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Title 3—

The President

Executive Order 13966 of December 14, 2020

Increasing Economic and Geographic Mobility

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 305 of title 5, United States Code, and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. *Policy and Principles.* As expressed in Executive Order 13777 of February 24, 2017 (Enforcing the Regulatory Reform Agenda), it is the policy of the United States to alleviate unnecessary regulatory burdens placed on the American people. Overly burdensome occupational licensing requirements can impede job creation and slow economic growth, which undermines our Nation's prosperity and the economic well-being of the American people. Such regulations can prevent American workers and job seekers from earning a living, maximizing their personal and economic potential, and achieving the American Dream. The purpose of this order is to reduce the burden of occupational regulations in order to promote the free practice of commerce, lower consumer costs, and increase economic and geographic mobility, including for military spouses.

My Administration is committed to continuing this important work by partnering with State, local, territorial, and tribal leaders throughout the country to eliminate harmful occupational regulations, which are frequently designed to protect politically connected interest groups. To this end, in October 2019, my Administration announced the establishment of the Governors' Initiative on Regulatory Innovation, which works with State, local, and tribal leaders to advance occupational licensing reforms, better align State and Federal regulations, and eliminate unnecessary regulations that drive up consumer costs.

Occupational regulations can protect practitioners from competition rather than protect the public from malpractice. Unfortunately, the number of occupational regulations has substantially increased over the last few decades. Since the 1950s, the percentage of jobs requiring a government-mandated occupational license has increased from less than 5 percent to between 25 and 30 percent. By requiring workers to acquire new licenses when they move to a new jurisdiction, occupational regulations reduce worker mobility, disproportionately harm low-income Americans, and are particularly burdensome to military spouses who must relocate to support the service members committed to keeping our country safe. Additionally, blanket prohibitions that prevent individuals with criminal records from obtaining occupational licenses may exacerbate disparities in employment opportunity and increase the likelihood of recidivism, particularly as regulatory barriers to enter lower- and middle-income occupations are associated with higher recidivism rates. Licensing requirements unnecessary to protect consumers from significant and demonstrable harm also frequently impose expensive educational requirements on potential job seekers, even for occupations with limited future earnings potential. According to recent research, licensing requirements have cost our country an estimated 2.85 million jobs and over $200 billion annually in increased consumer costs.

Therefore, it is the policy of the United States Government to support occupational regulation reform throughout the Nation, building on occupational licensing reforms enacted most recently in Arizona, Florida, Iowa, Missouri, and South Dakota, guided by six principles:

Principle 1. All recognized occupational licensure boards should be subject to active supervision of a designated governmental agency or office.

Principle 2. All occupational licensure boards recognized by a State, territorial, or tribal government that oversee personal qualifications related to the practice of an occupation should adopt and maintain the criteria and methods of occupational regulation that are least restrictive to competition sufficient to protect consumers from significant and demonstrable harm to their health and safety. The policies and procedures of such boards should be designed to protect consumer and worker safety and to encourage competition.

Principle 3. State, territorial, and tribal governments should review existing occupational regulations, including associated scope-of-practice provisions, to ensure that their requirements are the least restrictive to competition sufficient to protect consumers from significant and demonstrable harm. State, territorial, and tribal governments should also regularly review and analyze all occupational regulations, including associated personal qualifications required to obtain an occupational license, to ensure the adoption of the least restrictive requirements necessary to protect consumers from significant and demonstrable harm.

Principle 4. Individuals with criminal records should be encouraged to submit to the appropriate licensure board a preliminary application for an occupational license for a determination as to whether the criminal record would preclude their attainment of the appropriate occupational license.

Principle 5. A State, territorial, or tribal government should issue an occupational license to a person in the discipline applied for and at the same level of practice if the individual satisfies four requirements:

(a) the individual holds an occupational license for that discipline from another jurisdiction in the United States and is in good standing;

(b) the individual verifies having met, as applicable, the minimum examination, education, work, or clinical-supervision requirements imposed by the State, territory, or tribe;

(c) the individual:

(i) has not had the license previously revoked or suspended;

(ii) has not been disciplined related to the license by any other regulating entity; and

(iii) is not subject to any pending complaint, allegation, or investigation related to the license; and

(d) the individual pays all applicable fees required to obtain the new license.

Principle 6. Accommodations should be made for any applicant for an occupational license who is the spouse of an active duty member of the uniformed services and who is relocating with the member due to the member's official permanent change of station orders.

Sec. 2. *Review of and Report on Authorities, Regulations, Guidance, and Policies.* The head of each executive department and agency (agency) shall, within 90 days of the date of this order and every 2 years thereafter:

(a) review the agency's authorities, regulations, guidance, and polices to identify changes necessary to ensure alignment with the principles set forth in section 1 of this order; and

(b) submit a report to the Director of the Office of Management and Budget (Director of OMB), the Assistant to the President for Domestic Policy, and the Assistant to the President and Director of Intergovernmental Affairs (Director of IGA) identifying all necessary changes identified pursuant to subsection (a) of this section.

Sec. 3. *Identification and Report of Opportunities to Encourage Occupational Regulation Reform.* (a) Within 90 days of the date of this order, and every 2 years thereafter, the head of each agency shall submit a report to the

Director of OMB, the Assistant to the President for Domestic Policy, and the Director of IGA identifying a list of recommended actions available to any and all agencies to recognize and reward State, territorial, and tribal governments that have in place policies and procedures regarding occupational regulation that are consistent with the principles set forth in section 1 of this order; and

(b) Within 120 days of the date of this order, and every 2 years thereafter, the Assistant to the President for Domestic Policy, in consultation with the Secretary of Commerce, the Secretary of Labor, the Director of OMB, the Administrator of the Small Business Administration, the Director of IGA, and the heads of other agencies and offices as appropriate, shall submit a report to the President identifying:

(i) recommended changes to Federal law, regulations, guidance, and other policies to ensure alignment with the principles set forth in section 1 of this order;

(ii) recommended actions to be taken by agencies to recognize and reward State, territorial, and tribal governments that have in place policies and procedures regarding occupational regulation that are consistent with the principles set forth in section 1 of this order; and

(iii) a list of criteria that may be used to evaluate whether a State, territorial, or tribal government has in place policies and procedures that are consistent with the principles set forth in section 1 of this order.

Sec. 4. *Implementation of Recommendations to Recognize and Reward State, Territorial, and Tribal Regulatory Reform.* (a) Within 180 days of the date of this order, and every 2 years thereafter, the Administrator of the Small Business Administration, in consultation with the Secretary of Commerce, the Secretary of Labor, the Secretary of Health and Human Services, and the heads of other agencies as appropriate, shall seek and report on information from State, territorial, and tribal governments regarding whether they have in place policies and procedures consistent with the principles set forth in section 1 of this order and shall make the report publicly available, including on agencies' websites. The information sought shall be consistent with the criteria identified as required by section 3(b)(iii) of this order.

(b) Consistent with applicable law, and to the extent that the President approves any of the actions recommended pursuant to section 3(b)(ii) of this order, agencies shall implement such actions for the purpose of recognizing and rewarding a State, territorial, or tribal government that has in place policies and procedures regarding occupational regulation that are consistent with the principles set forth in section 1 of this order.

Sec. 5. *Definitions.* For the purposes of this order:

(a) ''Active supervision'' means:

(i) reviewing proposed occupational licensure board rules, policies, or other regulatory actions that may restrict market competition prior to issuance;

(ii) ensuring that any entity seeking to impose occupational licensing criteria adopts the criteria that are least restrictive to competition sufficient to protect consumers from significant and demonstrable harm to their health or safety; and

(iii) analyzing, where information is readily available, the effects of proposed rules, policies, and other regulatory actions on employment opportunities, consumer costs, market competition, and administrative costs.

(b) ''Agency'' has the meaning given that term in section 3502(1) of title 44, United States Code, except that the term does not include the agencies described in section 3502(5) of title 44, United States Code, other than the Bureau of Consumer Financial Protection.

(c) ''Occupational license'' means a license, registration, or certification without which an individual lacks the legal permission of a State, local, territorial, or tribal government to perform certain defined services for compensation.

(d) ''Occupational regulation'' includes:

(i) licensing or government certification, by which a government body requires personal qualifications in order to be permitted to practice an occupation; and

(ii) registration, bonding, or inspections, by which a government body does not require personal qualifications in order to be permitted to practice an occupation.

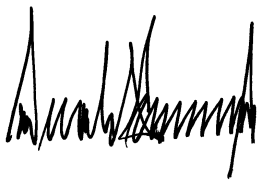
Sec. 6. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(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 14, 2020.

[FR Doc. 2020–27948
Filed 12–16–20; 8:45 am]
Billing code 3295–F1–P

Rules and Regulations

Federal Register
Vol. 85, No. 243
Thursday, December 17, 2020

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

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

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

2 CFR Part 376

42 CFR Parts 23, 51c, 52i, 56, 57, 63, and 124

45 CFR Parts 3, 63, and 75

48 CFR Parts 302 and 326

[Docket Number HHS–OS–2020–0015]

RIN 0991–AC19

Food and Drug Administration

21 CFR Parts 1, 5, 12, 14, 25, 81, 133, 172, 178, 184, 201, 310, 369, 501, and 582

Centers for Medicare & Medicaid Services

42 CFR Parts 411, 412, 422, 423, 426, 440, 441, 447, 482, and 485

Office of Inspector General

42 CFR Parts 1004 and 1008

Administration for Children and Families

45 CFR Parts 305, 307, 1324, 1325, 1326, and 1328

Regulatory Clean Up Initiative; Correction

AGENCY: Office of the Assistant Secretary for Administration (ASA), HHS.

ACTION: Final rule; correction.

SUMMARY: The Department of Health and Human Services is correcting a final rule that appeared in the **Federal Register** on November 16, 2020. This document had incorrectly designated footnotes and typographical errors.

DATES: Effective December 17, 2020.

FOR FURTHER INFORMATION CONTACT: Douglas Cheung, Ph.D., phone: 202–690–6704, email: *douglas.cheung@hhs.gov*; and *RegCleanUp@hhs.gov.*

SUPPLEMENTARY INFORMATION: In FR Doc. 2020–21774, appearing on page 72899 in the **Federal Register** of November 16, 2020, the following corrections are made:

§ 51c [Corrected]

■ 1. On page 72901, in the first column, in 42 CFR part 51c, ''*Correct Reference.* Section 51c.107(5) . . .'' is corrected to read ''*Correct Reference.* Section 51c.107(b)(5) . . .''

§ 56 [Corrected]

■ 2. On page 72901, in the second column, in 42 CFR part 56, a bullet is missing and is corrected to read as follows:

• *Correct Reference.* Section 56.603(e) is amended to remove the phrase ''the most recent CSA Income Poverty Guidelines (45 CFR 1060.2)'' and replace it with ''the poverty guidelines updated periodically in the **Federal Register** by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2)''. The Secretary of HHS is required to update the poverty guidelines at least annually, adjusting them based on the Consumer Price Index for All Urban Consumers. 45 CFR 1060.2 no longer exists; rather, updates are published at least annually in the **Federal Register**.

§ 422 [Corrected]

■ 3. On page 72902, in the first column, in 42 CFR part 422, the third sentence of the last bullet, ''The reference to § 423.858 . . .'' is corrected to read ''The reference to § 422.858 . . .''

§ 5.1100 [Corrected]

■ 4. On page 72906, in the third column, instruction 6 is corrected to read as follows:

■ 6. Amend § 5.1100 by:

a. Redesignating footnotes 2 through 62 as footnotes 3 through 63.

b. Revising the entry for ''Office of the Chief Counsel'' as follows:

§ 5.1100 Headquarters.

* * * * *

Office of the Chief Counsel.[2]

[2] The Office of the Chief Counsel (also known as the Food and Drug Division, Office of the General Counsel, Department of Health and Human Services), while administratively within the Office of the Commissioner, is part of the Office of the General Counsel of the Department of Health and Human Services.

* * * * *

§ 14.7 [Corrected]

■ 5. On page 72906, in the third column, instruction 11 is corrected to read as follows:

■ 11. Amend § 14.7(b) by removing ''45 CFR 5.34'' and adding in its place ''45 CFR 5.61 through 5.64''.

§ 56.303 [Corrected]

■ 6. On page 72908, in the third column, instructions 48 and 49 are corrected to read as follows:

■ 48. Amend § 56.303(f) by removing the phrase ''the most recent CSA Poverty Income Guidelines (45 CFR 1060.2)'' and adding in its place ''the poverty guidelines updated periodically in the **Federal Register** by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2)''.

49. Amend § 56.603(e) by removing the phrase ''the most recent CSA Poverty Income Guidelines (45 CFR 1060.2)'' and adding in its place ''the poverty guidelines updated periodically in the **Federal Register** by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2)''.''

§ 3.5 [Corrected]

■ 7. On page 72910, in the first column, instruction 91 is corrected to read as follows:

■ 91. Amend § 3.5 by:

a. Removing the reference ''41 CFR part 101–48'' and adding in its place ''41 CFR 102''.

b. Removing ''41 CFR 101–45.304 and 101–48.305'' and adding in its place ''41 CFR 102–41''.''

§ 1324.11 [Corrected]

■ 8. On page 72911, in the second column, instruction 102 is corrected to read as follows:

■ 102. Amend § 1324.11 by:

a. Removing the reference ''1327.13(e)'' and adding in its place ''1324.13(e)''.

b. Removing all references ''1327.19(b)(5) through (8)'' and adding in their places ''1324.19(b)(5) through (8)''.

c. Removing the reference ''1327.21'' and adding in its place ''1324.21''.''

Dated: November 24, 2020.

Wilma M. Robinson,

Deputy Executive Secretary, Department of Health and Human Services.

[FR Doc. 2020–26389 Filed 12–16–20; 8:45 am]

BILLING CODE 4151–17–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2019–1054; Special Conditions No. 25–777–SC]

Special Conditions: Boeing Commercial Airplanes Model 777–9 Airplane; Overhead Flightcrew Rest Compartment Occupiable During Taxi, Takeoff, and Landing

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Boeing Commercial Airplanes (Boeing) Model 777–9 airplane. This airplane will have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for transport-category airplanes. This design feature is an overhead flightcrew rest (OFCR) compartment occupiable during taxi, takeoff, and landing (TT&L). 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: Effective January 19, 2021.

FOR FURTHER INFORMATION CONTACT: Shannon Lennon, Airframe and Cabin Safety Section, AIR–675, Transport Standards Branch, Policy and Innovation Division, Aircraft Certification Service, Federal Aviation Administration, 2200 South 216th Street, Des Moines, Washington 98198; telephone and fax 206–231–3209; email *shannon.lennon@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

On December 6, 2013, Boeing applied for an amendment to Type Certificate No. T00001SE to include the new 777–9 airplane. The application date was extended to March 30, 2016, at Boeing's request. The Boeing Model 777–9 airplane, which is a derivative of the Boeing Model 777 airplane currently approved under Type Certificate No. T00001SE, is a twin-engine, transport-category airplane with seating for 495 passengers, and a maximum takeoff weight of 775,000 lbs.

Type Certification Basis

Under the provisions of title 14, Code of Federal Regulations (14 CFR) 21.101, Boeing must show that the 777–9 airplane, as changed, continues to meet the applicable provisions of the regulations listed in Type Certificate No. T00001SE, or the applicable regulations in effect on the date of application for the change, except for earlier amendments as agreed upon by the FAA.

If the Administrator finds that the applicable airworthiness regulations (*e.g.,* 14 CFR part 25) do not contain adequate or appropriate safety standards for the Boeing Model 777–9 airplane because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, or should any other model already included on the same type certificate be modified 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 Boeing Model 777–9 airplane must comply with the fuel-vent and exhaust-emission requirements of 14 CFR part 34, and 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 Boeing Model 777–9 airplane will incorporate the following novel or unusual design features:

An overhead flightcrew rest (OFCR) compartment occupiable during taxi, takeoff, and landing.

Discussion

Crew rest compartments have been previously installed and certificated on several Boeing airplane models in locations such as in the main passenger seating area, the overhead space above the main passenger-cabin seating area, and below the passenger-cabin seating area within the cargo compartment. In each case, the Administrator determined that the applicable regulations (*i.e.,* 14 CFR part 25) did not provide all of the necessary requirements, because each installation had unique features by virtue of its design, location, and use on the airplane.

For Boeing Model 777 airplanes, the FAA issued Special Conditions No. 25–260–SC, dated April 14, 2004, for OFCR compartments allowed to be occupied during TT&L, as well as during flight. However, after issuance of Special Conditions No. 25–260–SC, the FAA issued Special Conditions No. 25–418–SC for the Boeing Model 787–8 airplane, for the same novel design feature, with changes to better address oxygen systems and fire suppressors. Those special conditions reflected the methodology necessary to provide an equivalent level of safety for remote OFCR compartments. Therefore, new special conditions are issued for this design feature on Boeing Model 777–9 airplanes, in lieu of Special Conditions No. 25–260–SC.

For the Boeing Model 777–9 airplane, the OFCR compartment is located in the overhead space above the main passenger-cabin seating area immediately aft of the first pair of main-deck emergency exits (Door 1). The compartment includes two private berths and up to two seats. Occupancy of the compartment will be limited to a maximum of four trained crewmembers during flight, and two trained flightcrew members, one in each seat, during TT&L. The compartment will be accessed from the main deck by stairs through a vestibule. In addition, a secondary evacuation route, which opens directly into the main passenger seating area, will be available as an alternate route for evacuating occupants of the compartment. A smoke-detection system and an oxygen system will be provided in the compartment. Other optional features, such as a sink with cold-drink stowage or a lavatory, may be provided as well.

This Boeing Model 777–9 airplane OFCR compartment is novel or unusual to part 25 due to its design, location, and use on the airplane. This compartment is particularly novel or unusual in that it is located in the overhead area of the passenger compartment, and will be occupied by trained flightcrew during TT&L. Due to the novel or unusual features associated with the installation of this compartment, special conditions are considered necessary to provide a level

of safety equal to that established by the airworthiness regulations.

The 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.

Operational Evaluations and Approval

These special conditions establish requirements for OFCR-compartment design approvals administered by the FAA's Aircraft Certification Service. Before operational use of an OFCR compartment, the FAA's Flight Standards Service must evaluate and approve the ''basic suitability'' of the compartment for crew occupation. Additionally, if an operator wishes to use an OFCR compartment as ''sleeping quarters,'' the compartment must undergo an additional evaluation and approval (reference 14 CFR 121.485(a), 121.523(b), and 135.269(b)(5)). Compliance with these special conditions does not ensure that the applicant has demonstrated compliance with the requirements of parts 121 or 135.

To obtain an operational evaluation, the type certificate holder must contact the appropriate aircraft evaluation group (AEG) in the Flight Standards Service and request a ''basic suitability'' evaluation or a ''sleeping quarters'' evaluation of its OFCR compartment. The results of these evaluations should be documented in a Boeing Model 777–9 airplane flight standardization board (FSB) report appendix. Individual operators may reference these standardized evaluations in discussions with their FAA principal operating inspector as the basis for an operational approval, in lieu of an on-site operational evaluation.

Any changes to the approved OFCR compartment configuration that affect crewmember emergency egress, or any other procedures affecting safety of the occupying crewmembers or related emergency training, will require re-evaluation and approval. The applicant for an OFCR compartment design change that affects egress, safety procedures, or training is responsible for notifying the FAA's AEG that a new compartment evaluation is required. The results of a reevaluation should also be documented in a Boeing Model 777–9 airplane FSB report appendix.

Procedures must be developed to ensure that a crewmember, acting as firefighter, when entering the OFCR compartment through the stairway or vestibule to fight a fire, will examine the stairway or vestibule, and the adjacent galley or lavatory areas (if installed), for the source of the fire before entering the remaining areas of the compartment. This is intended to ensure that the source of the fire is not between the crewmember and the entrance to the OFCR compartment. If a fire source is not immediately evident to the firefighter, the firefighter should check for potential fire sources at areas closest to the OFCR compartment entrance first, then proceed to check areas in such a manner that the fire source, when found, will not be between the firefighter and their means of escape from the compartment. Procedures describing methods for searching the OFCR compartment for fire source(s) must be transmitted to operators for incorporation into their training programs and appropriate operational manuals.

Rescue-Crew Training Materials

Installation of an OFCR compartment that can be occupied during TT&L by flightcrew is unusual. Appropriate information must be provided to airport fire-rescue personnel so that they understand that this remote compartment may be occupied during an emergency landing. The applicant must provide rescue-crew training materials to the local FAA Airports Division, Safety and Standards Branch, to address this issue. The FAA Airports Division, Safety and Standards Branch, will ensure that these materials are distributed to appropriate airports, domestic and foreign. Special conditions are not considered appropriate to address this issue.

Discussion of the Special Conditions

These special conditions apply to OFCR compartments that are occupiable during TT&L and are installed immediately aft of the Door 1 exits on Boeing Model 777–9 airplanes. These special conditions for Boeing Model 777–9 airplanes supplement 14 CFR part 25. Except as noted below, these special conditions for Boeing Model 777–9 airplanes are identical to Boeing Model 777 airplane Special Conditions No. 25–260–SC.

Conditions 6 and 16 contain requirements for the exit signs that must be provided in the OFCR compartment. Symbols that satisfy the equivalent-level-of-safety finding established for Boeing Model 777–9 airplanes may be used in lieu of the text required by § 25.812(b)(1)(i). The FAA expects that the meaning of any symbolic exit sign will be reinforced as a part of crewmember training in evacuation procedures.

Condition 15 contains requirements for supplemental oxygen systems. Earlier Special Conditions No. 25–260–SC for Boeing Model 777–9 airplanes required that each berth be equipped with two oxygen masks. This was intended to address the case where a person not in a berth was moving around within the flightcrew rest compartment and needed quick access to an oxygen mask. For Boeing Model 777–9 airplanes, the requirement to have two masks per berth may not always meet the objective of having masks available to persons who are in transition within the compartment. Therefore, the wording of this condition has been modified to better state the objective, rather than specifying a two-masks-per-berth requirement. In addition, the requirement to have adequate illumination to retrieve an oxygen mask, while implied previously, is made explicit in these special conditions.

Condition 18 contains the requirements for materials used in the construction of the OFCR compartment. Special Conditions No. 25–260–SC stated that § 25.853, as amended by Amendment 25–83, is the appropriate regulation. Section 25.853 has since been further amended, and these special conditions reference the latest amendment level for § 25.853, Amendment 25–116.

Compliance with these special conditions does not relieve the applicant from the existing airplane certification-basis requirements. One particular area of concern is that installation of OFCR compartments changes the compartment volume in the overhead area of the airplane. The applicant must comply with the pressurized compartment loads requirements of § 25.365(e), (f), and (g) for the OFCR compartment, as well as for any other airplane compartments the decompression characteristics of which are affected by the installation of an OFCR compartment.

Compliance with § 25.813, emergency-exit access requirements, must be demonstrated for all phases of flight during which occupants will be present.

The configuration includes a seat installed adjacent to the OFCR compartment exit, with the compartment occupiable during TT&L. Note that the emergency-landing conditions requirements of §§ 25.561(d) and 25.562(c)(8) apply to this configuration. Deformations resulting from required static and dynamic structural tests must not impede rapid evacuation of the OFCR compartment occupants. Seat deformations must not prevent opening of the secondary escape

hatch or rapid evacuation through the secondary escape route.

Section 25.785(h)(2) mandates that the flight attendant seats required by the operating rules be located in a position that provides a direct view of the cabin area for which the flight attendant is responsible. Because the OFCR compartment will be occupied only by trained crewmembers, the FAA does not consider this requirement applicable to the seating area in the OFCR compartment.

Section 25.787(a) requires each stowage compartment in the passenger cabin, except for underseat and overhead stowage compartments for passenger convenience, to be completely enclosed. This requirement does not apply to the flight deck, because flightcrew members must be able to quickly access items to better perform their duties. Flightcrew members occupying the OFCR compartment will not be performing flight-deck duties however. Therefore, stowage compartments in the OFCR compartment, except for underseat compartments for occupant convenience, should be completely enclosed. This will provide occupants of the OFCR compartment a similar level of safety to that provided to passengers on the main deck. Condition 20 contains this requirement.

Section 25.811(c) requires that means be provided to assist occupants in locating the exits in conditions of dense smoke. Section 25.812(e) requires floor-proximity emergency-escape path marking to provide guidance for passengers when all sources of illumination above 4 feet from the cabin aisle floor are totally obscured. The FAA considers that the current OFCR compartment design is sufficient in regard to these regulations. The two OFCR compartment seats are only a couple of steps away from the stairway, and when a trained flightcrew member is at the top of the stairway, the stairway itself will guide them to the main deck. When the crewmember is on the main deck, floor proximity lighting and exit-marker signs, which are less than 4 feet above the floor, are provided.

Section 25.813(e) prohibits installation of interior doors between passenger compartments, but the FAA has historically found flightcrew rest-compartment doors to be acceptable, because flightcrew rest compartments are not passenger compartments. Conditions 2 and 16 provide requirements for flightcrew rest-compartment doors, conditions that are considered to provide an appropriate level of safety to OFCR compartment occupants.

Sections 25.1443, 25.1445, and 25.1447 describe oxygen requirements for flightcrew, passengers, and cabin attendants. Flightcrew members occupying the OFCR compartment are not on duty, and therefore are considered passengers in determining compliance with these oxygen regulations.

Discussion of Comments

The FAA issued Notice of Proposed Special Conditions No. 25–20–07–SC for the Boeing Model 777–9 airplane, which was published in the **Federal Register** on June 30, 2020 (85 FR 39100). The FAA received responses from three commenters.

The Air Line Pilots Association (ALPA) believes the special conditions contradict exemptions for mini-suites that prohibit the occupation of the OFCR during TT&L, and suggests that the special conditions be modified to provide consideration for Exemption No. 17634A, including a prohibition of occupancy of the OFCR during TT&L for airplanes fitted with high-walled mini-suites, as well as a requirement of applicable placarding to be visibly installed in the OFCR, and related limitations be published within the AFM.

The FAA partially agrees with this comment. The FAA's intends to prohibit occupancy of an OFCR during TT&L should any egress path from the crew rest fall into a mini-suite on the main deck as stated in FAA Exemption No. 17634A. However, such a limitation is not established solely by the installation of an OCFR. The necessity of such a limitation would be established by the installation of a mini-suite and the subsequent assessment of the egress paths from the OFCR relative to the mini-suite location. For this reason, and the because the subject of these special conditions is the OFCR and not mini-suite installations, the prohibition of occupancy of the OFCR during TT&L when mini-suites are installed will not be restated in these special conditions. The FAA does agree, however, that the special conditions should acknowledge that occupancy during TT&L may be further restricted for purposes of maintaining consistency with related exemptions. As such, these special conditions have been revised to include Condition 1.d.

Boeing recommends revising the title of the special conditions as follows:

Special Conditions: Boeing Commercial Airplanes Model 777–9 Airplane; Overhead Flightcrew Rest Compartment.

The FAA does not agree with the proposed change because the title, as written, differentiates the scope of these special conditions from other special conditions issued for Boeing Model 777 series airplanes with OFCR that are not to be occupied for taxi, takeoff, and landing, as is the case with Special Conditions No. 25–230–SC. These special conditions allow occupancy of the OFCR during taxi, takeoff, and landing, but there is no condition that requires occupancy of the OFCR such that it is permissible for the rest to be unoccupied during taxi, takeoff, and landing.

Boeing further comments that the Compliance by Inspection in Condition 4.a. states, in part,

Because a berth is required to have two separate exits, a fire within a berth that blocks an occupant of that berth from only one exit or the other need not be considered.

Boeing believes that the proposed wording implies a requirement for two exits out of each berth (with berth meaning each bunk), which they further believe is not the intent of this condition, recommending replacing the proposed text with the following:

A fire within a berth that only blocks the occupant of that berth from exiting the berth need not be considered.

The FAA recognizes that the current wording is cause for confusion and agrees with the recommended wording, which is consistent with Boeing Model 787 airplane Special Conditions No. 25–418–SC.

An individual commenter stated that Condition 1.b. appears to be inconsistent with Condition 1.a.iv. concerning smoking restriction and ashtray requirements, and recommends deleting Condition 1.b.

The FAA does not agree with the recommendation to remove Condition 1.b. Even though condition 1.a.iv prohibits smoking in the OFCR, the requirement of one ashtray on both the inside and outside of the OFCR entrance is a measure that is intended to further discourage smoking in the OFCR and to prevent improper disposal of smoking materials in the OFCR by providing a suitable disposal receptacle.

The commenter notes that Condition 15.d requires that the supplemental oxygen system ''provide an aural and visual alert to warn occupants of the OFCR compartment to don oxygen masks in the event of decompression,'' for each berthing area, to alert sleeping crewmembers. The aural alert is required to sound continuously for a period no less than 5 minutes or ''until a reset switch within the OFCR compartment is activated.''

The commenter recommends providing a means to prevent accidental

berth-occupant deactivation of the alerting system, to prevent deactivation of the oxygen-mask-alert reset switch due to turbulence or movement of a sleeping occupant. The commenter recommends that the reset-alarm switch be located away from the normal reach and position of an occupant in the berthing area, and that a physical guard, or similar means to prevent inadvertent deactivation, be provided.

While the FAA recognizes that an alarm-reset switch may be subject to inadvertent activation if not optimally placed, the FAA does not agree that an additional requirement for the location or design of the alert-reset switch is necessary. The reset switch in the OFCR is out of reach of the berth occupants and is placed out of the way of normal movement within the compartment, as dictated by the limited space within the OFCR, as well as placement of the OFCR interior features.

The commenter further states that crewmembers within the OFCR compartment should be provided immediate access to lifesaving equipment, such as personal flotation devices, adding that the special conditions do not appear to consider crew accessibility to such personal protective equipment.

The FAA agrees that crewmembers within the OFCR should be provided immediate access to personal flotation devices. However, the installation of flotation devices in the OFCR is not within the scope of these special conditions. Rather, the existing requirements for life-vest installations which address access of the life vest by OFCR occupants can be found in §§ 25.1411(f) and 25.1415(b). Other flotation means are addressed in 25.1415(e).

Except as discussed above, the special conditions are adopted as proposed.

Applicability

As discussed above, these special conditions are applicable to the Boeing Model 777–9 airplane. Should Boeing apply at a later date for a change to the type certificate to include another model incorporating 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 one airplane model. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

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 type certification basis for Boeing Model 777–9 airplanes with an OFCR compartment installed adjacent to, or immediately aft of, the first pair of exits (Door 1).

1. During flight, occupancy of the OFCR compartment is limited to the total number of installed bunks and seats in the compartment, and that are approved to the maximum flight-loading conditions. During TT&L, occupancy of the OFCR compartment is limited to the total number of installed seats approved for the flight and ground-load conditions, and emergency-landing conditions. Therefore, the OFCR compartment is limited to a maximum of four crewmembers during flight, and two flightcrew members during TT&L.

a. Appropriate placards must be located inside and outside each entrance to the OFCR compartment to indicate:

i. Occupancy is limited to flightcrew members (pilots) during TT&L.

ii. The maximum number of crewmembers allowed during flight, and the maximum number of flightcrew members allowed during TT&L.

iii. Occupancy is restricted to crewmembers the pilot in command has determined to be both trained in the emergency procedures for the OFCR compartment and able to rapidly use the evacuation routes.

iv. Smoking is prohibited in the OFCR compartment.

v. Stowage in the OFCR compartment area is limited to crew personal luggage. The stowage of cargo or passenger baggage is not allowed.

b. At least one ashtray must be located on both the inside and the outside of any entrance to the OFCR compartment.

c. A limitation in the airplane flight manual must restrict occupancy to crewmembers the pilot in command has determined to be both trained in the emergency procedures for the OFCR compartment and able to rapidly use the evacuation routes of the OFCR compartment.

d. If mini-suites with doors are installed on the main deck beneath the OFCR, occupancy of the OFCR may be prohibited during TT&L due to the conditions of an exemption that allows installation of mini-suites. If occupancy of the OFCR during TT&L is further restricted by exemption, the placard required in Condition 1.a must reflect that occupancy of the OFCR is not allowed during TT&L in lieu of Condition 1.a.i, stating occupancy is limited to flightcrew members (pilots) during TT&L.

2. The following requirements are applicable to OFCR compartment doors:

a. A means must be provided for any door installed between the OFCR compartment and the passenger cabin to be opened quickly from inside the OFCR compartment, and when crowding from an emergency evacuation occurs at each side of the door.

b. Doors installed across emergency egress routes must have a means to latch them in the open position. The latching means must be able to withstand the loads imposed upon it when the door is subjected to the ultimate inertia forces, relative to the surrounding structure, listed in § 25.561(b).

c. A placard must be displayed in a conspicuous place on the outside of the entrance door of the OFCR compartment, and on any other door(s) installed across emergency egress routes of the OFCR compartment, requiring those doors to be latched open when the OFCR compartment is occupied during TT&L.

i. This requirement does not apply to emergency-escape hatches installed in the floor of the OFCR compartment.

ii. A placard must be displayed in a conspicuous place on the outside of the entrance door to the OFCR compartment, and that requires the compartment door to be closed and locked when it is not occupied.

iii. Procedures for meeting these requirements must be transmitted to the operator for incorporation into its training programs and appropriate operational manuals.

d. For all doors installed in the OFCR compartment, a means must be provided to prevent anyone from being trapped inside the OFCR compartment. If a locking mechanism is installed, it must be capable of being unlocked from the outside without the aid of special tools. The lock must not prevent opening from the inside of the OFCR compartment at any time.

3. In addition to the requirements of § 25.562 for seats that are occupiable during takeoff and landing, and restraint systems, the OFCR compartment structure must be compatible with the loads imposed by the seats as a result of the conditions specified in § 25.562(b).

4. At least two emergency evacuation routes must be available for use by each occupant of the OFCR compartment to

rapidly evacuate to the main cabin. These evacuation routes must be able to be closed from the main passenger cabin after evacuation. In addition:

a. The routes must be located with sufficient separation within the OFCR compartment to minimize the possibility of an event either inside or outside of the OFCR compartment rendering both routes inoperative.

Compliance with requirements of Condition 4.a. of these special conditions may be shown by inspection or by analysis. Regardless of which method is used, the maximum acceptable distance between OFCR compartment exits is 60 feet.

Compliance by Inspection

Inspection may be used to show compliance with Condition 4.a. of these special conditions. An inspection finding that an OFCR compartment has evacuation routes located so that each occupant of the seats and berths has an unobstructed route to at least one of the OFCR compartment exits, regardless of the location of a fire, would be reason for a finding of compliance. A fire within a berth that only blocks the occupant of that berth from exiting the berth need not be considered. Therefore, OFCR compartment exits that are located at opposite ends (*i.e.,* adjacent to opposite-end walls) of the OFCR compartment would require no further review or analysis with regard to exit separation.

Compliance by Analysis

Analysis must show that the OFCR compartment configuration and interior features allow all occupants of the OFCR compartment to escape the compartment in the event of a hazard inside or outside of the compartment. Elements to consider in this evaluation are as follows:

i. Fire inside or outside the OFCR compartment, considered separately, and the design elements used to reduce the available fuel for the fire.

ii. Design elements used to reduce fire-ignition sources in the OFCR compartment.

iii. Distribution and quantity of emergency equipment within the OFCR compartment.

iv. Structural failure or deformation of components that could block access to the available evacuation routes (*e.g.,* seats, folding berths, contents of stowage compartments, etc.).

v. An incapacitated person blocking the evacuation routes.

vi. Any other foreseeable hazard not identified above that could cause the evacuation routes to be compromised.

Analysis must consider design features affecting access to the evacuation routes. Possibilities for design components affecting evacuation that should be considered include, but are not limited to, seat deformations (reference §§ 25.561(d) and 25.562(c)(8)), seat-back break-over, rigid structure that reduces access from one part of the compartment to another, and items known to be the cause of potential hazards. Factors that also should be considered are availability of emergency equipment to address fire hazards; availability of communications equipment; supplemental restraint devices to retain items of mass that, if broken loose, could hinder evacuation; and load-path isolation between components containing evacuation routes.

Analysis of fire threats should be used in determining placement of required fire extinguishers and protective breathing equipment (PBE). This analysis should consider the possibility of fire in any location in the OFCR compartment. The location and quantity of PBE equipment and fire extinguishers should allow occupants located in any approved seats or berths access to the equipment necessary to fight a fire in the OFCR compartment.

The intent of this condition is to provide sufficient exit-route separation. Therefore, the exit-separation analysis described above should not be used to approve OFCR-compartment exits that have less physical separation (measured between the centroid of each exit opening) than the minimums prescribed below, unless compensating features are identified and submitted to the FAA for evaluation and approval.

For an OFCR compartment with one exit located near the forward or aft end of the compartment (as measured by having the centroid of the exit opening within 20 percent of the forward or aft end of the total OFCR-compartment length), the exit separation from one exit to the other should not be less than 50 percent of the total OFCR compartment length.

For OFCR compartments with neither required OFCR compartment exit located near the forward or aft end of the compartment (as measured by not having the centroid of either exit opening within 20 percent of the forward or aft end of the total OFCR compartment length), the exit separation from one exit to the other should not be less than 30 percent of the total OFCR-compartment length.

b. The evacuation routes must be designed to minimize the possibility of blockage, which might result from fire, mechanical or structural failure, or persons standing below or against the OFCR-compartment exits. One of the two OFCR-compartment exits should not be located where normal movement or evacuation by passengers occurs (main aisle, cross aisle, or galley complex, for example) that would impede egress from the OFCR compartment. If an evacuation route is in an area where normal movement or evacuation of passengers occurs, it must be demonstrated that passengers would not impede egress to the main deck. If low headroom is at or near the evacuation route, provisions must be made to prevent or to protect occupants of the OFCR compartment from head injury. Use of evacuation routes must not depend on any powered device. If an OFCR-compartment exit is over an area of passenger seats, a maximum of five passengers may be displaced from their seats temporarily during the process of evacuating an incapacitated person(s). If such an evacuation procedure involves the evacuee stepping on seats, the seats must not be damaged to the extent that they would not be acceptable for occupancy during an emergency landing.

c. Emergency evacuation procedures, including procedures for emergency evacuation of an incapacitated occupant from the OFCR compartment, must be established. The applicant must transmit all of these procedures to the operator for incorporation into its training programs and appropriate operational manuals.

d. A limitation must be included in the airplane flight manual or other suitable means to require that crewmembers are trained in the use of the OFCR-compartment evacuation routes. This training must instruct crew to ensure that the OFCR compartment (including seats, doors, etc.) is in its proper TT&L configuration during TT&L.

e. In the event no flight attendant is present in the area around the door to the OFCR compartment, and also during an emergency, including an emergency evacuation, a means must be available to prevent passengers on the main deck from entering the OFCR compartment.

f. Doors or hatches separating the OFCR compartment from the main deck must not adversely affect evacuation of occupants on the main deck (slowing evacuation by encroaching into aisles, for example) or cause injury to those occupants during opening or while opened.

g. The means of opening doors and hatches to the OFCR compartment must be simple and obvious. The OFCR compartment doors and hatches must be

able to be closed from the main passenger cabin.

5. A means must be available for evacuating an incapacitated person, representative of a 95th percentile male, from the OFCR compartment to the passenger cabin floor. Such an evacuation must be demonstrated for all evacuation routes. A crewmember (a total of one assistant within the OFCR compartment) may provide assistance in the evacuation. Additional assistance may be provided by up to three persons in the main passenger compartment. These additional assistants must be standing on the floor while providing assistance. For evacuation routes with stairways, the additional assistants may ascend up to one half the elevation change from the main deck to the OFCR compartment, or to the first landing, whichever is lower.

6. The following signs and placards must be provided in the OFCR compartment and they must meet the following criteria:

a. At least one exit sign, located near each OFCR compartment exit, meeting the emergency lighting requirements of § 25.812(b)(1)(i). One allowable exception would be a sign with reduced background area of no less than 5.3 square inches (excluding the letters), provided that it is installed so that the material surrounding the exit sign is light in color (white, cream, light beige, for example). If the material surrounding the exit sign is not light in color, a sign with a minimum of a one-inch-wide background border around the letters would be acceptable. Another allowable exception is a sign with a symbol that the FAA has determined to be equivalent for use as an exit sign in an OFCR compartment.

b. An appropriate placard located conspicuously on or near each OFCR-compartment door or hatch that defines the location and the operating instructions for access to and operation of the door or hatch.

c. Placards must be readable from a distance of 30 inches under emergency lighting conditions.

d. The door or hatch handles, and operating-instruction placards required by Condition 6.b. of these special conditions, must be illuminated to at least 160 microlamberts under emergency lighting conditions.

7. A means must be available, in the event of failure of the airplane main power system, or of the normal OFCR-compartment lighting system, for emergency illumination to be automatically provided for the OFCR compartment.

a. This emergency illumination must be powered independently of the main lighting system.

b. The sources of general cabin illumination may be common to both the emergency and the main lighting systems if the power supply to the emergency lighting system is independent of the power supply to the main lighting system.

c. The illumination level must be sufficient to allow occupants of the OFCR compartment to locate and move to the main passenger cabin floor by means of each evacuation route.

d. The illumination level must be sufficient, with the privacy curtains in the closed position, for each occupant of the OFCR compartment to locate a deployed oxygen mask.

8. A means must be available for two-way voice communications between crewmembers on the flight deck and occupants of the OFCR compartment. Two-way communications must also be available between occupants of the OFCR compartment and each flight attendant station in the passenger cabin that is required, per § 25.1423(g), to have a public-address-system microphone. In addition, the public-address system must include provisions to provide only the relevant information to the crewmembers in the OFCR compartment (*e.g.,* fire in flight, aircraft depressurization, preparation of the compartment for landing, etc.). That is, provisions must be made so that occupants of the OFCR compartment will not be disturbed with normal, non-emergency announcements made to the passenger cabin.

9. A means must be available for manual activation of an aural emergency-alarm system, audible during normal and emergency conditions, to enable crewmembers on the flight deck and at each pair of required floor-level emergency exits to alert occupants of the OFCR compartment of an emergency situation. Use of a public address or crew interphone system will be acceptable, provided an adequate means of differentiating between normal and emergency communications is incorporated. The system must be powered in flight, after the shutdown or failure of all engines and auxiliary power units, for a period of at least ten minutes.

10. A means, readily detectable by seated or standing occupants of the OFCR compartment, must be in place to indicate when seat belts should be fastened. Seatbelt-type restraints must be provided for berths and must be compatible with the sleeping position during cruise conditions. A placard on each berth must require that these restraints be fastened when occupied. If compliance with any of the other requirements of these special conditions is predicated on specific head position, a placard must identify that head position.

11. Protective breathing equipment must be provided in accordance with § 25.1439, except that in lieu of a device for each crewmember, the following must be provided: Two PBE devices approved to Technical Standard Order (TSO)-C116 or equivalent, suitable for firefighting, or one PBE for each hand-held fire extinguisher, whichever is greater. The following equipment must also be provided in the OFCR compartment:

a. At least one approved hand-held fire extinguisher appropriate for the kinds of fires likely to occur.

b. One flashlight.

Note: Additional PBE devices and fire extinguishers in specific locations, beyond the minimum numbers prescribed in Condition 11 of these special conditions, may be required as a result of the egress analysis accomplished to satisfy Condition 4.a. of these special conditions.

12. A smoke- or fire-detection system (or systems) must be provided that monitors each occupiable space within the OFCR compartment, including those areas partitioned by curtains or doors. Flight tests must be conducted to show compliance with this requirement. If a fire occurs, each system (or systems) must provide:

a. A visual indication to the flight deck within one minute after the start of a fire.

b. An aural warning in the OFCR compartment.

c. A warning in the main passenger cabin. This warning must be readily detectable by a flight attendant, taking into consideration the locations of flight attendants throughout the main passenger compartment during various phases of flight.

13. A means to fight a fire must be provided. This can be either a built-in extinguishing system or a manual, hand-held extinguishing system.

a. For a built-in extinguishing system:

i. The system must have adequate capacity to suppress a fire considering the fire threat, volume of the compartment, and the ventilation rate. The system must have sufficient extinguishing agent to provide an initial knockdown and suppression environment per the minimum performance standards that have been established for the agent being used. In addition, certification flight testing will verify the acceptable duration that the

suppression environment can be maintained.

ii. If the capacity of the extinguishing system does not provide effective fire suppression that will last for the duration of flight from the farthest point in route to the nearest suitable landing site expected in service, an additional manual firefighting procedure must be established. For the built-in extinguishing system, the time duration for effective fire suppression must be established and documented in the firefighting procedures in the airplane flight manual. If the duration of time for demonstrated effective fire suppression provided by the built-in extinguishing agent will be exceeded, the firefighting procedures must instruct the crew to:

1. Enter the OFCR compartment at the time that demonstrated fire suppression effectiveness will be exceeded.

2. Check for and extinguish any residual fire.

3. Confirm that the fire is out.

b. For a manual, hand-held extinguishing system (designed as the sole means to fight a fire or to supplement a built-in extinguishing system of limited suppression duration) for the OFCR compartment:

i. A limitation must be included in the airplane flight manual or other suitable means requiring that crewmembers be trained in the firefighting procedures.

ii. The OFCR compartment design must allow crewmembers equipped for firefighting to have unrestricted access to all parts of the OFCR compartment.

iii. The time for a crewmember on the main deck to react to the fire alarm, don the firefighting equipment, and gain access to the OFCR compartment must not exceed the time it would take for the compartment to become filled with smoke, thus making it difficult to locate the fire source.

iv. Approved procedures describing methods for searching the OFCR compartment for fire source(s) must be established. These procedures must be transmitted to the operator for incorporation into its training programs and appropriate operational manuals.

14. A means must be provided to prevent hazardous quantities of smoke or extinguishing agent originating in the OFCR compartment from entering any other occupiable compartment.

a. Small quantities of smoke may penetrate from the OFCR compartment into other occupied areas during the one-minute smoke-detection time.

b. A provision in the firefighting procedures must ensure that all doors and hatches at the OFCR compartment are closed after evacuation of the compartment and during firefighting to minimize smoke and extinguishing agent entering other occupiable compartments.

c. All smoke entering any occupiable compartment when access to the OFCR compartment is open for evacuation must dissipate within five minutes after the access to the OFCR compartment is closed.

d. Hazardous quantities of smoke may not enter any occupied compartment during access to manually fight a fire in the OFCR compartment. The amount of smoke entrained by a firefighter exiting the OFCR compartment is not considered hazardous.

e. Flight tests must be conducted to show compliance with this requirement.

15. A supplemental oxygen system within the OFCR compartment must provide the following:

a. At least one mask for each seat and berth in the OFCR compartment.

b. If a destination area (such as a changing area) is provided in the OFCR compartment, an oxygen mask must be readily available for each occupant who can reasonably be expected to be in the destination area (with the maximum number of required masks within the destination area being limited to the placarded maximum occupancy of the OFCR compartment).

c. An oxygen mask must be readily accessible to each occupant who can reasonably be expected to be moving from the main cabin into the OFCR compartment, moving around within the OFCR compartment, or moving from the OFCR compartment to the main cabin.

d. The system must provide an aural and visual alert to warn occupants of the OFCR compartment to don oxygen masks in the event of decompression. The aural and visual alerts must activate concurrently with deployment of the oxygen masks in the passenger cabin. To compensate for sleeping occupants, the aural alert must be heard in each section of the OFCR compartment and must sound continuously for a minimum of 5 minutes or until a reset switch within the OFCR compartment is activated. A visual alert that informs occupants that they must don an oxygen mask must be visible in each section.

e. A means must be in place by which oxygen masks can be manually deployed from the flight deck.

f. Approved procedures must be established for OFCR occupants in the event of decompression. These procedures must be transmitted to the operator for incorporation into its training programs and appropriate operational manuals.

g. The supplemental oxygen system for the OFCR compartment must meet the same 14 CFR part 25 regulations as the supplemental oxygen system for the passenger cabin occupants, except for the 10 percent additional masks requirement of 14 CFR 25.1447(c)(1).

h. The illumination level of the normal OFCR-compartment lighting system must automatically be sufficient for each occupant of the compartment to locate a deployed oxygen mask.

16. The following additional requirements apply to OFCR compartments that are divided into several sections by the installation of curtains or partitions:

a. A placard is required adjacent to each curtain that visually divides or separates, for example, for privacy purposes, the OFCR compartment into multiple sections. The placard must require that the curtain(s) remains open when the section it creates is unoccupied. The vestibule section adjacent to the stairway is not considered a private section and, therefore, does not require a placard.

b. For each section of the OFCR compartment created by the installation of a curtain, the following requirements of these special conditions must be met with the curtain open or closed:

i. No-smoking placard requirement (Condition 1).

ii. Emergency illumination requirement (Condition 7).

iii. Emergency alarm-system requirement (Condition 9).

iv. Seatbelt-fasten signal or return-to-seat signal as applicable requirement (Condition 10).

v. Smoke- or fire-detection system requirement (Condition 12).

vi. Oxygen-system requirement (Condition 15).

c. OFCR compartments that are visually divided to the extent that evacuation could be adversely affected must have exit signs directing occupants to the exit at the primary stairway. The exit signs must be provided in each separate section of the OFCR compartment, except for curtained bunks, and must meet requirements of § 25.812(b)(1)(i). An exit sign with reduced background area or a symbolic exit sign, as described in Condition 6.a. of these special conditions, may be used to meet this requirement.

d. For sections within an OFCR compartment created by the installation of a rigid partition with a door separating the sections, the following requirements of these special conditions must be met with the door open or closed:

i. A secondary evacuation route from each section to the main deck, or the applicant must show that any door between the sections precludes anyone

from being trapped inside a section of the compartment. Removal of an incapacitated occupant from within this area must be considered. A secondary evacuation route from a small room designed for only one occupant for a short time duration, such as a changing area or lavatory, is not required, but removal of an incapacitated occupant from within such a small room must be considered.

ii. Any door between the sections must be shown to be openable when crowded against, even when crowding occurs at each side of the door.

iii. No more than one door may be located between any seat or berth and the primary stairway door.

iv. In each section, exit signs meeting requirements of § 25.812(b)(1)(i), or shown to have an equivalent level of safety, must direct occupants to the exit at the primary stairway. An exit sign with reduced background area or a symbolic exit sign, as described in Condition 6.a. of these special conditions, may be used to meet this requirement.

v. Conditions 1 (no-smoking placards), 7 (emergency illumination), 9 (emergency alarm system), 10 (fasten-seatbelt signal or return-to-seat signal as applicable), 12 (smoke- or fire-detection system), and 15 (oxygen system) must be met with the OFCR compartment door open or closed.

vi. Conditions 8 (two-way voice communication) and 11 (emergency firefighting and protective equipment) must be met independently for each separate section, except for lavatories or other small areas that are not intended to be occupied for extended periods of time.

17. If a waste-disposal receptacle is fitted in the OFCR compartment, it must be equipped with an automatic fire extinguisher that meets the performance requirements of § 25.854(b).

18. Materials (including finishes or decorative surfaces applied to the materials) must comply with the requirements of § 25.853 as amended by Amendment 25–116. Seat cushions and mattresses must comply with the requirements of § 25.853(c) as amended by Amendment 25–116, and the test requirements of part 25, appendix F, part II, or other equivalent methods.

19. The addition of a lavatory within the OFCR compartment would require the lavatory to meet the same requirements as those for a lavatory installed on the main deck, except with regard to Condition 12 of these special conditions for smoke detection.

20. Each stowage compartment in the OFCR compartment, except for underseat compartments for occupant convenience, must be completely enclosed. All enclosed stowage compartments within the OFCR compartment that are not limited to stowage of emergency equipment or airplane-supplied equipment (*i.e.,* bedding) must meet the design criteria described in the table below. Enclosed stowage compartments greater than 200 ft.[3] in interior volume are not addressed by this special condition. The in-flight accessibility of very large, enclosed stowage compartments, and the subsequent impact on the crewmembers' ability to effectively reach any part of the compartment with the contents of a hand-held fire-extinguishing system, will require additional fire-protection considerations similar to those required for inaccessible compartments such as Class C cargo compartments.

DESIGN CRITERIA FOR ENCLOSED STOWAGE COMPARTMENTS NOT LIMITED TO STOWAGE OF EMERGENCY OR AIRPLANE-SUPPLIED EQUIPMENT

Fire protection features	Applicability of fire protection requirements by interior volume		
	Less than 25 cu. ft.	25 cu. ft. to less than 57 cu. ft.	57 cu. ft. to 200 cu. ft.
Compliant Materials of Construction [1]	Yes	Yes	Yes.
Smoke or Fire Detectors [2]	No	Yes	Yes.
Liner [3]	No	Conditional	Yes.
Fire Location Detect [4]	No	Yes	Yes.

[1] *Compliant Materials of Construction:* The material used in constructing each enclosed stowage compartment must at least be fire resistant and must meet the flammability standards established for interior components (*i.e.,* 14 CFR part 25 Appendix F, Parts I, IV, and V) per the requirements of § 25.853. For compartments less than 25 ft.[3] in interior volume, the design must ensure the ability to contain a fire likely to occur within the compartment under normal use.

[2] *Smoke or Fire Detectors:* Enclosed stowage compartments equal to or exceeding 25 ft.[3] in interior volume must be provided with a smoke- or fire-detection system to ensure that a fire can be detected within a one-minute detection time. Flight tests must be conducted to show compliance with this requirement. Each system (or systems) must provide:

(a) A visual indication in the flight deck within one minute after the start of a fire.

(b) An aural warning in the OFCR compartment.

(c) A warning in the main passenger cabin. This warning must be readily detectable by a flight attendant, taking into consideration the locations of flight attendants throughout the main passenger compartment during various phases of flight.

[3] *Liner:* If material used in constructing the stowage compartment can be shown to meet the flammability requirements of a liner for a Class B cargo compartment (*i.e.,* § 25.855 at Amendment 25–116, and Appendix F, part I, paragraph (a)(2)(ii)), then no liner would be required for enclosed stowage compartments equal to or greater than 25 ft.[3] but less than 57 ft.[3] in interior volume. For all enclosed stowage compartments equal to or greater than 57 ft.[3] in interior volume but less than or equal to 200 ft.[3], a liner must be provided that meets the requirements of § 25.855 for a Class B cargo compartment.

[4] *Fire Location Detector:* If an OFCR compartment has enclosed stowage compartments exceeding 25 ft.[3] interior volume that are located separately from the other stowage compartments (located, for example, away from one central location, such as the entry to the OFCR compartment or a common area within the OFCR compartment, where the other stowage compartments are), that OFCR compartment would require additional fire-protection features and/or devices to assist the firefighter in determining the location of a fire.

Issued in Des Moines, Washington, on December 4, 2020.

James E. Wilborn,

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

[FR Doc. 2020–27107 Filed 12–16–20; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1122; Project Identifier MCAI–2020–00972–T; Amendment 39–21357; AD 2020–26–02]

RIN 2120–AA64

Airworthiness Directives; Yaborã Indústria Aeronáutica S.A. (Type Certificate Previously Held by Embraer S.A.) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Yaborã Indústria Aeronáutica S.A. (type certificate previously held by Embraer S.A.) Model ERJ 190–400 airplanes. This AD was prompted by a report of an in-flight shutdown (IFSD) due in part to failure in the low-pressure compressor (LPC) rotor 1 during operation in high altitude at high thrust settings. This AD requires amending the airplane flight manual (AFM) to incorporate a new limitation and revise certain normal procedures, as specified in an Agência Nacional de Aviação Civil (ANAC) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD becomes effective January 4, 2021.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 4, 2021.

The FAA must receive comments on this AD by February 1, 2021.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For the material incorporated by reference (IBR) in this AD, contact National Civil Aviation Agency (ANAC), Aeronautical Products Certification Branch (GGCP), Rua Dr. Orlando Feirabend Filho, 230—Centro Empresarial Aquarius—Torre B—Andares 14 a 18, Parque Residencial Aquarius, CEP 12.246–190—São José dos Campos—SP, BRAZIL, Tel: 55 (12) 3203–6600; Email: *pac@anac.gov.br;* internet *www.anac.gov.br/en/.* You may find this IBR material on the ANAC website at *https://sistemas.anac.gov.br/certificacao/DA/DAE.asp.* You may view this IBR material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1122.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1122; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Krista Greer, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3221; email *krista.greer@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The ANAC, which is the aviation authority for Brazil, has issued ANAC AD 2020–07–01, effective July 15, 2020 (ANAC AD 2020–07–01) (also referred to as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for certain Yaborã Indústria Aeronáutica S.A. (type certificate previously held by Embraer S.A.) Model ERJ 190–400 airplanes.

This AD was prompted by a report of an IFSD due in part to failure in the LPC rotor 1 during operation in high altitude at high thrust settings. The FAA is issuing this AD to address uncontained release of the LPC rotor 1 and damage to the engine and airplane structure, which could result in loss of control of the airplane. See the MCAI for additional background information.

Related Service Information Under 1 CFR Part 51

ANAC AD 2020–07–01 describes procedures for amending the AFM to incorporate a new limitation and revise the normal procedures to limit the engine N1 setting for flights above 33000 ft. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the State of Design Authority, the FAA has been notified of the unsafe condition described in the MCAI referenced above. The FAA is issuing this AD because the FAA evaluated all pertinent information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Requirements of This AD

This AD requires accomplishing the actions specified in the MCAI described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, ANAC AD 2020–07–01 is incorporated by reference in this final rule. This AD, therefore, requires compliance with ANAC AD 2020–07–01 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this AD. Service information specified in ANAC AD 2020–07–01 that is required for compliance with ANAC AD 2020–07–01 is available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1122.

FAA's Justification and Determination of the Effective Date

Since there are currently no domestic operators of these products, notice and opportunity for public comment before issuing this AD are unnecessary. In addition, for the reason stated above, the FAA finds that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment. However, the FAA invites you to send any written comments, data, or views about this AD. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only one copy of the comments. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2020–1122; Project Identifier MCAI–2020–00972–T'' at the beginning of your 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, as well as a report summarizing each substantive public contact with FAA personnel concerning this AD. The FAA will consider all comments received by the closing date for comments. The FAA may amend this AD because of those comments.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent to Krista Greer, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3221; email *krista.greer@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Regulatory Flexibility Act (RFA)

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

Costs of Compliance

Currently, there are no affected U.S.-registered airplanes. If an affected airplane is imported and placed on the U.S. Register in the future, the FAA provides the following cost estimates to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product
AFM revision	1 work-hour × $85 per hour = $85	$0	$85

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed 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.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–26–02 Yaborã Indústria Aeronáutica S.A. (Type Certificate Previously Held by Embraer S.A.) Airplanes: Amendment 39–21357; Docket No. FAA–2020–1122; Project Identifier MCAI–2020–00972–T.

(a) Effective Date

This AD becomes effective January 4, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Yaborã Indústria Aeronáutica S.A. (type certificate previously held by Embraer S.A.) Model ERJ 190–400 airplanes, certificated in any category, as identified in Agência Nacional de Aviação

Civil (ANAC) AD 2020–07–01, effective July 15, 2020 (ANAC AD 2020–07–01).

(d) Subject

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

(e) Reason

This AD was prompted by a report of an in-flight shutdown (IFSD) due in part to failure in the low-pressure compressor (LPC) rotor 1 during operation in high altitude at high thrust settings. The FAA is issuing this AD to address uncontained release of the LPC rotor 1 and damage to the engine and airplane structure, which could result in loss of control of the airplane.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, ANAC AD 2020–07–01.

(h) Exceptions to ANAC AD 2020–07–01

(1) Where ANAC AD 2020–07–01 refers to its effective date, this AD requires using after the effective date of this AD.

(2) The ''Alternative method of compliance (AMOCs)'' section of ANAC AD 2020–07–01 does not apply to this AD.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Large Aircraft Section, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the Large Aircraft Section, International Validation Branch, send it to the attention of the person identified in paragraph (j) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

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

(j) Related Information

For more information about this AD, contact Krista Greer, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3221; email *krista.greer@faa.gov.*

(l) Material Incorporated by Reference

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

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

(i) Agência Nacional de Aviação Civil (ANAC) AD 2020–07–01, effective July 15, 2020.

(ii) [Reserved]

(3) For ANAC AD 2020–07–01, contact National Civil Aviation Agency (ANAC), Aeronautical Products Certification Branch (GGCP), Rua Dr. Orlando Feirabend Filho, 230—Centro Empresarial Aquarius—Torre B—Andares 14 a 18, Parque Residencial Aquarius, CEP 12.246–190—São José dos Campos—SP, BRAZIL, Tel: 55 (12) 3203–6600; Email: *pac@anac.gov.br;* internet *www.anac.gov.br/en/.* You may find this IBR material on the ANAC website at *https://sistemas.anac.gov.br/certificacao/DA/DAE.asp.*

(4) You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1122.

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

Issued on December 7, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–27621 Filed 12–16–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1108; Project Identifier AD–2020–01397–T; Amendment 39–21360; AD 2020–26–05]

RIN 2120–AA64

Airworthiness Directives; Textron Aviation Inc. (Type Certificate Previously Held by Cessna Aircraft Company) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Textron Aviation Inc. (type certificate previously held by Cessna Aircraft Company) Model 560XL airplanes. This AD was prompted by an incident where a Model 560XL airplane experienced an uncommanded engine acceleration with the left engine throttle unresponsive to power commands, including engine shut-off. This AD requires an inspection of the rivet of the left and right throttle quadrant assembly (TQA) sensor link and sensor drive arm pivot for correct installation and corrective actions if necessary. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective December 17, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of December 17, 2020.

The FAA must receive comments on this AD by February 1, 2021.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this final rule, contact Textron Aviation Inc., P.O. Box 7706, Wichita, KS 67277; phone: (316) 517–5800; website: *https://txtav.com.* You may review this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148. It is also available at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1108.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1108; 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 street address for the Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Jeffrey Englert, Aviation Safety Engineer, Wichita ACO Branch, FAA, 1801 Airport Road, Room 100, Dwight D. Eisenhower National Airport, Wichita, KS 67209; phone: (316) 946–4167; fax: (316) 946–4107; email: *jeffrey.englert@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA has received a report of an incident where a Model 560XL airplane experienced an uncommanded engine acceleration on the ground following successful engine starts. The left engine throttle was unresponsive to power commands, including engine shut-off. An inspection identified that the left engine's sensor link and sensor drive arm (in the TQA) had separated. A sub-supplier of the TQA components failed to properly squeeze the rivet in a throttle quadrant link assembly. The rivet serves as the pivot between the TQA sensor link and sensor drive arm. The FAA determined that the failure of the TQA caused an asymmetrical uncommanded high-thrust that cannot be corrected by the flight crew in certain phases of flight.

This condition, if not addressed, could result in loss of thrust control, which could cause loss of control of the airplane. The FAA is issuing this AD to address the unsafe condition on these products.

FAA's Determination

The FAA is issuing this AD because the agency has determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Textron Aviation Inc. Mandatory Service Letter SL560XL–76–04, Revision 1, dated November 24, 2020. This service information specifies procedures for inspecting the rivet of the left and right TQA sensor link and sensor drive arm pivot for correct installation and, if necessary, replacing the rivet, reworking the diameter of the rivet, and inspecting the rivet butt for cracking. 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 **ADDRESSES**.

AD Requirements

This AD requires accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between this AD and the Service Information.''

Differences Between This AD and the Service Information

The service information specifies compliance at the next ''time limited dispatch check,'' not to exceed 170 airplane hours or 6 months, whichever occurs first. However, this AD specifies a compliance time of 50 hours time-in-service.

Interim Action

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

Justification for Immediate Adoption and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) 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 providing notice and seeking comment prior to issuance. Further, section 553(d) of the APA authorizes agencies to make rules effective in less than thirty days, upon a finding of good cause.

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies foregoing notice and comment prior to adoption of this rule because the potential for additional events to occur, based on average operational time, is an unacceptable risk. As a result, the required corrective actions must be accomplished within 50 hours time-in-service, a shorter time than necessary for the public to comment and for publication of the final rule. Accordingly, notice and opportunity for prior public comment are impracticable and contrary to the public interest pursuant to 5 U.S.C. 553(b)(3)(B).

In addition, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days, for the same reasons the FAA found good cause to forego notice and comment.

Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include the docket number FAA–2020–1108 and Project Identifier AD–2020–01397–T at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *https://www.regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this final rule.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent to Jeffrey Englert, Aviation Safety Engineer, Wichita ACO Branch, FAA, 1801 Airport Road, Room 100, Dwight D. Eisenhower National Airport, Wichita, KS 67209; phone: (316) 946–4167; fax: (316) 946–4107; email: *jeffrey.englert@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Regulatory Flexibility Act

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

Costs of Compliance

The FAA estimates that this AD affects 176 airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection of the rivet	1 work-hour × $85 per hour = $85	$0	$85	$14,960

The FAA estimates the following costs to do any necessary inspection, correction, or replacement that would be required based on the results of the inspection. The FAA has no way of determining the number of aircraft that might need these actions:

ON-CONDITION COSTS

Actions	Labor cost	Parts cost	Cost per product
Inspection of the rivet butt, modification, and replacement.	Up to 3.5 work-hour × $85 per hour = $297.50	N/A	Up to $297.50.

The FAA has included all known costs in its cost estimate. According to the manufacturer, some or all of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected operators.

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:

2020–26–05 Textron Aviation Inc. (Type Certificate Previously Held by Cessna Aircraft Company) Airplanes: Amendment 39–21360; Docket No. FAA–2020–1108; Project Identifier AD–2020–01397–T.

(a) Effective Date

This airworthiness directive (AD) is effective December 17, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Textron Aviation Inc. (Type Certificate previously held by Cessna Aircraft Company) Model 560XL airplanes, certificated in any category, serial numbers 560–6001 through 560–6290 inclusive.

(d) Subject

Joint Aircraft System Component (JASC) Code 7603, POWER LEVER.

(e) Unsafe Condition

This AD was prompted by a report that a Model 560XL airplane experienced an uncommanded engine acceleration with the left engine throttle unresponsive to power commands, including engine shut-off. The FAA is issuing this AD to address loss of thrust control. The unsafe condition, if not addressed, could result in loss of control of the airplane.

(f) Compliance

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

(g) Inspections, Correction, and Replacement

Within 50 hours time-in-service after the effective date of this AD, inspect the rivet in the left and right throttle quadrant assembly sensor link and sensor drive arm pivot for correct installation, and do all applicable corrective actions before further flight, in accordance with steps 2 through 5 of the Accomplishment Instructions in Textron Aviation Mandatory Service Letter SL560XL–76–04, Revision 1, dated November 24, 2020.

(h) Credit for Previous Actions

This paragraph provides credit for the actions specified in paragraph (g) of this AD, if those actions were performed before the effective date of this AD using Textron Aviation Mandatory Service Letter SL560XL–76–04, dated November 12, 2020.

(i) Special Flight Permit

Special flight permits may be issued in accordance with 14 CFR 21.197 and 21.199 to operate the airplane to a location where the airplane can be modified, provided there are no passengers onboard the airplane.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Wichita 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.

(k) Related Information

For more information about this AD, contact Jeffrey Englert, Aviation Safety Engineer, Wichita ACO Branch, FAA, 1801 Airport Road, Room 100, Dwight D. Eisenhower National Airport, Wichita, KS 67209; phone: (316) 946–4167; fax: (316) 946–4107; email: *jeffrey.englert@faa.gov.*

(l) Material Incorporated by Reference

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

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

(i) Textron Aviation Inc. Mandatory Service Letter SL560XL–76–04, Revision 1, dated November 24, 2020.

(ii) [Reserved]

(3) For Textron Aviation Inc. service information identified in this AD, contact Textron Aviation Inc., P.O. Box 7706, Wichita, KS 67277; phone: (316) 517–5800; website: *https://txtav.com.*

(4) You may review this referenced service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

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

Issued on December 8, 2020.

Ross Landes,

Deputy Director for Regulatory Operations, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–27741 Filed 12–16–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1133; Project Identifier MCAI–2020–01515–T; Amendment 39–21372; AD 2020–26–17]

RIN 2120–AA64

Airworthiness Directives; ATR—GIE Avions de Transport Régional Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all ATR—GIE Avions de Transport Régional Model ATR42–500 and ATR72 airplanes. This AD was prompted by a report of damage found on a wire bundle connecting an angle-of-attack (AOA) probe and a multi-function computer (MFC), which can inhibit activation of the stick pusher without any indication to the flight crew by the stall warning system. This AD requires a repetitive operational test for discrepancies of the stall warning system and stick pusher in the flight configuration, an inspection for discrepancies in the wiring bundles between AOA probes and MFCs, and corrective action if necessary, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD becomes effective January 4, 2021.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 4, 2021.

The FAA must receive comments on this AD by February 1, 2021.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For material incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this IBR material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1133.

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–2020–1133; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3220; email *shahram.daneshmandi@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0249, dated November 11, 2020 (EASA AD 2020–0249) (also referred to as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for all ATR-GIE Avions de Transport Régional Model ATR42–400 and –500 airplanes; and Model ATR72–101, –102, –201, –202, –211, –212, and –212A airplanes. Model ATR42–400 airplanes are not certificated by the FAA and are not included on the U.S. type certificate data sheet; this AD therefore does not include those airplanes in the applicability.

This AD was prompted by a report of damage found on a wire bundle connecting an AOA probe and a MFC, which can inhibit activation of the stick pusher without any indication to the

flight crew by the stall warning system. The FAA is issuing this AD to address latent failure of the stick pusher, which could result in loss of control of the airplane. See the MCAI for additional background information.

Related Service Information Under 1 CFR Part 51

EASA AD 2020–0249 describes procedures for a repetitive operational test for discrepancies (including missing or incorrect annunciators, messages, indicators, warnings, or sounds) of the stall warning system and stick pusher in the flight configuration, an inspection for discrepancies (including damage to electrical routing and conduits, foreign object debris, electrical routing and conduits not properly attached) in the wiring bundles between AOA probes and MFCs, corrective action, and an inspection report. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the State of Design Authority, the FAA has been notified of the unsafe condition described in the MCAI referenced above. The FAA is issuing this AD because the FAA evaluated all pertinent information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Requirements of This AD

This AD requires accomplishing the actions specified in the MCAI described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD and except as discussed under ''Differences Between this AD and the MCAI.''

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2020–0249 is incorporated by reference in this final rule. This AD, therefore, requires compliance with EASA AD 2020–0249 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in the EASA AD. Service information specified in EASA AD 2020–0249 that is required for compliance with EASA AD 2020–0249 is available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1133.

Differences Between This AD and the MCAI

The MCAI specifies a compliance for the inspection of the affected wiring within 750 FH (flight hours) or 5 months, whichever occurs first. For this AD, the compliance time for the inspection is within 750 FH or 4 months, whichever occurs first after the effective date of this AD. In developing an appropriate compliance time the FAA considered the State of Design authority's recommendation and the degree of urgency associated with the subject unsafe condition.

FAA's Justification and Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because of the failure of the stick pusher without any indication to the flight crew by the stall warning system. The latent failure of the stick pusher could result in loss of control of the airplane. In addition, the compliance time for the required action is shorter than the time necessary for the public to comment and for publication of the final rule. Therefore, the FAA finds good cause that notice and opportunity for prior public comment are impracticable. In addition, for the reasons stated above, the FAA finds that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2020–1133; Project Identifier MCAI–2020–01515–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *https://www.regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this final rule.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent to Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3220; email *shahram.daneshmandi@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Regulatory Flexibility Act (RFA)

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

Costs of Compliance

The FAA estimates that this AD affects 28 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS *

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Up to 10 work-hours × $85 per hour = Up to $850.	None	Up to $850	Up to $23,800.

* Table does not include estimated costs for reporting.

The FAA estimates that it takes about 1 work-hour per product to comply with the reporting requirement in this AD. The average labor rate is $85 per hour. Based on these figures, the FAA estimates the cost of reporting the wiring inspection results on U.S. operators to be $2,380, or $85 per product.

The FAA has received no definitive data on which to base the cost estimates for the on-condition actions specified in this AD.

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 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 current valid OMB control number. The control number for the collection of information required by this AD is 2120–0056. The paperwork cost associated with this AD has been detailed in the Costs of Compliance section of this document and includes time for reviewing instructions, as well as completing and reviewing the collection of information. Therefore, all reporting associated with this AD is mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed 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 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.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–26–17 ATR-GIE Avions de Transport Régional: Amendment 39–21372; Docket No. FAA–2020–1133; Project Identifier MCAI–2020–01515–T.

(a) Effective Date

This airworthiness directive (AD) becomes effective January 4, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all ATR-GIE Avions de Transport Régional airplanes identified in paragraphs (c)(1) and (2) of this AD, certificated in any category.

(1) Model ATR42–500 airplanes.

(2) Model ATR72–101, –102, –201, –202, –211, –212, and –212A airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 31, Instruments.

(e) Reason

This AD was prompted by a report of damage found on a wire bundle connecting an angle-of-attack probe and a multi-function computer, which can inhibit activation of the stick pusher without any indication to the flight crew by the stall warning system. The FAA is issuing this AD to address latent failure of the stick pusher, which could result in loss of control of the airplane.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2020–0249, dated November 11, 2020 (EASA AD 2020–0249).

(h) Exceptions to EASA AD 2020–0249

(1) Where EASA AD 2020–0249 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2020–0249 does not apply to this AD.

(3) Where paragraph (2) of EASA AD 2020–0249 specifies a compliance time for the inspection of ''within 750 FH [flight hours] or 5 months, whichever occurs first'' for this AD, the compliance time is ''within 750 FH or 4 months, whichever occurs first.''

(4) Paragraph (4) of EASA AD 2020–0249 specifies to report inspection results to ATR-GIE Avions de Transport Régional within a certain compliance time. For this AD, report inspection results at the applicable time

specified in paragraph (h)(4)(i) or (ii) of this AD.

(i) If the inspection was done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(ii) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(5) Where paragraph (3) of EASA AD 2020–0249 refers to discrepancies, for this AD, for the operational tests specified in paragraph (1) of EASA AD 2020–0249, discrepancies include missing or incorrect annunciators, messages, indicators, warnings, or sounds; and for the inspection specified in paragraph (2) of EASA AD 2020–0249, discrepancies include damage to electrical routing and conduits, foreign object debris, electrical routing and conduits not properly attached.

(6) Where paragraph (3) of EASA AD 2020–0249 specifies corrective actions if any discrepancies are detected ''during the first operational test as required by paragraph (1) of this [EASA] AD, or during the inspection as required by paragraph (2) of this [EASA] AD'' for this AD, the corrective actions must be done if any discrepancies are detected during any operational test required by paragraph (1) of EASA AD 2020–0249, or during the inspection required by paragraph (2) of EASA AD 2020–0249.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Large Aircraft Section, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the Large Aircraft Section, International Validation Branch, send it to the attention of the person identified in paragraph (j) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

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

(3) *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 current 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 1 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 as required by this AD. 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.

(j) Related Information

For more information about this AD, contact Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3220; email *shahram.daneshmandi@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2020–0249, dated November 11, 2020.

(ii) [Reserved]

(3) For EASA AD 2020–0249, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.*

(4) You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1133.

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

Issued on December 11, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–27910 Filed 12–15–20; 2:00 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 385

[Docket No. RM19–18–000; Order No. 862]

Formal Requirements for Filings in Proceedings Before the Commission

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Final rule; announcement of effective date.

SUMMARY: The Federal Energy Regulatory Commission is announcing the effective date for changes to the Commission's regulations that provide the address for hand-delivered filings and submissions to the Commission.

DATES: The final rule published at 84 FR 46440 on September 4, 2019, and delayed at 84 FR 55498 on October 17, 2019, is effective December 17, 2020.

FOR FURTHER INFORMATION CONTACT: Christopher Cook, Office of the Secretary, 888 First Street NE, Washington, DC 20426, (202) 502–8102, *christopher.cook@ferc.gov.*

Mark Hershfield, Office of the General Counsel, 888 First Street NE, Washington, DC 20426, (202) 502–8597, *mark.hershfield@ferc.gov.*

SUPPLEMENTARY INFORMATION: On August 27, 2019, the Commission issued a final rule in Docket No. RM19–18–000 requiring that deliveries of filings and submissions, other than by the United States Postal Service, be sent to an off-site facility [1] for security screening and processing.[2] The final rule, which was published in the **Federal Register** on September 4, 2019, provided that the new regulation would take effect 60 days after the date of publication of the final rule in the **Federal Register**.[3] On October 11, 2019, the Secretary issued a document, stating that the effective date for the final rule was postponed indefinitely to ensure that the public and the Commission make an effective transition to utilizing the off-site facility.[4] A Notice of Effective Date was issued on June 23, 2020 annoucing the regulation would take effect on July 1, 2020.[5] This document serves to make

[1] Federal Energy Regulatory Commission, c/o Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

[2] *Formal Requirements for Filings in Proceedings Before the Commission,* 168 FERC ¶ 61,120 (2019) (Final Rule).

[3] 84 FR 46440.

[4] 84 FR 55498.

[5] 85 FR 38884.

the regulatory change effective in the CFR.

Issued: December 14, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–27797 Filed 12–16–20; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2018–0053; FRL–10016–42]

Broflanilide; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of broflanilide in or on multiple commodities that are identified and discussed later in this document. BASF Corporation requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective December 17, 2020. Objections and requests for hearings must be received on or before February 16, 2021, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2018–0053, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805.

Due to the public health concerns related to COVID–19, the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

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

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2018–0053 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before February 16, 2021. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2018–0053, by one of the following methods:

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

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of July 24, 2018 (83 FR 34968) (FRL–9980–31), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 7F8646) by BASF Corporation, 26 Davis Dr., P.O. Box 13528, Research Triangle Park, NC 27709. The petition requested to establish tolerances in 40 CFR part 180 for residues of the insecticide, broflanilide, including its metabolites and degradates, in or on grain, cereal, except rice, group 15; amaranth grain; quinoa, grain; spelt, grain; canihua, grain; chia, grain; cram-cram, grain; huauzontle, grain; teff, grain; and corn, sweet, kernel plus cob with husks removed at 0.01 parts per million (ppm); and vegetables, tuberous and corm, subgroup 1C at 0.04 ppm. Tolerances were also requested for cattle, meat; goat, meat; horse, meat; sheep, meat at 0.01 ppm; milk, fat and poultry, fat at 0.02 ppm; and cattle, fat; sheep, fat; and goat, fat at 0.05 ppm. Additionally, tolerances were requested for grain, cereal, forage, fodder and straw, group 16, except rice; quinoa, hay; teff, hay; and corn, sweet, stover; corn, sweet, forage at 0.01 ppm; corn, field, milled products at 0.015 ppm; and potato, wet peel at 0.1 ppm. In addition, BASF proposed to establish a tolerance of 0.01 ppm for residues of broflanilide in or on all food items in food handling establishments where food and food products are held, processed, prepared and/or served. That document referenced a summary of the petition prepared by BASF, the registrant, which

is available in the docket, *http://www.regulations.gov.* A comment was received on the notice of filing. EPA's response to this comment is discussed in Unit IV.C.

In the **Federal Register** of June 24, 2020 (85 FR 37806) (FRL–10010–82), EPA issued a second notice amending the previous NOF published in the **Federal Register** on July 24, 2018, by announcing additional commodities for which the petitioner was seeking tolerances. BASF requested to establish a tolerance in 40 CFR part 180 for residues of the insecticide, broflanilide, including its metabolites and degradates, in or on amaranth, stover; quinoa, forage; quinoa, straw; teff, forage; and teff, straw at 0.01 ppm. (EPA's notice inadvertently listed amaranth, grain, which had already been identified in the July 2018 notice, instead of amaranth, stover, but BASF's petition included a request for amaranth, stover.) BASF also requested tolerances for food items (animal origin) for hog, meat; poultry, meat; eggs; cattle, meat byproducts; goat, meat byproducts; hog, meat byproducts; horse, meat byproducts; poultry, meat byproducts; sheep, meat byproducts; hog, fat; and horse, fat at 0.02 ppm. No comments were received in response to this notice.

Based upon review of the data supporting the petition, EPA is establishing some tolerances at different levels than were petitioned for. The reason for these changes is explained in Unit IV.D.

III. Aggregate Risk Assessment and Determination of Safety

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

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

A. Toxicological Profile

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

The target organs of broflanilide toxicity are the adrenal glands (rats, mice, and dogs) and ovaries (rats and mice). Adrenal effects include increased adrenal weights, increased incidence of adrenal cortex vacuolation, and adrenal cortex hypertrophy in both sexes. Ovarian effects include increased incidence of ovarian interstitial gland vacuolation.

There were no parental or developmental effects reported up to the limit dose tested (1000 mg/kg/day) in the developmental studies in rats and rabbits. In the reproduction study in rats, increased adrenal weights with corroborative histopathological findings (increased vacuolation and diffuse hypertrophy in the adrenal gland cortex) were observed in parental rats of both sexes and generations. Offspring showed decreased pup weights in F1 and F2 pups, which occurred at a higher dose level than the observed adverse effects in parental rats. Reproductive parameters showed increased ovarian weights and increased incidence of vacuolation of interstitial gland in the ovary at a higher dose level than the adverse effects in parental rats. There were no effects on fertility or other measured reproductive parameters.

There is no evidence of neurotoxicity in acute or subchronic neurotoxicity studies and broflanilide is not an immunotoxic chemical. In the subchronic inhalation study, there was an increase in absolute and relative adrenal weight and increased incidence of adrenal vacuolation in both sexes and increased incidence of ovarian vacuolation.

In the chronic toxicity/carcinogenicity study in rats, there were treatment-related increases in Leydig cell adenomas in male rats, and in luteomas and granulosa cell tumors in the ovaries, as well as in uterine adenocarcinomas, and adrenal cortex carcinomas in female rats. No treatment-related increase in tumor incidences was observed in mice. All mutagenicity studies were negative for both the parent and major metabolites (DM–8007, S(PFP–OH)-8007, DC–8007, DC–DM–8007, MFBA, AB-oxa, S9Br-OH)-8007).

Specific information on the studies received and the nature of the adverse effects caused by broflanilide as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document titled ''Broflanilide: New Active Ingredient Human Health Risk Assessment'' (hereinafter ''Broflanilide Human Health Risk Assessment'') on pages 42–58 in docket ID number EPA–HQ–OPP–2018–0053.

B. Toxicological Points of Departure/Levels of Concern

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

A summary of the toxicological endpoints for broflanilide used for human risk assessment can be found in the Broflanilide Human Health Risk Assessment.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to broflanilide, EPA considered exposure under the petitioned-for tolerances. EPA assessed dietary exposures from broflanilide in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure.

No such effects were identified in the toxicological studies for broflanilide; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the 2003–2008 food consumption data from the U.S. Department of Agriculture's National Health and Nutrition Examination Survey, What We Eat in America (NHANES/WWEIA). As to residue levels in food, for all commodities in the Dietary Exposure Evaluation Model software with the Food Commodity Intake Database (DEEM–FCID), EPA used tolerance-level residues, highest average field trials (HAFT) residue values, anticipated residues, 100 percent crop treated (PCT), and default processing factors resulting from agricultural uses, and the food handling establishment (FHE) values (½ FHE LOQ tolerance and 4.65% FHE treatment).

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that broflanilide should be classified as ''Likely to be Carcinogenic to Humans'' and a linear approach has been used to quantify cancer risk. The cancer risk assessment used the same assumptions as the chronic assessment.

iv. *Anticipated residue and PCT information.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

- *Condition a:* The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.
- *Condition b:* The exposure estimate does not underestimate exposure for any significant subpopulation group.
- *Condition c:* Data are available on pesticide use and food consumption in a particular area and the exposure estimate does not understate exposure for the population in such area.

In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

The chronic and cancer assessments assumed 100 PCT for agricultural uses and the treatment value of 4.65% for FHE uses.

EPA estimates the percent of commodities treated in Food Handling Establishments (FHE) for new uses of active ingredients based on the best available information. This includes survey information on pesticide usage related to the number of facilities being treated, product forms used (*e.g.,* liquids and aerosols), and treatment schedule by FHE segments (*e.g.,* warehouse, food processor, distributor, and restaurant). EPA also incorporated the best available information related to the transfer of commodities between various segments of food handling establishments and the percent of food consumed by location, either in the home or outside the home.

All information currently available has been considered and EPA has concluded that for any active ingredient, including broflanilide, there is at most a 4.65% likelihood that a food commodity could contain potential residues resulting from one or more treatments while in the food handling establishment channel of trade. Similar to estimates of agricultural use, this estimate should be reconsidered in 5 years.

The Agency believes that the three conditions discussed in Unit III.C.1.iv. have been met. With respect to Condition a, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions b and c, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available reliable information on the regional consumption of food to which broflanilide may be applied in a particular area.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for broflanilide alone as well as for the combined residues of concern (ROC), broflanilide and DC–8007 in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of broflanilide and the ROC, broflanilide and DC–8007. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/about-water-exposure-models-used-pesticide.*

Based on the Pesticide in Water Calculator (PWC) model and using the Total Residue (TR) method for the ROCs, the estimated drinking water concentrations (EDWCs) of broflanilide and DC–8007 for chronic exposures for non-cancer assessments are estimated to be 0.9 ppb for surface water and for chronic exposures for cancer assessments are estimated to be 0.7 ppb for surface water. Since breakthrough of broflanilide into groundwater is incomplete after 100 years of simulation, post-breakthrough EDWCs are negligible. Due to the high Freundlich adsorption coefficient (K_F) of broflanilide, peak EDWCs in groundwater were negligible as well.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For the chronic dietary risk assessment, the water concentration value of 0.9 ppb was used to assess the contribution to drinking water. For the cancer dietary risk assessment, the water concentration value of 0.7 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

There are several proposed residential uses for broflanilide. These uses include, but are not limited to, insecticide treatments in and around homes, apartments, schools, picnic areas, hospitals, and nursing homes. In addition, there are several proposed termiticide products that may be used around the exterior of homes, apartments, schools, and other residential use sites. EPA assessed residential exposure using the following assumptions:

- *Residential handler:* Although there is one proposed broflanilide product label with residential use sites (*e.g.,* homes, apartments, mobile homes), this product is formulated as a ready-to-use pressurized can, which, once dispensed, rapidly expands to generate a dry foam. One ounce (weight) of the product is being dispensed in approximately 5 seconds, and the ready-to-use pressurized can produces about 1 quart of foam. Based on the areas to which it is applied (*i.e.,* with actuators in voids, cracks, and other places where insects harbor), dermal exposure is expected to be negligible. In addition, considering the low vapor pressure of broflanilide (6.7×10^{-11} mmHg) and formulation into foam, inhalation exposure is also expected to be negligible. Therefore, neither a quantitative non-cancer nor cancer residential handler exposure and risk assessment was conducted.
- *Post-application exposure:* There is the potential for short-term post-application exposure for individuals exposed as a result of being in an environment that has been previously treated with broflanilide. Due to a lack of dermal hazard for broflanilide, a dermal non-cancer assessment was not conducted. The quantitative non-cancer exposure and risk assessment for residential short-term post-application exposures is based on the following maximum application rate scenarios: Inhalation and incidental oral exposure from indoor crack and crevice, banded, and spot applications.

The PODs for the oral and inhalation routes are based on the same effects: Therefore, oral and inhalation routes can be combined. Since the LOCs for both incidental oral and inhalation are different (100 and 30), the aggregate risk index (ARI) approach was used:

Aggregate Risk Index (ARI) = 1 ÷ [(Incidental Oral LOC ÷ Incidental Oral MOE) + (Inhalation LOC ÷ Inhalation MOE)].

Although a non-cancer dermal risk assessment was not performed due to the lack of an adverse effect in the non-cancer dermal study, a dermal cancer exposure and risk assessment was performed because dermal exposure does contribute to the overall cancer risk for broflanilide.

Post-application cancer risk estimates for adults were calculated using a linear low-dose extrapolation approach in which a Lifetime Average Daily Dose (LADD) is first calculated and then compared with a Q_1* that has been calculated for broflanilide based on dose response data in the appropriate toxicology study (Q_1* = 2.48×10^{-3} $(mg/kg/day)^{-1}$).

The residential exposure scenario used in the adult non-cancer aggregate assessment is short-term post-application inhalation exposure following an indoor surface directed spot application. The residential exposure scenario used in the non-cancer aggregate assessment of children 1 to less than 2 years old is the combined inhalation and hand-to-mouth exposures from short-term post-application exposure to indoor perimeter/spot coarse and pin stream surface spray applications on carpet.

The residential exposure scenario used in the adult cancer aggregate assessment is post-application dermal and inhalation exposure following an indoor surface directed perimeter/spot application.

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/standard-operating-procedures-residential-pesticide.*

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found broflanilide to share a common mechanism of toxicity with any other substances, and broflanilide does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that broflanilide does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/cumulative-assessment-risk-pesticides.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* Broflanilide did not demonstrate any evidence of increased qualitative or quantitative susceptibility in the rat and rabbit developmental toxicity studies or the 2-generation rat reproduction study. In the rabbit and rat developmental toxicity studies, there were no developmental effects up to the limit dose tested (1000 mg/kg/day). In the reproduction study in rats, decreased pup weights in F1 and F2 pups occurred at a higher dose levels than the dose with adverse parental findings.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for broflanilide is complete.

ii. Acute and subchronic neurotoxicity studies showed no evidence of neurotoxicity in male or female rats. There was no other evidence in any species tested to indicate neurotoxicity potential. Therefore, there is no concern for acute or subchronic neurotoxicity resulting from exposure to broflanilide.

iii. There is no evidence that broflanilide results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2-generation reproduction study.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments

were performed based on 100 PCT for agricultural uses, a treatment value of 4.65% for FHE uses, and some anticipated residue data. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to broflanilide in drinking water. EPA used similarly conservative assumptions to assess post-application exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by broflanilide.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. No adverse effect resulting from a single oral exposure was identified and no acute dietary endpoint was selected. Therefore, broflanilide is not expected to pose an acute risk.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to broflanilide from food and water will utilize less than 1% of the cPAD for children 1 to 2 years old, the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of broflanilide is not expected.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Broflanilide is proposed for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to broflanilide.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures result in aggregate ARIs of 320 for adults and 4.4 for children 1 to <2 years old. Because EPA's level of concern for broflanilide is an ARI of 1 or below, these ARIs are not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

An intermediate-term adverse effect was identified; however, broflanilide is not registered for any use patterns that would result in intermediate-term residential exposure. Intermediate-term risk is assessed based on intermediate-term residential exposure plus chronic dietary exposure. Because there is no intermediate-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess intermediate-term risk), no further assessment of intermediate-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating intermediate-term risk for broflanilide.

5. *Aggregate cancer risk for U.S. population.* A cancer aggregate risk assessment was completed for the proposed residential and dietary uses of broflanilide using the linear slope factor (Q1 *) of 2.48×10^{-3}. The assessment incorporates the adult post-application dermal and inhalation exposure following an indoor surface directed perimeter/spot application. The residential assessment is a conservative calculation which assumes 12 retreatments a year as allowed by the label at the maximum rate proposed, 365 days of exposure in the residential setting, and 10% dissipation of residues per day. The cancer dietary exposure estimate for adults 20–49 years old, the most highly-exposed adult population subgroup, assumed 100% crop treated for agricultural uses and the FHE treatment value of 4.65% for FHE uses. The resulting aggregate cancer risk estimate is 1×10^{-6}.

EPA generally considers cancer risks (expressed as the probability of an increased cancer case) in the range of 1 in 1 million (or 1×10^{-6}) or less to be negligible. Accordingly, EPA has concluded the aggregate cancer risk for all broflanilide uses fall within the range of 1×10^{-6} and are thus negligible.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to broflanilide residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

The petitioner proposed a multi-residue method, BASF method D1417/01, based on QuEChERS (quick, easy, cheap, effective, rugged, safe) for the determination of broflanilide residues in plant matrices. This method has been proven to be suitable for the determination of residues of broflanilide in plant matrices.

BASF method D1604/01 is proposed as the enforcement method for the determination of residues of broflanilide and DM–8007 in livestock commodities by LC–MS/MS. This method has been proven to be suitable for the determination of residues of broflanilide and DM–8007 in livestock matrices.

The methods may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov.*

B. International Residue Limits

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

Broflanilide is a new active ingredient and no MRLs have yet been established by Codex.

C. Response to Comments

One comment was received in response to the Notice of Filing. The comment stated in part that ''the notice of the application for these uses does not contain any information about human toxicity, water solubility, granular transmissibility, or other information which could help evaluate the risk of higher levels of use of

broflanilide'' and that ''perhaps EPA should reissue the notice with attached information on toxicity and transmission levels.'' A supporting document summarizing the information on the residue chemistry, toxicological profile, as well as an estimate of the aggregate exposure expected was available in the docket at the time the notice was published. The NOF published on July 24, 2018, referred to the docket and noted that the summary was available. That document provided information to help evaluate the risks of broflanilide.

D. Revisions to Petitioned-For Tolerances

EPA is establishing the tolerance in/on potato, wet peel at 0.08 ppm rather than the petitioned-for tolerance of 0.1 ppm. The Agency's practice is to use the HAFT value from the field trials and the median processing factor. Based on these data, the appropriate tolerance for potato, wet peel is 0.08 ppm.

EPA is not establishing a separate tolerance for corn, sweet, kernel plus cob with husks removed because it is covered under grain, cereal, group 15, except rice. Similarly, separate tolerances for corn, sweet, stover; and corn, sweet forage are not being established because they are covered under grain, cereal, forage, fodder, and straw, group 16, except rice.

EPA is including the livestock metabolite DM–8007 as a residue of concern for tolerance enforcement and risk assessment. Therefore, the tolerance expression for livestock commodities is being revised to include the metabolite DM–8007.

EPA is establishing a tolerance for residues in milk at 0.02 ppm to harmonize with Canadian livestock LOQ MRLs. The tolerance of 0.02 ppm for residues in milk is higher than the anticipated residues in milk fat; therefore, although the available data support a tolerance for residues in milk fat at 0.01 ppm, a separate milk fat tolerance is not necessary at this time.

Lastly, the commodity definitions for the FHE use, egg and crop group 16 are being modified to be consistent with Agency nomenclature.

V. Conclusion

Therefore, tolerances are established for residues of broflanilide, including its metabolites and degradates, in or on the following plant commodities: Amaranth, grain, grain at 0.01 ppm; Amaranth, grain, stover at 0.01 ppm; Cañihua, grain at 0.01 ppm; Chia, grain at 0.01 ppm; Corn, field, milled byproducts at 0.015 ppm; Cram-cram, grain at 0.01 ppm; Grain, cereal, group 15, except rice at 0.01 ppm; Food and feed commodities (other than those covered by a higher tolerance) at 0.01 ppm; Grain, cereal, forage, fodder, and straw, group 16, except rice at 0.01 ppm; Huauzontle, grain at 0.01 ppm; Potato, wet peel at 0.08 ppm; Quinoa, forage at 0.01 ppm; Quinoa, grain at 0.01 ppm; Quinoa, hay at 0.01 ppm; Quinoa, straw at 0.01 ppm; Spelt, grain at 0.01 ppm; Teff, forage at 0.01 ppm; Teff, grain at 0.01 ppm; Teff, hay at 0.01 ppm; Teff, straw at 0.01 ppm; and Vegetable, tuberous and corm, subgroup 1C at 0.04 ppm.

Tolerances are also established for residues of broflanilide, including its metabolites and degradates, in or on the following livestock commodities: Cattle, fat at 0.02 ppm; Cattle, meat at 0.02 ppm; Cattle, meat byproducts at 0.02 ppm; Egg at 0.02 ppm; Goat, fat at 0.02 ppm; Goat, meat at 0.02 ppm; Goat, meat byproducts at 0.02 ppm; Hog, fat at 0.02 ppm; Hog, meat at 0.02 ppm; Hog, meat byproducts at 0.02 ppm; Horse, fat at 0.02 ppm; Horse, meat at 0.02 ppm; Horse, meat byproducts at 0.02 ppm; Milk at 0.02 ppm; Poultry, fat at 0.02 ppm; Poultry, meat at 0.02 ppm; Poultry, meat byproducts at 0.02 ppm; Sheep, fat at 0.02 ppm; Sheep, meat at 0.02 ppm; and Sheep, meat byproducts at 0.02 ppm.

VI. Statutory and Executive Order Reviews

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

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

This action directly regulates growers, food processors, food handlers, and food retailers, not States or Tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or Tribal Governments, on the relationship between the National Government and the States or Tribal Governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian Tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

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

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: November 30, 2020.

Edward Messina,

Acting Director, Office of Pesticide Programs.

Therefore, for the reasons stated in the preamble, EPA is amending 40 CFR chapter I as follows:

PART 180—TOLERANCES AND EXEMPTIONS FOR PESTICIDE CHEMICAL RESIDUES IN FOOD

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

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

■ 2. Add § 180.714 to subpart C to read as follows:

§ 180.714 Broflanilide; tolerances for residues.

(a) *General.* (1) Tolerances are established for residues of broflanilide, including its metabolites and degradates, in or on the commodities to Table 1 of this section. Compliance with the tolerance levels specified in Table 1 is to be determined by measuring only broflanilide, 3-(benzoylmethylamino)-*N*-[2-bromo-4-[1,2,2,2-tetrafluoro-1-(trifluoromethyl)ethyl]-6-(trifluoromethyl)phenyl]-2-fluorobenzamide, in or on the commodity.

TABLE 1 TO PARAGRAPH (a)(1)

Commodity	Parts per million
Amaranth, grain, grain	0.01
Amaranth, grain, stover	0.01
Cañihua, grain	0.01
Chia, grain	0.01
Corn, field, milled byproducts	0.015
Cram-cram, grain	0.01
Grain, cereal, group 15, except rice	0.01
Food and feed commodities (other than those covered by a higher tolerance)	0.01
Grain, cereal, forage, fodder, and straw, group 16, except rice	0.01
Huauzontle, grain	0.01
Potato, wet peel	0.08
Quinoa, forage	0.01
Quinoa, grain	0.01
Quinoa, hay	0.01
Quinoa, straw	0.01
Spelt, grain	0.01
Teff, forage	0.01
Teff, grain	0.01
Teff, hay	0.01
Teff, straw	0.01
Vegetable, tuberous and corm, subgroup 1C	0.04

(2) Tolerances are established for residues of broflanilide, including its metabolites and degradates, in or on the commodities to Table 2 of this section. Compliance with the tolerance levels specified in Table 2 is to be determined by measuring the sum of broflanilide, 3-(benzoylmethylamino)-*N*-[2-bromo-4-[1,2,2,2-tetrafluoro-1-(trifluoromethyl)ethyl]-6-(trifluoromethyl)phenyl]-2-fluorobenzamide, and its metabolite 3-benzamido-*N*-[2-bromo-4-(perfluoropropan-2-yl)-6-(trifluoromethyl)phenyl]-2-fluorobenzamide, calculated as the stoichiometric equivalent of broflanilide, in or on the commodity.

TABLE 2 TO PARAGRAPH (a)(2)

Commodity	Parts per million
Cattle, fat	0.02
Cattle, meat	0.02
Cattle, meat byproducts	0.02
Egg	0.02
Goat, fat	0.02
Goat, meat	0.02
Goat, meat byproducts	0.02
Hog, fat	0.02
Hog, meat	0.02
Hog, meat byproducts	0.02
Horse, fat	0.02
Horse, meat	0.02
Horse, meat byproducts	0.02
Milk	0.02
Poultry, fat	0.02
Poultry, meat	0.02
Poultry, meat byproducts	0.02
Sheep, fat	0.02
Sheep, meat	0.02
Sheep, meat byproducts	0.02

(b)–(d) [Reserved]

[FR Doc. 2020–27906 Filed 12–16–20; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket Nos. 20–70, 17–105, 11–131; FCC 20–162; FRS 17261]

Review Procedures; Modernization of Media Regulation Initiative; Program Carriage Rules

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission revises the rules governing the resolution of program carriage disputes between video programming vendors and multichannel video programming distributors (MVPDs) and parallel procedural rules, which govern program access, open video system (OVS), and good-faith retransmission consent complaints. Specifically, the document amends the third prong of the statute of limitations for filing program carriage complaints so that it no longer undermines the fundamental purpose of a statute of limitations. To harmonize the rules, the document similarly amends the statutes of limitations for filing program access, OVS, and good-faith retransmission consent complaints. The document also revises the effective date and review procedures for initial decisions issued by an administrative law judge (ALJ) in program carriage, program access, and OVS proceedings to make them consistent with the Commission's generally applicable procedures and adopts an aspirational shot clock to encourage quick resolution of appeals of such decisions. The Commission concludes that these changes will help to ensure a clear and expeditious program access, program carriage, retransmission consent, and OVS complaint process for potential complainants and defendants.

DATES: Effective January 19, 2021.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact John Cobb, *John.Cobb@fcc.gov,* of the Policy Division, Media Bureau, (202) 418–2120.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order,* MB Docket Nos. 20–70, 17–105, 11–131; FCC 20–162, adopted and released on November 18, 2020. The full text of this document is available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word, and/or Adobe Acrobat.) To request these documents in accessible formats (computer diskettes, large print, audio recording, and Braille), send an email to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

In this *Report and Order* (*Order*), we adopt proposed changes to the rules governing the resolution of program carriage disputes between video programming vendors and multichannel video programming distributors (MVPDs) and parallel procedural rules in part 76 of our rules, which govern program access, open video system (OVS), and good-faith retransmission consent complaints. Specifically, we amend the third prong of the statute of limitations for filing program carriage complaints so that it no longer undermines the fundamental purpose of a statute of limitations. To harmonize our rules, we similarly amend the statutes of limitations for filing program

access, OVS, and good-faith retransmission consent complaints. We also revise the effective date and review procedures for initial decisions issued by an administrative law judge (ALJ) in program carriage, program access, and OVS proceedings to make them consistent with the Commission's generally applicable procedures and adopt an aspirational shot clock to encourage quick resolution of appeals of such decisions. We find that these changes will help to ensure a clear and expeditious program access, program carriage, retransmission consent, and OVS complaint process for potential complainants and defendants. With this proceeding, we continue our efforts to modernize our media regulations.

Background. Section 616 of the Communications Act of 1934, as amended (the Act), directs the Commission to adopt regulations governing program carriage agreements between MVPDs and video programming vendors that prohibit certain anti-competitive practices and provide for expedited review of program carriage complaints. Congress passed section 616 as part of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), which was designed to preserve diversity and competition in the video programming market. Two sets of rules adopted pursuant to the 1992 Cable Act principally are addressed in this *Report and Order*: The statute of limitations for filing a program carriage complaint and the rules governing the effective date and review procedures for initial decisions issued by an ALJ in program carriage cases. We discuss these rules, in turn, below.

First, for a program carriage complaint to be timely filed under our rules, it must be brought within one year of the date on which any of the following events occurs: (1) The defendant MVPD enters into a contract with a video programming vendor that a party alleges to violate the program carriage rules, (2) the defendant MVPD makes a carriage offer that allegedly violates the program carriage rules, and such offer is unrelated to any existing contract between the complainant and the MVPD; or (3) ''[a] party has notified [an MVPD] that it intends to file a complaint with the Commission'' based on a violation of the program carriage rules. As noted in the further notice of proposed rulemaking (*FNPRM*) in this proceeding (85 FR 21131, April 16, 2020), the third prong of the statute of limitations, as originally adopted in the *1993 Program Carriage Order* (58 FR 60390, November 16, 1993), contained additional limiting language that made it functionally identical to the current statutes of limitations governing program access, OVS, and good-faith negotiation of retransmission consent complaints. In particular, the original language provided that a program carriage complaint was timely if filed within one year of the date on which ''the complainant has notified [an MVPD] that it intends to file a complaint with the Commission based on a request for carriage or to negotiate for carriage of its programming on a defendant's distribution system that has been denied or unacknowledged,'' allegedly in violation of the program carriage rules. In a subsequent 1994 amendment (59 FR 43776, August 25, 1994), the Commission modified § 76.1302(h)(3) to eliminate this limiting language without setting forth an explicit rationale for doing so. After several program carriage decisions in which the third prong of the statute of limitations had been interpreted in a manner consistent with the plain meaning of the 1994 rule language, the Commission expressed concern in the *2011 Program Carriage NPRM* (76 FR 60675, September 29, 2011) that the third prong could be read to mean that a complaint would be deemed timely filed under our rules if brought within one year of the date on which a complainant notified the defendant MVPD of its intention to file a complaint, regardless of when the alleged violation of the rules had occurred, thereby ''undermining the fundamental purpose of a statute of limitations.'' In the *FNPRM,* we proposed to reinsert in the program carriage rules statute of limitations language similar to that adopted in the *1993 Program Carriage Order,* which would make the triggering event for the statute of limitations the denial or failure to acknowledge a request for carriage or to negotiate for carriage, and to clarify that the third prong applies only in instances where there is no existing contract or offer of carriage. For consistency, we also proposed to modify the similar third prongs of the statutes of limitations governing program access, OVS, and good-faith retransmission consent complaints to make the triggering event for each the denial or failure to acknowledge a request.

Second, program carriage disputes may be referred by the Chief of the Media Bureau to an ALJ for a hearing on the merits if a complainant establishes that a prima facie violation of § 76.1301 has occurred. A program carriage decision issued by an ALJ becomes effective upon release except in certain circumstances. If a party seeks review, the decision remains in effect pending Commission review, unlike the generally applicable procedures of § 1.276(d) that automatically stay an ALJ's initial decision pending Commission review. In the *FNPRM,* we noted that although Congress instructed the Commission to adopt procedures for the expedited review of program carriage complaints, there is no specific statutory requirement for ALJ decisions to take immediate effect, nor that they remain in effect pending Commission review. We observed that, in the past, the incongruous provisions in parts 76 and 1 of our rules have caused confusion for both parties and adjudicators, and can create inconsistent outcomes pending appeal. Therefore, we proposed to harmonize our parts 76 and 1 rules so that review of an ALJ's initial decision in program carriage, program access, and OVS proceedings is subject to the same procedural rules as other complaints adjudicated by the Commission.

Additionally, the *FNPRM* proposed to make several technical edits to the part 76 rules. The *FNPRM* also sought comment on whether, given the amount of time that has passed, the Commission should consider any of the substantive proposals from the *2011 Program Carriage NPRM,* which considered a range of substantive and procedural revisions to the program carriage rules.

As further discussed below, MVPDs responding to the *FNPRM* generally support our proposals and advocate for simplifying the regulatory framework for program carriage disputes. MVPDs assert that the rationale for protecting consumers from vertically-integrated distributors is outdated, given the increased competition in the video marketplace. On the other hand, independent video programming vendors oppose the rule revisions proposed in the *FNPRM.* In general, such programmers advocate for program carriage rules more favorable for programmers, citing the practical and financial hardships they face when bringing a complaint under our rules and alleging that the negotiation practices of vertically-integrated MVPDs continue to restrain their ability to compete.

Discussion. For the reasons discussed below, we adopt our proposals to amend the third prong of the statute of limitations for program carriage, program access, OVS, and good-faith retransmission consent complaints, as well as the rules governing the effective date and review procedures for initial decisions issued by an ALJ in program access, program carriage, and OVS proceedings. Additionally, in order to

ensure prompt resolution of appeals in program access, program carriage, and OVS proceedings, we adopt an aspirational 180-day shot clock for circulating a final Commission decision of ALJ initial decision appeals in such proceedings. We also make other revisions to our part 76 rules to ensure consistency among parallel provisions, clarify existing language, and eliminate inoperative language. Finally, we decline at this time to adopt other proposals from the *2011 Program Carriage NPRM.* We find that the rule revisions adopted herein will serve the public interest by clarifying and harmonizing the Commission's rules and encouraging the timely resolution of program carriage disputes.

Program Carriage Statute of Limitations. We adopt our proposal to revise the third prong of the program carriage statute of limitations to clarify that it applies only in circumstances where there is not an existing program carriage contract or carriage offer and the defendant MVPD has denied or failed to acknowledge either a request for program carriage or a request to negotiate for program carriage. We find that this rule revision will provide certainty to both MVPDs and prospective complainants and foreclose the possibility that the third prong could be read to allow the filing of a program carriage complaint at essentially any time, regardless of when the alleged violation of the rules occurred.

As explained above, the third prong of the program carriage statute of limitations currently provides that a complaint must be filed within one year of the date on which ''[a] party has notified [an MVPD] that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section.'' We agree with those commenters who assert that we should adopt our proposal because the current rule could be read to ''undermine[ ] the fundamental purpose of a statute of limitations 'to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed.' '' NCTA asserts, for example, that under the existing statute of limitations a complainant could file a program carriage complaint years after a contract is entered into with the goal of ''belatedly modify[ing] the agreed-upon terms of a contract.'' As explained previously, the third prong originally contained language limiting its application to circumstances in which there is an unreasonable refusal to negotiate, and this language was stricken by the Commission in 1994 without explanation. We agree with Comcast that this limiting language made clear that the statute of limitations contained ''three distinct and mutually exclusive paths for a program carriage complaint'' and that the ''ambiguity in the language of the revised rule has led to . . . interpretations of the third prong as an exception that swallows the other two prongs of the rule.'' We therefore clarify that the third prong applies only in circumstances where there is no existing contract or carriage offer, and the MVPD has denied or failed to acknowledge a request for carriage or a request to negotiate for program carriage allegedly in violation of the program carriage rules, consistent with the program carriage rules as originally adopted and with Congress's directive in section 616.

We are not persuaded that the public interest would be better served by abandoning our proposed changes in favor of alternative revisions advocated for by commenters. As an initial matter, we affirm our tentative conclusion from the *FNPRM* that reincorporating the limiting language originally contained in the third prong is preferable to adopting a single provision that would run for one year from the date on which a violation of the program carriage rules allegedly occurred. No commenter supported this latter option. Rather, we conclude that revising the third prong of the rule strikes an appropriate balance between the interest of MVPDs in ensuring that program carriage complaints are brought in a timely manner, unaffiliated programmers' interest in securing relief for alleged violations of the program carriage rules, and the interest of all parties in having greater procedural certainty.

We also decline to adopt alternative proposals raised by commenters in the record because we find that none would provide greater certainty to parties and adjudicators. First, Independent Programmers oppose our proposal, asserting that instead we should revise the statute of limitations to permit claims submitted within one year of the date that a programmer becomes aware, or should have become aware through the exercise of reasonable diligence, of an alleged program carriage violation. They assert that MVPDs often ''do not clearly decline or refuse carriage proposals'' during negotiations, making it difficult to determine when a denial of carriage occurs. However, given the inherent uncertainty in determining whether and when a potential complainant knew or should have known of an alleged violation of the program carriage rules, we agree with NCTA and AT&T that this option would not provide greater certainty and finality to the parties. Independent Programmers also assert that limiting the third prong to instances where a contract does not exist opens the door for MVPD misconduct in pre- or post-offer renewal negotiations. However, as noted in the *FNPRM,* our intent is that this revised third prong will ''encompass instances where an MVPD refuses to renew or to negotiate for renewal of a contract.'' Accordingly, we revise the rule to make clear that the third prong also applies in such instances. Other commenters do not directly oppose revising the third prong as proposed, but assert that if we were to do so, we should adopt a new fourth prong that would run from the date that a potential complainant learns that a contractual right has been exercised in a discriminatory manner by an MVPD. Commenters supporting this proposal contend that such a fourth prong is necessary because a contract provision may be consistent with the rules at the time it is entered into, but subsequently may be exercised by an MVPD in a manner that is unlawfully discriminatory. We decline to adopt this proposal. We agree with Comcast that such a proposal, if adopted, would create ''ongoing uncertainty and litigation risk for material decisions [MVPDs] make pursuant to existing agreements,'' and would fail to provide finality to the parties as virtually any conduct by an MVPD during the course of a carriage agreement could become the basis for a claim of allegedly impermissible discrimination. We also find merit in Comcast's assertion that allowing claims based on an MVPD's exercise (or non-exercise) of rights that a programmer has agreed to contractually would deprive the MVPD of the ''benefit of its bargain.''

We also reject beIN's proposal that we amend the rules so that the one-year period is separately triggered by each materially different offer made by an unaffiliated programmer to a vertically integrated MVPD. beIN contends that this would reflect the reality that program carriage negotiations often run longer than a single calendar year, and thus a programmer absent such an amendment may feel that it needs to resort to filing a program carriage complaint before necessary. However, we are persuaded that such a rule appears to give programmers the unilateral power to restart the limitations period at any point by making a new offer to an MVPD on whose platform they are seeking carriage. Thus, we find that such a rule

would be administratively unworkable and be susceptible to gaming by programmers seeking carriage.

We also conclude that determining when an MVPD has denied or failed to acknowledge a request for carriage or a request to negotiate for carriage is an inherently fact-specific exercise and, therefore, such a determination should be made on a case-by-case basis. beIN asks that we amend the rule so that ''the third prong of the statute of limitations does not begin to run until the vertically integrated MVPD provides a written and substantiated rejection of the unaffiliated programmer's carriage offer or request to negotiate.'' beIN suggests that such a rule is necessary to encourage MVPDs to ''be responsive to the offers and requests of unaffiliated programmers'' and to provide clarity about where such programmers stand in carriage negotiations. To the extent that it may be unclear whether an MVPD has denied or failed to respond to a request for carriage or to negotiate for carriage, we agree with commenters who assert that it would be appropriate for a programmer to request an answer by a reasonable date, after which it may consider an MVPD's failure to respond to constitute a denial of its request for purposes of triggering the third prong of the statute of limitations. We are not persuaded, however, that MVPDs should be required to substantiate in writing their denial of a request for carriage or to negotiate for carriage in order to trigger the third prong, as beIN requests. Because, as noted, an MVPD's failure to respond to a carriage request within a reasonable date specified by the programmer would be deemed a denial of such request, we find that requiring MVPDs to provide denials in writing is unnecessary and that the burdens imposed by such a requirement would outweigh any purported benefits.

Finally, we adopt our proposal to amend the parallel prongs in the statutes of limitations for program access, OVS, and good-faith retransmission consent complaints so that they run from the date that a potential defendant has denied or failed to acknowledge an offer or a request to negotiate, rather than from the date a potential complainant provides notice of its intent to file on that basis. Every commenter who addressed this proposal voiced support for maintaining consistency between the statutes of limitations for program carriage, program access, OVS, and good-faith retransmission consent complaints, and also ensures a finite limitations period.

Part 76 ALJ Initial Decision Effective Date and Review Procedures. We also adopt our proposal to harmonize the procedures governing the effective date and review of initial ALJ decisions in program carriage, program access, and OVS proceedings with the generally applicable procedures in part 1 of the Commission's rules. In practice, this means that rather than taking immediate effect and remaining in effect pending Commission review, ALJ initial decisions in these contexts will not take effect for at least 50 days following release and will be stayed automatically upon the filing of exceptions. We find that this action will simplify and streamline the Commission's procedures, which in turn will reduce uncertainty and confusion for both parties and adjudicators. Further, we agree with Comcast and AT&T that this action will benefit consumers by avoiding ''carriage whipsaw'' in the event that an ALJ initial decision mandating carriage is reversed by the Commission.

Although programmers express concern that any additional delays in implementing ALJ initial decisions would harm unaffiliated programmers, we disagree that this concern is best remedied by abandoning our proposal. Specifically, Independent Programmers contend that further delaying an order for mandatory carriage amplifies the harms to programmers by extending the length of time during which their programming is not carried. Independent Programmers further suggest that delaying the effectiveness of an ALJ initial decision pending appeal would incentivize MVPDs to pursue frivolous appeals for the purpose of delay. We are not persuaded that the potential harms to programmers from delaying the effectiveness of ALJ initial decisions justify retaining the existing effective date and review procedures. As noted by AT&T and Comcast, the rules provide that if the Commission upholds a mandatory carriage decision that is stayed pending review in certain instances, the MVPD will be required to carry the relevant programming for an additional period of time equal to the length of the delay caused by the review. Further, the Commission generally has the discretion to ''order appropriate remedies'' upon completion of program carriage proceedings. We find that these remedies adequately address the potential harm to unaffiliated programmers from delaying the effectiveness of ALJ initial decisions pending appeal.

Recognizing ''the logic'' in harmonizing the part 76 review procedures, but expressing concern about the effect of prolonged program carriage disputes on unaffiliated programmers, AMC Networks (AMCN) proposes that the Commission adopt a six-month ''shot clock'' for the Commission to review and issue an order upholding or overturning an ALJ initial decision when a party seeks review. We note that no other commenters addressed AMCN's proposal. Although the Commission is under no statutory obligation to review ALJ initial decisions within a specified timeframe, we agree with AMCN that such a timeframe would serve the public interest by limiting the harms to those programmers with finite litigation resources and expediting the resolution of complaints. We, therefore, establish a 180-day aspirational shot-clock for circulating to the Commission a proposed ruling on review of an initial ALJ decision in program access, program carriage, and OVS proceedings that commences from the date that an aggrieved party appeals such initial decision. We believe that creating this aspirational shot-clock will establish clearer expectations for all parties involved and facilitate prompt review of ALJ initial decisions. As in other contexts where the Commission has established such shot clocks, ''we intend to apply it in the ordinary course and only anticipate suspending it under special circumstances.''

Other Proposals. Standstill Rule. We decline to reimpose the standstill provision in the program carriage rules, as requested by beIN. In 2013, the Second Circuit vacated this provision without prejudice, which provides that ''[a] program carriage complainant seeking renewal of an existing programming contract may file a petition along with its complaint requesting a temporary standstill of the price, terms, and other conditions of the existing programming contract pending resolution of the complaint.'' The Second Circuit found that the public did not have adequate notice under the APA when the Commission adopted the provision. beIN asks that we initiate a notice-and-comment rulemaking to readopt this provision consistent with the APA. Comcast opposes this request, asserting that such a rule would be inconsistent with the goal of expeditious resolution of program carriage complaints. Because the absence of explicit standstill procedures in the program carriage rules does not preclude parties from filing a request for temporary injunctive relief with the Commission, we find it unnecessary to pursue readopting the standstill rule at this time. As the rule was vacated by the Second Circuit, we will take this opportunity to delete the standstill

provision, § 76.1302(k), from the text of the CFR.

2011 Proposals. We decline to address any of the remaining program carriage proposals put forth in the *2011 Program Carriage NPRM* at this time, but may consider them in a future order. As content and speaker neutral regulations on protected speech, the program carriage rules must advance an important government interest—here, fair competition and a diversity of voices in the video market—and be narrowly tailored to advance that interest. The Commission has recently found that the video programming market has vastly changed in the past decade. Congress enacted section 616 to promote competition in the marketplace at a time when most Americans had access to only a single MVPD and their local broadcast stations for video programming. Today, most Americans have access to at least three MVPDs, in addition to broadcast and online video distributor (OVD) offerings. Consumers now have a competitive choice of multiple delivery systems offering more programming options of more diverse types from more diverse sources than was envisioned when the 1992 Cable Act was enacted nearly 30 years ago. Significantly, in 2013, the last time the program carriage statute was considered in federal court, the Second Circuit observed that ''there is no denying that the video programming industry is dynamic and that the level of competition has rapidly increased in the last two decades.'' The court elaborated that in light of these changes ''some of the Cable Act's broad prophylactic rules may no longer be justified'' and that it considered the ''possibility more real than speculative'' that developments in the market would erode the justification for the program carriage regime.

Commenters disagree starkly on the degree of competition and vertical integration in today's video programming market and the need for these proposals. On one hand, MVPDs assert that competition is at an all-time high in the video programming market as a result of the advent of alternative video programming options since the passage of the 1992 Cable Act, and therefore generally oppose the adoption of any additional program carriage rules. On the other hand, programmers contend that MVPDs retain outsized market power in the video marketplace and thus have the ability to engage in behavior detrimental to programmers. Accordingly, programmers voice support for several of the 2011 proposals that they claim would create a more competitive video programming market, including: Adopting an anti-retaliation rule; allowing for the award of damages in successful program carriage complaints; implementing limited automatic discovery at the prima facie stage; shifting the burden of proof after the prima facie stage; and applying a good-faith negotiation rule to vertically integrated MVPDs in program carriage negotiations. Given the lack of consensus in the record, we are not persuaded that this procedure-focused proceeding is the appropriate vehicle through which to fully consider these proposals that, if adopted, would substantially alter the existing program carriage framework. Therefore, we decline to address these proposals at this time and instead may consider them in a future order.

Other Proposals. Commenters urge that we consider broader amendments to the program carriage rules to address, among other things, the imposition of most favored nation clauses by MVPDs, the challenges faced by smaller stations seeking to obtain carriage on virtual MVPDs (vMVPDs), and the effect of the retransmission consent rules on the program carriage market. We concur with those commenters who suggest that these other proposals fall outside the scope of this narrow procedure-focused proceeding, and therefore we decline to consider those proposals here.

Procedural Matters. Final Regulatory Flexibility Analysis. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) relating to this Order. The FRFA is set forth in Appendix B of the *Report and Order.*

Paperwork Reduction Act Analysis. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4).

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

Final Regulatory Flexibility Act Analysis. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *FNPRM* in this proceeding. The Commission sought written public comment on the proposals in the *FNPRM,* including comment on the IRFA. We received no comments specifically directed toward the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

Need for, and Objective of, the Report and Order. In this *Report and Order,* we adopt changes to the rules governing the resolution of program carriage disputes between video programming vendors and multichannel video programming distributors (MVPDs). Specifically, we amend the statute of limitations for program carriage complaints to make clear that the third triggering event applies only when a party seeks renewal of an existing contract or when there is not an existing program carriage contract or contract offer, and a defendant MVPD has denied or failed to acknowledge either a request for carriage or a request to negotiate for program carriage. This third prong of the program carriage statute of limitations originally contained similar limiting language concerning an unreasonable refusal to deal that appears to have been inadvertently stricken by the Commission in 1994. The Commission has previously expressed concern that without that language this provision could be read to mean that a complaint would be timely within one year of the date on which a complainant notified the defendant MVPD of its intention to file a complaint, regardless of when the actual violation of the rules had occurred, undermining the fundamental purpose of a statute of limitations. For consistency, we similarly amend parallel provisions in the statutes of limitations for filing program access, open video system (OVS), and good-faith retransmission consent complaints so that they run from the date that a potential defendant denied an offer or a request to negotiate, rather than from the date a potential complainant provides notice of its intent to file on that basis. We find that these changes will help ensure an expeditious program access, program carriage, retransmission consent, and OVS complaint process and provide additional clarity to both potential complainants and defendants, as well as adjudicators.

We also revise the effective date and review procedures for initial decisions issued by an administrative law judge (ALJ) in program carriage, program access, and OVS proceedings to make them consistent with the Commission's

generally applicable procedures. In practice, this means that rather than taking immediate effect and remaining in effect pending review, ALJ initial decisions in these contexts will not take effect for at least 50 days following release and will be stayed automatically upon the filing of exceptions. As discussed fully in the *FNPRM,* the incongruous provisions concerning the effective date and review procedures for ALJ initial decisions in parts 76 and 1 of our rules have caused confusion for both parties and adjudicators and can create inconsistent outcomes pending appeal. We find that this action will simplify and streamline the Commission's procedures, which will reduce uncertainty and confusion for both parties and adjudicators. The rest of the existing rules governing the resolution of program carriage, program access, OVS, and good-faith retransmission consent complaints remain unchanged by this *Report and Order.*

Summary of Significant Issues Raised by Public Comments in Response to the IRFA. There were no comments filed in response to the IRFA.

Response to comments by the Chief Counsel for Advocacy of the Small Business Administration. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.

The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

Description and Estimate of the Number of Small Entities to Which Rules Will Apply. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

Cable Companies and Systems (Rate Regulation Standard). The Commission has also developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers nationwide. Industry data indicates that, of the 777 cable companies currently operating in the United States, 766 serve 400,000 or fewer subscribers. Additionally, under the Commission's rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers. According to industry data, there are currently 4,336 active cable systems in the United States. Of this total, 3,650 cable systems have fewer than 15,000 subscribers. Thus, the Commission believes that the vast majority of cable companies and cable systems are small entities.

Cable System Operators (Telecom Act Standard). The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' As of 2019, there were approximately 48,646,056 basic cable video subscribers in the United States. Accordingly, an operator serving fewer than 486,460 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that all but five cable operators are small entities under this size standard. We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million. Therefore, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

Direct Broadcast Satellite (DBS) Service. DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic dish antenna at the subscriber's location. For the purposes of economic classification, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in the Wired Telecommunications Carriers industry. The Wired Telecommunications Carriers industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution; and wired broadband internet services. The SBA determines that a wireline business is small if it has fewer than 1,500 employees. Economic census data for 2012 indicate that 3,117 wireline companies were operational during that year. Of that number, 3,083 operated with fewer than 1,000 employees. Based on that data, we conclude that the majority of wireline firms are small under the applicable standard. However, currently only two entities provide DBS service, which requires a great deal of capital for operation: DIRECTV (owned by AT&T) and DISH Network. According to industry data, DIRECTV and DISH serve 14,831,379 and 8,957,469 subscribers respectively, and count the third and fourth most subscribers of any multichannel video distribution system in the U.S. Given the capital required to operate a DBS service, its national scope, and the approximately one-third share of the video market controlled by these two companies, we presume that neither would qualify as a small business.

Motion Picture and Video Production. This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials. The SBA has established a small size standard for businesses operating this industry, which consists of all such firms with gross annual receipts of $35 million dollars or less. U.S. Census Bureau data for 2012 show that there were 8203 firms operated for the entire year. Of that number, 8,075 had annual receipts of less than $25 million per year. Based on this data, we conclude that the majority of firms operating in this industry are small.

Motion Picture and Video Distribution. This industry ''comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television

networks and stations, and exhibitors.'' The Small Business Administration has developed a size standard for firms operating in this industry, which is that companies whose annual receipts are $34.5 million or less are considered small. U.S. Census Bureau data for 2012 indicate there were 307 firms that were operational throughout the entire year. Of those, 294 firms had annual receipts of less than $25 million. Based on this data, we conclude that a majority of firms operating in the motion picture and video distribution industry are small.

Television Broadcasting. This Economic Census category ''comprises establishments primarily engaged in broadcasting images together with sound.'' These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having $41.5 million or less in annual receipts. The 2012 Economic Census reports that 751 firms in this category operated in that year. Of this number, 656 had annual receipts of less than $25 million, 25 had annual receipts ranging from $25 million to $49,999,999, and 70 had annual receipts of $50 million or more. Based on this data, we estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

Additionally, the Commission has estimated the number of licensed commercial television stations to be 1374. Of this total, 1,282 stations (or 94.2%) had revenues of $38.5 million or less in 2018, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on April 15, 2019, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission estimates the number of licensed noncommercial educational (NCE) television stations to be 388. The Commission does not compile and does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

We note, however, that in assessing whether a business concern qualifies as ''small'' under the above definition, business (control) affiliations must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, another element of the definition of ''small business'' requires that an entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television broadcast station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive.

There are also 387 Class A stations. Given the nature of these services, the Commission presumes that all of these stations qualify as small entities under the applicable SBA size standard. In addition, there are 1,892 LPTV stations and 3,621 TV translator stations. Given the nature of these services as secondary and in some cases purely a ''fill-in'' service, we will presume that all of these entities qualify as small entities under the above SBA small business size standard.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities. As discussed fully above, this *Report and Order* adopts revisions to the part 76 procedural rules. These amendments do not create any new reporting or recordkeeping requirements.

Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): ''(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance an reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.''

The *Report and Order,* as stated in Section A of this FRFA, minimizes the burdens associated with the resolution of program carriage, program access, OVS, and good-faith retransmission consent complaints by amending the rules governing two procedural aspects of the complaint process. First, we clarify that the third prong of the statute of limitations for all four types of complaints is triggered by an MVPD's denial or failure to acknowledge either a request for program carriage or a request to negotiate for program carriage, rather than delivery of a notice of intent to file a complaint on that basis. Second, we amend the rules to provide that initial decisions by an ALJ in program carriage, program access, and OVS proceedings will be automatically stayed upon the filing of exceptions, consistent with the Commission's generally applicable procedures. The rest of the procedures governing the resolution of these complaints—*e.g.,* deadlines for filing answers and replies, adjudication procedures, etc.—remain unchanged. We find that these revisions will aid in the expeditious resolution of program access, program carriage, OVS, good-faith retransmission consent complaints consistent with the Act. These changes will reduce the costs associated with litigating program access, program carriage, OVS, good-faith retransmission consent complaints before the Commission by eliminating any confusion surrounding the statute of limitations in all four contexts and by eliminating the need to seek a stay of an initial decision issued by an ALJ pending review for program carriage, program access, and OVS complaints. This change will benefit both small and large entities.

Report to Congress. The Commission will send a copy of the *Report and Order,* including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *Report and Order,* including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Report and Order and FRFA (or summaries thereof) will also be published in the **Federal Register**.

Accordingly, *it is ordered* that, pursuant to the authority contained in sections 1, 4(i), 4(j), 303(r), 325, 616, 628, and 653 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 303(r), 325, 536, 548, and 573, this *Report and Order is adopted. It is further ordered* that the Commission's rules *are hereby amended* as set forth in Appendix A of the *Report and Order* and such amendments shall be effective 30 days after publication in the **Federal Register**. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Report and Order,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small

Business Administration. *It is further ordered* that the Commission will send a copy of this Report and Order in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act (CRA). *It is further ordered* that, should no petitions for reconsideration or petitions for judicial review be timely filed, MB Docket No. 20–70 *shall be terminated* and its docket *closed*.

List of Subjects in 47 CFR Part 76

Administrative practice and procedure, Cable Television, Communications, Telecommunications.

Federal Communications Commission.

Marlene Dortch,

Secretary.

For the reasons set forth in the preamble, the Federal Communications Commission amends part 76 of title 47 of the Code of Federal Regulations as follows:

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

■ 1. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

■ 2. Amend § 76.10 by revising paragraph (c)(2) to read as follows:

§ 76.10 Review.

* * * * *

(c) * * *

(2) Any party to a proceeding under this part aggrieved by any decision on the merits by an administrative law judge may file an appeal of the decision directly with the Commission, in accordance with §§ 1.276(a) and 1.277(a) through (c) of this chapter.

■ 3. Amend § 76.65 by revising paragraph (e)(3) to read as follows:

§ 76.65 Good faith and exclusive retransmission consent complaints.

* * * * *

(e) * * *

(3) The television broadcast station or multichannel video programming distributor has denied, unreasonably delayed, or failed to acknowledge a request to negotiate retransmission consent in violation of one or more of the rules contained in this subpart.

* * * * *

■ 4. Amend § 76.1003 by revising paragraphs (g)(3) and (h)(1) to read as follows:

§ 76.1003 Program access proceedings.

* * * * *

(g) * * *

(3) A cable operator, or a satellite cable programming vendor or a satellite broadcast programming vendor has denied or failed to acknowledge a request to purchase or negotiate to purchase satellite cable programming, satellite broadcast programming, or terrestrial cable programming, or a request to amend an existing contract pertaining to such programming pursuant to § 76.1002(f), allegedly in violation of one or more of the rules contained in this subpart.

(h) * * *

(1) *Remedies authorized.* Upon completion of such adjudicatory proceeding, the Commission, Commission staff, or Administrative Law Judge shall order appropriate remedies, including, if necessary, the imposition of damages, and/or the establishment of prices, terms, and conditions for the sale of programming to the aggrieved multichannel video programming distributor. Such order shall set forth a timetable for compliance. Such order issued by the Commission or Commission staff shall be effective upon release. See §§ 1.102(b) and 1.103 of this chapter. The effective date of such order issued by the Administrative Law Judge is set forth in § 1.276(d) of this chapter.

* * * * *

■ 5. Amend § 76.1302 by:

■ a. Revising paragraphs (h)(1) and (3) and (j)(1);

■ b. Removing paragraph (k).

The revisions read as follows:

§ 76.1302 Carriage agreement proceedings.

* * * * *

(h) * * *

(1) The multichannel video programming distributor enters into a contract with a video programming vendor that a party alleges to violate one or more of the rules contained in this section; or

* * * * *

(3) In instances where there is no existing contract or an offer for carriage, or in instances where a party seeks renewal of an existing contract, the multichannel video programming distributor has denied or failed to acknowledge a request by a video programming vendor for carriage or to negotiate for carriage of that video programming vendor's programming on defendant's distribution system, allegedly in violation of one or more of the rules contained in this section.

* * * * *

(j) * * *

(1) *Remedies authorized.* Upon completion of such adjudicatory proceeding, the Commission, Commission staff, or Administrative Law Judge shall order appropriate remedies, including, if necessary, mandatory carriage of a video programming vendor's programming on defendant's video distribution system, or the establishment of prices, terms, and conditions for the carriage of a video programming vendor's programming. Such order shall set forth a timetable for compliance. The effective date of such order issued by the Administrative Law Judge is set forth in § 1.276(d) of this chapter. Such order issued by the Commission or Commission staff shall become effective upon release, see §§ 1.102(b) and 1.103 of this chapter, unless any order of mandatory carriage issued by the staff would require the defendant multichannel video programming distributor to delete existing programming from its system to accommodate carriage of a video programming vendor's programming. In such instances, if the defendant seeks review of the staff decision, the order for carriage of a video programming vendor's programming will not become effective unless and until the decision of the staff is upheld by the Commission. If the Commission upholds the remedy ordered by the staff or Administrative Law Judge in its entirety, the defendant MVPD will be required to carry the video programming vendor's programming for an additional period equal to the time elapsed between the staff or Administrative Law Judge decision and the Commission's ruling, on the terms and conditions approved by the Commission.

* * * * *

■ 6. Amend § 76.1513 by revising paragraphs (g)(3) and (h)(1) to read as follows:

§ 76.1513 Open video dispute resolution.

* * * * *

(g) * * *

(3) An open video system operator has denied or failed to acknowledge a request for such operator to carry the complainant's programming on its open video system, allegedly in violation of one or more of the rules contained in this part.

(h) * * *

(1) *Remedies authorized.* Upon completion of such adjudicatory proceeding, the Commission, Commission staff, or Administrative Law Judge shall order appropriate remedies, including, if necessary, the

requiring carriage, awarding damages to any person denied carriage, or any combination of such sanctions. Such order shall set forth a timetable for compliance. Such order issued by the Commission or Commission staff shall be effective upon release. See §§ 1.102(b) and 1.103 of this chapter. The effective date of such order issued by the Administrative Law Judge is set forth in § 1.276(d) of this chapter.

* * * * *

[FR Doc. 2020–26259 Filed 12–16–20; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R3–ES–2020–0103; FF09E21000 FXES11110900000 212]

Endangered and Threatened Wildlife and Plants; 12-Month Finding for the Monarch Butterfly

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 12-month finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 12-month finding on a petition to list the monarch butterfly (*Danaus plexippus plexippus*) as a threatened species under the Endangered Species Act of 1973, as amended. After a thorough review of the best available scientific and commercial information, we find that listing the monarch butterfly as an endangered or threatened species is warranted but precluded by higher priority actions to amend the Lists of Endangered and Threatened Wildlife and Plants. We will develop a proposed rule to list the monarch butterfly as our priorities allow. However, we ask the public to submit to us any new information relevant to the status of the species or its habitat at any time.

DATES: The finding in this document was made on December 17, 2020.

ADDRESSES: A detailed description of the basis for this finding is available on the internet at *http://www.regulations.gov* under docket number FWS–R3–ES–2020–0103.

Supporting information used to prepare this finding is available for public inspection, by appointment, during normal business hours, by contacting the person specified under **FOR FURTHER INFORMATION CONTACT**. Please submit any new information, materials, comments, or questions concerning this finding to the person specified under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Barbara Hosler, Regional Listing Coordinator, Ecological Services, Great Lakes Region, telephone: 517–351–6326, email: *monarch@fws.gov*. If you use a telecommunications device for the deaf (TDD), please call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Under section 4(b)(3)(B) of the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*), we are required to make a finding whether or not a petitioned action is warranted within 12 months after receiving any petition that we have determined contains substantial scientific or commercial information indicating that the petitioned action may be warranted (''12-month finding''). We must make a finding that the petitioned action is (1) not warranted, (2) warranted, or (3) warranted but precluded. ''Warranted but precluded'' means that (a) the petitioned action is warranted, but the immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether species are endangered or threatened species, and (b) expeditious progress is being made to add qualified species to the Lists of Endangered and Threatened Wildlife and Plants (Lists) and to remove from the Lists species for which the protections of the Act are no longer necessary. Section 4(b)(3)(C) of the Act requires that, when we find that a petitioned action is warranted but precluded, we treat the petition as though it is resubmitted on the date of such finding, that is, requiring that a subsequent finding be made within 12 months of that date. We must publish these 12-month findings in the **Federal Register**.

Summary of Information Pertaining to the Five Factors

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations at part 424 of title 50 of the Code of Federal Regulations (50 CFR part 424) set forth procedures for adding species to, removing species from, or reclassifying species on the Lists (found in 50 CFR part 17). The Act defines ''endangered species'' as any species that is in danger of extinction throughout all or a significant portion of its range (16 U.S.C. 1532(6)) and ''threatened species'' as any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range (16 U.S.C. 1532(20)). Under section 4(a)(1) of the Act, a species may be determined to be an endangered species or a threatened species because of any of the following five factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the expected response by the species, and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only

after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term ''foreseeable future'' extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

In conducting our evaluation of the five factors provided in section 4(a)(1) of the Act to determine whether the monarch butterfly meets the definition of an ''endangered species'' or ''threatened species,'' we considered and thoroughly evaluated the best scientific and commercial information available regarding the past, present, and future threats to the species. We reviewed the petition, information available in our files, and other available published and unpublished information. This evaluation may include information from recognized experts; Federal, State, and Tribal governments; academic institutions; foreign governments; private entities; and other members of the public.

The species assessment form for the monarch butterfly contains more detailed biological information, a thorough analysis of the listing factors, and an explanation of why we determined that this species meets the definition of an endangered species or a threatened species. This supporting information can be found on the internet at *http://www.regulations.gov* under docket number FWS–R3–ES–2020–0103. The following is an informational summary of the finding in this document.

Previous Federal Actions

On August 26, 2014, we received a petition from the Center for Biological Diversity (CBD), Center for Food Safety (CFS), Xerces Society for Invertebrate Conservation, and Dr. Lincoln Brower, requesting that we list the monarch butterfly (*Danaus plexippus plexippus*) as a threatened species under the Act. On December 31, 2014, we published a 90-day finding that the petition presented substantial scientific or commercial information, indicating that listing the monarch butterfly may be warranted (79 FR 78775). On March 10, 2016, the CFS and CBD filed a complaint against the Service for not issuing a finding on the petition within the statutory timeframe, and on July 5, 2016, we entered a stipulated settlement agreement with CFS and CBD to submit the 12-month finding to the **Federal Register** by June 30, 2019. On May 24, 2019, the court granted an extension of this deadline to December 15, 2020.

Summary of Finding

The petition that the Service received in 2014 was for listing a subspecies of the monarch butterfly (*Danaus plexippus plexippus*) (Center for Biological Diversity et al., 2014, p. 4). The petition also requested a determination of whether any new North American subspecies of *Danaus plexippus* should be listed. After careful examination of the literature and consultation with experts, there is no clearly agreed upon definition of potential subspecies of *Danaus plexippus* or where the geographic borders between these subspecies might exist. Given these findings, we examined the entire range of *Danaus plexippus.*

Monarch butterflies in eastern and western North America represent the ancestral origin for the species worldwide. They exhibit long-distance migration and overwinter as adults at forested locations in Mexico and California. These overwintering sites provide protection from the elements (for example, rain, wind, hail, and excessive radiation) and moderate temperatures, as well as nectar and clean water sources located nearby. Adult monarch butterflies feed on nectar from a wide variety of flowers. Reproduction is dependent on the presence of milkweed, the sole food source for larvae. Monarch butterflies are found in 90 countries, islands, or island groups. Monarch butterflies have become naturalized at most of these locations outside of North America since 1840. The populations outside of eastern and western North America (including southern Florida) do not exhibit long-distance migratory behavior.

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the monarch butterfly, and we evaluated all relevant factors under the five listing factors, including any regulatory mechanisms and conservation measures addressing these stressors. The primary threats to the monarch's biological status include loss and degradation of habitat from conversion of grasslands to agriculture, widespread use of herbicides, logging/thinning at overwintering sites in Mexico, senescence and incompatible management of overwintering sites in California, urban development, and drought (Factor A); exposure to insecticides (Factor E); and effects of climate change (Factor E). Conservation efforts are addressing some of the threats from loss of milkweed and nectar resources across eastern and western North America and management at overwintering sites in California; however, these efforts and the existing regulatory mechanisms (Factor D) are not sufficient to protect the species from all of the threats. We found no evidence that the monarch butterfly is currently impacted at the population level by overutilization for commercial, recreational, scientific, or educational purposes (Factor B) or predation or disease (Factor C), nor did we find information to suggest that the species will be impacted by these factors in the future.

Based on the past annual censuses, the eastern and western North American migratory populations have been generally declining over the last 20 years. The monarch butterfly is also known from 29 populations that are outside of the 2 migratory North American populations. At least 1 monarch butterfly has been observed in 25 of these populations since 2000, and these are considered extant. Monarch butterfly presence within the remaining four populations has not been confirmed since 2000, but they are presumed extant. We know little about population sizes or trends of most of the populations outside of the eastern and western North American populations (except for Australia, which has an estimate of just over 1 million monarch butterflies). We do not have information related to the threats acting on the populations outside of eastern and western North America; however, we

determined that 15 of the 29 populations, including the Australian population, are classified as being ''at risk'' due to sea-level rise or increasing temperatures, resulting from climate change.

The North American migratory populations are the largest relative to the other rangewide populations, accounting for more than 90 percent of the worldwide number of monarch butterflies. For the two North American migratory populations, we estimated the probability of the population abundance reaching the point at which extinction is inevitable (pE) for each population. In its current condition, the eastern North American population has a pE less than 10 percent over the next 10 years. The western North American population has a much higher risk of extinction due to current threats, with a pE of 60–68 percent over the next 10 years. Looking across the range of future conditions that we can reasonably determine, the pE for the eastern population is estimated to be 24 percent to 46 percent in 30 years, and the pE for the western population is estimated to be 92 percent to 95 percent in 30 years. These pE estimates incorporate the primary factors that influence the populations' resiliency, including availability of milkweed and nectar resources (losses as well as gains from conservation efforts), loss and degradation of overwintering habitat, insecticides, and effects of climate change. Additionally, at the current and projected population numbers, both the eastern and western populations become more vulnerable to catastrophic events (for example, extreme storms at the overwintering habitat). Also, under different climate change scenarios, the number of days and the area in which monarch butterflies will be exposed to unsuitably high temperatures will increase markedly. The potential loss of the North American migratory populations from these identified threats would substantially reduce the species' resiliency, representation, and redundancy.

To alleviate threats to the monarch butterfly, numerous conservation efforts have been developed and/or implemented since the species was petitioned in 2014, and these were considered in our assessment of the status of the species. Protection, restoration, enhancement and creation of habitat is a central aspect of recent monarch butterfly conservation strategies. In the breeding and migratory grounds, these habitat conservation strategies include the enhancement and creation of milkweed and nectar sources. Improved management at overwintering sites in California has been targeted to improve the status of western North American monarch butterflies. Major overarching landscape-level conservation plans and efforts include the Mid-America Monarch Conservation Strategy developed by the Midwest Association of Fish and Wildlife Agencies (MAFWA) and the Western Monarch Butterfly Conservation Plan developed by the Western Association of Fish and Wildlife Agencies (WAFWA). In early 2020, the Nationwide Candidate Conservation Agreement for Monarch Butterfly on Energy and Transportation Lands (CCAA/CCA) was finalized and will contribute to meeting the MAFWA Strategy and WAFWA Plan goals. Under this agreement, energy and transportation entities will provide habitat for the species along energy and transportation rights-of-way corridors across the country, including a 100 foot extension of the right-of-way onto private agricultural lands. Participants will carry out conservation measures to reduce or remove threats to the species and create and maintain habitat annually. In exchange for implementing voluntary conservation efforts and meeting specific requirements and criteria, those businesses and organizations enrolled in the CCAA will receive assurance from the Service that they will not have to implement additional conservation measures should the species be listed. The goal of the CCAA, which participants may continue to join until a final listing rule is published, is enrollment of up to 26 million acres of land in the agreement, providing over 300 million additional stems of milkweed.

Many conservation efforts implemented under Federal, Tribal, State, or other programs, such as the Farm Service Agency's Conservation Reserve Program, the Natural Resource Conservation Service's (NRCS) Environmental Quality Incentives Program (EQIP), Agricultural Conservation Easement Program and Conservation Stewardship Program, and the Service's Partners For Fish and Wildlife Program, are expected to contribute to the overarching habitat and population goals of the MAFWA Strategy and WAFWA Plan. Smaller conservation efforts implemented by local governments, non-governmental organizations (NGOs), private businesses, and interested individuals will also play an important role in reaching habitat and population goals established in the MAFWA Strategy and WAFWA Plan. The Service developed the Monarch Conservation Database (MCD) to capture information about monarch butterfly conservation plans and efforts to inform the listing decision. As of June 1, 2020, there are 48,812 complete monarch butterfly conservation effort records in the MCD that have a status of completed, implemented, or planned since 2014, and 113 monarch butterfly conservation plans. Among the efforts included in the MCD are those provided by NRCS from EQIP, their program designed to provide financial and technical assistance to agricultural producers to address natural resource concerns. Across the 10 states that NRCS targeted for monarch butterfly conservation efforts through EQIP (Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Ohio, Oklahoma, Texas, and Wisconsin), efforts on 16,952 acres have already been implemented and NCRS anticipates conservation on an additional 31,322 acres through ongoing enrollment (see *https://www.fws.gov/savethemonarch/mcd.html*). In addition to conservation of the breeding and migratory habitats, land managers in California are developing and implementing grove management strategies within the western population's overwintering sites as well.

The monarch butterfly species assessment form and the Monarch Species Status Assessment report (Service 2020) provide additional details on the status of the monarch butterfly and the conservation efforts listed here (see **ADDRESSES**, above).

On the basis of the best scientific and commercial information available, we find that the petitioned action to list the monarch butterfly under the Act is warranted. We will make a determination on the status of the species as threatened or endangered when we complete a proposed listing determination. When we complete a proposed listing determination, we will examine whether the species may be endangered or threatened throughout all of its range or whether the species may be endangered or threatened in a significant portion of its range. However, an immediate proposal of a regulation implementing this action is precluded by work on higher priority listing actions and final listing determinations. This work includes all the actions listed in the National Listing Workplan discussed below under *Preclusion* and in the tables below under *Expeditious Progress,* as well as other actions at various stages of completion, such as 90-day findings for new petitions.

Preclusion and Expeditious Progress

To make a finding that a particular action is warranted but precluded, the Service must make two determinations: (1) That the immediate proposal and timely promulgation of a final regulation is precluded by pending proposals to determine whether any species is endangered or threatened; and (2) that expeditious progress is being made to add qualified species to either of the Lists and to remove species from the Lists (16 U.S.C. 1533(b)(3)(B)(iii)).

Preclusion

A listing proposal is precluded if the Service does not have sufficient resources available to complete the proposal, because there are competing demands for those resources, and the relative priority of those competing demands is higher. Thus, in any given fiscal year (FY), multiple factors dictate whether it will be possible to undertake work on a proposed listing regulation or whether promulgation of such a proposal is precluded by higher priority listing actions—(1) The amount of resources available for completing the listing function, (2) the estimated cost of completing the proposed listing regulation, and (3) the Service's workload, along with the Service's prioritization of the proposed listing regulation in relation to other actions in its workload.

Available Resources

The resources available for listing actions are determined through the annual Congressional appropriations process. In FY 1998 and for each fiscal year since then, Congress has placed a statutory cap on funds that may be expended for the Listing Program (spending cap). This spending cap was designed to prevent the listing function from depleting funds needed for other functions under the Act (for example, recovery functions, such as removing species from the Lists) or for other Service programs (see House Report 105–163, 105th Congress, 1st Session, July 1, 1997). The funds within the spending cap are available to support work involving the following listing actions: Proposed and final rules to add species to the Lists or to change the status of species from threatened to endangered; 90-day and 12-month findings on petitions to add species to the Lists or to change the status of a species from threatened to endangered; annual ''resubmitted'' petition findings on prior warranted-but-precluded petition findings as required under section 4(b)(3)(C)(i) of the Act; critical habitat petition findings; proposed rules designating critical habitat or final critical habitat determinations; and litigation-related, administrative, and program-management functions (including preparing and allocating budgets, responding to Congressional and public inquiries, and conducting public outreach regarding listing and critical habitat).

For more than two decades the size and cost of the workload in these categories of actions have far exceeded the amount of funding available to the Service under the spending cap for completing listing and critical habitat actions under the Act. Since we cannot exceed the spending cap without violating the Anti-Deficiency Act (31 U.S.C. 1341(a)(1)(A)), each year we have been compelled to determine that work on at least some actions was precluded by work on higher priority actions. We make our determinations of preclusion on a nationwide basis to ensure that the species most in need of listing will be addressed first, and because we allocate our listing budget on a nationwide basis. Through the listing cap and the amount of funds needed to complete court-mandated actions within the cap, Congress and the courts have in effect determined the amount of money remaining (after completing court-mandated actions) for listing activities nationwide. Therefore, the funds that remain within the listing cap—after paying for work needed to comply with court orders or court-approved settlement agreements—set the framework within which we make our determinations of preclusion and expeditious progress.

For FY 2019, through the Consolidated Appropriations Act of 2019 (Pub. L. 116–6, February 15, 2019), Congress appropriated the Service $18,318,000 under a consolidated cap for all domestic and foreign listing work, including status assessments, listings, domestic critical habitat determinations, and related activities. For FY 2020, through the Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94, December 20, 2019), Congress appropriated $20,318,000 for all domestic and foreign listing work. The amount of funding Congress will appropriate in future years is uncertain.

Costs of Listing Actions

The work involved in preparing various listing documents can be extensive, and may include, but is not limited to: Gathering and assessing the best scientific and commercial data available and conducting analyses used as the basis for our decisions; writing and publishing documents; and obtaining, reviewing, and evaluating public comments and peer-review comments on proposed rules and incorporating relevant information from those comments into final rules. The number of listing actions that we can undertake in a given year also is influenced by the complexity of those listing actions; that is, more complex actions generally are more costly. Our practice of proposing to designate critical habitat concurrent with listing species requires additional coordination and an analysis of the economic impacts of the designation, and thus adds to the complexity and cost of our work. Since completing all of the work for outstanding listing and critical habitat actions has for so long required more funding than has been available within the spending cap, the Service has developed several ways to determine the relative priorities of the actions within its workload to identify the work it can complete with the funding it has available for listing and critical habitat actions each year.

Prioritizing Listing Actions

The Service's Listing Program workload is broadly composed of four types of actions, which the Service prioritizes as follows: (1) Compliance with court orders and court-approved settlement agreements requiring that petition findings or listing or critical habitat determinations be completed by a specific date; (2) essential litigation-related, administrative, and listing program-management functions; (3) section 4 (of the Act) listing and critical habitat actions with absolute statutory deadlines; and (4) section 4 listing actions that do not have absolute statutory deadlines.

In previous years, the Service received many new petitions, including multiple petitions to list numerous species—a single petition even sought to list 404 domestic species. The emphasis that petitioners placed on seeking listing for hundreds of species at a time through the petition process significantly increased the number of actions within the third category of our workload—actions that have absolute statutory deadlines for making findings on those petitions. In addition, the necessity of dedicating all of the Listing Program funding towards determining the status of 251 candidate species and complying with other court-ordered requirements between 2011 and 2016 added to the number of petition findings awaiting action. Because we are not able to work on all of these at once, the Service's most recent effort to prioritize its workload focuses on addressing the backlog in petition findings that has resulted from the influx of large

multispecies petitions and the 5-year period in which the Service was compelled to suspend making 12-month findings for most of those petitions. The number of petitions that are awaiting status reviews and accompanying 12-month findings illustrates the considerable extent of this backlog. As a result of the outstanding petitions to list hundreds of species and our efforts to make initial petition findings within 90 days of receiving the petition to the maximum extent practicable, at the beginning of FY 2020, we had 422 12-month petition findings for domestic species yet to be initiated and completed.

To determine the relative priorities of the outstanding 12-month petition findings, the Service developed a prioritization methodology (methodology) (81 FR 49248; July 27, 2016) after providing the public with notice and an opportunity to comment on the draft methodology (81 FR 2229; January 15, 2016). Under the methodology, we assign each 12-month finding to one of five priority bins: (1) The species is critically imperiled; (2) strong data are already available about the status of the species; (3) new science is underway that would inform key uncertainties about the status of the species; (4) conservation efforts are in development or underway and likely to address the status of the species; or (5) the available data on the species are limited. As a general rule, 12-month findings with a lower bin number have a higher priority than, and are scheduled before, 12-month findings with a higher bin number. However, we make some limited exceptions—for example, we may schedule a lower priority finding earlier if batching it with a higher priority finding would generate efficiencies. We may also consider where there are any special circumstances whereby an action should be bumped up (or down) in scheduling. One limitation that might result in divergence from priority order is when the current highest priorities are clustered in a geographic area, such that our scientific expertise at the field office level is fully occupied with their existing workload. We recognize that the geographic distribution of our scientific expertise will in some cases require us to balance workload across geographic areas. Since before Congress first established the spending cap for the Listing Program in 1998, the Listing Program workload has required considerably more resources than the amount of funds Congress has allowed for the Listing Program. Therefore, it is important that we be as efficient as possible in our listing process.

In 2016, we assigned the 12-month finding for monarch butterfly to bin 4 due to the many conservation efforts underway to address threats facing the species. We determined that these efforts were likely to reduce threats from loss of breeding habitat for the eastern and western North American populations and overwintering habitat for the western North American population. However, due to the stipulated settlement agreement, we are completing the 12-month finding for monarch butterfly before other higher priority actions.

After finalizing the prioritization methodology, we then applied that methodology to develop a multiyear National Listing Workplan (Workplan) for completing the outstanding status assessments and accompanying 12-month findings. The purpose of the Workplan is to provide transparency and predictability to the public about when the Service anticipates completing specific 12-month findings while allowing for flexibility to update the Workplan when new information changes the priorities. In May 2019, the Service released its updated Workplan for addressing the Act's domestic listing and critical habitat decisions over the subsequent 5 years. The updated Workplan identified the Service's schedule for addressing all domestic species on the candidate list and conducting 267 status reviews and accompanying 12-month findings by FY 2023 for domestic species that have been petitioned for Federal protections under the Act. As we implement our Workplan and work on proposed rules for the highest priority species, we increase efficiency by preparing multispecies proposals when appropriate, and these may include species with lower priority if they overlap geographically or have the same threats as one of the highest priority species.

Overall, 161 species on the Workplan (64 percent) have a higher bin number than the monarch butterfly. Current funding levels would not be sufficient to complete all of those 12-month findings in FY 2020, and listing appropriations for FY 2021 are not determined yet. The National Listing Workplan is available online at *https://www.fws.gov/endangered/what-we-do/listing-workplan.html.*

An additional way in which we determine relative priorities of outstanding actions in the section 4 program is application of the listing priority guidelines (48 FR 43098; September 21, 1983). Under those guidelines, which apply primarily to candidate species, we assign each candidate a listing priority number (LPN) of 1 to 12, depending on the magnitude of threats (high or moderate to low), immediacy of threats (imminent or nonimminent), and taxonomic status of the species (in order of priority: Monotypic genus (a species that is the sole member of a genus), a species, or a part of a species (subspecies or distinct population segment)). The lower the listing priority number, the higher the listing priority (that is, a species with an LPN of 1 would have the highest listing priority). A species with a higher LPN would generally be precluded from listing by species with lower LPNs, unless work on a proposed rule for the species with the higher LPN can be combined for efficiency with work on a proposed rule for other high-priority species.

Based on our listing priority system, we are assigning an LPN of 8 for the monarch butterfly. This priority number indicates the magnitude of threats is moderate to low and those threats are imminent. The priority number also reflects that we are evaluating monarch butterflies at the species level. We will continue to monitor the threats to the monarch butterfly and the species' status on an annual basis, and should the magnitude or the imminence of the threats change, we will revisit our assessment of the LPN.

Listing Program Workload

The National Listing Workplan that the Service released in 2019 outlined work for domestic species over the period from 2019 to 2023. Tables 1 and 2 under *Expeditious Progress,* below, identify the higher priority listing actions that we completed through FY 2020 (September 30, 2020), as well as those we have been working on in FY 2020 but have not yet completed. For FY 2020, our National Listing Workplan includes 74 12-month findings or proposed listing actions that are at various stages of completion at the time of this finding. In addition to the actions scheduled in the National Listing Workplan, the overall Listing Program workload also includes the development and revision of listing regulations that are required by new court orders or settlement agreements, or to address the repercussions of any new court decisions, as well as proposed and final critical habitat designations or revisions for species that have already been listed. The Service's highest priorities for spending its funding in FY 2019 and FY 2020 are actions included in the Workplan and actions required to address court decisions. As described in

''Prioritizing Listing Actions,'' above, listing of the monarch butterfly is a lower priority action than these types of work. Therefore, these higher priority actions precluded immediate proposal of a regulation implementing the petitioned action in FY 2020, and the Service anticipates that they will continue to preclude work on listing the monarch butterfly in FY 2021 and the near future.

Expeditious Progress

As explained above, a determination that listing is warranted but precluded must also demonstrate that expeditious progress is being made to add and remove qualified species to and from the Lists. Please note that, in the Code of Federal Regulations, the ''Lists'' are grouped as one list of endangered and threatened wildlife (50 CFR 17.11(h)) and one list of endangered and threatened plants (50 CFR 17.12(h)). However, the ''Lists'' referred to in the Act mean one list of endangered species (wildlife and plants) and one list of threatened species (wildlife and plants). Therefore, under the Act, expeditious progress includes actions to reclassify species—that is, either remove them from the list of threatened species and add them to the list of endangered species, or remove them from the list of endangered species and add them to the list of threatened species.

As with our ''precluded'' finding, the evaluation of whether expeditious progress is being made is a function of the resources available and the competing demands for those funds. As discussed earlier, the FY 2020 appropriations law included a spending cap of $20,318,000 for listing activities, and the FY 2019 appropriations law included a spending cap of $18,318,000 for listing activities.

As discussed below, given the limited resources available for listing, the competing demands for those funds, and the completed work cataloged in the tables below, we find that we are making expeditious progress in adding qualified species to the Lists.

The work of the Service's domestic listing program in FY 2019 and FY 2020 (as of September 30, 2020) includes all three of the steps necessary for adding species to the Lists: (1) Identifying species that *may* warrant listing (90-day petition findings); (2) undertaking an evaluation of the best available scientific data about those species and the threats they face to determine whether or not listing is warranted (a status review and accompanying 12-month finding); and (3) adding qualified species to the Lists (by publishing proposed and final listing rules). We explain in more detail how we are making expeditious progress in all three of the steps necessary for adding qualified species to the Lists (identifying, evaluating, and adding species). Subsequent to discussing our expeditious progress in adding qualified species to the List, we explain our expeditious progress in removing from the Lists species that no longer require the protections of the Act.

First, we are making expeditious progress in identifying species that may warrant listing. In FY 2019 and FY 2020 (as of September 30, 2020), we completed 90-day findings on petitions to list 14 species.

Second, we are making expeditious progress in evaluating the best scientific and commercial data available about species and threats they face (status reviews) to determine whether or not listing is warranted. In FY 2019 and FY 2020 (as of September 30, 2020), we completed 12-month findings for 69 species. In addition, we funded and worked on the development of 12-month findings for 34 species and proposed listing determinations for 9 candidates. Although we did not complete those actions during FY 2019 or FY 2020 (as of September 30, 2020), we made expeditious progress towards doing so by initiating and making progress on the status reviews to determine whether adding the species to the Lists is warranted.

Third, we are making expeditious progress in adding qualified species to the Lists. In FY 2019 and FY 2020 (as of September 30, 2020), we published final listing rules for 7 species, including final critical habitat designations for 1 of those species and final protective regulations under section 4(d) of the Act for 2 of the species. In addition, we published proposed rules to list an additional 20 species (including concurrent proposed critical habitat designations for 13 species and concurrent protective regulations under the Act's section 4(d) for 14 species).

As required by the Act, we are also making expeditious progress in removing species from the Lists that no longer require the protections of the Act. Specifically, we are making expeditious progress in removing (delisting) domestic species, as well as reclassifying endangered species to threatened species status (downlisting). This work is being completed under the Recovery program in light of the resources available for recovery actions, which are funded through the recovery line item in the budget of the Endangered Species Program. Because recovery actions are funded separately from listing actions, they do not factor into our assessment of preclusion; that is, work on recovery actions does not preclude the availability of resources for completing new listing work. However, work on recovery actions does count towards our assessment of making expeditious progress because the Act states that expeditious progress includes both adding qualified species to, and removing qualified species from, the Lists of Endangered and Threatened Wildlife and Plants. During FY 2019 and FY 2020 (as of September 30, 2020), we finalized downlisting of 1 species, finalized delisting rules for 7 species, proposed downlisting of 7 species, and proposed delisting of 11 species. The rate at which the Service has completed delisting and downlisting actions in FY 2019 and FY 2020 (as of September 30, 2020) is higher than any point in the history of the Act.

The tables below catalog the Service's progress in FY 2019 and FY 2020 (as of September 30, 2020) as it pertains to our evaluation of making expeditious progress. Table 1 includes completed and published domestic listing actions; Table 2 includes domestic listing actions funded and initiated in previous fiscal years and in FY 2020 that are not yet complete as of September 30, 2020; and Table 3 includes completed and published proposed and final downlisting and delisting actions for domestic species.

TABLE 1—COMPLETED DOMESTIC LISTING ACTIONS IN FY 2019 AND FY 2020

[As of September 30]

Publication date	Title	Action(s)	Federal Register citation
10/9/2018	Threatened Species Status for Coastal Distinct Population Segment of the Pacific Marten.	Proposed Listing—Threatened with Section 4(d) Rule and 12-Month Petition Finding.	83 FR 50574–50582.
10/9/2018	Threatened Species Status for Black-Capped Petrel With a Section 4(d) Rule.	Proposed Listing—Threatened with Section 4(d) Rule and 12-Month Petition Finding.	83 FR 50560–50574.
10/9/2018	12-Month Petition Finding and Threatened Species Status for Eastern Black Rail With a Section 4(d) Rule.	Proposed Listing—Threatened with Section 4(d) Rule and 12-Month Petition Finding.	83 FR 50610–50630.
10/9/2018	Threatened Species Status With Section 4(d) Rule and Critical Habitat Designation for Slenderclaw Crayfish.	Proposed Listing—Threatened with Section 4(d) Rule and Critical Habitat and 12-Month Finding.	83 FR 50582–50610.
10/11/2018	Threatened Species Status With Section 4(d) Rule and Critical Habitat Designation for Atlantic Pigtoe.	Proposed Listing—Threatened with Section 4(d) Rule and Critical Habitat and 12-Month Finding.	83 FR 51570–51609.
11/21/2018	Endangered Species Status for the Candy Darter	Final Listing—Endangered	83 FR 58747–58754.
12/19/2018	12-Month Findings on Petitions to List 13 Species as Endangered or Threatened Species.	12-Month Petition Findings	83 FR 65127–65134.
12/28/2018	Threatened Species Status for Trispot Darter	Final Listing—Threatened	83 FR 67131–67140.
4/4/2019	12-Month Findings on Petitions to List Eight Species as Endangered or Threatened Species.	12-Month Petition Findings	84 FR 13237–13242.
4/4/2019	12-Month Petition Finding and Endangered Species Status for the Missouri Distinct Population Segment of Eastern Hellbender.	Proposed Listing—Endangered and 12-Month Petition Finding.	84 FR 13223–13237.
4/26/2019	90-Day Findings for Four Species (3 domestic species and 1 foreign species) *.	90-Day Petition Findings	84 FR 17768–17771.
5/22/2019	Threatened Species Status with Section 4(d) Rule for Neuse River Waterdog and Endangered Species Status for Carolina Madtom and Proposed Designations of Critical Habitat.	Proposed Listings—Threatened Status with Section 4(d) Rule with Critical Habitat; Endangered Status with Critical Habitat and 12-Month Petition Findings.	84 FR 23644–23691.
8/13/2019	Endangered Species Status for Franklin's Bumble Bee.	Proposed Listing—Endangered and 12-Month Petition Finding.	84 FR 40006–40019.
8/15/2019	12-Month Findings on Petitions to List Eight Species as Endangered or Threatened Species.	12-Month Petition Findings	84 FR 41694–41699.
8/15/2019	90-Day Findings for Three Species	90-Day Petition Findings	84 FR 41691–41694.
9/6/2019	90-Day Findings for Three Species	90-Day Petition Findings	84 FR 46927–46931.
10/07/2019	Twelve Species Not Warranted for Listing as Endangered or Threatened Species.	12-Month Petition Findings	84 FR 53336–53343.
10/21/2019	Endangered Species Status for Barrens Topminnow.	Final Listing—Endangered	84 FR 56131–56136.
11/08/2019	12-Month Finding for the California Spotted Owl	12-Month Petition Finding	84 FR 60371–60372.
11/21/2019	Threatened Species Status for Meltwater Lednian Stonefly and Western Glacier Stonefly With a Section 4(d) Rule.	Final Listing—Threatened with Section 4(d) Rule	84 FR 64210–64227.
12/06/2019	Endangered Species Status for Beardless Chinchweed With Designation of Critical Habitat, and Threatened Species Status for Bartram's Stonecrop With Section 4(d) Rule.	Proposed Listings—Endangered with Critical Habitat; Threatened with Section 4(d) Rule and 12-Month Petition Findings.	84 FR 67060–67104.
12/19/2019	Five Species Not Warranted for Listing as Endangered or Threatened Species.	12-Month Petition Findings	84 FR 69707–69712.
12/19/2019	90-Day Findings for Two Species	90-Day Petition Findings	84 FR 69713–69715.
01/08/2020	Threatened Species Status for the Hermes Copper Butterfly With 4(d) Rule and Designation of Critical Habitat.	Proposed Listing—Threatened with Section 4(d) Rule and Critical Habitat.	85 FR 1018–1050.
01/08/2020	Endangered Status for the Sierra Nevada Distinct Population Segment of the Sierra Nevada Red Fox.	Proposed Listing—Endangered	85 FR 862–872.
05/05/2020	Endangered Status for the Island Marble Butterfly and Designation of Critical Habitat.	Final Listing—Endangered with Critical Habitat ...	85 FR 26786–26820.
05/15/2020	Endangered Species Status for Southern Sierra Nevada Distinct Population Segment of Fisher.	Final Listing—Endangered	85 FR 29532–29589.
7/16/2020	90-Day Finding for the Dunes Sagebrush Lizard	90-Day Petition Finding	85 FR 43203–43204.
7/22/2020	90-Day Findings for Two Species	90-Day Petition Findings	85 FR 44265–44267.
7/23/2020	Four Species Not Warranted for Listing as Endangered or Threatened Species.	12-Month Petition Findings	85 FR 44478–44483.
8/26/2020	Endangered Species Status for Marron Bacora and Designation of Critical Habitat.	Proposed Listing—Endangered with Critical Habitat and 12-Month Petition Finding.	85 FR 52516–52540.
9/1/2020	Two Species Not Warranted for Listing as Endangered or Threatened Species.	12-Month Petition Findings	85 FR 54339–54342.

TABLE 1—COMPLETED DOMESTIC LISTING ACTIONS IN FY 2019 AND FY 2020—Continued

[As of September 30]

Publication date	Title	Action(s)	**Federal Register** citation
9/16/2020	Findings on a Petition To Delist the Distinct Population Segment of the Western Yellow-Billed Cuckoo and a Petition To List the U.S. Population of Northwestern Moose**.	12-Month Petition Finding	85 FR 57816–57818.
9/17/2020	Threatened Species Status for Chapin Mesa milkvetch and Section 4(d) Rule with Designation of Critical Habitat.	Proposed Listing—Threatened With Section 4(d) Rule and Critical Habitat.	85 FR 58224–58250.
9/17/2020	Threatened Species Status for Big Creek crayfish and St. Francis River Crayfish and With Section 4(d) Rule with Designation of Critical Habitat.	Proposed Listings—Threatened With Section 4(d) Rule and Critical Habitat.	85 FR 58192–58222.
9/29/2020	Threatened Species Status for longsolid and round hickorynut mussel and Section 4(d) Rule With Designation of Critical Habitat, Not Warranted 12-Month Finding for purple Lilliput.	Proposed Listings—Threatened With Section 4(d) Rule and Critical Habitat; 12-Month Petition Findings.	85 FR 61384–61458.
9/29/2020	Threatened Species Status for Wright's Marsh Thistle and Section 4(d) Rule With Designation of Critical Habitat.	Proposed Listing—Threatened With Section (4) Rule and Critical Habitat.	85 FR 61460–61498.

*90-Day finding batches may include findings regarding both domestic and foreign species. The total number of 90-day findings reported in this assessment of expeditious progress pertains to domestic species only.

**Batched 12-month findings may include findings regarding listing and delisting petitions. The total number of 12-month findings reported in this assessment of expeditious progress pertains to listing petitions only.

TABLE 2—DOMESTIC LISTING ACTIONS FUNDED AND INITIATED IN PREVIOUS FYS AND IN FY 2020 THAT ARE NOT YET COMPLETE AS OF SEPTEMBER 30, 2020

Species	Action
northern spotted owl	12-month finding.
false spike	12-month finding.
Guadalupe fatmucket	12-month finding.
Guadalupe orb	12-month finding.
Texas fatmucket	Proposed listing determination or not warranted finding.
Texas fawnsfoot	Proposed listing determination or not warranted finding.
Texas pimpleback	Proposed listing determination or not warranted finding.
South Llano Springs moss	12-month finding.
peppered chub	12-month finding.
whitebark pine	Proposed listing determination or not warranted finding.
Key ringneck snake	12-month finding.
Rimrock crowned snake	12-month finding.
Euphilotes ancilla cryptica	12-month finding.
Euphilotes ancilla purpura	12-month finding.
Hamlin Valley pyrg	12-month finding.
longitudinal gland pyrg	12-month finding.
sub-globose snake pyrg	12-month finding.
Louisiana pigtoe	12-month finding.
Texas heelsplitter	12-month finding.
triangle pigtoe	12-month finding.
prostrate milkweed	12-month finding.
alligator snapping turtle	12-month finding.
Black Creek crayfish	12-month finding.
bracted twistflower	Proposed listing determination or not warranted finding.
Canoe Creek clubshell	12-month finding.
Clear Lake hitch	12-month finding.
Doll's daisy	12-month finding.
frecklebelly madtom	12-month finding.
longfin smelt (San Francisco Bay-Delta DPS)	Proposed listing determination or not warranted finding.
magnificent Ramshorn	Proposed listing determination or not warranted finding.
Mt. Rainier white-tailed ptarmigan	12-month finding.
Ocmulgee skullcap	12-month finding.
Penasco least chipmunk	Proposed listing determination or not warranted finding.
Puerto Rico harlequin butterfly	Proposed listing determination or not warranted finding.
Puget oregonian snail	12-month finding.
relict dace	12-month finding.
Rocky Mountain monkeyflower	12-month finding.
sickle darter	12-month finding.
southern elktoe	12-month finding.
southern white-tailed ptarmigan	12-month finding.
tidewater amphipod	12-month finding.

TABLE 2—DOMESTIC LISTING ACTIONS FUNDED AND INITIATED IN PREVIOUS FYS AND IN FY 2020 THAT ARE NOT YET COMPLETE AS OF SEPTEMBER 30, 2020—Continued

Species	Action
tufted puffin	12-month finding.
western spadefoot	12-month finding.

TABLE 3—COMPLETED DOMESTIC RECOVERY ACTIONS (PROPOSED AND FINAL DOWNLISTINGS AND DELISTINGS) IN FY 2019 AND FY 2020

[As of September 30, 2020]

Publication date	Title	Action(s)	**Federal Register** Citation
10/18/2018	Removing Deseret Milkvetch (*Astragalus desereticus*) From the Federal List of Endangered and Threatened Plants.	Final Rule—Delisting	83 FR 52775–52786.
02/26/2019	Removing the Borax Lake Chub From the List of Endangered and Threatened Wildlife.	Proposed Rule—Delisting	84 FR 6110–6126.
03/15/2019	Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife.	Proposed Rule—Delisting	84 FR 9648–9687.
05/03/2019	Reclassifying the American Burying Beetle From Endangered to Threatened on the Federal List of Endangered and Threatened Wildlife With a 4(d) Rule.	Proposed Rule—Downlisting	84 FR 19013–19029.
08/27/2019	Removing *Trifolium stoloniferum* (Running Buffalo Clover) From the Federal List of Endangered and Threatened Plants.	Proposed Rule—Delisting	84 FR 44832–44841.
09/13/2019	Removing the Foskett Speckled Dace From the List of Endangered and Threatened Wildlife.	Final Rule—Delisting	84 FR 48290–48308.
10/03/2019	Removal of the Monito Gecko (*Sphaerodactylus micropithecus*) From the Federal List of Endangered and Threatened Wildlife.	Final Rule—Delisting	84 FR 52791–52800.
10/07/2019	Removal of *Howellia aquatilis* (Water Howellia) From the List of Endangered and Threatened Plants.	Proposed Rule—Delisting	84 FR 53380–53397.
10/09/2019	Removing the Kirtland's Warbler From the Federal List of Endangered and Threatened Wildlife.	Final Rule—Delisting	84 FR 54436–54463.
10/24/2019	Removal of the Interior Least Tern From the Federal List of Endangered and Threatened Wildlife.	Proposed Rule—Delisting	84 FR 56977–56991.
11/05/2019	Removing *Oenothera coloradensis* (Colorado Butterfly Plant) From the Federal List of Endangered and Threatened Plants.	Final Rule—Delisting	84 FR 59570–59588.
11/26/2019	Removing Bradshaw's Lomatium *(Lomatium bradshawii)* From the Federal List of Endangered and Threatened Plants.	Proposed Rule—Delisting	84 FR 65067–65080.
11/26/2019	Reclassification of the Endangered June Sucker to Threatened With a Section 4(d) Rule.	Proposed Rule—Downlisting	84 FR 65080–65098.
11/26/2019	Removal of the Nashville Crayfish From the Federal List of Endangered and Threatened Wildlife.	Proposed Rule—Delisting	84 FR 65098–65112.
12/19/2019	Reclassifying the Hawaiian Goose From Endangered to Threatened With a Section 4(d) Rule.	Final Rule—Downlisting	84 FR 69918–69947.
01/02/2020	Removing the Hawaiian Hawk From the Federal List of Endangered and Threatened Wildlife.	Final Rule—Delisting	85 FR 164–189.
01/06/2020	Removing the Kanab Ambersnail From the List of Endangered and Threatened Wildlife.	Proposed Rule—Delisting	85 FR 487–492.
01/22/2020	Reclassification of the Humpback Chub From Endangered to Threatened With a Section 4(d) Rule.	Proposed Rule—Downlisting	85 FR 3586–3601
03/10/2020	Removing *Lepanthes eltoroensis* From the Federal List of Endangered and Threatened Plants.	Proposed Rule—Delisting	85 FR 13844–13856.

TABLE 3—COMPLETED DOMESTIC RECOVERY ACTIONS (PROPOSED AND FINAL DOWNLISTINGS AND DELISTINGS) IN FY 2019 AND FY 2020—Continued

[As of September 30, 2020]

Publication date	Title	Action(s)	**Federal Register** Citation
4/27/2020	Removing *Arenaria cumberlandensis* (Cumberland Sandwort) From the Federal List of Endangered and Threatened Plants.	Proposed Rule—Delisting	85 FR 23302–23315.
06/01/2020	Removing San Benito Evening-Primrose (*Camissonia benitensis*) From the Federal List of Endangered and Threatened Plants.	Proposed Rule—Delisting	85 FR 33060–33078.
06/11/2020	Removing the Borax Lake Chub From the List of Endangered and Threatened Wildlife.	Final Rule—Delisting	85 FR 35574–35594.
07/24/2020	Reclassification of Morro Shoulderband Snail (*Helminthoglypta walkeriana*) From Endangered to Threatened With a 4(d) Rule.	Proposed Rule—Downlisting	85 FR 44821–44835.
08/19/2020	Reclassification of Stephens' Kangaroo Rat From Endangered to Threatened With a Section 4(d) Rule.	Proposed Rule—Downlisting	85 FR 50991–51006.
9/30/2020	Reclassification of *Layia carnosa* (Beach Layia) From Endangered To Threatened Species Status With Section 4(d) Rule.	Proposed Rule—Downlisting	85 FR 61684–61700.
9/30/2020	Reclassifying the Virgin Islands Tree Boa From Endangered To Threatened With a Section 4(d) Rule.	Proposed Rule—Downlisting	85 FR 61700–61717.

When a petitioned action is found to be warranted but precluded, the Service is required by the Act to treat the petition as resubmitted on an annual basis until a proposal or withdrawal is published. If the petitioned species is not already listed under the Act, the species becomes a ''candidate'' and is reviewed annually in the Candidate Notice of Review. The number of candidate species remaining in FY 2020 is the lowest it has been since 1975. For these species, we are working on developing a species status assessment, preparing proposed listing determinations, or preparing not-warranted 12-month findings.

Another way that we have been expeditious in making progress in adding and removing qualified species to and from the Lists is that we have made our actions as efficient and timely as possible, given the requirements of the Act and regulations and constraints relating to workload and personnel. We are continually seeking ways to streamline processes or achieve economies of scale, such as batching related actions together for publication. Given our limited budget for implementing section 4 of the Act, these efforts also contribute toward our expeditious progress in adding and removing qualified species to and from the Lists.

The monarch butterfly will be added to the candidate list, and we will continue to evaluate this species as new information becomes available. Continuing review will determine if a change in status is warranted, including the need to make prompt use of emergency listing procedures.

A detailed discussion of the basis for this finding can be found in the monarch butterfly species assessment form and other supporting documents (see **ADDRESSES**, above).

New Information

We intend that any proposed listing rule for the monarch butterfly will be as accurate as possible. Therefore, we will continue to accept additional information and comments from all concerned governmental agencies, the scientific community, industry, or any other interested party concerning this finding. We request that you submit any new information concerning the taxonomy of, biology of, ecology of, status of, threats to, or conservation actions for the monarch butterfly to the person specified under **FOR FURTHER INFORMATION CONTACT**, whenever it becomes available. New information will help us monitor this species and make appropriate decisions about its conservation and status. We encourage all stakeholders to continue cooperative monitoring and conservation efforts.

References Cited

The list of the references cited in the petition finding is available on the internet at *http://www.regulations.gov* under docket number FWS–R3–ES–2020–0103 and upon request from the person specified under **FOR FURTHER INFORMATION CONTACT**.

Authors

The primary authors of this document are the staff members of the Fish and Wildlife Service's Species Assessment Team.

Authority

The authority for this action is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq*.).

Aurelia Skipwith,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2020–27523 Filed 12–16–20; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No. 201123–0313; RTID 0648–XE804]

Revisions to Hatchery Programs Included as Part of Pacific Salmon and Steelhead Species Listed Under the Endangered Species Act

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

ACTION: Final rule.

SUMMARY: We, NMFS, announce updates to the descriptions of Pacific salmon and steelhead (*Oncorhynchus spp.*)

species that are currently listed as threatened or endangered under the Endangered Species Act of 1973 (ESA). Updates include the addition or removal of specific hatchery programs, as well as clarifying changes to the names of specific hatchery programs included as part of the listings of certain Pacific salmon and steelhead species. These changes are informed by our most recent ESA 5-year reviews, which were completed in 2016. We are not changing the ESA-listing status of any species under NMFS's jurisdiction, or modifying any critical habitat designation. The updates also include minor changes in terminology to standardize species descriptions.

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

ADDRESSES: NMFS, Protected Resources Division, 1201 NE Lloyd Boulevard, Suite 1100, Portland, OR 97232.

FOR FURTHER INFORMATION CONTACT: Robert Markle, NMFS, West Coast Region, Protected Resources Division, 1201 NE Lloyd Blvd., Suite 1100, Portland, OR 97232, by phone at (503) 230–5433, or by email at *robert.markle@noaa.gov.* You may also contact Maggie Miller, NMFS, Office of Protected Resources, (301) 427–8403. Copies of the 5-year status reviews can be found on our website at *https://www.fisheries.noaa.gov/action/2016-5-year-reviews-28-listed-species-pacific-salmon-steelhead-and-eulachon.*

SUPPLEMENTARY INFORMATION:

Background

Section 4 of the ESA provides for NMFS and the U.S. Fish and Wildlife Service (FWS) to make determinations as to the endangered or threatened status of ''species'' in response to petitions or on their own initiative. In accordance with the ESA, we (NMFS) make determinations as to the threatened or endangered status of species by regulation. These regulations provide the text for each species' listing and include the content required by the ESA section 4(c)(1). We enumerate and maintain a list of species under our jurisdiction which we have determined to be threatened or endangered at 50 CFR 223.102 (threatened species) and 50 CFR 224.101 (endangered species) (hereafter referred to as the ''NMFS Lists''). The FWS maintains two master lists of all threatened and endangered species, *i.e.,* both species under NMFS's jurisdiction and species under FWS's jurisdiction (the ''FWS Lists'') at 50 CFR 17.11 (threatened and endangered animals) and 50 CFR 17.12 (threatened and endangered plants). The term ''species'' for listing purposes under the ESA includes the following entities: Species, subspecies, and, for vertebrates only, ''distinct population segments (DPSs).'' Steelhead are listed as DPSs and Pacific salmon are listed as ''evolutionarily significant units (ESUs),'' which are essentially equivalent to DPSs for the purpose of the ESA.

For West Coast salmon and steelhead, many of the ESU and DPS descriptions include fish originating from specific artificial propagation programs (*e.g.,* hatcheries) that, along with their naturally-produced counterparts, are included as part of the listed species. NMFS' Policy on the Consideration of Hatchery-Origin Fish in Endangered Species Act Listing Determinations for Pacific Salmon and Steelhead (Hatchery Listing Policy) (70 FR 37204, June 28, 2005) guides our analysis of whether individual hatchery programs should be included as part of the listed species. The Hatchery Listing Policy states that hatchery programs will be considered part of an ESU/DPS if they exhibit a level of genetic divergence relative to the local natural population(s) that is not more than what occurs within the ESU/DPS. In applying the Hatchery Listing Policy, we use a variety of sources to reach conclusions about divergence.

Section 4(c)(2)(A) of the ESA requires regular review of listed species to determine whether a species should be delisted, reclassified, or retain its current classification (16 U.S.C. 1533(c)(2)). We completed our most recent 5-year review of the status of ESA-listed salmon ESUs and steelhead DPSs in California, Oregon, Idaho, and Washington in 2016 (81 FR 33468, May 26, 2016). As part of the 5-year review, we reviewed the classification of all West Coast salmon and steelhead hatchery programs, guided by our Hatchery Listing Policy. We considered the origin for each hatchery stock, the location of release of hatchery fish, and the degree of known or inferred genetic divergence between the hatchery stock and the local natural population(s). A NMFS internal memorandum (Jones 2015) explains the results of our hatchery program review. Jones (2015) found that, based on the best scientific evidence available, some hatchery programs should be reclassified, that is, added to or removed from the description of the relevant ESUs/DPSs.

On October 21, 2016, we proposed to revise the NMFS Lists based on the aforementioned review and we solicited public comments (81 FR 72759). The proposed revisions to listed species descriptions included:

(1) Adding new hatchery programs that meet the Hatchery Listing Policy criteria for inclusion, or adding programs that resulted from dividing existing listed hatchery programs into separate programs with new names;

(2) Removing hatchery programs that have been terminated and do not have any fish remaining from the program, or removing previously listed hatchery programs that were subsumed by another listed program;

(3) Revising some hatchery program names for clarity or to standardize conventions for naming programs; and

(4) Making minor changes in terminology to standardize species descriptions.

The approach we used in the proposed rule and this final rule to determine which hatchery programs are included within an ESU or DPS is consistent with the approach taken in the 2016 status review. That is, as part of our status reviews, we reviewed hatchery programs under our Hatchery Listing Policy and concluded that some changes to the list of hatchery programs included in certain ESUs and DPSs were warranted. Those changes included updates to hatchery program names as well as the inclusion of new programs and the removal of programs that had been discontinued. However, as indicated in the 2016 status review, none of these changes resulted in a change to the listing status of an ESU or DPS because none of the changes affected the extinction risk of the ESU or DPS.

Comments Received in Response to the Proposed Rule and Responses

We received 23 comments on the proposed rule via *www.regulations.gov,* letter, or email. These comments were submitted by individuals, state agencies, non-governmental organizations, and tribes or tribal representatives. Many of the submissions included similar comments, and several were form letters. We reviewed all comments for substantive issues or new information and identified several broad issues of concern. In the text below we have organized comments by major issue categories, summarized the comments for brevity and clarity, and addressed similar comments with common responses where possible. After considering all comments, we made changes or clarifications in the final rule as explained below.

Comment 1—Genetic and Ecological Risk of Hatchery Programs: Numerous commenters stated their opposition to the release of hatchery fish into areas with natural populations. They also opposed adding new hatchery programs

to ESA-listed ESUs or DPSs. Commenters stated that NMFS is failing to adequately address the deleterious genetic and ecological effects of hatchery fish, and requested that we convene a panel of experts to revise and update our Hatchery Listing Policy.

Response: This final rule arises from our obligation under ESA section 4(c)(2) to regularly assess the status of listed species and determine whether they should be de-listed or changed in classification from threatened to endangered or vice-versa. 16 U.S.C. 1531(c)(2). In 2016, we assessed the composition of salmonid ESUs and DPSs pursuant to the requirements of the ESA and our Hatchery Listing Policy to determine whether any changes were warranted.

The Hatchery Listing Policy was developed, in part, in response to the lawsuit *Alsea Valley Alliance* v. *Evans* (2001) (*Alsea* decision), where a U.S. District Court ruled that NMFS cannot exclude hatchery fish from an ESA listing if NMFS determines that such fish comprise part of the listed ESU/DPS under the applicable ESA standards. The Hatchery Listing Policy was subsequently upheld in the lawsuit *Trout Unlimited* v. *Lohn* (2009). In that case, the court upheld NMFS' determination to include both hatchery and natural fish in a listed steelhead DPS, despite the potential threats posed by hatchery fish. The court noted that the listing process comprises two distinct phases: The initial decision regarding the composition of the DPS, and the subsequent decision whether to list the DPS.

Our recommendation to include a hatchery program in an ESA-listed ESU or DPS does not reflect a de-emphasis of the risks from hatchery programs. The Hatchery Listing Policy guiding our recommendation acknowledges such risks and their impacts on the adaptive genetic diversity, reproductive fitness, and productivity of the ESU. If we determine that a hatchery program warrants inclusion in an ESU or DPS, we consider effects of the hatchery fish on the natural fish comprising the ESU/DPS in determining how the ESU/DPS should be classified under ESA section 4(c). For the hatchery programs that are being added, a summary of findings from this analysis can be found in Jones (2015).

The Hatchery Listing Policy states that hatchery programs will be considered part of an ESU/DPS if they exhibit a level of genetic divergence relative to the local natural population(s) that is not more than what occurs within the ESU/DPS. We are not changing or weakening our application of this moderate divergence criterion relative to how we have applied it in the past.

We do not believe there is a need to revise our Hatchery Listing Policy, and reiterate that the policy does recognize the risks from hatchery programs and allows us to evaluate them in a manner commensurate with the potential benefits of the programs.

Of note, many hatchery programs have undergone or are undergoing review under our ESA section 4(d) regulations at 50 CFR 223.203(d)(5) (4(d) Rule). When NMFS determines that a Hatchery and Genetic Management Plan (HGMP) meets the 4(d) Rule requirements and approves the HGMP, then the ESA's prohibitions against take of threatened species do not apply to program activities. When we list a hatchery program under the ESA, it does not automatically receive an exemption from the ESA's prohibitions against take. In evaluating whether to approve an HGMP under the 4(d) Rule, NMFS carries out consultation under ESA section 7 to ensure that HGMP implementation is not likely to jeopardize any listed species or destroy or adversely modify its critical habitat. This provides another means for NMFS to evaluate the effects of hatchery fish on the ESU/DPS to which they belong and recommend management measures to improve hatchery operations.

Comment 2—Use of Best Available Science: Numerous commenters stated that the Hatchery Listing Policy and the moderate divergence criterion are not consistent with the best available science. Three commenters stated that use of a criterion that focuses solely on genetics—without attention to life history, ecology, and population demographics—is inadequate. Related comments questioned the current relevance of supporting documents including the Jones (2011, 2015) memos and two reports, the Salmon and Steelhead Assessment Group's (SSHAG), ''Hatchery Broodstock Summaries and Assessments for Chum, Coho, and Chinook,'' and the Salmonid Hatchery Inventory and Effects Evaluation Report (SHIEER) titled ''An Evaluation of the Effects of Artificial Propagation on the Status and Likelihood of Extinction of West Coast Salmon and Steelhead under the Federal Endangered Species Act'' (SSHAG 2003, SHIEER 2004).

Response: The best available information upon which to determine whether hatchery programs should be included in a salmon ESU or steelhead DPS is referenced in Jones (2015). This report, in conjunction with individual HGMPs and associated section 7 consultations, is the most comprehensive and current information available. In the few cases where commenters provided new information, we considered the information (see *Revisions to Threatened Species Descriptions* and *Revisions to Endangered Species Descriptions,* below). In most cases, commenters provided no new information for us to consider. Under the Hatchery Listing Policy, we base our determinations of species status under the ESA on the status of the entire ESU/DPS, including hatchery fish. We recognize that important genetic resources representing the ecological and genetic diversity of species can reside in hatchery fish as well as natural fish. We apply the Hatchery Listing Policy in support of the conservation of naturally-spawning salmon and the ecosystems upon which they depend, consistent with section 2(b) of the ESA.

Comment 3—Justification for the Rule and Data Sources: Numerous comments asserted that the proposed rule did not provide adequate justification to support our proposed revisions. Comments requested more detail about the criteria, data, and analytical methods that we used to evaluate each hatchery program. Several comments asked how the level of divergence between hatchery and natural populations is measured. Other comments stated that pHOS (proportion of spawners of hatchery origin) and PNI (the proportionate natural influence in a natural salmon or steelhead population) metrics should have been explained and evaluated in the proposed rule. In sum, the commenters requested that we more clearly link our proposed revisions to supporting documentation, including the 5-year status reviews and relevant HGMPs.

Response: We apply the best available information when determining whether a hatchery program should be included in an ESU or DPS. The primary sources of information that NMFS considers in defining each ESU/DPS, including recently approved HGMPs, are referenced in Jones (2015), which was cited in the proposed rule. NMFS' most recent 5-year reviews (81 FR 33468, May 26, 2016), which were also cited in the proposed rule, describe relationships, risks, benefits, and uncertainties of specific hatchery stocks relative to natural populations of ESUs/DPSs. Links to these 5-year reviews can be found on our website (*https://www.fisheries.noaa.gov/action/2016-5-year-reviews-28-listed-species-pacific-salmon-steelhead-and-eulachon*). For many species, data are not available to quantitatively assess the level of genetic

divergence between a hatchery stock and natural populations, and so surrogate information must be used.

We agree that the pHOS and PNI metrics are helpful in assessing the effects of hatchery programs and we did evaluate the most recently available pHOS and PNI information. The widely-used demographic metrics pHOS, pNOB (proportion of broodstock of natural origin) and PNI are typically used as measures of genetic risk associated with program operations. In the absence of historical genetic databases, we use these metrics extensively in making decisions regarding levels of divergence. A summary of the analysis of these metrics for each hatchery program can be found in Jones (2015).

Comment 4—Need for Approved HGMPs: A commenter stated that the listed ESU/DPS should only include hatchery programs that have been evaluated under the ESA. The commenter asserted that the proposed rule ''notably leaves out the critical details within approved HGMPs that link to broodstock source, breeding and rearing protocols, monitoring and genetics,'' and ''without that information any inclusion of additional hatcheries, or even previously included hatcheries, lacks the scientific rigor that is required to include a hatchery population within the DPS/ESU.''

Response: Under our Hatchery Listing Policy, we assess whether hatchery programs should be included in an ESU or DPS based on the best available scientific information and the standards identified in the policy. By contrast, evaluation of an HGMP under the ESA is a separate process from our listing determinations under ESA section 4(c). HGMP reviews involve a separate, legal determination as to whether a hatchery program qualifies for an exemption from the ESA's take prohibition. The inclusion of a hatchery program in a listing does not authorize the propagation of that hatchery stock, and each hatchery program must still undergo ESA review before it can be exempted from the ESA's take prohibition.

Comment 5—Reproductive Fitness of Hatchery Fish: A commenter asked, ''Where are the documents that set forth the reproduction success rates of the genetically similar hatchery fish to establish whether they can promote wild fish recovery?''

Response: The relevant information associated with the decision herein is whether the level of genetic divergence of the hatchery stock is not more than what occurs within the natural population. Consequently, reproductive success was not evaluated. An evaluation of available reproductive success information would occur during our consideration of an HGMP.

Comment 6—Conservation Value of Hatchery Programs Using Local Broodstock: Several commenters stated that NMFS has acknowledged the limited conservation value of segregated hatchery programs using broodstocks derived from local populations, yet has adopted a standard that encompasses virtually all hatchery programs using local broodstock. Several commenters also recommended that we exclude ''segregated'' hatchery programs because they serve no conservation purpose (*e.g.,* the Deep River Net Pen-Washougal, Klaskanine Hatchery, Bonneville Hatchery, and Cathlamet Channel Net Pen Programs within the Lower Columbia River ESU). The commenter stated that high stray rates from these segregated hatchery programs result in the fish from these programs appearing to be ''no more than moderately diverged'' from natural populations, while the listed natural populations decrease in fitness and recovery potential as a result of genetic introgression from the hatchery strays.

Response: The fundamental issue in determining the listing status of a hatchery program is its divergence from natural populations, not the purpose of the hatchery (*i.e.,* conservation or harvest). Including a hatchery program in an ESU or DPS listing does not endorse its use for any purpose, but rather acknowledges that fish from the program are within the range of genetic diversity exhibited by naturally produced fish in the ESU/DPS. Many hatchery programs designed without conservation intent use local broodstock. We evaluate any potential impact associated with the release of hatchery program fish in the wild during our consideration of an HGMP.

Comment 7—Genetic Introgression: Several commenters stated that genetic introgression (the transfer of genetic information) between hatchery and natural fish increases the likelihood that hatchery stocks will qualify for inclusion in an ESU/DPS listing when using the moderate divergence criterion. One commenter provided an analysis for Puget Sound steelhead, calculating Fst/Gst for five listed natural populations and two unlisted, segregated hatchery programs derived from Chambers Creek hatchery broodstock. The commenter noted that in their example, NMFS correctly declined to list the segregated steelhead programs under the ESA, due to their high degree of domestication. The commenter stated that absent biologically credible, measurable criteria for determining divergence, decisions to either include or exclude hatchery populations from listing will be arbitrary and inconsistent.

Response: As stated above, NMFS is required to use the best available information when making ESA listing decisions. The ESA requires that we conduct status reviews for listed species every 5 years. Prior to our review, we publish a **Federal Register** notice requesting information pertinent to our reviews. We then review this information to inform our assessment of the species' ESA status. As part of that assessment, we consider species composition, including whether any hatchery programs should be included in the listed entity.

For many listed ESUs/DPSs, metrics such as Fst, or even pHOS and PNI (as mentioned in an earlier comment) are not available. As a result, mandating a quantitative genetics approach to our listing decisions is impossible due to such data limitations. As mentioned above, we are required to decide whether or not to include a hatchery program as part of a listed ESU/DPS using the best available information. The analysis of Puget Sound steelhead provided by the commenter noted above provides a good example of the limitations of genetic data. Based on molecular genetic markers, winter steelhead derived from Chambers Creek hatchery broodstock do not appear to be substantively diverged from other naturally-spawning populations, suggesting that such hatchery fish may warrant listing as part of the Puget Sound steelhead DPS. However, fish from this hatchery program are not listed due to domestication, which has occurred over several generations and resulted in a noticeably earlier run timing and poorer productivity than natural typical Puget Sound steelhead populations.

In our analysis we use a qualitative categorization scheme based on SSHAG (2003), which we believe is the best way to consistently evaluate hatchery programs at this time. We categorize each hatchery program as category 1 through category 4, based on the program's degree of divergence from the natural population. Programs designated category 1 and 2 are included as part of the listed ESU/DPS because they have a minimal to moderate level of genetic divergence based on the best available information. Furthermore, our determination whether to include a hatchery program in a listing, as we mentioned above, is not to be conflated with program purpose or program type.

Comment 8—Release Location: A commenter inquired about how release

location affects our evaluation of the listing status of a hatchery program. The commenter stated that ''if fish used in a hatchery program are of ESU origin and within the accepted divergence limits of the ESU, then it would seem that these fish, biologically, are part of the ESU, no matter the location of release from a hatchery program.''

Response: We agree in circumstances where those release locations are within the ESU/DPS range, and this idea is the impetus for many of our decisions to add certain hatchery programs to the listing. However, there are a few exceptions, largely for reintroduction programs where listed fish are moved to a separate geographic location and used to create a stock that adapts, over time, to the new geographic location (*i.e.,* coho salmon in the Upper Columbia and Snake River Basins).

Comment 9—Puget Sound Steelhead Hatchery Program Divergence: One commenter stated that the Jones (2015) memo cited in the proposed rule seems to carry forward estimates of divergence between hatchery and natural production from the 2003 SSHAG document, which were overestimated out of caution, due to a lack of data. The commenter stated that more recent information is available in revised HGMPs for Puget Sound steelhead, for example the proportion of natural-origin broodstock used in each hatchery program and the proportion of hatchery fish found in carcass surveys of the rivers. The degree of gene flow inferred from these revised HGMPs indicates that the 'moderate' divergence classification (category 2 in the Jones 2015 memo) should be replaced with 'minimal' divergence (category 1 in the Jones 2015 memo).

Response: There are only a few steelhead programs in Puget Sound where hatchery and natural fish are integrated. In Table 4 of Jones (2015), we identified three programs that are ongoing; the Green River Natural, the White River Supplementation, the Elwha River. We are adding the new Fish Restoration Facility program to the Puget Sound steelhead DPS. All of these are classified as category 1's with the exception of the Green River Natural program, which is classified as a category 1 or 2. Thus, we think our listing decisions are in line with the commenter's statement.

Comment 10—Experimental Populations: Two commenters stated that hatchery fish used for experimental populations should ''not necessarily'' be excluded from listing. The commenters pointed out that hatchery fish used to establish an experimental population may meet the criteria for inclusion in an ESU/DPS and could potentially be used later for recovery.

Response: The ESA includes provisions in section 10 for designating experimental populations (50 CFR 17.80 through 17.86). All such populations have potential value for the recovery of salmon and steelhead, but ESA section 10(j) requires that they be designated either as essential or nonessential for recovery. Nonessential experimental populations (NEP) are treated as proposed for listing under the ESA for purposes of section 7 of the ESA, while essential populations are treated as a threatened species. To date, all salmon/steelhead hatchery programs associated with experimental populations are designated as nonessential. Under the ESA, NEPs do not receive the same level of protection as populations listed as threatened or endangered. Thus, we believe it was more consistent with the ESA's treatment of NEPs to consider their associated hatchery programs as not listed. In the future, new salmon hatchery programs could be considered essential for recovery and thus experimental populations could include such hatchery fish in the listing.

Comment 11—Winthrop National Fish Hatchery Program and Okanogan NEP: Two commenters requested clarification regarding the Winthrop National Fish Hatchery Program in the Upper Columbia spring-run Chinook salmon ESU. One comment stated that ''it is unclear if the designated [section] 10(j) NEP program is included as part of this Winthrop National Fish Hatchery Program'' and requested that NMFS include language in the species listing to eliminate any ambiguity. The other comment recommended that we include in the listing the Chief Joseph Hatchery Program that uses ESA-listed broodstock from the Winthrop National Fish Hatchery Program for rearing and release in the Okanogan NEP. This second commenter asserted that the fish at the Chief Joseph Hatchery are still of ESU origin and within the acceptable divergence level, and therefore should carry the protections of the ESA prior to their release into the NEP.

Response: The Okanogan NEP and the Winthrop National Fish Hatchery share a common broodstock, however the Okanogan NEP fish are reared in a separate hatchery (Chief Joseph Hatchery), and are released in a different river basin located outside the geographic range of the ESU. The Jones memo (2015) documents that the Winthrop National Fish Hatchery Program provides fish for the Okanogan spring Chinook salmon reintroduction. We agree that spring Chinook salmon from the Winthrop National Fish Hatchery being reared in the Chief Joseph hatchery should still be included as part of the Upper Columbia River spring-run Chinook salmon listing. However, upon release into the Okanogan River basin these fish would no longer be considered part of the endangered Upper Columbia spring-run Chinook salmon ESU. Consistent with our regulations at 50 CFR 223.102(e), such fish would instead be considered members of the threatened NEP of Upper Columbia spring-run Chinook salmon when, and at such times as, they are found in the mainstem or tributaries of the Okanogan River from the Canada-United States border to the confluence of the Okanogan River with the Columbia River, Washington.

Comment 12—STEP Programs: A commenter stated that Salmon and Trout Enhancement Programs (STEP) should be excluded from listing, stating that these programs lack monitoring of broodstock, release sites and strategies, and return rates.

Response: We base our listing determinations on the best scientific information available. While monitoring data may be limited for STEP programs, we have evaluated the origin and history of their broodstocks and conclude that several programs warrant inclusion in the ESU/DPS listing.

Comment 13—Lower Columbia River Chinook Salmon Programs: One commenter stated that the Lower Columbia River Chinook salmon Cathlamet Channel Net Pens program and the Lower Columbia River coho salmon Clatsop County Fisheries Net Pen program should not be included in the Lower Columbia River Chinook salmon ESU. The basis for this comment is that these net pen programs produce Chinook salmon for selective harvest purposes and not for conservation.

Response: Non-biological considerations, including whether a hatchery program is planned to contribute to ESU recovery or to harvest, are not a factor in listing decisions. In this case, based on available biological information, spring-run Chinook salmon from net pens in the lower Columbia River are not more than moderately diverged from the Lower Columbia River Chinook Salmon ESU.

Comment 14—Cowlitz River Spring Chinook Salmon Hatchery: A comment stated that the Cowlitz River spring-run Chinook salmon hatchery program is not listed and thus two programs that use this stock, Cathlamet net pens program and the Friends of the Cowlitz program, should be removed from listing.

Response: The commenter is in error. The Cowlitz River spring-run Chinook

salmon hatchery program is included in the Lower Columbia River Chinook Salmon ESU and is listed under the ESA (50 CFR 223.102).

Comment 15—Lower Columbia River Coho Salmon Description: The Lower Columbia River coho salmon ESU description contains Eagle Creek National Fish Hatchery Program, Bonneville/Cascade/Oxbow Hatchery Program, and Kalama River Type N Program, which provide broodstock sources to reintroduce coho in the Clearwater and Grande Ronde basins. A comment suggested adding to the ESU description that the listing ''excludes Clearwater and Grande Ronde production groups.''

Response: Snake River coho salmon were extirpated in the Snake River basin by 1986. Coho salmon were reintroduced to the Clearwater subbasin in 1994 and the Grande Ronde/Lostine subbasin in 2017 using broodstock from the Lower Columbia River ESU. Lower Columbia River coho salmon are described in the CFR as ''naturally spawned coho salmon originating from the Columbia River and its tributaries downstream from the Big White Salmon and Hood Rivers (inclusive) and any such fish originating from the Willamette River and its tributaries below Willamette Falls.'' By this definition, Lower Columbia River coho salmon occurring in the Snake River basin are excluded from the listing and we see no need to add the commenter's proposed new language.

Comment 16—Snake River Sockeye Salmon Hatchery Programs: One comment stated that only the Redfish Lake Captive Broodstock Program is listed, and the recently-added ''smolt production program'' is not listed but should be.

Response: The commenter is correct. The Redfish Lake Captive Broodstock Program currently produces the eggs used in the new smolt production program. Therefore, the smolts produced for this new hatchery program are a category 1a (Jones 2015) and should be included in the Snake River sockeye salmon ESU. We will list this program under Idaho Department of Fish and Game's program name, the ''Snake River Sockeye Salmon Hatchery Program.''

Comment 17—Upper Salmon River Steelhead Programs: A commenter stated that the Upper Salmon River programs are similar to the Little Salmon River in that the programs are in the process of changing stocks that do not utilize B-run steelhead from Dworshak Hatchery.

Response: Currently these programs still use some fish from the Dworshak National Fish Hatchery for broodstock. Thus, these fish should be listed because the ''parent'' program is listed. NMFS may reconsider this listing decision once the programs in the Upper Salmon River no longer use Dworshak National Fish Hatchery steelhead.

Comment 18—Dollar Creek Programs: A commenter suggested removing the Dollar Creek Program because it is subset of the McCall Hatchery.

Response: Dollar Creek is an egg box program that has its own HGMP. We will identify this program individually in the listing description because it is managed by a separate entity, it has a separate HGMP, and it is a separate line item in the 2018–2027 *U.S.* v. *Oregon Management Agreement* (*U.S.* v. *OR*). Identifying this program separately allows us to better track program implementation. In the proposed rule we identified this as the Dollar Creek Program, but have renamed it the South Fork Salmon River Eggbox Program as it is more consistent with the description in *U.S.* v. *OR.*

Comment 19—Listing Status of Panther Creek: A commenter stated that we are treating populations in Panther Creek and Lookingglass Creek inconsistently. The commenter asked if functionally-extirpated populations that have been reestablished with ''within ESU'' stock (but not 'within-population') would be considered to be recovered?

Response: We are listing Panther Creek because the fish released there are from an already listed hatchery program within the same ESU, and this is consistent with how we have handled other reintroduction programs within the same ESU/DPS for the purpose of reintroducing fish into functionally extirpated populations (*e.g.,* Lookingglass in the Grande Ronde River Basin).

Comment 20—Wells Fish Hatchery Program Description: One commenter stated that the Wells Fish Hatchery program releases Columbia River steelhead smolts directly into the Columbia River and other locations, so it is not clear why in the listing language the Methow and Okanogan are listed in parentheses and the Columbia River is excluded. The commenter recommends deleting 'in the Methow and Okanogan' in the listing language.

Response: The Wells Program has three separate components: Releases into the Methow River, the Twisp River, and the Columbia River. The Methow River and Twisp River releases use Methow River steelhead. Previously, the rationale for excluding the Columbia River release was because it uses Wells hatchery stock, which was created using fish from all steelhead populations returning to the Upper Columbia. Given the Wells stock is not representative of any one single population, we have decided not to list components of the Wells Program that propagate this stock.

Comment 21—Upper Willamette River Chinook Salmon: A commenter stated that the Jones (2015) memo did not adequately address the relationships between hatchery and natural populations of Chinook salmon and steelhead in the Willamette River. The commenter stated that recent genetic analysis by Oregon State University and the FWS suggests that the ''Willamette River population is more appropriate (sic) considered one stock and not divided between Upper Willamette and Lower Columbia River.'' The commenter suggests a more accurate delineation would be ''Willamette River stock'' and ''Columbia River stock.'' Furthermore, the commenter stated that Jones (2015) did not analyze this new genetic data, nor did it analyze proposed HGMPs for hatchery populations under the Willamette Biological Opinion or the Portland General Electric Hydropower Settlement Agreement, which requires long term changes to the hatchery populations and releases.

Response: This comment addresses how the Upper Willamette River Chinook salmon and Lower Columbia River Chinook salmon ESUs are defined, which is not the subject of this rulemaking.

Comment 22—ESU Description: Several comments requested that we revise ESU/DPS descriptions for various reasons.

Response: This final rule addresses hatchery programs associated with listed ESU/DPSs. Our recently-completed 5-year reviews did not recommend modifications to the composition of any ESU/DPS apart from the modifications related to hatchery programs addressed in this final rule.

Comment 23—Naming of Hatchery Programs: A commenter stated that it is unclear what strategy NMFS used to name the different hatchery programs included in the proposed changes.

Response: We acknowledge that naming conventions are not always consistent. Hatchery program names sometimes include reference to stocking location and sometimes they do not. For programs with submitted HGMPs, we use program names provided in the HGMP. In general, our intention is to use program names that are commonly accepted and which provide sufficient description to identify the program.

Comment 24—Consistency with Alsea Decision: A commenter stated that the

proposed rule is inconsistent with the *Alsea* decision.

Response: NMFS issued the ''Interim Policy on Artificial (Hatchery) Propagation of Pacific Salmon under the Endangered Species Act'' (Interim Policy) in 1993. The Interim Policy provided that hatchery salmon and steelhead would not be listed under the ESA unless they were found to be essential for recovery of a listed species (*i.e.,* if the hatchery population contained a substantial portion of the remaining genetic diversity of the species). The result of this policy was that a listing determination for a species depended solely upon the relative health of the naturally spawning component of the species. In most cases, hatchery fish were not relied upon to contribute to recovery, and therefore were not listed.

As explained above, a federal court ruled in the *Alsea* decision that NMFS made an improper distinction under the ESA by excluding certain hatchery programs from the listing of Oregon Coast coho salmon, even though NMFS had determined that these hatchery programs were otherwise a part of the same ESU as the listed natural populations. The Court set aside NMFS' 1998 listing of Oregon Coast coho salmon because it impermissibly excluded hatchery fish within the ESU from listing and therefore listed an entity that was not a species, subspecies or DPS. While the *Alsea* decision only addressed Oregon Coast coho salmon, it prompted NMFS to reconsider the inclusion of hatchery fish in ESA listings for other West Coast salmon and steelhead species.

In 2005, NMFS issued the Hatchery Listing Policy, which superseded the Interim Policy. Under the Hatchery Listing Policy, hatchery stocks with a level of genetic divergence relative to the local natural populations that is no more than what occurs within the DPS are: (a) Considered part of the DPS; (b) considered in determining whether the DPS should be listed under the ESA; and (c) to be included in any listing of the DPS. Thus, the proposed rule and this final rule are consistent with the *Alsea* decision.

Comment 25—Administrative Procedure Act (APA) Compliance: A commenter suggested that updates to the list of hatchery programs included with listed ESU/DPSs is in violation of the APA because relevant data were not made available to the public.

Response: This rule was published as a proposed rule (81 FR 72759, October 21, 2016) and the public was entitled to contact NMFS and request additional information. We provided links to our most recent 5-year status reviews and Jones (2015) memos as well as NMFS staff contact information to obtain any additional supporting information.

Comment 26—ESA Compliance: Several commenters stated that the proposed rule does not comply with the requirements of section 4 of the ESA and requested that we re-issue the proposed rule and re-open for public comment. Commenters also stated that to update the list of hatchery programs included with listed ESU/DPSs, NMFS must engage in consultation under section 7(a)(2) of the ESA.

Response: As noted in the Background section above, in accordance with section 4(c)(2)(A) of the ESA, we completed our most recent 5-year reviews of the status of ESA-listed salmon ESUs and steelhead DPSs in California, Oregon, Idaho, and Washington in 2016 (81 FR 33468, May 26, 2016). At that time, we evaluated hatchery stocks associated with the relevant ESUs/DPS as part of a hatchery program review (Jones 2015), which in turn informed the overall ESA status reviews. Our evaluation addressed a number of factors regarding hatchery fish, including the degree of known or inferred genetic divergence between the hatchery stock and the local natural population(s) as well as the role and impacts of hatchery programs on key viability parameters such as abundance, productivity, spatial structure, and diversity. As a result of those 2016 status reviews, we concluded that the species membership of several salmonid hatchery programs warranted revision and advised the public that we would make those revisions through a subsequent rulemaking (*i.e.,* this **Federal Register** document).

ESA sections 4 and 7 serve different purposes. Under section 4, NMFS determines whether a species should be listed as endangered or threatened based on section 4's standards. Under ESA section 7, Federal agencies must engage in consultation with NMFS or the FWS prior to authorizing, funding, or carrying out actions that may affect listed species. It would not make sense for NMFS to carry out section 7 consultation over whether to list a species, as section 7 only applies to species that are already listed.

Comment 27—National Environmental Policy Act (NEPA) Compliance: Multiple commenters stated that the proposed rule violates NEPA and NMFS must prepare an Environmental Impact Statement (EIS).

Response: ESA listing decisions are non-discretionary actions by the agency which are exempt from the requirement to prepare an environmental assessment or EIS under NEPA. See NOAA Administrative Order 216 6.03(e)(1) and *Pacific Legal Foundation* v. *Andrus,* 675 F. 2d 825 (6th Cir. 1981).

Summary of Changes Made Between the Proposed and Final Rules

Please refer to the proposed rule (81 FR 72759) for details on the rationale for our decision for each affected hatchery program. We carefully considered all comments received in response to the proposed rule and, as a result, have made the appropriate changes in this final rule. Below we summarize the changes made between the proposed and final rules.

Threatened Species at 50 CFR 223.102

Revisions to Threatened Species Descriptions

Salmon, Chinook (Puget Sound ESU)

In response to the proposed rule we received numerous comments requesting name changes to listed hatchery programs to ensure consistency with HGMPs. A few comments corrected errors we had made in the proposed rule. In response to these comments, we made the following changes between the proposed and final rules:

(1) We had proposed updating the name of the Keta Creek Hatchery Program to the Fish Restoration Facility Program. Instead, we are removing the Keta Creek Hatchery Program from listing, as it never existed and was previously listed in error. However, we are adding the Fish Restoration Facility Program, which is a new program.

(2) We had proposed to add the Bernie Kai-Kai Gobin (Tulalip) Hatchery-Skykomish Program. We want to correct the description of this action. This update is not the addition of a new program but rather a program name change from the existing Tulalip Bay Program to the Bernie Kai-Kai Gobin (Tulalip) Hatchery-Skykomish Program.

(3) We had proposed updating the name of the Harvey Creek Hatchery Program to the Brenner Creek Hatchery Program. In fact, the Harvey Creek and Brenner Creek hatchery programs are two distinct programs based on geography and run-timing. The Harvey Creek Hatchery Program (summer-run and fall-run) was already listed as part of the ESU. The updated listing language will better describe these programs as the Harvey Creek Hatchery Program (summer-run), and the now distinct Brenner Creek Hatchery Program (fall-run).

(4) We are changing the name of the Marblemount Hatchery Program (spring-run subyearlings and summer-run). This

program is now considered to be two distinct programs: The Marblemount Hatchery Program (spring-run) and Marblemount Hatchery Program (summer-run). This name change was not described in the proposed rule.

(5) We are changing the names of several other programs and these changes were not described in the proposed rule. We are changing the names of: The Whitehorse Springs Pond Program to the Whitehorse Springs Hatchery Program (summer-run); the Diru Creek Program to the Clarks Creek Hatchery Program; the Issaquah Hatchery Program to the Issaquah Creek Hatchery Program; the White Acclimation Pond Program to the White River Acclimation Pond Program; the Clear Creek Program to the Clear Creek Hatchery Program; and the Kalama Creek Program to the Kalama Creek Hatchery Program.

(6) There was a typographical error in the proposed rule referring to the ''Hamma Hatchery Program.'' The correct name for this program is the Hamma Hamma Hatchery Program.

Salmon, Chinook (Snake River Spring/Summer-Run ESU)

We are making two changes that differ from those described in the proposed rule.

(1) We proposed updating the name of the Big Sheep Creek Program to the Big Sheep Creek-Adult outplanting from Imnaha Program. Instead, we are removing this program from listing as a separate program, because it is now considered to be part of the listed Imnaha River Program.

(2) We proposed to add the Dollar Creek Program. We will be adding this new program, but it will be named the South Fork Salmon River Eggbox Program.

Salmon, Coho (Lower Columbia River ESU)

We are making two changes that differ from those described in the proposed rule.

(1) We removed the Kalama River Type-S Coho Program because it was terminated.

(2) The North Fork Toutle River Hatchery Program will now be named the North Fork Toutle River Type-S Hatchery Program.

Steelhead (Puget Sound DPS)

We are changing the name of the Hood Canal Steelhead Supplementation Off-station Projects in the Dewatto, Skokomish, and Duckabush Rivers Program to the Hood Canal Supplementation Program.

Steelhead (Snake River Basin DPS)

We are making three changes that differ from those described in the proposed rule.

(1) We are adding the South Fork Clearwater Hatchery Program, as proposed, but we correct the name for this program to be the South Fork Clearwater (Clearwater Hatchery) B-run Program.

(2) We are removing the individual listings of the Lolo Creek Program and the North Fork Clearwater Program, because they are now considered to be part of the listed Dworshak National Fish Hatchery Program.

(3) We had proposed to add the Squaw Creek, Yankee Fork, and Pahsimeroi River Programs as discrete programs. In fact, these releases of listed hatchery fish are considered to be part of the Salmon River B-run Program and so we are not listing these tributary release sites as individual programs.

Endangered Species at 50 CFR 224.101

Revisions to Endangered Species Descriptions

Salmon, Chinook (Upper Columbia River Spring-Run ESU)

We are adding the new Chief Joseph spring Chinook Hatchery Program (Okanogan release). For further explanation, see *Issue—Winthrop National Fish Hatchery Program and Okanogan NEP* in the response to comments, above.

Salmon, Sockeye (Snake River ESU)

In the proposed rule we recommended minor changes in terminology to standardize species descriptions in regulations, but we did not propose any changes in hatchery programs included in this ESU. In response to comments, we are adding the Snake River Sockeye Salmon Hatchery Program.

In Table 1 we summarize this final rule's revisions to hatchery programs associated with listed species descriptions for Pacific salmon and steelhead species listed under the ESA.

TABLE 1—WEST COAST SALMON AND STEELHEAD HATCHERY PROGRAMS ADDRESSED IN THIS FINAL RULE

ESU/DPS (listing status), and name of hatchery program	Run timing	Location of release (watershed, state)	Type of update	Reason for update
Lower Columbia River Chinook salmon (Threatened):				
Klaskanine Hatchery Program	Fall (Tule)	Klaskanine River (OR)	Add	Existing release now classified as a separate and distinct program.
Deep River Net Pens-Washougal Program.	Fall (Tule)	Deep River (WA)	Add	Existing release now classified as a separate and distinct program.
Bonneville Hatchery Program	Fall (Tule)	Lower Columbia River Gorge (OR).	Add	Existing release now classified as a separate and distinct program.
Cathlamet Channel Net Pens Program	Spring	Lower Columbia River (WA/OR).	Add	Existing release now classified as a separate and distinct program.
Puget Sound Chinook salmon (Threatened):				
Marblemount Hatchery Program (spring-run).	Spring	Cascade River (WA)	Name Change	Previously listed as Marblemount Hatchery Program (spring subyearlings and summer-run).
Marblemount Hatchery Program (summer-run).	Summer	Skagit River (WA)	Name Change	Previously listed as Marblemount Hatchery Program (spring subyearlings and summer-run).
Harvey Creek Hatchery Program (summer-run).	Summer	Stillaguamish River (WA)	Name Change	Previously listed as Harvey Creek Hatchery (summer-run and fall-run).
Brenner Creek Hatchery Program (fall-run).	Fall	Stillaguamish River (WA)	Add	Existing release now classified as a separate and distinct program.
Whitehorse Springs Hatchery Program (summer-run).	Summer	Stillaguamish River (WA)	Name Change	Previously listed as Whitehorse Springs Pond Program.
Issaquah Creek Hatchery Program	Fall	Sammamish River (WA)	Name Change	Previously listed as Issaquah Hatchery Program.
White River Acclimation Pond Program	Spring	White River (WA)	Name Change	Previously listed as White Acclimation Pond Program.

TABLE 1—WEST COAST SALMON AND STEELHEAD HATCHERY PROGRAMS ADDRESSED IN THIS FINAL RULE—Continued

ESU/DPS (listing status), and name of hatchery program	Run timing	Location of release (watershed, state)	Type of update	Reason for update
Clarks Creek Hatchery Program	Fall	Puyallup River (WA)	Name Change	Previously listed as Diru Creek Hatchery Program.
Clear Creek Hatchery Program	Fall	Nisqually River (WA)	Name Change	Previously listed as Clear Creek Program.
Kalama Creek Hatchery Program	Fall	Nisqually River (WA)	Name Change	Previously listed as Kalama Creek Program.
Bernie Kai-Kai Gobin (Tulalip) Hatchery-Skykomish Program.	Summer	Skykomish River/Tulalip Bay (WA).	Name Change	Previously listed as Tulalip Bay Program.
Bernie Kai-Kai Gobin (Tulalip) Hatchery-Cascade Program.	Spring	Snohomish River/Tulalip Bay (WA).	Add	New program.
Soos Creek Hatchery Program (Subyearlings and Yearlings).	Fall	Green River (WA)	Name Change	Previously listed as two programs: the Soos Creek Hatchery Subyearlings Program and the Soos Creek Hatchery Yearlings Program.
Icy Creek Hatchery	Fall	Green River (WA)	Remove	Program now considered part of the listed Soos Creek Hatchery Program.
Keta Creek Hatchery Program	N/A	Green River (WA)	Remove	Program never existed and was previously listed in error.
Fish Restoration Facility Program	Fall	Green River (WA)	Add	New program.
Hupp Springs Hatchery-Adult Returns to Minter Creek Program.	Spring	Minter Creek, Carr Inlet (WA)	Name Change	Previously listed as Hupp Springs Hatchery Program.
Rick's Pond Hatchery	Fall	Skokomish River (WA)	Remove	Program terminated.
Sacramento River winter-run Chinook salmon (Endangered):				
Livingston Stone National Fish Hatchery (Supplementation and Captive Broodstock).	Winter	Sacramento River (CA)	Add	New program.
Snake River fall-run Chinook salmon (Threatened):				
Idaho Power Program	Fall	Salmon River (ID)	Name Change	Previously listed as Oxbow Hatchery Program.
Snake River spring/summer-run Chinook salmon (Threatened):				
South Fork Salmon River Eggbox Program.	Summer	South Fork Salmon River (ID)	Add	Existing release now classified as a separate and distinct program.
Panther Creek Program	Spring/Summer	Salmon River (ID)	Add	New program.
Yankee Fork Program	Spring/Summer	Yankee Fork (ID)	Add	New program.
Big Sheep Creek Program	Spring/Summer	Imnaha River (OR)	Remove	Program now considered part of the listed Imnaha River Program.
Upper Columbia River spring-run Chinook salmon (Endangered):				
Nason Creek Program	Spring	Wenatchee River (WA)	Add	New program.
Chewuch River Program	Spring	Chewuch River (WA)	Remove	Program now considered part of the listed Methow Composite Program.
Chief Joseph spring Chinook Hatchery Program (Okanogan release).	Spring	Okanogan (WA)	Add	New program.
Upper Willamette River Chinook salmon (Threatened):				
McKenzie River Hatchery Program	Spring	McKenzie River (OR)	Name Change	Previously listed as McKenzie River Hatchery Program (ODFW Stock #23).
North Santiam River Program	Spring	North Fork Santiam River (OR)	Name Change	Previously listed as Marion Forks Hatchery/North Fork Santiam Hatchery Program (ODFW Stock #21).
Molalla River Program	Spring	Molalla River (OR)	Name Change	Previously listed as South Santiam Hatchery Program (ODFW Stock #24) in the South Fork Santiam River and Mollala River.
South Santiam River Program	Spring	South Fork Santiam River (OR).	Name Change	Previously listed as South Santiam Hatchery Program (ODFW Stock #24) in the South Fork Santiam River and Mollala River.
Willamette Hatchery Program	Spring	Middle Fork Willamette River (OR).	Name Change	Previously listed as Willamette Hatchery Program (ODFW Stock #22).
Clackamas Hatchery Program	Spring	Clackamas River (OR)	Name Change	Previously listed as Clackamas Hatchery Program (ODFW Stock #19).
Columbia River chum salmon (Threatened):				
Big Creek Hatchery Program	Fall	Big Creek (OR)	Add	New program.
Hood Canal summer-run chum salmon (Threatened):				
Hamma Hamma Fish Hatchery Program	Summer	Hamma Hamma River (WA)	Remove	Program terminated.
Jimmycomelately Creek Fish Hatchery Program.	Summer	Sequim Bay (WA)	Remove	Program terminated.
Lower Columbia River coho salmon (Threatened):				
Clatsop County Fisheries/Klaskanine Hatchery.	N/A	SF Klaskanine River (OR)	Add	Existing release now classified as a separate and distinct program.
Clatsop County Fisheries Net Pen Program.	N/A	Youngs Bay (OR)	Add	Existing release now classified as a separate and distinct program.
Kalama River Type-S Coho Program	N/A	Kalama River (WA)	Remove	Program terminated.
Big Creek Hatchery Program	N/A	Big Creek (OR)	Name Change	Previously listed as Big Creek Hatchery Program (ODFW Stock #13).
Sandy Hatchery Program	Late	Sandy River (OR)	Name Change	Previously listed as Sandy Hatchery Program (ODFW Stock #11).

TABLE 1—WEST COAST SALMON AND STEELHEAD HATCHERY PROGRAMS ADDRESSED IN THIS FINAL RULE—Continued

ESU/DPS (listing status), and name of hatchery program	Run timing	Location of release (watershed, state)	Type of update	Reason for update
Bonneville/Cascade/Oxbow Complex Hatchery Program.	N/A	Lower Columbia River Gorge (OR).	Name Change	Previously listed as Bonneville/Cascade/Oxbow Complex (ODFW Stock #14) Hatchery.
North Fork Toutle River Type-S Hatchery Program.	N/A	North Fork Toutle River	Name Change	Previously listed as North Fork Toutle River Hatchery Program.
Oregon Coast coho salmon (Threatened):				
Cow Creek Hatchery Program	N/A	South Fork Umpqua River (OR).	Name Change	Previously listed as Cow Creek Hatchery Program (ODFW Stock #18).
Southern Oregon/Northern California Coast coho salmon ESU (Threatened):				
Cole Rivers Hatchery Program	N/A	Rogue River (OR)	Name Change	Previously listed as Cole Rivers Hatchery Program (ODFW Stock #52).
Ozette Lake sockeye (Threatened):				
Umbrella Creek/Big River Hatcheries Program.	N/A	Lake Ozette (WA)	Name Change	Previously listed as two programs: The Umbrella Creek Hatchery Program and the Big River Hatchery Program.
Snake River sockeye (Endangered):				
Snake River Sockeye Salmon Hatchery Program.	N/A	Upper Salmon River (ID)	Add	New program.
California Central Valley steelhead (Threatened):				
Mokelumne River Hatchery	Winter	Mokelumne River (CA)	Add	New program.
Lower Columbia River steelhead (Threatened):				
Clackamas Hatchery Late Winter-run Program.	Late Winter	Clackamas River (OR)	Name Change	Previously listed as Clackamas Hatchery Late Winter-run Program (ODFW Stock #122).
Sandy Hatchery Late Winter-run Program.	Late Winter	Sandy River (OR)	Name Change	Previously listed as Sandy Hatchery Late Winter-run Program (ODFW Stock #11).
Hood River Winter-run Program	Winter	Hood River (OR)	Name Change	Previously listed as Hood River Winter-run Program (ODFW Stock #50).
Upper Cowlitz River Wild Program	Late Winter	Upper Cowlitz River (WA)	Add	New program.
Tilton River Wild Program	Late Winter	Upper Cowlitz River (WA)	Add	New program.
Middle Columbia River steelhead (Threatened):				
Deschutes River Program	Summer	Deschutes River (OR)	Name Change	Previously listed as Deschutes River Program (ODFW Stock #66).
Umatilla River Program	Summer	Umatilla River (OR)	Name Change	Previously listed as Umatilla River Program (ODFW Stock #91).
Puget Sound steelhead (Threatened):				
Fish Restoration Facility Program	Winter	Green River (WA)	Add	New program.
Hood Canal Supplementation Program	Winter	Hood Canal (WA)	Name Change	Previously listed as Hood Canal Steelhead Supplementation Off-station Projects in the Dewatto, Skokomish, and Duckabush Rivers.
Snake River Basin steelhead (Threatened):				
Salmon River B-run Program	Summer (B)	Salmon River (ID)	Add	Existing release now classified as a separate and distinct program.
South Fork Clearwater (Clearwater Hatchery) B-run program.	Summer (B)	SF Clearwater River (ID)	Add	Existing release now classified as a separate and distinct program.
East Fork Salmon River Natural Program.	Summer (A)	Salmon River (ID)	Name Change	Previously listed as East Fork Salmon River Program.
Lolo Creek Program	Summer (B)	Clearwater River (ID)	Remove	Now considered part of the listed Dworshak National Fish Hatchery Program.
North Fork Clearwater Program	Summer (B)	Clearwater River (ID)	Remove	Now considered part of the listed Dworshak National Fish Hatchery Program.
Little Sheep Creek/Imnaha River Program.	Summer (A)	Imnaha River (OR)	Name Change	Previously listed as Little Sheep Creek/Imnaha River Hatchery Program (ODFW Stock #29).
Upper Columbia River steelhead (Threatened):				
Okanogan River Program	Summer	Okanogan River (WA)	Name Change	Previously listed as Omak Creek Program.

Note: Updates to listing descriptions consist of three types: ''Add'' (a new program that meets Hatchery Listing Policy criteria, or an existing program that was divided into separate programs); ''Remove'' (a program terminated or now considered to be part of another listed program); or ''Name Change'' (a change to the name of a hatchery program that already was listed). N/A indicates that run-timing is not specified for the program.

References

Copies of previous **Federal Register** notices and related reference materials are available on the internet at *https://www.fisheries.noaa.gov/rules-and-regulations, http://www.westcoast.fisheries.noaa.gov/,* or upon request (see **FOR FURTHER INFORMATION CONTACT** section above).

Classification

Executive Order 12866, Regulatory Flexibility Act, and Paperwork Reduction Act

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of a species. Therefore, the economic analysis requirements of the Regulatory Flexibility Act are not applicable to the listing process. In addition, this final rule is exempt from review under Executive Order 12866. This rule does not contain a collection of information requirement for the purposes of the Paperwork Reduction Act.

Federalism

In accordance with Executive Order 13132, we determined that this rule does not have significant federalism effects and that a federalism assessment is not required. In keeping with the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual state and Federal interest, this final rule will be shared with the relevant state agencies. The revisions may have some benefit to state and local resource agencies in that the ESA-listed species addressed in this rulemaking are more clearly and consistently described.

Civil Justice Reform

The Department of Commerce has determined that this final rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of Executive Order 12988. In keeping with that order, we are revising our descriptions of ESA-listed species to improve the clarity of our regulations.

National Environmental Policy Act of 1969

The 1982 amendments to the ESA, in section 4(b)(1)(A), restrict the information that may be considered when assessing species for listing. Based on this limitation of criteria for a listing decision and the opinion in *Pacific Legal Foundation* v. *Andrus,* 657 F. 2d 829 (6th Cir. 1981), we have concluded that NEPA does not apply to ESA listing actions. (See NOAA Administrative Order 216–6.)

Government-to-Government Relationship With Tribes

Executive Order 13084 requires that if NMFS issues a regulation that significantly or uniquely affects the communities of Indian tribal governments and imposes substantial direct compliance costs on those communities, NMFS must consult with those governments or the Federal Government must provide the funds necessary to pay the direct compliance costs incurred by the tribal governments. This final rule does not impose substantial direct compliance costs on Indian tribal governments or communities. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this final rule. Nonetheless, during our preparation of the proposed and final rules, we solicited information from tribal governments and tribal fish commissions. We informed potentially affected tribal governments of the proposed rule and considered their comments in formulation of the final rule. We will continue to coordinate on future management actions pertaining to the listed species addressed in this final rule.

List of Subjects

50 CFR Part 223

Endangered and threatened species, Exports, Imports, Transportation.

50 CFR Part 224

Administrative practice and procedure, Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Dated: November 23, 2020.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, we amend 50 CFR parts 223 and 224 as follows:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531 1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.;* 16 U.S.C. 5503(d) for § 223.206(d)(9).

■ 2. In § 223.102, amend the table in paragraph (e) by revising the entries for ''Salmon, Chinook (Lower Columbia River ESU);'' ''Salmon, Chinook (Puget Sound ESU);'' ''Salmon, Chinook (Snake River fall-run ESU);'' ''Salmon, Chinook (Snake River spring/summer-run ESU);'' ''Salmon, Chinook (Upper Willamette River ESU);'' ''Salmon, chum (Columbia River ESU);'' ''Salmon, chum (Hood Canal summer-run ESU);'' ''Salmon, coho (Lower Columbia River ESU);'' ''Salmon, coho (Oregon Coast ESU);'' ''Salmon, coho (Southern Oregon/Northern California Coast ESU);'' ''Salmon, sockeye (Ozette Lake ESU);'' ''Steelhead (California Central Valley DPS);'' ''Steelhead (Central California Coast DPS);'' ''Steelhead (Lower Columbia River DPS);'' ''Steelhead (Middle Columbia River DPS);'' ''Steelhead (Puget Sound DPS);'' ''Steelhead (Snake River Basin DPS);'' and ''Steelhead (Upper Columbia River DPS)'' to read as follows:

§ 223.102 Enumeration of threatened marine and anadromous species.

* * * * *

(e) * * *

Species [1]			Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
*	*	*	*	*	*
Fishes					

Species [1]			Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
*	*	* * *	*	*	
Salmon, Chinook (Lower Columbia River ESU).	*Oncorhynchus tshawytscha*.	Naturally spawned Chinook salmon originating from the Columbia River and its tributaries downstream of a transitional point east of the Hood and White Salmon Rivers, and any such fish originating from the Willamette River and its tributaries below Willamette Falls. Not included in this DPS are: (1) Spring-run Chinook salmon originating from the Clackamas River; (2) fall-run Chinook salmon originating from Upper Columbia River bright hatchery stocks, that spawn in the mainstem Columbia River below Bonneville Dam, and in other tributaries upstream from the Sandy River to the Hood and White Salmon Rivers; (3) spring-run Chinook salmon originating from the Round Butte Hatchery (Deschutes River, Oregon) and spawning in the Hood River; (4) spring-run Chinook salmon originating from the Carson National Fish Hatchery and spawning in the Wind River; and (5) naturally spawned Chinook salmon originating from the Rogue River Fall Chinook Program. This DPS does include Chinook salmon from the following artificial propagation programs: The Big Creek Tule Chinook Program; Astoria High School Salmon-Trout Enhancement Program (STEP) Tule Chinook Program; Warrenton High School STEP Tule Chinook Program; Cowlitz Tule Chinook Program; North Fork Toutle Tule Chinook Program; Kalama Tule Chinook Program; Washougal River Tule Chinook Program; Spring Creek National Fish Hatchery (NFH) Tule Chinook Program; Cowlitz Spring Chinook Program in the Upper Cowlitz River and the Cispus River; Friends of the Cowlitz Spring Chinook Program; Kalama River Spring Chinook Program; Lewis River Spring Chinook Program; Fish First Spring Chinook Program; Sandy River Hatchery Program; Deep River Net Pens-Washougal Program; Klaskanine Hatchery Program; Bonneville Hatchery Program; and the Cathlamet Channel Net Pens Program.	70 FR 37160, June 28, 2005.	226.212	223.203
Salmon, Chinook (Puget Sound ESU).	*Oncorhynchus tshawytscha*.	Naturally spawned Chinook salmon originating from rivers flowing into Puget Sound from the Elwha River (inclusive) eastward, including rivers in Hood Canal, South Sound, North Sound and the Strait of Georgia. Also, Chinook salmon from the following artificial propagation programs: The Kendall Creek Hatchery Program; Marblemount Hatchery Program (spring-run); Marblemount Hatchery Program (summer-run); Brenner Creek Hatchery Program (fall-run); Harvey Creek Hatchery Program (summer-run); Whitehorse Springs Hatchery Program (summer-run); Wallace River Hatchery Program (yearlings and subyearlings); Issaquah Creek Hatchery Program; White River Hatchery Program; White River Acclimation Pond Program; Voights Creek Hatchery Program; Clarks Creek Hatchery Program; Clear Creek Hatchery Program; Kalama Creek Hatchery Program; George Adams Hatchery Program; Hamma Hamma Hatchery Program; Dungeness/Hurd Creek Hatchery Program; Elwha Channel Hatchery Program; Skookum Creek Hatchery Spring-run Program; Bernie Kai-Kai Gobin (Tulalip) Hatchery-Cascade Program; North Fork Skokomish River Spring-run Program; Soos Creek Hatchery Program (subyearlings and yearlings); Fish Restoration Facility Program; Bernie Kai-Kai Gobin (Tulalip) Hatchery-Skykomish Program; and Hupp Springs Hatchery-Adult Returns to Minter Creek Program.	70 FR 37160, June 28, 2005.	226.212	223.203
Salmon, Chinook (Snake River fall-run ESU).	*Oncorhynchus tshawytscha*.	Naturally spawned fall-run Chinook salmon originating from the mainstem Snake River below Hells Canyon Dam and from the Tucannon River, Grande Ronde River, Imnaha River, Salmon River, and Clearwater River subbasins. Also, fall-run Chinook salmon from the following artificial propagation programs: The Lyons Ferry Hatchery Program; Fall Chinook Acclimation Ponds Program; Nez Perce Tribal Hatchery Program; and the Idaho Power Program.	70 FR 37160, June 28, 2005.	226.205	223.203

Species [1]			Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
Salmon, Chinook (Snake River spring/summer-run ESU).	*Oncorhynchus tshawytscha*.	Naturally spawned spring/summer-run Chinook salmon originating from the mainstem Snake River and the Tucannon River, Grande Ronde River, Imnaha River, and Salmon River subbasins. Also, spring/summer-run Chinook salmon from the following artificial propagation programs: The Tucannon River Program; Lostine River Program; Catherine Creek Program; Lookingglass Hatchery Program; Upper Grande Ronde Program; Imnaha River Program; McCall Hatchery Program; Johnson Creek Artificial Propagation Enhancement Program; Pahsimeroi Hatchery Program; Sawtooth Hatchery Program; Yankee Fork Program; South For Salmon River Eggbox Program; and the Panther Creek Program.	70 FR 37160, June 28, 2005.	226.205	223.203
Salmon, Chinook (Upper Willamette River ESU).	*Oncorhynchus tshawytscha*.	Naturally spawned spring-run Chinook salmon originating from the Clackamas River and from the Willamette River and its tributaries above Willamette Falls. Also, spring-run Chinook salmon from the following artificial propagation programs: The McKenzie River Hatchery Program; Willamette Hatchery Program; Clackamas Hatchery Program; North Santiam River Program; South Santiam River Program; and the Mollala River Program.	70 FR 37160, June 28, 2005.	226.212	223.203
*	*	* * *	*	*	
Salmon, chum (Columbia River ESU).	*Oncorhynchus keta*	Naturally spawned chum salmon originating from the Columbia River and its tributaries in Washington and Oregon. Also, chum salmon from the following artificial propagation programs: The Grays River Program; Washougal River Hatchery/Duncan Creek Program; and the Big Creek Hatchery Program.	70 FR 37160, June 28, 2005.	226.212	223.203
Salmon, chum (Hood Canal summer-run ESU).	*Oncorhynchus keta*	Naturally spawned summer-run chum salmon originating from Hood Canal and its tributaries as well as from Olympic Peninsula rivers between Hood Canal and Dungeness Bay (inclusive). Also, summer-run chum salmon from the following artificial propagation programs: The Lilliwaup Creek Fish Hatchery Program; and the Tahuya River Program.	70 FR 37160, June 28, 2005.	226.212	223.203
Salmon, coho (Lower Columbia River ESU).	*Oncorhynchus kisutch*	Naturally spawned coho salmon originating from the Columbia River and its tributaries downstream from the Big White Salmon and Hood Rivers (inclusive) and any such fish originating from the Willamette River and its tributaries below Willamette Falls. Also, coho salmon from the following artificial propagation programs: The Grays River Program; Peterson Coho Project; Big Creek Hatchery Program; Astoria High School Salmon-Trout Enhancement Program (STEP) Coho Program; Warrenton High School STEP Coho Program; Cowlitz Type-N Coho Program in the Upper and Lower Cowlitz Rivers; Cowlitz Game and Anglers Coho Program; Friends of the Cowlitz Coho Program; North Fork Toutle River Type-S Hatchery Program; Kalama River Type-N Coho Program; Lewis River Type-N Coho Program; Lewis River Type-S Coho Program; Fish First Wild Coho Program; Fish First Type-N Coho Program; Syverson Project Type-N Coho Program; Washougal River Type-N Coho Program; Eagle Creek National Fish Hatchery Program; Sandy Hatchery Program; Bonneville/Cascade/Oxbow Complex Hatchery Program; Clatsop County Fisheries Net Pen Program; and the Clatsop County Fisheries/Klaskanine Hatchery Program.	70 FR 37160, June 28, 2005.	226.212	223.203
Salmon, coho (Oregon Coast ESU).	*Oncorhynchus kisutch*	Naturally spawned coho salmon originating from coastal rivers south of the Columbia River and north of Cape Blanco. Also, coho salmon from the Cow Creek Hatchery Program.	76 FR 35755, June 20, 2011.	226.212	223.203
Salmon, coho (Southern Oregon/Northern California Coast ESU).	*Oncorhynchus kisutch*	Naturally spawned coho salmon originating from coastal streams and rivers between Cape Blanco, Oregon, and Punta Gorda, California. Also, coho salmon from the following artificial propagation programs: The Cole Rivers Hatchery Program; Trinity River Hatchery Program; and the Iron Gate Hatchery Program.	70 FR 37160, June 28, 2005.	226.210	223.203

Species [1]			Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
Salmon, sockeye (Ozette Lake ESU).	*Oncorhynchus nerka*	Naturally spawned sockeye salmon originating from the Ozette River and Ozette Lake and its tributaries. Also, sockeye salmon from the Umbrella Creek/Big River Hatchery Program.	70 FR 37160, June 28, 2005.	226.212	223.203
*	*	* * *	*	*	
Steelhead (California Central Valley DPS).	*Oncorhynchus mykiss*	Naturally spawned anadromous *O. mykiss* (steelhead) originating below natural and manmade impassable barriers from the Sacramento and San Joaquin Rivers and their tributaries; excludes such fish originating from San Francisco and San Pablo Bays and their tributaries. This DPS includes steelhead from the following artificial propagation programs: The Coleman National Fish Hatchery Program; Feather River Fish Hatchery Program; and the Mokelumne River Hatchery Program.	71 FR 834, Jan. 5, 2006	226.211	223.203
Steelhead (Central California Coast DPS).	*Oncorhynchus mykiss*	Naturally spawned anadromous *O. mykiss* (steelhead) originating below natural and manmade impassable barriers from the Russian River to and including Aptos Creek, and all drainages of San Francisco and San Pablo Bays eastward to Chipps Island at the confluence of the Sacramento and San Joaquin Rivers. Also, steelhead from the following artificial propagation programs: The Don Clausen Fish Hatchery Program, and the Kingfisher Flat Hatchery Program (Monterey Bay Salmon and Trout Project).	71 FR 834, Jan. 5, 2006	226.211	223.203
Steelhead (Lower Columbia River DPS).	*Oncorhynchus mykiss*	Naturally spawned anadromous *O. mykiss* (steelhead) originating below natural and manmade impassable barriers from rivers between the Cowlitz and Wind Rivers (inclusive) and the Willamette and Hood Rivers (inclusive); excludes such fish originating from the upper Willamette River basin above Willamette Falls. This DPS includes steelhead from the following artificial propagation programs: The Cowlitz Trout Hatchery Late Winter-run Program (Lower Cowlitz); Kalama River Wild Winter-run and Summer-run Programs; Clackamas Hatchery Late Winter-run Program; Sandy Hatchery Late Winter-run Program; Hood River Winter-run Program; Lewis River Wild Late-run Winter Steelhead Program; Upper Cowlitz Wild Program; and the Tilton River Wild Program.	71 FR 834, Jan. 5, 2006	226.212	223.203
Steelhead (Middle Columbia River DPS).	*Oncorhynchus mykiss*	Naturally spawned anadromous *O. mykiss* (steelhead) originating below natural and manmade impassable barriers from the Columbia River and its tributaries upstream of the Wind and Hood Rivers (exclusive) to and including the Yakima River; excludes such fish originating from the Snake River basin. This DPS includes steelhead from the following artificial propagation programs: The Touchet River Endemic Program; Yakima River Kelt Reconditioning Program (in Satus Creek, Toppenish Creek, Naches River, and Upper Yakima River); Umatilla River Program; and the Deschutes River Program. This DPS does not include steelhead that are designated as part of an experimental population.	71 FR 834, Jan. 5, 2006	226.212	223.203
*	*	* * *	*	*	
Steelhead (Puget Sound DPS).	*Oncorhynchus mykiss*	Naturally spawned anadromous *O. mykiss* (steelhead) originating below natural and manmade impassable barriers from rivers flowing into Puget Sound from the Elwha River (inclusive) eastward, including rivers in Hood Canal, South Sound, North Sound and the Strait of Georgia. Also, steelhead from the following artificial propagation programs: The Green River Natural Program; White River Winter Steelhead Supplementation Program; Hood Canal Supplementation Program; Lower Elwha Fish Hatchery Wild Steelhead Recovery Program; and the Fish Restoration Facility Program.	72 FR 26722, May 11, 2007.	226.212	223.203

Species [1]			Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
Steelhead (Snake River Basin DPS).	*Oncorhynchus mykiss*	Naturally spawned anadromous *O. mykiss* (steelhead) originating below natural and man-made impassable barriers from the Snake River basin. Also, steelhead from the following artificial propagation programs: The Tucannon River Program; Dworshak National Fish Hatchery Program; East Fork Salmon River Natural Program; Little Sheep Creek/Imnaha River Hatchery Program; Salmon River B-run Program; and the South Fork Clearwater (Clearwater Hatchery) B-run Program.	71 FR 834, Jan. 5, 2006	226.212	223.203
*	*	* * *	*	*	*
Steelhead (Upper Columbia River DPS).	*Oncorhynchus mykiss*	Naturally spawned anadromous *O. mykiss* (steelhead) originating below natural and man-made impassable barriers from the Columbia River and its tributaries upstream of the Yakima River to the U.S.-Canada border. Also, steelhead from the following artificial propagation programs: The Wenatchee River Program; Wells Complex Hatchery Program (in the Methow River); Winthrop National Fish Hatchery Program; Ringold Hatchery Program; and the Okanogan River Program.	71 FR 834, Jan. 5, 2006	226.212	223.203
*	*	* * *	*	*	*

[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).

* * * * *

PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

■ 3. The authority citation for part 224 continues to read as follows:

Authority: 16 U.S.C. 1531–1543 and 16 U.S.C. 1361 *et seq.*

■ 4. In § 224.101, amend the table in paragraph (h) by revising the entries for ''Salmon, Chinook (Sacramento River winter-run ESU)''; ''Salmon, Chinook (Upper Columbia River spring-run ESU)''; ''Salmon, coho (Central California Coast ESU);'' and ''Salmon, sockeye (Snake River ESU)'' to read as follows:

§ 224.101 Enumeration of endangered marine and anadromous species.

* * * * *

(h) * * *

Species [1]			Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
*	*	* * *	*	*	
		Fishes			
*	*	* * *	*	*	
Salmon, Chinook (Sacramento River winter-run ESU).	*Oncorhynchus tshawytscha.*	Naturally spawned winter-run Chinook salmon originating from the Sacramento River and its tributaries. Also, winter-run Chinook salmon from the following artificial propagation programs: The Livingston Stone National Fish Hatchery (Supplementation and Captive Broodstock).	70 FR 37160, June 28, 2005.	226.204	NA
Salmon, Chinook (Upper Columbia River spring-run ESU).	*Oncorhynchus tshawytscha.*	Naturally spawned spring-run Chinook salmon originating from Columbia River tributaries upstream of the Rock Island Dam and downstream of Chief Joseph Dam (excluding the Okanogan River subbasin). Also, spring-run Chinook salmon from the following artificial propagation programs: The Twisp River Program; Chief Joseph spring Chinook Hatchery Program (Okanogan release); Methow Program; Winthrop National Fish Hatchery Program; Chiwawa River Program; White River Program; and the Nason Creek Program.	70 FR 37160, June 28, 2005.	226.212	NA
Salmon, coho (Central California Coast ESU).	*Oncorhynchus kisutch*	Naturally spawned coho salmon originating from rivers south of Punta Gorda, California to and including Aptos Creek, as well as such coho salmon originating from tributaries to San Francisco Bay. Also, coho salmon from the following artificial propagation programs: The Don Clausen Fish Hatchery Captive Broodstock Program; the Scott Creek/King Fisher Flats Conservation Program; and the Scott Creek Captive Broodstock Program.	70 FR 37160, June 28, 2005; 77 FR 19552, Apr. 2, 2012.	226.210	NA
Salmon, sockeye (Snake River ESU).	*Oncorhynchus nerka*	Naturally spawned anadromous and residual sockeye salmon originating from the Snake River basin. Also, sockeye salmon from the Redfish Lake Captive Broodstock Program and the Snake River Sockeye Salmon Hatchery Program.	70 FR 37160, June 28, 2005.	226.205	NA

Species [1]			Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
*	*	*	*	*	*	*

[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).

* * * * *

[FR Doc. 2020–26287 Filed 12–16–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 180117042–8884–02; RTID 0648–XA672]

Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS closes the Atlantic bluefin tuna (BFT) General category fishery for the December subquota period, and thus for the remainder of 2020. The intent of this closure is to prevent further overharvest of the adjusted December subquota, and the overall adjusted General category quota.

DATES: Effective 11:30 p.m., local time, December 14, 2020, through December 31, 2020.

FOR FURTHER INFORMATION CONTACT: Sarah McLaughlin, 978–281–9260, Nicholas Velseboer 978–675–2168, or Larry Redd, 301–427–8503.

SUPPLEMENTARY INFORMATION: Regulations implemented under the authority of the Atlantic Tunas Convention Act (ATCA; 16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) governing the harvest of BFT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. Section 635.27 subdivides the U.S. BFT quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) among the various domestic fishing categories, per the allocations established in the 2006 Consolidated Highly Migratory Species Fishery Management Plan (2006 Consolidated HMS FMP) (71 FR 58058, October 2, 2006) and amendments, and in accordance with implementing regulations.

Under § 635.28(a)(1), NMFS files a closure notice with the Office of the Federal Register for publication when a BFT quota (or subquota) is reached or is projected to be reached. Retaining, possessing, or landing BFT under that quota category is prohibited on and after the effective date and time of a closure notice for that category, for the remainder of the fishing year, until the opening of the subsequent quota period or until such date as specified.

The baseline General category quota is 555.7 mt. See § 635.27(a). Each of the General category time periods (January, June through August, September, October through November, and December) is allocated a ''subquota'' or portion of the annual General category quota. The baseline subquotas for each time period are as follows: 29.5 mt for January; 277.9 mt for June through August; 147.3 mt for September; 72.2 mt for October through November; and 28.9 mt for December.

Closure of the December 2020 General Category Fishery

NMFS has determined that the General category December subquota of 28.9 mt has been reached and exceeded (*i.e.,* 32.7 mt have been landed as of December 14, 2020), as has the overall adjusted General category quota of 846.5 mt, and that the fishery should be closed. Through this action, we are closing the General category BFT fishery effective 11:30 p.m., December 14, 2020, through December 31, 2020. Therefore, retaining, possessing, or landing large medium or giant BFT by persons aboard vessels permitted in the Atlantic tunas General category and HMS Charter/Headboat category (while fishing commercially) must cease at 11:30 p.m. local time on December 14, 2020. The General category will reopen automatically on January 1, 2021, for the January 2021 subquota period. This action applies to those vessels permitted in the General category, as well as to those HMS Charter/Headboat permitted vessels with a commercial sale endorsement when fishing commercially for BFT, and is taken consistent with the regulations at § 635.28(a)(1). The intent of this closure is to prevent further overharvest of the adjusted December subquota, and the adjusted 2020 General category quota.

Fishermen may catch and release (or tag and release) BFT of all sizes, subject to the requirements of the catch-and-release and tag-and-release programs at § 635.26. All BFT that are released must be handled in a manner that will maximize their survival, and without removing the fish from the water, consistent with requirements at § 635.21(a)(1). For additional information on safe handling, see the ''Careful Catch and Release'' brochure available at *https://www.fisheries.noaa.gov/resource/outreach-and-education/careful-catch-and-release-brochure/.*

Monitoring and Reporting

Dealers are required to submit landings reports within 24 hours of a dealer receiving BFT. Late reporting by dealers compromises NMFS' ability to timely implement actions such as quota and retention limit adjustment, as well as closures, and may result in enforcement actions. Additionally, and separate from the dealer reporting requirement, General and HMS Charter/Headboat category vessel owners are required to report the catch of all BFT retained or discarded dead within 24 hours of the landing(s) or end of each trip, by accessing *hmspermits.noaa.gov,* using the HMS Catch Reporting app, or calling (888) 872–8862 (Monday through Friday from 8 a.m. until 4:30 p.m.).

NMFS will need to account for 2020 landings and dead discards within the adjusted U.S. quota, consistent with ICCAT recommendations, and anticipates having sufficient quota to do that based on anticipated underharvest due to landings of some quota categories being substantially less than the available quotas for those categories.'' Could add ''(*e.g.,* the Purse Seine, Trap, and Longline categories).

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is taken pursuant to regulations at 50 CFR part 635, which were issued pursuant to section 304(c) of the Magnuson-Stevens Act and the Atlantic Tunas Convention Act, and is

exempt from review under Executive Order 12866.

The Assistant Administrator for NMFS finds that pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice of, and an opportunity for public comment on, for the following reasons: The regulations implementing the 2006 Consolidated HMS FMP and amendments provide for inseason retention limit adjustments and fishery closures to respond to the unpredictable nature of BFT availability on the fishing grounds, the migratory nature of this species, and the regional variations in the BFT fishery. This fishery is currently underway, and delaying this action would be contrary to the public interest as it could result in BFT landings exceeding the adjusted December 2020 General category quota and the adjusted 2020 General category quota. For all of the above reasons, there is good cause under 5 U.S.C. 553(d) to waive the 30-day delay in effectiveness.

Authority: 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: December 14, 2020.

Jennifer M. Wallace,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2020–27794 Filed 12–14–20; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 85, No. 243
Thursday, December 17, 2020

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 351 and 430

RIN 3206–AO06

Reduction in Force

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing a proposed regulation to revise its reduction-in-force (RIF) regulations to set forth the principle that agencies should prioritize performance over length of service when determining which employees will be retained in a RIF following regulations that OPM will issue. In addition, OPM is exercising its authority to modify the order of retention, clarify tenure group definitions, and modify how credit for performance is computed.

DATES: Comments must be received on or before January 19, 2021.

ADDRESSES: You may submit comments, identified by the docket number or Regulation Identifier Number (RIN) for this proposed rulemaking, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for sending comments.

All submissions received must include the agency name and docket number or RIN for this document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Kimberly A. Holden by email at *employ@opm.gov* or by fax at (202) 606–4430.

SUPPLEMENTARY INFORMATION: The OPM is proposing to revise its regulations governing reduction in force and related technical changes under statutory authority vested in it by Congress in 5 U.S.C. 1103, 3502, 3596, 4305, and 4315. The regulations will also assist agencies in carrying out certain principles set forth by the President in Executive Order (E.O.) 13839, titled: ''Promoting Accountability and Streamlining Removal Procedures Consistent with Merit Systems and Principles'' consistent with law, and update current procedures to make them more efficient and effective. The proposed regulations will change existing regulations regarding RIF procedures to modify the order of retention and enhance the value of performance relative to length of service when determining which employees will be retained in a RIF.

The proposed regulations will assist agencies in better aligning, consistent with law, to certain of the principles articulated by the President to the Executive Branch in E.O. 13839 and update current procedures to make them more efficient and effective.[1] Apart from OPM's existing authority to promulgate regulations relating to reductions in force, 5 U.S.C. 3502, Section 7 of the E.O. directs OPM to propose revisions to existing regulations, as needed, to effectuate the principles set forth in section 2, including those pertaining to RIFs.

Reduction in Force

Section 2(j) of E.O. 13839 calls on agencies to prioritize performance over length of service in determining who will be retained in a RIF. Section 7 of the E.O. directs OPM to examine whether existing regulations effectuate the principles set forth in section 2 of the Order. It directs OPM, ''to the extent necessary or appropriate,'' to propose for notice and public comment appropriate regulations to effectuate the principles set forth in Section 2.

After conducting this examination, OPM, under its statutory authority in 5 U.S.C. 3502, is proposing, in accordance with the procedural requirements under 5 U.S.C. 1103(b) and the Administrative Procedure Act, to amend its regulations at Subpart E of 5 CFR part 351 and to make corresponding changes to Subparts B and Subpart G of 5 CFR part 351 and to Subpart B of 5 CFR part 430 to prioritize performance over length of service in a RIF. In addition, we are modifying the order of retention at 5 CFR 351.501. Specifically, when determining the order in which employees are placed on a RIF retention register, agencies will do so on the basis of tenure first, followed by performance, then veterans' preference, and finally length of service, as outlined in further detail below. In addition, we are proposing to clarify the definition of tenure groups.

Proposed § 351.501 *Order of retention* establishes that competing employees in a RIF will be classified on a retention register on the basis of (in descending order): (1) Tenure of employment, (2) performance, (3) veterans' preference, and (4) length of service. This section also clarifies that the order of retention provisions applies to employees in both the competitive and excepted services.

Under current regulations at 5 CFR 351.501, the order of retention for classifying competing employees on a retention register is (in descending order): Tenure of employment, veterans' preference, length of service, and performance. Length of service is augmented by performance; an employee receives additional retention service credit (*i.e.,* additional years of service) based on the employee's applicable ratings of record. OPM is proposing to modify the order of retention to be: Tenure of employment, performance, veterans' preference, and length of service.

Under the current regulations at 5 CFR 351.504, credit for performance is used to supplement an employee's length of service for purposes of determining an employee's standing on a retention register (both of these retention factors are expressed in years). An employee receives additional retention service credit based on his or her performance ratings of record and their assigned summary levels. This additional credit is added to the employee's length of service to

[1] Some of the provisions of E.O. 13839 were enjoined by the United States District Court for the District of Columbia. *Am. Fed'n of Gov't Employees, AFL–CIO* v. *Trump,* 318 F. Supp. 3d 370 (D.D.C. 2018). The principles pertaining to RIFs, however, were not among those provisions that were enjoined. *Id.* at 440. The plaintiffs did not seek further judicial review of this decision, so this determination is final. In any event, the decision imposing the injunction against other provisions of the E.O. was subsequently reversed, see *Am. Fed'n of Gov't Employees, AFL–CIO* v. *Trump,* 929 F.3d 748 (D.C. Cir. 2019), and thus no longer has any effect.

determine that employee's retention standing within the employee's appropriate tenure group and veterans' preference subgroup. An employee receives additional credit for performance (added to his or her length of service) on the following basis: 20 additional years of service for each rating of record with a Level 5 (Outstanding or equivalent) summary level; 16 additional years of service for each rating of record with a Level 4 (Exceeds Fully Successful or equivalent) summary level; and 12 additional years of service for each rating of record with a Level 3 (Fully Successful or equivalent) summary level, in accordance with the summary levels described in 5 CFR 430.208. The additional years of service are added together, divided by 3, and rounded up to a whole number if necessary to determine the number of years that will be used to adjust an employee's actual service computation date and arrive at an adjusted service computation date for RIF purposes.

OPM is proposing to elevate performance above length of service in the RIF order of retention. We propose to do this by establishing performance as a subgroup within the appropriate tenure group. The proposed order of retention will be: (1) Tenure, (2) performance, (3) veterans' preference, and (4) length of service. Under this proposal, employees competing in a RIF will first be sorted into their appropriate tenure group; then within each tenure group employees will be sorted by performance in descending order based on the total of the employee's three most recent ratings of record; then within each tenure group and performance subgroup, according to their veterans' preference status or subgroup; then within each tenure group, performance subgroup, and veterans' preference subgroup, employees will be listed on the retention register in terms of their length of service based on each employee's actual service computation date. Thus, length of service will be used as a tie-breaker for employees with the same tenure, three-year total of their summary level performance ratings, and veterans' preference status (*i.e.,* the first three factors being equal, an employee with longer length of service will be listed ahead of an employee(s) with shorter length of service).

We are proposing that an agency determine an employee's performance standing by adding each employee's summary level performance rating for the three most recent ratings of record issued under 5 CFR part 430 (or equivalent ratings of record established in accordance with 5 CFR 430.201(c)) prior to the RIF. An agency will place employees on a retention register based on the total of each employee's summary level rating in descending order, within each tenure group. In most instances, an employee's summary level ratings of record for the three most recent ratings of record will be added together. Ratings of record will be assigned a numerical value as follows in conjunction with the patterns of summary level in 5 CFR 430.208(d): 5 for a Level 5 (Outstanding or equivalent) summary level, 4 for a Level 4 (Exceeds Fully Successful or equivalent) summary level, 3 for a Level 3 (Fully Successful or equivalent) summary level, 2 for a Level 2 (Minimally Successful or equivalent) summary level, 1 for a Level 1 (Unacceptable) summary level. Agencies will list competing employees on the retention register in descending order (within the same tenure group) based on the total of their three most recent ratings of record. OPM believes listing employees in descending order (*i.e.,* highest to lowest) based on their total summary level rating for three most recent ratings of record is the most objective methodology for these purposes, and best implements the principle of emphasizing performance over length of service as set forth in E.O. 13839.

The following example illustrates and contrasts the impact of performance ratings of record and their summary levels on a retention register under the current rules and the proposed rules. Consider the following employees in a General Schedule (GS) 201–12 position:

Name	Tenure group	Vets pref subgroup	Rating of record summary levels	Service comp date
Al	I	A	3/3/3	01/01/1988
Barb	I	A	5/4/5	01/01/2010
Carl	I	A	3/4/3	01/01/2000
Dave	I	A	4/5/4	01/01/1980
Emma	I	A	3/4/4	01/01/2014

Under the current rules, a retention register constructed in 2018 for these employees would look like this, based on retention factors considered in this order: Tenure | Vets Pref | Adjusted Service Computation Date (ASCD) — *i.e.,* the service computation date (SCD) adjusted for additional service credit (ASC) based on ratings of record and summary levels:

	SCD	ASC	ASCD
Dave:	I | A | (01/01/1980 – 18 years *[(16+20+16)/3]*)	=	I | A | 01/01/1962
Al:	I | A | (01/01/1988 – 12 years *[(12+12+12)/3]*)	=	I | A | 01/01/1976
Carl:	I | A | (01/01/2000 – 14 years *[(12+16+12)/3]*)	=	I | A | 01/01/1986
Barb:	I | A | (01/01/2010 – 19 years *[(20+16+20)/3]*)	=	I | A | 01/01/1991
Emma:	I | A | (01/01/2014 – 15 years *[(12+16+16)/3]*)	=	I | A | 01/01/1999

Under the proposed rules, the retention register for these same competing employees would look like this, based on considering retention factors in this order: Tenure | Performance based on the total of the employee's summary levels | Vets Pref | Service Computation Date:

Barb: I | 14 | A | 01/01/2010
Dave: I | 13 | A | 01/01/1980
Emma: I | 11 | A | 01/01/2014
Carl: I | 10 | A | 01/01/2000
Al: I | 9 | A | 01/01/1988

The following illustrates how veterans' preference and length of service will be used under the proposed rules. Assuming the same group of employees but with two differences: Al and Carl have the same ratings of record, but Carl's veterans' preference subgroup is AD, as follows:

Name	Tenure group	Rating of record summary levels	Vets pref subgroup	Service comp date
Al	I	3/3/3	A	01/01/1988
Barb	I	5/4/5	A	01/01/2010
Carl	I	3/3/3	AD	01/01/2000
Dave	I	4/5/4	A	01/01/1980
Emma	I	3/4/4	A	01/01/2014

Under the proposed rules, the retention register for these employees would look like this, based on considering retention factors in this order (in this example Carl is listed ahead of Al because he is in veterans' preference subgroup AD despite having less service credit than Al):

Barb: I | 14 | A | 01/01/2010
Dave: I | 13 | A | 01/01/1980
Emma: I | 11 | A | 01/01/2014
Carl: I | 9 | AD | 01/01/2000
Al: I | 9 | A | 01/01/1988

OPM is proposing to revamp 5 CFR part 351, sections 501 through 505. We are proposing to renumber current § 351.505 *Records,* and § 351.506 *Effective date of retention standing,* to § 351.506 *Records* and § 351.507 *Effective date of retention standing,* respectively. We are also proposing corresponding changes to § 351.701 *Assignment rights (bump and retreat).* Lastly, OPM is proposing to modify § 430.208(d) to attune those provisions with the proposed changes in 5 CFR part 351. The proposed changes are as follows:

Proposed § 351.501 *Order of retention* establishes that competing employees in a RIF will be classified on a retention register on the basis of (in descending order): (1) Tenure of employment, (2) performance, (3) veterans' preference, and (4) length of service. This section also clarifies that the order of retention provisions applies to employees in both the competitive and excepted services.

Proposed § 351.502 *Tenure of employment* defines tenure groups for competitive service and excepted service employees. Proposed § 351.502(a) defines tenure groups for competitive service employees. The new § 351.502(a) incorporates the provisions currently found in § 351.501(b)(1)–(3) but clarifies that Tenure group I will consist of career employees who are not serving a probationary period. Proposed tenure group II will consist of career-conditional employees and other employees serving a probationary period, as well as the other categories of employees currently described in § 351.501(b)(2). OPM is deleting the reference to ''temporary appointments pending establishment of a register'' listed in current Tenure group III at § 351.501(b)(3) because these types of appointments, also known as TAPER appointments, were abolished in 2003 (see 68 FR 35265, ''Organization of the Government for Personnel Management, Overseas Employment, Temporary and Term Employment, Recruitment and Selection for Temporary and Term Appointments Outside the Register, Examining System, and Training''). Proposed § 351.502(b) defines tenure groups for excepted service employees. The new § 351.502(b) incorporates the provisions currently found in § 351.502 *Order of retention—excepted service* without change. OPM is proposing to consolidate tenure of employment definitions for both services into one section for the convenience of the reader.

Proposed § 351.503 *Performance* establishes that an agency will list employees on a RIF retention register (within the same tenure group) based on the total of each employee's summary level ratings for the employee's three most recent ratings of record for performance. In accordance with 5 CFR 430.208(d) summary level ratings of record for these purposes are as follows:

(i) 5 for a Level 5 (Outstanding or equivalent) summary level
(ii) 4 for a Level 4 (Exceeds Fully Successful or equivalent) summary level

(iii) 3 for a Level 3 (Fully Successful or equivalent) summary level
(iv) 2 for a Level 2 (Minimally Successful or equivalent) summary level, and
(v) 1 for a Level 1 (Unacceptable) summary level

This section also explains that an agency lists competing employees on the retention register in descending order (*i.e.,* highest to lowest) based on their totals within the same tenure group.

Section 351.503(b) *Ratings used* explains that an employee's ratings of record are to be used in a manner consistent with the provisions of subpart B of 5 CFR part 430, and provides guidance as to how an agency determines an employee's performance standing for RIF purposes for employees not covered under subpart B of 5 CFR part 430 and in other special circumstances. § 351.503(b) remains largely unchanged from the provisions currently in § 351.504(a)(1)–(3), though we are removing the reference to 'additional retention service credit' currently found in § 351.504(a)(1).

Section 351.503(c) *Consideration of performance* includes language currently in § 351.504(b) but modifies this language by removing the reference to ''additional retention service credit'' consistent with the aim of E.O. 13839 (*i.e.,* credit for performance will no longer be added to an employee's length of service). Performance will now be a subgroup, within the tenure group, which will be based on the total of each employee's summary level ratings for the employee's three most recent ratings of record for performance consistent with § 351.503(a). Proposed § 351.503(c)(1) removes the reference to 'awarding additional retention service credit' currently found in § 351.504(b)(4).

Section 351.503(d) *How to apply performance ratings* is a new subsection which explains to agencies that they must total the summary levels from an employee's three most recent ratings of record to derive a total summary level value for purposes of placing the employee on a RIF retention register under this part. This new subsection uses the rating of record summary levels described in subpart B of 5 CFR part 430. For example, the employees below are covered under a pattern H five-summary level rating performance appraisal system as described in 5 CFR 430.208(d). Their ratings and totals are:

Employee	Ratings	Total
Alice	5/4/4	13
Bill	4/3/3	10
Carol	4/4/3	11
Fred	3/4/5	12

These employees would be listed on the retention register in the following order: Alice, Fred, Carol, then Bill.

New paragraph § 351.503(e) *Single rating pattern* describes how agencies list employees who have been covered under the same rating pattern of summary levels during the 4-year period prior to the date of issuance of the reduction in force notice or the agency-established cutoff date. Subparagraph (e)(ii) proposes that for employees covered under a summary level appraisal system in which the highest summary level is a level ''3'' rating (*i.e.,* a pattern A ('pass/fail'), or pattern D system) the agency may create a performance subgroup for employees who have documented exceptional performance above the norm. This subparagraph explains that evidence of exceptional performance may include documentation showing an agency: Has awarded an employee the highest Agency or Departmental award (such as a Secretary's or Chairman's award), a special act or service award, a quality step increase, or other performance awards or bonus (*e.g.,* a 'time-off' for demonstrated performance above expectations). OPM is proposing this to effectuate the principle of the E.O. (which is to elevate performance over length of service) and to provide a method by which an agency may make meaningful distinctions among employees in a pattern A or D performance appraisal program (*i.e.,* the highest summary level rating is a ''3'' or satisfactory) who have documented performance above expectations in these appraisals systems.

In new subparagraph § 351.503(e)(2)(B) OPM is also proposing to allow an agency to give more weight to certain performance-related actions than others for purposes of listing some level ''3'' employees ahead of other employees on a retention register. For example, an agency could list all employees who received the agency's highest sustained performance award ahead of all employees who received an organizational or component-specific award, and ahead employee who received a time off award (both groups would be listed ahead of the other level ''3'' employees). An agency that chooses this option must specify and document, in advance of any RIF, how it will prioritize performance awards for these purposes. OPM believes this option is consistent with the E.O. and the principle of elevating performance over length of service, and it provides an agency with a method for making meaningful distinctions among employees with a fully successful rating when some of these employees were recognized for exceptional performance.

Section 351.503(f) *Multiple rating patterns* addresses situations in which an agency has employees in a competitive area who have ratings of record under more than one pattern of summary levels, as described in 5 CFR 403.208(d). This paragraph explains that an agency shall consider the mix of patterns and proposes that an agency shall provide enhanced performance standing to employees under disparate pattern summary levels under certain circumstances. To do this OPM is proposing that an agency transmute or assign an employee a higher summary level rating than what he or she received under a previous rating system only when there is documented evidence of exceptional or higher level performance consistent with the criteria in proposed § 351.503(e). An agency must transmute the rating of an employee who meets this requirement to the highest summary level of the pattern summary level being used during the RIF (*i.e.,* a level ''4'' rating if the agency conducting the RIF uses a pattern C or G summary level appraisal system, or a level ''5'' rating if the agency uses a pattern B, E, F, or H summary level appraisal system). Documented evidence of exceptional or higher level performance for these purposes includes: Award or receipt of the highest Agency or Departmental award (such as a Secretary's or Chairman's award), a quality step increase, or an annual performance appraisal bonus. For example, an employee was covered by a pattern A (pass/fail) appraisal program for two years and a pattern H (5 summary level) appraisal program for the one year prior to a RIF. While covered under the pattern A appraisal program the employee received his agency's highest award for excellent performance in the second year. Under the five-summary level system he received a level ''4'' rating. Under this proposal the agency must assign the employee a higher rating level; so in this instance the employee's performance ratings for the three year period would be 3/5/4 (his level 3 rating would be transmuted to a level 5) and his ratings of record total for the three year period would be 12 for purposes of 351.503(d). OPM is also proposing that an employee who goes from an appraisal system which uses a higher pattern of summary levels to a lower one (*e.g.,* an employee who goes

from a 5 summary level appraisal program to two level system (*i.e.,* pass/fail system)) with ratings above the highest summary level of the lower pattern system be listed ahead of any employee on the retention register who does not have documented evidence of exceptional performance as described above. Lastly, this proposed section requires an agency to specify the basis on which it will consider exceptional or higher level performance described in § 351.503(e) and transmute or assign an employee a higher rating in accordance with the pattern of summary level used during the RIF, and make this information readily available for review prior to running a reduction in force. OPM is proposing enhanced performance credit or standing to implement the E.O.'s principle that an agency emphasize performance over length of service in a RIF. We believe this method prevents exceptional performers from being disadvantaged because they may be covered under two or more patterns of summary rating levels which may not make meaningful distinctions for performance among employees.

§ 351.503(g) *Missing ratings* describes how an agency should factor performance ratings into the RIF process when an employee does not have three actual ratings of record during the 4-year period prior to the date of issuance of RIF notices, or the 4-year period prior to the agency-established cut-off date. Proposed § 351.503(g) uses the modal rating concept for employees with no ratings during the 4 year period prior to the RIF currently found in § 351.504(c)(1) but modifies the current provisions by removing the reference to ''additional retention service credit'' consistent with the aim of E.O. 13839 (i.e., credit for performance will no longer be added to an employee's length of service). The term 'modal rating' is currently defined in § 351.203. For employees with at least one rating of record but less than three, this section proposes that an agency total the summary levels, divide by the number of ratings, and use this value for the missing ratings. For example, an employee in five level pattern H summary level appraisal system has summary level rating of ''3'' fully successful and ''4'' exceeds fully successful but is missing a third rating. The agency would add 3 + 4, then divide by 2, for a value of 3.5 for the missing rating. The agency then adds the three ratings of record: 3, 4, and 3.5 for a total of 10.5 and enters the employee on the retention register accordingly.

Proposed § 351.504 *Veterans' preference* defines veterans' preference subgroups for employees in both the competitive and excepted services. This proposed section will consist of the provisions currently found in § 351.501(c) and (d) without change.

OPM is proposing to delete current § 351.502 *Order of retention—excepted service* and cover these provisions in proposed § 351.501(a).

OPM is proposing to modify current § 351.705 *Administrative assignment* to be consistent with the proposed changes to §§ 351.501–.505. Specifically, OPM is proposing to update § 351.705(a)(2) to incorporate the new order of retention and the creation of the new subgroup called 'performance'.

Performance Management

OPM is proposing to modify current § 430.208(d)(4) to attune this language with the proposed changes in part 351. To do this, we propose removing the current reference to ''. . . assigning additional retention service credit under § 351.504.''

OPM is proposing to modify current § 430.208(d)(5) by removing the reference to ''the number of years of additional retention service credit'' and replacing it with a general reference to proposed § 351.503 *Performance.*

Regulatory Impact Analysis

OPM has examined the impact of this rulemaking as required by Executive Order 12866 and Executive Order 13563, which directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public, health, and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for major rules with economically significant effects of $100 million or more in any one year. While this proposed rule does not reach the economic effect of $100 million or more under Executive Order 12866, this proposed rule is still designated as a ''significant regulatory action,'' under Executive Order 12866.

Reducing Regulation and Controlling Regulatory Costs

This proposed rule is not an E.O. 13771 regulatory action because this proposed rule is expected to be no more than de minimis costs.

Regulatory Flexibility Act

The Office of Personnel Management certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities.

Federalism

We have examined this proposed rule in accordance with Executive Order 13132, Federalism, and have determined that this proposed rule will not have any negative impact on the rights, roles and responsibilities of State, local, or tribal governments.

Civil Justice Reform

This regulation meets the applicable standard set forth in Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This proposed 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 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.

Congressional Review Act

The Congressional Review Act (5 U.S.C. 801 *et seq.*) requires rules to be submitted to Congress before taking effect. OPM will submit to Congress and the Comptroller General of the United States a report regarding the issuance of this proposed rule before its effective date, as required by 5 U.S.C. 801. This proposed rule is not a major rule as defined by the Congressional Review Act (CRA) (5 U.S.C. 804).

Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)

This regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects in 5 CFR Parts 351 and 430

Government employees.

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

Accordingly, for the reasons stated in the preamble, OPM proposes to amend 5 CFR parts 351, and 430 as follows:

PART 351—REDUCTION IN FORCE

■ 1. Revise the authority citation for part 351 to read as follows:

Authority: 5 U.S.C. 1302, 3502, 3503; sec. 351.801 also issued under E.O. 12828, 58 FR 2965; E.O. 13839, 83 FR 25343.

Subpart B—General Provisions

■ 2. In § 351.203, revise the definition of ''*Current rating of record*'' to read as follows:

§ 351.203 Definitions.

* * * * *

Current rating of record is the rating of record for the most recently completed appraisal period as provided in § 351.503(c)(3).

* * * * *

Subpart E—Retention Standing

■ 3. Revise Subpart E to read as follows:

Subpart E—Retention Standing

Sec.

351.501 Order of retention.
351.502 Tenure of employment.
351.503 Performance.
351.504 Veterans' preference.
351.505 Length of service.
351.506 Records.
351.507 Effective date of retention standing.

§ 351.501 Order of retention.

Competing employees in the competitive and excepted services shall be classified on a retention register on the basis of four factors: Tenure of employment, performance, veterans' preference, and length of service as follows:

(a) On the same retention register in descending order by tenure group I, group II, group III, as described in § 351.502;

(b) Within each tenure group by performance based on the sum of the summary levels for the employee's three most recent ratings of record for performance in accordance with § 351.503;

(c) Within each performance subgroup by veterans' preference subgroup AD, subgroup A, subgroup B, as described in § 351.504; and

(d) Within each veterans' preference subgroup by years of service beginning with the earliest service computation date, as computed under § 351.505, when two or more employees have the same summary level total value for the employees' three most recent ratings of record.

§ 351.502 Tenure of employment.

(a) *Competitive service.* Tenure groups in the competitive service are defined as follows:

(1) Group I includes each career employee who is not serving a probationary period. (A supervisory or managerial employee serving a probationary period required by subpart I of part 315 of this chapter is in group I if the employee is otherwise eligible to be included in this group.) The following employees are in group I as soon as the employee completes any required probationary period for initial appointment:

(i) An employee for whom substantial evidence exists of eligibility to immediately acquire status and career tenure, and whose case is pending final resolution by OPM (including cases under Executive Order 10826 to correct certain administrative errors);

(ii) An employee who acquires competitive status and satisfies the service requirement for career tenure when the employee's position is brought into the competitive service;

(iii) An administrative law judge;

(iv) An employee appointed under 5 U.S.C. 3104, which provides for the employment of specially-qualified scientific or professional personnel, or a similar authority; and

(v) An employee who acquired status under 5 U.S.C. 3304(c) on transfer to the competitive service from the legislative or judicial branches of the Federal Government.

(2) Group II includes each career-conditional employee, and each employee serving a probationary period under subpart H of part 315 of this chapter. (A supervisory or managerial employee serving a probationary period required by subpart I of part 315 of this chapter is in group II if the employee has not completed a probationary period under subpart H of part 315 of this chapter.) Group II also includes an employee when substantial evidence exists of the employee's eligibility to immediately acquire status and career-conditional tenure, and the employee's case is pending final resolution by OPM (including cases under Executive Order 10826 to correct certain administrative errors).

(3) Group III includes all employees serving under indefinite appointments, status quo appointments, term appointments, and any other non-status non-temporary appointments which meet the definition of provisional appointments contained in §§ 316.401 and 316.403 of this chapter.

(b) *Excepted service.* Tenure groups in the excepted service are defined as follows:

(1) Group I includes each permanent employee whose appointment carries no restriction or condition such as conditional, indefinite, specific time limit, or trial period.

(2) Group II includes each employee:

(i) Serving a trial period; or

(ii) Whose tenure is equivalent to a career-conditional appointment in the competitive service in agencies having such excepted appointments.

(3) Group III includes each employee:

(i) Whose tenure is indefinite (*i.e.,* without specific time limit), but not actually or potentially permanent;

(ii) Whose appointment has a specific time limitation of more than 1 year; or

(iii) Who is currently employed under a temporary appointment limited to 1 year or less, but who has completed 1 year of current continuous service under a temporary appointment with no break in service of 1 workday or more.

§ 351.503 Performance.

(a) *Performance subgroup.* Within the tenure groups an agency shall list competing employees in descending order (*i.e.,* highest to lowest) based on the total of the summary levels for each employee's three most recent ratings of record for performance in accordance with part 430 of this Chapter.

(b) *Ratings used.* (1) Except as provided at § 351.503(d)(3), only ratings of record as defined in § 351.203 shall be used as the basis for classifying an employee's performance in a reduction in force.

(2) For employees who received ratings of record while covered by part 430, subpart B, of this chapter, the summary levels assigned for those ratings of record shall be used to establish the employee's performance subgroup in a reduction in force in accordance with 5 CFR 351.501, except as provided in 5 CFR 351.503(d)(3).

(3) For employees who received performance ratings while not covered by the provisions of 5 U.S.C. chapter 43 and subpart B of part 430 of this chapter, those performance ratings shall be considered ratings of record with summary levels for designating an employee's performance subgroup in a reduction in force only when it is determined that those performance ratings are equivalent ratings of record under the provisions of § 430.201(c) of this chapter. The agency conducting the reduction in force shall make that determination.

(c) *Consideration of performance.* (1) An employee's entitlement to performance consideration under this subpart shall be based on the employee's three most recent ratings of record received during the 4-year period prior to the date of issuance of reduction in force notices, except as otherwise provided in paragraphs (c)(2) and (g) of this section.

(2) To provide adequate time to determine employee performance total values, an agency may provide for a cutoff date, a specified number of days prior to the issuance of reduction in force notices after which no new ratings of record will be put on record and used

for purposes of this subpart. When a cutoff date is used, an employee's performance average will be based on the three most recent ratings of record received during the 4-year period prior to the cutoff date.

(3) To be considered for purposes of this subpart, a rating of record and its assigned summary level (including any adjustments to performance consistent with this subpart) must have been issued to the employee, with all appropriate reviews and signatures, and must also be on record (*i.e.,* the rating of record is available for use by the office responsible for establishing retention registers).

(4) The use of performance ratings of record and assigned summary levels (including any adjustments to performance) for purposes of this subpart must be uniformly and consistently applied within a competitive area, and must be consistent with any agency's appropriate issuance(s) that implement these policies in part 351. Each agency must specify in its appropriate issuance(s):

(i) The conditions under which a rating of record is considered to have been received for purposes of determining whether it is within the 4-year period prior to either the date the agency issues reduction in force notices or the agency-established cutoff date for ratings of record, as appropriate; and

(ii) If the agency elects to use a cutoff date, the number of days prior to the issuance of reduction in force notices after which no new ratings of record will be put on record and used for purposes of this subpart.

(d) *How to apply performance ratings of record.* Agencies determine each competing employee's performance standing (or numerical value) by adding the employee's three most recent summary level ratings of record during the 4-year period prior to the date of issuance of the reduction in force notice or the agency-established cutoff date. An agency lists competing employees on the retention register in descending order (*i.e.,* highest to lowest) based on these totals.

(e) *Single rating pattern.* (1) If all employees in a reduction in force competitive area have received ratings of record under a single pattern of summary levels as set forth in § 430.208(d) of this chapter, agencies must apply the method described in paragraph (d) of this section.

(2) An agency may give additional credit for performance for employees covered under a summary level appraisal system in which the highest summary level is a level ''3'' rating (*i.e.,* a pattern A 'pass/fail', or pattern D system), consistent with § 430.208(d) of this chapter. At its discretion an agency may create a subgroup of level ''3'' employees with demonstrated exceptional performance and list them ahead of other level ''3'' employees if, within the 4-year period prior to either the date the agency issues reduction in force notices or the agency-established cutoff date for ratings of record, the following condition is met:

(i) The agency has applied performance-related criteria and taken an action that recognizes the employee's exceptional performance; such actions may include but are not limited to awarding an employee: The highest Agency or Departmental award (such as a Secretary's or Chairman's award), a special act or service award, a quality step increase, or other performance awards or bonus (*e.g.,* a 'time-off' for demonstrated performance above expectations), etc.

(ii) An agency may determine on its own whether to give more weight to the performance-related action described in paragraph (e)(2)(i) of this section for purposes of listing some level ''3'' employees ahead of other on a retention register. For example, an agency could list all employees who received the agency's highest sustained performance award ahead of all employees who received an organizational or component-specific award, and ahead of an employee who received a time off award. An agency which chooses this option must specify and document, in advance of the RIF, how it will prioritize performance awards for these purposes.

(iii) An agency that chooses to give an employee additional credit for performance must specify and document, in advance of the RIF, how it will prioritize performance awards for these purposes and make this criterion readily available for review.

(f) *Multiple rating patterns.* (1) If an agency has employees in a competitive area who have ratings of record under more than one pattern of summary levels, as set forth in § 430.208(d) of this chapter, it shall consider the mix of patterns and provide additional retention credit for performance in accordance with the following:

(i) Transmute or assign an employee a higher summary level rating than what he or she received under their previous appraisal system in accordance with the appraisal system (*i.e.,* pattern of summary level) being applied to the Reduction in Force;

(ii) Transmute or assign an employee a summary level rating only when there is documented evidence of exceptional or higher level performance as evidenced by an employee who received the highest Agency or Departmental award (such as a Secretary's or Chairman's award), a quality step increase, or appraisal performance awards or bonus (*e.g.,* a ''time-off'' for demonstrated performance above expectations in lieu of a cash bonus); and

(iii) Each agency must specify and document, in advance of a RIF, the basis on which it will transmute an employee's rating; *i.e.,* the agency needs to describe how it will translate evidence of documented exceptional performance to a higher performance rating under the appraisal system (*i.e.,* pattern of summary level) being applied to the RIF and make this criteria readily available for review.

(iii) An agency must transmute the rating of an employee who meets the requirement in 351.503(f)(1)(B) to the highest summary level of the pattern summary level being applied to the RIF (*i.e.,* a level ''4'' rating if the agency conducting the RIF uses a pattern C or G summary level appraisal system, or a level ''5'' rating if the agency uses a pattern B, E, F, or H summary level appraisal system). An agency cannot transmute a rating to a summary level which is not among those in the pattern being applied to the RIF.

(ii) In situations in which the agency running the RIF is using a pattern summary level rating appraisal system with a summary level no higher than a level ''3'' (*i.e.,* a pass/fail system) but has employees rated previously under a pattern with higher summary levels the agency must place the employees with the higher summary ratings at the performance subgroup at the top of retention register, or ahead of, other summary level ''3'' employees with no documented evidence of exceptional performance.

(g) *Missing ratings.* (1) Use of performance ratings for employees who do not have three actual ratings of record during the 4-year period prior to the date of issuance of reduction in force notices or the 4-year period prior to the agency-established cutoff date for ratings of record permitted in paragraph (c)(2) of this section shall be determined under paragraph (d) of this section, as appropriate, and as follows:

(2) The performance standing of an employee who has not received any rating of record for any year during the 4-year period shall be based on the modal rating as defined in 5 CFR 351.203 for the summary level pattern that applies to the employee's official position of record at the time of the reduction in force.

(3) The performance standing of an employee who has received at least one but fewer than three previous ratings of record during the 4-year period shall have his or her performance standing determined on the basis of the value of summary levels for the actual rating(s) of record divided by the number of actual ratings received. If an employee has received only two actual ratings of record during the period, the value of the summary levels is added together and divided by 2, with the result being either (1) a whole number or (2) a number with .5 decimal value. The agency totals these values and lists the employee in score order in accordance with § 351.204(d). If an employee has received only one actual rating of record during the period, its summary level value determines the employee's performance subgroup for purposes of this part.

§ 351.504 Veterans' preference.

(a) *Veterans' preference subgroups.* Veterans' preference subgroups for both competitive and excepted service employees are defined as follows:

(1) Subgroup AD includes each preference eligible employee who has a compensable service-connected disability of 30 percent or more.

(2) Subgroup A includes each preference eligible employee not included in subgroup AD.

(3) Subgroup B includes each nonpreference eligible employee.

(b) A retired member of a uniformed service is considered a preference eligible under this part only if the member meets at least one of the conditions of the following paragraphs (b)(1), (2), or (3) of this section, except as limited by paragraph (b)(4) or (b)(5):

(1) The employee's military retirement is based on disability that either:

(i) Resulted from injury or disease received in the line of duty as a direct result of armed conflict; or

(ii) Was caused by an instrumentality of war incurred in the line of duty during a period of war as defined by sections 101 and 301 of title 38, United States Code.

(2) The employee's retired pay from a uniformed service is not based upon 20 or more years of full-time active service, regardless of when performed but not including periods of active duty for training.

(3) The employee has been continuously employed in a position covered by this part since November 30, 1964, without a break in service of more than 30 days.

(4) An employee retired at the rank of major or above (or equivalent) is considered a preference eligible under this part if such employee is a disabled veteran as defined in section 2108(2) of title 5, United States Code, and meets one of the conditions covered in paragraphs (b)(1), (2), or (3) of this section.

(5) An employee who is eligible for retired pay under chapter 67 of title 10, United States Code, and who retired at the rank of major or above (or equivalent) is considered a preference eligible under this part at age 60, only if such employee is a disabled veteran as defined in section 2108(2) of title 5, United States Code.

§ 351.505 Length of service.

(a) All civilian service as a Federal employee, as defined in 5 U.S.C. 2105(a), is creditable for purposes of this part. Civilian service performed in employment that does not meet the definition of *Federal employee* set forth in 5 U.S.C. 2105(a) is creditable for purposes of this part only if specifically authorized by statute as creditable for retention purposes.

(b)(1) As authorized by 5 U.S.C. 3502(a)(A), all active duty in a uniformed service, as defined in 5 U.S.C. 2101(3), is creditable for purposes of this part, except as provided in paragraphs (b)(2) and (b)(3) of this section.

(2) As authorized by 5 U.S.C. 3502(a)(B), a retired member of a uniformed service who is covered by § 351.503(b) is entitled to credit under this part only for:

(i) The length of time in active service in the Armed Forces during a war, or in a campaign or expedition for which a campaign or expedition badge has been authorized; or

(ii) The total length of time in active service in the Armed Forces if the employee is considered a preference eligible under 5 U.S.C. 2108 and 5 U.S.C. 3501(a), as implemented in § 351.504(b).

(3) An employee may not receive dual service credit for purposes of this part for service performed on active duty in the Armed Forces that was performed during concurrent civilian employment as a Federal employee, as defined in 5 U.S.C. 2105(a).

(c)(1) The agency is responsible for establishing the service computation date applicable to each employee competing for retention under this part. If applicable, the agency is also responsible for adjusting the service computation date to withhold retention service credit for non-creditable service.

(2) The service computation date includes all actual creditable service under paragraph (a) and paragraph (b) of this section.

(d) *Service computation date.* The service computation date is computed on the following basis:

(1) The effective date of appointment as a Federal employee under 5 U.S.C. 2105(a) when the employee has no previous creditable service under paragraph (a) or (b) of this section; or if applicable,

(2) The date calculated by subtracting the employee's total previous creditable service under paragraph (a) or (b) of this section from the most recent effective date of appointment as a Federal employee under 5 U.S.C. 2105(a).

§ 351.506 Records.

(a) The agency is responsible for maintaining correct personnel records that are used to determine the retention standing of its employees competing for retention under this part.

(b) The agency must allow its retention registers and related records to be inspected by:

(1) An employee of the agency who has received a specific reduction in force notice, and/or the employee's representative if the representative is acting on behalf of the individual employee; and

(2) An authorized representative of OPM.

(c) An employee who has received a specific notice of reduction in force under authority of subpart H of this part has the right to review any completed records used by the agency in a reduction in force action that was taken, or will be taken, against the employee, including:

(1) The complete retention register with the released employee's name and other relevant retention information (including the names of all other employees listed on that register, and their individual service computation dates calculated under § 351.505(d)), so that the employee may consider how the agency constructed the competitive level, and how the agency determined the relative retention standing of the competing employees; and

(2) The complete retention registers for other positions that could affect the composition of the employee's competitive level, and/or the determination of the employee's assignment rights (*e.g.,* registers to which the released employee may have potential assignment rights under § 351.701(b) and (c)).

(d) An employee who has not received a specific reduction in force notice has no right to review the agency's retention registers and related records.

(e) The agency is responsible for ensuring that each employee's access to retention records is consistent with both the Freedom of Information Act (5 U.S.C. 552), and the Privacy Act (5 U.S.C. 552a).

(f) The agency must preserve all registers and records relating to a reduction in force for at least 1 year after the date it issues a specific reduction in force notice.

§ 351.507 Effective date of retention standing.

(a) The retention standing of each employee released from a competitive level in the order prescribed in § 351.601 is determined as of the date the employee is so released.

(b) The retention standing of each employee retained in a competitive level as an exception under § 351.606(b), § 351.607, or § 351.608, is determined as of the date the employee would have been released had the exception not been used. The retention standing of each employee retained under any of these provisions remains fixed until completion of the reduction in force action which resulted in the temporary retention.

(c) When an agency discovers an error in the determination of an employee's retention standing, it shall correct the error and adjust any erroneous reduction-in-force action to accord with the employee's proper retention standing as of the effective date established by this section.

■ 5. Revise § 351.705(a)(2) to read as follows:

§ 351.705 Administrative assignment.

(a) * * *

(2) Permit an employee in tenure group III, same performance subgroup, veterans' preference subgroup AD to displace an employee in tenure group III, same performance subgroup, veterans' preference subgroup A or B, or permit an employee in tenure group III, same performance subgroup, veterans' preference subgroup A to displace an employee in tenure group III, same performance subgroup, veterans' preference subgroup B consistent with § 351.701 (*e.g.,* an employee in tenure group III, performance summary level ratings of record total of 12, veterans' preference subgroup AD to displace an employee tenure group III, performance summary level ratings of record total of 12, veterans' preference subgroup A or B).

* * * * *

PART 430—PERFORMANCE MANAGEMENT

Subpart B—Performance Appraisal for General Schedule, Prevailing Rate, and Certain Other Employees

■ 6.Revise § 430.208(d)(4) to read as follows:

§ 430.208 Rating Performance.

* * * * *

(d) * * *

(4) The designation of a summary level and its pattern shall be used to provide consistency in describing ratings of record and as a reference point for applying other related regulations, excluding enhanced performance values under § 351.503(d) and (f) of this chapter.

§ 430.208 [Amended]

■ 7. In § 430.208, remove paragraph (d)(5).

[FR Doc. 2020–26347 Filed 12–16–20; 8:45 am]

BILLING CODE 6325–39–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 26

[Docket Nos. PRM–26–3; NRC–2009–0482, PRM–26–5; NRC–2010–0304]

Fitness-for-Duty Program

AGENCY: Nuclear Regulatory Commission.

ACTION: Petitions for rulemaking; denial.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is denying two petitions for rulemaking related to the fitness-for-duty program that were docketed as PRM–26–3, ''Professional Reactor Operator Society—Fitness-for-Duty Programs,'' and PRM–26–5, ''Nuclear Energy Institute—Fitness-for-Duty Programs,'' due to the discontinuation of the associated rulemaking.

DATES: As of December 17, 2020, the dockets for PRM–26–3 and PRM–26–5 are closed.

ADDRESSES: Please refer to Docket IDs NRC–2009–0482 or NRC–2010–0304 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket IDs NRC–2009–0482 or NRC–2010–0304. Address questions about NRC dockets to Dawn Forder; telephone: 301–415–3407; email: *Dawn.Forder@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in the **SUPPLEMENTARY INFORMATION** section.
- *Attention:* The PDR, where you may examine and order copies of public documents, is currently closed. You may submit your request to the PDR via email at *PDR.Resource@nrc.gov* 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: Yanely Malave, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–1519, email: *Yanely.Malave-Velez@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

Title 10 of the *Code of Federal Regulations* (10 CFR) 2.802, ''Petition for rulemaking—requirements for filing,'' provides an opportunity for any interested person to petition the Commission to issue, amend, or rescind any regulation in 10 CFR chapter I. The NRC received the following petitions for rulemaking (PRMs) regarding 10 CFR part 26, ''Fitness for Duty Programs,'' subpart I, ''Managing Fatigue,'' from the Professional Reactor Operator Society (PROS) and the Nuclear Energy Institute (NEI) after the NRC issued a final rule [1] in 2008 that substantially revised its fitness for duty requirements:

(1) PRM–26–3 Submitted by Robert N. Meyer on Behalf of PROS

On October 16, 2009, Mr. Robert N. Meyer, on behalf of PROS, an organization of operations personnel employed at nuclear power plants throughout the United States, submitted a PRM requesting that the NRC amend its fatigue management regulations to

[1] ''Fitness for Duty Programs; Final Rule,'' 73 FR 16966 (March 31, 2008).

change the term ''unit outage'' to ''site outage'' used in § 26.205(d)(4) and (d)(5) and that the definition of ''site outage'' should be provided to read as ''up to 1 week prior to disconnecting the reactor unit from the grid and up to 75-percent turbine power following reconnection to the grid'' (ADAMS Accession No. ML092960440). The NRC docketed the petition as PRM–26–3, and on November 27, 2009, published a document in the **Federal Register** requesting public comment (74 FR 62257). The comment period closed on February 10, 2010, and the NRC received 4 comment letters. After evaluating the merits of the petition and the public comments, the NRC determined that the issues raised in PRM–26–3 would be considered in a planned rulemaking activity titled, ''Quality Control/Quality Verification'' (QC/QV) (Docket ID: NRC–2009–0090) and published a **Federal Register** notice (76 FR 28192) on May 16, 2011 to this effect.

(2) PRM–26–5 Submitted by Anthony R. Pietrangelo on Behalf of NEI

On September 3, 2010, Anthony R. Pietrangelo on behalf of NEI, a nuclear power industry trade association, submitted a PRM requesting that the NRC amend its regulations regarding fatigue management based on experience gained since the regulations were amended in 2008. The NRC docketed the petition as PRM–26–5, and on October 22, 2010, published a document in the **Federal Register** requesting public comment (75 FR 65249). The comment period closed on January 5, 2011, and the NRC received 39 comment letters. After evaluating the merits of the petition and the public comments, the NRC determined that the issues raised in PRM–26–5 would be considered in the planned QC/QV rulemaking and published a **Federal Register** notice (76 FR 28192) on May 16, 2011 to this effect.

II. Discussion

A. Discontinuation of the Quality Control/Quality Verification (QC/QV) Rulemaking

In SECY–15–0074, ''Discontinuation of Rulemaking Activity—Title 10 of the *Code of Federal Regulations* Part 26, Subpart I, Quality Control and Quality Verification Personnel in Fitness for Duty Program (RIN 3150–AF12),'' (ADAMS Accession No. ML15084A092) dated May 19, 2015, the NRC staff requested Commission approval to discontinue the QC/QV rulemaking. This request was based on the following factors: (1) QC/QV inspections are most often performed by maintenance personnel who are already covered by the work hour controls in 10 CFR part 26, subpart I; (2) the few remaining inspections are performed by a small number of QC/QV-dedicated personnel; and (3) backfitting the 10 CFR part 26, subpart I, work hour controls to the QC/QV-dedicated personnel would not result in a substantial increase in the overall protection of the public health and safety or common defense and security. The Commission approved the discontinuation of this rulemaking effort in SRM–SECY–15–0074, ''Staff Requirements—SECY–15–0074—Discontinuation of Rulemaking Activity—Title 10 of the *Code of Federal Regulations* Part 26, Subpart I, Quality Control and Quality Verification Personnel in Fitness for Duty Program (RIN 3150–AF12),'' dated July 14, 2015 (ADAMS Accession No. ML15195A577).

B. Denial of PRM–26–3 and PRM–26–5

Under § 2.803(i)(2), if after closing the docket for a PRM under § 2.803(h)(2)(ii) by addressing it in an ongoing rulemaking the NRC decides not to complete the rulemaking, the PRM is documented as a denial of the PRM. In SRM–SECY–15–0074, the Commission approved the discontinuation of the QC/QV rulemaking, which was identified to address PRM–26–3 and PRM–26–5. Therefore, the NRC is denying these petitions without prejudice.

III. Conclusion

The NRC previously discontinued the QC/QV rulemaking and is therefore denying without prejudice PRM–26–3 and PRM–26–5 for the reasons discussed in this document.

Dated: December 8, 2020.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2020–27363 Filed 12–16–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

[Docket No. PRM–50–75; NRC–2002–0018]

Large Break Loss-of-Coolant Accident Redefinition

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; denial.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking dated February 6, 2002, submitted by Anthony R. Pietrangelo on behalf of the Nuclear Energy Institute, due to the discontinuation of the associated rulemaking.

DATES: As of December 17, 2020, the docket for PRM–50–75 is closed.

ADDRESSES: Please refer to Docket ID NRC–2002–0018 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2002–0018. Address questions about NRC dockets to Dawn Forder; telephone: 301–415–3407; email: *Dawn.Forder@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in the **SUPPLEMENTARY INFORMATION** section.
- *Attention:* The PDR, where you may examine and order copies of public documents, is currently closed. You may submit your request to the PDR via email at *PDR.Resource@nrc.gov* 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: Yanely Malave, telephone: 301–415–1519; email: *Yanely.Malave@nrc.gov;* or Robert Beall, telephone: 301–415–3874; email: *Robert.Beall@nrc.gov.* Both are staff of the Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Background

Title 10 of the *Code of Federal Regulations* (10 CFR) 2.802, ''Petition for rulemaking—requirements for filing,'' provides an opportunity for any interested person to petition the Commission to issue, amend, or rescind any regulation. On February 6, 2002, Anthony R. Pietrangelo, on behalf of the Nuclear Energy Institute (petitioner),

submitted a petition for rulemaking requesting that the NRC amend its regulations to allow licensees to use an alternative to the double-ended guillotine break of the largest pipe in the reactor coolant system in emergency core cooling system (ECCS) evaluation models (ADAMS Accession No. ML082460625). The NRC docketed the petition as PRM–50–75, and on April 8, 2002, published a notice of docketing in the **Federal Register** and requested public comment (67 FR 16654). The comment period closed on June 24, 2002, and the NRC received 18 comment letters (ADAMS Accession No. ML022390515).

After evaluating the merits of the petition and the public comments, the NRC determined that the issues raised in PRM–50–75 would be considered in the ongoing ''Risk-Informed Redefinition of Large Break Loss-of-Coolant Accident (LOCA) Emergency Core Cooling System (ECCS) Requirements'' rulemaking. On November 6, 2008, the NRC published a document in the **Federal Register** (73 FR 66000) stating that the NRC would address the substantive comments filed in PRM–50–75 as part of that rulemaking.

II. Discussion

A. Discontinuation of the Rulemaking

On December 10, 2010, the NRC staff provided the Commission SECY–10–0161, ''Final Rule: Risk-Informed Changes to Loss-of-Coolant Accident Technical Requirements (10 CFR 50.46a)(RIN 3150–AH29).'' Subsequent to the accident at Fukushima Dai-Ichi Nuclear Plant in March of 2011, the NRC staff requested Commission approval to withdraw the draft final rule during its evaluation of Fukushima Near-Term Task Force Recommendation 1 regarding the development of a new risk-informed regulatory framework from SECY–11–0093, ''Near-Term Report and Recommendations for Agency Actions Following The Events in Japan,'' and the recent publication of NUREG–2150, ''A Proposed Risk Management Regulatory Framework.'' The staff stated that:

> Although the staff believes that the draft final 10 CFR 50.46a rule is an appropriate and well-founded approach to risk-inform the NRC's emergency core cooling requirements, the staff requests that SECY–10-0161 be withdrawn from Commission consideration so that it may be resubmitted later after the staff has completed its regulatory framework evaluation. When the staff establishes its recommended approach, it will re-evaluate the draft final 10 CFR 50.46a rule to ensure its compatibility with the recommended regulatory framework. Based on the outcome of the compatibility evaluation and the completion of any necessary changes, the staff will re-submit the draft final 10 CFR 50.46a rule with or shortly after providing its regulatory framework recommendation to the Commission.[1]

In SECY–16–0009, ''Recommendations Resulting from the Integrated Prioritization and Re-Baselining of Agency Activities'' (ADAMS Accession No. ML16028A189) dated January 31, 2016, the NRC staff requested Commission approval of work to be shed, deprioritized, or performed with fewer resources. One of the items to be discontinued was the risk-informed loss-of-coolant accident rulemaking (Item 1 of Enclosure 1 to SECY–16–0009).

This rule would have provided a voluntary alternative to current regulatory requirements. However, at a public meeting to discuss the Risk Management Regulatory Framework paper (ADAMS Accession No. ML15026A328), certain industry representatives indicated that the nuclear industry would not be interested in implementing the final rule. The NRC staff's regulatory analysis for the draft final rule (ADAMS Accession No. ML103230250) also discussed comments submitted by the Boiling Water Reactor Owners Group, which conveyed the view that it would be difficult to evaluate the cost-benefit of the rule due to uncertainties about the cost of adopting the rule.

The Commission approved the discontinuation of the rulemaking in the staff requirements memorandum (SRM) to SECY–16–0009. On October 6, 2016, the NRC published a notice in the **Federal Register** informing the public of its decision to discontinue the 10 CFR 50.46a ECCS rulemaking. The NRC stated that it had ''decided not to proceed with this rulemaking activity because there is minimal adverse impact on our mission, principles, or values and the industry has indicated that there may not be much interest in implementing the final rule'' (81 FR 69447).

B. Denial of PRM–50–75

Under 10 CFR 2.803(i)(2), after closing the docket for a PRM under § 2.803(h)(2)(ii) by addressing it in an ongoing rulemaking, if the NRC decides not to complete the rulemaking, the PRM is documented as denied. In SRM–SECY–16–0009, the Commission approved discontinuation of the risk-informed LOCA requirements rulemaking, which was the rulemaking identified to address PRM–50–75. Therefore, the NRC is denying PRM–50–75 without prejudice.

III. Conclusion

The NRC previously discontinued the risk-informed LOCA requirements rulemaking and is therefore denying without prejudice PRM–50–75 for the reasons discussed in this document.

Dated: December 8, 2020.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2020–27364 Filed 12–16–20; 8:45 am]

BILLING CODE 7590–01–P

[1] Email dated April 20, 2012 from G. Bowman requesting withdrawal of 10 CFR 50.46a final rule (ADAMS Accession No. ML121500380).

NUCLEAR REGULATORY COMMISSION

10 CFR Chapter I

[NRC–2020–0065]

Transfer of Very Low-Level Waste To Exempt Persons for Disposal

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed interpretive rule; withdrawal.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is withdrawing a proposed interpretation of its low-level radioactive waste disposal regulations that would permit licensees to dispose of waste by transfer to persons who hold specific exemptions for the purpose of disposal by burial. The proposal is being withdrawn based on the NRC staff's assessment that the proposed changes may not benefit the regulatory framework for the disposal of low-level radioactive waste.

DATES: The proposed interpretive rule is withdrawn as of December 17, 2020.

ADDRESSES: Please refer to Docket ID NRC–2020–0065 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0065. 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.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly

available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.

• *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: Maurice Heath, telephone: 301–415–3137, email: *Maurice.Heath@nrc.gov* and Stephen Dembek, telephone: 301–415–2343, email: *Stephen.Dembek@nrc.gov.* Both are staff of the Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION: On March 6, 2020, the NRC issued a proposed interpretation of paragraph 20.2001(a)(1) of title 10 of the *Code of Federal Regulations* in the **Federal Register** (85 FR 13076). The proposed interpretation would have expanded, in guidance, the meaning of ''authorized recipient'' in § 20.2001, allowing for the disposal of very low-level radioactive waste (VLLW) at approved non-licensed disposal sites in accordance with technical and regulatory requirements established by the NRC or Agreement States for granting such an exemption.

This change would have had the effect of providing a regulatory approach that, in addition to that specified by § 20.2002, allowed the transfer and disposal of certain VLLW in hazardous and solid waste disposal facilities having explicit approval to dispose of VLLW. In cases where the waste disposal site had an approval (exemption) for disposing of VLLW, the use of § 20.2001 by the licensee would not have required additional, specific approval to transfer VLLW to that disposal site under certain circumstances.

The NRC sought comments on the proposed interpretive rule in order to engage stakeholders on the merits of the idea and collect feedback prior to making a decision on whether or not to move forward with the proposed interpretation. The comment period was extended in response to requests related to the COVID–19 Public Health Emergency and closed on October 21, 2020 (85 FR 45809).

The NRC received approximately 200 individual comment submissions and approximately 15,000 form letter submissions. The vast majority of these comments opposed the proposed interpretive rule. The major comment themes included:

The NRC should complete the 2018 VLLW Scoping Study, address the comments already submitted, and publicize the results instead of pursuing the proposed interpretive rule.

The current regulations for the disposal of VLLW are sufficient and already allow for an alternate method of disposal on a case-by-case basis under the provisions of § 20.2002.

The NRC should pursue rulemaking to provide a definition of VLLW that can be used across the industry if a regulatory change is pursued. Changes to LLW regulations, including the definitions of authorized recipient and VLLW, should be pursued via the formal rulemaking process and not as an interpretation to an existing regulation. This approach would be more in keeping with the provisions of the Administrative Procedures Act.

The NRC and/or Agreement State should provide opportunities for public involvement during the exemption review process that evaluates a disposal facility request to become an authorized recipient for the disposal of VLLW.

The approval process should consider the need for an NRC or Agreement State environmental review related to the proposed VLLW disposal sites.

The NRC should provide an explanation of the implementation of the proposed interpretation. Specific comments questioned how implementation would be managed across various Agreement State programs, the methods for verifying that VLLW disposals were conducted as intended, and requested clarification of oversight responsibilities in the event that provisions of an exemption for disposal were challenged or found not to have been met.

Implementation of the proposed interpretive rule should consider potential impacts on existing state and LLW compact requirements, including additional burdens on state agencies that would be the primary regulatory body involved in the review, approval, and oversight of disposal sites wishing to obtain an exemption for VLLW disposal. Specific comments questioned how the proposed change could affect the LLW disposal agreements already in place amongst various states involved in the LLW compact system.

In addition, the Organization of Agreement States Board and 10 individual Agreement States provided comments that did not support the NRC's expanded definition of ''authorized recipient.'' Most Agreement State comments also cited the restrictions in individual states that would prevent them from implementing the expanded definition.

The NRC staff assesses that the potential main benefit of the proposed interpretive rule—the potential for fewer regulatory approvals related to disposal at an authorized disposal site—would not outweigh the costs of implementing the proposed interpretive rule, especially given the lack of Agreement State support and a limited number of potential users. Therefore, the NRC has decided to withdraw its proposed interpretation of ''authorized recipient'' related to the requirements in § 20.2001 based on the conclusion that the proposed changes would not benefit the current regulatory framework for the disposal of VLLW.

The information obtained through the public comments on this effort will be considered in other ongoing low-level waste program initiatives, including the staff's Very Low-Level Waste Scoping Study. The scoping study is an ongoing action from SECY–16–0118, ''Programmatic Assessment of Low-Level Radioactive Waste Regulatory Program'' (ADAMS Package Accession No. ML15208A305). The staff will continue to monitor the external environment and seek innovations in the low-level waste regulatory program.

Dated: December 10, 2020.

For the Nuclear Regulatory Commission.

Patricia K. Holahan,

Director, Division of Decommissioning, Uranium Recovery, and Waste Programs, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2020–27565 Filed 12–16–20; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1134; Project Identifier MCAI–2020–01053–T]

RIN 2120–AA64

Airworthiness Directives; Airbus Defense and Space S.A. (Formerly Known as Construcciones Aeronauticas, S.A.) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2017–19–25, which applies to all Airbus Defense and Space S.A. Model CN–235, CN–235–100, CN–235–200, and CN–235–300 airplanes; and Model C–295 airplanes. AD 2017–19–25 requires repetitive inspections and operational checks of the affected fuel valves, and corrective actions if necessary. Since the FAA issued AD 2017–19–25, it has been determined that it is necessary to limit the installation of affected parts specified in AD 2017–19–25 to those parts that are maintained in accordance with certain instructions. This proposed AD would continue to require repetitive inspections and operational checks of the affected fuel valves, and corrective actions if necessary. This proposed AD would also limit the installation of affected parts to those that that are maintained in accordance with certain instructions, as specified in a European Union Aviation Safety Agency (EASA), which will be incorporated by reference. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by February 1, 2021.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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

You may view this IBR material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1134.

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–2020–1134; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3220; email *shahram.daneshmandi@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2020–1134; Project Identifier MCAI–2020–01053–T'' 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 the 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 *https://www.regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this proposed AD.

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 Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3220; email *shahram.daneshmandi@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Discussion

The FAA issued AD 2017–19–25, Amendment 39–19055 (82 FR 44895, September 27, 2017) (AD 2017–19–25), which applies to all Airbus Defense and Space S.A. Model CN–235, CN–235–100, CN–235–200, and CN–235–300 airplanes; and Model C–295 airplanes. AD 2017–19–25 requires repetitive inspections and operational checks of the affected fuel valves, and corrective actions if necessary. The FAA issued AD 2017–19–25 to address leaks in a motorized fuel valve, which could lead to failure of the fuel valve and consequent improper fuel system functioning or, in case of the presence of an ignition source, an airplane fire.

Actions Since AD 2017–19–25 Was Issued

Since the FAA issued AD 2017–19–25, it has been determined that it is necessary to limit the installation of affected parts specified in AD 2017–19–25 to those parts that are maintained in accordance with certain instructions.

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2019–0212, dated August 27, 2019

(EASA AD 2019–0212) (also referred to as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for all Airbus Defense and Space S.A. Model CN–235, CN–235–100, CN–235–200, and CN–235–300 airplanes; and Model C–295 airplanes. EASA AD 2019–0212 supersedes EASA AD 2017–0004 (which corresponds to FAA AD 2017–19–25).

This proposed AD was prompted by leakage of a motorized cross-feed fuel valve and a determination that it is necessary to limit the installation of affected parts specified in AD 2017–19–25 to those parts that are maintained in accordance with certain instructions. The FAA is proposing this AD to address leaks in a motorized fuel valve, which could lead to failure of the fuel valve and consequent improper fuel system functioning or, in case of the presence of an ignition source, an airplane fire. See the MCAI for additional background information.

Explanation of Retained Requirements

Although this proposed AD does not explicitly restate the requirements of AD 2017–19–25, this proposed AD would retain all of the requirements of AD 2017–19–25. Those requirements are referenced in EASA AD 2019–0212, which, in turn, is referenced in paragraph (g) of this proposed AD.

Related Service Information Under 1 CFR Part 51

EASA AD 2019–0212 describes procedures for repetitive inspections and operational checks of the affected fuel valves (cycling procedures and reapplication of grease or overhaul as applicable), and corrective actions if necessary. Corrective actions include replacement. EASA AD 2019–0212 also describes procedures for reporting inspection results.

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

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the State of Design Authority, the FAA has been notified of the unsafe condition described in the MCAI referenced above. The FAA is proposing this AD because the FAA evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in EASA AD 2019–0212 described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2019–0212 will be incorporated by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2019–0212 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in the EASA AD. Service information specified in EASA AD 2019–0212 that is required for compliance with EASA AD 2019–0212 will be available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1134 after the FAA final rule is published.

Costs of Compliance

The FAA estimates that this proposed AD affects 8 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
3 work-hours × $85 per hour = $255	$0	$255	$2,040

The FAA estimates the following costs to do any necessary replacements that would be required based on the results of the proposed inspection. The FAA has no way of determining the number of aircraft that might need these replacements:

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
5 work-hours × $85 per hour = $425	$38,448	$38,873

* Table does not include estimated costs for reporting.

The FAA estimates that it would take about 1 work-hour per product to comply with the proposed on-condition reporting requirement in this proposed AD. The average labor rate is $85 per hour. Based on these figures, the FAA estimates the cost of reporting the inspection results on U.S. operators to be $85 per product.

The FAA has received no definitive data on which to base the cost estimates for the on-condition corrective actions for the operational check specified in this proposed AD.

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 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 current valid OMB control number. The control number for the collection of information required by this proposed AD is 2120–0056. The paperwork cost associated with this proposed AD has been detailed in the Costs of Compliance section of this document and includes time for reviewing instructions, as well as completing and reviewing the collection of information. Therefore, all reporting associated with this proposed AD is mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed 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 above, I certify this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive (AD) 2017–19–25, Amendment 39–19055 (82 FR 44895, September 27, 2017), and

■ b. Adding the following new AD:

Airbus Defense and Space S.A. (Formerly known as Construcciones Aeronauticas, S.A.): Docket No. FAA–2020–1134; Project Identifier MCAI–2020–01053–T.

(a) Comments Due Date

The FAA must receive comments by February 1, 2021.

(b) Affected ADs

This AD replaces AD 2017–19–25, Amendment 39–19055 (82 FR 44895, September 27, 2017) (AD 2017–19–25).

(c) Applicability

This AD applies to all Airbus Defense and Space S.A. Model CN–235, CN–235–100, CN–235–200, and CN–235–300 airplanes; and Model C–295 airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 28, Fuel.

(e) Reason

This AD was prompted by leakage of a motorized cross-feed fuel valve and a determination that it is necessary to limit the installation of affected parts to those parts that are maintained in accordance with certain instructions. The FAA is issuing this AD to address leaks in a motorized fuel valve, which could lead to failure of the fuel valve and consequent improper fuel system functioning or, in case of the presence of an ignition source, an airplane fire.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2019–0212, dated August 27, 2019 (EASA AD 2019–0212).

(h) Exceptions to EASA AD 2019–0212

(1) Where EASA AD 2019–0212 refers to April 25, 2016 (the effective date of EASA AD 2016–0071) or January 23, 3017 (the effective date of EASA AD 2017–0004), this AD requires using November 1, 2017 (the effective date of AD 2017–19–25).

(2) Where EASA AD 2019–0212 refers to its effective date, this AD requires using the effective date of this AD.

(3) The ''Remarks'' section of EASA AD 2019–0212 does not apply to this AD.

(4) Although the service information referenced in EASA AD 2019–0212 specifies to submit all inspection findings to the manufacturer, this AD requires reporting only as specified in paragraph (8) of EASA AD 2019–0212.

(5) Where paragraph (5) of EASA AD 2019–0212 specifies ''any discrepancy,'' for this AD ''any discrepancy'' is defined as the valve not opening or closing as commanded during the operational check.

(6) Paragraph (8) of EASA AD 2019–0212 specifies to report inspection results to Airbus Defense and Space S.A. within a certain compliance time. For this AD, report inspection results at the applicable time specified in paragraph (h)(6)(i) or (ii) of this AD.

(i) If the inspection was done on or after the effective date of this AD: Submit the report within 60 days after the inspection.

(ii) If the inspection was done before the effective date of this AD: Submit the report within 60 days after the effective date of this AD.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Large Aircraft Section, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the Large Aircraft Section, International Validation Branch, send it to the attention of the person identified in paragraph (j)(2) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, Large Aircraft Section, International Validation Branch, FAA; or EASA; or Airbus Defense and Space S.A.'s EASA Design Organization Approval (DOA).

If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *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 current 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 1 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 as required by this AD. 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.

(j) Related Information

(1) For information about EASA AD 2019–0212, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1134.

(2) For more information about this AD, contact Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3220; email *shahram.daneshmandi@faa.gov.*

Issued on December 11, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–27691 Filed 12–16–20; 8:45 am]

BILLING CODE 4910–13–P

PEACE CORPS

22 CFR Part 306

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

45 CFR Part 1225

RIN 0420–AA27

Volunteer Discrimination Complaint Process

AGENCY: The Peace Corps and The Corporation for National and Community Service (CNCS).

ACTION: Joint proposed rule.

SUMMARY: This joint document amends the regulations that the Peace Corps and Corporation for National and Community Service (CNCS) follow to process complaints of discrimination by volunteers and applicants for volunteer service. The current regulations were promulgated in January 1981 when the Peace Corps and domestic volunteer programs (such as VISTA, now subsumed by CNCS) were one entity under an organization called ACTION. At that time, Congress extended the statutory protections of the Civil Rights Act and other laws to such volunteers. Congress has since separated out the two agencies and has expressly removed the Peace Corps. As such, the regulations need to be updated.

DATES: This document is applicable March 17, 2021 without further action, unless adverse comment is received by January 19, 2021. If adverse comment is received, the Peace Corps and CNCS will publish a timely withdrawal of the document in the **Federal Register**.

ADDRESSES: You may send comments, identified by RIN 0420–AA27, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for sending comments.
- *Email: policy@peacecorps.gov.* Include RIN 0420–AA27 in the subject line of the message.
- *Mail:* The Peace Corps/The Office of General Counsel/1275 First Street NE/Washington, DC 20526.

Instructions: All submissions received must include the receiving agency's name, which is the Peace Corps, designate the Office of General Counsel, and note the Regulatory Information Number (RIN) for this rulemaking.

FOR FURTHER INFORMATION CONTACT: David van Hoogstraten, (202) 692–2150, *dvanhoogstraten@peacecorps.gov.*

Background: The Peace Corps is an independent government agency that was legislatively established in 1961 by the Peace Corps Act. Separately, in 1973, the Domestic Volunteer Service Act (Pub. L. 93–113) established domestic volunteer programs, such as VISTA, and joined the Peace Corps with those domestic volunteer programs under an umbrella organization called ACTION.

In 1979, the Domestic Volunteer Service Act Amendments (Pub. L. 96–143) extended the nondiscrimination policies and authorities set forth in Title VII of the Civil Rights Act of 1964, Title V of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975 to applicants for enrollment and volunteers serving under both the Peace Corps Act and the Domestic Volunteer Service Act. That section further directed that any remedies available to individuals under such laws, other than the right to appeal to the Equal Employment Opportunity Commission, would be available to such applicants or volunteers. Congress, in extending the non-discrimination protections to the volunteers, required that the Directors of ACTION and Peace Corps prescribe regulations specifically tailored to the circumstances of such volunteers. This mandate led to the promulgation of the rules in 45 CFR 1225, which applied to both Peace Corps volunteers and domestic volunteers (and applicants for such volunteer service) who filed complaints of discrimination. At that time, a section was also added to the Peace Corps' regulations, at 22 CFR 300, et seq, entitled *Volunteer Discrimination Complaint Procedure,* which only contains a cross reference to 45 CFR 1225 (see 22 CFR 306).

In December of 1981, Congress again separated the Peace Corps from domestic volunteers, and removed it from the umbrella of ACTION (Pub. L. 97–113). In the Domestic Volunteer Service Act Amendment of 1984, Pub. L. 98–288, sec. 30a (codified at 42 U.S.C. 5057), Congress expressly removed the Peace Corps from being subject to Title VII of the Civil Rights Act and the other non-discrimination statutes. However, conforming amendments by ACTION (now subsumed by the Corporation for National and Community Service) were not made to 45 CFR 1225 to remove references to the Peace Corps.

At this time, the Peace Corps seeks to update its regulations to reflect the current statutory framework applicable to Peace Corps volunteers and applicants, by striking references to the Peace Corps from 45 CFR 1225, and adding a revised non-discrimination process into the Peace Corps regulations in 22 CFR 306.

SUPPLEMENTARY INFORMATION: The Peace Corps Act (22 U.S.C. 2501, *et seq.*) establishes the Peace Corps and sets forth the requirements for program operations, including those for selecting volunteers. The Act states that ''except as provided in [the Act], volunteers shall not be deemed officers or employees or otherwise in the service or employment of, or holding office under, the United States for any purpose. *In carrying out this subsection, there shall be no discrimination against any person on account of race, sex, creed, or color.*''

Because Peace Corps volunteers are not considered federal employees or otherwise in the service or employment of the United States for any purpose not specified in the Peace Corps Act, the regulations implementing Section 717 of the Civil Rights Act of 1964 (and other nondiscrimination policies and authorities), and the right to appeal to the Equal Employment Opportunity Commission, do not apply to volunteers.

These regulations were first promulgated to ensure that volunteers had a process to make complaints regarding discriminatory conduct proscribed by the Peace Corps Act and the Peace Corps' policy. The regulations are now being updated and revised to reflect current best practices.

The proposed rule would revise and update rules for volunteer discrimination complaint processing, which were last published in the **Federal Register** on January 6, 1981, and entered into effect on January 6, 1981, and currently appear at 45 CFR part 1225, which is cross referenced in 22 CFR part 306.

Request for Comments

The Peace Corps invites public comment on all aspects of this proposed rule and will take those comments into account before publishing a final rule. The proposed rule makes adjustments for clarification, efficiency, and streamlines the language of some procedural provisions and makes the following key changes:

22 CFR 306

(1) *Purpose.* § 306.1 is a revision of 45 CFR 1225.1. It changes and expands the list of protected classes that can be considered as a basis for filing claims of discrimination, and includes the Peace Corps Inspector General as an additional avenue for filing claims of discrimination.

(2) *Policy.* § 306.2 is a revision of 45 CFR 1225.2. It amends the language setting forth how the Peace Corps will respond to cases in which discrimination was found and adds that Peace Corps staff members are required to participate in investigations.

(3) *Definitions.* § 306.3 is a revision of 45 CFR 1225.3. It expands the definition of ''volunteer'' to include persons who were sworn in as volunteers but are no longer in service; conforms changes to titles such as the Director of the Office of Civil Rights and Diversity (instead of E.O. Director); adds definitions for words used in the regulations, such as ''counselor'' and ''filing date''; and revises other definitions to reflect current roles and practices.

(4) *Coverage.* § 306.4 is a revision of 45 CFR 1225.4. It addresses the consolidation of claims under a single complaint, as well as complaints that fall under separate Peace Corps administrative processes. The revision clarifies that these regulations do not create any new rights of action or jurisdiction before U.S. courts.

(5) *Representation.* § 306.5 is a revision of 45 CFR 1225.5. It abridges the current section on representation and removes language that is no longer pertinent.

(6) *Freedom from Retaliation.* § 306.6 is a restatement of 45 CFR 1225.6 with no significant changes other than changing the word reprisal to retaliation and consolidating a number of behaviors under the term retaliation.

(7) *Review of Allegations of Retaliation.* § 306.7 is a restatement of 45 CFR 1225.7, and it additionally grants the OCRD Director discretion in consolidating claims.

(8) *Pre-complaint procedure.* § 306.8 replaces the current 45 CFR 1225.8. It is a step-by-step explanation of the process followed when an individual files an initial complaint of discrimination, which is also known as the ''counseling'' or ''informal'' stage, and is geared toward reaching a mutual resolution between the complainant and the agency. The new section specifies timetables to be followed, responsibilities of specific agency officers, and notifications that need to be provided to the individual and to relevant staff.

(9) *Complaint Procedure.* § 306.9 replaces the current 45 CFR 1225.9. It is a step-by-step explanation of the process to be followed when an individual files a formal complaint of discrimination, which involves an investigation and a final agency decision. The new section specifies standards for acceptance and dismissal, timetables to be followed, responsibilities of specific agency officers, and notifications that need to be provided to the individual and to relevant staff. It also outlines the timeframe and process for appealing a proposed final agency decision to the Director of the Peace Corps.

(10) *Corrective Action.* § 306.10 is a restatement of 45 CFR 1225.10 with no changes other than removing a provision about attorney's fees. Sections 1225.11 through 1225.21 were stricken in their entirety.

45 CFR 1225

The proposed edits are technical in nature. For example, they remove any references to the Peace Corps, the Director of Peace Corps, or the Peace Corps Act throughout the section, and replace references to ACTION with Corporation for Community and National Service (CNCS) and AmeriCorps and SeniorCorps.

Regulatory Certifications

Executive Orders 12866 and 13563—Regulatory Review

This regulation has been drafted and reviewed in accordance with E.O. 12866, ''Regulatory Planning and Review,'' section 1(b), Principles of Regulation, and in accordance with E.O. 13563, ''Improving Regulation and Regulatory Review,'' section 1(b), General Principles of Regulation, and the Office of Management and Budget, Office of Information and Regulatory Affairs has determined it to be non-significant within the meaning of E.O. 12866. Additionally, because this rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in E.O. 13771. See OMB's Memorandum titled ''Interim Guidance Implementing Section 2 of the E.O. of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs' '' (February 2, 2017), supplemented by OMB's Memorandum titled ''Implementing E.O. 13771, Titled 'Reducing Regulation and Controlling Regulatory Costs.' ''

Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b))

This regulatory action will not have a significant adverse impact on a substantial number of small entities.

Unfunded Mandates Act of 1995 (Sec. 202, Pub. L. 104–4)

This regulatory action does not contain a Federal mandate that will result in the expenditure by State, local, and tribal governments, in aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments.

Paperwork Reduction Act of 1995 (44 U.S.C., Chapter 35)

This regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

Federalism (Executive Order 13132)

This regulatory action does not have Federalism implications, as set forth in E.O. 13132. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

List of Subjects in 22 CFR Part 306 and 45 CFR Part 1225

Volunteer Discrimination Complaint Procedures.

Title 22

Peace Corps

■ 1. For the reasons set out in the preamble, the Peace Corps proposes to revise 22 CFR Part 306 as follows:

Part 306—Volunteer Discrimination Complaint Procedure

Secs.

Subpart A. General Provisions

306.1 Purpose.
306.2 Policy.
306.3 Definitions.
306.4 Coverage.
306.5 Representation.
306.6 Freedom from Retaliation.
306.7 Review of Allegations of Retaliation.

Subpart B. Processing Individual Complaints of Discrimination

306.8 Pre-complaint Procedure.
306.9 Complaint Procedure.
306.10 Corrective Action.

Authority: 22 U.S.C. 2501 *et seq.*

PART 306—VOLUNTEER DISCRIMINATION COMPLAINT PROCEDURE

Subpart A—General Provisions

§ 306.1 Purpose.

The purpose of this Part is to establish a procedure for the filing, investigation, and administrative determination of allegations of discrimination (including harassment) based on race, color, religion, sex, national origin, age (40 or over), disability or other bases provided for in applicable statutes, regulations or the Peace Corps Manual or history of participation in the Peace Corps discrimination complaint process which arise in connection with the recruitment, selection, placement, service, or termination of applicants, Trainees, or Volunteers. In addition, any Peace Corps applicant, Trainee, or Volunteer may submit an allegation of discrimination to the Peace Corps Office of Inspector General at any time, and the allegation will be processed in accordance with policy and procedures of the Office of Inspector General.

§ 306.2 Policy.

(a) In the recruitment, selection, placement, service, and termination of Peace Corps Trainees and Volunteers, it is the policy of the Peace Corps to provide equal opportunity for all persons and to prohibit discrimination based on race, color, religion, sex, national origin, age (40 or over), disability, and other bases provided for in applicable statutes, regulations or the Peace Corps Manual, or history of participation in the Peace Corps discrimination complaint process.

(b) It is the policy of the Peace Corps, upon a determination that such prohibited discrimination has occurred, to take appropriate corrective action to remedy the discrimination and to prevent its recurrence.

(c) It is the policy of the Peace Corps that all agency staff must cooperate in the investigation of a complaint. Volunteers and Trainees are strongly encouraged to cooperate.

§ 306.3 Definitions.

Unless the context requires otherwise, in this Part:

(a) ''Director'' means the Director of the Peace Corps.

(b) ''OCRD Director'' means the Director of the Peace Corps' Office of Civil Rights and Diversity.

(c) ''Prohibited discrimination'' means discrimination (including harassment) on the basis of race, color, religion, sex, national origin, age (40 or over), disability, or other bases provided for in applicable statutes, regulations or the Peace Corps Manual, or history of participation in the Peace Corps discrimination complaint process.

(d) ''Applicant'' means a person who has submitted a completed application required for consideration of eligibility for Peace Corps Volunteer service. ''Applicant'' may also mean a person who alleges that the actions of agency personnel precluded them from submitting such an application or any other information reasonably required by the appropriate personnel as necessary for a determination of the individual's eligibility for Volunteer service.

(e) ''Trainee'' means a person who has accepted an invitation issued by the Peace Corps and has registered for Peace Corps staging.

(f) ''Volunteer'' means a person who has taken the oath of service and been sworn in for Peace Corps service, whether or not this person is still in Peace Corps service.

(g) ''Complainant'' means an aggrieved applicant, Trainee, or Volunteer who believes they have been subject to prohibited discrimination and files a formal complaint.

(h) ''Complaint'' means a written statement signed by a Complainant alleging prohibited discrimination and submitted to the OCRD Director, as described in section 306.9(a) of this Part.

(i) ''File(d) Date'' means the date a Complaint is received by the appropriate agency official.

(j) ''Counselor'' means an official designated by the OCRD Director to perform an informal inquiry focused on possible resolution as detailed in this Part.

(k) ''Final Agency Decision (FAD)'' means the Peace Corps' final written determination on a Complaint.

§ 306.4 Coverage.

(a) Except as set out below, these procedures apply to all Peace Corps applicants, Trainees, and Volunteers.

(1) To the extent that a Trainee or Volunteer makes a complaint containing an allegation of prohibited discrimination in connection with conduct that constitutes sexual misconduct as defined in the Peace Corps' policy on Volunteer sexual misconduct.

(2) When an applicant, Trainee, or Volunteer makes a complaint which contains an allegation of prohibited discrimination in connection with an early termination or other administrative procedure of the agency, only the allegation of prohibited discrimination will be processed under this Part. At the discretion of the OCRD Director, additional allegations or claims material to the complaint may be consolidated with the discrimination complaint for processing under these regulations. Any issues which are not so consolidated will continue to be processed under those procedures pursuant to which they were originally raised.

(3) Complaints of retaliation in connection with allegations made under the Peace Corps Volunteer Confidentiality Protection policy shall be handled in accordance with that policy.

(b) The OCRD Director has the discretion to consolidate complaints from different applicants, Trainees, or Volunteers that allege common underlying facts and similar claims.

(c) These regulations do 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. Coverage under these rules does not constitute acceptance by the agency or the United States Government of jurisdiction for judicial review.

§ 306.5 Representation.

Any aggrieved party may be assisted in all stages of these procedures under this Part by an attorney or non-staff representative of his or her own choosing at his or her own expense. An aggrieved party must immediately inform the agency if representation is retained.

§ 306.6 Freedom from Retaliation.

Aggrieved parties, their representatives, and witnesses will be free from retaliation at any stage in the presentation and processing of a complaint under this section, including the counseling stage described in 306.8 of this Part, or any time thereafter.

§ 306.7 Review of Allegations of Retaliation.

(a) An aggrieved party, his or her representative, or a witness who alleges retaliation in connection with the presentation of a complaint under this Part, may, if covered by this Part, request in writing that the allegation be reviewed as an act of discrimination subject to the procedures described in Subpart B or that the allegation be considered as an issue in the complaint at hand. The determination whether to consider the complaint in the same or a separate proceeding is within the discretion of the OCRD Director.

Subpart B—Processing Individual Complaints of Discrimination

§ 306.8 Pre-complaint procedure.

(a) Any applicant, Trainee or Volunteer who believes that he or she has been subject to prohibited discrimination must bring such allegations to the attention of OCRD within 60 days of the alleged discrimination, at which point a Counselor will be assigned to attempt to resolve them.

(b) The pre-complaint procedure is intended to determine whether the concerns of the aggrieved party can be resolved to the mutual satisfaction of the aggrieved party and the agency without the filing of a formal complaint.

(c) The Counselor serves as a neutral party, to gather a limited amount of information from the aggrieved party about his or her allegations, explain to the aggrieved party his or her rights, obtain information to determine the applicability of this regulation, and where appropriate, attempt an informal resolution among relevant parties.

(d) The amount of information that the Counselor gathers from the agency is limited to information needed to reach an informal resolution to the mutual satisfaction of the aggrieved party and the agency.

(e) The Counselor will keep a written record of his or her activities, which will be submitted to the OCRD Director as a Counselor's report.

(f) To the extent necessary to reach an informal resolution, the Counselor may reveal to relevant agency officials the identity of the aggrieved party. In the event that the aggrieved party requests that the Counselor not share his or her identity with agency officials, the Counselor will not reveal the identity of the aggrieved party (or information that could be used to easily identify the aggrieved party) outside of OCRD. If appropriate, the Counselor should explain to the aggrieved party that an informal resolution and/or the scope of relief available may be limited as a result of the request for anonymity.

(g) The pre-complaint process should be completed within 30 days, but the OCRD Director may extend the period upon request of the aggrieved party or the agency for good cause shown.

(h) If, after inquiry and counseling, an informal resolution to the allegation is not reached, the Counselor will notify the aggrieved party in writing of the right to file a formal complaint of discrimination with the OCRD Director within 30 calendar days of the aggrieved party's receipt of the notice.

(i) As an alternative to assignment of a Counselor as described above, the aggrieved party may ask for Alternative Dispute Resolution as set out in the Peace Corps' policy. In such a case, the parties have 90 days to attempt in good faith to reach an informal resolution of the allegation. At any time during the course of Alternative Dispute Resolution, the aggrieved party or the Responsible Management Official (or their Supervisor), in consultation with the Office of the General Counsel, may terminate those proceedings.

§ 306.9 Complaint Procedure.

(a) An applicant, Trainee or Volunteer who wishes to file a formal complaint must do so within 30 days of receiving the notice set out in 306.8(g) above, by filing a signed complaint in writing with OCRD. A complaint must set forth specifically:

(1) A detailed description, including names and dates, if possible, of the actions of the Peace Corps officials or other persons which resulted in the alleged prohibited discrimination;

(2) The manner in which the Peace Corps' action directly affected the complainant; and

(3) The relief sought.

(b) A complaint that does not conform to the above requirements will nevertheless be deemed to have been received by the OCRD, and the complainant will be notified of the steps necessary to correct the deficiencies of the complaint. The complainant will have 30 days from receipt of notification that the complaint is defective to submit an amended complaint.

(c) The OCRD Director must accept a complaint if the process set forth above has been followed, and the complaint states a covered claim of prohibited discrimination. The OCRD Director may extend the time limits set out above:

(1) When the complainant shows that they were not notified of the time limits and were not otherwise aware of them;

(2) The complainant shows that they were prevented by circumstances beyond their control from submitting the matter in a timely fashion; or

(3) For other reasons considered sufficient by the OCRD Director.

(d) At any time during the complaint procedure, the OCRD Director may dismiss a complaint based on the aggrieved party's failure to prosecute the complaint. However, this action may be taken only after:

(1) The OCRD Director has made a written request, including notice of the proposed dismissal, that the Complainant provide certain information or otherwise proceed with the complaint; and

(2) 30 days have elapsed since the sending of the request.

If the complaint is rejected for failure to meet one or more of the requirements set out in the procedure outlined in 306.8 or is dismissed, the OCRD Director will inform the aggrieved party in writing of this FAD, advising that the Peace Corps will take no further action.

(e) Upon acceptance of the complaint and receipt of the Counselor's report, the OCRD Director will provide for a prompt impartial investigation of the complaint. The OCRD may employ a Peace Corps employee or external party to conduct the investigation. If a Peace Corps employee is selected to investigate the complaint, the person assigned to investigate the complaint may not occupy a position in the agency which is, directly or indirectly, under the jurisdiction of the head of that part of the agency in which the complaint

arose. The investigation will include a review of the circumstances under which the alleged discrimination occurred, and any other circumstances which may constitute, or appear to constitute, discrimination against the complainant.

(f) Agency officials responsible for providing information relating to the complaint to the investigator will be provided such information about the complaint as they may need in order to respond appropriately. For example, responding agency officials who have a need to know may be provided with information including the identity of the complainant and statements of the alleged discriminatory basis and adverse action.

(g) In cases where sensitive and/or protected information about applicants, Trainees, or Volunteers (other than the complainant) is requested or involved, agency officials may only disclose such information that is directly relevant to claim(s) being investigated, and must ensure that such information is handled in such a manner that the privacy of the applicants, Trainees, or Volunteers in question is fully protected, in accordance with the Peace Corps' policy on confidentiality of Volunteer information.

(h) Every agency official responsible for providing information relating to the complaint to the investigator may at any point consult the Office of the General Counsel and/or his or her supervisor, unless the supervisor is alleged to have been involved in the conduct that is the subject of the complaint. Agency officials responsible for providing information to the investigator shall only provide information based on personal knowledge, and should not seek to align or conform his or her statement with that of another responding agency official.

(i) The investigator will compile a report of investigation (ROI) and forward the ROI to the OCRD Director. The OCRD Director will arrange for preparation of a draft FAD, which will be in writing, state the reasons underlying the decision, recommend corrective action if and as appropriate, and advise the complainant of the right to appeal the recommended FAD to the Peace Corps Director, or designee. To the extent feasible, this will be completed within 120 days of the filing of the complaint. However, the OCRD Director has discretion to extend the period.

(j) The OCRD Director will issue the proposed FAD to the complainant with a copy of the ROI.

(k) Within ten calendar days of receipt of such proposed FAD, the complainant may submit his or her appeal of the proposed disposition to the Peace Corps Director, or designee.

(l) The Peace Corps Director, or designee, will, to the extent feasible, decide the issue within 45 days of the date of receipt of the appeal. The claimant will be informed in writing of the decision and its basis and advised that it is the FAD regarding the complaint.

(m) Where a complainant does not submit a timely appeal pursuant to (k) above, the OCRD Director will issue the proposed FAD as the FAD.

(n) The OCRD Director will inform relevant management officials as to whether or not prohibited discrimination was found in the FAD.

§ 306.10 Corrective Action.

When the agency's FAD states that the aggrieved party has been subjected to prohibited discrimination, the following corrective actions may be taken:

(a) Selection as a trainee for an otherwise qualified complainant found to have been denied selection based on prohibited discrimination.

(b) Reinstatement to Volunteer service for a complainant found to have been early-terminated as a result of prohibited discrimination. To the extent possible, a terminated Volunteer will be placed in the same position previously held. However, reinstatement to the specific country of prior service, or to the specific position previously held is contingent on programmatic considerations, including but not limited to the continued availability of the position or program in that country, and acceptance by the host country of such placement. If the same position is deemed to be no longer available, the aggrieved party will be offered reenrollment in a position in as similar as possible circumstances to the position previously held, or will be given interrupted service status. A reenrollment may require a medical clearance and/or other clearances, and both additional training and an additional two year commitment to Volunteer service.

(c) Such other relief as may be deemed appropriate by the Peace Corps.

Title 45

Corporation for National Community Service

■ 2. For the reasons set out in the preamble, the Corporation for National Community Service proposes to add 45 CFR part 1225 to read as follows:

PART 1225—MEMBER AND VOLUNTEER DISCRIMINATION COMPLAINT PROCEDURE

Secs.

Subpart A. General Provisions

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1225.12 Precomplaint Procedure.
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1225.15 Notification and Opting Out.
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1225.17 Agency Decision.
1225.18 Notification of Class Members of Decision.
1225.19 Corrective Action.
1225.20 Claim Appeals.
1225.21 Judicial Review.

Authority: 42 U.S.C. 5057(d), 12635(d), and 12651(c).

PART 1225—MEMBER AND VOLUNTEER DISCRIMINATION COMPLAINT PROCEDURE

Subpart A—General Provisions

§ 1225.1 Purpose.

The purpose of this part is to establish a procedure for the filing, investigation, and administrative determination of allegations of discrimination based on race, color, national origin, religion, age, sex, disability or political affiliation, which arise in connection with the recruitment, selection, placement, service, or termination of AmeriCorps and AmeriCorps Seniors applicants, candidates, Members and Volunteers for part time and full time service, as appropriate.

§ 1225.2 Policy.

It is the policy of the Corporation for National and Community Service (CNCS) to provide equal opportunity in all its national service programs for all persons and to prohibit discrimination based on race, color, national origin, religion, age, sex, disability or political affiliation in the recruitment, selection, placement, service, and termination of AmeriCorps and AmeriCorps Seniors applicants, candidates, Members and

Volunteers. It is the policy of CNCS, upon determining that such prohibited discrimination has occurred, to take all necessary corrective action to remedy the discrimination, and to prevent its recurrence.

§ 1225.3 Definitions.

Unless the context requires otherwise, in this Part:

(a) ''CEO'' means the Chief Executive Officer of CNCS. The term shall also refer to any designee of the CEO.

(b) ''EEOP Director'' means the Director of the Equal Employment Opportunity Program of CNCS. The term shall also refer to any designee of the EEOP Director.

(c) ''Illegal discrimination'' means discrimination on the basis of race, color, national origin, religion, age, sex, disability or political affiliation as defined in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); Title V of the Rehabilitation Act of 1973 (29 U.S.C. 791, *et seq.*); the Age Discrimination Act of 1975 (42 U.S.C 6101, *et seq.*), Section 175 of the National and Community Service Act of 1990, as amended, and Section 5057 of the Domestic Volunteer Service Act of 1973, as amended. Further clarification of the scope of matters covered by this definition may be obtained by referring to the following regulations: Sex Discrimination: 29 CFR part 1604; Religious Discrimination: 29 CFR part 1605; National Origin Discrimination: 29 CFR part 1606; Age Discrimination: 45 CFR part 90; Disability Discrimination: 29 CFR 1630.

(d) ''Applicant'' means a person who has submitted a completed application required for consideration of eligibility for CNCS national service as a Member or Volunteer. ''Applicant'' may also mean a person who alleges that the actions of recipient or subrecipient organization staff, or agency personnel precluded him or her from submitting such an application or any other information reasonably required by CNCS as necessary for a determination of the individual's eligibility for national service.

(e) ''Candidate'' means a person who has accepted an offer to commence service as a Member or Volunteer but has not yet enrolled for service in a CNCS national service program.

(f) ''AmeriCorps Member'' means a person who serves in a national service position for which a Segal AmeriCorps Education Award could be provided.

(g) ''AmeriCorps Seniors Volunteer'' means a person who serves as a volunteer through a program funded under Title II of the DVSA, including the Retired Senior Volunteer Program, the Foster Grandparent Program, and the Senior Companion Program.

(h) ''Complaint'' means a written statement signed by the complainant and submitted to the EEOP Director. A complaint shall set forth specifically and in detail:

(1) A description of the management policy or practice during the application stage as an applicant, during the candidacy stage as a Candidate, or during the service stage as a Member or Volunteer, if any, giving rise to the complaint;

(2) A detailed description including names and dates, if possible, of the actions of CNCS, recipients or subrecipients of CNCS assistance or resources, or the officials of those recipients or subrecipients, which resulted in the alleged illegal discrimination;

(3) The manner in which the action of CNCS, or the CNCS recipient or subrecipient, directly affected the complainant; and

(4) The relief sought.

A complaint shall be deemed filed on the date it is received by the appropriate agency official. When a complaint does not conform with the above definition, it shall nevertheless be accepted. The complainant shall be notified of the steps necessary to correct the deficiencies of the complaint. The complainant shall have 30 days from his or her receipt of notification of the complaint defects to resubmit an amended complaint.

(i) ''Counselor'' means an official designated by the EEOP Director to perform the functions of conciliation as detailed in this part.

(j) ''Agent'' means a class member who acts for the class during the processing of a class complaint. In order to be accepted as the agent for a class complaint, in addition to those requirements of a complaint found in 1225.3(g) of this part, the complaint must meet the requirements for a class complaint as found in Subpart C of these regulations.

§ 1225.4 Coverage.

(a) These procedures apply to all CNCS national service applicants, candidates, Members and Volunteers throughout their term of service with CNCS, or with recipients and subrecipients of CNCS assistance or resources. When an applicant, candidate, Member or Volunteer makes a complaint which contains an allegation of illegal discrimination in connection with an action that would be otherwise be processed under a grievance, early termination, or other administrative system of the agency, the allegation of illegal discrimination shall be processed under this Part. At the discretion of the EEOP Director, any other issues raised may be consolidated with the discrimination complaint for processing under these regulations. Any issues which are not so consolidated shall continue to be processed under those procedures in which they were originally raised.

(b) The submission of class complaints alleging illegal discrimination as defined above will be handled in accordance with the procedure outlined in Subpart C.

§ 1225.5 Representation.

Any aggrieved party may be represented and assisted in all stages of these procedures by an attorney or representative of his or her own choosing. An aggrieved party must immediately inform the agency if counsel is retained. Attorney fees or other appropriate relief may be awarded in the following circumstances; (a) Informal adjustment of a complaint. An informal adjustment of a complaint may include an award of attorney fees or other relief deemed appropriate by the EEOP Director. Where the parties agree on an adjustment of the complaint, but cannot agree on whether attorney fees or costs should be awarded, or on their amount, this issue may be appealed to the CEO, or their designee, in the manner detailed in 1225.11 of this Part. (b) Final Agency Decision. When discrimination is found, the CEO, or their designee, shall advise the complainant that any request for attorney fees or costs must be documented and submitted for review within 20 calendar days after his or her receipt of the final agency decision. The amount of such awards shall be determined under 1225.11. In the unusual situation in which it is determined not to award attorney fees or other costs to a prevailing complainant, the CEO, or their designee, in his or her final decision shall set forth the specific reasons thereof.

§ 1225.6 Freedom from Reprisal.

Aggrieved parties, their representatives, and witnesses will be free from restraint, interference, coercion, discrimination, or reprisal at any stage in the presentation and processing of a complaint, including the counseling stage described in 1225.8 of this part, or any time thereafter.

§ 1225.7 Review of Allegations of Reprisal.

An aggrieved party, his or her representative, or a witness who alleges restraint, interference, coercion, discrimination, or reprisal in connection

with the presentation of a complaint under this part, may if covered by this part, request in writing that the allegation be reviewed as an individual complaint of discrimination subject to the procedures described in Subpart B or that the allegation be considered as an issue in the complaint at hand.

Subpart B—Processing Individual Complaints of Discrimination

§ 1225.8 Precomplaint Procedure.

(a) An aggrieved person who believes that he or she has been subject to illegal discrimination shall bring such allegations to the attention of the appropriate Counselor within 30 days of the alleged discrimination to attempt to resolve them. Aggrieved applicants, candidates, Members, and Volunteers applying for, or enrolled in programs operated by CNCS, or by recipients or subrecipients of CNCS assistance or resources, shall direct their allegations to the designated Counselor.

(b) Upon receipt of the allegation, the Counselor or designee shall make whatever inquiry is deemed necessary into the facts alleged by the aggrieved party and shall counsel the aggrieved party for the purpose of attempting an informal resolution agreeable to all parties. The Counselor will keep a written record of his or her activities which will be submitted to the EEOP Director if a formal complaint concerning the matter is filed.

(c) If after such inquiry and counseling an informal resolution to the allegation is not reached, the Counselor shall notify the aggrieved party in writing of the right to file a complaint of discrimination with the EEOP Director within 15 calendar days of the aggrieved party's receipt of the notice.

(d) The Counselor shall not reveal the identity of the aggrieved party who has come to him or her for consultation, except when authorized to do so by the aggrieved party. However, the identity of the aggrieved party may be revealed once the agency has accepted a complaint of discrimination from the aggrieved party.

§ 1225.9 Complaint Procedure.

(a) The EEOP Director must accept a complaint if the process set forth above has followed, and the complaint states a charge of illegal discrimination. The agency will extend the time limits set herein (a) when the complainant shows that he or she was not notified of the time limits and was not otherwise aware of them, or (b) the complainant shows that he or she was prevented by circumstances beyond his or her control from submitting the matter in a timely fashion, or (c) for other reasons considered sufficiently by the agency. At any time during the complaint procedure, the EEOP Director may cancel a complaint because of failure of the aggrieved party to prosecute the complaint. If the complaint is rejected for failure to meet one or more of the requirements set out in the procedure outlined in 1225.8 or is cancelled, the EEOP Director shall inform the aggrieved party in writing of this Final Agency Decision: That CNCS will take no further action; and of the right, to file a civil action as described in 1225.21 of this part.

(b) Upon acceptance of the complaint and receipt of the Counselor's report, the EEOP Director shall provide for the prompt investigation of the complaint. Whenever possible, the person assigned to investigate the complaint shall occupy a position in the agency which is not, directly or indirectly, under the jurisdiction of the head of that part of the agency in which the complaint arose. The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred, and any other circumstances which may constitute, or appear to constitute discrimination against the complainant. The investigator shall compile an investigative file, which includes a summary of the investigation, recommended findings of fact and a recommended resolution of the complaint. The investigator shall forward the investigative file to the EEOP Director and shall provide the complainant with a copy.

(c) The EEOP Director shall review the complaint file including any additional statements provided by the complainant, make findings of fact, and shall offer an adjustment of the complaint if the facts support the complaint. If the proposed adjustment is agreeable to all parties, the terms of the adjustment shall be reduced to writing, signed by both parties, and made part of the complaint file. A copy of the terms of the adjustment shall be provided to the complainant. If the proposed adjustment of the complaint is not acceptable to the complainant, or the EEOP Director determines that such an offer is inappropriate, the EEOP Director shall forward the complaint file with a written notification of the findings of facts, and his or her recommendations of the proposed disposition of the complaint to the CEO or their designee. The aggrieved party shall receive a copy of the notification and recommendation and shall be advised of the right to appeal the recommended disposition to the CEO or their designee. Within ten (10) calendar days of receipt of such notice the complainant may submit his or her appeal of the recommended disposition to the CEO or their designee.

(d) *Appeal to CEO.* If no timely notice of appeal is received from the aggrieved party, the CEO or their designee may adopt the proposed disposition as the Final Agency Decision. If the aggrieved party appeals, the CEO, or a designee who has been delegated authority to issue such a decision, after review of the total complaint file, shall issue a decision to the aggrieved party. The decision of the CEO, or their designee, shall be in writing, state the reasons underlying the decision, shall be the Final Agency Decision, shall inform the aggrieved party of the right to file a civil action as described in 1225.21 of this part, and, if appropriate, designate the procedure to be followed for the award of attorney fees or costs.

§ 1225.10 Corrective Action.

When it has been determined by Final Agency Decision that the aggrieved party has been subjected to illegal discrimination, the following corrective actions may be taken:

(a) Selection as a Member or Volunteer for aggrieved parties found to have been denied selection based on prohibited discrimination.

(b) Reappointment to national service for aggrieved parties found to have been early-terminated as a result of prohibited discrimination. To the extent possible, a Member or Volunteer will be placed in the same position previously held. However, reassignment to the specific position previously held is contingent on several programmatic considerations such as the continued availability of the position. If the same position is deemed to be no longer available, the aggrieved party will be offered a reassignment to a position in as similar circumstances to the position previously held, or to resign from service for reasons beyond his or her control. Such a reassignment may require both additional training and an additional commitment to national service.

(c) Provision for reasonable attorney fees and other costs incurred by the aggrieved party.

(d) Such other relief as may be deemed appropriate by the CEO or their designee.

§ 1225.11 Amount of Attorney Fees.

(a) When a decision of the agency provides for an award of attorney's fees or costs, the complainant's attorney shall submit a verified statement of costs and attorney's fees as appropriate, to the agency within 20 days of receipt of the decision. A statement of

attorney's fees shall be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. Both the verified statement and the accompanying affidavit shall be made a part of the complaint file. The amount of attorney's fees or costs to be awarded the complainant shall be determined by agreement between the complainant, the complainant's representative and the CEO or their designee. Such agreement shall immediately be reduced to writing. If the complainant, the representative and the agency cannot reach an agreement on the amount of attorney's fees or costs within 20 calendar days of receipt of the verified statement and accompanying affidavit, the CEO or their designee shall issue a decision determining the amount of attorney fees or costs within 30 calendar days of receipt of the statement and affidavit. Such decision shall include the specific reasons for determining the amount of the award.

(b) The amount of attorney's fees shall be made in accordance with the following standards: The time and labor required, the novelty and difficulty of the questions, the skills requisite to perform the legal service properly, the preclusion of other employment by the attorney due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, time limitation imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation, and ability of the attorney, the undesirability of the case, the nature and length of the professional relationship with the client, and the awards in similar cases.

Subpart C—Processing Class Complaints of Discrimination

§ 1225.12 Precomplaint Procedure.

An applicant, candidate, Member or Volunteer who believes that he or she is among a group of present or former CNCS national service applicants, candidates, Members or Volunteers, who have been illegally discriminated against and who wants to be an agent for the class shall follow those precomplaint procedures outlined in 1225.8 of this part.

§ 1225.13 Acceptance, Rejection or Cancellation of a Complaint.

(a) Upon receipt of a class complaint, the Counselor's report, and any other information pertaining to timeliness or other relevant circumstances related to the complaint, the EEOP Director shall review the file to determine whether to accept or reject the complaint, or a portion thereof, for any of the following reasons:

(1) It was not timely filed;

(2) It consists of an allegation which is identical to an allegation contained in a previous complaint filed on behalf of the same class which is pending in the agency or which has been resolved or decided by the agency;

(3) It is not within the purview of this subpart;

(4) The agent failed to consult a Counselor in a timely manner;

(5) It lacks specificity and detail;

(6) It was not submitted in writing or was not signed by the agent;

(7) It does not meet the following prerequisites.

(i) The class is so numerous that a consolidated complaint of the members of the class is impractical;

(ii) There are questions of fact common to the class;

(iii) The claims of the agent of the class are representative of the claims of the class;

(iv) The agent of the class, or his or her representative will fairly and adequately protect the interest of the class.

(b) If an allegation is not included in the Counselor's report, the EEOP Director shall afford the agent 15 calendar days to explain whether the matter was discussed and if not, why he or she did not discuss the allegation with the Counselor. If the explanation is not satisfactory, the EEOP Director may decide to reject the allegation. If the explanation is not satisfactory, the EEOP Director may require further counseling of the agent.

(c) If an allegation lacks specificity and detail, or if it was not submitted in writing or not signed by the agent, the EEOP Director shall afford the agent 30 days from his or her receipt of notification of the complaint defects to resubmit an amended complaint. The EEOP Director may decide that the agency reject the complaint if the agent fails to provide such information within the specified time period. If the information provided contains new allegations outside the scope of the complaint, the EEOP Director must advise the agent how to proceed on an individual or class basis concerning these allegations.

(d) The EEOP Director may extend the time limits for filing a complaint and for consulting with a Counselor when the agent, or his or her representative, shows that he or she was not notified of the prescribed time limits and was not otherwise aware of them or that he or she was prevented by circumstances beyond his or her control from acting within the time limit.

(e) When appropriate, the EEOP Director may determine that a class be divided into subclasses and that each subclass be treated as a class, and the provisions of this section than shall be construed and applied accordingly.

(f) The EEOP Director may cancel a complaint after it has been accepted because of failure of the agent to prosecute the complaint. This action may be taken only after:

(1) The EEOP Director has provided the agent a written request, including notice of proposed cancellation, that he or she provide certain information or otherwise proceed with the complaint; and

(2) within 30 days of his or her receipt of the request.

(g) An agent must be informed by the EEOP Director in a request under paragraphs (b) or (c) of this section that his or her complaint may be rejected if the information is not provided.

§ 1225.14 Consolidation of Complaints.

The EEOP Director may consolidate the complaint if it involves the same or sufficiently similar allegations as those contained in a previous complaint filed on behalf of the same class which is pending in the agency or which had been resolved or decided by the agency.

§ 1225.15 Notification and Opting Out.

(a) Upon acceptance of a class complaint, the agency, within 30 calendar days, shall use reasonable means such as delivery, mailing, distribution, or posting, to notify all class members of the existence of the class complaint.

(b) A notice shall contain:

(1) The name of the agency or organizational segment thereof, its location and the date of acceptance of the complaint:

(2) A description of the issues accepted as part of the class complaint;

(3) an explanation that class members may remove themselves from the class by notifying the agency within 30 calendar days after issuance of the notice; and

(4) an explanation of the binding nature of the final decision or resolution of the complaint.

§ 1225.16 Investigation and Adjustment of Complaint.

The complaint shall be processed promptly after it has been accepted. Once a class complaint has been accepted, the procedure outlined in 1225.9 of this part shall apply.

§ 1225.17 Agency Decision.

(a) If an adjustment of the complaint cannot be made, the procedures outlined in 1225.9 shall be followed by

the EEOP Director except that any notice required to be sent to the aggrieved party shall be sent to the agent of the class or his or her representative.

(b) The Final Agency Decision on a class complaint shall be binding on all members of the class.

§ 1225.18 Notification of Class Members of Decision.

Class members shall be notified by the agency of the final agency decision and corrective action, if any, using at the minimum, the same media employed to give notice of the existence of the class complaint. The notice, where appropriate, shall include information concerning the rights of class members to seek individual relief and of the procedures to be followed. Notice shall be given by the Agency within ten (10) calendar days of the transmittal of its decision to the agent.

§ 1225.19 Corrective Action.

(a) When discrimination is found. CNCS, or the recipient or subrecipient of CNCS assistance or resources, as appropriate, must take appropriate action to eliminate or modify the policy or practice out of which such discrimination arose, and provide individual corrective action to the agent and other class members in accordance with 1225.10 of this part.

(b) When discrimination is found and a class member believes that but for that discrimination he or she would have been accepted as a Member of Volunteer or received some other volunteer service benefit, the class member may file a written claim with the EEOP Director within thirty (30) calendar days of notification by the agency of its decision.

(c) The claim must include a specific, detailed statement showing that the claimant is a class member who was affected by an action or matter resulting from the discriminatory policy or practice which arose not more than 30 days preceding the filing of the class complaint.

(d) The Agency shall attempt to resolve the claim within sixty (60) calendar days after the date the claim was postmarked, or in the absence of a postmark, within sixty (60) calendar days after the date it was received by the EEOP Director.

§ 1225.20 Claim Appeals.

(a) If the EEOP Director and claimant do not agree that the claimant is a member of the class, or upon the relief to which the claimant is entitled, the EEOP Director shall refer the claim, with recommendations concerning it, to the CEO or their designee for a Final Agency Decision and shall so notify the claimant. The class member may submit written evidence to the CEO or their designee concerning his or her status as a member of the class. Such evidence must be submitted no later than ten (10) calendar days after receipt of referral.

(b) The CEO or their designee shall decide the issue within thirty (30) days of the date of referral by the EEOP Director. The claimant shall be informed in writing of the decision and its basis and that it will be the Final Agency Decision of the issue.

§ 1225.21 Judicial Review.

(a) An applicant, candidate, Member or Volunteer is authorized to file a civil action in an appropriate U.S. District Court:

(1) Within thirty (30) calendar days of his or her receipt of the notice of final action taken by the agency; or

(2) After one hundred eighty (180) calendar days from the date of filing a formal discrimination complaint with the agency if there has been no final agency action.

Dated: November 20, 2020.

Helen Serassio,

Acting General Counsel of Corporation for National and Community Service.

Timothy Noelker,

General Counsel of the Peace Corps.

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 926

[SATS No. MT–039–FOR; Docket ID: OSM–2020–0004; S1D1S SS08011000 SX064A000 212S180110; S2D2S SS08011000 SX064A000 21XS501520]

Montana AML Plan

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are announcing receipt of a proposed amendment to the Montana Abandoned Mine Land Reclamation Plan (Montana Plan) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The State submitted this proposal in response to OSMRE's request to update the Montana Plan. Montana also seeks to make changes that will improve the Plan's readability and operational efficiency. This document gives the times and locations that the Montana Plan and this proposed amendment to that Plan are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4:00 p.m., M.D.T., January 19, 2021. If requested, we will hold a public hearing on the amendment on January 11, 2021. We will accept requests to speak at a hearing until 4:00 p.m., M.D.T. on January 4, 2021.

ADDRESSES: You may submit comments, identified by SATS No. MT–039–FOR, by any of the following methods:

- *Mail/Hand Delivery:* OSMRE, Attn: Jeffrey Fleischman, P.O. Box 11018, Dick Cheney Federal Building, 100 East B Street, Casper, WY 82601–7032.
- *Fax:* (307) 261–6552.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Comment Procedures'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to review copies of the Montana program, this amendment, a listing of any scheduled public hearings, and all written comments received in response to this document, you must go to the address listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSMRE's Casper Field Office or the full text of the program amendment is available for you to read at *www.regulations.gov.*

Attn: Jeffrey Fleischman, Division Manager, Office of Surface Mining Reclamation and Enforcement, OSMRE, Dick Cheney Federal Building, 150 East B Street, Casper, WY 82601–7032. Telephone: 307–261–6550. Email: *JFleischman@osmre.gov.*

In addition, you may review a copy of the amendment during regular business hours at the following location: Montana Department of Environmental Quality, 1225 Cedar Street, Helena, MT 59601.

FOR FURTHER INFORMATION CONTACT: Jeffrey Fleischman, Office of Surface

Mining Reclamation and Enforcement, Dick Cheney Federal Building, 150 East B Street, Casper, WY 82601–7032. Telephone: (307) 261–6550. Email: *JFleischman@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Montana Plan
II. Description of the Proposed Amendment
III. Public Comment Procedures
IV. Statutory and Executive Order Reviews

I. Background on the Montana Plan

The Abandoned Mine Land Reclamation Program was established by Title IV of the Act (30 U.S.C. 1201 *et seq.*) in response to concerns over extensive environmental damage caused by past coal mining activities. The program is funded by a reclamation fee collected on each ton of coal that is produced. The money collected is used to finance the reclamation of abandoned coal mines and for other authorized activities. Section 405 of the Act allows States and Indian tribes to assume exclusive responsibility for reclamation activity within the State or on Indian lands if they develop and submit to the Secretary of the Interior for approval, a program (often referred to as a plan) for the reclamation of abandoned coal mines.

On October 24, 1980, the Secretary of the Interior approved the Montana Plan. You can find general background information on the Montana Plan, including the Secretary's findings and the disposition of comments, in the October 24, 1980, **Federal Register** (45 FR 70445). OSMRE announced in the July 9, 1990, **Federal Register** (55 FR 28022), the Director's decision accepting certification by Montana that it had addressed all known coal-related impacts in the State that were eligible for funding under the Montana Plan. You can also find later actions concerning Montana's Plan and Plan amendments at 30 CFR 926.25.

II. Description of the Proposed Amendment

In a letter dated March 6, 2019 (Document ID No. OSM–2020–0004–0003), OSMRE, under the authority of 30 CFR 884.15, directed the State to update the Montana Plan. OSMRE requested that Montana update its Plan to meet the requirements of SMCRA, as revised on December 20, 2006 as part of the Tax Relief and Health Care Act of 2006 (Pub. L. 109–432), and in response to changes made to the implementing federal regulations as revised on November 14, 2008 (73 FR 67576) and February 5, 2015 (80 FR 6435). By letter dated August 4, 2020 (Administrative Record No. OSM–2020–0004–0002), Montana sent us an amendment to its State Plan under SMCRA (30 U.S.C. 1201 *et seq.*). This amendment is intended to address the required amendments identified in OSMRE's letter dated March 6, 2019. The State has also proposed additional changes as part of the State's initiative to improve the Plan's readability and operational efficiency. This amendment will essentially repeal and replace Montana's existing AML Plan. A summary of the proposed changes is provided below.

Through this amendment, Montana proposes to include an updated legal opinion from the State indicating the Department of Environmental Quality (DEQ) has legal authority to conduct the AML Program under SMCRA as required under 30 CFR 884.13(a)(2). The State also proposes to omit historical documents regarding approval of previous changes to the Montana Plan; reference statutory sections rather than incorporating statutory language; reference rather than incorporating other relevant State laws such as personnel and procurement policies; clarify how AML hazards are classified into priority ranks and selected for funding; indicate how coal versus non-coal projects will be selected; clarify the Authorization to Proceed process prior to beginning reclamation projects; clarify historic set-aside fund and acid mine drainage treatment accounts, remove the Emergency Program section; and make general editorial changes for brevity and structural alignment with the Federal AML Plan requirements under 30 CFR 884.13. Montana's amendment submittal package also proposes a change to statutory language at MCA 82–4–1006 enacted by the State Legislature in 2007 regarding establishment, management, and use of funds in the State's Abandoned Mine Reclamation Account.

The full text of the program amendment is available for you to read at the locations listed above under **ADDRESSES** or at *www.regulations.gov.*

III. Public Comment Procedures

We are seeking your comments on whether the amendment satisfies the applicable plan approval criteria of 30 CFR 884.14 and 884.15. If we approve the amendment, it will become part of the state Plan.

Electric or Written Comments

If you submit written or electronic comments on the proposed rule during the 30-day comment period, they should be specific, confined to issues pertinent to the proposed Plan, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on the final Plan will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent State or Federal laws or regulations, technical literature, or other relevant publications.

We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than those listed (see **ADDRESSES**) will be included in the docket for this rulemaking and considered.

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.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4:00 p.m., M.D.T. on January 4, 2021. If you are disabled and need reasonable accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold a hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at the public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION**

CONTACT. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

IV. Procedural Determinations

Executive Order 12866—Regulatory Planning and Review and Executive Order 13563—Improving Regulation and Regulatory Review

Executive Order 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB) will review all significant rules. Pursuant to OMB guidance, dated October 12, 1993, the approval of State program and is exempted from OMB review under Executive Order 12866. Executive Order 13563, which reaffirms and supplements Executive Order 12866, retains this exemption.

Other Laws and Executive Orders Affecting Rulemaking

When a state submits a Plan amendment to OSMRE for review, our regulations at 30 CFR 884.14 and 884.15, and agency policy require public notification and an opportunity for public comment. We accomplish this by publishing a notice in the **Federal Register** indicating receipt of the proposed amendment, its text or a summary of its terms. We conclude our review of the proposed amendment after the close of the public comment period and determine whether the amendment should be approved, approved in part, or not approved. At that time, we will also make the determinations and certifications required by the various laws and executive orders governing the rulemaking process and include them in the final rule.

List of Subjects in 30 CFR Part 926

Abandoned mine reclamation programs, Intergovernmental relations, Surface mining, Underground mining.

David A. Berry,

Regional Director, Unified Regions 5, 7–11.

[FR Doc. 2020–27544 Filed 12–16–20; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

[SATS No. PA–172–FOR; Docket ID: OSM–2020–0001; S1D1S SS08011000 SX064A000 212S180110; S2D2S SS08011000 SX064A000 21XS501520]

Pennsylvania Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are announcing receipt of a proposed amendment to the Pennsylvania regulatory program (hereinafter, the Pennsylvania program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Through this proposed amendment, Pennsylvania is requesting to make changes to its regulations addressing four required amendments, one part not previously approved, and several program revisions submitted. The proposed amendment includes, but is not limited to, augmented seeding, bonding, haul roads, effluent limitations for bituminous underground mines, temporary cessation, definition of Surface Mining Activities, civil penalties, administrative requirements, and Employee Financial Interest Reporting Form, as well as other administrative updates and corrections.

This document gives the times and locations that the Pennsylvania program and this proposed amendment to that program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4:00 p.m., Eastern Standard Time (e.s.t.), January 19, 2021. If requested, we may hold a public hearing or meeting on the amendment on January 11, 2021. We will accept requests to speak at a hearing until 4:00 p.m., e.s.t. on January 4, 2021.

ADDRESSES: You may submit comments, identified by SATS No. PA–172–FOR, by any of the following methods:

- *Mail/Hand Delivery:* Ben Owens, Acting Field Office Director, Pittsburgh Field Office, 3 Parkway Center South, 2nd Floor, Pittsburgh, PA 15220.
- *Fax:* (412) 937–2903.
- *Email: bowens@osmre.gov.*
- *Federal eRulemaking Portal:* The amendment is assigned the Docket ID: OSM–2020–0001, If you would like to submit comments go to *https://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Comment Procedures'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to review copies of the Pennsylvania program, this amendment, a listing of any scheduled public hearings or meetings, and all written comments received in response to this document, you must go to the address listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSMRE's Pittsburgh Field Office or the full text of the program amendment is available for you to read at *https://www.regulations.gov.*

Ben Owens, Acting Field Office Director, Pittsburgh Field Office, Office of Surface Mining Reclamation and Enforcement, 3 Parkway Center Drive South, 2nd Floor, Pittsburgh, PA 15220. Telephone: (412) 937–2827. Email: *bowens@osmre.gov.*

In addition, you may review a copy of the amendment during regular business hours at the following location: William S. Allen, Jr., Director, Bureau of Mining Programs, Pennsylvania Department of Environmental Protection, Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA 17101.

FOR FURTHER INFORMATION CONTACT: Ben Owens, Acting Field Office Director, Pittsburgh Field Office, Office of Surface Mining Reclamation and Enforcement, 3 Parkway Center Drive South, 2nd Floor, Pittsburgh, PA 15220 Telephone: (412) 937–2827. Email: *bowens@osmre.com.*

SUPPLEMENTARY INFORMATION:

I. Background on the Pennsylvania Program
II. Description of the Proposed Amendment
III. Public Comment Procedures
IV. Statutory Orders and Executive Reviews

I. Background on the Pennsylvania Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its approved, State program includes, among other

things, State laws and regulations that govern surface coal mining and reclamation operations in accordance with the Act and consistent with the Federal regulations. See 30 U.S.C. 1253(a)(1) and (7). Based on these criteria, the Secretary of the Interior conditionally approved the Pennsylvania program on July 30, 1982. You can find background information on the Pennsylvania program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Pennsylvania program in the July 30, 1982, **Federal Register** (47 FR 33050). You can also find later actions concerning the Pennsylvania program and program amendments at 30 CFR 938.11, 938.12, 938.13, 938.15, and 938.16.

II. Description of the Proposed Amendment

By letter dated March 16, 2020, (Administrative Record No. PA 906.00), Pennsylvania sent us an amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*). This submittal addresses four separate required program amendments codified at 30 CFR 938.16(m)–(o) (bonding) and 938.16(mmm) (haul roads), and a correction to a previously unapproved term at 938.12(d) (augmented seeding). In addition, the submission includes numerous other revisions to the Pennsylvania program that are unrelated to the required amendments.

The proposed amendment would make changes to the following:

A. 25 Pa. Code § 86.151(d)—Augmented Seeding (Relating to period of liability). The program amendment proposes to delete the term ''augmented'' in the last sentence in accordance with 30 CFR 938.12(d).

B. Chapter § 86.158(b) (Relating to Special Terms and Conditions for Collateral Bonds). The program amendment proposes to make the corrections and/or additions to the rules and reiterate that collateral bonds are to be determined by current market value and not face value and shall be at least equal to the amount of the bond less any legal and liquidation fees, in accordance with 30 CFR 938.16(m)–(o).

1. *25 Pa. Code § 86.158(b)(1)* proposes to make the revision of ''may'' to ''will.''

2. *25 Pa. Code § 86.158(b)(2)* proposes to add the wording ''less any legal and liquidation costs.''

3. *5 Pa. Code § 86.158(b)(3)* proposes to require the posting of any needed additional bond amount with the permit renewal, which is at least every 5 years.

C. 25 Pa. Code § 88.1 Haul Roads. The proposed amendment expands the definition of haul roads to include public roads that are used as an integral part of the coal mining activity in accordance with 30 CFR 938.16(mmm).

D. 25 Pa. Code § 89.52 Effluent Limitations for Bituminous Underground Mines. The proposed amendment would delete the portion of subsection (f), eliminating the alternative effluent limits for passive treatment systems for underground mines.

E. Temporary Cessation. The proposed amendment would make revisions in each of the citations for the removal of the upper time limits.

1. *25 Pa. Code § 87.157 (Relating to cessation of operations: Temporary).*

2. *25 Pa. Code § 88.131 (Regarding anthracite surface mines).*

3. *25 Pa. Code § 88.219 (Regarding anthracite bank removal).*

F. 25 Pa. Code § 86.1 and § 87.1 Definition: Surface mining activities. Proposed amendment seeks to incorporate by reference the 30 CFR 701.5 definition of surface mining activities to assure consistency with the Federal requirements.

G. 25 Pa. Code § 86.193(b) and (c)—Civil Penalties. The proposed amendment seeks to resolve the fluctuating dollar amount by utilizing the Federal point system thereby mandating that the assessment of penalty will be reflective of the violation circumstances and not a specific dollar amount.

H. Administrative Requirements

1. *25 Pa. Code § 86.31(c)(1) (Relating to Public Notices of filing of permit applications)* seeks to remove the registered mail requirement and allow electronic notice in cases where applicable.

2. *25 Pa. Code § 86.62(a)(3) (Relating to identification of interests)* seeks to remove the date of issuance requirement.

I. 25 Pa. Code § 86.238. The proposed amendment seeks to update the OSMRE Form 705–1 to Form 23.

J. Administrative Updates and Corrections

1. *Storm Events*—The proposed amendment would remove tables provided in Sections 87.103, 88.93, 88.188, 88.293 and 89.53 and replaces them with a general reference to data available through NOAA or an equivalent resource.

2. *Remining Financial Guarantees* The proposed amendment offers the following changes:

- *25 Pa. Code § 86.281(b)* to describe the process used to determine the amount of an individual remining financial guarantee;
- to revise *§ 86.281(c)* to clarify that the designated amount is maintained at the program level rather than on a permit-by-permit basis;
- *§ 86.281(d)* to refer to the designated amount when describing the permit limit, the operator limit and the program limit; and
- *§ 86.281(f)* to describe the reserve;
- *§ 86.282(a)(4)* adds that to participate, the operator cannot have been previously issued a notice of violation relating to maintaining bonds, including a missing or late payment.
- *§ 86.284(d)* is being revised to read the same as PA SMCRA.

3. *Natural Resources Conservation Service.* This proposed amendment corrects the agency name from Soil Conservation Service to Natural Resource Conservation Service.

4. *Conservation District.* The proposed amendment corrects the reference at *§ 86.189(b)(4)* from Soil Conservation District to its current name of Conservation District.

5. *Chapter 92a.* This proposed amendment corrects all references of Chapter 92 to Chapter 92a in Chapters 86–90.

6. *Department Reference.* This proposed amendment updates reference of Department of Environmental Resources in Section 86.232 to Department of Environmental Protection.

7. *Chapter 96.* This proposed amendment seeks to update and include reference to Chapter 96 in Sections 87.102, 88.92, 88.187, 88.292, 89.52 and 90.102.

8. *Coal Ash and Biosolids.* This proposed amendment seeks to update references of ''fly ash'' to ''coal ash'' and ''sewage sludge'' to ''biosolids'' in 25 Pa. Code §§ 86.54 and 87.100(d).

9. *Anthracite Mine Operators Emergency Bond Fund.* This proposed amendment seeks to delete the word ''deep'' from 25 Pa. Code § 86.162a to clarify that not only deep mines are eligible for participation.

10. *Coal Refuse Disposal Site Selections.* This proposed amendment adds language to 52 P.S. § 305.54a to read ''an area adjacent to or an expansion of an existing coal refuse disposal site.''

11. *25 Pa. Code § 86.51* corrects ''. . . a review of the permit shall be no less frequent than the permit midterm *of* every 5 years . . .'' The underlined ''of'' should be ''or''.

12. *25 Pa. Code § 86.84* corrects Mining Enforcement and Safety Administration to Mine Safety and Health Administration.

13. *25 Pa. Code § 88.1* ''A surface right-of-way for purposes of travel by land vehicles used in coal exploration *of* surface coal mining and reclamation

operations.'' The underlined ''of'' should be ''or''.

14. *Remining Program.*

• 25 Pa. Code § 88.502 the correct citation is § 88.295(b)–(i).

• 25 Pa. Code § 88.507(c) the correct citations are §§ 88.95(b)–(g), 88.190(b)–(g) and 88.295(b)–(i).

• 25 Pa. Code §§ 88.508 and 90.308 shall delete the references to § 86.172(d) as this subsection does not exist.

The full text of the program amendment is available for you to read at the locations listed above under **ADDRESSES** or at *https://www.regulations.gov.*

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the State program.

Electronic or Written Comments

If you submit written or electronic comments on the proposed rule during the 30-day comment period, they should be specific, confined to issues pertinent to the proposed regulations, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on the final regulations will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent State or Federal laws or regulations, technical literature, or other relevant publications.

We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than those listed (see **ADDRESSES**) will be included in the docket for this rulemaking and considered.

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.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4:00 p.m., e.s.t. on January 4, 2021. If you are disabled and need reasonable accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold a hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at the public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

IV. Statutory Orders and Executive Reviews

Executive Order 12866—Regulatory Planning and Review and Executive Order 13563—Improving Regulation and Regulatory Review

Executive Order 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB) will review all significant rules. Pursuant to OMB guidance, dated October 12, 1993, the approval of State program amendments is exempted from OMB review under Executive Order 12866. Executive Order 13563, which reaffirms and supplements Executive Order 12866, retains this exemption.

Other Laws and Executive Orders Affecting Rulemaking

When a State submits a program amendment to OSMRE for review, our regulations at 30 CFR 732.17(h) require us to publish a notice in the **Federal Register** indicating receipt of the proposed amendment, its text or a summary of its terms, and an opportunity for public comment. We conclude our review of the proposed amendment after the close of the public comment period and determine whether the amendment should be approved, approved in part, or not approved. At that time, we will also make the determinations and certifications required by the various laws and executive orders governing the rulemaking process and include them in the final rule.

List of Subjects in 30 CFR Part 938

Intergovernmental relations, Surface mining, Underground mining.

Thomas D. Shope,

Regional Director, North Atlantic—Appalachian Region.

[FR Doc. 2020–27602 Filed 12–16–20; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 950

[SATS No. WY–048–FOR; Docket ID OSM–2020–0005; S1D1S SS08011000 SX064A000 212S180110; S2D2S SS08011000 SX064A000 21XS501520]

Wyoming Abandoned Mine Land Reclamation Plan

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; opening of public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are announcing receipt of a proposed amendment to the Wyoming Abandoned Mine Land Reclamation (AMLR) Plan (hereinafter, the Wyoming Plan) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Wyoming proposes extensive revisions to its Plan in response to a letter sent from OSMRE and to improve the Plan's readability and operational efficiency. These changes are being submitted in response to legislative and regulatory changes made under SMCRA. This document gives the times and locations that the Wyoming plan and proposed amendment to that plan are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4:00 p.m., m.d.t. January 19, 2021. If requested, we will hold a public hearing on the amendment on January 11, 2021. We will accept requests to speak at a public hearing until 4:00 p.m., m.d.t. on January 4, 2021.

ADDRESSES: You may submit comments, identified by SATS No. WY–048–FOR, by any of the following methods:

- *Mail/Hand Delivery:* Mr. Jeffrey Fleischman, Director, Denver Field Division; Office of Surface Mining Reclamation and Enforcement; Casper Area Office; 150 East ''B'' Street, Room 1018, P.O. Box 11018, Casper, Wyoming 82601.
- *Fax:* (307) 261–6552.
- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than the ones listed above will be included in the docket for this rulemaking and considered.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Comment Procedures'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to review copies of the Wyoming plan, this amendment, a listing of any scheduled public hearings, and all written comments received in response to this document, you must go to the address listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSMRE's Casper Area Office or the full text of the plan amendment is available for you to read at *http://www.regulations.gov.*

Jeffrey Fleischman, Director Denver Field Division, Office of Surface Mining Reclamation and Enforcement, Dick Cheney Federal Building, 150 East B Street, Room 1018, Casper, Wyoming 82601–1018. Telephone: (307) 261–6550. Email: *jfleischman@osmre.gov.*

In addition, you may review a copy of the amendment during regular business hours at the following location: Alan Edwards, AML Administrator, Wyoming Department of Environmental Quality, 200 West 17th Street, Cheyenne, Wyoming 82002, Telephone: 307–777–7062.

FOR FURTHER INFORMATION CONTACT: Jeffrey Fleischman, Division Chief, Casper Area Office. Office of Surface Mining Reclamation and Enforcement, Dick Cheney Federal Building, P.O. Box 11018, 150 East B Street, Casper, Wyoming 82601–1018. Telephone: (307) 261–6555. Email: *jfleischman@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Wyoming Plan
II. Description of the Proposed Amendment
III. Public Comment Procedures
IV. Statutory and Executive Order Reviews

I. Background on the Wyoming Plan

The Abandoned Mine Land Reclamation Program was established by Title IV of the Act (30 U.S.C. 1201 *et seq.*) in response to concerns over extensive environmental damage caused by past coal mining activities. The program is funded by a reclamation fee collected on each ton of coal that is produced. The money collected is used to finance the reclamation of abandoned coal mines and for other authorized activities. Section 405 of the Act allows States and Indian tribes to assume exclusive responsibility for reclamation activity within the State or on Indian lands if they develop and submit to the Secretary of the Interior for approval, a program (often referred to as a plan) for the reclamation of abandoned coal mines.

On February 14, 1983, the Secretary of the Interior approved Wyoming's AMLR Plan. You can find general background information on the Wyoming Plan, including the Secretary's findings and the disposition of comments, in the February 14, 1983, **Federal Register** (48 FR 6536). OSM announced in the May 25, 1984, **Federal Register** (49 FR 22139), the Director's decision accepting certification by Wyoming that it had addressed all known coal-related impacts in the State that were eligible for funding under the Wyoming Plan. Wyoming could then proceed in reclaiming low priority non-coal projects. The Director accepted Wyoming's proposal that it would seek immediate funding for reclamation of any additional coal-related problems that occur during the life of the Wyoming Plan. You can find later actions concerning Wyoming's Plan and plan amendments at 30 CFR 950.35.

II. Description of the Proposed Amendment

On March 6, 2019, OSMRE issued a letter to Wyoming, under the authority of 30 CFR 884.15, directing the State to update its Reclamation Plan to meet the requirements of SMCRA as revised on December 20, 2006 as part of the Tax Relief and Health Care Act of 2006 (Pub. L. 109–432), and the implementing federal regulations as revised on November 14, 2008 (73 FR 67576) and February 5, 2015 (80 FR 6435). OSMRE provided Wyoming with a summary of these changes to the Federal program and a description of the potentially required State Plan amendments in the March 6, 2019 letter.

By letter dated July 21, 2020, Wyoming submitted this proposed amendment to implement the required changes identified in OSMRE's letter as well as additional changes proposed at the State's initiative to make the Wyoming Plan more reader friendly. The proposed amendment would repeal and replace Wyoming's existing AML Plan.

Wyoming's Proposed Plan Amendment

1. Reorganizes the Wyoming Plan to implement the required changes identified in OSMRE's March 6, 2019 letter.
2. Restructures the Wyoming Plan to be more reader friendly, by removing excess narrative and instead incorporating required information by reference.
3. Revises the Wyoming Plan to include an updated Attorney General's opinion, which confirms that the Wyoming Department of Environmental Quality continues to have the legal authority to oversee and implement Wyoming's AMLR Program.
4. Incorporates in the Wyoming Plan, the provisions from 30 CFR 875.19, **Federal Register** (80 FR 6435), which extend limited liability protection to non-coal reclamation projects.
5. Reaffirms in the Wyoming Plan, that non-coal reclamation activities will reflect the priorities under Title IV, Section 411(c) and 30 CFR 875.15.
6. Identifies in the Wyoming Plan, that the first priority for reclamation shall be for high priority coal, but reserves the Wyoming AML Program's ability to reclaim non-coal land, water, and facilities as allowed by Title IV, Section 411(b) through (g), with approval by OSMRE and after the issuance of an Authorization to Proceed (ATP) which is required for all projects.
7. Acknowledges in the Wyoming Plan, that emergency conditions may arise at times which require quick responses and outlines the processes by which such emergency conditions are addressed, because the Wyoming AML Program does not have an approved emergency response program under section 410 of SMCRA (30 U.S.C. 1240).
8. Incorporates new language in the Wyoming Plan regarding public records, which reflects a change to the Wyoming AML regulations approved by state statute in 2018.

9. Summarizes in the Wyoming Plan, overall AML Policies and Procedures, including staffing, personnel policies, and the accounting system, as well as describes the processes followed to comply with applicable federal regulations.

The full text of the plan amendment is available for you to read at the locations listed above under **ADDRESSES**.

III. Public Comment Procedures

We are seeking your comments on whether the amendment satisfies the applicable plan approval criteria of 30 CFR 884.14 and 884.15. If we approve the amendment, it will become part of the Wyoming Plan.

Electronic or Written Comments

If you submit written or electronic comments on the proposed rule during the 30-day comment period, they should be specific, confined to issues pertinent to the proposed regulations, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on the final regulations will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent State or Federal laws or regulations, technical literature, or other relevant publications.

We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than those listed above (see **ADDRESSES**) will be included in the docket for this rulemaking and considered.

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.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4:00 p.m., m.d.t. on January 4, 2021. If you are disabled and need special accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold the hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at the public hearing provide us with a written copy of his or her comments. The public hearing will continue, on the specified date, until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

IV. Statutory and Executive Order Reviews

Executive Order 12866—Regulatory Planning and Review and Executive Order 13563—Improving Regulation and Regulatory Review

Executive Order 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB) will review all significant rules. Pursuant to OMB guidance, dated October 12, 1993, the approval of State program and/or AML plan amendments is exempted from OMB review under Executive Order 12866. Executive Order 13563, which reaffirms and supplements Executive Order 12866, retains this exemption.

Other Laws and Executive Orders Affecting Rulemaking

When a State submits a Plan amendment to OSMRE for review, our regulations at 30 CFR 884.14 and 884.15, and agency policy require public notification and an opportunity for public comment. We accomplish this by publishing a notice in the **Federal Register** indicating receipt of the proposed amendment and its text or a summary of its terms. We conclude our review of the proposed amendment after the close of the public comment period and determine whether the amendment should be approved, approved in part, or not approved. At that time, we will also make the determinations and certifications required by the various laws and executive orders governing the rulemaking process and include them in the final rule.

List of Subjects in 30 CFR Part 950

Abandoned mine reclamation programs, Intergovernmental relations, Surface mining, Underground mining.

David Berry,

Regional Director, Western Region.

[FR Doc. 2020–27545 Filed 12–16–20; 8:45 am]

BILLING CODE 4310–05–P

Notices

Federal Register
Vol. 85, No. 243
Thursday, December 17, 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 14, 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 19, 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.

Food and Nutrition Service

Title: School Food Purchase Study IV (SFPS–IV).

OMB Control Number: 0584–0471.

Summary of Collection: This study is the fourth in a series of studies designed to provide statistically valid national estimates of food acquisitions (both purchased foods and USDA Foods) made by school food authorities (SFAs) participating in the Federally supported National School Lunch Program (NSLP) and School Breakfast Program (SBP). In the decade following the release of the third School Food Purchase Study (SFPS III) report, the school nutrition environment has undergone considerable changes. Key among them are the provisions of the Healthy, Hunger-Free Kids Act of 2010 (Pub. L. 111–296) which required updated nutrition standards for the NSLP and SBP. These standards require meals to include greater quantities of fruits and vegetables, whole grains, and low-fat dairy and reduced sodium. These changes have affected the purchasing practices of SFAs in terms of the types, volume, and cost of foods. This study is restricted to public SFAs to allow for direct comparisons of the results (*i.e.,* changes in the mix of acquired foods) to the prior study, SFPS III, which was conducted in SY 2009–2010. In addition, the study will describe food purchase practices of SFAs so that information associated with food purchasing efficiency can be provided to all SFAs.

Need and Use of the Information: SFPS–IV will provide updated national estimates of school food authority (SFA) food acquisitions (commercial purchases and USDA Foods) and a description and analysis of food purchase practices in SY 2021–2022. In addition, the study will assess changes in food acquisitions and purchase practices since SFPS–III, to provide important information about the impact of updated nutrition standards for meals and nonprogram (competitive) foods, and other changes made to the school meal programs following the Healthy, Hunger-Free Kids Act of 2010 (HHFKA). SFPS–IV will provide Federal, State, and local policymakers with current information about how Federally sponsored school meal programs are operating since the last study more than 10 years ago. Information about food buying efficiencies will be useful for SFAs as they strive to maximize available resources and improve food service operations. This study will include State Directors (Child Nutrition and State Distributing Agencies), SFA Directors, as well as food vendors and food service management companies (FSMCs).

Description of Respondents: State, Local, or Tribal Government and Business or Other-for-Profit.

Number of Respondents: 760.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 4,942.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2020–27779 Filed 12–16–20; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2018–0078]

Notice of Proposed Revision To Import Requirements for the Importation of Fresh Citrus Fruit From Australia Into the United States

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability.

SUMMARY: We are advising the public that we have prepared a pest risk analysis and treatment evaluation document relative to the importation into the United States of citrus fruit from additional areas of production in Australia. Based on the findings of these documents, we are proposing to authorize the importation of citrus fruit from additional areas of production in Australia, and revise the conditions under which citrus fruit from authorized areas of production in Australia may be imported into the United States. We are making the pest risk analysis and treatment evaluation document available to the public for review and comment.

DATES: We will consider all comments that we receive on or before February 16, 2021.

ADDRESSES: You may submit comments by either of the following methods:

• *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2018-0078.*

• *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2018–0078, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2018-0078* or in our reading room, which is located in Room 1620 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: Mr. Tony Román, Senior Regulatory Policy Specialist, Regulatory Coordination and Compliance, PPQ, APHIS, 4700 River Road, Unit 133, Riverdale, MD 20737–1231; (301) 851–2242.

SUPPLEMENTARY INFORMATION: Under the regulations in ''Subpart L—Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–12, referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) prohibits or restricts the importation of fruits and vegetables into the United States from certain parts of the world to prevent plant pests from being introduced into or disseminated within the United States.

Section 319.56–4 of the regulations provides the requirements for authorizing the new importation of fruits and vegetables into the United States, as well as revising existing requirements for the importation of fruits and vegetables. Paragraph (c) of that section provides that the name and origin of all fruits and vegetables authorized importation into the United States, as well as the requirements for their importation, are listed on the internet in APHIS' Fruits and Vegetables Import Requirements database, or FAVIR (*https://epermits.aphis.usda.gov/manual*). It also provides that, if the Administrator determines that any of the phytosanitary measures required for the importation of a particular fruit or vegetable are no longer necessary to reasonably mitigate the plant pest risk posed by the fruit or vegetable, APHIS will publish a notice in the **Federal Register** making its pest risk analysis and determination available for public comment.

Citrus fruit from Australia is currently listed in FAVIR as a fruit authorized importation into the United States, subject to the following phytosanitary measures:

• The citrus fruit must be produced in Riverina region of New South Wales District, Riverland region of South Australia, or Sunraysia region in Northwest Victoria District.

• The citrus fruit must either originate from an area within these approved production areas that is free of the fruit flies *Bactrocera tryoni* (Queensland fruit fly) and *Ceratitis capitata* (Medfly), or be treated with cold treatment in accordance with treatment schedule T107–d or T107–d–2 (all citrus other than lemons) or T107–d–3 (lemons), as well as the relevant requirements of 7 CFR part 305, which contains APHIS' phytosanitary treatment regulations.

• The citrus fruit must be accompanied by a phytosanitary certificate that attests to the production in a pest-free area of production or that indicates that cold treatment was applied to the commodity during transit to the United States, and that contains an additional declaration stating that the fruit in the consignment was subject to phytosanitary measures to ensure the consignment is free of *Epiphyas postvittana* (light brown apple moth).

• The citrus fruit is subject to inspection at the port of entry into the United States.

• Only commercial consignments of Australian citrus fruit may be imported into the United States.

• The citrus fruit must be imported under permit.

APHIS received a request from the national plant protection organization (NPPO) of Australia to authorize the importation of citrus from three additional areas of Australia: The inland region of Queensland, the regions that compose Western Australia, and the shires of Bourke and Narromine within New South Wales District. The NPPO also asked us to reevaluate whether light brown apple moth could follow the pathway of citrus fruit from Australia into the United States.

In response to Australia's request, we have prepared a pest risk assessment (PRA) to evaluate the pests of quarantine significance that could follow the pathway of importation of fresh citrus from these areas of Australia into the United States. The PRA also evaluates whether light brown apple moth, which exists in the areas, is likely to follow the pathway of citrus fruit from the areas into the United States. Based on the PRA, a commodity import evaluation document (CIED) was prepared to identify phytosanitary measures that could be applied to the importation of citrus fruit from these additional areas of Australia to mitigate the pest risk.

We have concluded that citrus can safely be imported from these additional areas of Australia into the United States, using the following phytosanitary measures:

• The citrus must either originate from an area within these approved production areas that is free of the fruit flies Queensland fruit fly, Medfly, and/or *Bactrocera neohumeralis* (Lesser Queensland fruit fly), or be treated with cold treatment for the relevant fruit flies. If the area has Medfly but is free of Queensland fruit fly and Lesser Queensland fruit fly, treatment schedule T107–a may be used. If the area has Queensland fruit fly or Lesser Queensland fruit fly, treatment schedules T107–d–2 or T107–d–3 must be used. We have prepared a treatment evaluation document (TED) that determines that these two schedules are effective for Lesser Queensland fruit fly on Australian citrus.

• The citrus must be accompanied by a phytosanitary certificate that attests to the production in a pest-free area of production or that indicates that cold treatment was applied to the commodity during transit to the United States. We are not requiring an additional declaration for light brown apple moth because the PRA considers this pest unlikely to follow the pathway on citrus fruit from these areas. We are also proposing to remove the additional declaration requirement for light brown apple moth for the importation of citrus fruit from other approved areas of Australia.

• The citrus is subject to inspection at the port of entry into the United States.

• Only commercial consignments of Australian citrus may be imported into the United States.

• An operational work plan that details the requirements under which citrus will be safely imported is in place.

• The citrus fruit must be imported under permit.

Therefore, in accordance with § 319.56–4(c)(3), we are announcing the availability of our PRA and CIED for public review and comment. Those documents, as well as a description of the economic considerations associated with the importation of fresh citrus fruit from these additional areas of Australia and the TED, may be viewed on the *Regulations.gov* website or in our reading room (see **ADDRESSES** above for a link to *Regulations.gov* and information on the location and hours of

the reading room). You may request paper copies of these documents by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. Please refer to the subject of the analysis you wish to review when requesting copies.

After reviewing any comments we receive, we will announce our decision regarding whether to revise the requirements for the importation of citrus fruit from Australia in a subsequent notice. If the overall conclusions of our analysis and the Administrator's determination of risk remain unchanged following our consideration of the comments, then we will revise the requirements for the importation of citrus fruit from Australia in accordance with this notice.

Authority: 7 U.S.C. 1633, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 14th day of December 2020.

Michael Watson,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2020–27803 Filed 12–16–20; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

[Docket No. NRCS–2020–0009]

Guidance for Identification of Nonindustrial Private Forest Land (NIPF)

AGENCY: Natural Resources Conservation Service (NRCS), U.S. Department of Agriculture (USDA).

ACTION: Notice and request for comments.

SUMMARY: NRCS is requesting input about guidance it intends to provide its agency staff concerning the identification of NIPF for NRCS conservation programs. NRCS welcomes input from the public prior to NRCS incorporating the guidance into the NRCS conservation program manual. This guidance will be used by staff to identify NIPF and relates to eligibility for certain NRCS programs.

DATES: *Comment Date:* We will consider comments received by January 19, 2021.

ADDRESSES: We invite you to submit comments on this notice. You may submit comments through the:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and search for Docket ID NRCS–2020–0009. Follow the online instructions for submitting comments.

All comments will be available on *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Martha Joseph; (814) 203–5562; *martha.joseph@usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

NRCS is one of the USDA agencies that identifies nonindustrial private forest land (NIPF) for program enrollment. In particular, NRCS identifies NIPF for enrollment in the Agricultural Conservation Easement Program (ACEP), the Conservation Stewardship Program (CSP), the Environmental Quality Incentives Program (EQIP), and the Regional Conservation Partnership Program (RCPP).

Identification for NIPF enrollment under these NRCS programs is based upon section 1201(18) of the Food Security Act of 1985 (the 1985 Farm Bill), which defines NIPF as rural land, as determined by the Secretary, that:

- Has existing tree cover or is suitable for growing trees; and
- Is owned by any nonindustrial private individual, group, association, corporation, Indian Tribe, or other private legal entity that has definitive decision-making authority over the land.

NRCS recently attempted to clarify how it identifies NIPF for program enrollment in the fiscal years 2020 and 2021 RCPP Announcement for Program Funding (*https://www.grants.gov/web/grants/view-opportunity.html?oppId=328578*), by summarizing language from the USDA Forest Service's Forest Inventory & Analysis (FIA) glossary. NRCS used text that specified NIPF does not encompass industrial lands but the attempted clarification resulted in further confusion. After becoming aware of the confusion, the NRCS Acting Chief identified during a House Agriculture Committee hearing, on October 1, 2020, that NRCS would welcome input from stakeholders about how NRCS identifies NIPF, which is the purpose of this notice.

Identification of Land as NIPF

NRCS identifies NIPF as defined by the 1985 Farm Bill and program regulations. To make the identification, NRCS examines the components of the definition to determine if the land can be identified as NIPF, as explained below. In its identification, NRCS must also ensure that such identification is consistent with how other USDA agencies identify NIPF under identical or similar program definitions.

In order to determine whether land offered for enrollment meets land eligibility criteria, NRCS must identify whether the land is ''rural land'' that ''has existing tree cover or is suitable for growing trees'' and whether the land is owned by ''a nonindustrial private landowner.'' NRCS has long identified land use in accordance with its National Resources Inventory (NRI). The NRI provides updated information about the status, condition, and trends of land, soil, water, and related resources on U.S. non-Federal lands, and identifies the four primary land types (forest, rangeland, cropland, and pasture) of non-Federal rural land. In particular, the NRI defines forest land as follows:

Forest land. A land cover/use category that is at least 10 percent stocked by single-stemmed woody species of any size that will be at least 4 meters (13 feet) tall at maturity. Also included is land bearing evidence of natural regeneration of tree cover (cut over forest or abandoned farmland) and not currently developed for non-forest use. Ten percent stocked, when viewed from a vertical direction, equates to an areal canopy cover of leaves and branches of 25 percent or greater. The minimum area for classification as forest land is 1 acre, and the area must be at least 100 feet wide. See Glossary, 2017 National Resources Inventory, p. 8–3.

The NRI identification of forest land is consistent with how both the USDA Farm Service Agency (FSA) and Forest Service identify forest land for NIPF purposes, with some slight differences such as the Forest Service requires a canopy cover or crown cover of only 10 percent and a minimum area that is at least 120 feet wide.

The landowner component of NIPF identification is more complex as it relates to identification of whether the forest land is owned by a ''nonindustrial private individual, group, association, corporation, Indian [T]ribe, or other private legal entity that has definitive decision-making authority over the land.'' FSA specifies in its Emergency Forest Restoration Program that owners or lessees principally engaged in the primary processing of raw wood products are excluded from the definition of an owner of nonindustrial private forest. NRCS refers to this criterion as the ''mill status'' criterion (that is, whether or not the applicant owns a wood-processing facility on their land).

The Forest Service identifies industrial versus nonindustrial private forest landowners for its FIA with reference to several factors that reflect current trends in the forestry industry. In particular, the Forest Service

similarly identifies NIPF landowners with respect to their mill status but are also collecting information about whether corporate owners are ''industrial'' irrespective of mill status based on size of the landowner's forest holdings. Based on a series of analyses the Forest Service conducted, they looked at owner behavior as a function of size of holdings. The Forest Service identified that holdings greater than 45,000 acres are associated with large corporate forest owners and that this acreage threshold provides a quantitative measure that assists with identification of industrial landowners in the FIA database. Specifically, the Forest Service analysis observed:

> Many of the largest industrial forest owners, including many established timber companies, can be easily identified based on expert knowledge. However, many cannot be so readily identified, particularly many holding companies and some TIMOs/REITs [timberland investment management organizations and real estate investment trusts]. Therefore, the most practical way to define large corporate forest owners using consistent methodology is to determine an acreage threshold above which a corporate forest owner will be considered to be a large corporate owner.[1]

NIPF Guidance

Therefore, from a practical manner in which to identify NIPF landowners consistently with both FSA and the Forest Service, NRCS intends to clarify in its conservation program manual the following guidance:

Nonindustrial private landowner means a private individual, group, association, corporation, Indian Tribe, or other private entity. NRCS will identify someone as a nonindustrial private landowner if they:

(1)(i) Own fewer than 45,000 acres of forest land in the United States; and

(ii) Do not own or operate an industrial mill for the primary processing of raw wood products as determined by NRCS in consultation with the State Technical Committees; or

(2) Meet criteria established for a nonindustrial private landowner by NRCS in a State in consultation the State Technical Committee.

NRCS believes that item (1)(i) will ensure consistency with the Forest Service identification of owners of industrial private forest lands under its FIA. NRCS believes that item (1)(ii) will ensure continued consistency with both the Forest Service and FSA with respect to the role that the primary processing of raw wood products serves for identification of industrial landowners. However, NRCS is aware that with the advent of portable mills common among family forestry operations, a strict mill criterion may inadvertently exclude assistance to the very operations that conservation assistance for NIPF lands is intended to reach. Therefore, NRCS intends to incorporate in its guidance that such determinations about whether a mill is of industrial scale should be made in light of more localized criteria identified by the State Conservationist, in consultation with the State Technical Committee.

NRCS believes that incorporation of item (2) will ensure that NRCS national guidance does not supersede more localized expert knowledge that may exist for identification of NIPF landowners. In particular, NRCS believes that it should coordinate at the State level with FSA, Forest Service, the State Forester, and other members of the State Technical Committee in circumstances where the national criteria do not encompass adequately the nature of NIPF operations within the State.

Public Comments Requested

NRCS requests public comment on these technical criteria for the identification of NIPF eligibility for its conservation programs. In particular, NRCS seeks input about how these criteria may either exclude lands that should be considered NIPF or include lands that should not be considered NIPF. NRCS also welcomes input about what alternative criteria should be considered in its technical guidance.

The guidance for identification of NIPF will be adopted after the close of the 30-day period, and after consideration of all comments.

Kevin Norton

Acting Chief, Natural Resources Conservation Service.

[FR Doc. 2020–27703 Filed 12–15–20; 8:45 am]

BILLING CODE 3410–16–P

[1] Caputo, Jesse; Butler, Brett; Hartsell, Andy. 2017. How large is large? Identifying large corporate ownerships in FIA datasets. Res. Pap. NRS–29. Newtown Square, PA: U.S. Department of Agriculture, Forest Service, Northern Research Station. P. 1.

DEPARTMENT OF AGRICULTURE

Rural Housing Service

[RHS–20–CF–0028]

Notice of Request for Revision of a Currently Approved Information Collection

AGENCY: Rural Housing Service, USDA.

ACTION: Proposed collection; Comments requested.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Rural Housing Service's (RHS) intention to request a revision of a currently approved information collection in support of the Rural Community Development Initiative (RCDI) grant program.

DATES: Comments on this notice must be received by February 16, 2021 to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Pamela Bennett, Rural Development Innovation Center, Regulations Management Division, U.S. Department of Agriculture, 1400 Independence Avenue SW, STOP 0793, Room 4015 South Building, Washington, DC 20250–0793. Telephone: (202) 720–9639. Email: *pamela.bennett@usda.gov.*

SUPPLEMENTARY INFORMATION: The Office of Management and Budget's (OMB) regulation (5 CFR part 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). This notice identifies an information collection that RHS is submitting to OMB for approval. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) The accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) Ways to enhance the quality, utility and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent by the Federal eRulemaking Portal: Go to *http://www.regulations.gov* and, in the lower ''Search Regulations and Federal Actions'' box, select ''Rural Housing Service'' from the agency drop-down menu, then click on ''Submit.'' In the Docket ID column, select RHS–20–CF–0028 to submit or view public comments and to view supporting and related materials available electronically. Information on using *Regulations.gov*, including instructions for accessing documents, submitting comments, and viewing the docket after

the close of the comment period, is available through the site's ''User Tips'' link.

Title: Rural Community Development Initiative.

OMB Number: 0575–0180.

Expiration Date of Approval: July 31, 2021.

Type of Request: Revision of a currently approved information collection.

Abstract: RHS, an Agency within the USDA Rural Development mission area, will administer the RCDI grant program through their Community Facilities Division. The intent of the RCDI grant program is to develop the capacity and ability of rural area recipients to undertake projects through a program of technical assistance provided by qualified intermediary organizations. The eligible recipients are nonprofit organizations, low-income rural communities, or federally recognized Indian tribes. The intermediary may be a qualified private, nonprofit, or public (including tribal) organization. The intermediary is the applicant. The intermediary must have been organized a minimum of 3 years at the time of application. The intermediary will be required to provide matching funds, in the form of cash or committed funding, in an amount at least equal to the RCDI grant.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 1.34 hours per response.

Respondents: Intermediaries and recipients.

Estimated Number of Respondents: 90.

Estimated Number of Responses per Respondent: 34.78.

Estimated Number of Responses: 3,130.

Estimated Total Annual Burden on Respondents: 4,194.

Copies of this information collection can be obtained from Pamela Bennett, Rural Development Innovation Center, Regulations Management Division, at (202) 720–9639. 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.

Elizabeth Green,

Acting Administrator, Rural Housing Service.

[FR Doc. 2020–27775 Filed 12–16–20; 8:45 am]

BILLING CODE 3410–XV–P

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

[Docket No. ATBCB–2020–0005]

Proposed Submission of Information Collection for OMB Review; Comment Request; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Architectural and Transportation Barriers Compliance Board (Access Board) invites comment on the proposed extension of its existing generic clearance for the collection of qualitative feedback on agency service delivery, which was developed as part of a Federal Government-wide effort to streamline the process for seeking feedback from the public expires in January 2021. (OMB Control No. 3014–0011). This information collection on service delivery. With this notice, the Access Board solicits comments on extension of its existing generic clearance without change. Following review of comments received in response to this 60-day notice, the Access Board intends to submit a request to the Office of Management and Budget (OMB) to renew its generic clearance for collection of qualitative feedback for another three-year term.

DATES: Submit comments by February 16, 2021.

ADDRESSES: You may submit comments, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the directions for sending comments.
- *Email: spiegel@access-board.gov.* Include ATBCB–2020–0005 in the subject line of the message.

Instructions: All submissions received must include the agency name and docket number for this Notice (ATBCB–2020–0005). All comments received, including any personal information provided, will be posted without change to *http://www.regulations.gov.* For this reason, please do not include information of a confidential nature in your comments, such as sensitive personal or proprietary information. For additional submission methods, please contact the person identified below for availability information.

FOR FURTHER INFORMATION CONTACT: Frances Spiegel, Attorney Advisor, Office of General Counsel, U.S. Access Board, 1331 F Street NW, Suite 1000, Washington, DC 20004–1111. Phone: 202–272–0041 (voice). Email: *spiegel@access-board.gov*.

SUPPLEMENTARY INFORMATION:

A. Background

Under the PRA and its implementing regulations (5 CFR part 1320), Federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor (*e.g.,* contractually-required information collection by a third-party). ''Collection of information,'' within the meaning of the PRA, includes agency requests that pose identical questions to, or impose reporting or recording keeping obligations on, ten or more persons, regardless of whether response to such request is mandatory or voluntary. *See* 5 CFR 1320.3(c); *see also* 44 U.S.C. 3502(3). Before seeking clearance from OMB, agencies are generally required, among other things, to publish a 60-day notice in the **Federal Register** concerning any proposed information collection—including extension of a previously-approved collection—and provide an opportunity for comment. *See* 44 U.S.C. 3506(c)(2)(A); 5 CFR 1320.8(d)(1).

B. Proposed Renewal of Information Collection Request

The Access Board is providing notice of its intent to seek renewal of its existing generic clearance for the collection of qualitative feedback with regard to agency services delivered by its Office of Technical and Information Services (OTIS) and Architectural Barriers Act (ABA) compliance and enforcement program. To date, we have found the feedback garnered through qualitative customer satisfaction surveys (and similar information collections) to be beneficial, by providing useful insights in experiences, perceptions, opinions, and expectations regarding Access Board services or focusing attention on areas in need of improvement. We thus intend to seek approval to continue our current efforts to solicit qualitative customer feedback by seeking input from customers across our agency programs and services. Online surveys will be used unless the customer contacts the agency by phone for technical assistance or an individual otherwise expresses a preference for another survey format (*i.e.,* fillable form in portable document format or paper survey). In addition, paper surveys may be used to garner feedback from participants at in-person trainings or similar events.

OMB Control Number: 3014–0011.

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

Type of Request: Extension without change.

Abstract: The proposed information collection activity facilitates collection of qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Federal Government's commitment to improving service delivery. By qualitative feedback we mean information collections that provide useful insights on perceptions and opinions but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insight into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training, or changes in operations might improve delivery of services. These collections will allow for ongoing, collaborative, and actionable communications between the Access Board and its customers and stakeholders.

Respondents/Affected Public: Individuals and Households; Businesses and Organizations; State, Local or Tribal Government.

Burden Estimates: In the table below (Table 1), the Access Board provides estimates for the annual reporting burden for the information collections proposed under this renewed generic information collection request. (The Access Board does not anticipate incurring any capital or other direct costs associated with this information collection. Nor will there be any costs to respondents, other than their time.)

TABLE 1—ESTIMATED ANNUAL BURDEN HOURS

Type of collection	Number of respondents	Frequency of response (per year)	Average response time (mins.)	Total burden (hours)
Customer feedback surveys—Office of Technical and Information Services	3,830	1	4	255
Customer feedback survey: ABA Compliance and enforcement program	40	1	4	3
Totals	3,870	n/a	n/a	258

(**Note:** Total burden hours per collection rounded to the nearest full hour.)

Request for Comment: The Access Board seeks comment on any aspect of the proposed renewal of its existing generic clearance for the collection of qualitative feedback on agency service delivery, including (a) whether the proposed collection of information is necessary for the Access Board's performance; (b) the accuracy of the estimated burden; (c) ways for the Access Board 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. Comments will be summarized and included in our request for OMB's approval of renewal of our existing generic clearance.

Gretchen Jacobs,

Interim Executive Director.

[FR Doc. 2020–27722 Filed 12–16–20; 8:45 am]

BILLING CODE 8150–01–P

DEPARTMENT OF COMMERCE

Census Bureau

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Quarterly Survey of Plant Capacity Utilization

AGENCY: U.S. Census Bureau, Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act (PRA) of 1995, invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment on the proposed extension of the Quarterly Survey of Plant Capacity Utilization prior to the submission of the information collection request (ICR) to OMB for approval.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before February 16, 2021.

ADDRESSES: Interested persons are invited to submit written comments by email to *Thomas.J.Smith@census.gov.* Please reference Quarterly Survey of Plant Capacity Utilization in the subject line of your comments. You may also submit comments, identified by Docket Number USBC–2020–0032, to the Federal e-Rulemaking Portal: *http://www.regulations.gov.* All comments received are part of the public record. No comments will be posted to *http://www.regulations.gov* for public viewing until after the comment period has closed. Comments will generally be posted without change. All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. You may submit attachments to electronic comments in Microsoft Word, Excel, or Adobe PDF file formats.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Mary Susan Bucci, Chief Economic Reimbursable Surveys Division, (301) 763–4639, and *Mary.Susan.Bucci@census.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau plans to request an extension of the current OMB clearance for the Quarterly Survey of Plant Capacity Utilization (SPC). The SPC is conducted quarterly, collecting from manufacturing plants and publishers, the value of actual production, the value of production that could have been achieved if operating at ''full production'' levels, and the value of production that could have been achieved if operating at ''national emergency'' levels. The survey also collects data on work patterns by shift. These data include hours in operations, production workers, and plant hours worked.

The primary sponsors of this collection and users of these data are the Federal Reserve Board (FRB) and the Defense Logistics Agency (DLA). The FRB uses these data in several ways. First, the capital workweek data is used as an indicator of capital use in the estimation of monthly output (industrial production). Second, the workweek data is used to improve the projections of labor productivity that are used to align industrial production (IP) with comprehensive benchmark information in the Manufacturing Sector of the Economic Census and the Annual Survey of Manufactures. Third, the utilization rate data assists in the assessment of recent changes in IP, as most of the high-frequency movement in utilization rates reflect production changes rather than capacity changes. Fourth, the time series of utilization rate data for each industry, in combination with the FRB IP data, is used to estimate current and historical measures of capacity consistent with the FRB production measures. The DLA uses these data to assess readiness to meet demand for goods under selected national emergency scenarios.

II. Method of Collection

The Census Bureau mails letters to respondents instructing them how to report electronically. Companies are asked to respond within 20 days of the initial mailing. The due date will be imprinted at the top of the letter. A reminder email is sent a week before the due date to delinquent respondents. Letters encouraging participation are mailed to companies that have not responded by the designated due date. A final email is sent to delinquent respondents with information for reporting online. Lastly, we will conduct a telephone follow-up.

III. Data

OMB Control Number: 0607–0175.

Form Number(s): MQ–C2.

Type of Review: Regular submission, Request for an Extension, without Change, of a Currently Approved Collection.

Affected Public: Manufacturing and publishing plants.

Estimated Number of Respondents: 7,500 per quarter.

Estimated Time per Response: 2 hours and 5 minutes.

Estimated Total Annual Burden Hours: 62,500.

Estimated Total Annual Cost to Public: $0. (This is not the cost of respondents' time, but the indirect costs respondents may incur for such things as purchases of specialized software or hardware needed to report, or expenditures for accounting or records maintenance services required specifically by the collection.)

Respondent's Obligation: Voluntary.

Legal Authority: Title 13 U.S.C. Section 8(b); 50 U.S.C. Section 98, *et seq.*; 12 U.S.C. Section 244.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include, or summarize, each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–27792 Filed 12–16–20; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–52–2020]

Foreign-Trade Zone (FTZ) 38—Spartanburg County, South Carolina, Application for Production Authority, Teijin Carbon Fibers, Inc. (Polyacrylonitrile-Based Carbon Fiber); Invitation for Public Comment on Rebuttal Submission

Pursuant to 15 CFR 400.32(c)(2), the FTZ Board is inviting public comment on the rebuttal submission of Teijin Carbon Fibers, Inc. (TCF) (dated November 10, 2020) that contains new or expanded argument or evidence. The rebuttal submission was presented in the context of the FTZ Board's consideration of the pending application requesting certain authority for TCF to produce polyacrylonitrile-based carbon fiber at its facility in Greenwood, South Carolina within FTZ 38. In response to this invitation for public comment, parties may also address argument or evidence presented in the application and in other parties' submissions in response to the initial invitation for public comment on the application (85 FR 49359, August 13, 2020). The application and parties' submissions may be viewed in the Online FTZ Information System on the FTZ Board's website (accessible via *www.trade.gov/ftz*).

Public comment is invited from interested parties. The closing period for their receipt is January 19, 2021. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to February 1, 2021. Submissions shall be addressed to the Board's Executive Secretary and sent to: *ftz@trade.gov.*

For further information, contact Diane Finver at *Diane.Finver@trade.gov* or (202) 482–1367.

Dated: December 14, 2020.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2020–27789 Filed 12–16–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–69–2020]

Foreign-Trade Zone (FTZ) 46—Cincinnati, Ohio; Notification of Proposed Production Activity; MANE, Inc. (Flavor Preparations and Seasonings), Cincinnati and Lebanon, Ohio

MANE, Inc. (MANE) submitted a notification of proposed production activity to the FTZ Board for its facilities in Cincinnati and Lebanon, Ohio. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on December 8, 2020.

The MANE facilities are located within Subzone 46H. The facilities are used for the production of flavors and seasonings in capsule, liquid, or dry form. Pursuant to 15 CFR 400.14(b), FTZ activity would be limited to the specific foreign-status materials and components

and specific finished products described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt MANE from customs duty payments on the foreign-status components used in export production. On its domestic sales, for the foreign-status materials/components noted below, MANE would be able to choose the duty rates during customs entry procedures that apply to seasonings and flavor preparations (for food, drink, and other products) (duty free to 7.5%; 8.4¢/Kg + 1.9%; 17¢/Kg + 1.9%; 30.5¢/Kg + 6.4%). MANE would be able to avoid duty on foreign-status components which become scrap/waste. Customs duties also could possibly be deferred or reduced on foreign-status production equipment.

The components and materials sourced from abroad include: Coffee (not roasted; extract, essence or concentrate); vanilla, ground or crushed; turmeric; lac, gums or resins other than gum arabic; vegetable saps and extracts; sunflower or safflower oil (not crude); vegetable fats and oils and fractions thereof; beeswax and other insect waxes; fruit or vegetable juice (single source); sauces and preparations; silicon dioxide; unsaturated acyclic hydrocarbons and derivatives; cyclanes, cyclenes, and cycloterpenes other than cyclohexane; other cyclic hydrocarbons and derivatives; butan-1-ol (n-butyl alcohol); octanol and isomers thereof; acyclic terpene alcohols; other unsaturated monohydric alcohols; sorbitol; menthol; other cyclanic, cyclenic or cycloterpenic alcohols; monophenols; cyclanic, cyclenic or cycloterpenic ethers and derivatives; ether alcohols and derivatives; ether-phenols, ether-alcohol-phenols and derivatives; acetals and derivatives; acyclic aldehydes; vanillin; aldehyde alcohols, aldehyde ethers, and aldehyde phenols; acyclic ketones; cyclohexanone and methylcyclohexanones; ionones and methylionones; cyclanic, cyclenic or cycloterpenic ketones; ketone-phenols and ketones with other oxygen function; esters of formic acid; esters of acetic acid; propionic acid and derivatives; butanoic acids, pentanoic acids and derivatives; saturated acyclic monocarboxylic acids and derivatives; oleic, linoleic or linolenic acids and derivatives; unsaturated acyclic monocarboxylic acids and their derivatives; benzoic acid and derivatives; aromatic monocarboxylic acids and their derivatives; acyclic polycarboxylic acids and their derivatives; lactic acid and derivatives; amino-acids and derivatives; thiocarbamates and dithiocarbamates; organo-sulfur compounds; compounds containing an unfused furan ring; lactones and derivatives; heterocyclic compounds (oxygen) and derivatives; compounds containing an unfused pyridine ring; lactams; heterocyclic compounds (nitrogen) and derivatives; compounds containing an unfused thiazole ring; vitamin E and derivatives; glycosides and derivatives; coloring extract from vegetable or animal origin; acid dyes and preparations thereof; essential oils derived from orange, lemon, other citrus fruit, peppermint, other mint sources, or other botanical sources; resinoids; oleoresins; flavor preparations for food or drink; preparations of odoriferous substances; gelatin; peptones, other protein substances and derivatives; dextrins and other modified starch; other terpenic oils; pyroligneous acid; and, natural polymers (duty rate ranges from duty free to 7.7%; 0.2/liter to 0.64/liter; 0.7¢/Kg to 8.8¢/Kg; 1.2¢/Kg + 1.5%; 1.7¢/Kg + 3.4%; 2.8¢/Kg + 3.8%; 8.4¢/Kg + 1.9%; 17¢/Kg + 1.9%). The request indicates that certain materials/components are subject to duties under Section 301 of the Trade Act of 1974 (Section 301), depending on the country of origin. The applicable Section 301 decisions require subject merchandise to be admitted to FTZs in privileged foreign status (19 CFR 146.41).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is January 26, 2021.

A copy of the notification will be available for public inspection in the ''Reading Room'' section of the Board's website, which is accessible via *www.trade.gov/ftz.*

For further information, contact Juanita Chen at *juanita.chen@trade.gov* or 202–482–1378.

Dated: December 14, 2020.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2020–27790 Filed 12–16–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–891; A–580–904; C–533–892]

Forged Steel Fittings From India and the Republic of Korea: Notice of Correction to the Antidumping Duty and Countervailing Duty Orders

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) is issuing a correction to the previously published **Federal Register** notices pertaining to the antidumping duty orders on forged steel fittings from India and the Republic of Korea (Korea) and the countervailing duty order on forged steel fittings from India.

DATES: *Applicable:* 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:

Correction

On December 11, 2020, Commerce published the antidumping duty orders on forged steel fittings from India and Korea and the countervailing duty order on forged steel fittings from India.[1] Due to a typographical error, the scope of the *Orders* included a misspelling.[2]

[1] *See Forged Steel Fittings from India and the Republic of Korea: Antidumping Duty Orders,* 85 FR 80014 (December 11, 2020); *see also Forged Steel Fittings from India: Countervailing Duty Order,* 85 FR 80016 (December 11, 2020) (collectively, the *Orders*).

[2] The misspelling was also included in the initiation notices, preliminary determinations, amended countervailing duty preliminary determination, and final determinations. *See Forged Steel Fittings from India and the Republic of Korea: Initiation of Less-Than-Fair-Value Investigations,* 84 FR 64265 (November 21, 2019); *see also Forged Steel Fittings from India: Initiation* of *Countervailing Duty Investigation,* 84 FR 64270 (November 21, 2019); *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); *Forged Steel Fittings from India: Amended Preliminary Affirmative Countervailing Duty Determination,* 85 FR 36835 (June 18, 2020); *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); *Forged Steel Fittings from the Republic of Korea: Preliminary Affirmative Determination of Sales at Less-Than-Fair Value, Postponement of Final Determination, and*

Specifically, in the Appendix to the published *Orders,* the second sentence of paragraph three reads: ''Forged steel fittings are not manufactured from casings.'' The sentence should have read: ''Forged steel fittings are not manufactured from *castings.*'' (emphasis added).[3]

We are hereby correcting the *Orders* to include the correct scope as described above and included in the Appendix to this notice.

This notice serves as a correction to the *Orders* and is published in accordance with section 706(a) and 736(a)of the Tariff Act of 1930, as amended.

Dated: December 11, 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 castings. 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 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. 2020–27783 Filed 12–16–20; 8:45 am]

BILLING CODE 3510–DS–P

Extension of Provisional Measures, 85 FR 32010 (May 28, 2020); *Forged Steel Fittings from India: Final Affirmative Determination of Sales at Less Than Fair Value,* 85 FR 66306 (October 19, 2020); *Forged Steel Fittings from the Republic of Korea: Final Affirmative Determination of Sales at Less Than Fair Value,* 85 FR 66302 (October 19, 2020); and *Forged Steel Fittings from India: Final Affirmative Countervailing Duty Determination,* 85 FR 66535 (October 20, 2020).

[3] We note that the scope of the *Orders* lists ''Casing conductor connectors made to proprietary specifications'' in the list of excluded products, and confirm that this spelling is intended and correct (*i.e.,* not a typographical error).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–822]

Welded Line Pipe From the Republic of Turkey: Preliminary Rescission of Antidumping Duty Administrative Review, in Part, and Preliminary Deferral of Administrative Review, in Part; 2018–2019

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that Cimtas Boru Imalatlari ve Ticaret, Ltd. Sti. (Cimtas), the sole mandatory respondent and only company with suspended entries during the period of review (POR), did not have reviewable sales during the POR. We are preliminarily deferring, in part, Cimtas's sales reporting until a subsequent review period and are preliminarily rescinding, in part, this administrative review with respect to the remaining 18 companies. Interested parties are invited to comment on these preliminary results.

DATES: Applicable December 17, 2020.

FOR FURTHER INFORMATION CONTACT: Alice Maldonado, 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) 482–4682.

SUPPLEMENTARY INFORMATION:

Background

On December 6, 2019, Commerce published in the **Federal Register** a notice of opportunity to request an administrative review of the antidumping duty order on welded line pipe from the Republic of Turkey (Turkey) for the period December 1, 2018, through November 30, 2019.[1] In December 2019, Commerce received a timely request, in accordance with section 751(a)(1) of the Tariff Act of 1930, as amended (the Act), to conduct an administrative review of the antidumping duty order on welded line pipe from Turkey from California Steel Industries, TMK IPSCO, Welspun Tubular LLC USA, and Maverick Tube Corporation (collectively, the petitioners).[2] Based on this request, on February 6, 2020, in accordance with 751(a)(1) of the Act, Commerce published in the **Federal Register** a notice of initiation listing 19 companies for which the petitioners requested an administrative review.[3] On February 24, 2020, Commerce selected Cimtas, the only company with suspended entries of welded line pipe from Turkey during the POR, for individual examination and issued the antidumping duty questionnaire to the company.[4]

On April 24, 2020, Commerce tolled all deadlines in administrative reviews by 50 days, and, on July 21, 2020, Commerce tolled deadlines for preliminary and final results in administrative reviews by an additional 60 days,[5] thereby extending the deadline for withdrawing requests for review until June 25, 2020, and the deadline for these preliminary results until December 21, 2020.

On August 20, 2020, the petitioners withdrew their request for an administrative review for the 19 companies for which they had requested a review.[6]

Scope of the Order

The products covered by the order are circular welded carbon and alloy steel (other than stainless steel) pipe of a kind used for oil or gas pipelines (welded line pipe), not more than 24 inches in nominal outside diameter, regardless of wall thickness, length, surface finish, end finish, or stenciling. Welded line pipe is normally produced to the American Petroleum Institute (API) specification 5L, but can be produced to comparable foreign specifications, to proprietary grades, or can be non-graded material. All pipe meeting the physical description set forth above, including multiple-stenciled pipe with an API or comparable foreign specification line pipe stencil is covered by the scope of this order.

The welded line pipe that is subject to the order is currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 7305.11.1030, 7305.11.5000, 7305.12.1030, 7305.12.5000, 7305.19.1030, 7305.19.5000, 7306.19.1010, 7306.19.1050, 7306.19.5110, and 7306.19.5150. The subject merchandise may also enter in HTSUS 7305.11.1060 and 7305.12.1060. While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

Preliminary Partial Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if a party who requested the review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. The aforementioned withdrawal request was untimely submitted; therefore, we are not rescinding this administrative review based on this request. Nonetheless, the record of this administrative review indicates that, of the 19 companies subject to review, Cimtas is the only company with suspended entries of subject merchandise during the period of review.[7] It is Commerce's practice to rescind an administrative review pursuant to 19 CFR 351.213(d)(3) when there are no reviewable entries of subject merchandise during the POR subject to the antidumping duty order for which liquidation is suspended.[8] At the end of the administrative review, the suspended entries are liquidated at the assessment rate computed for the review period.[9] Therefore, for an administrative review to be conducted, there must be a reviewable, suspended entry to be liquidated at the newly calculated assessment rate. Accordingly, pursuant to 19 CFR 351.213(d)(3), we have preliminarily determined to rescind this administrative review with respect to the 18 companies listed in the appendix to this notice that have no reviewable, suspended entries of subject merchandise during the POR.

Partial Deferral of Administrative Review

For the reasons discussed in the accompanying proprietary analysis memorandum, we preliminarily determine that there are no reviewable sales to an unaffiliated U.S. customer related to Cimtas's POR entries of welded line pipe.[10] Therefore, because there are no reviewable sales during this POR, we are deferring Cimtas's reporting of its sales to the appropriate subsequent review, contingent upon a request for review of Cimtas.

Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance. Interested parties may submit case briefs to Commerce no later than 30 days after the date of publication of this notice.[11] Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline for case briefs.[12] Commerce has modified certain

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 84 FR 66880 (December 6, 2019).

[2] *See* Petitioners' Letter, ''Welded Line Pipe from the Republic of Turkey: Request for Administrative Review,'' dated December 27, 2019.

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 85 FR 6896 (February 6, 2020); *see also Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 85 FR 13860, 13868 (March 10, 2020) for correction of the spelling of certain company names.

[4] *See* Memorandum, ''2018–2019 Administrative Review of the Antidumping Duty Order on Welded Line Pipe from Turkey: Respondent Selection,'' dated February 24, 2020.

[5] *See* Memorandum, ''Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews in Response to Operational Adjustments Due to COVID–19,'' dated April 24, 2020; *see also* Memorandum, ''Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews,'' dated July 21, 2020.

[6] *See* Petitioners' Letter, ''Welded Line Pipe from the Republic of Turkey: Withdrawal of Request for Administrative Review,'' dated August 20, 2020.

[7] *See* Memorandum, ''Release of U.S. Customs and Border Protection Entry Data,'' dated February 6, 2020.

[8] *See, e.g., Forged Steel Fittings from Taiwan: Rescission of Antidumping Duty Administrative Review; 2018–2019,* 85 FR 71317, 71318 (November 9, 2020); *see also Certain Circular Welded Non-Alloy Steel Pipe from Mexico: Rescission of Antidumping Duty Administrative Review; 2016–2017,* 83 FR 54084 (October 26, 2018).

[9] *See* 19 CFR 351.212(b)(1).

[10] *See* Memorandum, ''Antidumping Duty Administrative Review of Welded Line Pipe from the Republic of Turkey: Business Proprietary Information (BPI) Related to the Preliminary Results,'' dated concurrently with this notice.

[11] *See* 19 CFR 351.309(c).

[12] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements).

of its requirements for serving documents containing business proprietary information until further notice.[13] 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 date and time 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 via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS) by 5:00 p.m. Eastern Time on the established deadline.

Final Results

Commerce intends to issue the final results of this administrative review, including the results of its analysis of issues raised in any written briefs, not later than 120 days after the date of publication of this notice, unless otherwise extended.[14]

Assessment

If Commerce proceeds to a final rescission of this administrative review, Commerce will instruct U.S. Customs and Border Protection (CBP) to liquidate any suspended entries for the 18 companies listed in Appendix I at the rate in effect at the time of entry. We intend to issue liquidation instructions to CBP 15 days after publication of the final results of this review. If Commerce proceeds to a final deferral with respect to Cimtas's suspended entries during the POR, they will remain suspended until parties have an opportunity to request a review of the antidumping duty order of welded line pipe from Turkey for the period December 1, 2019, through November 30, 2020. If Commerce does not receive a timely request to review Cimtas for the period December 1, 2019, through November 30, 2020, Commerce will instruct CBP to assess antidumping duties on and liquidate Cimtas' suspended entries during the POR at the cash deposit rate in effect at the time of entry. If Commerce receives a timely request to review Cimtas for the period December 1, 2019, through November 30, 2020, Cimtas's suspended entries during the POR will remain suspended until the completion of the review and will be liquidated based on the final results for Cimtas.

Cash Deposit Requirements

If Commerce proceeds to a final rescission, in part, and final deferral, in part, of this administrative review, no cash deposit rates will change. Accordingly, the current cash deposit requirements shall remain in effect until further notice.

Notification to Importers

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. 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

We are issuing and publishing these results in accordance with sections 751(a)(1) of the Act and 19 CFR 351.213(d).

Dated: December 11, 2020.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

Appendix

Borusan Istikbal Ticaret
Borusan Mannesmann Boru Sanayi ve Ticaret A.S.
Cayirova Boru Sanayi ve Ticaret A.S.
Emek Boru Makina Sanayi ve Ticaret A.S.
Erbosan Erciyas Tube Industry and Trade Co. Inc.
Erciyas Celik Boru Sanayii A.S.
Guven Celik Boru Sanayii ve Ticaret Ltd. Sti.
Has Altinyagmur celik Boru Sanayii ve Ticaret Ltd. Sti.
HDM Steel Pipe Industry & Trade Co. Ltd.
Metalteks Celik Urunleri Sanayii
MMZ Onur Boru Profil Uretim Sanayii ve Ticaret A.S.
Noksel Steel Pipe Co. Inc.
Ozbal Celik Boru
Toscelik Profile and Sheet Industry, Co.
Tosyali Dis Ticaret A.S.
Umran Celik Boru Sanayii
YMS Pipe & Metal Sanayii A.S.
Yucel Boru Ithalat-Ihracat ve Pazarlama A.S.

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[13] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[14] *See* section 751(a)(3)(A) of the Act.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA716]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys Off of Coastal Virginia

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

ACTION: Issuance of a modified incidental harassment authorization; request for comments.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA), as amended, notification is hereby given that NMFS has issued a modified incidental harassment authorization (IHA) to Dominion Energy Virginia (Dominion) to incidentally harass marine mammals incidental to marine site characterization surveys conducted in the areas of the Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS) Offshore Virginia (Lease No. OCS–A–0483) as well as in coastal waters where an export cable corridor will be established in support of the Coastal Virginia Offshore Wind

Commercial (CVOW Commercial) Project.

DATES: This modified IHA is valid from the date of issuance through August 27, 2021.

FOR FURTHER INFORMATION CONTACT: Robert Pauline, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the original application and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), 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 such 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 such takings are set forth.

History of Request

On February 7, 2020, NMFS received a request from Dominion for an IHA to take marine mammals incidental to marine site characterization surveys in the areas of the Commercial Lease of Submerged Lands for Renewable Energy Development on the OCS Offshore Virginia (Lease No. OCS–A–0483) as well as in coastal waters where an export cable corridor will be established in support of the offshore wind project. Dominion's planned marine site characterization surveys include high-resolution geophysical (HRG) and geotechnical survey activities. Geophysical and shallow geotechnical survey activities are anticipated to be supported by up to four vessels. The vessels will transit a combined estimated total of 121.54 kilometers (km) of survey lines per day. Dominion's request was for incidental take of small numbers of nine marine mammal species by Level B harassment only. The application was deemed adequate and complete on May 12, 2020. We published a notice of proposed IHA and request for comments in the **Federal Register** on June 17, 2020 (85 FR 36562). We subsequently published the final notice of our issuance of the IHA in the **Federal Register** on September 8, 2020 (85 FR 55415), with effective dates from August 28, 2020, to August 27, 2021. The specified activities were expected to result in the take by Level B harassment of 9 species (10 stocks) of marine mammals including bottlenose dolphin (*Tursiops truncatus*), pilot whale (*Globicephala spp.*), common dolphin (*Delphinus delphis*), Atlantic white sided dolphin (*Lagenorhynchus acutus*), Atlantic spotted dolphin (*Stenella frontalis*), Risso's dolphin (*Grampus griseus*), harbor porpoise (*Phocoena phocoena*), harbor seal (*Phoca vitulina*), and gray seal (*Halichoerus grypus*).

On September 29, 2020, NMFS received a request from Dominion for a modification to the IHA that was issued on August 28, 2020 (85 FR 55415; September 8, 2020). Since the issuance of the initial IHA, Dominion has been recording large pods of Atlantic spotted dolphin within the Level B harassment zone such that they were approaching the authorized take limit for this species. Dominion determined that without an increase in authorized take of spotted dolphins they would be forced to repeatedly shut down whenever animals entered into specified Level B harassment zones. This would likely prolong the duration of survey and add increased costs to the project.

Therefore, Dominion requested a modification of the IHA to increase authorized take of spotted dolphin by Level B harassment. NMFS published the notice of the proposed IHA modification in the **Federal Register** on November 12, 2020 (85 FR 71881). The mitigation, monitoring, and reporting measures remain the same as prescribed in the initial IHA and no additional take is authorized for species other than spotted dolphin. Moreover, the IHA would still expire on August 27, 2021.

Description of the Specified Activity and Anticipated Impacts

The modified IHA includes the same HRG and geotechnical surveys in the same locations that were described in the initial IHA. The mitigation, monitoring, and reporting measures remain the same as prescribed in the initial IHA. NMFS refers the reader to the documents related to the initial IHA issued on August 28, 2020, for more detailed description of the project activities. These previous documents include the notice of proposed IHA and request for comments (85 FR 36562; June 17, 2020), notice of our issuance of the initial IHA in the **Federal Register** (85 FR 55415; September 8, 2020), and notice of proposed IHA modification in the **Federal Register** (85 FR 71881; November 12, 2020).

Detailed Description of the Action

A detailed description of the survey activities is found in these previous documents. The location, timing, and nature of the activities, including the types of HRG equipment planned for use, daily trackline distances and number of survey vessels (four) are identical to those described in the previous notices.

Public Comments

A notice of proposed IHA modification was published in the **Federal Register** on November 12, 2020 (85 FR 71881). During the 15-day public comment period, NMFS received comments from the Southern Environmental Law Center (SELC), which submitted comments on behalf of the Conservation Law Foundation, Defenders of Wildlife, Natural Resources Defense Council, Whale and Dolphin Conservation, Sierra Club Virginia Chapter, Assateague Coastal Trust, Inland Ocean Coalition, the International Marine Mammal Project of Earth Island Institute, and NY4WHALES. NMFS has posted the comments online at: *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable.* A summary of the comments as well as NMFS' responses are below.

Comment 1: SELC indicated that NMFS's interpretation of small numbers is contrary to the purpose of the MMPA

and that the agency failed to consider the unique conservation status of individual populations. Instead of applying a 30% ceiling for all species, SELC recommended that NMFS revisit its small numbers interpretation to consider whether the specific take percentage for Atlantic spotted dolphin will ensure that population levels are maintained at or restored to healthy population numbers.

Response: SELC's suggestion would import biological considerations into the term ''small numbers,'' which NMFS has determined are more properly considered in a ''negligible impact'' evaluation. Note that MMPA does not define ''small numbers.'' NMFS's and the U.S. Fish and Wildlife Service's 1989 implementing regulations defined small numbers as a portion of a marine mammal species or stock whose taking would have a negligible impact on that species or stock. This definition was invalidated in *Natural Resources Defense Council* v. *Evans,* 279 F.Supp.2d 1129 (2003) (N.D. Cal. 2003), based on the court's determination that the regulatory definition of small numbers was improperly conflated with the regulatory definition of ''negligible impact,'' which rendered the small numbers standard superfluous. As the court observed, ''the plain language indicates that small numbers is a separate requirement from negligible impact.'' Since that time, NMFS has not applied the definition found in its regulations. Rather, consistent with Congress' pronouncement that small numbers is not a concept that can be expressed in absolute terms (House Committee on Merchant Marine and Fisheries Report No. 97–228 (September 16, 1981)), NMFS makes its small numbers findings based on an analysis of whether the number of individuals authorized to be taken annually from a specified activity is small relative to the stock or population size. The Ninth Circuit has upheld a similar approach. See *Center for Biological Diversity* v. *Salazar,* No. 10–35123, 2012 WL 3570667 (9th Cir. Aug. 21, 2012). However, we have not historically indicated what we believe the upper limit of small numbers is.

To maintain an interpretation of small numbers as a proportion of a species or stock that does not conflate with negligible impact, we use the following framework. A plain reading of ''small'' implies as corollary that there also could be ''medium'' or ''large'' numbers of animals from the species or stock taken. We therefore use a simple approach that establishes equal bins corresponding to small, medium, and large proportions of the population abundance.

NMFS's practice for making small numbers determinations is to compare the number of individuals estimated and authorized to be taken (often using estimates of total instances of take, without regard to whether individuals are exposed more than once) against the best available abundance estimate for that species or stock. We note, however, that although NMFS's implementing regulations require applications for incidental take to include an estimate of the marine mammals to be taken, there is nothing in section 101(a)(5)(D) (or the similar provision in section 101(a)(5)(A) that requires NMFS to quantify or estimate numbers of marine mammals to be taken for purposes of evaluating whether the number is small. (See *CBD* v. *Salazar.*) While it can be challenging to predict the numbers of individual marine mammals that will be taken by an activity (again, many models calculate instances of take and are unable to account for repeated exposures of individuals), in some cases we are able to generate a reasonable estimate utilizing a combination of quantitative tools and qualitative information. When it is possible to predict with relative confidence the number of individual marine mammals of each species or stock that are likely to be taken, the small numbers determination should be based directly upon whether or not these estimates exceed one third of the stock abundance. In other words, consistent with past practice, when the estimated number of individual animals taken (which may or may not be assumed as equal to the total number of takes, depending on the available information) is up to, but not greater than, one third of the species or stock abundance, NMFS will determine that the numbers of marine mammals taken of a species or stock are small.

In contrast, 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.

Given the definitions present above, establishment of a small numbers threshold based on a stock-specific context is unnecessarily duplicative of the required negligible impact finding.

Comment 2: SELC stated that NMFS' updated negligible impact analysis underestimates the potential impacts of HRG surveys on small cetaceans like the Atlantic spotted dolphin. The MMPA authorizes NMFS to issue an IHA only if the agency finds that the authorized harassment caused by a ''specified activity'' will have a ''negligible impact'' on marine mammals. SELC stated that NMFS' negligible impact analysis is inadequate given the increased level of take that the agency proposed. SELC referenced several scientific research papers which indicated that Atlantic spotted dolphin is a particularly acoustically sensitive species, has the potential to be displaced, shift their behavioral state and stop or alter in response to a variety of anthropogenic noises, with potentially adverse energetic effects even from minor changes.

Response: Most of the scientific papers referenced by SELC describe the responses of various cetacean species to underwater noise associated with the use of seismic airguns, which are among the loudest anthropogenic sounds introduced into the marine environment. The HRG equipment used by Dominion radiates out less energy than seismic airguns and also operates in smaller areas. Therefore, the size of the area impacted by sound is much smaller. None of the references cited by SELC investigated potential impacts of HRG equipment to cetaceans. It should not be assumed that potential impacts to marine mammals from seismic airguns and from HRG equipment are similar, given the differences between the devices.

Even with the increase in authorized take numbers, the impacts of these lower severity exposures associated with HRG equipment are not expected to accrue to the degree that the fitness of any individuals is impacted, and, therefore no impacts on annual rates of recruitment or survival will result. Furthermore, the authorized take amount of spotted dolphin would be of small numbers relative to the population size (less than 5 percent).

Comment 3: SELC reiterated that NMFS's use of the 160 decibel (dB) threshold for behavioral harassment is not supported by the best available scientific information and results in an inaccurate negligible impact analysis.

Note that NMFS addressed this comment in the **Federal Register** notice of issue of the initial IHA (85 FR 55415; September 8, 2020).

Response: NMFS acknowledges that the 160-dB root mean-square (rms) step-function approach is simplistic, and that an approach reflecting a more complex probabilistic function may more effectively represent the known variation in responses at different levels due to differences in the receivers, the context of the exposure, and other factors. We recognize the potential for Level B harassment at exposures to received levels (RLs) below 160 dB rms, and conversely the potential that animals exposed to RLs above 160 dB rms will not respond in ways constituting behavioral harassment (*e.g.,* Malme *et al.,* 1983, 1984, 1985, 1988; McCauley *et al.,* 1998, 2000a, 2000b; Barkaszi *et al.,* 2012; Stone, 2015a; Gailey *et al.,* 2016; Barkaszi and Kelly, 2018). While in practice the 160-dB threshold works as a step-function, *i.e.,* animals exposed to RLs above the threshold are considered to be ''taken'' and those exposed to levels below the threshold are not, it represents a sort of mid-point of likely behavioral responses (which are extremely complex depending on many factors including species, noise source, individual experience, and behavioral context). What this means is that, conceptually, the function recognizes that some animals exposed to levels below the threshold will in fact react in ways that are appropriately considered take, while others that are exposed to levels above the threshold will not. Use of the 160-dB threshold allows for a simplistic quantitative estimate of take, while we can qualitatively address the variation in responses across different RLs in our discussion and analysis.

As behavioral responses to sound depend on the context in which an animal receives the sound, including the animal's behavioral mode when it hears sounds, prior experience, additional biological factors, and other contextual factors, defining sound levels that disrupt behavioral patterns is extremely difficult. Even experts have not previously been able to suggest specific new criteria due to these difficulties (*e.g.,* Southall *et al.* 2007; Gomez *et al.,* 2016). NMFS acknowledges the limitations of the current system and is in the process of developing an updated approach to more accurately predict under what circumstances take is likely to result from sound exposure.

Comment 4: SELC recommended that HRG surveys should commence, with ramp-up, during daylight hours only, to maximize the chance that marine mammals are detected and confirmed clear of the exclusion zone.

Response: NMFS acknowledges the limitations inherent in detection of marine mammals at night. However, no injury is expected to result even in the absence of mitigation, given the very small estimated Level A harassment zones. Any potential impacts to marine mammals authorized for take would be limited to short-term behavioral responses. Restricting surveys in the manner suggested by the commenters may reduce marine mammal exposures by some degree in the short term, but would not result in any significant reduction in either intensity or duration of noise exposure. The restrictions recommended by the commenters could result in the surveys spending increased time on the water, which may result in greater overall exposure to sound for marine mammals and increase the risk of a vessel strike; thus the commenters have not demonstrated that such a requirement would result in a net benefit. Restricting the applicant to ramp-up only during daylight hours would have the potential to result in lengthy shutdowns of the survey equipment, which could result in the applicant failing to collect the data they have determined is necessary and, subsequently, the need to conduct additional surveys the following year. This would result in significantly increased costs incurred by the applicant. Thus, the restriction suggested by the commenters would not be practicable for the applicant to implement. In consideration of potential effectiveness of the recommended measure and its practicability for the applicant, NMFS has determined that restricting survey start-ups to daylight hours when visibility is unimpeded is not warranted or practicable in this case. Note that NMFS addressed this comment in the **Federal Register** notice of issue of the initial IHA (85 FR 55415; September 8, 2020).

Comment 5: SELC recommended that a standard 500-meter exclusion zone be established for all marine mammal species around survey vessels.

Response: NMFS has determined that, with the exception of right whales, a 500-m exclusion zone is not warranted. The largest calculated Level B harassment distance for all marine mammals is calculated to be 100 m. We note that a 500-m exclusion zone would exceed the modeled distance to the largest Level B harassment isopleth distance (100 m) by a factor of five. Thus, NMFS is not requiring shutdown if marine mammals are sighted within 500 m of survey vessels. NMFS addressed this comment previously in the **Federal Register** notice of issue of the initial IHA (85 FR 55415; September 8, 2020).

Comment 6: SELC recommended that combination of visual monitoring—by four protected species observers adhering to ''two-on/two-off'' schedule—and passive acoustic monitoring (PAM) should be used at all times that survey work is underway, and, for efforts that continue into the nighttime, night vision or infrared technology should also be used.

Response: NMFS does not agree with the commenters that a minimum of four protected species observers (PSOs) should be required. The relatively small size of the exclusion means that a single PSO stationed at the highest vantage point and engaged in general 360-degree scanning during daylight hours is able to effectively observe the necessary area. Additionally, PSOs must be on duty 30 minutes prior to and during nighttime ramp-ups for HRG surveys. Dominion has also committed to employing a minimum of two NMFS-approved PSOs when HRG equipment is in use at night.

There are several reasons why we do not agree that use of PAM is warranted for 24-hour HRG surveys. While NMFS agrees that PAM can be an important tool for augmenting detection capabilities in certain circumstances, its utility in further reducing impact for Dominion's HRG survey activities is limited. First, for this activity, the area expected to be ensonified above the Level B harassment threshold is relatively small (a maximum of 100 m). This reflects the fact that the source level is comparatively low and the intensity of any resulting impacts would also be low. Further, inasmuch as PAM will only detect a portion of any animals exposed within a zone (see below), the overall probability of PAM detecting an animal in the harassment zone is low. Together these factors support the limited value of PAM for use in reducing take in small impact zones. PAM is only capable of detecting animals that are actively vocalizing, while many marine mammal species vocalize infrequently or during certain activities, which means that only a subset of the animals within the range of the PAM would be detected (and potentially have reduced impacts). Additionally, localization and range detection can be challenging under certain scenarios. For example, odontocetes are fast moving and often travel in large or dispersed groups which makes localization difficult. In addition, the ability of PAM to detect baleen whale vocalizations is further limited due to its deployment from the

stern of a vessel, which puts the PAM hydrophones in proximity to propeller noise and low frequency engine noise, which can mask the low frequency sounds emitted by baleen whales, including North Atlantic right whales.

We also note that the effects to all marine mammals, including spotted dolphins, from the types of surveys authorized in this IHA are expected to be limited to low level behavioral harassment even in the absence of mitigation; no injury is expected or authorized. In consideration of the limited additional benefit anticipated by adding this detection method and the cost and impracticability of implementing a full-time PAM program, we have determined the current requirements for visual monitoring are sufficient to ensure the least practicable adverse impact on the affected species or stocks and their habitat. Note that the initial IHA contained a requirement, retained in the modified IHA, that night-vision equipment (*i.e.,* night-vision goggles and infrared technology) must be available for use for PSOs. NMFS previously addressed this comment in the **Federal Register** notice of issue of the initial IHA (85 FR 55415; September 8, 2020).

Comment 7: SELC reiterated some of the recommendations they submitted in response to our initial Notice of proposed IHA published in **Federal Register** on June 17, 2020 (85 FR 36537) which focused on the need for stronger mitigation measures for North Atlantic right whale.

Response: Comments submitted by SELC pertaining to the North Atlantic right whale are outside the scope of this action, which only addresses increased take of dolphins and, further, were already addressed in previously in the **Federal Register** notice of issue of the initial IHA (85 FR 55415; September 8, 2020).

Comment 8: SELC recommended that all vessels traveling to and from the project area maintain a speed of 10 knots (18.5 km/hour) or less throughout the survey period.

Response: NMFS does not concur with this measure. NMFS has analyzed the potential for ship strike resulting from Dominion's activity and has determined that the mitigation measures specific to ship strike avoidance are sufficient to avoid the potential for ship strike. These include: A requirement that all vessel operators comply with 10 knot (18.5 km/hour) or less speed restrictions in any established dynamic management area (DMA) or seasonal management area (SMA); a requirement that all vessel operators reduce vessel speed to 10 knots (18.5 km/hour) or less when any large whale, any mother/calf pairs, pods, or large assemblages of non-delphinoid cetaceans are observed within 100 m of an underway vessel; a requirement that all survey vessels maintain a separation distance of 500-m or greater from any sighted North Atlantic right whale; a requirement that, if underway, vessels must steer a course away from any sighted North Atlantic right whale at 10 knots or less until the 500-m minimum separation distance has been established; and a requirement that, if a North Atlantic right whale is sighted in a vessel's path, or within 500 m of an underway vessel, the underway vessel must reduce speed and shift the engine to neutral. We have determined that the ship strike avoidance measures are sufficient to ensure the least practicable adverse impact on species or stocks and their habitat. Furthermore, no documented vessel strikes have occurred for any HRG surveys which were issued IHAs from NMFS. NMFS addressed this comment previously in the **Federal Register** notice of issue of the initial IHA (85 FR 55415; September 8, 2020).

Comment 10: SELC recommended that NMFS consider activating Dynamic Management Areas (DMAs) whenever a single North Atlantic right whale is sighted or acoustically detected neat the project area, not just an aggregation of three or more whales.

Response: DMAs are a component of the 2008 NOAA Ship Strike Rule to minimize lethal ship strikes of North Atlantic right whales. Note that the trigger of three or more whales is taken from a NOAA Northeast Fisheries Science Center (NEFSC) analysis of sightings data from Cape Cod Bay and Stellwagen Bank from 1980 to 1996 (Clapham & Pace 2001). This analysis found that an initial sighting of three or more North Atlantic right whales was a reasonably good indicator that whales would persist in the area, and the average duration of the whale's presence based on these sightings data was two weeks.

Description of Marine Mammals

A description of the marine mammals in the area of the activities is found in these previous documents, which remains applicable to this modified IHA as well. In addition, NMFS has reviewed recent Stock Assessment Reports, information on relevant Unusual Mortality Events, and recent scientific literature, and determined that no new information affects our original analysis of impacts under the initial IHA.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

A description of the potential effects of the specified activities on marine mammals and their habitat may be found in the documents supporting the initial IHA, which remains applicable to the issuance of this modified IHA. There is no new information on potential effects.

Estimated Take

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the notice of IHA for the initial authorization (85 FR 55415; September 8, 2020). The HRG equipment that may result in take, as well as the source levels, marine mammal stocks taken, marine mammal density data and the methods of take estimation applicable to this authorization remain unchanged from the previously issued IHA. The number of authorized takes is also identical with the exception of spotted dolphin.

During the one month period from the effective date of the initial IHA (August 28, 2020) through September 29, 2020, a total of 19 spotted dolphins had been observed within the Level B harassment zone distances and recorded as takes. This was largely due to a single pod of 15 dolphins sighted in the zone. Another 24 dolphins were observed over three survey days but they were not located in the Level B harassment zone. Prior to the issuance of the initial IHA, Dominion operated only during daylight hours under a Letter of Concurrence (LoC) issued by NMFS. As such, Dominion committed to shutting down whenever a marine mammal approached or entered a Level B harassment zone in order to avoid all incidental take. In the weeks prior to the issuance of the initial IHA, Dominion had observed pods containing up to 17 individuals in the Level B harassment zone. However, these pods were not recorded as incidental takes since mitigation measures were employed, *i.e.,* the acoustic source was shut down and the animals were not exposed to source levels associated with harassment. The estimated take in the initial IHA was based on the best available density data from Roberts *et al.* (2016, 2017, 2018), however, the multiple occurrences of the large pod in the vicinity of the survey was unexpected and not reflected in the take estimate. Table 1 shows spotted dolphin detection events when Dominion was operating under both the LoC (before August 28, 2020) as well as during the initial IHA (on or after August 28, 2020).

TABLE 1—ATLANTIC SPOTTED DOLPHIN OBSERVATIONS DURING DOMINION ENERGY HRG SURVEY ACTIVITIES

Vessel name	Date of detection	Number of animals observed in the group	Level B takes accumulated
Sarah Bordelon	9/16/2020	15	15
Marcelle Bordelon	9/9/2020	4	4
Marcelle Bordelon	9/7/2020	6	.....
Sarah Bordelon	9/4/2020	7	.....
Sarah Bordelon	9/4/2020	11	.....
Marcelle Bordelon	8/23/2020	5	.....
Sarah Bordelon	8/17/2020	17	.....

Given that large pods of spotted dolphin were recorded on multiple occasions, Dominion became concerned that the authorized number of takes by Level B harassment would be exceeded, necessitating the frequent shutdown of HRG survey equipment to avoid additional take of this species. On October 3, 2020, Dominion reached the authorized take amount for spotted dolphins. Since that time, they have been shutting down whenever spotted dolphins are sighted approaching or entering the harassment zone. Dominion requested and NMFS has authorized additional take of this species to conservatively allow 20 authorized takes per day. NMFS concurs that this take amount is reasonable in case observed dolphin pods are larger than what has been recorded to date. While NMFS does not expect that larger spotted dolphin pods would occur every day, it cannot be ruled out. With approximately 120 survey days remaining, NMFS has authorized increased take by Level B harassment from 27 to 2,427 ((20 animals/day * 120 survey days) + initial 27 authorized takes). This represents 4.38 percent of the western North Atlantic stock of spotted dolphin. Take by Level A harassment was not requested, and has not been authorized by NMFS (or anticipated).

The total numbers of incidental takes by Level B harassment, including the authorized update in spotted dolphin takes, and as a percentage of population, is shown in Table 2 below.

TABLE 2—TOTAL NUMBERS OF AUTHORIZED TAKES BY LEVEL B HARASSMENT AND AS A PERCENTAGE OF POPULATION

Species	Totals	
	Take authorization (number)	Instances of take as percentage of population [1]
Short-finned pilot whale	12	0.06
Bottlenose dolphin (Offshore)	511	0.81
Bottlenose dolphin (Southern Migratory Coastal)	224	6.5
Common dolphin	68	0.08
Atlantic white-sided dolphin	44	0.12
Spotted dolphin (adjusted)	2,427	4.38
Risso's dolphin	6	0.08
Harbor porpoise	39	0.09
Harbor seal [2]	35	0.02
Gray Seal [2]	.....	0.06

[1] Calculations of percentage of stock taken are based on the best available abundance estimate as shown in Table 2 in **Federal Register** final notice of issuance of the IHA (85 FR 55415; September 8, 2020). In most cases the best available abundance estimate is provided by Roberts *et al.* (2016, 2017, 2018), when available, to maintain consistency with density estimates derived from Roberts *et al.* (2016, 2017, 2018. For bottlenose dolphins, Roberts *et al.* (2016, 2017, 2018) provides only a single abundance estimate and does not provide abundance estimates at the stock or species level (respectively), so abundance estimates used to estimate percentage of stock taken for bottlenose dolphins are derived from NMFS SARs (Hayes *et al.* 2019).

[2] Pinniped density values reported as "seals" and not species-specific.

Description of Mitigation, Monitoring and Reporting Measures

The mitigation, monitoring, and reporting measures included in this modified IHA are identical to those included in the **Federal Register** notice announcing the initial IHA and the discussion of the least practicable adverse impact included in that document remains accurate (85 FR 55415; September 8, 2020).

Establishment of Exclusion Zones (EZs)—Marine mammal EZs must be established around the HRG survey equipment and monitored by protected species observers (PSOs) during HRG surveys as follows:

- 500-m EZ is required for North Atlantic right whales;
- During use of the GeoMarine Dual 400 Sparker 800J, a 100-m EZ is required for all other marine mammals except delphinid(s) from the genera *Delphinus, Lagenorhynchus, Stenella* or *Tursiops* and seals; and
- When only the Triple Plate Boomer 1000J is in use, a 25-m EZ is required for all other marine mammals except delphinid(s) from the genera *Delphinus, Lagenorhynchus, Stenella* or *Tursiops* and seals; a 200-m buffer zone is required for all marine mammals except those species otherwise excluded (*i.e.,* North Atlantic right whale).

If a marine mammal is detected approaching or entering the EZs during the survey, the vessel operator must adhere to the shutdown procedures described below. In addition to the EZs described above, PSOs must visually monitor a 200-m buffer zone for the

purposes of pre-clearance. During use of acoustic sources with the potential to result in marine mammal harassment (*i.e.,* anytime the acoustic source is active, including ramp-up), occurrences of marine mammals within the monitoring zone (but outside the EZs) must be communicated to the vessel operator to prepare for potential shutdown of the acoustic source. The buffer zone is not applicable when the EZ is greater than 100 m. PSOs are also required to observe a 500-m monitoring zone and record the presence of all marine mammals within this zone.

Visual Monitoring—Monitoring must be conducted by qualified protected PSOs who are trained biologists, with minimum qualifications described in the **Federal Register** notice of the issuance of the initial IHA (85 FR 55415; September 8, 2020). Dominion must have one PSO on duty during the day and has committed that a minimum of two NMFS-approved PSOs must be on duty and conducting visual observations when HRG equipment is in use at night. Visual monitoring must begin no less than 30 minutes prior to ramp-up of HRG equipment and continue until 30 minutes after use of the acoustic source. PSOs must establish and monitor the applicable EZs, Buffer Zone and Monitoring Zone as described above. PSOs must coordinate to ensure 360° visual coverage around the vessel from the most appropriate observation posts, and must conduct observations while free from distractions and in a consistent, systematic, and diligent manner. PSOs are required to estimate distances to observed marine mammals. It is the responsibility of the Lead PSO on duty to communicate the presence of marine mammals as well as to communicate action(s) that are necessary to ensure mitigation and monitoring requirements are implemented as appropriate.

Pre-Clearance of the Exclusion Zones—Prior to initiating HRG survey activities, Dominion must implement a 30-minute pre-clearance period. During pre-clearance monitoring (*i.e.,* before ramp-up of HRG equipment begins), the Buffer Zone also acts as an extension of the 100-m EZ in that observations of marine mammals within the 200-m Buffer Zone would also preclude HRG operations from beginning. During this period, PSOs must ensure that no marine mammals are observed within 200 m of the survey equipment (500 m in the case of North Atlantic right whales). HRG equipment must not start up until this 200-m zone (or, 500-m zone in the case of North Atlantic right whales) is clear of marine mammals for at least 30 minutes. The vessel operator must notify a designated PSO of the proposed start of HRG survey equipment as agreed upon with the lead PSO; the notification time must not be less than 30 minutes prior to the planned initiation of HRG equipment in order to allow the PSOs time to monitor the EZs and Buffer Zone for the 30 minutes of pre-clearance.

If a marine mammal is observed within the relevant EZs or Buffer Zone during the pre-clearance period, initiation of HRG survey equipment must not begin until the animal(s) has been observed exiting the respective EZ or Buffer Zone, or, until an additional time period has elapsed with no further sighting (*i.e.,* minimum 15 minutes for porpoises, and 30 minutes for all other species). The pre-clearance requirement includes small delphinoids. PSOs must also continue to monitor the zone for 30 minutes after survey equipment is shut down or survey activity has concluded.

Ramp-Up of Survey Equipment—When technically feasible, a ramp-up procedure must be used for geophysical survey equipment capable of adjusting energy levels at the start or re-start of survey activities. The ramp-up procedure must be used at the beginning of HRG survey activities in order to provide additional protection to marine mammals near the Survey Area by allowing them to detect the presence of the survey and vacate the area prior to the commencement of survey equipment operation at full power. Ramp-up of the survey equipment must not begin until the relevant EZs and Buffer Zone has been cleared by the PSOs, as described above. HRG equipment must be initiated at their lowest power output and would be incrementally increased to full power. If any marine mammals are detected within the EZs or Buffer Zone prior to or during ramp-up, the HRG equipment must be shut down (as described below).

Shutdown Procedures—If an HRG source is active and a marine mammal is observed within or entering a relevant EZ (as described above) an immediate shutdown of the HRG survey equipment is required. When shutdown is called for by a PSO, the acoustic source must be immediately deactivated and any dispute resolved only following deactivation. Any PSO on duty has the authority to delay the start of survey operations or to call for shutdown of the acoustic source if a marine mammal is detected within the applicable EZ. The vessel operator must establish and maintain clear lines of communication directly between PSOs on duty and crew controlling the HRG source(s) to ensure that shutdown commands are conveyed swiftly while allowing PSOs to maintain watch. Subsequent restart of the HRG equipment must only occur after the marine mammal has either been observed exiting the relevant EZ, or, until an additional time period has elapsed with no further sighting of the animal within the relevant EZ.

Upon implementation of shutdown, the HRG source may be reactivated after the marine mammal that triggered the shutdown has been observed exiting the applicable EZ (*i.e.,* the animal is not required to fully exit the Buffer Zone where applicable) or, following a clearance period of 15 minutes for small odontocetes and seals and 30 minutes for all other species with no further observation of the marine mammal(s) within the relevant EZ. If the HRG equipment shuts down for brief periods (*i.e.,* less than 30 minutes) for reasons other than mitigation (*e.g.,* mechanical or electronic failure) the equipment may be re-activated as soon as is practicable at full operational level, without 30 minutes of pre-clearance, only if PSOs have maintained constant visual observation during the shutdown and no visual detections of marine mammals occurred within the applicable EZs and Buffer Zone during that time. For a shutdown of 30 minutes or longer, or if visual observation was not continued diligently during the pause, pre-clearance observation is required, as described above.

The shutdown requirement is waived for certain genera of small delphinids (*i.e., Delphinus, Lagenorhynchus, Stenella* (which includes Atlantic spotted dolphins), or *Tursiops*) under certain circumstances. If a delphinid(s) from these genera is visually detected within the EZ shutdown would not be required. If there is uncertainty regarding identification of a marine mammal species (*i.e.,* whether the observed marine mammal(s) belongs to one of the delphinid genera for which shutdown is waived), PSOs must use best professional judgment in making the decision to call for a shutdown.

If a species for which authorization has not been granted, or a species for which authorization has been granted but the authorized number of takes have been met, approaches or is observed within the area encompassing the Level B harassment isopleth (100 m or 25 m), shutdown must occur.

Vessel Strike Avoidance—Dominion must comply with vessel strike avoidance measures as described in the **Federal Register** notice of the issuance of the initial IHA (85 FR 55415; September 8, 2020).

Seasonal Operating Requirements—Dominion will conduct HRG survey

activities in the vicinity of the North Atlantic right whale Mid-Atlantic SMA near Norfolk and the mouth of the Chesapeake Bay. Activities conducted prior to May 1 must comply with the seasonal mandatory speed restriction period for this SMA (November 1 through April 30) for any survey work or transit within this area.

Throughout all phases of the survey activities, Dominion must monitor NOAA Fisheries North Atlantic right whale reporting systems for the establishment of a DMA. If NMFS establishes a DMA in the Lease Area or cable route corridor being surveyed, within 24 hours of the establishment of the DMA, Dominion is required to work with NMFS to shut down and/or alter activities to avoid the DMA.

Training—Project-specific training is required for all vessel crew prior to the start of survey activities. Confirmation of the training and understanding of the requirements must be documented on a training course log sheet. Signing the log sheet will certify that the crew members understand and will comply with the necessary requirements throughout the survey activities.

Reporting—PSOs must record specific information on the sighting forms as described in the **Federal Register** notice of the issuance of the initial IHA (85 FR 55415; September 8, 2020). Within 90 days after completion of survey activities, Dominion must provide NMFS with a monitoring report which includes summaries of recorded takes and estimates of the number of marine mammals that may have been harassed.

In the event of a ship strike or discovery of an injured or dead marine mammal, Dominion must report the incident to the Office of Protected Resources, NMFS and to the New England/Mid-Atlantic Regional Stranding Coordinator as soon as feasible. The report must include the information listed in the **Federal Register** notice of the issuance of the initial IHA (85 FR 55415; September 8, 2020).

Based on our evaluation of the applicant's measures in consideration of the increased estimated take for spotted dolphins, NMFS has re-affirmed the determination that the required mitigation measures provide the means effecting the least practicable impact on spotted dolphins and their habitat.

Determinations

Dominion's HRG survey activities and the mitigation, monitoring, and reporting requirements are unchanged from those covered in the initial IHA. The effects of the activity, taking into consideration the mitigation and related monitoring measures, remain unchanged from those stated in the initial IHA, notwithstanding the increase to the authorized amount of spotted dolphin take. Specifically, the Level B harassment authorized for spotted dolphins is expected to be of low severity, predominantly in the form of avoidance of the sound source and potential occasional interruption of foraging. With approximately 120 survey days remaining, NMFS has increased authorized spotted dolphin take by Level B harassment to 2,427. Even in consideration of the increased estimated numbers of take by Level B harassment, the impacts of these lower severity exposures are not expected to accrue to the degree that the fitness of any individuals is impacted, and, therefore no impacts on annual rates of recruitment or survival will result. Further, and separately, the authorized take amount of spotted dolphin would be of small numbers of spotted dolphins relative to the population size (less than 5 percent), as take that is less than one third of the species or stock abundance is considered by NMFS to be small numbers. In conclusion, there is no new information suggesting that our effects analysis or negligible impact finding for Atlantic spotted dolphins should change.

Based on the information contained here and in the referenced documents, NMFS has reaffirmed the following: (1) The required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) Dominion's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action, and (5) appropriate monitoring and reporting requirements are included.

Endangered Species Act (ESA)

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.

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 modification 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 determined that the issuance of the modified IHA qualifies to be categorically excluded from further NEPA review.

Authorization

NMFS has issued a modified IHA to Dominion for conducting marine site characterization surveys in the areas of the Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf Offshore Virginia (Lease No. OCS–A–0483) as well as in coastal waters where an export cable corridor will be established in support of the CVOW Commercial Project effective from the date of issuance until August 27, 2021.

Dated: December 14, 2020.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2020–27761 Filed 12–16–20; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA694]

Takes of Marine Mammals Incidental To Specified Activities; Taking Marine Mammals Incidental to Washington State Department of Transportation Purdy Bridge Rehabilitation Project, Pierce County, WA

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 Washington State Department of Transportation (WADOT) for authorization to take marine mammals incidental to the Purdy Bridge

Rehabilitation Project in Pierce County, WA. 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 19, 2021.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Electronic comments 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 27, 2020, NMFS received an application from WADOT requesting an IHA to take small numbers of six species of marine mammals incidental to pile driving and removal associated with the Purdy Bridge Rehabilitation Project. The application was deemed adequate and complete on December 1, 2020. WADOT's request is for take of a small number of each species by Level B harassment. Neither WADOT 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 rehabilitate the two in-water support piers of the State Route 302 Purdy Bridge by removing the top 3 inches (7.5 centimeter (cm)) of decaying concrete on each support pier and replacing with fiberglass reinforced concrete. Twenty steel H piles and 44 sheetpiles will be driven to create a caisson-like dewatered structures around the bridge piers to allow the work to be completed. Once the work on the piers is completed the piles will be removed. A needle gun will be used to remove 3 inches (7.5 cm) of decayed concrete from the two in-water bridge piers. Pile driving/removal and concrete removal is expected to take no more than 20 days. Pile driving/removal would be by vibratory pile driving.

The pile driving/removal can result in take of marine mammals from sound in the water which results in behavioral harassment or auditory injury. Needle gun scraping from sound in the air may result in behavioral harassment of pinnipeds.

Dates and Duration

The work described here is scheduled for July 16, 2021 through February 15, 2022 as it is limited to this work window because of restrictions to protect ESA-listed salmonids. In-water activities will occur during daylight hours only.

Specific Geographic Region

The activities would occur in Henderson Bay, a small isolated bat of south Puget Sound near the unincorporated community of Purdy, WA, north of the city of Gig Harbor, WA

(Figure 1). The Bay is oriented basically north-south with the Purdy Bridge spanning the bay where a sand spit narrows the width of the bay near its northern limit. North of the bridge is the Burley Lagoon, a 1.45 square kilometer (km^2) (0.56 square miles (mi^2)) shallow water lagoon with significant acreage used for commercial shellfishing. The width of Henderson Bay ranges from 0.3 to 5.8 kilometer (km) (0.2 to 3.6 miles (mi)), and depths range from 23 meter (m) (74 feet (ft)) Mean Lower Low Water (MLLW) to intertidal. Water depths near the bridge vary from exposed substrate at low tides to 5 m (15 ft) at high tide. The substrate in the area is gravels in a sand matrix which do not require impact pile driving.

Detailed Description of Specific Activity

Purdy Bridge is a continuous hollow-box girder bridge that is 170 m (550 ft) long and was built in 1937. It is two lanes wide and supported by four piers, two of which are in the water and will be repaired as part of this project. These two piers are 190 feet apart and seriously decayed. The purpose of the project is to rehabilitate the two in-water support piers by removing the top 3 inches (7.5 cm) of decaying concrete on each support pier and replacing with fiberglass reinforced concrete. Twenty steel H piles and 44 sheetpiles will be driven with a vibratory hammer to create a caisson-like dewatered structures around the bridge piers to allow the work to be completed.

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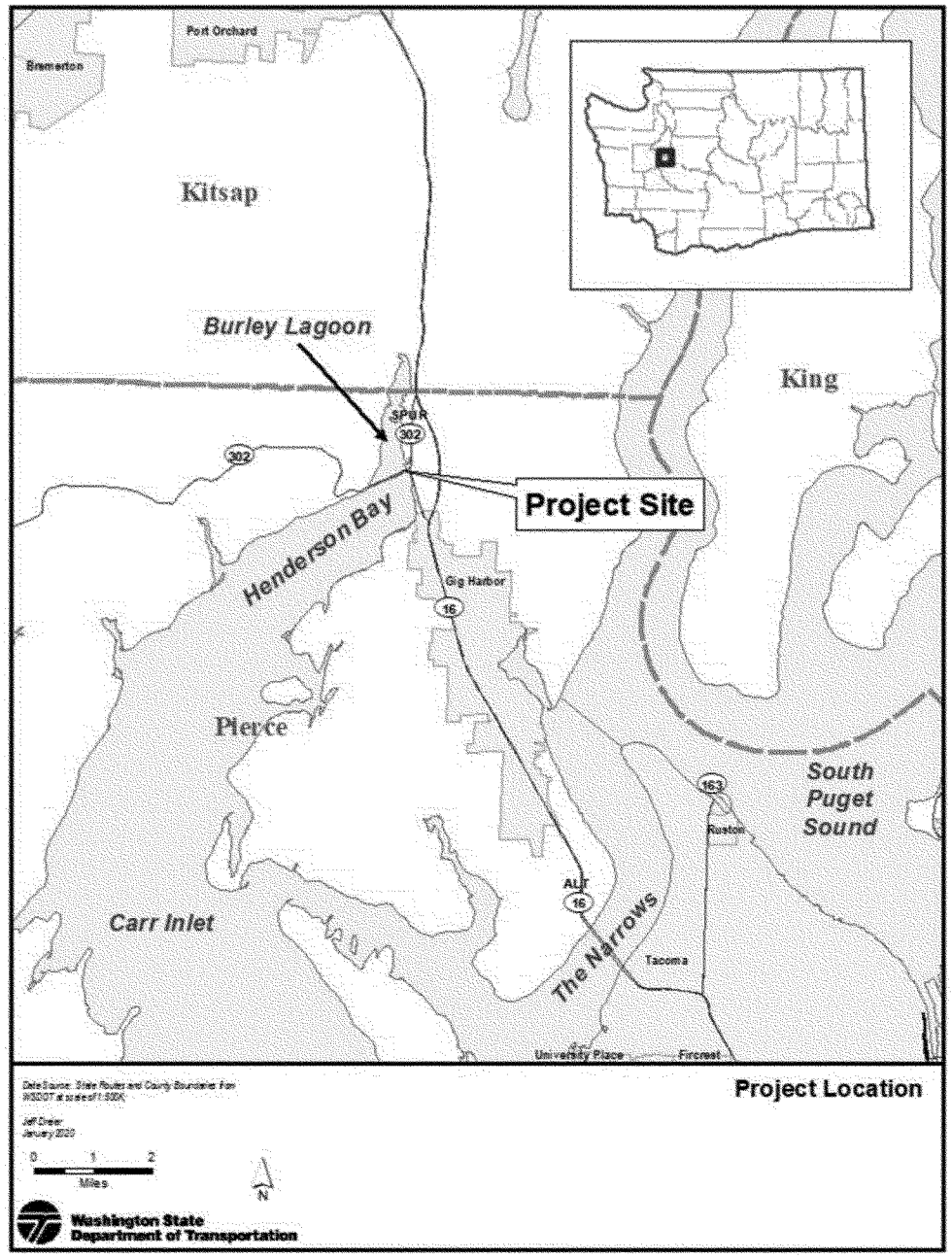

Figure 1-- Map of Proposed Project Area in Puget Sound, WA

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Areas immediately surrounding the pier footings will be excavated to expose the footings and provide a stable base for any cofferdam system that may be required. The excavated area will be approximately 40 square m (430 square ft) for each pier column, based on a 1.5 m (5 ft) pad around the pier footing. Around each pier, 10 12-inch steel H piles will be installed with a vibratory hammer. Additional H piles will then be tacked horizontally (not hammered) onto the vertical H piles above the water level to create a flat supportive surface template to align the sheet piles. Using this template as a guide, 22 48-inch sheet piles will be driven with a vibratory hammer into the substrate immediately adjacent to each pier to form a temporary interlocked sheet pile wall to isolate the work area from the surrounding water.

Once these structures are in place, the rest of the containment system will be installed prior to removing marine growth and preparing the piers for repair. The pier columns will then be pressure washed to remove all existing marine growth. Next, the exposed concrete surface of each pier will be prepared by removing approximately 3 inches (7.5 cm) of the concrete on all four sides of the columns with a needle gun. Any potentially contaminated water from these procedures will be removed from the containment system and treated. Finally, the columns will be repaired with the placement of corrosion resistant fiberglass reinforcement. Forms will be installed and approximately 6 inches (15 cm) of concrete or grout will be placed to encapsulate the fiberglass reinforcement. A pigmented sealer will then be applied to all surfaces of the pier columns. Once the pier columns are repaired, the containment system will be removed, including vibratory pile removal to remove the H piles and sheetpiles. The earth removed around each column will be allowed to fill back naturally as part of the tidal process.

Pile driving/removal is expected to take no more than 14 days total; 9 days to install the containment system at the beginning of the project and 5 days for pile removal at the end (Table 1). Needle gun use will be for no more than 4 hours per day over a maximum of 6 days.

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	Minutes per pile	Piles per day	Duration (days)
Vibratory Driving	Sheet	44	30	8	6
Vibratory Driving	H pile	20	30	8	3
Vibratory Removal	Sheet	44	15	16	3
Vibratory Removal	H pile	20	15	16	2

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 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 or Alaska SARs (*e.g.,* Caretta *et al.,* 2020; Muto *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 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

TABLE 2—SPECIES THAT SPATIALLY CO-OCCUR WITH THE ACTIVITY TO THE DEGREE THAT TAKE IS REASONABLY LIKELY TO OCCUR—Continued

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 Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae:						
Short-beaked Common Dolphin.	*Delphinus delphis*	California/Oregon/Washington	-, -, N	969,861 (0.17, 839,325, 2014).	8,393	>40
Family Phocoenidae (porpoises):						
Harbor porpoise	*Phocoena phocoena*	Washington Inland Waters	-, -, N	11,233 (0.37, 8,308, 2015).	66	≥7.2
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
Steller Sea Lion	*Eumetopias jubatus*	Eastern DPS	-, -, N	43,201a (see SAR, 43,201, 2017).	2,592	112
Family Phocidae (earless seals):						
Harbor Seal	*Phoca vitulina*	Southern Puget Sound	-, -, N	UNK (UNK, UNK, 1999)	UND	3.4

[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; N_{min} is the minimum estimate of stock abundance. UNK—Unknown, UND—Undetermined.

[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.

Harbor seal, California sea lion, and Harbor porpoise spatially co-occur with the activity to the degree that take is reasonably likely to occur, and we have proposed authorizing take of these species. For gray whale, Steller sea lion, and short-beaked common dolphin, occurrence is such that take is possible, and we have proposed authorizing take of these species also. All species that could potentially occur in the proposed survey areas are included in WADOT's IHA application (see application, Table 3–1).

Transient killer whales (*Orcinus orca*) spatially co-occur with the activity to the degree that take is possible, while Southern Resident killer whales and humpback whales (*Megaptera novaeangliae*) are very rare visitors to the area. Work will be shutdown if any of these species approach the Level B harassment zone, so take is not requested for these species and they are not further discussed. Northern elephant seals (*Mirounga angustirostris*) have been observed in Puget Sound but are not anticipated to occur in the project area and no take of this species is anticipated or requested.

Gray Whale

In the fall, gray whales migrate from their summer feeding grounds in the North Pacific and Arctic, heading south along the coast of North America to spend the winter in their breeding and calving areas off the coast of Baja California, Mexico. From mid-February to May, the Eastern North Pacific stock of gray whales can be seen migrating northward with newborn calves along the west coast of the U.S. During these migrations, gray whales will occasionally enter rivers and bays (including Puget Sound) along the coast but not in high numbers.

An exception to this is a few hundred whales that summer and feed along the Pacific coast between Kodiak Island, Alaska and northern California, referred to as the ''Pacific Coast Feeding Group''. A subset of this group can often be found throughout Puget Sound (Calambokidis *et al.,* 2017). One individual was observed near the Purdy Bridge in June 2013 (TWM, 2020).

Short-Beaked Common Dolphin

Common dolphins occur in temperate and tropical waters globally. They are abundant off California but the distribution of short-beaked common dolphins throughout the project region is highly variable and generally rare, apparently in response to oceanographic changes on both seasonal and interannual time scales (Heyning and Perrin 1994; Forney 1997; Forney and Barlow 1998). The Whale Museum database has some sightings of common dolphins in the area near the project, mostly in 2016 and 2017 (TWM, 2020).

Short-beaked common dolphins travel in large social pods and are generally associated with oceanic and offshore waters, prey-rich ocean upwellings, and underwater landscape features such as seamounts, continental shelves, and oceanic ridges. They largely forage on schooling fish and squid. Calving takes place in winter months. Abundance of the CA/OR/WA stock short-beaked common dolphins has increased since large-scale surveys began in 1991.

Harbor Porpoise

Harbor porpoise occur along the US west coast from southern California to the Bering Sea (Carretta *et al.,* 2020). They rarely occur in waters warmer than 62.6 degrees Fahrenheit (17 degrees Celsius; Read, 1990). The Washington Inland Waters stock is found from Cape Flattery throughout Puget Sound and the Salish Sea region. In southern Puget Sound, harbor porpoise were common in the 1940s, but marine mammal surveys, stranding records since the early 1970s, and harbor porpoise surveys in the early 1990's indicated that harbor porpoise abundance had declined in southern Puget Sound (Carretta *et al.,* 2020). Annual winter aerial surveys conducted by the Washington Department of Fish and Wildlife from 1995 to 2015 revealed

an increasing trend in harbor porpoise in Washington inland waters, including the return of harbor porpoise to Puget Sound (Carretta *et al.,* 2020). Seasonal surveys conducted in spring, summer, and fall 2013–2015 in Puget Sound and Hood Canal documented substantial numbers of harbor porpoise in Puget Sound. Observed porpoise numbers were twice as high in spring as in fall or summer, indicating a seasonal shift in distribution.

In most areas, harbor porpoise occur in small groups of just a few individuals. Harbor porpoise must forage nearly continuously to meet their high metabolic needs (Wisniewska *et al.,* 2016). They consume up to 550 small fish (1.2–3.9 inches [3–10 cm]; *e.g.,* anchovies) per hour at a nearly 90 percent capture success rate (Wisniewska *et al.,* 2016).

California Sea Lion

California sea lions occur from Vancouver Island, British Columbia, to the southern tip of Baja California. They 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. 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).

California sea lions regularly occur on rocks, buoys and other structures. Occurrence in the project area is expected to be common. Some 3,000 to 5,000 animals are estimated to move into Pacific Northwest waters of Washington and British Columbia during the fall (September) and remain until the late spring (May) when most return to breeding rookeries in California and Mexico (Jeffries *et al.,* 2000). Peak counts of over 1,000 animals have been made in Puget Sound (Jeffries *et al.,* 2000). The nearest documented California sea lion haul out site to the project site are on the Toliva Shoals Buoys, approximately 26 km (16 water miles) to the south (Jeffries *et al.,* 2000). This haul out typically is used by less than 10 individuals at any one time.

Steller Sea Lion

Steller sea lions range along the North Pacific Rim from northern Japan to California, with centers of abundance and distribution in the Gulf of Alaska and Aleutian Islands. Large numbers of individuals widely disperse when not breeding (late May to early July) to access seasonally important prey resources (Muto *et al.,* 2019). They were listed as threatened range-wide under the ESA on November 26, 1990 (55 FR 49204). Steller sea lions were subsequently partitioned into the western and eastern Distinct Population Segments (DPSs; western and eastern stocks) in 1997 (62 FR 24345, May 5, 1997). The western DPS breeds on rookeries located west of 144° W in Alaska and Russia, whereas the eastern DPS breeds on rookeries in southeast Alaska through California. The eastern DPS was delisted in 2013.

The eastern DPS is the only population of Steller's sea lions thought to occur in the project area. In Washington waters, numbers decline during the summer months, which correspond to the breeding season at Oregon and British Columbia rookeries (approximately late May to early June) and peak during the fall and winter months. Steller sea lion abundances vary seasonally with a minimum estimate of 1,000 to 2,000 individuals present or passing through the Strait of Juan de Fuca in fall and winter months (Jeffries, *et al.* 2000). The nearest documented haul out site is also on the Toliva Shoals Buoys.

Harbor Seal

Harbor seals are found from Baja California to the eastern Aleutian Islands of Alaska (Harvey and Goley, 2011). The animals in the project area are part of the Southern Puget Sound stock. Harbor seals are the most common marine mammal species observed in the project area and are the only one that breeds and remains in the inland marine waters of Washington year-round (Calambokidis and Baird, 1994).

Harbor seals are central-place foragers (Orians and Pearson, 1979) and tend to exhibit strong site fidelity within season and across years, generally forage close to haulout sites, and repeatedly visit specific foraging areas (Grigg *et al.,* 2012; Suryan and Harvey, 1998; Thompson *et al.,* 1998). Harbor seals in San Francisco Bay forage mainly within 7 mi (10 km) of their primary haulout site (Grigg *et al.,* 2012), and often within just 1–3 mi (1–5 km; Torok, 1994). Depth, bottom relief, and prey abundance also influence foraging location (Grigg *et al.,* 2012).

Harbor seals molt from May through June. Peak numbers of harbor seals haul out during late May to early June, which coincides with the peak molt. During both pupping and molting seasons, the number of seals and the length of time hauled out per day increase, from an average of 7 hours per day to 10–12 hours (Harvey and Goley, 2011; Huber *et al.,* 2001; Stewart and Yochem, 1994).

Harbor seals tend to forage at night and haul out during the day with a peak in the afternoon between 1 p.m. and 4 p.m. (Grigg *et al.,* 2012; London *et al.,* 2001; Stewart and Yochem, 1994; Yochem *et al.,* 1987). Tide levels affect the maximum number of seals hauled out, with the largest number of seals hauled out at low tide, but time of day and season have the greatest influence on haul out behavior (Manugian *et al.,* 2017; Patterson and Acevedo-Gutiérrez, 2008; Stewart and Yochem, 1994).

The closest haulout to the project area is the Rosedale Beach floats located 5.8 km (3.6 miles) to the southwest, but not in direct line-of-sight contact with the project location (see application Figure 3–1).

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. Gray whales are low frequency cetaceans, short-beaked common dolphins are mid-frequency cetaceans, harbor porpoises are classified as high-frequency cetaceans, Harbor seals are in the phocid group, and Steller sea lions and California sea lions are otariids.

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 pile driving and potentially from needle gun use. The effects of underwater noise from WADOT's proposed activities have the potential to result in Level A or Level B harassment of marine mammals in the action area. The effects of in-air noise from WADOT's proposed needle gun use have the potential to result in Level B harassment of pinnipeds 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 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.

Construction activities associated with the project would include vibratory pile driving, vibratory pile removal and needle guns. 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, needle guns, 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).

Vibratory pile hammers would be used on this project. 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).

Needle guns are a drill like tool that use a series of strong elongate metal chisels or ''bristles'' to scrape away material using high speed rotation up to 5000 revolution per minute. Sounds are produced by the tool motor as well as the scraping action of the tool on concrete. Peak SPLs are up to 112 dBA (OSHA, 2020).

The likely or possible impacts of WADOT'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 also 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 is the primary means by which marine mammals may be harassed from WADOT'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 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 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.,* 2003; 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 *et al.,* 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).

For this project, 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 and needle gun use 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.,* 2003; 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). Whether or not foraging disruptions have the potential to incur fitness consequences is dependent upon the intensity and duration of the disturbance, 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 (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 harassment zone during pile driving or drilling (*i.e.,* documented as Level B harassment take). Of these, 19 individuals demonstrated an alert behavior, 7 fled, 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 WADOT'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.,* Selye 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 Henderson Bay area contains mostly small recreational and commercial vessel traffic and background sound levels in the area are not excessively elevated.

Airborne Acoustic Effects—Pinnipeds that occur near the project site could be exposed to airborne sounds associated with pile driving and removal and needle gun use 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, for pile-driving/removal 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 the in-water estimates of potential take. Therefore, we do not believe that authorization of incidental take resulting from airborne sound from pile driving for pinnipeds is warranted. Since the needle gun will be used on days when there is no pile driving, behavioral harassment from its use could occur and is discussed below.

Marine Mammal Habitat Effects

WADOT'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* above) and adversely affect marine mammal prey in the vicinity of the project area (see discussion below). During vibratory pile driving or removal, elevated levels of underwater noise would ensonify the project area 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 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 north of the bay only) of Henderson 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 Henderson Bay and Puget Sound. At best, the impact area provides marginal foraging habitat for marine mammals and fishes. 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).

The most likely impact to fish from pile driving and removal 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 (Hastings and Popper, 2005, Popper and Hastings, 2009).

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 ft (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 Henderson 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 pile driving/removal and needle gun) 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 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). Below, we describe the factors considered here in

more detail and present the proposed take estimate.

The effect of needle guns is unclear as we have not recently authorized take by this method in these circumstances. Given the relatively low source level for needle guns and small ensonified areas discussed below, there is some uncertainty about whether take will occur from this activity. However, in consideration of the applicant's request and the predicted source levels, we conservatively propose the authorization of some take for this project.

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). Thresholds have also been developed identifying the received level of in-air sound above which exposed pinnipeds would likely be behaviorally harassed.

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. For in-air sounds, NMFS predicts that harbor seals exposed above received levels of 90 dB re 20 μPa (rms) will be behaviorally harassed, and other pinnipeds will be harassed when exposed above 100 dB re 20 μPa (rms).

WADOT's proposed activity includes the use of continuous (vibratory pile-driving and removal in water and needle guns) in air sources, and therefore the 120 dB re 1 μPa (rms) threshold is applicable in water and the pinniped thresholds are applicable in air.

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). WADOT's activity includes the use of non-impulsive (vibratory pile driving/removal) 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)
	Non-Impulsive
Low-Frequency (LF) Cetaceans	*Cell 2:* $L_{E,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	*Cell 4:* $L_{E,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	*Cell 6:* $L_{E,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 8:* $L_{E,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	*Cell 10:* $L_{E,OW,24h}$: 219 dB.

Note: Cumulative sound exposure level (L_E) has a reference value of $1\mu Pa^2s$. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). 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.,* vibratory pile driving and removal and needle guns).

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. 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 or the various pile types, sizes and methods (see Table 5). Source levels for the 48-inch sheetpiles come from the Caltrans compendium (2015) measurements of 24-inch steel sheetpiles supported by acoustic data from another project in Seattle, Washington that used 48-inch steel sheetpiles (Greenbusch Group, 2015), while the source data for H piles comes from the Caltrans (2015) compendium. Needle guns can produce sounds up to 112 dbA (OSHA, 2020) and we use that as the source level for that activity.

TABLE 5—PROJECT SOUND SOURCE LEVELS

Method	Pile type	Estimated noise level	Source
Vibratory Driving/Removal	48-inch sheet	165 dB_{RMS}	CALTRANS 2015, Greenbusch Group 2015.
Vibratory Driving/Removal	12-inch H pile	150 dB_{RMS}	CALTRANS 2015.

Note: SEL = single strike sound exposure level; dB peak = peak sound level; rms = root mean square.

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 WADOT's proposed activity in the absence of specific modelling.

Using the equation above, underwater noise is predicted to fall below the behavioral effects threshold of 120 dB rms for marine mammals at distances of 1,000 or 10,000 m depending on the pile type(s) and methods (Table 6). It should be noted that based on the geography of Henderson Bay, sound will not reach the full distance of the Level B harassment isopleths in most directions. In-air needle gun noise is predicted to reach the phocid (harbor seal) threshold (90 dB) at 192 meters (629 feet), and the otariid threshold (100 dB) at 60 meters (200 feet).

TABLE 6—LEVEL A AND LEVEL B HARASSMENT ISOPLETHS (m) FOR EACH PILE TYPE AND HEARING GROUP

Pile type	Level A harassment					Level B harassment
	Low frequency	Mid frequency	High frequency	Otariid	Phocid	
Sheet	31.8	2.8	47	19.3	1.4	10,000
H pile	3.2	0.3	4.7	1.9	0.1	1,000

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 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. Inputs used in the User Spreadsheet are reported in Table 7 and the resulting isopleths are reported in Table 6 for each of the work scenarios. Note that while the inputs for driving and removal of each type of pile are different, the resulting isopleths are the same because the total time per day (number of piles per day times minutes per pile) of pile driving is identical. Therefore Table 6 includes only a single row for each pile type. The above input scenarios lead to PTS isopleth distances (Level A thresholds) of less than 1 m to 47 m.

The Level A harassment zones identified in Table 6 are based upon an animal exposed to pile driving multiple piles per day. Considering duration of driving or removing each pile (up to 30 minutes) and breaks between pile installations (to reset equipment and move pile into place), this means an animal would have to remain within the small 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.

TABLE 7—NMFS TECHNICAL GUIDANCE USER SPREADSHEET INPUT TO CALCULATE LEVEL A ISOPLETHS FOR A COMBINATION OF PILE DRIVING

Method	Pile type	Source level	Minutes per pile	Piles per day
Vibratory Driving	Sheet	165 db RMS	30	8
Vibratory Driving	H pile	150 db RMS	30	8
Vibratory Removal	Sheet	165 db RMS	15	16

TABLE 7—NMFS TECHNICAL GUIDANCE USER SPREADSHEET INPUT TO CALCULATE LEVEL A ISOPLETHS FOR A COMBINATION OF PILE DRIVING—Continued

Method	Pile type	Source level	Minutes per pile	Piles per day
Vibratory Removal	H pile	150 db RMS	15	16

Note: Transmission Loss for all methods is 15 LogR and the weighting factor adjustment is 2.5.

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. The main source of density information for the area is the U.S. Navy's database used to establish baseline density estimates for their construction and testing and training activities in Puget Sound (U.S. Navy, 2019). The Navy database includes seasonal estimates of abundance where available and appropriate. Where such estimates existed, we used the larger density estimate for the fall or summer seasons, when this project is scheduled to occur. These density estimates are shown in Table 8. No density estimates exist for the rarer short-beaked common dolphin so we used more qualitative data on observations from The Whale Museum's sightings database and project specific report to WADOT (TWM, 2020).

TABLE 8—DENSITY OF MARINE MAMMALS USED TO CALCULATE EXPECTED TAKE

Species	Density #/km²
Harbor seal	3.91
California sea lion	0.2211
Steller sea lion	0.0478
Gray whale	0.000086
Short-beaked common dolphin	(*)
Harbor porpoise	0.86

* See text, no density estimate exists for short-beaked common dolphins.

Here we describe how the information provided above is brought together to produce a quantitative take estimate. Given the geography of the project area, the area ensonified when driving or removing H piles is 1.36 km² (0.53 mi²), the area ensonified when driving or removing sheetpiles is 17.9 km² (6.9 mi²), and the area ensonified when using the needle gun is 0.06 km² (0.023 mi²) for phocids and 0.01 km² (0.004 mi²) for otariids. As noted above, there will be a total of 5 days driving or removing H piles, 9 days driving or removing sheetpiles, and 6 days of using the needle gun. For species with density estimates, the estimated take is calculated as the sum of the density times the area and days for each pile type/activity with the results for each activity added to give a total estimated take. Additional qualitative factors may be considered for species with small estimated take calculations (see below). Take by Level B harassment is proposed for authorization and summarized in Table 9.

Gray Whale

The Navy Marine Species Density Database (U.S. Navy 2019) estimates the density of gray whales in the Henderson Bay area as 0.000086/km². Based on this density estimate, the following number of gray whales may be present in the Level B harassment zones:

H piles: 0.000086/km² * 1.36 km² * 5 days = 0.0005848

Sheetpiles: 0.000086/km² * 17.9 km² * 9 days = 0.0138546

Total Estimated Take = 0.014 animals

The total represents less than one gray whale. In the event an individual enters the area and remains for some time and is harassed on multiple days, we are proposing authorization for Level B harassment of 10 gray whales. Because the Level A harassment zones are relatively small and we believe the PSO will be able to effectively monitor the Level A harassment zones, we do not anticipate or propose take by Level A harassment of gray whales.

Short-Beaked Common Dolphin

As mentioned above, the Navy Marine Species Density Database (U.S. Navy 2019) does not provide an estimate of density of short-beaked common dolphins in the Henderson Bay area. The Whale Museum data indicate that common dolphins have been documented in waters adjacent to the project (TWM, 2020). Nearly all sightings were in 2016 and 2017 pointing out the variability and uncertainty of their presence. Short-beaked common dolphins often occur in groups; for the Puget Sound data groups consisted of no more than five individuals (Orca Network. 2020). Due to the low likelihood of occurrence an expectation of one group of five animals in the large level B harassment zone for sheetpiles per day is a reasonable representation of occurrence. With 9 days of sheetpiling maximum this equates to 45 level B takes. Because of the smaller size of the Level B harassment zones for the H-piles, we expect that one group of five animals over the course of the 5 work days with H piles is a reasonable representation of occurrence. We are thus proposing authorization for Level B harassment of 50 short-beaked common dolphins. Because the Level A harassment zones are relatively small and we believe the PSO will be able to effectively monitor the Level A harassment zones, we do not anticipate or propose take by Level A harassment of short-beaked common dolphins.

Harbor Porpoise

The Navy Marine Species Density Database (U.S. Navy 2019) estimates the density of harbor porpoise in the Henderson Bay area as 0.86/km². Based on this density estimate, the following number of harbor porpoises may be present in the Level B harassment zones:

H piles: 0.86/km² * 1.36 km² * 5 days = 5.848

Sheetpiles: 0.86/km² * 17.9 km² * 9 days = 138.546

Total Estimated Take = 144.4 animals

We are proposing authorization for Level B harassment of 145 harbor porpoises. Because the Level A harassment zones are relatively small and we believe the PSO will be able to effectively monitor the Level A harassment zones, we do not anticipate or propose take by Level A harassment of harbor porpoises.

California Sea Lion

The Navy Marine Species Density Database (U.S. Navy 2019) estimates the density of California sea lions in the Henderson Bay area as 0.2211/km^2. Based on this density estimate, the following number of California sea lions may be present in the Level B harassment zones:

H piles: 0.2211/km^2 * 1.36 km^2 * 5 days = 1.503

Sheetpiles: 0.2211/km^2 * 17.9 km^2 * 9 days = 35.619

Needle gun: 0.2211/km^2 * 0.01 km^2 * 6 days = 0.013

Total Estimated Take = 37.14 animals

We are proposing authorization for Level B harassment of 38 California sea lions. Because the Level A harassment zones are relatively small and we believe the PSO will be able to effectively monitor the Level A harassment zones, we do not anticipate or propose take by Level A harassment of California sea lions.

Steller Sea Lion

The Navy Marine Species Density Database (U.S. Navy 2019) estimates the density of Steller sea lions in the Henderson Bay area as 0.0478/km^2. Based on this density estimate, the following number of Steller sea lions may be present in the Level B harassment zones:

H piles: 0.0478/km^2 * 1.36 km^2 * 5 days = 0.325

Sheetpiles: 0.0478/km^2 * 17.9 km^2 * 9 days = 7.70

Needle gun: 0.0478/km^2 * 0.01 km^2 * 6 days = 0.007

Total Estimated Take = 8.03 animals

We are proposing authorization for Level B harassment of nine Steller sea lions. Because the Level A harassment zones are relatively small and we believe the PSO will be able to effectively monitor the Level A harassment zones, we do not anticipate or propose take by Level A harassment of Steller sea lions.

Harbor Seal

The Navy Marine Species Density Database (U.S. Navy 2019) estimates the density of harbor seal in the Henderson Bay area as 3.91/km^2. Based on this density estimate, the following number of harbor seals may be present in the Level B harassment zones:

H piles: 3.91/km^2 * 1.36 km^2 * 5 days = 26.588

Sheetpiles: 3.91/km^2 * 17.9 km^2 * 9 days = 629.901

Needle gun: 3.91/km^2 * 0.06 km^2 * 6 days = 1.408

Total Estimated Take = 657.9 animals

We are proposing authorization for Level B harassment of 658 harbor seals.

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	Take request	Percent of stock
Harbor seal	658	(*)
California sea lion	38	<0.1
Steller sea lion	9	<0.1
Gray whale	10	0.4
Short-beaked common dolphin	50	<0.1
Harbor porpoise	145	1.3

* There is no official estimate of stock size for this stock.

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/removal (*e.g.,* standard barges, *etc.*), and for needle gun work, 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 or around 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/removal 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/removal will be stopped as these species approach the Level B harassment zone to avoid additional take.

The following mitigation measures would apply to WADOT's in-water construction activities.

- *Establishment of Shutdown Zones*—WADOT will establish shutdown zones for all pile driving and removal activities (Table 10). 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). Because the zones are small in this project, and WADOT seeks to simplify their monitoring, they have requested to establish shutdown zones of the same size that apply separately to cetaceans and pinnipeds, rather than having multiple size zones within each of these marine mammal groups corresponding to each hearing group. Therefore the shutdown zones are based on the largest Level A harassment zone within the cetacean and pinniped groups, respecitively, with an absolute minimum shutdown zone size of 10 m (33 ft).
- *Pile wake-up*—When removing piles WADOT will shake the pile slightly prior to removal to break the bond with surrounding sediment to avoid pulling out large blocks of sediment. Piles they will also be removed slowly to minimize turbidity.
- 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*—WADOT will monitor the Level A and B harassment and shutdown 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 that serve as monitoring 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.
- Pile driving or removal must occur during daylight hours.

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.

TABLE 10—SHUTDOWN ZONES (RADIUS IN METERS) BY PILE TYPE, ACTIVITY AND HEARING GROUP

Pile type	Low frequency	Mid frequency	High frequency	Otariid	Phocid
Sheet	50	50	50	20	20
H pile	10	10	10	10	10

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;
- Other PSOs may substitute education (degree in biological science or related field) or training for experience; and
- WADOT 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 and the small area north into Burley Lagoon;

(2) At Purdy Spit Park to monitor the Level B harassment zone near the project site in Henderson Bay; and

(3) For the smaller Level B harassment zone associated with H pile driving/removal, an additional PSOs will be located on the southeast end of the level B harassment zone (see Monitoring Plan Figure 4);

(4) For the larger Level B harassment zone associated with sheetpile driving/removal PSOs will be at the pile/driving removal site and Purdy Spit park as described above. Two additional PSOs will be located further south in Henderson Bay (see Monitoring Plan Figure 2): One at Kopachuck State Park to monitor the southern end of the Level B harassment zone and one further south at Penrose Point State Park to monitor the approaches into Henderson Bay, especially for killer and humpback whales and other large whales not authorized for take.

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 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, and estimates of number of marine mammals taken, by species (a correction factor may be applied to total take numbers, as appropriate).
- 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.

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, WADOT 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, WADOT 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, the discussion of our analyses applies to all the species listed in Table 9, given that the anticipated effects of this activity on these different marine mammal stocks are expected to be similar. There is little information about the nature or severity of the impacts, or the size, status, or structure of any of these species or stocks that would lead to a different analysis for this activity. 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 and needle gun use. Potential takes could occur if individuals are present in the ensonified zone when these activities are underway.

Takes by Level B harassment would be in the form of behavioral disturbance and/or TTS. No mortality or PTS (Level A harassment) 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 (north-central Henderson Bay) of the 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, and as a result, as discussed above, Level A harassment is not anticipated to occur. 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 and needle gun use 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 three 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 fitness of any individual or 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 biologically important areas have been identified within the project area.
- For all species, Henderson Bay is a very small and peripheral part of their range.
- WADOT would implement mitigation measures such as shut downs and slow removal of piles to minimize turbidity and shaking the pile slightly prior to removal (wake up) to break the bond with surrounding sediment to avoid pulling out large blocks of sediment.
- Monitoring reports from similar work in Puget Sound 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 for all stocks. For harbor seals there are no official estimates of the stock size. We do know the populations of harbor seals in Puget Sound are increasing and number at least 32,000 (Jeffries, 2013). We also know that harbor seals do not

generally range over large areas (see above). Therefore, it is most likely that the number of harbor seal takes is a small number. For all stocks, these are all likely conservative estimates of percent of stock 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 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 WADOT to conduct the Purdy Bridge Rehabilitation project in Pierce, WA from July 16, 2021 through September 30, 2021, 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 Purdy Bridge Rehabilitation 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 1-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 14, 2020.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2020–27787 Filed 12–16–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Patent and Trademark Resource Center Metrics

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Notice of information collection; request for comment.

SUMMARY: The United States Patent and Trademark Office, in accordance with the Paperwork Reduction Act of 1995, invites comments on the extension and revision of an existing information collection: 0651–0068 (Patent and Trademark Resource Center Metrics). The purpose of this notice is to allow 60 days for public comment preceding submission of the information collection to OMB.

DATES: To ensure consideration, comments regarding this information collection must be received on or before February 16, 2021.

ADDRESSES: Interested persons are invited to submit written comments by any of the following methods. Do not submit Confidential Business Information or otherwise sensitive or protected information:

- *Email: InformationCollection@uspto.gov.* Include ''0651–0068 comment'' in the subject line of the message.
- *Federal Register Portal: https://www.regulations.gov.*
- *Mail:* Kimberly Hardy, Office of the Chief Administrative Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to the attention of Robert Berry, Manager, Patent and Trademark Resource Center Program, Office of the Chief Information Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450; by telephone at 571–272–7152; or by email at *Robert.Berry@uspto.gov.* Additional information about this information collection is also available at *http://www.reginfo.gov* under ''Information Collection Review.''

SUPPLEMENTARY INFORMATION:

I. Abstract

The Patent and Trademark Resource Center (PTRC) Program is authorized under the provision of 35 U.S.C. 2(a)(2), which provides that the United States Patent and Trademark Office (USPTO) shall be responsible for disseminating information with respect to patents and trademarks to the public. The PTRC Program is made up of public, state, and academic libraries. Each participating library designated as a PTRC must fulfill the following requirements: Assist the public in the efficient use of patent and trademark information resources; provide free access to patent and trademark resources provided by the USPTO; and send representatives to attend the USPTO-hosted PTRC training seminars.

The USPTO seeks to collect information about the public's use of the PTRCs and training provided through the PTRC system. The PTRC Program requirements stipulate that all participating libraries must submit periodic metrics on the public's use of the PTRC's services and the public outreach efforts provided by the PTRCs. To facilitate this requirement, the USPTO electronically collects the metrics on a quarterly basis. This information collection enables the USPTO to see how current customers are being served by the PTRCs and ascertain what changes may be needed in the types of services and trainings the PTRCs should offer.

II. Method of Collection

The metrics will be submitted electronically to the USPTO.

III. Data

OMB Control Number: 0651–0068.

Forms: None.

Type of Review: Revision of a currently approved information collection.

Affected Public: Private Sector; State and Local Governments.

Estimated Number of Respondents: 90 respondents per year. The USPTO estimates that there will be up to 90 libraries reporting their metrics once per quarter, resulting in a total of 360 responses per year. This estimate includes possible growth in the PTRC program above the 83 libraries that are currently reporting.

Estimated Time per Response: The USPTO estimates that it will take the public approximately 30 minutes (0.5 hours) to complete a response, depending on the complexity of the particular item. This includes the time to gather the necessary information, create the documents, and submit the completed request to the USPTO.

Estimated Total Annual Respondent Burden Hours: 180 hours.

Estimated Total Annual Respondent Cost Burden: $5,927.

TABLE 1—TOTAL HOURLY BURDEN FOR PRIVATE SECTOR RESPONDENTS

Item No.	Item	Estimated annual respondents	Estimated annual responses (year) (a)	Estimated time for response (hours) (b)	Estimated annual burden (hour/year) (c) (a) × (b) = (c)	Rate [1] ($/hour) (d)	Estimated annual respondent cost burden (e) (c) × (d) = (e)
1	PTRC Metrics	4	16	0.5 (30 minutes)	8	$32.93	$263
Total		4	16		8		263

TABLE 2—TOTAL HOURLY BURDEN FOR STATE, LOCAL, AND TRIBAL GOVERNMENT RESPONDENTS

Item No.	Item	Estimated annual respondents	Estimated annual responses (year) (a)	Estimated time for response (hours) (b)	Estimated annual burden (hour/year) (c) (a) × (b) = (c)	Rate [2] ($/hour) (d)	Estimated annual respondent cost burden (e) (c) × (d) = (e)
1	PTRC Metrics	86	344	0.5 (30 minutes)	172	$32.93	$5,664
Total		86	344		172		5,664

Estimated Total Annual Non-Hour Respondent Cost Burden: $0. There are no filing fees, capital start-up, maintenance, operation, or postage costs associated with this information collection.

Respondent's Obligation: Required to obtain or retain benefits.

IV. Request for Comments

The USPTO is soliciting public comments to:

(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 Agency's estimate of the burden of the proposed collection of information; including the validity of the methodology and assumptions used;

[1] Bureau of Labor Statistics Occupation Employment Statistics wage 25–4022 for Librarians and Media Collections Specialists working in Colleges, Universities, and Professional Schools. *https://www.bls.gov/oes/current/oes254022.htm.*

[2] Bureau of Labor Statistics Occupation Employment Statistics wage 25–4022 for Librarians and Media Collections Specialists working in Colleges, Universities, and Professional Schools. *https://www.bls.gov/oes/current/oes254022.htm.*

(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.

All comments submitted in response to this notice are a matter of public record. USPTO will include or summarize each comment in the request to OMB to approve this information collection. Before including an address, phone number, email address, or other personal identifying information in a comment, be aware that the entire comment—including personal identifying information—may be made publicly available at any time. While you may ask in your comment to withhold personal identifying information from public view, USPTO cannot guarantee that it will be able to do so.

Kimberly Hardy,

Information Collections Officer, Office of the Chief Administrative Officer, United States Patent and Trademark Office.

[FR Doc. 2020–27784 Filed 12–16–20; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 20–75]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense (DoD).

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 20–75 with attached Policy Justification and Sensitivity of Technology.

Dated: December 11, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

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. 20-75 concerning the Air Force'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 $367.2 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

BILLING CODE 5001–01–C

Transmittal No. 20–75

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 *.	$ 0 million
Other	$367.2 million
TOTAL	$367.2 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE): None.

Non-MDE: Six (6) MS–110 Recce Pods; three (3) Transportable Ground Stations; one (1) Fixed Ground station; spare and repair parts; repair and return; site surveys; integration and test equipment; system support and equipment; personnel training and training equipment; publications and technical documentation; U.S. Government and contractor engineering, technical, and logistical support services; and other related elements of logistical and program support.

(iv) *Military Department:* Air Force (TW–D–QAS).

(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)—MS–110 Recce Pod System

TECRO has requested to buy six (6) MS–110 Recce Pods; three (3) Transportable Ground Stations; one (1) Fixed Ground station; spare and repair parts; repair and return; site surveys; integration and test equipment; system support and equipment; personnel training and training equipment; publications and technical documentation; U.S. Government and contractor engineering, technical, and logistical support services; and other related elements of logistical and program support. The total estimated program cost is $367.2 million.

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 timely Intelligence, Surveillance, and Reconnaissance (ISR), capabilities for its security and defense. The enhanced capability is a deterrent to regional threats and will strengthen the recipient's self-defense. 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 Collins Aerospace, Westford, MA. The purchaser typically requests offsets. Any offset agreement will be defined in negotiations between the purchaser and the contractor.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to the recipient.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 20–75

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 MS–110 is a Non-Program of Record electro-optic and infrared airborne reconnaissance system with long range, day/night, multi-spectral sensor technology. The multi-spectral sensor lets the end user see color and better distinguish subtle features that traditional gray-scale imagery cannot. The pod can transmit imagery via a datalink to ground-stations for near-real time analysis and exploitation.

2. The highest level of classification of information included in this potential sale is UNCLASSIFIED.

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. 2020–27732 Filed 12–16–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 20–77]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense (DoD).

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 20–77 with attached Policy Justification and Sensitivity of Technology.

Dated: December 11, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

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. 20-77 concerning the Army'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 $436.1 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

BILLING CODE 5001–06–C

Transmittal No. 20–77

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 *.	$357.5 million
Other	$ 78.6 million
TOTAL	$436.1 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase*:

Major Defense Equipment (MDE):

Eleven (11) High Mobility Artillery Rocket Systems (HIMARS) M142 Launchers
Sixty-four (64) Army Tactical Missile Systems (ATACMS) M57 Unitary Missiles
Seven (7) M1152Al High Mobility Multipurpose Wheeled Vehicles (HMMWVs)
Eleven (11) M240B Machine Guns, 7.62MM

Seventeen (17) International Field Artillery Tactical Data Systems (IFATDS)

Non-MDE: Also included are fifty-four (54) M28A2 Low Cost Reduced Range Practice Rocket Pods (LCRRPR); eleven (11) M2Al machine guns, .50 caliber; twenty-two (22) AN/NRC-92E dual radio systems; seven (7) AN/NRC-92E dual radio ground stations; fifteen (15) AN/VRC-90E single radio systems; eleven (11) M1084A2 cargo Family of Medium Tactical Vehicles (FMTV) Resupply Vehicles (RSV); two (2) M1089A2 cargo wrecker FMTV RSV; eleven (11) M1095 trailer cargo FMTV, 5-ton; support equipment; communications equipment; spare and repair parts; test sets; laptop computers; training and training equipment; publication; systems integration support; technical data; Stockpile Reliability Program (SRP); Quality Assurance and Technical Assistance Teams; U.S. Government and contractor technical, engineering, and logistics support services; and other related elements of logistical and program support.

(iv) *Military Department*: Army (TW-B-ZDJ)

(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)—HIMARS, Support, and Equipment

TECRO has requested to buy eleven (11) High Mobility Artillery Rocket Systems (HIMARS) M142 Launchers; sixty-four (64) Army Tactical Missile Systems (ATACMS) M57 Unitary Missiles; seven (7) M1152Al High Mobility Multipurpose Wheeled Vehicles (HMMWVs); eleven (11) M240B Machine Guns, 7.62MM; and seventeen (17) International Field Artillery Tactical Data Systems (IFATDS). Also included are fifty-four (54) M28A2 Low Cost Reduced Range Practice Rocket Pods (LCRRPR); eleven (11) M2Al machine guns, .50 caliber; twenty-two (22) AN/NRC-92E dual radio systems; seven (7) AN/NRC-92E dual radio ground stations; fifteen (15) AN/VRC-90E single radio systems; eleven (11) M1084A2 cargo Family of Medium Tactical Vehicles (FMTV) Resupply Vehicles (RSV); two (2) M1089A2 cargo wrecker FMTV RSV; eleven (11) M1095 trailer cargo FMTV, 5-ton; support equipment; communications equipment; spare and repair parts; test sets; laptop computers; training and training equipment; publication; systems integration support; technical data; Stockpile Reliability Program (SRP): Quality Assurance and Technical Assistance Teams; U.S. Government and contractor technical, engineering, and logistics support services; and other related elements of logistical and program support. The total estimated program cost is $436.1 million.

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.

The recipient will use this capability as a deterrent to regional threats and to strengthen homeland defense. Acquisition of HIMARS will contribute to the recipient's goal of updating its military capability while further enhancing interoperability with the United States and other allies. 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 prime contractor will be Lockheed Martin Missile and Fire Control, Grand Prairie, TX. The purchaser typically requests offsets. Any offset agreement will be defined in negotiations between the purchaser and the contractor.

Implementation of this proposed sale will require the assignment of U.S. Government and U.S. contractor representatives in-country; seven (7) U.S. Government and thirteen (13) U.S. contractor representatives for a period of 1 month; two (2) U.S. Government and seven (7) U.S. contractor representatives for a period of two months; and five (5) U.S. contractor representatives for a period of one year.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 20–77

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 M142 High Mobility Artillery Rocket System (HIMARS) is a C-130 transportable wheeled launcher mounted on a 5-ton Family of Medium Tactical Vehicles truck chassis. HIMARS is the modern Army-fielded version of the Multiple Launch Rocket System (MLRS) M270 launcher, and can fire all of the MLRS Family of Munitions (FOM) including Guided Multiple Launch Rocket System (GMLRS) variants and the Army Tactical Missile System (ATACMS). Utilizing the MLRS FOM, the HIMARS can engage targets between 15 and 300 kilometers with GPS-aided precision accuracy.

2. The M57 Army Tactical Missile System (ATACMS)—Unitary is a conventional, semi-ballistic missile that utilizes a 500-pound high explosive warhead. It has an effective range of between 70 and 300 kilometers, and has increased lethality and accuracy over previous versions of the AT ACMS due to a GPS/Precise Position System (PPS) aided navigation system.

3. The International Field Artillery Tactical Data System is the international export version of the Army's Advanced Field Artillery Tactical Data System (AFATDS). It provides networked and fully automated support for the planning, coordination, control, and execution of fires and effects such as mortars, field artillery, rockets and missiles, and close air support. International versions are developed for each customer unique to the weapon and targeting systems in their inventory.

4. The M1152Al High Mobility Multipurpose Wheeled Vehicle (HMMWV) is a two-man wheeled vehicle primarily used for the transport of personnel or as a shelter carrier.

5. The M240B Machine Gun is a family of belt-fed gas-operated medium machine guns that chamber the 7.62x51 mm NATO cartridge. It has been used extensively by the U.S. Army in infantry companies and as a mounted weapon on ground vehicles.

6. The highest level of information required to facilitate sale, training, operation, and maintenance of these systems is classified SECRET.

7. 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.

8. 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.

9. All defense articles and services listed in this transmittal have been authorized for release and export to the recipient.

[FR Doc. 2020–27716 Filed 12–16–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 20–74]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense (DoD).

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 20–74 with attached Policy Justification and Sensitivity of Technology.

Dated: December 11, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

November 3, 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. 20-74 concerning the Air Force'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 $600 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

BILLING CODE 5001–06–C

Transmittal No. 20–74

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 * ..	$153 million
Other	$447 million
TOTAL	$600 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE):

Four (4) Weapons-Ready MQ-9B Remotely Piloted Aircraft
Two (2) Fixed Ground Control Stations
Two (2) Mobile Ground Control Stations
Fourteen (14) Embedded Global Positioning System/Inertial Navigations Systems (EGI) with Selective Availability Anti-Spoofing Module (SAASM) (12 installed, 2 spares)

Non-MDE:

Also included are MX-20 Multi-Spectral Targeting Systems and spares; SeaVue Maritime Multi-Role Patrol Radars; SAGE 750 Electronic Surveillance Measures (ESM) Systems; C-Band Line-of-Sight (LOS) Ground Data Terminals; Ku-Band SATCOM GA-ASI Transportable Earth Stations (GATES); AN/DPX-7 IFF Transponders; Honeywell TPE-331-10GD Turboprop Engines; M6000 UHF/VHF Radios; KIV-77 Mode 5 IFF cryptographic appliques; AN/PYQ-10C Simple Key Loaders; secure communications, cryptographic and Identification Friend or Foe (IFF)

equipment; initial spare and repair parts; hard points, power, and data connections for weapons integration; support and test equipment; publications and technical documentation; personnel training and training equipment; U.S. Government and contractor engineering, technical, and logistics support services; and other related elements of logistical and program support.

(iv) *Military Department:* Air Force (TW-D-SAQ)

(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:* November 3, 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)—MQ-9B Remotely Piloted Aircraft

TECRO has requested to buy four (4) Weapons-Ready MQ-9B Remotely Piloted Aircraft; two (2) Fixed Ground Control Stations; two (2) Mobile Ground Control Stations; and fourteen (14) Embedded Global Positioning System/Inertial Navigations Systems (EGI) with Selective Availability Anti-Spoofing Module (SAASM) (12 installed, 2 spares). Also included are MX-20 Multi-Spectral Targeting Systems and spares; SeaVue Maritime Multi-Role Patrol Radars; SAGE 750 Electronic Surveillance Measures (ESM) Systems; C-Band Line-of-Sight (LOS) Ground Data Terminals; Ku-Band SATCOM GA-ASI Transportable Earth Stations (GATES); AN/DPX-7 IFF Transponders; Honeywell TPE-331–10GD Turboprop Engines; M6000 UHF/VHF Radios; KIV-77 Mode 5 IFF cryptographic appliques; AN/PYQ-10C Simple Key Loaders; secure communications, cryptographic and Identification Friend or Foe (IFF) equipment; initial spare and repair parts; hard points, power, and data connections for weapons integration; support and test equipment; publications and technical documentation; personnel training and training equipment; U.S. Government and contractor engineering, technical, and logistics support services; and other related elements of logistical and program support. The total estimated program cost is $600 million.

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 timely Intelligence, Surveillance, and Reconnaissance (ISR), target acquisition, and counter-land, counter-sea, and anti-submarine strike capabilities for its security and defense. The capability is a deterrent to regional threats and will strengthen the recipient's self-defense. 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 General Atomics Aeronautical Systems, Inc., San Diego, CA. The purchaser typically requests offsets. Any offset agreement will be defined in negotiations between the purchaser and the contractor.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to the recipient.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 20–74

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 MQ-9B Remotely Piloted Aircraft (RPA) is a weapons-ready aircraft designed for Medium-Altitude Long-Endurance (MALE) Intelligence, Surveillance and Reconnaissance (ISR), Target Acquisition, and Strike Missions. The MQ-9B RPA is not a USAF program of record but has close ties to, and builds upon, the proven success of the MQ-9A Reaper. The MQ-9B is a highly modular, easily configurable aircraft that contains the necessary hard points, power, and data connections to accommodate a variety of payloads and munitions to meet multiple missions—including counter-land, counter-sea, and anti-submarine strike operations. The system is designed to be controlled by two operators within a Certifiable Ground Control Station (CGCS). The CGCS is designed to emulate a reconnaissance aircraft cockpit, giving users extensive means to operate both the aircraft and sensors. The MQ-9B is able to operate using a direct Line-of-Sight (LOS) datalink or Beyond Line-of-Sight (BLOS) through satellite communications (SATCOM). The MQ-9B system can be deployed from a single site that supports launch/recovery, mission control, and maintenance. The system also supports remote-split operations where launch/recovery and maintenance occur at a Forward Operating Base and mission control is conducted from another location or Main Operating Base (MOB).

2. The Ground Control Station (GCS) can be either fixed or mobile. The fixed GCS is enclosed in a customer-specified shelter. It incorporates workstations that allow operators to control and monitor the aircraft, as well as record and exploit downlinked payload data. The mobile GCS allows operators to perform the same functions and is contained on a mobile trailer. Workstations in either GCS can be tailored to meet customer requirements.

3. The Embedded GPS-INS (EGI) with Selective Availability Anti-Spoofing Module (SAASM) is a self-contained navigation system that provides the following: acceleration, velocity, position, attitude, platform azimuth, magnetic and true heading, altitude, body angular rates, time tags and coordinated universal time (UTC) synchronized time. SAASM enables the GPS receiver access to the encrypted P(Y) signal providing protection against active spoofing attacks.

4. The AN/DPX-7 is an Identification Friend or Foe (IFF) Transponder used to identify and track aircraft, ships, and some ground forces to reduce friendly fire incidents.

5. The MX-20 Multi-Spectral Targeting System is a multi-use highly advanced EO/IR sensor that provides long-range surveillance, high altitude, target acquisition, tracking, range finding, and laser designation for all NATO and tri-service laser guided munitions, enabling precision-strike against a variety of land and maritime targets.

6. SeaVue Maritime Multi-Role Patrol Radar is a synthetic aperture X-band radar that provides small-target maritime detection in high seas, maritime search (including submarine periscopes and semi-submersibles), radar imaging of ocean targets, and weather detection and avoidance.

7. The SAGE 750 Electronic Surveillance Measures (ESM) System is a UK-produced digital electronic

intelligence (ELINT) sensor which analyzes the electromagnetic spectrum to map the source of active emissions. Using highly accurate Direction Finding (DF) antennas, SAGE builds target locations and provides situational awareness, advance warning of threats and the ability to cue other sensors.

8. The C-Band Line-of-Sight (LOS) Ground Data Terminals and Ku-Band SATCOM GA-ASI Transportable Earth Stations (GATES) provide command, control, and data acquisition for the MQ-9B.

9. The Honeywell TPE-331–10-GD Turboprop Engine is used in a variety of airborne platforms including the MQ-9B.

10. The M6000 UHF/VHF Radio is a multi-band, portable, two-way communication radio.

11. The KIV-77 Mode 5 crypto applique computer for IFF is Type 1 certified by the National Security Agency and provides information assurance for Mode 5 IFF equipment. The KIV-77 is used to store the classified keys.

12. The AN/APQ-10C Simple Key Loader is a handheld fill device for securely receiving, storing, and transferring data between cryptographic and communications equipment.

13. The highest level of classification of information included in this potential sale is SECRET.

14. 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.

15. 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.

16. All defense articles and services listed in this transmittal have been authorized for release and export to the recipient.

[FR Doc. 2020–27709 Filed 12–16–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 20–82]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense (DoD).

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 20–82 with attached Policy Justification and Sensitivity of Technology.

Dated: December 11, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

November 5, 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. 20-82 concerning the Navy's proposed Letter(s) of Offer and Acceptance to the Government of Canada for defense articles and services estimated to cost $500 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

BILLING CODE 5001–06–C

Transmittal No. 20–82

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 Canada

(ii) *Total Estimated Value:*

Major Defense Equipment * ..	$300 million
Other	$200 million
TOTAL	$500 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE):

One hundred (100) Standard Missile 2 (SM-2) Block IIIC Missiles

One hundred (100) MK 13 Vertical Launch Systems (VLS) (canisters modified to employ the SM-2 Block IIIC missile)

Non-MDE: Also included is obsolescence engineering; integration and test activity associated with production of subject missiles; canister handling and loading/unloading equipment and associated spares; training and training equipment/aids; technical publications and data; U.S.

Government and contractor engineering, technical, and logistics support; and other related elements of logistical and program support.

(iv) *Military Department:* Navy (CN-P-APW)

(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:* November 5, 2020

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Canada—Standard Missile 2 (SM-2) Block IIIC Missiles

The Government of Canada has requested to buy one hundred (100) Standard Missile 2 (SM-2) Block IIIC missiles; and one hundred (100) MK 13 Vertical Launch Systems (VLS) (canisters modified to employ the SM-2 Block IIIC missile). Also included is obsolescence engineering; integration and test activity associated with production of subject missiles; canister handling and loading/unloading equipment and associated spares; training and training equipment/aids; technical publications and data; U.S. Government and contractor engineering, technical, and logistics support; and other related elements of logistical and program support. The total estimated program cost is $500 million.

This proposed sale will support the foreign policy and national security objectives of the United States by helping to improve the military capability of Canada, a NATO ally that is an important force for ensuring political stability and economic progress and a contributor to military, peacekeeping and humanitarian operations around the world.

This proposed sale will provide Canada with SM-2 Block IIIC missiles for installation on its planned 15 Type 26 Canada Surface Combatant (CSC) ships, ensuring its ability to operate alongside U.S. and Allied naval forces against the full spectrum of naval threats. Canada will have no difficulty absorbing this equipment into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal U.S. contractor will be Raytheon Missiles and Defense, Tucson, AZ. The purchaser typically requests offsets. Any offset agreement will be defined in negotiations between the purchaser and the contractor(s).

Implementation of the proposed sale will require U.S. Government and contractor personnel to visit Canada 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. 20–82

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 SM-2 Block IIIC Active Missile maximizes existing SM-6 Block I active and SM-2 semi-active missile technology to deliver a low cost, medium range dual mode active/semi-active missile. Guidance, Ordnance and Power, Control and Telemetry (PC&T) Sections are derived from SM-6 Block I, Dual Thrust Rocket Motor (DTRM) and missile canisters are derived from SM-2. Planned changes include new dorsal sections and thrust vector control to accommodate the revised flight characteristics driven by the incorporation of the active missile capability. Improvements to the Guidance Section, communications plate and steering control section are planned to address obsolescence.

2. The highest level of classification of defense articles, components, and services included in this potential sale is SECRET.

3. 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.

4. A determination has been made that Canada 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 Government of Canada.

[FR Doc. 2020–27733 Filed 12–16–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 20–73]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense (DoD).

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 20–73 with attached Policy Justification and Sensitivity of Technology.

Dated: December 11, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

October 30, 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. 20-73 concerning the Army's proposed Letter(s) of Offer and Acceptance to the Government of Australia for defense articles and services estimated to cost $46 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

BILLING CODE 5001–06–C

Transmittal No. 20–73

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 Australia.

(ii) *Total Estimated Value:*

Major Defense Equipment * ..	$40 million
Other	$ 6 million
TOTAL	$46 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE):

Two hundred (200) Javelin FGM-148E missiles

Non-MDE: U.S. Government technical assistance and other related elements of logistics and program support.

(iv) *Military Department:* Army (AT-B-ULI).

(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 30, 2020.

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Australia—Javelin Missiles

The Government of Australia has requested to buy two hundred (200) Javelin FGM-148E missiles with U.S. Government technical assistance and other related elements of logistics and program support. The total estimated cost is not to exceed $46 million.

This proposed sale will support the foreign policy and national security objectives of the United States. Australia is one of our most important allies in the Western Pacific. The strategic location of this political and economic power contributes significantly to ensuring peace and economic stability in the region.

The Australian Defence Force (ADF) is seeking to fill a short-term shortfall in its Javelin missile inventory in order to maintain the appropriate level of readiness. Australia will not have any difficulty absorbing these missiles into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

These missiles will be provided from U.S. Army stocks. There are no known offsets associated with this sale.

Implementation of this proposed sale will not require the assignment of U.S. Government or contractor representatives to Australia.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 20–73

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The Javelin Weapon System is a medium-range, man portable, shoulder-launched, fire-and-forget, anti-tank system for infantry, scouts, and combat engineers. It may also be mounted on a variety of platforms including vehicles, aircraft and watercraft. The system weighs 49.5 pounds and has a maximum range in excess of 2,500 meters. The system is highly lethal against tanks and other systems with conventional and reactive armors. The system possesses a secondary capability against bunkers.

2. Javelin's key technical feature is the use of fire-and-forget technology, which allows the gunner to fire and immediately relocate or take cover. Additional special features are the top attack and/or direct fire modes, an advanced tandem warhead and imaging infrared seeker, target lock-on before launch, and soft launch from enclosures or covered fighting positions. The Javelin missile also has a minimum smoke motor thus decreasing its detection on the battlefield.

3. The Javelin Weapon System is comprised of two major tactical components, which are a reusable Command Launch Unit (CLU) and a round contained in a disposable launch tube assembly. The CLU incorporates an integrated day-night sight that provides a target engagement capability in adverse weather and countermeasure environments. The CLU may also be used in a stand-alone mode for battlefield surveillance and target detection. The CLU's thermal sight is a second generation Forward Looking Infrared (FLIR) sensor.

4. The missile is autonomously guided to the target using an imaging infrared seeker and adaptive correlation tracking algorithms. This allows the gunner to take cover or reload and engage another target after firing a missile. The missile has an advanced tandem warhead and can be used in either the top attack or direct fire modes (for target undercover). An onboard flight computer guides the missile to the selected target.

5. The Javelin Missile System hardware and the documentation are UNCLASSIFIED.

6. If a technologically advanced adversary obtains knowledge of the specific hardware and software elements, the information could be used to develop countermeasures or equivalent systems that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

7. A determination has been made that Australia can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This proposed sale is necessary to further the U.S. foreign policy and national security objectives outlined in the Policy Justification.

8. All defense articles and services listed on this transmittal are authorized for release and export to the Government of Australia.

[FR Doc. 2020–27706 Filed 12–16–20; 8:45 am]

BILLING CODE 5001–06–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: EC21–21–000.
Applicants: North Fork Ridge Wind, LLC, The Empire District Electric Company.
Description: Supplement to Application of North Fork Ridge Wind, LLC, and The Empire District Electric Company.
Filed Date: 12/11/20.
Accession Number: 20201211–5133.
Comments Due: 5 p.m. ET 1/4/21.

Docket Numbers: EC21–27–000.
Applicants: Neosho Ridge Wind, LLC, The Empire District Electric Company.
Description: Supplement to Application of Neosho Ridge Wind, LLC, and The Empire District Electric Company.
Filed Date: 12/11/20.
Accession Number: 20201211–5135.
Comments Due: 5 p.m. ET 1/4/21.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG21–52–000.
Applicants: Harry Allen Solar Energy LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Harry Allen Solar Energy LLC.
Filed Date: 12/11/20.
Accession Number: 20201211–5062.
Comments Due: 5 p.m. ET 1/4/21.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER19–2846–003.
Applicants: Trans Bay Cable LLC.
Description: Compliance filing: Compliance filing for Docket ER19–2846 to be effective 4/23/2020.
Filed Date: 12/11/20.
Accession Number: 20201211–5071.
Comments Due: 5 p.m. ET 1/4/21.

Docket Numbers: ER20–1087–001.
Applicants: New England Electric Transmission Corporation.
Description: Compliance filing: Amended Order No. 864 Compliance Filing to be effective 1/27/2020.
Filed Date: 12/11/20.
Accession Number: 20201211–5161.
Comments Due: 5 p.m. ET 1/4/21.

Docket Numbers: ER20–1088–001.
Applicants: New England Hydro Transmission Electric.
Description: Compliance filing: Amended Order No. 864 Compliance Filing to be effective 1/27/2020.

Filed Date: 12/11/20.
Accession Number: 20201211–5162.
Comments Due: 5 p.m. ET 1/4/21.
Docket Numbers: ER20–1089–001.
Applicants: New England Hydro Transmission Corporation.
Description: Compliance filing: Amended Order No. 864 Compliance Filing to be effective 1/27/2020.
Filed Date: 12/11/20.
Accession Number: 20201211–5166.
Comments Due: 5 p.m. ET 1/4/21.
Docket Numbers: ER20–1720–002.
Applicants: Southern California Edison Company.
Description: Compliance filing: SCE Response to Deficiency Letter Docket No. ER20–1720–001 to be effective N/A.
Filed Date: 12/11/20.
Accession Number: 20201211–5115.
Comments Due: 5 p.m. ET 1/4/21.
Docket Numbers: ER20–1742–001.
Applicants: San Diego Gas & Electric Company.
Description: Compliance filing: Order No. 864 Compliance Filing to be effective 1/27/2020.
Filed Date: 12/11/20.
Accession Number: 20201211–5083.
Comments Due: 5 p.m. ET 1/4/21.
Docket Numbers: ER20–1828–001.
Applicants: PacifiCorp.
Description: Compliance filing: OATT Order 864—Directive 10/28/2020 to be effective N/A.
Filed Date: 12/11/20.
Accession Number: 20201211–5102.
Comments Due: 5 p.m. ET 1/4/21.
Docket Numbers: ER20–2916–002.
Applicants: Alabama Power Company.
Description: Tariff Amendment: Amendment to Bird Dog Solar LGIA Termination Filing (Request to Defer Action) to be effective 9/18/2020.
Filed Date: 12/11/20.
Accession Number: 20201211–5113.
Comments Due: 5 p.m. ET 1/4/21.
Docket Numbers: ER21–223–001.
Applicants: Union Electric Company.
Description: Tariff Amendment: Request to Defer Action to be effective 12/31/9998.
Filed Date: 12/11/20.
Accession Number: 20201211–5152.
Comments Due: 5 p.m. ET 1/4/21.
Docket Numbers: ER21–252–001.
Applicants: Duke Energy Florida, LLC.
Description: Tariff Amendment: Errata—DEF Rate Schedule No. 226 to be effective 1/1/2021.
Filed Date: 12/10/20.
Accession Number: 20201210–5169.
Comments Due: 5 p.m. ET 12/16/20.
Docket Numbers: ER21–622–000.
Applicants: Black Hills Power, Inc.
Description: § 205(d) Rate Filing: WAPA BA Agreement to be effective 12/31/2020.
Filed Date: 12/10/20.
Accession Number: 20201210–5156.
Comments Due: 5 p.m. ET 12/31/20.
Docket Numbers: ER21–623–000.
Applicants: Cheyenne Light, Fuel and Power Company.
Description: § 205(d) Rate Filing: WAPA BA Agreement Concurrence to be effective 12/31/2020.
Filed Date: 12/10/20.
Accession Number: 20201210–5164.
Comments Due: 5 p.m. ET 12/31/20.
Docket Numbers: ER21–624–000.
Applicants: Florida Power & Light Company.
Description: § 205(d) Rate Filing: FPL Reactive Service Rate Reduction for Transmission Service Agreements to be effective 12/1/2020.
Filed Date: 12/11/20.
Accession Number: 20201211–5000.
Comments Due: 5 p.m. ET 1/4/21.
Docket Numbers: ER21–625–000.
Applicants: New York Independent System Operator, Inc.
Description: § 205(d) Rate Filing: NYISO 205 filing re: SENY Reserve enhancements to be effective 12/31/9998.
Filed Date: 12/11/20.
Accession Number: 20201211–5002.
Comments Due: 5 p.m. ET 1/4/21.
Docket Numbers: ER21–626–000.
Applicants: PacifiCorp.
Description: Notice of Termination of Long-Term Power Transaction Agreement of PacifiCorp.
Filed Date: 12/10/20.
Accession Number: 20201210–5183.
Comments Due: 5 p.m. ET 12/31/20.
Docket Numbers: ER21–627–000.
Applicants: Dry Lake Solar Holdings LLC.
Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization to be effective 2/10/2021.
Filed Date: 12/11/20.
Accession Number: 20201211–5047.
Comments Due: 5 p.m. ET 1/4/21.
Docket Numbers: ER21–628–000.
Applicants: Harry Allen Solar Energy LLC.
Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization to be effective 2/10/2021.
Filed Date: 12/11/20.
Accession Number: 20201211–5049.
Comments Due: 5 p.m. ET 1/4/21.
Docket Numbers: ER21–629–000.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Cancellation: Notice of Cancellation of ISA, SA No. 4872; Queue No. AA2–132 to be effective 12/6/2020.
Filed Date: 12/11/20.
Accession Number: 20201211–5068.
Comments Due: 5 p.m. ET 1/4/21.
Docket Numbers: ER21–630–000.
Applicants: 325MK 8ME LLC.
Description: Baseline eTariff Filing: 325MK 8ME LLC MBR Tariff to be effective 12/14/2020.
Filed Date: 12/11/20.
Accession Number: 20201211–5094.
Comments Due: 5 p.m. ET 1/4/21.
Docket Numbers: ER21–631–000.
Applicants: Southern California Edison Company.
Description: Tariff Cancellation: Notice of Termination County of Orange SA Nos. 23 & 118 WDT040 to be effective 1/30/2021.
Filed Date: 12/11/20.
Accession Number: 20201211–5098.
Comments Due: 5 p.m. ET 1/4/21.
Docket Numbers: ER21–632–000.
Applicants: Toms River Merchant Solar, LLC.
Description: Baseline eTariff Filing: Market-Based Rate Application to be effective 2/1/2021.
Filed Date: 12/11/20.
Accession Number: 20201211–5114.
Comments Due: 5 p.m. ET 1/4/21.
Docket Numbers: ER21–633–000.
Applicants: Alabama Power Company.
Description: § 205(d) Rate Filing: Vogtle 3 & 4 LGIA Amendment Filing to be effective 11/19/2020.
Filed Date: 12/11/20.
Accession Number: 20201211–5117.
Comments Due: 5 p.m. ET 1/4/21.
Docket Numbers: ER21–634–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Amendment to ISA/ICSA; Queue No. AE1–142 to be effective 1/7/2020.
Filed Date: 12/11/20.
Accession Number: 20201211–5121.
Comments Due: 5 p.m. ET 1/4/21.

Take notice that the Commission received the following qualifying facility filings:

Docket Numbers: QF21–222–000.
Applicants: Board of Trustees of Michigan State University.
Description: Form 556 of Board of Trustees of Michigan State University.
Filed Date: 12/7/20.
Accession Number: 20201207–5182.
Comments Due: Non-Applicable.

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 11, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–27800 Filed 12–16–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP20–479–000]

Northern Natural Gas Company; Notice of Availability of the Environmental Assessment for the Proposed 2021 Auburn A-Line Abandonment and Capacity Replacement Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) for the 2021 Auburn A-Line Abandonment and Capacity Replacement Project, proposed by Northern Natural Gas Company (Northern), in the above-referenced docket. Northern requests authorization to construct, own, and operate a pipeline loop [1] and appurtenant aboveground facilities, and abandon-in-place a segment of its A-line pipeline in Nebraska. Northern's purpose for the project is to improve reliability, enable safer long-term operation of Northern's system, and serve the needs of its shippers more effectively by eliminating inefficiencies associated with the operation and maintenance of the A-line segment.

The EA assesses the potential environmental effects of the construction, operation, and abandonment activities associated with the 2021 Auburn A-Line Abandonment and Capacity Replacement Project in accordance with the requirements of the National Environmental Policy Act (NEPA). The FERC staff concludes that approval of the proposed project, with appropriate mitigating measures, would not constitute a major federal action significantly affecting the quality of the human environment.

The proposed 2021 Auburn A-Line Abandonment and Capacity Replacement Project includes the following:

- Construction of approximately 4.4 miles of new 8-inch-diameter pipeline loop in Lancaster and Otoe Counties, Nebraska (proposed B-line);
- installation of a pig [2] launcher and valve station in Lancaster County, Nebraska;
- installation of a regulation station in Otoe County, Nebraska; and
- abandonment in-place of approximately 31.7 miles of 4- and 6-inch-diameter A-line in Lancaster, Otoe, Johnson, and Nemaha counties, Nebraska.

The Commission mailed a copy of the *Notice of Availability* to federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners and other interested individuals and groups; and newspapers and libraries in the project area. The EA is only available in electronic format. It may be viewed and downloaded from the FERC's website (*www.ferc.gov*), on the natural gas environmental documents page (*https://www.ferc.gov/industries-data/natural-gas/environment/environmental-documents*). In addition, the EA may be accessed by using the eLibrary link on the FERC's website. Click on the eLibrary link (*https://elibrary.ferc.gov/eLibrary/search*), select General Search and enter the docket number in the Docket Number field, excluding the last three digits (*i.e.* CP20–479). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

The EA is not a decision document. It presents Commission staff's independent analysis of the environmental issues for the Commission to consider when addressing the merits of all issues in this proceeding. Any person wishing to comment on the EA may do so. Your comments should focus on the EA's disclosure and discussion of potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that the Commission has the opportunity to consider your comments prior to making its decision on this project, it is important that we receive your comments in Washington, DC on or before 5:00 p.m. Eastern Time on January 11, 2021.

For your convenience, there are three methods you can use to file your comments to the Commission. The Commission encourages electronic filing of comments and has staff available to assist you at (866) 208–3676 or *FercOnlineSupport@ferc.gov.* Please carefully follow these instructions so that your comments are properly recorded.

(1) You can file your comments electronically using the eComment feature on the Commission's website (*www.ferc.gov*) under the link to FERC Online. This is an easy method for submitting brief, text-only comments on a project;

(2) You can also file your comments electronically using the eFiling feature on the Commission's website (*www.ferc.gov*) under the link to FERC Online. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on eRegister. You must select the type of filing you are making. If you are filing a comment on a particular project, please select Comment on a Filing; or

(3) You can file a paper copy of your comments by mailing them to the Commission. Be sure to reference the project docket number (CP20–479) on your letter. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Filing environmental comments will not give you intervenor status, but you do not need intervenor status to have your comments considered. Only intervenors have the right to seek rehearing or judicial review of the Commission's decision. At this point in this proceeding, the timeframe for filing timely intervention requests has expired. Any person seeking to become a party to the proceeding must file a motion to intervene out-of-time pursuant to Rule 214(b)(3) and (d) of the Commission's Rules of Practice and Procedures (18 CFR 385.214(b)(3) and (d)) and show good cause why the time

[1] A loop is a pipeline that is constructed adjacent to another pipeline for the purpose of increasing capacity in this portion of the system.

[2] A pig is a tool that is inserted into and pushed through the pipeline for cleaning the pipeline, conducting internal inspections, or other purposes.

limitation should be waived. Motions to intervene are more fully described at *https://www.ferc.gov/ferc-online/ferc-online/how-guides.*

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website (*www.ferc.gov*) using the eLibrary link. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *https://www.ferc.gov/ferc-online/overview* to register for eSubscription.

Dated: December 11, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–27798 Filed 12–16–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP21–302–000.

Applicants: Northern Border Pipeline Company.

Description: § 4(d) Rate Filing: NBPL Sequent NRA to be effective 11/1/2020.

Filed Date: 12/7/20.

Accession Number: 20201207–5111.

Comments Due: 5 p.m. ET 12/21/20.

Docket Numbers: RP21–304–000.

Applicants: Transwestern Pipeline Company, LLC.

Description: § 4(d) Rate Filing: Revise Contracting Procedures to be effective 1/9/2021.

Filed Date: 12/9/20.

Accession Number: 20201209–5026.

Comments Due: 5 p.m. ET 12/21/20.

Docket Numbers: RP21–305–000.

Applicants: Bear Creek Storage Company, L.L.C.

Description: Compliance filing Annual Fuel Summary 2020 to be effective N/A.

Filed Date: 12/10/20.

Accession Number: 20201210–5015.

Comments Due: 5 p.m. ET 12/22/20.

Docket Numbers: RP21–306–000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: § 4(d) Rate Filing: 121020 Negotiated Rates—Mercuria Energy America, LLC R–7540–02 to be effective 1/1/2021.

Filed Date: 12/10/20.

Accession Number: 20201210–5040.

Comments Due: 5 p.m. ET 12/22/20.

Docket Numbers: RP21–307–000.

Applicants: Equitrans, L.P.

Description: § 4(d) Rate Filing: Standards of Conduct Update to be effective 1/10/2021.

Filed Date: 12/10/20.

Accession Number: 20201210–5114.

Comments Due: 5 p.m. ET 12/22/20.

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 11, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–27795 Filed 12–16–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 4428–011]

Walden Hydro, LLC; Notice Soliciting Scoping Comments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* P–4428–011.

c. *Date filed:* May 29, 2020.

d. *Applicant:* Walden Hydro, LLC.

e. *Name of Project:* Walden Hydroelectric Project.

f. *Location:* On the Wallkill River, in the Village of Walden, Orange County, New York. The project does not occupy any federal land.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Ms. Elise Anderson, Senior Environmental Permitting Specialist, Walden Hydro, LLC, Enel Green Power North America, Inc., 100 Brickstone Square, Suite 300, Andover, MA 01810; Phone at (978) 447–4408 or email at *Elise.Anderson@enel.com.*

i. *FERC Contact:* Samantha Pollak at (202) 502–6419, or *samantha.pollak@ferc.gov.*

j. *Deadline for filing scoping comments:* January 11, 2021.

The Commission strongly encourages electronic filing. Please file scoping comments using the Commission's eFiling system at *https://ferconline.ferc.gov/FERCOnline.aspx.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *https://ferconline.ferc.gov/QuickComment.aspx.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P–4428–011.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application is not ready for environmental analysis at this time.

l. The Walden Project consists of: (1) A 417-foot-long (consisting of 165-foot-long east-west and 252-foot-long north-south portions), V-shaped concrete dam topped with 2-foot-high flashboards; (2) an impoundment with a surface area of 69 acres at the normal pool elevation of

321.3 feet National Geodetic Vertical Datum of 1929 (NGVD29); (3) an intake structure consisting of a 252-foot-long, 56-foot-wide, 18-foot-deep canal forebay; (4) a 6-foot-wide sluice gate for a minimum flow of 31 cfs; (5) four 40-foot-long steel penstocks; (6) a 60-foot-long, 45-foot-wide, 29-foot-high powerhouse containing three horizontal double-runner Francis turbine units with actual ratings of 740 kilowatts (kW), 540 kW, and 360 kW, respectively, for a total capacity of 1,640 kW; [1] (7) a 30-foot-long, 37-foot-wide tailrace; (8) a 230-foot-long bypassed reach; (9) a 115-foot-long transmission line from the project generators to a New York State Electric and Gas Corporation's 4.16-kilovolt (kV) distribution line; (10) a substation with a single-phase 13.2-kV transformer; and (11) appurtenant facilities.

m. In addition to publishing the full text of this notice in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this notice, as well as other documents in the proceeding (*e.g.,* scoping document) via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document (P–4428). 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 FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3673 or (202) 502–8659 (TTY).

n. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

o. Scoping Process.

The Commission staff intends to prepare an Environmental Assessment (EA) or Environmental Impact Statement (EIS) for the Walden Hydroelectric Project in accordance with the National Environmental Policy Act (NEPA). The NEPA document will consider impacts and reasonable alternatives to the proposed action.

[1] In an October 14, 2020 filing, Walden Hydro stated that although the total rated capacity of the project as stated in the license application is 2,110 kW (980 kW, 630 kW, and 500 kW), the maximum achievable output from each turbine/generator unit is lower than the stated capacities.

Commission staff does not propose to conduct any on-site scoping meetings at this time. Instead, we are soliciting comments, recommendations, and information, on the Scoping Document (SD) issued on December 11, 2020.

Copies of the SD outlining the subject areas to be addressed in the NEPA document were distributed to the parties on the Commission's mailing list and the applicant's distribution list. Copies of the SD may be viewed on the web at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call 1–866–208–3676 or for TTY, (202) 502–8659.

Dated: December 11, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–27799 Filed 12–16–20; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2017–0440; FRL–10016–61–OMS]

Agency Information Collection Activities; Renewal Request Submitted to OMB for Review and Approval; Comment Request; Plant Incorporated Protectants; CBI Substantiation and Adverse Effects Reporting (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Plant Incorporated Protectants; CBI Substantiation and Adverse Effects Reporting (EPA ICR Number 1693.10, OMB Control Number 2070–0142) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through February 28, 2021. Public comments were previously requested via the **Federal Register** on August 17, 2020 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before January 19, 2021.

ADDRESSES: Submit your comments to EPA, referencing Docket ID No. EPA–HQ–OPP–2017–0440, online using *www.regulations.gov.* EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* 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: Carolyn Siu, Mission Support Division (7101M), Office of Program Support, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (703) 347–0159; email address: *siu.carolyn@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: EPA is responsible for the regulation of pesticides as authorized by Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Prior to EPA granting a registration, the manufacturer of the pesticide must demonstrate to the Agency that the use of the pesticide product will not result in any unreasonable adverse effects to humans or the environment. EPA is also responsible under the Federal Food, Drug, and Cosmetic Act (FFDCA) for establishing a tolerance or exemption from the requirement of a tolerance for pesticide residues on food or feed.

Form Numbers: None.

Respondents/Affected entities: Pesticides and other agricultural chemical manufacturing, research and development in the physical, engineering, and life sciences, biological

products (except diagnostic) manufacturing, colleges, universities, and professional schools, farm supplies wholesalers, flower, nursery stock, and florists' supplies (wholesalers).

Respondent's obligation to respond: Mandatory under FIFRA section 2 and applicable CBI requirements per 40 CFR part 2.

Estimated number of respondents: 25 (total).

Frequency of response: On occasion.

Estimated total burden: 518 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Estimated total costs: $41,892 (per year), includes $0 annualized capital or operation & maintenance costs.

Changes in the estimates from the last approval: There are no changes in the estimates.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2020–27801 Filed 12–16–20; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

[Public Notice: 2020–0005]

Agency Information Collection Activities: Comment Request

AGENCY: Export-Import Bank of the United States.

SUMMARY: The Export-Import Bank of the United States (Ex-Im Bank), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

DATES: Comments must be received on or before January 19, 2021 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *www.regulations.gov* or by mail to Donna Schneider, Export-Import Bank of the United States, 811 Vermont Ave. NW, Washington, DC 20571.

SUPPLEMENTARY INFORMATION: By neutralizing the effect of export credit support offered by foreign governments and by absorbing credit risks that the private sector will not accept, Ex-Im Bank enables U.S. exporters to compete fairly in foreign markets on the basis of price and product. Under the Working Capital Guarantee Program, Ex-Im Bank provides repayment guarantees to lenders on secured, short-term working capital loans made to qualified exporters. The guarantee may be approved for a single loan or a revolving line of credit. In the event that a borrower defaults on a transaction guaranteed by Ex-Im Bank the guaranteed lender may seek payment by the submission of a claim.

This collection of information is necessary, pursuant to 12 U.S.C. 635 (a)(1), to determine if such claim complies with the terms and conditions of the relevant working capital guarantee. The Notice of Claim and Proof of Loss, Working Capital Guarantee is used to determine compliance with the terms of the guarantee and the appropriateness of paying a claim. Export-Import Bank customers are able to submit this form on paper or electronically.

The information collection tool can be reviewed at: *https://www.exim.gov/sites/default/files/pub/pending/eib10-04.pdf.*

Title and Form Number: EIB 10–04 Notice of Claim and Proof of Loss, Working Capital Guarantee.

OMB Number: 3048–0035.

Type of Review: Regular.

Need and Use: This collection of information is necessary, pursuant to 12 U.S.C. 635(a)(1), to determine if such claim complies with the terms and conditions of the relevant guarantee.

Affected Public: This form affects entities involved in the export of U.S. goods and services.

Annual Number of Respondents: 17.

Estimated Time per Respondent: 1 hour.

Annual Burden Hours: 17 hours.

Frequency of Reporting of Use: As needed to request a claim payment.

Government Expenses:

Reviewing Time per Year: 17 hours.

Average Wages per Hour: $42.50.

*Average Cost per Year (time * wages):* $722.50.

Benefits and Overhead: 20%.

Total Government Cost: $867.

Bassam Doughman,

Project Manager, Agency Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2020–27774 Filed 12–16–20; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meetings

TIME AND DATE: 11:14 a.m. on Tuesday, December 15, 2020.

PLACE: The meeting was held in the Board Room located on the sixth floor of the FDIC Building located at 550 17th Street NW, Washington, DC.

STATUS: Closed.

MATTERS TO BE CONSIDERED: In calling the meeting, the Board determined, on motion of Director Martin J. Gruenberg, seconded by Director Brian P. Brooks (Acting Comptroller of the Currency), and concurred in by Director Kathleen L. Kraninger (Director, Consumer Financial Protection Bureau), and Chairman Jelena McWilliams, that Corporation business required its consideration of the matters which were to be the subject of this meeting on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of the ''Government in the Sunshine Act'' (5 U.S.C. 552b(c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B).

CONTACT PERSON FOR MORE INFORMATION: Requests for further information concerning the meeting may be directed to Mr. James P. Sheesley, Assistant Executive Secretary of the Corporation, at (703) 562–2047.

Federal Deposit Insurance Corporation.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2020–27991 Filed 12–15–20; 4:15 pm]

BILLING CODE 6714–01–P

FEDERAL RESERVE SYSTEM

[Docket No. R–1734]

RIN 7100–AG04

Regulation Q; Regulatory Capital Rules: Risk-Based Capital Surcharges for Global Systemically Important Bank Holding Companies

AGENCY: Board of Governors of the Federal Reserve System (Board).

ACTION: Notice.

SUMMARY: The Board is providing notice of the 2020 aggregate global indicator amounts, as required under the Board's rule regarding risk-based capital surcharges for global systemically important bank holding companies (GSIB surcharge rule).

DATES: December 17, 2020.

FOR FURTHER INFORMATION CONTACT: Constance Horsley, Deputy Associate Director, (202) 452–5239, Mark Handzlik, Manager, (202) 475–6636, Naima Jefferson, Lead Financial Institution Policy Analyst, (202) 912–4613, Christopher Appel, Senior Financial Institution Policy Analyst II, (202) 973–6862, or Brendan Rowan, Senior Financial Institution Policy Analyst I, (202) 475–6685, Division of

Supervision and Regulation; or Mark Buresh, Senior Counsel, (202) 452–5270, or Mary Watkins, Counsel, (202) 452–3722, Legal Division. Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551. For users of Telecommunications Device for the Deaf (TDD) contact (202) 263–4869.

SUPPLEMENTARY INFORMATION: The Board's GSIB surcharge rule establishes a methodology to identify global systemically important bank holding companies in the United States (GSIBs) based on indicators that are correlated with systemic importance.[1] Under the GSIB surcharge rule, a firm must calculate its GSIB score using a specific formula (Method 1). Method 1 uses five equally weighted categories that are correlated with systemic importance—size, interconnectedness, cross-jurisdictional activity, substitutability, and complexity—and subdivided into twelve systemic indicators. A firm divides its own measure of each systemic indicator by an aggregate global indicator amount. A firm's Method 1 score is the sum of its weighted systemic indicator scores expressed in basis points. The GSIB surcharge for a firm is the higher of the GSIB surcharge determined under Method 1 and a second method, Method 2, which weights size, interconnectedness, cross-jurisdictional activity, complexity, and a measure of a firm's reliance on short-term wholesale funding.[2]

The aggregate global indicator amounts used in the score calculation under Method 1 are based on data collected by the Basel Committee on Banking Supervision (BCBS). The BCBS amounts are determined based on the sum of the systemic indicator amounts as reported by the 75 largest U.S. and foreign banking organizations as measured by the BCBS, and any other banking organization that the BCBS includes in its sample total for that year. The BCBS publicly releases these amounts, denominated in euros, each year.[3] Pursuant to the GSIB surcharge rule, the Board publishes the aggregate global indicator amounts each year as denominated in U.S. dollars using the euro-dollar exchange rate provided by the BCBS.[4] Specifically, to determine the 2020 aggregate global indicator amounts, the Board multiplied each of the euro-denominated indicator amounts made publicly available by the BCBS by 1.1234, which was the daily euro to U.S. dollar spot rate on December 31, 2019.[5]

The aggregate global indicator amounts for purposes of the 2020 Method 1 score calculation under § 217.404(b)(1)(i)(B) of the GSIB surcharge rule are:

AGGREGATE GLOBAL INDICATOR AMOUNTS IN U.S. DOLLARS (USD) FOR 2020

Category	Systemic indicator	Aggregate global indicator amount (in USD)
Size	Total exposures	91,356,116,001,552
Interconnectedness	Intra-financial system assets	8,711,746,598,677
	Intra-financial system liabilities	9,745,958,746,356
	Securities outstanding	16,507,336,812,775
Substitutability	Payments activity	2,597,250,324,410,487
	Assets under custody	181,254,610,899,160
	Underwritten transactions in debt and equity markets	7,280,431,346,279
Complexity	Notional amount of over-the-counter (OTC) derivatives	623,682,857,713,896
	Trading and available-for-sale (AFS) securities	3,854,344,460,622
	Level 3 assets	577,982,516,649
Cross-jurisdictional activity	Cross-jurisdictional claims	22,968,366,792,194
	Cross-jurisdictional liabilities	18,594,151,540,975

Authority: 12 U.S.C. 248(a), 321–338a, 481–486, 1462a, 1467a, 1818, 1828, 1831n, 1831o, 1831p–l, 1831w, 1835, 1844(b), 1851, 3904, 3906–3909, 4808, 5365, 5368, 5371.

By order of the Board of Governors of the Federal Reserve System, acting through the Director of Supervision and Regulation under delegated authority.

Ann Misback,

Secretary of the Board.

[FR Doc. 2020–27591 Filed 12–16–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Agency Information Collection Activities; Proposed Collection; Public Comment Request; Independent Living Services (ILS) Program Performance Report (PPR) 0985–0043

AGENCY: Administration for Community Living, HHS.

ACTION: Notice.

SUMMARY: The Administration for Community Living (ACL) is announcing an opportunity for the public to comment on the proposed collection of information listed above. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish a notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This Extension of a Currently Approved Collection (ICR Rev) solicits comments on the information collection requirements related to the Independent Living Services (ILS) Program Performance Report (PPR).

DATES: Comments on the collection of information must be submitted

[1] *See* 12 CFR 217.402, 217.404.

[2] Method 2 uses similar inputs to those used in Method 1, but replaces the substitutability category with a measure of a firm's use of short-term wholesale funding. In addition, Method 2 is calibrated differently from Method 1.

[3] The data used by the Board are available on the BCBS website at *https://www.bis.org/bcbs/gsib/denominators/gsib_framework_denominators_end19_exercise.xlsx*.

[4] 12 CFR 217.404(b)(1)(i)(B); 80 FR 49082, 49086–87 (August 14, 2015). In addition, the Board maintains the GSIB Framework Denominators on its website, available at *https://www.federalreserve.gov/bankinforeg/basel/denominators.htm*.

[5] Data are provided by the BCBS (as published by the European Central Bank, available at *http://www.ecb.europa.eu/stats/eurofxref/index.en.html*).

electronically by 11:59 p.m. (EST) or postmarked by February 16, 2021.

ADDRESSES: Submit electronic comments on the information collection request to: Peter Nye at *OILPPRAComments@acl.hhs.gov.* Submit written comments on the collection of information to Administration for Community Living, Washington, DC 20201, Attention: Peter Nye.

FOR FURTHER INFORMATION CONTACT: Peter Nye, Administration for Community Living, Washington, DC 20201, (202) 795–7606, or *peter.nye@acl.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, ACL is publishing a notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, ACL invites comments on our burden estimates or any other aspect of this collection of information, including:

(1) Whether the proposed collection of information is necessary for the proper performance of ACL's functions, including whether the information will have practical utility;

(2) the accuracy of ACL's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used to determine burden estimates;

(3) ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques when appropriate, and other forms of information technology.

The Independent Living Services (ILS) program provides financial assistance, through formula grants, to states, the District of Columbia, Puerto Rico, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the US Virgin Islands for expanding, and improving the provision of, independent living (IL) services. The Designated State Entity (DSE) is the agency that, on behalf of the state, receives, accounts for, and disburses funds received under Part B of the Rehabilitation Act of 1973, as amended (the Act). Funds are also made available for the provision of training and technical assistance to Statewide Independent Living Councils (SILCs). The Act permits an annual program performance report (PPR). This request is for the ILS PPR, which is submitted annually by the SILC and DSE in every state, territory, and commonwealth. ACL uses the ILS PPR to assess grantee compliance with title VII of the Act, with 45 CFR part 1329 of the Code of Federal Regulations, and with applicable provisions of the HHS Regulations at 45 CFR part 75. The ILS PPR serves as the primary basis for ACL's monitoring activities in fulfillment of its responsibilities under sections 706 and 722 of the Act. ACL also uses the PPR to identify training and technical assistance needs for SILCs and centers for independent living.

To view the data collection activity for this information collection request, please visit the ACL public input website: *https://www.acl.gov/about-acl/public-input.*

Estimated Program Burden

ACL estimates the burden of this collection of information as follows: Fifty-six jurisdictions—specifically, the fifty states, Puerto Rico, the District of Columbia, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the US Virgin Islands—will each complete ILS PPRs annually, and it will take an estimated thirty-five hours per jurisdiction per ILS PPR. Each jurisdiction's SILC and DSE will collaborate to complete the ILS PPR. The fifty-six jurisdictions, combined, will take an estimated 1,960 hours per year to complete ILS PPRs. This burden estimate is based on what DSEs and SILCs have told ACL about how long filling out ILS PPRs took in previous reporting years.

Respondent/data collection activity	Number of respondents	Responses per respondent	Hours per response	Total annual burden hours
SILCs and DSEs	56	1	35	1,960

Dated: December 10, 2020.

Mary Lazare,

Principal Deputy Administrator.

[FR Doc. 2020–27734 Filed 12–16–20; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2019–D–3679]

Interacting With the Food and Drug Administration on Complex Innovative Trial Designs for Drugs and Biological Products; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance entitled ''Interacting with the FDA on Complex Innovative Trial Designs for Drugs and Biological Products.'' The guidance provides recommendations to sponsors and applicants on interacting with FDA on complex innovative trial design (CID) proposals for drugs or biological products. FDA is issuing this guidance to satisfy, in part, a mandate under the 21st Century Cures Act (Cures Act). In accordance with the Cures Act mandate, this guidance discusses the use of novel trial designs in the development and regulatory review of drugs and biological products, how sponsors may obtain feedback on technical issues related to modeling and simulation, and

the types of quantitative and qualitative information that should be submitted for review. The guidance announced in this notice finalizes the draft guidance of the same title dated September 2019.

DATES: The announcement of the guidance is published in the **Federal Register** on December 17, 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–3679 for ''Interacting with the FDA on Complex Innovative Trial Designs for Drugs and Biological Products.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 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 Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist the office in processing your requests. The guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 240–402–8010. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Shruti Modi, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911; or Scott Goldie, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 21, Rm. 3557, Silver Spring, MD 20993–0002, 301–796–2055.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a document entitled ''Interacting with the FDA on Complex Innovative Trial Designs for Drugs and Biological Products.'' The guidance provides recommendations to sponsors and applicants on interacting with FDA on CID proposals for drugs or biological products. FDA is issuing this guidance to satisfy, in part, a mandate under section 3021 of the Cures Act (Pub. L. 114–255). In accordance with the Cures Act mandate, the guidance discusses the use of novel trial designs in the development and regulatory review of drugs and biological products, how sponsors may obtain feedback on technical issues related to modeling and simulation, and the types of quantitative and qualitative information that should be submitted for review.

In the **Federal Register** of September 23, 2019 (84 FR 49743), FDA announced the availability of the draft guidance of the same title dated September 2019. FDA received several comments on the draft guidance and those comments were considered as the guidance was finalized. Changes made to the guidance include the incorporation of example CID proposals submitted to FDA's CID Pilot Program, and revision of the discussion of alternative operating characteristics for Bayesian trial designs. In addition, editorial changes were made to improve clarity. The guidance announced in this notice finalizes the draft guidance dated September 2019.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ''Interacting with the FDA on Complex Innovative Trial Designs for Drugs and Biological Products.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the

requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved collections of information found in FDA regulations. 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 the OMB under the PRA. The collections of information in 21 CFR part 314 have been approved under OMB control number 0910–0001; the collections of information in 21 CFR part 312 have been approved under OMB control number 0910–0014; and the collections of information in 21 CFR part 601 have been approved under OMB control number 0910–0338.

III. Electronic Access

Persons with access to the internet may obtain the guidance at either *https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances, https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs,* or *https://www.regulations.gov.*

Dated: December 14, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–27813 Filed 12–16–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–D–2214]

Dry Eye: Developing Drugs for Treatment; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled ''Dry Eye: Developing Drugs for Treatment.'' The purpose of this draft guidance is to foster greater efficiency in drug development for this disease, which currently has few effective treatment options. The goal is to enhance clinical trial data quality and to support the development of treatments for dry eye conditions. Specifically, the draft guidance provides the Agency's current recommendations regarding eligibility criteria, trial design considerations, and efficacy endpoints for use in clinical development programs of investigational drugs to treat dry eye conditions.

DATES: Submit either electronic or written comments on the draft guidance by March 17, 2021 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov*.
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2020–D–2214 for ''Dry Eye: Developing Drugs for Treatment.'' 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 draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY**

INFORMATION section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Wiley A. Chambers, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Avenue, Bldg. 22, Rm. 6108, Silver Spring, MD 20993, 301–796–0690.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Dry Eye: Developing Drugs for Treatment.'' Dry eye disease is a common condition, particularly in older individuals. Signs and symptoms of dry eye disease can cause interference with activities of daily living. This draft guidance document, once finalized, will help developers of treatments for dry eye disease efficiently develop drugs to treat dry eye conditions.

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 ''Dry Eye: Developing Drugs for Treatment.'' 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 parts 312 and 314 have been approved under OMB control numbers 0910–0014 and 0910–0001, respectively.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at either *https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs* or *https://www.regulations.gov.*

Dated: December 14, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–27762 Filed 12–16–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–D–1167]

Controlled Correspondence Related to Generic Drug Development; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance for industry entitled ''Controlled Correspondence Related to Generic Drug Development.'' This guidance provides information regarding the process by which generic drug manufacturers and related industry can submit controlled correspondence to FDA requesting information related to generic drug development and the Agency's process for providing communications related to such correspondence. This guidance also describes the process by which generic drug manufacturers and related industry can submit requests to clarify ambiguities in FDA's controlled correspondence response and the Agency's process for responding to those requests. This guidance finalizes the draft guidance announced in the **Federal Register** on November 3, 2017, and replaces the guidance for industry ''Controlled Correspondence Related to Generic Drug Development'' issued in September 2015.

DATES: The announcement of the guidance is published in the **Federal Register** on December 17, 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–2014–D–1167 for ''Controlled Correspondence Related to Generic Drug Development.'' 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 this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Lisa Bercu, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 240–402–6902.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry entitled ''Controlled Correspondence Related to Generic Drug Development.'' This guidance provides information regarding the process by which generic drug manufacturers and related industry can submit to FDA controlled correspondence requesting information related to generic drug development and the Agency's process for providing communications related to such correspondence. This guidance also describes the process by which generic drug manufacturers and related industry can submit requests to clarify ambiguities in FDA's controlled correspondence response and the Agency's process for responding to those requests.

In accordance with the Generic Drug User Fee Amendments (GDUFA) Reauthorization Performance Goals and Program Enhancements Fiscal Years 2018–2022 (GDUFA II Goals Letter or GDUFA II Commitment Letter), FDA agreed to certain review goals and procedures for the review of controlled correspondence received both before and on or after October 1, 2017. The GDUFA II Commitment Letter also defines standard controlled correspondence and complex controlled correspondence, and the guidance provides additional details and recommendations concerning what inquiries FDA considers controlled correspondence for the purposes of meeting the Agency's GDUFA II commitment. In addition, the guidance provides details and recommendations concerning what information requestors should include in a controlled correspondence to facilitate FDA's consideration of and response to the controlled correspondence and what information FDA will provide in its communications to requestors that have submitted controlled correspondence. The GDUFA II Commitment Letter also states that FDA will review and respond to requests to clarify ambiguities in the controlled correspondence response, and the guidance provides information on how requestors may submit these requests and the Agency's process for responding to them.

This guidance finalizes the draft guidance announced in the **Federal Register** on November 3, 2017 (82 FR 51277), and replaces the guidance for industry ''Controlled Correspondence Related to Generic Drug Development'' issued in September 2015. The Agency considered comments on the draft guidance while finalizing the guidance. Revisions include clarification on FDA's practices regarding controlled correspondence that is related to a pending petition, what information should be submitted with a request related to an inactive ingredient, and when FDA may determine an inquiry is a complex controlled correspondence. We also revised the guidance to recommend that requestors submit their controlled correspondence through the CDER Direct NextGen Collaboration Portal.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ''Controlled Correspondence Related to Generic Drug Development.'' 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 (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 part 314 have been approved under OMB control number 0910–0797.

III. Electronic Access

Persons with access to the internet may obtain the guidance at either *https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *https://www.regulations.gov.*

Dated: December 14, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–27810 Filed 12–16–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–0026]

Issuance of Priority Review Voucher; Rare Pediatric Disease Product

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the issuance of a priority review voucher to the sponsor of a rare pediatric disease product application. The Federal Food, Drug, and Cosmetic Act (FD&C Act) authorizes FDA to award priority review vouchers to sponsors of approved rare pediatric disease product applications that meet certain criteria. FDA is required to publish notice of the award of the priority review voucher. FDA has determined that IMCIVREE (setmelanotide) injection, manufactured by Rhythm Pharmaceuticals, Inc., meets the criteria for a priority review voucher.

FOR FURTHER INFORMATION CONTACT: Althea Cuff, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 301–796–4061, Fax: 301–796–9856, email: *althea.cuff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: FDA is announcing the issuance of a priority review voucher to the sponsor of an

approved rare pediatric disease product application. Under section 529 of the FD&C Act (21 U.S.C. 360ff), FDA will award priority review vouchers to sponsors of approved rare pediatric disease product applications that meet certain criteria. FDA has determined that IMCIVREE (setmelanotide) injection, manufactured by Rhythm Pharmaceuticals, Inc., meets the criteria for a priority review voucher. IMCIVREE (setmelanotide) injection is indicated for the treatment of chronic weight management in adult and pediatric patients 6 years of age and older with proopiomelanocortin (POMC), proprotein convertase subtilisin/kexin type 1 (PCSK1), or leptin receptor (LEPR) deficiency obesity confirmed by genetic testing demonstrating variants in *POMC, PCSK1,* or *LEPR* genes that are interpreted as pathogenic, likely pathogenic, or of uncertain significance.

For further information about the Rare Pediatric Disease Priority Review Voucher Program and for a link to the full text of section 529 of the FD&C Act, go to *http://www.fda.gov/ForIndustry/DevelopingProductsforRareDiseasesConditions/RarePediatricDiseasePriorityVoucherProgram/default.htm.* For further information about IMCIVREE (setmelanotide) injection, go to the ''Drugs@FDA'' website at *http://www.accessdata.fda.gov/scripts/cder/daf/.*

Dated: December 14, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–27760 Filed 12–16–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0520]

Agency Information Collection Activities; Proposed Collection; Comment Request; Substances Prohibited From Use in Animal Food or Feed

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the recordkeeping requirements for substances prohibited from use in animal food or feed.

DATES: Submit either electronic or written comments on the collection of information by February 16, 2021.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before February 16, 2021. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 16, 2021. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2013–N–0520 for ''Substances Prohibited From Use in Animal Food or Feed.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Ila S. Mizrachi, Office of Operations, Food and Drug Administration, Three White

Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–7726, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3521), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA'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 respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Substances Prohibited From Use in Animal Food or Feed—21 CFR Part 589

OMB Control Number 0910–0627—Extension

This information collection supports Agency regulations regarding substances prohibited from use in animal food or feed. Bovine spongiform encephalopathy (BSE) is a progressive and fatal neurological disorder of cattle that results from an unconventional transmissible agent. BSE belongs to the family of diseases known as transmissible spongiform encephalopathies (TSEs). All TSEs affect the central nervous system of infected animals. Our regulation at § 589.2001 (21 CFR 589.2001), entitled ''Cattle materials prohibited in animal food or feed to prevent the transmission of bovine spongiform encephalopathy,'' is designed to further strengthen existing safeguards against the establishment and amplification of BSE in the United States through animal feed. The regulation prohibits the use of certain cattle origin materials in the food or feed of all animals. These materials are referred to as ''cattle materials prohibited in animal feed'' or CMPAF. Under § 589.2001, no animal feed or feed ingredient can contain CMPAF. As a result, we impose requirements on renderers of specifically defined cattle materials, including reporting and recordkeeping requirements. For purposes of the regulation, we define a renderer as any firm or individual that processes slaughter byproducts; animals unfit for human consumption, including carcasses of dead cattle; or meat scraps. Reporting and recordkeeping requirements are necessary because once materials are separated from an animal it may not be possible, without records, to know whether the cattle material meets the requirements of our regulation.

Reporting: Under our regulations, we may designate a country from which cattle materials are not considered CMPAF. Section 589.2001(f) provides that a country seeking to be so designated must send a written request to the Director of the Center for Veterinary Medicine. The country is required to submit information about its BSE case history, risk factors, measures to prevent the introduction and transmission of BSE, and any other information relevant to determining whether the cattle materials from the requesting country do or do not meet the definitions set forth in § 589.2001(b)(1). We use the information to determine whether to grant a request for designation and to impose conditions if a request is granted. Section 589.2001(f) further states that countries designated under that section will be subject to our future review to determine whether their designations remain appropriate. As part of this process, we may ask designated countries from time to time to confirm that their BSE situation and the information submitted by them in support of their original application remains unchanged. We may revoke a country's designation if we determine that it is no longer appropriate. Therefore, designated countries may respond to our periodic requests by submitting information to confirm their designations remain appropriate. We use the information to ensure their designations remain appropriate.

Recordkeeping: Renderers that receive, manufacture, process, blend, or distribute CMPAF, or products that contain or may contain CMPAF, must take measures to ensure that the materials are not introduced into animal feed, including maintaining adequate written procedures specifying how such processes are to be carried out (§ 589.2001(c)(2)(ii)). Renderers that receive, manufacture, process, blend, or distribute CMPAF are required to establish and maintain records sufficient to track the CMPAF to ensure that they are not introduced into animal feed (§ 589.2001(c)(2)(vi)).

Renderers that receive, manufacture, process, blend, or distribute *any* cattle materials must establish and maintain records sufficient to demonstrate that material rendered for use in animal feed was not manufactured from, processed with, or does not otherwise contain, CMPAF (§ 589.2001(c)(3)(i)).

Renderers that receive, manufacture, process, blend, or distribute *any* cattle materials must, if these materials were obtained from an establishment that segregates CMPAF from other materials, establish and maintain records to demonstrate that the supplier has adequate procedures in place to effectively exclude CMPAF from any materials supplied (§ 589.2001(c)(3)(i)). Records will meet this requirement if they include either: (1) Certification or other documentation from the supplier that materials supplied do not include CMPAF (§ 589.2001(c)(3)(i)(A)), or (2) documentation of another method acceptable to FDA, such as third-party certification (§ 589.2001(c)(3)(i)(B)).

Description of Respondents: Respondents to this information collection include rendering facilities, feed manufacturers, livestock feeders, and foreign governments seeking designation under § 589.2001(f).

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR part	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
589.2001(f); request for designation	1	1	1	80	80
589.2001(f); response to request for review by FDA	1	1	1	26	26
Total					106

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR part	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
589.2001(c)(2)(ii); maintain written procedures	50	1	50	20	1,000
589.2001(c)(2)(vi) and (c)(3)(i); maintain records	175	1	175	20	3,500
589.2001(c)(3)(i)(A) and (B); certification or documentation from the supplier	175	1	175	26	4,550
Total					9,050

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Based on a review of the information collection since our last request for OMB approval, we have made no adjustments to our burden estimate.

Dated: December 9, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–27746 Filed 12–16–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–0074]

Agency Information Collection Activities; Proposed Collection; Comment Request; State Enforcement Notifications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, we, or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on reporting requirements contained in existing FDA regulations governing State enforcement notifications.

DATES: Submit either electronic or written comments on the collection of information by February 16, 2021.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before February 16, 2021. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 16, 2021. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2018–N–0074 for ''Agency Information Collection Activities; Proposed Collection; Comment Request; State Enforcement Notifications.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 202–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be

made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Ila S. Mizrachi, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–7726, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3521), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA'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 respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

State Enforcement Notifications—21 CFR 100.2(d)

OMB Control Number 0910–0275—Extension

This information collection supports Agency regulations. Specifically, section 310(b) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 337(b)) authorizes a State to enforce certain sections of the FD&C Act in their own name and within their own jurisdiction. However, before doing so, a State must provide notice to FDA according to § 100.2 (21 CFR 100.2). The information required in a letter of notification under § 100.2(d) enables us to identify the food against which a State intends to take action and to advise that State whether Federal enforcement action against the food has been taken or is in process. With certain narrow exceptions, Federal enforcement action precludes State action under the FD&C Act.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
100.2(d)	1	1	1	10	10

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Based on a review of the information collection since our last request for OMB approval, we have made no adjustments to our burden estimate.

The estimated reporting burden for § 100.2(d) is minimal because enforcement notifications are seldom used by States. During the last 3 years, we have not received any new enforcement notifications; therefore, we estimate that one or fewer notifications will be submitted annually. Although we have not received any new enforcement notifications in the last 3 years, we believe these information collection provisions should be extended to provide for the potential future need of a State government to submit enforcement notifications informing us when it intends to take enforcement action under the FD&C Act against a particular food located in the State.

Dated: December 9, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–27748 Filed 12–16–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–0026]

Issuance of Priority Review Voucher; Rare Pediatric Disease Product

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the issuance of a priority review voucher to the sponsor of a rare pediatric disease

product application. The Federal Food, Drug, and Cosmetic Act (FD&C Act) authorizes FDA to award priority review vouchers to sponsors of approved rare pediatric disease product applications that meet certain criteria. FDA is required to publish notice of the award of the priority review voucher. FDA has determined that ZOKINVY (lonafarnib), manufactured by Eiger BioPharmaceuticals, Inc., meets the criteria for a priority review voucher.

FOR FURTHER INFORMATION CONTACT: Althea Cuff, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 301–796–4061, Fax: 301–796–9856, email: *althea.cuff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: FDA is announcing the issuance of a priority review voucher to the sponsor of an approved rare pediatric disease product application. Under section 529 of the FD&C Act (21 U.S.C. 360ff), FDA will award priority review vouchers to sponsors of approved rare pediatric disease product applications that meet certain criteria. FDA has determined that ZOKINVY (lonafarnib), manufactured by Eiger BioPharmaceuticals, Inc., meets the criteria for a priority review voucher.

ZOKINVY (lonafarnib) is indicated in patients 12 months of age and older with a body surface area of 0.39 m^2 and above:

- To reduce the risk of mortality in Hutchinson-Gilford progeria syndrome
- For the treatment of processing-deficient progeroid laminopathies with either:
  - Heterozygous *LMNA* mutation with progerin-like protein accumulation or
  - Homozygous or compound heterozygous *ZMPSTE24* mutations

For further information about the Rare Pediatric Disease Priority Review Voucher Program and for a link to the full text of section 529 of the FD&C Act, go to *http://www.fda.gov/ForIndustry/DevelopingProductsforRareDiseasesConditions/RarePediatricDiseasePriorityVoucherProgram/default.htm.* For further information about ZOKINVY (lonafarnib), go to the ''Drugs@FDA'' website at *http://www.accessdata.fda.gov/scripts/cder/daf/.*

Dated: December 14, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–27778 Filed 12–16–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the Presidential Advisory Council on Combating Antibiotic-Resistant Bacteria

AGENCY: Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) is hereby giving notice that a meeting is scheduled to be held for the Presidential Advisory Council on Combating Antibiotic-Resistant Bacteria (PACCARB). The meeting will be open to the public via webex and teleconference; a pre-registered public comment session will be held during the meeting. Pre-registration is required for members of the public who wish to attend the meeting via webex/teleconference. Individuals who wish to send in their pre-recorded or written public comments should send an email to *CARB@hhs.gov.* Registration information is available on the website *http://www.hhs.gov/paccarb* and must be completed by February 8, 2021. Additional information about registering for the meeting and providing public comment can be obtained at *http://www.hhs.gov/paccarb* on the Meetings page.

DATES: The meeting is scheduled to be held on February 10, 2021, from 10:00 a.m. to 4:00 p.m. and February 11, 2021, from 10:00 a.m. to 3:30 p.m. ET (times are tentative and subject to change). The confirmed times and agenda items for the meeting will be posted on the website for the PACCARB at *http://www.hhs.gov/paccarb* when this information becomes available. Pre-registration for attending the meeting is required to be completed no later than February 8, 2021.

ADDRESSES: Instructions regarding attending this meeting virtually will be posted one week prior to the meeting at: *http://www.hhs.gov/paccarb.*

FOR FURTHER INFORMATION CONTACT: Jomana Musmar, M.S., Ph.D., Designated Federal Officer, Presidential Advisory Council on Combating Antibiotic-Resistant Bacteria, Office of the Assistant Secretary for Health, U.S. Department of Health and Human Services, Room L616, Switzer Building, 330 C St. SW, Washington, DC 20201. Phone: 202–746–1512; Email: *CARB@hhs.gov.*

SUPPLEMENTARY INFORMATION: The Presidential Advisory Council on Combating Antibiotic-Resistant Bacteria (PACCARB), established by Executive Order 13676, is continued by Section 505 of Public Law 116–22, the Pandemic and All-Hazards Preparedness and Advancing Innovation Act of 2019 (PAHPAIA). Activities and duties of the Advisory Council are governed by the provisions of the Federal Advisory Committee Act (FACA), Public Law 92–463, as amended (5 U.S.C. App.), which sets forth standards for the formation and use of federal advisory committees.

The PACCARB shall advise and provide information and recommendations to the Secretary regarding programs and policies intended to reduce or combat antibiotic-resistant bacteria that may present a public health threat and improve capabilities to prevent, diagnose, mitigate, or treat such resistance. The PACCARB shall function solely for advisory purposes.

Such advice, information, and recommendations may be related to improving: The effectiveness of antibiotics; research and advanced research on, and the development of, improved and innovative methods for combating or reducing antibiotic resistance, including new treatments, rapid point-of-care diagnostics, alternatives to antibiotics, including alternatives to animal antibiotics, and antimicrobial stewardship activities; surveillance of antibiotic-resistant bacterial infections, including publicly available and up-to-date information on resistance to antibiotics; education for health care providers and the public with respect to up-to-date information on antibiotic resistance and ways to reduce or combat such resistance to antibiotics related to humans and animals; methods to prevent or reduce the transmission of antibiotic-resistant bacterial infections; including stewardship programs; and coordination with respect to international efforts in order to inform and advance the United States capabilities to combat antibiotic resistance.

The February 10–11, 2021, public meeting will be dedicated to presentations from two new working groups of the PACCARB, one on Inter-Professional Education and another on Antibiotics Access and Use, which were formed in response to a task letter from the Assistant Secretary for Health. The two-day virtual public meeting will also include an update on the impact of COVID–19 on antimicrobial resistance. The meeting agenda will be posted on the PACCARB website at *http://*

www.hhs.gov/paccarb when it has been finalized. All agenda items are tentative and subject to change.

Instructions regarding attending this meeting virtually will be posted one week prior to the meeting at: *http://www.hhs.gov/paccarb.*

Members of the public will have the opportunity to provide comments prior to the public meeting by emailing *CARB@hhs.gov.* Public comments should be sent in by midnight February 7, 2021 and should be limited to no more than one page. All public comments received prior to February 7, 2021, will be provided to Advisory Council members and will be acknowledged during the public teleconference.

Dated: December 4, 2020.

Jomana F. Musmar,

Designated Federal Officer, Presidential Advisory Council on Combating Antibiotic-Resistant Bacteria, Office of the Assistant Secretary for Health.

[FR Doc. 2020–27769 Filed 12–16–20; 8:45 am]

BILLING CODE 4150–44–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Statement of Organization, Functions, and Delegations of Authority

AGENCY: Office of the Assistant Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) is updating the organizational structure of the Office of Grants in the Office of the Assistant Secretary for Financial Resources (ASFR), which is located within the Office of the Secretary. ASFR is modifying the Office of Grants organizational structure to further improve and streamline its operation and to assume responsibility for maintaining and operating the GrantSolutions System currently aligned to the National Grant Center of Excellence (COE) in the Administration for Children and Families (ACF). The changes proposed affect HHS organizational Chapter AM Section AMU1 and AMU2 and Chapter KP Section KPA.

ADDRESSES: 200 Independence Ave. SW, Washington, DC 20201, (202) 619–0142.

FOR FURTHER INFORMATION CONTACT: Alice Bettencourt, Deputy Assistant Secretary for Grants, *Alice.Bettencourt@hhs.gov* or (202) 619–0142.

SUPPLEMENTARY INFORMATION:

Chapter AMU, the Office of Grants Section AMU1 and AMU2

The Office of Grants (AMU) organizational structure and responsibilities remain as described in **Federal Register** Document 2019–09459, with two divisional modifications.

1. The Division of Systems (AMU2) is renamed the Division of Information and Solutions. The Division of Information and Solutions is headed by a Director and develops, manages, and operates major, grant-shared services and solution offerings for HHS, as directed by the Secretary of HHS or delegated authority. Organizational units within AMU2 may be adjusted from time to time and as necessary to accommodate new, changing, or discontinued shared services or solution offerings. The Division of Information and Solutions assumes responsibility for operating and maintaining the GrantSolutions system in its current form as well as for future GrantSolutions development efforts. The Division of Information and Solutions will also manage GrantSolutions-related customer relationships and agreements, formerly managed by the National Grant COE in ACF.

2. The Division of Grant Policy, Oversight, and Evaluation (AMU1) is renamed the Division of Policy, Oversight, and Evaluation.

Chapter KP, the Office of the Deputy Associate Secretary for Administration (ODASA) in ACF, Section KPA, National Grants Center of Excellence

ODASA dissolves the National Grant COE, in compliance with OMB Memo Memorandum M–18–24, *Strategies to Reduce Grant Recipient Reporting Burden,* which rescinded all Center of Excellence designations. Responsibility for operating and managing the GrantSolutions system moves to The Office of Grants, Division of Information and Solutions (AMU2).

Dated: December 10, 2020.

Alex M. Azar II,

Secretary, Department of Health & Human Services.

[FR Doc. 2020–27814 Filed 12–16–20; 8:45 am]

BILLING CODE 4150–24–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Emergency Awards: Rapid Investigation of Severe Acute Respiratory Syndrome Coronavirus 2 (SARS–CoV–2) and Coronavirus Disease 2019 (COVID–19).

Date: January 14–15, 2021.

Time: 10:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3E61, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Ann Marie M. Brighenti, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3E61, Rockville, MD 20852, 301–761–3100, *ann-marie.brighenti@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 11, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–27780 Filed 12–16–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Comprehensive and Rapid Response to NIAID Research Programs (N01), Task Area A.

Date: January 8, 2021.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G11, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Kumud Singh, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G11, Rockville, MD 20852, 301–761–7830, *kumud.singh@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 11, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–27781 Filed 12–16–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Neurosignaling in Neurodegeneration.

Date: January 6, 2021.

Time: 12:00 p.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Carol Hamelink, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4192, MSC 7850, Bethesda, MD 20892, (301) 213–9887, *hamelinc@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA Panel: Lasker Clinical Research Scholars Program.

Date: January 13, 2021.

Time: 10:00 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Abdelouahab Aitouche, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4222, MSC 7814, Bethesda, MD 20892, 301–435–2365, *aitouchea@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 11, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–27782 Filed 12–16–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2020–0672]

Information Collection Request to Office of Management and Budget; OMB Control Number: 1625–0082

AGENCY: Coast Guard, DHS.

ACTION: Sixty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the U.S. Coast Guard intends to submit an Information Collection Request (ICR) to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting an extension of its approval for the following collection of information: 1625–0082, Navigation Safety Information and Emergency Instructions for Certain Towing Vessels; without change. Our ICR describes the information we seek to collect from the public. Before submitting this ICR to OIRA, the Coast Guard is inviting comments as described below.

DATES: Comments must reach the Coast Guard on or before February 16, 2021.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2020–0672] to the Coast Guard using the Federal eRulemaking Portal at *https://www.regulations.gov.* See the ''Public participation and request for comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

A copy of the ICR is available through the docket on the internet at *https://www.regulations.gov.* Additionally, copies are available from: Commandant (CG–6P), Attn: Paperwork Reduction Act Manager, U.S. Coast Guard, 2703 Martin Luther King Jr. Ave. SE, Stop 7710, Washington, DC 20593–7710.

FOR FURTHER INFORMATION CONTACT: A.L. Craig, Office of Privacy Management, telephone 202–475–3528, or fax 202–372–8405, for questions on these documents.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection.

The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection;

and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology. Consistent with the requirements of Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, and Executive Order 13777, Enforcing the Regulatory Reform Agenda, the Coast Guard is also requesting comments on the extent to which this request for information could be modified to reduce the burden on respondents.

In response to your comments, we may revise this ICR or decide not to seek an extension of approval for the Collection. We will consider all comments and material received during the comment period.

We encourage you to respond to this request by submitting comments and related materials. Comments must contain the OMB Control Number of the ICR and the docket number of this request, [USCG–2020–0672], and must be received by February 16, 2021.

Submitting Comments

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. Documents mentioned in this notice, and all public comments, are in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted.

We accept anonymous comments. All comments received will be posted without change to *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

Information Collection Request

Title: Navigation Safety Information and Emergency Instructions for Certain Towing Vessels.

OMB Control Number: 1625–0082.

Summary: Navigation safety regulations in 33 CFR part 164 help assure that the mariner piloting a towing vessel has adequate equipment, charts, maps, and other publications. For certain inspected towing vessels, under 46 CFR 199.80 a muster list and emergency instructions provide effective plans and references for crew to follow in an emergency situation.

Need: The purpose of the regulations is to improve the safety of towing vessels and the crews that operate them.

Forms: None.

Respondents: Owners, operators and masters of vessels.

Frequency: On occasion.

Hour Burden Estimate: The estimated burden has increased from 369,980 hours to 387,509 hours a year, due to an increase in the estimated annual number of respondents.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended.

Dated: December 11, 2020.

Kathleen Claffie,

Chief, Office of Privacy Management, U.S. Coast Guard.

[FR Doc. 2020–27757 Filed 12–16–20; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2020–0618]

Collection of Information Under Review by Office of Management and Budget; OMB Control Number 1625–0062

AGENCY: Coast Guard, DHS.

ACTION: Thirty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 the U.S. Coast Guard is forwarding an Information Collection Request (ICR), abstracted below, to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting an extension of its approval for the following collection of information: 1625–0062, Approval of Alterations to Marine Portable Tanks; Approval of Non-Specification Portable Tanks; without change. Our ICR describes the information we seek to collect from the public. Review and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

DATES: You may submit comments to the Coast Guard and OIRA on or before January 19, 2021.

ADDRESSES: Comments to the Coast Guard should be submitted using the Federal eRulemaking Portal at *https://www.regulations.gov.* Search for docket number [USCG–2020–0618. Written comments and recommendations to OIRA for the proposed information collection should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

A copy of the ICR is available through the docket on the internet at *https://www.regulations.gov.* Additionally, copies are available from: Commandant (CG–6P), Attn: Paperwork Reduction Act Manager, U.S. Coast Guard, 2703 Martin Luther King Jr. Ave. SE, Stop 7710, Washington, DC 20593–7710.

FOR FURTHER INFORMATION CONTACT: A.L. Craig, Office of Privacy Management, telephone 202–475–3528, or fax 202–372–8405, for questions on these documents.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection. The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology. Consistent with the requirements of Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, and Executive Order 13777, Enforcing the Regulatory Reform Agenda, the Coast Guard is also requesting comments on the extent to which this request for information could be modified to reduce the burden on respondents. These comments will help OIRA determine

whether to approve the ICR referred to in this Notice.

We encourage you to respond to this request by submitting comments and related materials. Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICR. They must also contain the docket number of this request, [USCG–2020–0618], and must be received by January 19, 2021.

Submitting Comments

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. Documents mentioned in this notice, and all public comments, are in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted.

We accept anonymous comments. All comments to the Coast Guard will be posted without change to *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and submissions to the Coast Guard in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020). For more about privacy and submissions to OIRA in response to this document, see the *https://www.reginfo.gov,* comment-submission web page. OIRA posts its decisions on ICRs online at *https://www.reginfo.gov/public/do/PRAMain* after the comment period for each ICR. An OMB Notice of Action on each ICR will become available via a hyperlink in the OMB Control Number: 1625–0062.

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard published the 60-day notice (85 FR 62751, October 5, 2020) required by 44 U.S.C. 3506(c)(2). That notice elicited no comments. Accordingly, no changes have been made to the Collection.

Information Collection Request

Title: Approval of Alterations to Marine Portable Tanks; Approval of Non-Specification Portable Tanks.

OMB Control Number: 1625–0062.

Summary: The information will be used to evaluate the safety of proposed alterations to marine portable tanks and non-specification portable tank designs used to transfer hazardous materials during offshore operations.

Need: The information will be used to evaluate the safety of proposed alterations to marine portable tanks and non-specification portable tank designs used to transfer hazardous materials during offshore operations.

Forms: Not applicable.

Respondents: Owners of marine portable tanks and owners/designers of non-specification portable tanks.

Frequency: On occasion.

Hour Burden Estimate: The estimated burden remains 18 hours a year.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended.

Dated: December 11, 2020.

Kathleen Claffie,

Chief, Office of Privacy Management, U.S. Coast Guard.

[FR Doc. 2020–27755 Filed 12–16–20; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2020–0752]

Information Collection Request to Office of Management and Budget; OMB Control Number: 1625–0092

AGENCY: Coast Guard, DHS.

ACTION: Sixty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the U.S. Coast Guard intends to submit an Information Collection Request (ICR) to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting an extension of its approval for the following collection of information: 1625–0092, Sewage and Graywater Discharge Records for Certain Cruise Vessels Operating on Alaskan Waters; without change. Our ICR describes the information we seek to collect from the public. Before submitting this ICR to OIRA, the Coast Guard is inviting comments as described below.

DATES: Comments must reach the Coast Guard on or before February 16, 2021.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2020–0752] to the Coast Guard using the Federal eRulemaking Portal at *https://www.regulations.gov.* See the ''Public participation and request for comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

A copy of the ICR is available through the docket on the internet at *https://www.regulations.gov.* Additionally, copies are available from: Commandant (CG–6P), Attn: Paperwork Reduction Act Manager, U.S. Coast Guard, 2703 Martin Luther King Jr. Ave. SE, Stop 7710, Washington, DC 20593–7710.

FOR FURTHER INFORMATION CONTACT: A.L. Craig, Office of Privacy Management, telephone 202–475–3528, or fax 202–372–8405, for questions on these documents.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection.

The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology. Consistent with the requirements of Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, and Executive Order 13777, Enforcing the Regulatory Reform Agenda, the Coast Guard is also requesting comments on the extent to which this request for information could be modified to reduce the burden on respondents.

In response to your comments, we may revise this ICR or decide not to seek an extension of approval for the Collection. We will consider all comments and material received during the comment period.

We encourage you to respond to this request by submitting comments and related materials. Comments must contain the OMB Control Number of the ICR and the docket number of this

request, [USCG–2020–0752], and must be received by February 16, 2021.

Submitting Comments

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. Documents mentioned in this notice, and all public comments, are in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted.

We accept anonymous comments. All comments received will be posted without change to *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

Information Collection Request

Title: Sewage and Graywater Discharge Records for Certain Cruise Vessels Operating on Alaskan Waters.

OMB Control Number: 1625–0092.

Summary: To comply with the Title XIV of Public Law 106–554, this information collection is needed to enforce sewage and graywater discharges requirements from certain cruise ships operating on Alaskan waters.

Need: Title 33 CFR part 159 subpart E prescribe regulations governing the discharge of sewage and graywater from cruise vessels, requires sampling and testing of sewage and graywater discharges, and establishes reporting and recordkeeping requirements.

Forms: Not applicable.

Respondents: Owners, operators and masters of vessels.

Frequency: On occasion.

Hour Burden Estimate: The estimated burden has decreased from 404 hours to 358 hours a year, due to a calculation error made during the last periodic renewal.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended.

Dated: December 11, 2020.

Kathleen Claffie,

Chief, Office of Privacy Management, U.S. Coast Guard.

[FR Doc. 2020–27756 Filed 12–16–20; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2020–0671]

Information Collection Request to Office of Management and Budget; OMB Control Number: 1625–0031

AGENCY: Coast Guard, DHS.

ACTION: Sixty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the U.S. Coast Guard intends to submit an Information Collection Request (ICR) to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting an extension of its approval for the following collection of information: 1625–0031, Plan Approval and Records for Electrical Engineering Regulations; without change. Our ICR describes the information we seek to collect from the public. Before submitting this ICR to OIRA, the Coast Guard is inviting comments as described below.

DATES: Comments must reach the Coast Guard on or before February 16, 2021.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2020–0671] to the Coast Guard using the Federal eRulemaking Portal at *https://www.regulations.gov.* See the ''Public participation and request for comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

A copy of the ICR is available through the docket on the internet at *https://www.regulations.gov.* Additionally, copies are available from: Commandant (CG–6P), Attn: Paperwork Reduction Act Manager, U.S. Coast Guard, 2703 Martin Luther King Jr. Ave. SE, Stop 7710, Washington, DC 20593–7710.

FOR FURTHER INFORMATION CONTACT: A.L. Craig, Office of Privacy Management, telephone 202–475–3528, or fax 202–372–8405, for questions on these documents.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection.

The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology. Consistent with the requirements of Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, and Executive Order 13777, Enforcing the Regulatory Reform Agenda, the Coast Guard is also requesting comments on the extent to which this request for information could be modified to reduce the burden on respondents.

In response to your comments, we may revise this ICR or decide not to seek an extension of approval for the Collection. We will consider all comments and material received during the comment period.

We encourage you to respond to this request by submitting comments and related materials. Comments must contain the OMB Control Number of the ICR and the docket number of this request, [USCG–2020–0671], and must be received by February 16, 2021.

Submitting Comments

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. Documents mentioned in this notice, and all public comments, are in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted.

We accept anonymous comments. All comments received will be posted without change to *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and

submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

Information Collection Request

Title: Plan Approval and Records for Electrical Engineering Regulations—Title 46 CFR Subchapter J.

OMB Control Number: 1625–0031.

Summary: The information is needed to ensure compliance with our rules on electrical engineering for the design and construction of U.S.-flag commercial vessels.

Need: Title 46 U.S.C. 3306 and 3703 authorize the Coast Guard to establish rules to promote the safety of life and property in commercial vessels. The electrical engineering rules appear at 46 CFR subchapter J (parts 110 through 113).

Forms: None.

Respondents: Owners, operators, shipyards, designers, and manufacturers of vessels.

Frequency: On occasion.

Hour Burden Estimate: The estimated burden has increased from 6,524 hours to 6,536 hours a year due to an estimated increase in the annual number of responses.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended.

Dated: December 11, 2020.

Kathleen Claffie,

Chief, Office of Privacy Management, U.S. Coast Guard.

[FR Doc. 2020–27758 Filed 12–16–20; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2020–0002; Internal Agency Docket No. FEMA–B–2074]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, the FIRM and FIS report, once effective, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings.

DATES: Comments are to be submitted on or before March 17, 2021.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location *https://www.fema.gov/preliminaryfloodhazarddata* and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–2074, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP and are used to calculate the appropriate flood insurance premium rates for new buildings built after the FIRM and FIS report become effective.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *https://www.floodsrp.org/pdfs/srp_overview.pdf.*

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location *https://www.fema.gov/preliminaryfloodhazarddata* and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Michael M. Grimm,

Assistant Administrator for Risk Management, Department of Homeland Security, Federal Emergency Management Agency.

Community	Community map repository address
Charlotte County, Florida and Incorporated Areas Project: 14–04–2183S Preliminary Date: October 25, 2019	
City of Punta Gorda	City Hall, 326 West Marion Avenue, Punta Gorda, FL 33950.
Unincorporated Areas of Charlotte County	Charlotte County Community Development Building, 18400 Murdock Circle, Port Charlotte, FL 33948.
Collier County, Florida and Incorporated Areas Project: 18–04–0009S Preliminary Date: December 31, 2019	
City of Everglades City	City Hall, 102 Copeland Avenue North, Everglades City, FL 34139.
City of Marco Island	Growth Management Department, 50 Bald Eagle Drive, Marco Island, FL 34145.
City of Naples	Building Department, 295 Riverside Circle, Naples, FL 34102.
Unincorporated Areas of Collier County	Collier County Growth Management Department, 2800 North Horseshoe Drive, Naples, FL 34104.
Glades County, Florida and Incorporated Areas Project: 19–04–0013S Preliminary Date: November 13, 2019	
Unincorporated Areas of Glades County	Glades County Community Development Department, 198 6th Street, Moore Haven, FL 33471.
Sarasota County, Florida and Incorporated Areas Project: 14–04–2183S Preliminary Date: December 31, 2019	
City of North Port	Building Department, 4970 City Hall Boulevard, North Port, FL 34286.
City of Sarasota	Department of Development Services, 1565 First Street, 2nd Floor, Sarasota, FL 34236.
City of Venice	Building Department, 401 West Venice Avenue, Venice, FL 34285.
Town of Longboat Key	Planning, Zoning and Building Department, 501 Bay Isles Road, Longboat Key, FL 34228.
Unincorporated Areas of Sarasota County	Sarasota County Building Department, 1001 Sarasota Center Boulevard, Sarasota, FL 34240.

[FR Doc. 2020–27710 Filed 12–16–20; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2020–0002; Internal Agency Docket No. FEMA–B–2076]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR), in accordance with Federal Regulations. The LOMR will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings. For rating purposes, the currently effective community number is shown in the table below and must be used for all new policies and renewals.

DATES: These flood hazard determinations will be finalized on the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has 90 days in which to request through the community that the Deputy Associate Administrator for Insurance and Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

ADDRESSES: The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood

hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Michael M. Grimm,

Assistant Administrator for Risk Management, Department of Homeland Security, Federal Emergency Management Agency.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Alabama: Tuscaloosa.	City of Tuscaloosa (20–04–2661P).	The Honorable Walt Maddox, Mayor, City of Tuscaloosa, P.O. Box 2089, Tuscaloosa, AL 35403.	City Hall, 2201 University Boulevard, Tuscaloosa AL 35401.	*https://msc.fema.gov/portal/advanceSearch.*	Jan. 4, 2021	010203
Colorado: Jefferson	Unincorporated areas of Jefferson County (20–08–0724P).	The Honorable Lesley Dahlkemper, Chair, Jefferson County Board of Commissioners, 100 Jefferson County Parkway, Suite 5550, Golden, CO 80419.	Jefferson County Department of Planning and Zoning, 100 Jefferson County Parkway, Suite 3550, Golden, CO 80419.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 19, 2021	080087
Connecticut: New Haven.	Town of Seymour (20–01–0712P).	The Honorable W. Kurt Miller, First Selectman, Town of Seymour Board of Selectmen, 1 1st Street, Seymour, CT 06483.	Town Hall, 1 1st Street, Seymour, CT 06483.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 16, 2021	090088
Florida:						
Lake	City of Leesburg (20–04–1242P).	Mr. Al Minner, Manager, City of Leesburg, 501 West Meadow Street, Leesburg, FL 34748.	City Hall, 501 West Meadow Street, Leesburg, FL 34748.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 12, 2021	120136
Lake	Unincorporated areas of Lake County (20–04–1242P).	The Honorable Jeff Cole, Manager, Lake County, P.O. Box 7800, Tavares, FL 32778.	Lake County Administration Building, 315 West Main Street, Tavares, FL 32778.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 12, 2021	120421
Manatee	Unincorporated areas of Manatee County (20–04–3373P).	The Honorable Betsy Benac, Chair, Manatee County Board of Commissioners, 1112 Manatee Avenue West, Bradenton, FL 34205.	Manatee County Administration Building, 1112 Manatee Avenue West, Bradenton, FL 34205.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 16, 2021	120153
Palm Beach ...	City of Westlake (20–04–2587P).	The Honorable Roger Manning, Mayor, City of Westlake, 4001 Seminole Pratt Whitney Road, Westlake, FL 33470.	City Hall, 4001 Seminole Pratt Whitney Road, Westlake, FL 33470.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 15, 2021	120018
Pinellas	City of Clearwater (20–04–4362P).	The Honorable Frank V. Hibbard, Mayor, City of Clearwater, P.O. Box 4748, Clearwater, FL 33758.	Engineering Department, 100 South Myrtle Avenue, Clearwater, FL 33756.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 11, 2021	125096
Sarasota	Unincorporated areas of Sarasota County (20–04–5135P).	The Honorable Michael A. Moran, Chairman, Sarasota County Board of Commissioners, 1660 Ringling Boulevard, Sarasota, FL 34236.	Sarasota County Planning and Development Services Department, 1001 Sarasota Center Boulevard, Sarasota, FL 34240.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 12, 2021	125144
Maryland:						
Anne Arundel	Unincorporated areas of Anne Arundel County (20–03–1079P).	The Honorable Steuart Pittman, Anne Arundel County Executive, 44 Calvert Street, Annapolis, MD 21401.	Anne Arundel County Heritage Office Complex, 2664 Riva Road, Annapolis, MD 21401.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 9, 2021	240008

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Prince George's.	City of Laurel (20–03–1079P).	The Honorable Craig A. Moe, Mayor, City of Laurel, 8103 Sandy Spring Road, Laurel, MD 20707.	City Hall, 8103 Sandy Spring Road, Laurel, MD 20707.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 9, 2021	240053
Prince George's.	Unincorporated areas of Prince George's County (20–03–1079P).	The Honorable Angela D. Alsobrooks, Prince George's County Executive, 14741 Governor Oden Bowie Drive, Upper Marlboro, MD 20772.	Prince George's County Department of Environment, 1801 McCormick Drive, Suite 500, Largo, MD 20774.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 9, 2021	245208
Massachusetts: Bristol.	Town of Easton (20–01–0637P).	The Honorable Dottie Fulginiti, Chair, Town of Easton Select Board, 136 Elm Street, Easton, MA 02356.	Department of Public Works, 130 Center Street, Easton, MA 02356.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 15, 2021	250053
North Carolina: Pamlico.	Town of Vandemere (20–04–5047P).	The Honorable Judy H. Thaanum, Mayor, Town of Vandemere, P.O. Box 338, Vandemere, NC 28587.	Town Hall, 1042 Pennsylvania Avenue, Vandemere, NC 28587.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 11, 2021	370438
Pennsylvania:						
Allegheny	Township of Shaler (20–03–0720P).	The Honorable David Shutter, President, Township of Shaler Board of Commissioners, 300 Wetzel Road, Glenshaw, PA 15116.	Township Hall, 300 Wetzel Road, Glenshaw, PA 15116.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 1, 2021	421101
Lancaster	Township of East Lampeter (20–03–1645P).	Mr. Ralph Hutchison, Manager, Township of East Lampeter, 2250 Old Philadelphia Pike, Lancaster, PA 17602.	Planning, Zoning, and Building Department, 2250 Old Philadelphia Pike, Lancaster, PA 17602.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 22, 2021	421771
South Carolina:						
Charleston	City of Charleston (20–04–5212P).	The Honorable John J. Tecklenburg, Mayor, City of Charleston, 80 Broad Street, Charleston, SC 29401.	Department of Public Service, 2 George Street, Suite 2100, Charleston, SC 29401.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 22, 2021	455412
Dillon	Town of Latta (20–04–2341P).	Mr. Jarett Taylor, Town of Latta Administrator, 107 Northwest Railroad Avenue, Latta, SC 29565.	Town Hall, 107 Northwest Railroad Avenue, Latta, SC 29565.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 24, 2021	450067
Dillon	Unincorporated areas of Dillon County (20–04–2341P).	The Honorable Stevie Grice, Chairman, Dillon County Council, P.O. Box 449, Dillon, SC 29536.	Dillon County Administrative Building, 211 West Howard Street, Dillon, SC 29536.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 24, 2021	450064
Tennessee: Williamson.	City of Franklin (20–04–2146P).	The Honorable Ken Moore, Mayor, City of Franklin, 109 3rd Avenue South, Suite 103, Franklin, TN 37064.	Engineering Department, 109 3rd Avenue South, Franklin, TN 37064.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 19, 2021	470206
Texas:						
Burnet	Unincorporated areas of Burnet County (20–06–3344P).	The Honorable James Oakley, Burnet County Judge, 220 South Pierce Street, Burnet, TX 78611.	Burnet County Development services Department, 133 East Jackson Street, Burnet, TX 78611.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 28, 2021	481209
Denton	City of Carrollton (20–06–0797P).	Ms. Erin Rinehart, Manager, City of Carrollton, 1945 East Jackson Road, Carrollton, TX 75006.	Engineering Department, 1945 East Jackson Road, Carrollton, TX 75006.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 15, 2021	480167
Harris	Unincorporated areas of Harris County (20–06–2019P).	The Honorable Lina Hidalgo, Harris County Judge, 1001 Preston Street, Suite 911, Houston, TX 77002.	Harris County Permit Office, 10555 Northwest Freeway, Suite 120, Houston, TX 77092.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 1, 2021	480287
Llano	Unincorporated areas of Llano County (20–06–3344P).	The Honorable Mary S. Cunningham, Llano County Judge, 801 Ford Street, Room 101, Llano, TX 78643.	Llano County Land Development and Emergency Management, 100 West Sandstone Street, Suite 200A, Llano, TX 78643.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 28, 2021	481234
Tarrant	City of Arlington (20–06–2041P).	The Honorable Jeff Williams, Mayor, City of Arlington, P.O. Box 90231, Arlington, TX 76004.	Public Works and Transportation Department, 101 West Abram Street, Arlington, TX 76010.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 8, 2021	485454

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Tom Green	City of San Angelo (20–06–2379P).	The Honorable Brenda Gunter, Mayor, City of San Angelo, 72 West College Avenue, San Angelo, TX 76903.	City Hall, 301 West Beauregard Avenue, San Angelo, TX 76902.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 22, 2021	480623
Webb	Unincorporated areas of Webb County (20–06–1430P).	The Honorable Tano E. Tijerina, Webb County Judge, 1000 Houston Street, 3rd Floor, Laredo, TX 78040.	Webb County Planning Department, 1110 Washington Street, Suite 302, Laredo, TX 78040.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 1, 2021	481059
Virginia:						
Goochland	Unincorporated areas of Goochland County (20–03–0873P).	The Honorable Susan F. Lascolette, Chair, Goochland County Board of Supervisors, P.O. Box 10, Goochland, VA 23063.	Goochland County Environmental and Development Review Department, 1800 Sandy Hook Road, Goochland, VA 23063.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 8, 2021	510072
Henrico	Unincorporated areas of Henrico County (20–03–0873P).	Mr. John A. Vithoulkas, Manager, Henrico County, P.O. Box 90775, Henrico, VA 23273.	Henrico County Department of Public Works, 4305 East Parham Road, Henrico, VA 23228.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 8, 2021	510077
Loudoun	Unincorporated areas of Loudoun County (20–03–1100P).	Mr. Tim Hemstreet, Loudoun County Administrator, P.O. Box 7000, Leesburg, VA 20177.	Loudoun County Office of Mapping and Geographic Information, 1 Harrison Street Southeast, Leesburg, VA 20175.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 16, 2021	510090
Prince William	City of Manassas (20–03–0768P).	The Honorable Harry J. Parrish, II, Mayor, City of Manassas, 9027 Center Street, Manassas, VA 20110.	Public Works Department, 8500 Public Works Drive, Manassas, VA 20110.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 4, 2021	510122

[FR Doc. 2020–27711 Filed 12–16–20; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7027–N–36]

60-Day Notice of Proposed Information Collection: Mortgagee's Application for Partial Settlement (Multifamily Mortgage); OMB Control No.: 2502–0427

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 16, 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: Mortgagee's Application for Partial Settlement (Multifamily Mortgage).

OMB Approval Number: 2502–0427.

OMB Expiration Date: 12/31/2020.

Type of Request: Revision of a currently approved collection.

Form Numbers: HUD–2537, HUD–2747, HUD–1044–D

Description of the need for the information and proposed use:

When a FHA insured Multifamily mortgage goes into default, the Mortgagee may file a claim with the Secretary to receive the insurance benefits. The Mortgagee is required by HUD to furnish HUD Form 2537 prior to receiving the telefax. Once the telefax arrives, HUD pays 70 or 90% of the UPB plus interest within 24 to 48 hours after assignment or conveyance. Interest will continue to accrue on the claim until the partial settlement is paid. Interest paid on each claim is based on the default date, the escrows reported on HUD form 2537 and the Unpaid Principal Balance reported.

Respondents: Business or other for-profit; State, Local, or Tribal Government.

Estimated Number of Respondents: 110.

Estimated Number of Responses: 110.

Frequency of Response: 1.

Average Hours per Response: 1.75.

Total Estimated Burden: 193.

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. 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 Liaison for the Department of Housing and Urban Development.

[FR Doc. 2020–27742 Filed 12–16–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7027–N–25]

60-Day Notice of Proposed Information Collection: OMB Collection 2502–0574; Office of Housing Counseling—Agency Performance Review

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 16, 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 Federal Relay Service at (800) 877–8339 (this is a toll-free number).

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 Federal Relay Service at (800) 877–8339. This is 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.

A. Overview of Information Collection

Title of Information Collection: Office of Housing Counseling—Agency Performance Review.

OMB Approval Number: 2502–0574.

OMB Expiration Date: March 31, 2021.

Type of Request: Revision of a currently approved collection.

Form Number: HUD–9910, Office of Housing Counseling—Performance Review Of a HUD-Approved Housing Counseling Agency or Participating Agency.

Description of the need for the information and proposed use: The information is used to assist HUD in evaluating the managerial and financial capacity of organizations to sustain operations sufficient to implement HUD approved housing counseling programs. The collection of information assists HUD to reduce its own risk from fraudulent activities or supporting inefficient or ineffective housing counseling programs. Since HUD publishes a web list of HUD-approved Housing Counseling Agencies and maintains a toll-free housing counseling hotline, performance reviews help HUD ensure that individuals seeking assistance from these approved agencies can have confidence in the quality of services that they will receive.

HUD uses performance reviews to ascertain the professional and management capacity of HUD-approved Housing Counseling Agencies to provide adequate housing counseling services that are necessary to comply with the requirements of the Housing and Urban Development Act and to ensure that grant funded organizations comply with HUD and OMB administrative and financial regulations. If this information is not collected, HUD would be unable to effectively monitor the Housing Counseling Program to guard against waste, fraud, abuse, or inappropriate program practices. This collection provides the means to meet that obligation.

Respondents (i.e., affected public): Not-for profit institutions; State, Local, or Tribal Governments.

Estimated Number of Respondents: 353 annually.

Estimated Number of Responses: 353 annually.

Frequency of Response: 1 per agency performance review.

Average Hours per Response: 1 hour annually.

Total Estimated Burden: 353 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 comment in response to these questions.

C. 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 Liaison for the Department of Housing and Urban Development.

[FR Doc. 2020–27744 Filed 12–16–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7025–N–09]

60-Day Notice of Proposed Information Collection: Continuum of Care (CoC) Program Registration; OMB Control No: 2506–0182

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 16, 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: Sherri Boyd, Senior Program Specialist, Office of Special Needs Assistance Programs, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Sherri Boyd at *Sherri.L.Boyd@hud.gov,* 202–402–6070. 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. Boyd.

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: Continuum of Care (CoC) Program Registration.

OMB Approval Number: 2506–0182.

Type of Request: Extension of currently approved collection.

Form Number: None.

Description of the need for the information and proposed use: This submission is to request an extension of an existing collection in use without an OMB Control Number for the Recordkeeping for HUD's Continuum of Care Program. Continuum of Care program recipients will be expected to implement and retain the information collection for the recordkeeping requirements. The statutory provisions and implementing interim regulations govern the Continuum of Care Program recordkeeping requirements for recipient and subrecipients and the standard operating procedures for ensuring that Continuum of Care Program funds are used in accordance with the program requirements. To see the regulations for the new CoC program and applicable supplementary documents, visit HUD's Homeless Resource Exchange at *https://www.onecpd.info/resource/2033/hearth-coc-program-interim-rule/.*

Respondents (*i.e.* affected public): Nonprofit organizations, states, local governments, and instrumentalities of state and local governments. Includes Public Housing Agencies (PHAs), as such term is defined in 24 CFR 5.100.

Estimated Number of Respondents: 400.

Estimated Number of Responses: 400.

Frequency of Response: Annually.

Average Hours per Response: See chart.

Total Estimated Burdens: See chart.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
CoC Registration—Basic	400	1	400	1	400	$41.37	$16,548
CoC Registration—UFA designation request *	20	1	20	15	300	41.37	12,411
CoC Registration—HPC designation request *	5	1	5	10	50	41.37	2,068.50
Grant Inventory Worksheet	400	1	400	8	3,200	41.37	132,384
Total	400	1	400				163,411.50

* Responses to UFA and HPC designations are subsets of the total 400 basic registration numbers as the basic CoC Registration is completed by all Collaborative Applicants to register the CoCs. On average there are 20 requests for UFA designation and to date no requests for HPC designation.

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. 2020–27764 Filed 12–16–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7024–N–55]

30-Day Notice of Proposed Information Collection: Quality Control Requirements for Direct Endorsement Lenders; OMB Control No.: 2502–0600

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 19, 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.

A. Overview of Information Collection

Title of Information Collection: Quality Control Requirements for Direct Endorsement Lenders.

OMB Approval Number: 2502–0600.

Type of Request: Revision.

Form Number: Not Applicable.

Description of the need for the information and proposed use: Per 24 CFR 202.8(3), a Direct Endorsement (DE) lender that sponsors third party originators (TPOs) is, ''responsible to the Secretary for the actions of its third party originators or mortgagees in originating loans or mortgages, unless applicable law or regulation requires specific knowledge on the part of the party to be held responsible.'' As a result, DE lenders are responsible for conducting quality control reviews on TPO originations of FHA-insured mortgage loans and ensuring that their Quality Control Plans contain this oversight provision. This creates an information collection burden on DE lenders, since these institutions must also conduct quality control on loans they originate and underwrite.

DE lenders must conduct quality control reviews on a sample of loans that they originate or underwrite, including loans originated by TPOs. For the purposes of this information collection, it is assumed that the number of loans reviewed by each DE lender will comply with the Sample Size Standard and Sample Composition Standard described in HUD Handbook 4000.1, Section V.A.3.a.

In addition, under 24 CFR 203.255(c) and (e), HUD conducts both pre- and post-endorsement reviews of loans submitted for FHA insurance by DE lenders. As part of those reviews, the Secretary is authorized to determine if there is any information indicating that any certification or required document is false, misleading, or constitutes fraud or misrepresentation on the part of any party, or that the mortgage fails to meet a statutory or regulatory requirement. In order to assist the Secretary with this directive, FHA requires that lenders self-report all findings of fraud and material misrepresentation, as well any material findings concerning the origination, underwriting, or servicing of the loan that the lender is unable to mitigate or otherwise resolve. The obligation to self-report these findings creates an additional information collection burden on DE lenders.

In accordance with the requirements of 5 CFR 1320.8(d), a Notice soliciting comments on this collection of information was initially published in the **Federal Register** on December 21, 2010 (Volume 75, Number 244, page 80066). At that time, FHA still allowed for loan correspondents to participate in its programs and had not yet transitioned to the use of TPOs. Therefore, FHA estimated information collection burdens based on the estimated used of TPOs by DE lenders. FHA has since revised these estimates with real data that captures TPO originations of FHA-insured single-family mortgage loans. This revision has increased the information collection burden associated with OMB Control Number 2502–0600.

Respondents: Active Title II Direct Endorsement (DE) lenders.

Estimated Number of Respondents: 3,641.

Estimated Number of Responses: 118,952.

Frequency of Response: Annually.

Average Hours per Response: 25.

Total Estimated Burdens: 29,738.

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,

Department reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2020–27771 Filed 12–16–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7025–N–11]

60-Day Notice of Proposed Information Collection: Relocation & Real Property Acquisition Recordkeeping Requirements; OMB Control No.: 2506–0121

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 16, 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: Lori Martin, Relocation Specialist, CPD, Department of Housing and Urban Development, 909 First Avenue, Seattle, WA 98104; email *Lori.Martin@hud.gov* or telephone 206–220–5373. 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: Recordkeeping Requirements under the Uniform Relocation Assistance and Real Property Acquisition Policies Act.

OMB Approval Number: 2506–0121.

Type of Request: Extension of currently approved collection.

Form Number: N/A.

Description of the need for the information and proposed use: HUD funded projects involving the acquisition of real property or the displacement of persons as a result of acquisition, rehabilitation or demolition are subject to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA).

Respondents (i.e., affected public): State, local or tribal government.

Estimated Number of Respondents: 2,000.

Estimated Number of Responses: 80,000.

Frequency of Response: 40.

Average Hours per Response: 3.5.

Total Estimated Burdens: 280,000.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
Total	3,278	40	3,278	60	196,680	$18.30	$3,599,24

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. 2020–27763 Filed 12–16–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7024–N–59]

30-Day Notice of Proposed Information Collection: Emergency Waivers Reporting; OMB Control No.: 2577–0292

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 19, 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 September 23, 2020 at 85 FR 59816.

A. Overview of Information Collection

Title of Information Collection: Emergency Waivers Reporting.

OMB Approval Number: 2577–0292.

Type of Request: Extension of a currently approved collection.

Form Numbers: HUD–5883, HUD–5884, HUD–5885.

Description of the need for the information and proposed use: The purpose of this notice is to solicit public comment on the proposed Emergency Waivers Reporting.

In response to the national COVID–19 emergency, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was enacted on March 27, 2020. The Act gives the Department the ability to waive regulatory and statutory provisions that apply to Public Housing Agencies (PHAs). Specifically, the CARES Act allows the Secretary of HUD to ''waive, or specify alternative requirements for, any provision of any statute or regulation (except for requirements related to fair housing, nondiscrimination, labor standards, and the environment) . . . . upon a finding by the Secretary that any such waivers or alternative requirements are necessary for the safe and effective administration of these funds . . . to prevent, prepare for, and respond to coronavirus.''

HUD issued a notice detailing the waivers available in response to the COVID–19 crisis, posted on April 10, 2020, as PIH Notice 2020–05. This notice states: PHAs are required to keep written documentation that record which waivers the PHA applied to their programs(s) and the effective dates.

In response to presidentially declared Major Disaster Declarations (MDDs), FR–6050–N–04 is: Relief from HUD Public Housing and Section 8 Requirements Available During CY2020 and CY2021 to Public Housing Agencies to Assist with Recovery and Relief Efforts. This notice lists the specific waivers and relief options available for use by PHAs.

No respondent is mandated to use a waiver but use of the waivers is encouraged by HUD in response to specific emergencies to reduce burdens and administrative requirements. The notice announcing the availability of waivers becomes the checklist which respondents use to note responses as to which waivers they elected to use and their start date.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of responses, and hours of response:

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost	Total annual cost
HUD–5883	3,800	1	3,800	1	3,800	36.86	$140,068
HUD–5884	300	1	300	1	300	36.86	11,058
HUD–5885	1,000	1	1,000	1	1,000	36.86	36,860
Total	5,100	1	5,100	1	5,100	36.86	187,986

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,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2020–27770 Filed 12–16–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[FR–6241–N–01]

Section 8 Housing Assistance Payments Program—Annual Adjustment Factors, Fiscal Year 2021

AGENCY: Office of the Assistant Secretary for Policy Development and Research, Housing and Urban Development (HUD).

ACTION: Notice of Fiscal Year (FY) 2021 Annual Adjustment Factors (AAFs).

SUMMARY: The United States Housing Act of 1937 requires that certain assistance contracts signed by owners participating in the Department's Section 8 housing assistance payment programs provide annual adjustments to monthly rentals for units covered by the contracts. This notice announces FY 2021 AAFs for adjustment of contract rents on the anniversary of those assistance contracts. A separate **Federal Register** notice, to be published following the finalization of the FY 2021 Federal appropriations, will be used in the calculation of the calendar year (CY) 2021 Housing Choice Voucher (HCV) renewal funding for public housing agencies (PHAs).

DATES: The FY 2021 AAFs are effective December 17, 2020.

FOR FURTHER INFORMATION CONTACT: Becky Primeaux, Director, Management and Operations Division, Office of Housing Voucher Programs, Office of Public and Indian Housing, 202–708–1380, for questions relating to the Project-Based Certificate and Moderate Rehabilitation programs (not the Single Room Occupancy program); Norman A. Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, 202–402–5015, for questions regarding the Single Room Occupancy (SRO) Moderate Rehabilitation program; Katherine Nzive, Director, OAMPO Program Administration Office, Office of Multifamily Housing, 202–402–3440,

for questions relating to all other Section 8 programs; and Marie Lihn, Economist, Program Parameters and Research Division, Office of Policy Development and Research, 202–402–5866, for technical information regarding the development of the schedules for specific areas or the methods used for calculating the AAFs. The mailing address for these individuals is: Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410. Hearing- or speech-impaired persons may contact the Federal Information Relay Service at 800–877–8339 (TTY). (Other than the ''800'' TTY number, the above-listed telephone numbers are not toll free.)

SUPPLEMENTARY INFORMATION: The factors are based on a formula using residential rent and utility cost changes from the most recent annual Bureau of Labor Statistics (BLS) Consumer Price Index (CPI) survey. The FY 2020 AAFs were the first to use the revised BLS area definitions for local area CPI. The revised area definitions for local CPI reduced the number of metropolitan areas covered by local data from 123 metropolitan areas (including some nonmetro counties) that were formerly in metropolitan areas to 70 metropolitan areas. The AAFs are applied at the anniversary of Housing Assistance Payment (HAP) contracts for which rents are to be adjusted using the AAF for those calendar months commencing after the effective date of this notice. AAFs are distinct from, and do not apply to the same properties as, Operating Cost Adjustment Factors (OCAFs). OCAFs are annual factors used to adjust rents for project-based rental assistance contracts issued under Section 8 of the United States Housing Act of 1937 and renewed under section 515 or section 524 of the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA). Tables showing AAFs will be available electronically from the HUD data information page at *http://www.huduser.gov/portal/datasets/aaf.html.*

I. Applying AAFs to Various Section 8 Programs

AAFs established by this notice are used to adjust contract rents for units assisted in certain Section 8 housing assistance payment programs during the initial (*i.e.,* pre-renewal) term of the HAP contract. There are two categories of Section 8 programs that use the AAFs:

Category 1: The Section 8 New Construction, Substantial Rehabilitation, and Moderate Rehabilitation programs;

Category 2: The Section 8 Loan Management (LM) and Property Disposition (PD) programs.

Each Section 8 program category uses the AAFs differently. The specific application of the AAFs is determined by the law, the HAP contract, and appropriate program regulations or requirements.

AAFs are not used in the following cases:

Renewal Rents. AAFs are not used to determine renewal rents after expiration of the original Section 8 HAP contract (either for projects where the Section 8 HAP contract is renewed under a restructuring plan adopted under 24 CFR part 401; or renewed without restructuring under 24 CFR part 402). In general, renewal rents are established in accordance with the statutory provision in MAHRA, as amended, under which the HAP is renewed. After renewal, annual rent adjustments will be provided in accordance with MAHRA.

Budget-based Rents. AAFs are not used for budget-based rent adjustments. For projects receiving Section 8 subsidies under the LM program (24 CFR part 886, subpart A) and for projects receiving Section 8 subsidies under the PD program (24 CFR part 886, subpart C), contract rents are adjusted, at HUD's option, either by applying the AAFs or by budget-based adjustments in accordance with 24 CFR 886.112(b) and 24 CFR 886.312(b). Budget-based adjustments are used for most Section 8/202 projects.

Housing Choice Voucher Program. AAFs are not used to adjust rents in the Tenant-Based or the Project-Based Voucher programs.

II. Adjustment Procedures

This section of the notice provides a broad description of procedures for adjusting the contract rent. Technical details and requirements are described in HUD notices H 2002–10 (Section 8 New Construction and Substantial Rehabilitation, Loan Management, and Property Disposition) and PIH 97–57 (Moderate Rehabilitation and Project-Based Certificates). HUD publishes two separate AAF Tables, Table 1 and Table 2. The difference between Table 1 and Table 2 is that each AAF in Table 2 is 0.01 less than the corresponding AAF in Table 1. Where an AAF in Table 1 would otherwise be less than 1.0, it is set at 1.0, as required by statute; the corresponding AAF in Table 2 will also be set at 1.0, as required by statute. Because of statutory and structural distinctions among the various Section 8 programs, there are separate rent adjustment procedures for the two program categories:

Category 1: Section 8 New Construction, Substantial Rehabilitation, and Moderate Rehabilitation Programs

In the Section 8 New Construction and Substantial Rehabilitation programs, the published AAF factor is applied to the pre-adjustment contract rent. In the Section 8 Moderate Rehabilitation program (both the regular program and the single room occupancy program) the published AAF is applied to the pre-adjustment base rent.

For Category 1 programs, the Table 1 AAF factor is applied before determining comparability (rent reasonableness). Comparability applies if the pre-adjustment gross rent (pre-adjustment contract rent plus any allowance for tenant-paid utilities) is above the published Fair Market Rent (FMR).

If the comparable rent level (plus any initial difference) is lower than the contract rent as adjusted by application of the Table 1 AAF, the comparable rent level (plus any initial difference) will be the new contract rent. However, the pre-adjustment contract rent will not be decreased by application of comparability.

In all other cases (*i.e.,* unless the contract rent is reduced by comparability):

- Table 1 AAF is used for a unit occupied by a new family since the last annual contract anniversary.
- Table 2 AAF is used for a unit occupied by the same family as at the time of the last annual contract anniversary.

Category 2: Section 8 Loan Management Program (24 CFR Part 886, Subpart A) and Property Disposition Program (24 CFR Part 886, Subpart C)

Category 2 programs are not currently subject to comparability. Comparability will again apply if HUD establishes regulations for conducting comparability studies under 42 U.S.C. 1437f(c)(2)(C).

The applicable AAF is determined as follows:

- Table 1 AAF is used for a unit occupied by a new family since the last annual contract anniversary.
- Table 2 AAF is used for a unit occupied by the same family as at the time of the last annual contract anniversary.

III. When To Use Reduced AAFs (From AAF Table 2)

In accordance with Section 8(c)(2)(A) of the United States Housing Act of 1937 (42 U.S.C. 1437f(c)(2)(A)), the AAF

is reduced by 0.01 in Section 8 programs, for a unit occupied by the same family at the time of the last annual rent adjustment (and where the rent is not reduced by application of comparability (rent reasonableness)).

The law provides that except for assistance under the certificate program, for any unit occupied by the same family at the time of the last annual rental adjustment, where the assistance contract provides for the adjustment of the maximum monthly rent by applying an annual adjustment factor and where the rent for a unit is otherwise eligible for an adjustment based on the full amount of the factor, 0.01 shall be subtracted from the amount of the factor, except that the factor shall not be reduced to less than 1.0. In the case of assistance under the certificate program, 0.01 shall be subtracted from the amount of the annual adjustment factor (except that the factor shall not be reduced to less than 1.0), and the adjusted rent shall not exceed the rent for a comparable unassisted unit of similar quality, type and age in the market area. 42 U.S.C. 1437f(c)(2)(A).

Legislative history for this statutory provision states that ''the rationale [for lower AAFs for non-turnover units is] that operating costs are less if tenant turnover is less . . .'' (see Department of Veteran Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 1995, Hearings Before a Subcommittee of the Committee on Appropriations 103d Cong., 2d Sess. 591 (1994)). The Congressional Record also states the following:

> Because the cost to owners of turnover-related vacancies, maintenance, and marketing are lower for long-term stable tenants, these tenants are typically charged less than recent movers in the unassisted market. Since HUD pays the full amount of any rent increases for assisted tenants in section 8 projects and under the Certificate program, HUD should expect to benefit from this 'tenure discount.' Turnover is lower in assisted properties than in the unassisted market, so the effect of the current inconsistency with market-based rent increases is exacerbated. (140 Cong. Rec. 8659, 8693 (1994)).

IV. How To Find the AAF

AAF Table 1 and Table 2 are posted on the HUD User website at *http://www.huduser.gov/portal/datasets/aaf.html.* There are two columns in each AAF table. The first column is used to adjust contract rent for rental units where the highest cost utility is included in the contract rent, *i.e.,* where the owner pays for the highest cost utility. The second column is used where the highest cost utility is not included in the contract rent, *i.e.,* where the tenant pays for the highest cost utility.

The applicable AAF is selected as follows:

- Determine whether Table 1 or Table 2 is applicable. In Table 1 or Table 2, locate the AAF for the geographic area where the contract unit is located.
- Determine whether the highest cost utility is or is not included in contract rent for the contract unit.
- If highest cost utility is included, select the AAF from the column for ''Highest Cost Utility Included.'' If highest cost utility is not included, select the AAF from the column for ''Highest Cost Utility Excluded.''

V. Methodology

AAFs are rent inflation factors. Two types of rent inflation factors are calculated for AAFs: Gross rent factors and shelter rent factors. The gross rent factor accounts for inflation in the cost of both the rent of the residence and the utilities used by the unit; the shelter rent factor accounts for the inflation in the rent of the residence but does not reflect any change in the cost of utilities. The gross rent inflation factor is designated as ''Highest Cost Utility Included'' and the shelter rent inflation factor is designated as ''Highest Cost Utility Excluded.''

AAFs are calculated using CPI data on ''rent of primary residence'' and ''fuels and utilities.'' [1] The CPI inflation index for rent of primary residence measures the inflation of all surveyed units regardless of whether utilities are included in the rent of the unit or not. In other words, it measures the inflation of the ''contract rent'' which includes units with all utilities included in the rent, units with some utilities included in the rent, and units with no utilities included in the rent. In producing a gross rent inflation factor and a shelter rent inflation factor, HUD decomposes the contract rent CPI inflation factor into parts to represent the gross rent change and the shelter rent change. This is done by applying data from the Consumer Expenditure Survey (CEX) on the percentage of renters who pay for heat (a proxy for the percentage of renters who pay shelter rent) and, also, American Community Survey (ACS) data on the ratio of utilities to rents. For Puerto Rico, the Puerto Rico Community Survey (PRCS) is used to determine the ratio of utilities to rents, resulting in different AAFs for some metropolitan areas in Puerto Rico.[2]

[1] CPI indexes CUUSA103SEHA and CUSR0000SAH2 respectively.

[2] The formulas used to produce these factors can be found in the Annual Adjustment Factors overview and in the FMR documentation at *www.HUDUSER.gov.*

Survey Data Used To Produce AAFs

The rent inflation factor and fuel and utilities inflation factor for each large metropolitan area and Census region are based, respectively, on changes in the CPI index for rent of primary residence and the CPI index for fuels and utilities from 2018 to 2019. The CEX data used to decompose the contract rent inflation factor into gross rent and shelter rent inflation factors come from a special tabulation of 2019 CEX survey data produced for HUD. The utility-to-rent ratio used to produce AAFs comes from 2018 ACS median rent and utility costs.

Geographic Areas

Beginning with the data collection for 2018, BLS revised the sample for the CPI to be based on Core Based Statistical Areas (CBSAs). Previously the sample was based on Metropolitan Statistical Areas (MSAs) as defined in 1998. In addition, the population required to be designated a Class A CPI city was increased from 1.5 million to 2.5 million. The following major metropolitan areas were eliminated under the new sample design: Pittsburgh PA, Cincinnati-Hamilton OH-KY-IN, Cleveland-Akron OH, Milwaukee-Racine WI, Kansas City MO-KS, and Portland-Salem OR-WA. With the change in metropolitan area definitions and the designation of Class A cities, the number of CPI cities declined from 28 metropolitan areas to 23 metropolitan areas (Riverside-San Bernardino has been split off from the Los Angeles survey area). This decline has resulted in fewer metropolitan component areas receiving local CPI adjustments, down to 70 metropolitan areas and subareas (HUD Metro FMR Areas) from 124 metropolitan and nonmetropolitan areas. The 2018 CPI data with new metropolitan area definitions was first used with the FY 2020 AAFs. There are no longer any nonmetropolitan areas using local CPI inflation factors in the U.S. This change did not impact Puerto Rico which applies an island-wide CPI to all metropolitan and nonmetropolitan areas.

Each metropolitan area that uses a local CPI update factor is listed alphabetically in the tables and each HUD Metro FMR Area (HMFA) is listed alphabetically within its respective CBSA. Each AAF applies to a specific geographic area and to units of all bedroom sizes. AAFs are provided:

- For metropolitan areas at the MSA or HMFA level.

• For the four Census Regions (to be used for those metropolitan areas that are not covered by a CPI city-survey and non-metropolitan areas).

AAFs use the same Office of Management and Budget (OMB) metropolitan area definitions, as revised by HUD, that are used for the FY 2021 FMRs.

Area Definitions

To make certain that they are using the correct AAFs, users should refer to the Area Definitions Table section at *http://www.huduser.gov/portal/datasets/aaf.html.* The Area Definitions Table lists CPI areas in alphabetical order by state, and the associated Census region is shown next to each state name. Areas whose AAFs are determined by local CPI surveys are listed first. All metropolitan areas with local CPI survey areas have separate AAF schedules and are shown with their corresponding county definitions or as metropolitan counties. In the six New England states, the listings are for counties or parts of counties as defined by towns or cities. The remaining counties use the CPI for the Census Region and are not separately listed in the Area Definitions Table at *http://www.huduser.gov/portal/datasets/aaf.html.*

Puerto Rico uses its own AAFs calculated from the Puerto Rico CPI as adjusted by the PRCS, the Virgin Islands uses the South Region AAFs and the Pacific Islands use the West Region AAFs.

Todd M. Richardson,

General Deputy Assistant Secretary, Office of Policy Development and Research.

[FR Doc. 2020–27708 Filed 12–16–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R2–NWRS–2020–N072; FVRS84510200000–20X–FF02R05000]

Notice of Receipt of Right-of-Way Application for Natural Gas Pipeline Crossing San Bernard National Wildlife Refuge

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of Receipt of Right-of-Way Application for Natural Gas Pipeline; request for comment.

SUMMARY: The U.S. Fish and Wildlife Service has received two applications for 30-year right-of-way permits from Baymark Pipeline LLC and South Texas NGL Pipeline LLC, respectively. The U.S. Fish and Wildlife Service will open the National Wildlife Refuge System lands, allowing for this infrastructure, under the authority of the National Wildlife Refuge System Administration Act. The U.S. Fish and Wildlife Service requests public comment on the permit applications and associated documents.

DATES: We must receive any written comments on or before January 19, 2021.

ADDRESSES: Send your comments or requests by any one of the following methods.

• *Email: jennifer_sanchez@fws.gov* (use ''Enterprise ROW'' as your subject line).

• *Fax:* 979–964–4021 (use ''Enterprise ROW'' as your subject line).

• *U.S. mail:* Project Leader, Texas Mid-coast Complex, U.S. Fish and Wildlife Service, 2547 County Road 316, Brazoria, TX 77422.

Public Availability of Comments

• Written comments we receive will become part of the public record associated with this action. Please be aware that your entire comment—including your personal identifying information, address, phone number, and email—may be made publicly available at any time. While you may request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

FOR FURTHER INFORMATION CONTACT: Jennifer Sanchez, 979–964–4011 (phone), or *jennifer_sanchez@fws.gov* (email). Individuals who are hearing or speech impaired may call the Federal Relay Service at 1–800–877–8339 for TTY assistance.

SUPPLEMENTARY INFORMATION: The U.S. Fish and Wildlife Service (Service), has received two applications for 30-year right-of-way (ROW) permits under the Mineral Leasing Act.

Applicants' Permit Proposals

Baymark Pipeline LLC and South Texas NGL Pipeline LLC have each requested a 30-ft-wide pipeline right-of-way across a 203-ft-long section of the San Bernard National Wildlife Refuge NWR in Brazoria County, Texas.

The applicants request ROW permits for the following pipelines:

Applicant	Pipeline description	Material to be transported
Baymark Pipeline LLC	12-inch-diameter pipeline, steel	natural gas (ethylene).
South Texas NGL Pipeline LLC	8-inch-diameter pipeline, steel	natural gas (propylene).

The ROW permits, if granted by the Service, would enable each respective applicant to construct, operate, maintain, and terminate an ethylene and propylene pipeline. The purpose of the new pipelines would be to transport ethylene and propylene through Matagorda, Brazoria, Galveston, and Harris Counties in Texas. The requested ROWs would be collocated within an existing 30-fit pipeline ROW that is used by Florida Gas and Lavaca to transport natural gas. The existing pipeline ROW is not an exclusive area; therefore, additional uses may be collocated within the same cleared corridor.

The applicants' pipelines would be installed by means of a conventional bore technique under refuge land; therefore, the construction would not require trenching on refuge lands. No additional permit boundaries beyond the existing ROW are required. The bore holes would be located 300 ft outside the refuge property line on adjacent private lands.

Next Steps

This notice informs the public that the Service will process the ROW permit applications from Baymark Pipeline LLC and South Texas NGL Pipeline LLC, which includes the preparation of the National Environmental Policy Act documentation along with terms and conditions of the right-of-way permit.

Authority

Applications for ROW for natural gas pipelines are to be filed in accordance with Section 28 of the Mineral Leasing

Act of 1920 (30 U.S.C. Ch. 3A § 181), as amended, (41 Stat. 437, Pub. L. 66–146).

Amy Lueders,

Southwest Region Director, Interior Region 6, U.S. Fish and Wildlife Service.

[FR Doc. 2020–27752 Filed 12–16–20; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R8–ES–2020–0142; FXES1120800000–201–FF08ENVS00]

Receipt of Incidental Take Permit Application and Draft Low-Effect Habitat Conservation Plan, and Draft NEPA Compliance Documentation, for the Gamebird Substation Expansion in Pahrump, Nye County, Nevada

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability of the proposed low-effect habitat conservation plan, and NEPA compliance documentation; request for comment.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the receipt and availability of an application for an incidental take permit (ITP) under the Endangered Species Act (ESA) and an associated draft low-effect habitat conservation plan (HCP). Additionally, consistent with the requirements of the National Environmental Policy Act (NEPA), we have prepared a draft low-effect screening form and environmental action statement supporting our preliminary determination that the proposed permit action qualifies for a categorical exclusion under NEPA. GridLiance West, LLC has applied for an ITP under the ESA for the Gamebird Substation Expansion in Pahrump, Nye County, Nevada. The ITP would authorize the take of one species incidental to the development and construction of the project. We invite the public and local, State, Tribal, and Federal agencies to comment on the permit application, proposed low-effect HCP, and NEPA categorical exclusion determination documentation. Before issuing the requested ITP, we will take into consideration any information that we receive during the public comment period.

DATES: We must receive your written comments on or before January 19, 2021.

ADDRESSES:

Obtaining Documents: The documents this notice announces, as well as any comments and other materials that we receive, will be available for public inspection online in Docket No. FWS–R8–ES–2020–0142 at *http://www.regulations.gov.*

Submitting Comments: To send written comments, please use one of the following methods and identify to which document your comments are in reference—the ITP application, draft HCP, or NEPA compliance documentation.

- *Internet:* Submit comments at *http://www.regulations.gov* under Docket No. FWS–R8–ES–2020–0142.
- *U.S. Mail:* Public Comments Processing, Attn: Docket No. FWS–R8–ES–2020–0142; U.S. Fish and Wildlife Service Headquarters, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

For more information, see Public Comments and Public Availability of Comments under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Glen W. Knowles, Field Supervisor, Southern Nevada Fish and Wildlife Office, by phone at 702–515–5244 or via the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service (Service), announce the receipt and availability of an application submitted by GridLiance West, LLC (applicant), for a 4-year incidental take permit (ITP) under section 10(a)(1)(B) of the Endangered Species Act, as amended (ESA; 16 U.S.C. 1531 *et seq.*). Application for the permit requires the preparation of an HCP with measures to avoid, minimize, and mitigate the impacts of incidental take of endangered or threatened species to the maximum extent practicable. The applicant prepared the draft Low Effect HCP for the Gamebird Substation Expansion pursuant to section 10(a)(1)(B) of the ESA. FWS consideration of issuing an ITP also requires evaluation of its potential impacts on the natural and human environment in accordance with NEPA. FWS has prepared a low-effect screening form and environmental action statement (categorical exclusion, or catex documentation), pursuant to NEPA (42 U.S.C. 4321 *et seq.*) and its implementing regulations in the Code of Federal Regulations (CFR) at 40 CFR 1501.4, to preliminarily determine if the proposed HCP qualifies as a low-effect HCP, eligible for a categorical exclusion.

Background

Except for permitted exceptions, section 9 of the ESA (16 U.S.C. 1538 *et seq.*) prohibits the taking of fish and wildlife species listed as endangered under section 4 of the ESA; by regulation, take of certain species listed as threatened is also prohibited (16 U.S.C. 1533(d); 50 CFR 17.31). Regulations governing the permitted exception for allowable incidental take of endangered and threatened species are at 50 CFR 17.22 and 17.32. For more about the Federal habitat conservation HCP program, go to *http://www.fws.gov/endangered/esa-library/pdf/hcp.pdf.*

National Environmental Policy Act Compliance

The proposed permit issuance triggers the need for compliance with the NEPA. The draft catex documentation was prepared to determine if issuance of an ITP, based on the draft HCP, would individually or cumulatively have only a minor or negligible effect on the species covered in the HCP, and would therefore qualify as a low-effect HCP eligible for a categorical exclusion from further environmental analysis under NEPA.

Proposed Action

Under the proposed action, the Service would issue an ITP to the applicant for a period of 4 years for certain covered activities (described below) related to the expansion of the existing Gamebird Substation. The applicant has requested an ITP for one covered species, the Mojave desert tortoise (*Gopherus agassizii*), which was, and remains as listed under the ESA as threatened in April 1990.

Habitat Conservation Plan Area

The geographic scope of the draft habitat conservation plan (HCP) area encompasses 18.2 acres in Nye County, Nevada, where the expansion will occur.

Covered Activities

The proposed section 10(a) ITP would allow incidental take of one covered species from covered activities in the proposed HCP area. The applicant is requesting incidental take authorization for covered activities, including site preparation, geotechnical drilling, associated infrastructure development, expansion of the substation, and the installation of a 230-kilovolt (kV) transmission line to connect the substation to an existing 230-kV transmission line that runs from Pahrump to the Sloan Canyon Switch.

The applicant has proposed to minimize and mitigate for the direct impacts to desert tortoises and its habitat in the HCP area through the following measures:

1. Implementing a worker environmental awareness training program;

2. Setting speed limits to avoid collisions with tortoise;

3. Having an approved biologist ensure implementation of minimization measures, monitor covered activities to avoid collisions, and clear the work site and materials, vehicles, and equipment of tortoises before work activity;

4. Requiring pre-movement vehicle and equipment inspections by workers;

5. Installing temporary tortoise exclusion fencing around substation area;

6. Conducting pre-construction clearance surveys and translocation by an approved biologist;

7. Developing a plan for spill prevention and control, with countermeasures;

8. Implementing proper waste management and disposal actions;

9. Developing a fire management plan; and

10. Implementing certain weed management efforts.

The proposed action will result in the permanent loss of moderate-quality habitat in Nye County, Nevada. In addition to the minimization measures, the applicant will make a one-time contribution of $26,500, payable to the National Fish and Wildlife Foundation (NFWF), to offset the impacts of permanent Mojave desert tortoise habitat loss and habitat modification of about 18.2 acres.

No-Action Alternative

Under the No-Action Alternative, the Service would not issue an ITP to the applicant, and the draft HCP would not be implemented. Under this alternative, the applicant may choose not to construct the facility or would do so in a manner presumed not to result in the take of ESA-listed species.

Public Comments

We request data, comments, new information, or suggestions from the public, other concerned governmental agencies, the scientific community, Tribes, industry, or any other interested party on permit application, draft HCP, and associated documents. If you wish to comment, you may submit comments by any of the methods in **ADDRESSES**.

Public Availability of Comments

Any comments we receive will become part of the decision record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—might be made publicly available at any time. While you can request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Next Steps

Issuance of an incidental take permit is a Federal proposed action subject to compliance with NEPA and section 7 of the ESA. We will evaluate the application, associated documents, and any public comments we receive during this comment period to determine whether the application meets the requirements of section 10(a) of the ESA. If we determine that those requirements are met, we will conduct an intra-Service consultation under section 7 of the ESA for the Federal action for the potential issuance of an ITP. If the intra-Service consultation confirms that issuance of the ITP will not jeopardize the continued existence of any endangered or threatened species, or destroy or adversely modify critical habitat, we will issue a permit to the applicant for the incidental take of the covered species.

Authority

We provide this notice under section 10(c) of the Endangered Species Act (16 U.S.C. 1539(c) and its implementing regulations (50 CFR 17.32), and NEPA (42 U.S.C. 4321 *et seq.*) and NEPA implementing regulations (40 CFR 1501.4).

Glen W. Knowles,

Field Supervisor, Southern Nevada Fish and Wildlife Office, U.S. Fish and Wildlife Service, Las Vegas, Nevada.

[FR Doc. 2020–27705 Filed 12–16–20; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[212A2100DD/AAKC001030/A0A51010.999900]

Notice of Deadline for Submitting Completed Applications To Begin Participation in the Tribal Self-Governance Program in Fiscal Year 2022 or Calendar Year 2022

AGENCY: Office of Self-Governance, Bureau of Indian Affairs, Interior.

ACTION: Notice of application deadline.

SUMMARY: In this notice, the Office of Self-Governance (OSG) establishes the deadline for Indian Tribes/consortia to submit completed applications to begin participation in the Tribal self-governance program in fiscal year 2022 or calendar year 2022.

DATES: Completed application packages must be received by the Director, Office of Self-Governance, by March 1, 2021.

ADDRESSES: Application packages for inclusion in the applicant pool should be sent to Sharee M. Freeman, Director, Office of Self-Governance, Department of the Interior, Mail Stop 3624–MIB, 1849 C Street NW, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Dr. Kenneth D. Reinfeld, Office of Self-Governance, Telephone (202) 821–7107, *kenneth.reinfeld@bia.gov.*

SUPPLEMENTARY INFORMATION: Under the Tribal Self-Governance Act of 1994 (Pub. L. 103–413), as amended by the Practical Reforms and Other Goals to Reinforce the Effectiveness of Self-Governance and Self-Determination Act of 2019–2020 or the PROGRESS for Indian Tribes Act (Pub. L. 116–180), Section 402(b)(1)(A), the Secretary, acting through the Director of the Office of Self-Governance, may select not more than 50 new Indian Tribes per year from those eligible Tribes. *See* 25 U.S.C. 5362(b)(1).

The Tribal Self-Governance Act, as amended by the PROGRESS for Indian Tribes Act, mandates that copies of the funding agreements be sent at least 90 days before the proposed effective date to each Indian Tribe that is served by the Bureau of Indian Affairs' agency that is serving the Tribe that is a party to the funding agreement. Initial negotiations with a Tribe/consortium located in a region and/or agency that has not previously been involved with self-governance negotiations will take approximately 2 months from start to finish. Agreements for an October 1 to September 30 funding year need to be signed and submitted by July 1. Agreements for a January 1 to December 31 need to be signed and submitted by October 1.

Eligibility To Participate in Self-Governance

The Department will be initiating a negotiated rulemaking to develop regulations to meet the requirements of Section 101 of the newly enacted PROGRESS Act. To be eligible to participate in self-governance, an Indian Tribe must:

(1) Successfully complete the planning phase described in section 402(d) of the Tribal Self-Governance Act

as amended by the PROGRESS Act [25 U.S.C. 5362(d)];

(2) Request participation in self-governance by resolution or other official action by the Tribal governing body;

(3) Demonstrate for the 3 fiscal years preceding the date for which the Tribe requests participation, financial stability and financial management capability as evidenced by the Indian Tribe having no uncorrected significant and material audit exceptions in the required annual audit of its self-determination or self-governance agreements with any Federal Agency.

Planning Phase

An Indian Tribe seeking to begin participation in self-governance must complete a planning phase that:

(1) Is conducted to the satisfaction of the Indian Tribe; and

(2) Includes:

- Legal and budgetary research; and
- Internal Tribal government planning, training, and organizational preparation.

Applicants should be guided by the referenced requirements in preparing their applications to begin participation in the Tribal self-governance program in fiscal year 2022 and calendar year 2022. Copies of these requirements may be obtained from the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Tribes/consortia wishing to be considered for participation in the Tribal self-governance program in fiscal year 2022 or calendar year 2022 must respond to this notice, except for those Tribes/consortia which are either: (1) Currently involved in negotiations with the Department; or (2) one of the 134 Tribal entities with signed agreements.

Information Collection

This information collection is authorized by OMB Control Number 1076–0143, Tribal Self-Governance Program, which expires December 31, 2022.

Tara Sweeney,

Assistant Secretary—Indian Affairs.

[FR Doc. 2020–27786 Filed 12–16–20; 8:45 am]

BILLING CODE 4337–15–P

OFFICE OF MANAGEMENT AND BUDGET

Final Revisions to Uniform Freedom of Information Act Fee Schedule and Guidelines

AGENCY: Office of Management and Budget.

ACTION: Notice of revised guidelines.

SUMMARY: The Office of Management and Budget (OMB) is finalizing revisions to sections of its Uniform Freedom of Information Act Fee Schedule and Guidelines (''Guidelines'') last published in 1987. This action is necessary to conform the Guidelines with statutory amendments to the Freedom of Information Act (FOIA) and to clarify the scope of the Guidelines. This action is intended to provide Federal agencies with guidance on the appropriate and uniform application of FOIA processing fees.

DATES: These revisions to the Guidelines are effective December 17, 2020.

FOR FURTHER INFORMATION CONTACT: Jonathan Hill, Office of Information and Regulatory Affairs, OMB, at (202) 395–1658 or *oira_pb_comments@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: The Freedom of Information Reform Act of 1986, Public Law 99–570 (1986), required OMB to promulgate a uniform schedule of fees and guidelines, pursuant to notice and public comment, for agencies to use when processing FOIA requests. 5 U.S.C. 552(a)(4)(A)(i). OMB issued the Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 FR 10012 (available at *https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/foia_fee_schedule_1987.pdf*) on March 27, 1987. In the ensuing years, the FOIA has been amended, notably by the OPEN Government Act of 2007, Public Law 110–175 (2007), and the FOIA Improvement Act of 2016, Public Law 114–185 (2016). In response, OMB has undertaken to revise the Guidelines.

On May 4, 2020, OMB published a notice in the **Federal Register**, 85 FR 26499, seeking comments on four proposed substantive revisions. OMB also proposed to revise Section 4. *Inquiries,* to update contact information for questions about the Guidelines. OMB received comments directly and through *Regulations.gov* from 13 entities, including both individuals and organizations. OMB greatly appreciates the detailed comments it received, and believes the final guidance, as modified in response to those comments, has been significantly improved. A description of the relevant comments, and OMB's responses, follow.

(1) *OMB proposes to revise Section 2.* Scope *to indicate that the Guidelines do not address the waiver or reduction of fees if disclosure is in the public interest.*

Four commenters recommended that OMB address public interest fee waivers in the Guidelines. OMB finds that addressing fee waivers is beyond the allowable scope of this guidance. In relevant part, the FOIA requires OMB to promulgate guidelines ''which shall provide for a uniform schedule of fees for all agencies.'' 5 U.S.C. 552(a)(4)(A)(i). As OMB explained in the preamble to the first publication of the Guidelines, ''OMB's role is limited by the plain wording of the statute to developing guidelines and a fee schedule.'' 52 FR 10016.

The application of the OMB fee schedule to related fee categories is distinct from a public interest fee waiver. A requester's fee category concerns the services—search, duplication, and review—for which that requester may be assessed fees. *See* 5 U.S.C. 552(a)(4)(A)(ii). By contrast, a public interest fee waiver concerns whether the requester will ultimately be responsible for paying any such fees. *See* 5 U.S.C. 552(a)(4)(A)(iii).

The comments on this proposal suggested that there is an inter-relationship between a requester's fee category and whether they are eligible for a public interest fee waiver, and as a result, the OMB Guidelines should also address public interest fee waivers. Whether or not the two issues involve a common element, for instance whether there is a commercial interest at stake, the fact remains that separate legal constructs have developed around each, and other, independent considerations are necessary to the analysis of each. To expound on distinct elements of the public interest fee waiver would exceed OMB's mandate, which is limited to fee categories.

At least one commenter suggested that it would cause confusion among requesters and agencies for the Guidelines to address fee categories but not public interest fee waivers. OMB disagrees. Whatever commonalities there may be, OMB intends these Guidelines only to advise agencies with respect to fee categories. The revision to Section 2 is carefully worded, with citation to the public interest fee waiver provision in the FOIA, to specifically exclude from the scope of the Guidelines ''the waiver or reduction of fees if the disclosure of the information is in the public interest.'' No commenter offered a recommendation on a more effective way to achieve this limitation on the scope.

OMB emphasizes that, while the Guidelines do not address public interest fee waivers, it is not the case that agencies have no guidance on this topic. Just as OMB issued the original Guidelines in response to the Freedom of Information Reform Act, one

commenter rightly pointed out that the Department of Justice (DOJ) issued its own New Fee Waiver Policy Guidance (Apr. 2, 1987) (*https://www.justice.gov/oip/blog/foia-update-new-fee-waiver-policy-guidance*). Furthermore, the DOJ Guide to the Freedom of Information Act (*https://www.justice.gov/oip/doj-guide-freedom-information-act-0*), updated in relevant part in September 2020, also provides a thorough survey and discussion of case law related to public interest fee waivers. Rather than causing confusion, OMB believes it is more effective and efficient for the Guidelines to explicitly and only address fee categories, and to continue the decades-long practice of deferring to other sources for guidance on public interest fee waivers.

(2) *OMB proposes to remove Section 6j, which defines* ''*representative of the news media,*'' *given that this term is now defined in statute.*

Six commenters submitted recommendations related to this proposal. Each commenter recommended that, instead of removing Section 6j, OMB revise it to explicitly reiterate the statutory definition of ''a representative of the news media'' and/or incorporate judicial interpretations of that definition. OMB points out that the Guidelines already incorporate the FOIA's statutory definitions, and rejects these recommendations, except as discussed below.

As a general proposition, agencies are expected to stay abreast of relevant statutory and judicial developments related to their implementation of the FOIA. It is usually unnecessary to issue guidance that merely reiterates standards that are stated authoritatively elsewhere, and in the case of judicial developments, that are more susceptible to evolving factors.

This is especially true with respect to the statutory definition of ''a representative of the news media.'' Section 6a of the Guidelines states clearly that ''[a]ll the terms defined in the Freedom of Information Act apply.'' There should be no doubt that this provision applies to the term ''a representative of the news media,'' which is defined at 5 U.S.C. 552(a)(4)(A)(ii). One commenter suggested that reiterating the statutory definition in the Guidelines would avoid confusion, but did not elaborate. OMB fails to see what confusion would result from expressly incorporating all of the statutory definitions, rather than spelling them out in the guidance. Rather than causing confusion, OMB considers cross-referencing the statutory definition an effective way to avoid potential future confusion, if Congress amends the definition.

Similarly, OMB does not agree with the all of the recommendations to incorporate judicial interpretations of the statutory definition into these Guidelines, but has made some modifications based on these comments. In the notice, OMB indicated that part of the purpose of revising the Guidelines is ''to provide clarity in light of evolving judicial interpretation,'' and to ''ensure they reflect . . . leading judicial decisions.'' 85 FR 26500.

This goal has its limits, however. Commenters urged the incorporation of a D.C. Circuit opinion that interpreted the statutory definition of ''a representative of the news media.'' *See Cause of Action* v. *FTC,* 799 F.3d 1108, 1125 (D.C. Cir. 2015). Insofar as the decision rejects the definition of ''representative of the news media'' in Section 6j as factually inconsistent with the current statutory definition, OMB agrees with the comments and has removed the inconsistent language from the Guidelines. Instead the Guidelines cross-reference the definition now provided in statute, to avoid any inconsistency.

However, OMB does not believe it is generally necessary to incorporate, proactively, judicially-developed analytical frameworks into the Guidelines, especially when no inconsistency is evident. In fact, there are practical and policy reasons why doing so is imprudent. Along these lines, OMB rejects other, specific recommendations made by commenters to incorporate other aspects of judicial holdings in the Guidelines.

First, there are hundreds of FOIA cases decided each year.[1] It would not be efficient to try to update the Guidelines to account for the decisions in these cases. While OMB recognizes that not every holding would require updates to the Guidelines, there would be diminishing returns in trying to parse out which ones rise to that level and retrospectively evaluating which ones last the test of time. To borrow an economic term, there would be an opportunity cost that would serve neither agencies nor the public, if agencies were to wait for OMB to update the Guidelines before applying otherwise applicable case law.

Relatedly, it is not OMB's role to serve as legal counsel to agencies. Every agency has attorneys, and the Office of Information Policy (OIP) at the Department of Justice exists, in part, to ''provide[ ] legal counsel and training to agency personnel,'' with respect to complying with the FOIA. *See www.justice.gov/oip/about-office* (last visited Dec. 10, 2020). In fact, DOJ's Guide to the Freedom of Information Act, discussed above, is a ''comprehensive legal treatise on the FOIA'' that ''contains a detailed analysis of the key judicial opinions issued on the FOIA,'' including those related to fees and fee waivers. *See https://www.justice.gov/oip/doj-guide-freedom-information-act-0* (last visited Dec. 10, 2020). OMB considers that agencies' primary source of advice concerning the application of judicial decisions should be the attorneys who represent them.

One commenter opined that some elements of Section 6j continue to warrant inclusion in the Guidelines, such as the definition of ''news.'' As the commenter recognizes, however, the definition of ''news'' in the statute, 5 U.S.C. 552(a)(4)(A)(ii), is unchanged from the definition in Section 6j. Moreover, OMB fails to perceive any significant substantive differences—and the commenter failed to identify any—between the rest of the text in Section 6j and in the statute. Insofar as any difference exists, OMB considers that Congress had the language in the Guidelines at its disposal when it amended the FOIA, and chose to diverge. In that case, OMB defers to the language in the statute as the best indicator of Congress's will. Just as discussed above, OMB considers it unnecessary to restate the language in the statute.

Several commenters recommended that OMB include in the Guidelines examples of types of entities that would be considered representatives of the news media. OMB declines. Congress has provided the framework agencies should use to determine when a requester qualifies as a representative of the news media, and the courts have interpreted, and continue to interpret, that framework. To the extent such authorities leave no doubt whether a type of entity qualifies as a representative of the news media, OMB will let those authorities speak for themselves. To the extent there is a doubt, as discussed above, OMB defers to agency counsel to advise on the proper application of the law under specific circumstances. Furthermore, OMB considers that including a list of

[1] One commenter drew OMB's attention to the FOIA Project, which claims that its website ''includes detailed information on every case that challenges government withholding [under the FOIA] in federal court.'' *See www.foiaproject.org/about* (last visited Dec. 10, 2020). While OMB has not verified this number, the FOIA Project reports that in fiscal year 2020, 844 FOIA cases were filed. *See www.foiaproject.org* (last visited Dec. 10, 2020).

examples, even with a disclaimer that it is non-exclusive, runs the risk of being interpreted as exclusive. Failure to include a type of requester in this list—especially in light of the rapid evolution of the state of technology and information dissemination—could lead to the conclusion that such a requester is not a representative of the news media. This outcome would not serve agencies nor the public.

One commenter recommended that OMB define representative of the news media because the Guidelines define other fee categories. The difference is that the FOIA does not define those other categories in the way that it defines ''a representative of the news media.'' As discussed, OMB does not consider it necessary to repeat the law.

Furthermore, as discussed above, the definition in the statute generally covers the same subject matter as exists in Section 6j. Therefore, removing the section and cross-referencing the statute does not result in the loss of detail.

OMB received comments of a technical nature on two issues. One commenter pointed out that the preamble of the notice seeking comments misidentified the section that OMB proposed to remove as Section 6f, instead of Section 6j. This comment is correct; however, no further revision to the Guidelines is necessary. OMB correctly identified Section 6j later in the notice, and there was no evident confusion about OMB's intent. Existing-Section 6j is clearly the provision that defines ''representative of the news media,'' and despite the earlier typographical error, commenters discerned OMB's intent and provided recommendations in response. OMB affirms that its actions with respect to this proposal relate to Section 6j, not Section 6f.

Two comments pointed out that OMB failed to address a cross-reference to Section 6j appearing in Section 8c. OMB responds by revising Section 8c to bring it into conformity with its decision to remove Section 6j. Section 8c will refer to the statutory definition, rather than the definition in Section 6j.

(3) *OMB proposes to revise Section 8b.* Educational and Non-commercial Scientific Institution Requesters *to clarify that both teachers and students may be eligible for inclusion in this fee category.*

OMB received recommendations from three commenters with respect to this proposal.

Two commenters recommended that Section 8b be further revised to clarify that it applies not only to teachers and students but to other staff of educational institutions, such as librarians. OMB accepts this recommendation and revises the relevant language in Section 8b to include ''faculty, staff, or students.'' While the comments focused on staff of educational institutions, OMB considers that the inclusion of ''staff'' also appropriately accounts for requests made in connection with a non-commercial scientific institution. So long as staff of an educational or non-commercial scientific institution can demonstrate that their request is being made in connection with their role at the institution, OMB considers them to be appropriately within the scope of this fee category.

One commenter suggested that it would be necessary to amend Section 6h to conform to the new language in Section 8b, to ensure consistency. OMB perceives no inconsistency, and therefore rejects this recommendation. The commenter drew an analogy to the relationship between Section 6j and Section 8c, discussed above. Section 6j and Section 8c both address requesters. Conversely, Section 6h (and Section 6i) defines a type of institution, while Section 8b addresses requesters associated with those institutions. The FOIA requires agencies to determine the nature of the institution as a distinct entity, which is why OMB provides a separate definition in Section 6. OMB does not consider clarifying who may be considered a requester, in Section 8b, to have a necessary impact on the definition of the institution, in Section 6h or Section 6i.

(4) *OMB proposes to add a subsection to Section 9.* Administrative Actions to Improve Assessment and Collection of Fees *to indicate that agencies may not charge certain fees when they fail to comply with the FOIA's time limits, except under certain circumstances provided in the statute.*

OMB received recommendations related to this proposal from three commenters. Two commenters recommended that OMB provide additional guidance on the application of the referenced provision concerning an agency's failure to comply with the FOIA's time limits, 5 U.S.C. 552(a)(4)(A)(viii). OMB did not accept these recommendations. This is a complex statutory provision better addressed through legal analysis and individualized counsel, rather than OMB policy. Furthermore, insofar as the provision relies on terms defined in the statute, OMB defers to the statutory language and judicial interpretation, just as discussed above. OMB points out that the Department of Justice has issued guidance on this provision, including a ''Decision Tree for Assessing Fees.'' *See* Dep't of Justice, OIP Guidance: Prohibition on Assessing Certain Fees When the FOIA's Time Limits Are Not Met (Oct. 19, 2016), *https://www.justice.gov/oip/oip-guidance/prohibition_on_assessing_certain_fees_when_foia_time_limits_not_met* (last visited Dec. 10, 2020).

One requester recommended that all charges and fees be waived for United States citizens when the government fails to comply with requests in a timely manner. This comment appears to OMB to be insufficiently supported by statutory authority, and therefore it is rejected.

In addition to the four topics discussed above, OMB received a number of comments on topics that were clearly out of scope of the proposal and therefore will not be addressed here.

As discussed in the notice seeking comment, OMB revises Section 4. *Inquiries* to update contact information for questions about the Guidelines.

For the reasons discussed in the Preamble, and under the authority of 5 U.S.C. 552(a)(4)(A)(i) and 44 U.S.C. chapter 35, OMB amends the Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 FR 10012, by removing Section 6j, adding Section 9f, and revising Sections 2, 4, 8b, and 8c to read as follows:

UNIFORM FREEDOM OF INFORMATION ACT FEE SCHEDULE AND GUIDELINES

* * * * *

2. *Scope*—* * * This Fee Schedule and Guidelines, including Sections 6 and 8, does not address the waiver or reduction of fees if the disclosure of the information is in the public interest, as provided in 5 U.S.C. 552(a)(4)(A)(iii).

* * * * *

4. *Inquiries*—Inquiries should be directed to the Office of Information and Regulatory Affairs, Office of Management and Budget, at *oira_pb_comments@omb.eop.gov.*

* * * * *

8. *Fees to be Charged—Categories of Requesters.* * * *

b. Educational and Non-commercial Scientific Institution Requesters—* * * To be eligible for inclusion in this category, requesters—whether faculty, staff, or students—must show that the request is being made in connection with their role at the institution, and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research. * * *

c. Requesters who are Representatives of the News Media—* * * To be eligible for inclusion in this category, a requester must meet the criteria established by the FOIA. *See* 5 U.S.C. 552(a)(4)(A)(ii). * * *

* * * * *

9. *Administrative Actions to Improve Assessment and Collection of Fees*—* * *

f. Failure to Comply with Time Limits—An agency may not charge search fees (or in the case of educational or non-commercial scientific institution requesters, or representatives of the news media, duplication fees) if it has failed to comply with any time limit under 5 U.S.C. 552(a)(6), except as provided in 5 U.S.C. 552(a)(4)(A)(viii).

Paul J. Ray,

Administrator, Office of Information and Regulatory Affairs.

[FR Doc. 2020–27707 Filed 12–16–20; 8:45 am]

BILLING CODE 3110–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2020–0245]

Environmental Qualification of Certain Electrical Equipment Important to Safety for Nuclear Power Plants

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft regulatory guide; request for comment.

SUMMARY: The Nuclear Regulatory Commission (NRC) is issuing for public comment a draft regulatory guide (DG), DG–1361, ''Environmental Qualification of Certain Electrical Equipment Important to Safety for Nuclear Power Plants.'' This draft guide is proposed revision 2 of regulatory guide (RG) 1.89 of the same name. The proposed revision describes an approach that is acceptable to the staff of the NRC to meet regulatory requirements for environmental qualification (EQ) of certain electric equipment important to safety for nuclear power plants. The previous revision of RG 1.89 was issued in June 1984 and endorsed the use of Institute of Electrical and Electronic Engineers (IEEE) Standard (Std.) 323–1974. This proposed revision incorporates additional information regarding the dual logo International Electrotechnical Commission (IEC)/IEEE Std. 60780–323, ''Nuclear Facilities—Electrical Equipment Important to Safety—Qualification,'' Edition 1, 2016–02.

DATES: Submit comments by February 16, 2021. Comments received after this date will be considered if it is practical to do so, but the NRC 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–2020–0245. Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9221; 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–7A06, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Matthew McConnell, Office of Nuclear Reactor Regulation, telephone: 301–415–1597, email: *Matthew.McConnell@nrc.gov,* and Michael Eudy, Office of Nuclear Regulatory Research, telephone: 301–415–3104, email: *Michael.Eudy@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–2020–0245 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0245.
- *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–2020–0245 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 enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Additional Information

The NRC is issuing for public comment a draft guide 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.

The DG, titled, ''Environmental Qualification of Certain Electrical Equipment Important to Safety for Nuclear Power Plants,'' is temporarily identified by its task number, DG–1361 (ADAMS Accession No. ML20183A423). DG–1361 is proposed revision 2 of RG 1.89. This revision of the guide (revision 2) endorses, with clarifications, the ''English'' portion of the dual logo IEC/IEEE Std. 60780–323, Edition 1, 2016–02 as a method acceptable to the NRC for meeting the regulatory requirements for EQ of certain electric equipment important to safety for nuclear power plants. This DG applies to licensees and applicants subject to title 10 of the *Code of Federal Regulations* (10 CFR) part 50, ''Domestic Licensing of Production and

Utilization Facilities,'' and 10 CFR part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants.''

The staff is also issuing for public comment a draft regulatory analysis (ADAMS Accession No. ML20192A230). The staff develops a regulatory analysis to assess the value of issuing or revising a regulatory guide as well as alternative courses of action.

III. Backfitting, Forward Fitting, and Issue Finality

DG–1361, if finalized, would provide the most recent guidance acceptable to the NRC staff for compliance with 10 CFR 50.49, ''Environmental qualification of electrical equipment important to safety for nuclear power plants'' for certain electrical equipment important to safety. Issuance of DG–1361, if finalized, would not constitute backfitting, as that term is defined in 10 CFR 50.109, ''Backfitting,'' and as described in NRC Management Directive 8.4, ''Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests''; constitute forward fitting, as that term is defined and described in Management Directive 8.4; or affect the issue finality of any approval issued under 10 CFR part 52. As explained in DG–1361, applicants and licensees would not be required to comply with the positions set forth in DG–1361.

IV. Specific Requests for Comments

In addition to the general request for comments on DG–1361, the NRC is also seeking specific comments that address the following question:

In this proposed RG revision, the staff has updated the current version of the RG (Revision 1) to endorse, with clarifications, IEC/IEEE Std. 60780–323, Edition 1, 2016–2. The current version of the RG (Revision 1) endorsed IEEE Std. 323–1974, ''IEEE Standard for Qualifying Class IE Equipment for Nuclear Power Generating Stations.'' As stated in the Implementation section of the DG, the staff does not intend to use this RG revision to support NRC staff actions in a manner that would constitute backfitting or forward fitting or affect the issue finality of an approval under 10 CFR part 52. Further, licensees or applicants are not required to comply with the RG. However, does the staff's proposed endorsement of IEEE Std. 60780–323, Edition 1, 2016–02 raise any concerns related to backfitting, forward fitting, or issue finality that the staff has not considered?

Dated: December 11, 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. 2020–27717 Filed 12–16–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 72–17; NRC–2020–0243]

Portland General Electric Company; Trojan Independent Spent Fuel Storage Installation

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment application; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) reviewed an application by Portland General Electric Company (PGE) for amendment of Materials License No. SNM–2509 which authorizes PGE to receive, possess, store, and transfer spent nuclear fuel and associated radioactive materials. The amendment sought to revise the description in the safety analysis report of the licensee's evaluation of explosion accident events.

DATES: December 17, 2020.

ADDRESSES: Please refer to Docket ID NRC–2020–0243 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0243. 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.'' 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: Chris Allen, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6877; email: *William.Allen@nrc.gov.*

SUPPLEMENTARY INFORMATION: By letter dated March 10, 2020 (ADAMS Package Accession No. ML20083G798), PGE submitted to the NRC, in accordance with part 72 of title 10 of the *Code of Federal Regulations* (10 CFR), a request to amend Special Nuclear Materials License No. SNM–2509 for the Trojan Independent Spent Fuel Storage Installation (ISFSI) site located in Columbia County, Oregon. License No. SNM–2509 authorizes PGE to receive, possess, store, and transfer spent nuclear fuel and associated radioactive materials resulting from the operation of the Trojan Power Plant in an ISFSI. Specifically, the amendment proposed to address a new anchorage point on the Columbia River near the ISFSI and incorporate a new method of evaluating explosion accident events.

The NRC issued a letter dated June 12, 2020 (ADAMS Accession No. ML20149K631), notifying PGE that the application was acceptable for review. In accordance with 10 CFR 72.16, a notice of docketing was published in the **Federal Register** on June 26, 2020 (85 FR 38398). The notice of docketing included an opportunity to request a hearing and to petition for leave to intervene. No requests for a hearing or petitions for leave to intervene were submitted.

The NRC prepared a safety evaluation report (ADAMS Accession No. ML20280A520) to document its review and evaluation of the amendment request. Also, in connection with this action, the NRC prepared an environmental assessment (EA) and a finding of no significant impact (FONSI). The notice of availability of the EA and FONSI was published in the **Federal Register** on November 17, 2020 (85 FR 73298).

Upon completing its review, the NRC staff determined that the request complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), as well as the NRC's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment. The NRC

approved and issued Amendment No. 7 to Special Nuclear Materials License No. SNM–2509, held by PGE for the receipt, possession, transfer, and storage of spent fuel and associated radioactive materials at the Trojan ISFSI. Pursuant to 10 CFR 72.46(d), the NRC is providing notice of the action taken. Amendment No. 7 was effective as of the date of issuance, December 11, 2020.

Dated: December 11, 2020.

For the Nuclear Regulatory Commission.

John B. McKirgan,

Chief, Storage and Transportation Licensing Branch, Division of Fuel Management, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2020–27702 Filed 12–16–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2020–0079]

Information Collection: Material Control and Accounting of Special Nuclear Material

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted a request for renewal of an existing collection of information to the Office of Management and Budget (OMB) for review. The information collection is entitled, ''Material Control and Accounting of Special Nuclear Material.''

DATES: Submit comments by January 19, 2021. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: David Cullison, NRC Clearance Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2020–0079 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0079.
- *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, then select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The supporting statement and burden spreadsheet are available in ADAMS under Accession Nos. ML20308A245 and ML20168A874, respectively.
- *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.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

B. Submitting Comments

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *https://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the OMB, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC recently submitted a request for renewal of an existing collection of information to OMB for review entitled, ''10 CFR part 74, Material Control and Accounting of Special Nuclear Material.'' The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on August 19, 2020, 85 FR 51070.

1. *The title of the information collection:* ''10 CFR part 74, Material Control and Accounting of Special Nuclear Material.''

2. *OMB approval number:* 3150–0123.

3. *Type of submission:* Extension.

4. *The form number if applicable:* Not applicable.

5. *How often the collection is required or requested:* Submission of fundamental nuclear material control plans is a one-time requirement which has been completed by all current licensees as required. However, licensees may submit amendments or revisions to the plans as necessary. Reports are submitted as events occur.

6. *Who will be required or asked to respond:* Persons licensed under Part 70 of title 10 of the *Code of Federal Regulations* (10 CFR), who possess and use certain forms and quantities of special nuclear material (SNM).

7. *The estimated number of annual responses:* 174 (17 reporting responses + 157 recordkeepers).

8. *The estimated number of annual respondents:* 157.

9. *An estimate of the total number of hours needed annually to comply with the information collection requirement or request:* 8,909 (669 hours reporting + 8,240 hours recordkeeping).

10. *Abstract:* 10 CFR part 74 establishes requirements for material control and accounting of SNM, and specific performance-based regulations for licensees authorized to possess, use, and produced strategic SNM, and SNM of moderate strategic significance and low strategic significance. The information is used by the NRC to make licensing and regulatory determinations concerning material control of SNM and to satisfy obligations of the United

States to the International Atomic Energy Agency. Submission or retention of the information is mandatory for persons subject to the requirements.

Dated: December 14, 2020.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2020–27743 Filed 12–16–20; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: 11:00 a.m. on Monday, December 21, 2020.

PLACE: The meeting will be held via remote means and/or at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present.

In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at *https://www.sec.gov.*

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matters at the closed meeting.

The subject matter of the closed meeting will consist of the following topics: Institution and settlement of injunctive actions; Institution and settlement of administrative proceedings; Resolution of litigation claims; and Other matters relating to enforcement proceedings; and Disclosure of non-public information.

At times, changes in Commission priorities require alterations in the scheduling of meeting agenda items that may consist of adjudicatory, examination, litigation, or regulatory matters.

CONTACT PERSON FOR MORE INFORMATION: For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

Dated: December 14, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–27862 Filed 12–15–20; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90649; File Nos. SR–DTC–2020–018; SR–FICC–2020–018; SR–NSCC–2020–021]

Self-Regulatory Organizations; The Depository Trust Company; Fixed Income Clearing Corporation; National Securities Clearing Corporation; Notice of Filings and Immediate Effectiveness of Proposed Rule Changes To Amend the Clearing Agencies Liquidity Risk Management Framework

December 11, 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 30, 2020, The Depository Trust Company (''DTC''), Fixed Income Clearing Corporation (''FICC''), and National Securities Clearing Corporation (''NSCC,'' and collectively, the ''Clearing Agencies'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule changes as described in Items I, II and III below, which Items have been primarily prepared by the Clearing Agencies. The Clearing Agencies filed the proposed rule changes pursuant to Section 19(b)(3)(A) 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 changes from interested persons.

I. Clearing Agencies' Statement of the Terms of Substance of the Proposed Rule Changes

The proposed rule changes consist of amendments to the Clearing Agency Liquidity Risk Management Framework (''Framework'') of the Clearing Agencies. Specifically, the proposed rule changes would (1) reflect that a stress testing team (''Stress Testing Team'') has taken over certain responsibilities related to liquidity risk management; (2) simplify the description of the FICC qualifying liquidity resources, which are identical for each of its divisions; (3) reflect the inclusion of the proceeds of NSCC's issuance and private placement of term debt as an additional NSCC liquidity resource; (4) revise the description of NSCC's supplemental liquidity deposits to allow for future revisions to this requirement; (5) reflect the reclassification of a stress scenario that assumes the default of multiple participants as an informational stress scenario; and (6) make other revisions in order to clarify and simplify the descriptions within the Framework, as further described below.

II. Clearing Agencies' Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

In their filings with the Commission, the Clearing Agencies included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments they received on the proposed rule changes. The text of these statements may be examined at the places specified in Item IV below. The Clearing Agencies have prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agencies' Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

1. Purpose

The Clearing Agencies adopted the Framework [5] to set forth the manner in which they measure, monitor and manage the liquidity risks that arise in or are borne by each of the Clearing Agencies, including (i) the manner in which each of the Clearing Agencies deploy their respective liquidity tools to meet their settlement obligations on an ongoing and timely basis, and (ii) each applicable Clearing Agencies' use of intraday liquidity.[6] In this way, the Framework describes the liquidity risk management of each of the Clearing Agencies and how the Clearing Agencies meet the applicable requirements of Rule 17Ad–22(e)(7).[7]

The Clearing Agencies are proposing changes to the Framework that would update, clarify and simplify the descriptions, but would not make any substantive revisions to how the Clearing Agencies manage their liquidity risks and comply with the applicable regulatory requirements. More specifically, the proposed changes would (1) reflect that the Stress Testing

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 82377 (December 21, 2017), 82 FR 61617 (December 28, 2017) (SR–DTC–2017–004; SR–NSCC–2017–005; SR–FICC–2017–008 (''Initial Filing'').

[6] *See* 17 CFR 240.17Ad–22(e)(7)(i), (ii), and (iv) through (ix).

[7] *Id.*

Team that has taken over certain responsibilities related to liquidity risk management; (2) simplify the description of the FICC qualifying liquidity resources, which are identical for each of its divisions; (3) reflect the inclusion of the proceeds of NSCC's issuance and private placement of term debt as an additional NSCC liquidity resource; (4) revise the description of NSCC's supplemental liquidity deposits to allow for future revisions to this requirement; (5) reflect the reclassification of a stress scenario that assumes the default of multiple participants as an informational stress scenario; and (6) make other revisions in order to clarify and simplify the descriptions within the Framework. Each of these proposed changes are described in greater detail below.

i. Proposed Amendments To Reflect Creation of Stress Testing Team

First, the proposed changes would reflect that the Stress Testing Team within the Group Chief Risk Office of DTCC (''GCRO''),[8] which previously was responsible for market risk stress testing, took over stress testing and other responsibilities related to liquidity risk management in late 2019. This change was intended to centralize stress testing and related responsibilities under one team. Because this team has taken responsibility for certain actions described in the Framework, the proposed changes would identify this team as responsible for those actions. For example, the Stress Testing Team would be identified as responsible for performing daily stress testing of the qualifying liquid resources that are held by each of NSCC and FICC in compliance with Rule 17Ad–22(e)(7)(i), and as responsible for certain actions related to the development and maintenance of stress scenarios.[9] The proposed changes would also identify the Stress Testing Working Group as responsible for reviewing and approving stress scenarios on a monthly basis to determine that they meeting regulatory requirements.

In connection with this proposed change, the Clearing Agencies are also proposing to include a general statement in Section 1 (Executive Summary) of the Framework, that, unless otherwise specified, actions in the Framework related to stress testing are performed by the Stress Testing Team and all other actions described in the Framework are the responsibility of the Liquidity Product Risk Unit. The proposed changes would also revise descriptions of certain actions to remove references to the group that is responsible for those actions. These proposed changes would simplify the description of these actions, while clarifying the teams responsible for conducting these actions in a general statement within the Framework.

ii. Proposed Amendments To Simplify the Description of FICC's Liquidity Resources

Second, the proposed changes would consolidate Sections 5.2.1 and 5.2.2 (in the proposed amended Framework, Section 5.2.2) to simplify the description of FICC's qualifying liquidity resources, which are identical for its Government Securities Division (''GSD'') and Mortgage-Backed Securities Division (''MBSD'').[10] The qualifying liquidity resources of both GSD and MBSD consist of deposits to their respective Clearing Funds, consisting of both cash and eligible securities,[11] and funds available from their respective rules-based committed Capped Contingency Liquidity Facility programs.[12] The proposed changes would simplify the Framework by consolidating two sections that currently describe identical resources for the two divisions of FICC. The proposed changes would also make conforming changes to section numbers, footnotes, and cross-references in Section 2 (Glossary of Key Terms).

iii. Proposed Amendments To Include Term Debt as NSCC Liquidity Resource

Third, the proposed changes would amend Section 5.2.3, which currently describes each of the qualifying liquidity resources of NSCC.[13] NSCC recently began raising additional prefunded liquidity through the issuance and private placement of term debt in the form of medium- and long-term unsecured notes.[14] The proposed changes would amend Section 5.2.3 to include a description of the proceeds of these debt issuances as an additional qualifying liquidity resource of NSCC. The proposed changes would update this section to accurately identify all qualifying liquidity resources of NSCC.

iv. Proposed Amendments To Revise Description of NSCC Supplemental Liquidity Deposits

Fourth, the proposed changes would also amend Section 5.2.3 (in the proposed amended Framework, Section 5.2.2) to revise the description of the supplemental liquidity deposits, or ''SLD.'' Under Rule 4(A) of the NSCC Rules & Procedures (''NSCC Rules''), Members whose default would pose the largest liquidity exposure to NSCC are required to make additional deposits to the NSCC Clearing Fund in the form of SLD to cover that liquidity exposure.[15]

The proposed changes to Section 5.2.3 would remove references to certain aspects of the SLD requirements that NSCC is planning to amend pursuant to a separate proposed rule change to be filed.[16] The proposed changes to Section 5.2.3 would remove these descriptions but would retain a complete and clear description of the SLD requirements for purposes of the Framework. The proposed changes would allow the Framework to accurately describe the SLD requirements, notwithstanding any future changes to those requirements.

v. Proposed Amendments To Update the Multiple Member Default Stress Scenario

Fifth, the proposed changes would update Sections 6.2.3 to reflect the recent reclassification of a stress scenario that assumes a simultaneous default of multiple unaffiliated participants or multiple Affiliated Families from a ''Regulatory Level 3 Scenario'' to an ''Informational Level 3 Scenario.'' Section 6.2 describes how FICC and NSCC measure the sufficiency of their respective qualifying liquid resources through daily liquidity studies, across a range of stress scenarios in compliance with the requirements under Rule 17Ad–22(e)(7)(i) and (vi)(A).[17] One set of stress scenarios are categorized as Level 3

[8] The parent company of the Clearing Agencies is The Depository Trust & Clearing Corporation (''DTCC''). DTCC operates on a shared services model with respect to the Clearing Agencies and its other subsidiaries. Most corporate functions are established and managed on an enterprise-wide basis pursuant to intercompany agreements under which it is generally DTCC that provides a relevant service to a subsidiary, including the Clearing Agencies.

[9] 17 CFR 240.17Ad–22(e)(7)(i).

[10] ''Qualifying liquid resources'' are defined in Rule 17Ad–22(a)(14). 17 CFR 240.17Ad–22(a)(14).

[11] Rule 4, Section 5 (Use of Clearing Fund) of the Rulebook of GSD and Rule 4, Section 5 (Use of Clearing Fund) of the Clearing Rules of MBSD, *available at http://dtcc.com/legal/rules-and-procedures.*

[12] Rule 22A, Section 2a (Liquidity Requirements of Netting Members) of the Rulebook of GSD and Rule 17, Section 2a (Capped Contingency Liquidity Facility) of the Clearing Rules of MBSD, *available at http://dtcc.com/legal/rules-and-procedures.*

[13] *Supra* note 10.

[14] *See* Securities Exchange Act Release No. 88146 (February 7, 2020), 85 FR 8046 (February 12, 2020) (SR–NSCC–2019–802).

[15] Rule 4(A) of the NSCC Rules, *available at http://dtcc.com/legal/rules-and-procedures.*

[16] Such proposed changes to Rule 4(A) of the NSCC Rules would be filed by NSCC pursuant to Section 19(b)(1) of the Act. 15 U.S.C. 78s(b)(1).

[17] 17 CFR 240.17Ad–22(e)(7)(i) and (vi)(A).

Scenarios, which are further identified as either (1) Regulatory Stress Scenarios, which are stress scenarios that meet the requirements set forth in Rule 17Ad–22(e)(7)(vi)(A),[18] and (2) Informational Stress Scenarios, which are stress scenarios that are not designed to meet the requirements set forth in Rule 17Ad–22(e)(7)(vi)(A),[19] but are used for both informational and monitoring purposes.

NSCC previously included a stress scenario that assumed the default of multiple participants as a Regulatory Level 3 Scenario, despite the fact that this scenario utilizes parameters and assumptions that exceed the requirements of Rule 17Ad–22(e)(7)(vi)(A).[20] NSCC has reclassified this scenario as an Informational Level 3 Scenario and, as such, it is utilized for informational and monitoring purposes only. The proposed changes would reflect this reclassification in Section 6.2.3, where Level 3 Scenarios are described.

vi. Proposed Amendments To Clarify and Simplify Descriptions in the Framework

Finally, the proposed changes would make minor updates to certain descriptions in the Framework to clarify and simplify those descriptions. For example, the proposed changes would amend Section 2 (Glossary of Key Terms) to use the term ''Group Chief Risk Office'' in the definition of the Liquidity Product Risk Unit, instead of using the defined term ''GCRO'' which is not otherwise defined in the Framework. The proposed changes would also amend Section 2 to update the defined terms of ''CP Program'', ''Prefunded Liquidity'', and ''Term Debt Issuance'' in connection with the proposed changes to include term debt as an NSCC liquidity resource, as described above.

The proposed changes would also clarify the names of certain groups identified in the Framework. For example, the team that is responsible for market risk management would be referred to as ''Market Risk Management'' rather than the ''Market Risk unit''.

These proposed changes would not make any substantive revisions to the amended descriptions in the Framework but would clarify and simplify those descriptions with immaterial updates.

2. Statutory Basis

The Clearing Agencies believe that the proposed changes are consistent with Section 17A(b)(3)(F) of the Act, for the reasons described below.[21]

Section 17A(b)(3)(F) of the Act requires, in part, that the rules of a registered clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions, and to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, for the reasons described below.[22] As described above, the proposed changes would update the Framework to (1) reflect a change in the teams responsible for certain actions, (2) include an additional liquidity resource at NSCC, and (3) reflect a change in the classification of one of the stress scenarios used by NSCC and FICC. The proposed changes would also simplify the description of the FICC qualifying liquidity resources, update the description of the NSCC SLD, and make other updates to clarify and simplify descriptions in the Framework. By updating the Framework to reflect these changes, and creating clearer, simpler descriptions, the Clearing Agencies believe the proposed changes would make the Framework more effective in describing liquidity risk management that is conducted by the Clearing Agencies, as described therein.

The Framework describes how the Clearing Agencies carry out its liquidity risk management strategy such that, with respect to FICC and NSCC, they maintain liquid resources sufficient to meet the potential amount of funding required to settle outstanding transactions of a defaulting participant or family of affiliated participants in a timely manner, and with respect to DTC, it maintains sufficient available liquid resources to complete system-wide settlement on each business day, with a high degree of confidence and notwithstanding the failure to settle of the participant or affiliated family of participants with the largest settlement obligation. As such, the Clearing Agencies' liquidity risk management strategies address the Clearing Agencies' maintenance of sufficient liquid resources, which allow them to continue the prompt and accurate clearance and settlement of securities and can continue to assure the safeguarding of securities and funds which are in their custody or control or for which they are responsible notwithstanding the default of a participant or family of affiliated participants.

The proposed changes to update the Framework and improve the clarity and accuracy of the descriptions of liquidity risk management functions within the Framework would assist the Clearing Agencies in carrying out these functions. Therefore, the Clearing Agencies believe the proposed changes are consistent with the requirements of Section 17A(b)(3)(F) of the Act.[23]

(B) Clearing Agencies Statement on Burden on Competition

The Clearing Agencies do not believe the proposed changes to the Framework described above would have any impact, or impose any burden, on competition. As described above, the proposed changes would update the Framework, and would improve the clarity and accuracy of the descriptions of the Clearing Agencies' liquidity risk management functions. Therefore, the proposed changes are technical and non-material in nature, relating mostly to the operation of the Framework rather than the liquidity risk management functions described therein. As such, the Clearing Agencies do not believe that the proposed rule changes would have any impact on competition.

(C) Clearing Agencies' Statement on Comments on the Proposed Rule Changes Received From Members, Participants, or Others

The Clearing Agencies have not solicited or received any written comments relating to this proposal. The Clearing Agencies will notify the Commission of any written comments received by the Clearing Agencies.

III. Date of Effectiveness of the Proposed Rule Changes, and Timing for Commission Action

Because the foregoing proposed rule changes do 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[24] and Rule 19b–4(f)(6) thereunder.[25]

At any time within 60 days of the filing of the proposed rule changes, the Commission summarily may

[18] 17 CFR 240.17Ad–22(e)(7)(vi)(A).

[19] *Id.*

[20] *Id.*

[21] 15 U.S.C. 78q–1(b)(3)(F).

[22] *Id.*

[23] *Id.*

[24] 15 U.S.C. 78s(b)(3)(A).

[25] 17 CFR 240.19b–4(f)(6).

temporarily suspend such rule changes if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule changes are 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 Numbers SR–DTC–2020–018, SR–FICC–2020–018, and SR–NSCC–2020–021 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Numbers SR–DTC–2020–018, SR–FICC–2020–018, and SR–NSCC–2020–021. These file numbers 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 changes that are filed with the Commission, and all written communications relating to the proposed rule changes 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 Clearing Agencies and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Numbers SR–DTC–2020–018, SR–FICC–2020–018, and SR–NSCC–2020–021 and should be submitted on or before January 7, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27728 Filed 12–16–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90639; File No. SR–EMERALD–2020–19]

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule

December 11, 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, MIAX Emerald, LLC (''MIAX Emerald'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Emerald Fee Schedule (the ''Fee Schedule'').

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/emerald,* at MIAX Emerald's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to amend the exchange groupings of options exchanges within the routing fee table in Section 1)b) of the Fee Schedule.

Currently, the Exchange assesses routing fees based upon (i) the origin type of the order, (ii) whether or not it is an order for standard option classes in the Penny Interval Program[3] (''Penny classes'') or an order for standard option classes which are not in the Penny Interval Program (''Non-Penny classes'') (or other explicitly identified classes), and (iii) to which away market it is being routed. This assessment practice is identical to the routing fees assessment practice currently utilized by the Exchange's affiliates, Miami International Securities Exchange, LLC (''MIAX'') and MIAX PEARL, LLC (''MIAX PEARL''). This is also similar to the methodologies utilized by other competing options exchanges, such as the Cboe BZX Exchange, Inc. (''Cboe BZX''), in assessing routing fees. Cboe BZX has exchange groupings in its fee schedule, similar to those of the Exchange, whereby several exchanges are grouped into the same category, dependent on the order's origin type and whether it is a Penny or Non-Penny class.[4]

As a result of conducting a periodic review of the current transaction fees and rebates charged by away markets, the Exchange has determined to amend the exchange groupings of options exchanges within the routing fee table to better reflect the associated costs of routing customer orders to those options exchanges for execution. In particular, the Exchange proposes to amend the seventh ''Routed, Public Customer that

[26] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 88993 (June 2, 2020), 85 FR 35145 (June 8, 2020) (SR–EMERALD–2020–05) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 510, Minimum Price Variations and Minimum Trading Increments, To Conform the Rule to Section 3.1 of the Plan for the Purpose of Developing and Implementing Procedures Designed To Facilitate the Listing and Trading of Standardized Options).

[4] *See* Cboe BZX Fee Schedule under ''Fee Codes and Associated Fees.''

is not a Priority Customer, Non-Penny Program'' exchange grouping to move Nasdaq MRX from the seventh exchange grouping into the eighth ''Routed, Public Customer that is not a Priority Customer, Non-Penny Program'' exchange grouping. The impact of this proposed change will be that the routing fee for Public Customer orders that are not Priority Customer orders in the Penny Program, that are routed to Nasdaq MRX, LLC (''Nasdaq MRX''), will increase from $1.15 to $1.25. The Exchange notes that no options exchanges were removed from the routing fee table entirely, with the only change being the change in categorization for Nasdaq MRX. The purpose of the proposed rule change is to adjust the routing fee for certain orders routed to Nasdaq MRX to reflect the associated costs for that routed execution.

Accordingly, with the proposed change, the routing fee table will be as follows:

Description	Fees
Routed, Priority Customer, Penny Program, to: NYSE American, BOX, Cboe, Cboe EDGX Options, MIAX, Nasdaq MRX, Nasdaq PHLX (except SPY), Nasdaq BX Options	$0.15
Routed, Priority Customer, Penny Program, to: NYSE Arca Options, Cboe BZX Options, Cboe C2, Nasdaq GEMX, Nasdaq ISE, NOM, Nasdaq PHLX (SPY only), MIAX PEARL	0.65
Routed, Priority Customer, Non-Penny Program, to: NYSE American, BOX, Cboe, Cboe EDGX Options, MIAX, Nasdaq ISE, Nasdaq MRX, Nasdaq PHLX, Nasdaq BX Options	0.15
Routed, Priority Customer, Non-Penny Program, to: NYSE Arca Options, Cboe BZX Options, Cboe C2, MIAX PEARL, Nasdaq GEMX, NOM	1.00
Routed, Public Customer that is not a Priority Customer, Penny Program, to: NYSE American, NYSE Arca Options, Cboe BZX Options, BOX, Cboe, Cboe C2, Cboe EDGX Options, Nasdaq GEMX, Nasdaq ISE, Nasdaq MRX, MIAX, MIAX PEARL, NOM, Nasdaq PHLX, Nasdaq BX Options	0.65
Routed, Public Customer that is not a Priority Customer, Non-Penny Program, to: MIAX, NYSE American, Cboe, Nasdaq PHLX, Nasdaq ISE, Cboe EDGX Options	1.00
Routed, Public Customer that is not a Priority Customer, Non-Penny Program, to: Cboe C2, BOX, Nasdaq BX Options, NOM, MIAX PEARL	1.15
Routed, Public Customer that is not a Priority Customer, Non-Penny Program, to: Cboe BZX Options, NYSE Arca Options, Nasdaq GEMX, Nasdaq MRX	1.25

In determining to amend its Routing Fees, the Exchange took into account transaction fees and rebates assessed by the away markets to which the Exchange routes orders, as well as the Exchange's clearing costs,[5] administrative, regulatory, and technical costs associated with routing orders to an away market. The Exchange uses unaffiliated routing brokers to route orders to the away markets; the costs associated with the use of these services are included in the routing fees specified in the Fee Schedule. This routing fees structure is not only similar to the Exchange's affiliates, MIAX and MIAX PEARL, but is also comparable to the structures in place at other competing options exchanges, such as Cboe BZX.[6] The Exchange's routing fee structure approximates the Exchange's costs associated with routing orders to away markets. The per-contract transaction fee amount associated with each grouping closely approximates the Exchange's all-in cost (plus an additional, non-material amount) to execute that corresponding contract at that corresponding exchange. The Exchange notes that in determining whether to adjust certain groupings of options exchanges in the routing fee table, the Exchange considered the transaction fees and rebates assessed by away markets, and determined to amend the grouping of exchanges that assess transaction fees for routed orders within a similar range. This same logic and structure applies to all of the groupings in the routing fees table. By utilizing the same structure that is utilized by the Exchange's affiliates, MIAX and MIAX PEARL, the Exchange's Members[7] will be assessed routing fees in a similar manner. The Exchange believes that this structure will minimize any confusion as to the method of assessing routing fees between the three exchanges. The Exchange notes that its affiliates, MIAX and MIAX PEARL, will file to make the same proposed routing fee change for Nasdaq MRX.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act[8] in general, and furthers the objectives of Section 6(b)(4) of the Act[9] in particular, in that it is an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act[10] in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes the proposed change to the exchange groupings of options exchanges within the routing fee table furthers the objectives of Section 6(b)(4) of the Act and is reasonable, equitable and not unfairly discriminatory because the proposed change will continue to apply in the same manner to all Members that are subject to routing fees. The Exchange believes the proposed change to the routing fee table exchange groupings furthers the objectives of Section 6(b)(5) of the Act and is designed to promote just and equitable principles of trade and is not unfairly discriminatory because the proposed change seeks to recoup costs that are incurred by the Exchange when routing customer orders

[5] The OCC amended its clearing fee from $0.01 per contract side to $0.02 per contract side. *See* Securities Exchange Act Release No. 71769 (March 21, 2014), 79 FR 17214 (March 27, 2014) (SR–OCC–2014–05).

[6] *See supra* note 4. The Cboe BZX fee schedule has exchange groupings, whereby several exchanges are grouped into the same category, dependent on the order's Origin type and whether it is a Penny or Non-Penny class. For example, Cboe BZX fee code RR covers routed customer orders in Non-Penny classes to NYSE Arca, Cboe C2, Nasdaq ISE, Nasdaq Gemini, MIAX Emerald, MIAX PEARL, or NOM, with a single fee of $1.25 per contract. *Id.*

[7] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* the Definitions section of the Fee Schedule and Exchange Rule 100.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78f(b)(5).

to away markets on behalf of Members and does so in the same manner to all Members that are subject to routing fees. The costs to the Exchange to route orders to away markets for execution primarily includes transaction fees and rebates assessed by the away markets to which the Exchange routes orders, in addition to the Exchange's clearing costs, administrative, regulatory and technical costs. The Exchange believes that the proposed re-categorization of certain exchange groupings would enable the Exchange to recover the costs it incurs to route orders to Nasdaq MRX. The per-contract transaction fee amount associated with each grouping approximates the Exchange's all-in cost (plus an additional, non-material amount) to execute the corresponding contract at the corresponding exchange.

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 its proposed re-categorization of certain exchange groupings is intended to enable the Exchange to recover the costs it incurs to route orders to away markets, particularly Nasdaq MRX. The Exchange does not believe that this proposal imposes any unnecessary burden on competition because it seeks to recoup costs incurred by the Exchange when routing orders to away markets on behalf of Members and other exchanges have similar routing fee structures.[11]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[12] and Rule 19b–4(f)(2)[13] 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–EMERALD–2020–19 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–EMERALD–2020–19. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EMERALD–2020–19 and should be submitted on or before January 7, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

J. Matthew DeLesDernier,

Assistant Secretary.

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[11] *See supra* note 4.

[12] 15 U.S.C. 78s(b)(3)(A)(ii).

[13] 17 CFR 240.19b–4(f)(2).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90643; File No. SR–CboeEDGX–2020–061]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Amend Its Fee Schedule With Respect to Qualified Contingent Cross (''QCC'') and Solicitation Auction Mechanism (''SAM'') Orders

December 11, 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 December 3, 2020, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX Options'') proposes to amend its Fee Schedule with respect to Qualified Contingent Cross (''QCC'') and Solicitation Auction Mechanism (''SAM'') orders. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

[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 Exchange proposes to modify the Fee Schedule relating to Qualified Contingent Cross (''QCC'') and Solicitation Auction Mechanism (''SAM'') [3] orders.[4]

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 15% of the market share.[5] Thus, in such a low-concentrated and highly competitive market, no single options exchange possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. In response to the competitive environment, the Exchange offers specific rates and credits in its fees schedule, like that of other options exchanges' fees schedules, which the Exchange believes provide incentive to Members to increase order flow of certain qualifying orders.

QCC Transaction Fees

By way of background, a QCC order is comprised of an 'initiating order' to buy (sell) at least 1,000 contracts, coupled with a contra-side order to sell (buy) an equal number of contracts and that for complex QCC transactions, the 1,000 contracts minimum is applied per leg. Currently, the Exchange assesses a fee of $0.08 per contract for Non-Customer Agency and Contra QCC orders and $0.00 for Customer QCC Agency and Contra orders. The Exchange proposes to amend its fees for orders executed in QCC transactions. First, the Exchange proposes to eliminate transaction fees for Professional Agency and Contra QCC orders. The purpose of the proposed change to waive fees for Professional QCC orders is to incentivize the sending of QCC orders to the Exchange by these market participants and compete with other Exchanges that similarly do not assess fees on Professional QCC orders.[6] In connection with this proposed change, the Exchange proposes to adopt new fee codes QO and QP to apply specifically to QCC Agency and Contra Professional orders, respectively, and amend the description of current fee codes QM and QN to provide it applies to Non-Customer, Non-Professionals. The Exchange next proposes to increase the fees for QCC Agency and Contra Non-Customer, Non-Professional orders from $0.08 per contract to $0.20 per contract. The proposed Non-Customer, Non-Professional QCC fee change is also in line with amounts assessed by other exchanges for similar transactions.[7]

Agency Orders and Designated Give Up

Footnote 5 of the Fee Schedule currently specifies that when an order is submitted with a Designated Give Up, as defined in Rule 21.12(b)(1), the applicable rebates for such orders when executed on the Exchange (orders yielding fee code BC, NC, PC, SC, QA, QM, ZA and ZB) are provided to the Member who routed the order to the Exchange. Pursuant to Rule 21.12, which specifies the process to submit an order with a Designated Give Up, a Member acting as an options routing firm on behalf of one or more other Exchange Members (a ''Routing Firm'') is able to route orders to the Exchange and to immediately give up the party (a party other than the Routing Firm itself or the Routing Firm's own clearing firm) who accepts and clears any resulting transaction. Because the Routing Firm is responsible for the decision to route the order to the Exchange, the Exchange currently provides such Member with the rebate when orders that yield fee code BC,[8] NC,[9] PC,[10] SC,[11] QA,[12] QM,[13] ZA [14] and ZB [15] are executed. In connection with the adoption of a new fee code for QCC Professional orders, the Exchange proposes to add new fee code QO (QCC Professional Agency Order) to the lead-in sentence of footnote 5 and to append footnote 5 to fee code QO in the Fee Codes and Associated Fees table of the Fee Schedule. The Exchange notes that Professional QCC Agency orders are currently included under Footnote 5, albeit represented by fee code QM, which will no longer be appended to Professional QCC Agency orders.

QCC Initiator/Solicitation Rebate Tiers

As noted above, the Exchange operates in a highly-competitive market by which competitive forces constrain the Exchange's transaction fees and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. In response to the competitive environment, the Exchange offers, among other things, tiered pricing which provides Members opportunities to qualify for higher rebates or reduced fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher

[3] SAM is the Exchange's solicited order mechanism for larger-sized orders.

[4] The Exchange initially filed the proposed fee changes on December 1, 2020 (SR–CboeEDGX–2020–058). On December 3, 2020, the Exchange withdrew that filing and submitted this proposal.

[5] *See* Cboe Global Markets U.S. Options Market Monthly Volume Summary (November 25, 2020), available at *https://markets.cboe.com/us/options/market_statistics/*.

[6] *See e.g.,* BOX Options Fee Schedule, Section 1(D), Qualified Contingent Cross (''QCC'') Transactions, which provides that no fees are assessed for Customer and Professional Customer QCC transactions. *See also* NYSE American Options Fee Schedule, Section 1(F), QCC Fees and Credits, which also provides that no fees are assessed for Customer and Professional Customer QCC transactions.

[7] *See e.g.,* Nasdaq ISE LLC Pricing Schedule, Options 7 Pricing Schedule, Section 1, ''Crossing Orders'', which provides that non-customer, non-professional QCC orders are assessed $0.20 per contract.

[8] Fee Code ''BC'' is appended to AIM Agency Customer orders.

[9] Fee Code ''NC'' is appended to Customer Non-Penny orders.

[10] Fee Code ''PC'' is appended to Customer Penny orders.

[11] Fee Code ''SC'' is appended to SAM Agency Customer orders.

[12] Fee Code ''QA'' is appended to QCC Agency Customer orders.

[13] Fee Code ''QM'' is appended to QCC Agency Non-Customer orders.

[14] Fee Code ''ZA'' is appended to Complex Customer (contra Non-Customer), Penny orders.

[15] Fee Code ''ZB'' is appended to Complex Customer (contra Non-Customer), Non-Penny orders.

benefits or discounts for satisfying increasingly more stringent criteria. One such example is that the Exchange currently offers QCC Initiator/Solicitation Rebate Tiers under footnote 7, which provide enhanced rebates for qualifying QCC and SAM Agency orders where a Member meets incrementally increasing volume thresholds. Particularly, the Exchange will apply the QCC Initiator/Solicitation Rebate to the Member that submits QCC Agency Orders or Solicitation Agency Orders, including a Member who routed orders to the Exchange with a Designated Give Up, when at least one side of the transaction is of Non-Customer capacity. Currently fee codes QA, QM, SA [16] and SC qualify for these rebates. Currently, Tier 1 provides no rebates for Members that submit qualifying orders (*i.e.,* QA, QM, SA and SC) totaling 0 to 99,999 contracts per month; Tier 2, provides a rebate of $0.05 per contract for Members that submit qualifying orders totaling 100,000 to 199,999 contracts per month; Tier 3, provides a rebate of $0.07 per contract for Members that submit qualifying orders totaling 200,000 to 499,999 contracts per month; Tier 4, provides a rebate of $0.09 per contract for Members that submit qualifying orders totaling 500,000 to 749,999 contracts per month; Tier 5 provides a rebate of $0.10 per contract for Members that submit qualifying orders totaling 750,000 to 999,999 contracts per month; and Tier 6, provides a rebate of $0.11 per contract for Members that submit qualifying orders totaling 1,000,000 or more contracts per month.

The Exchange proposes to amend the QCC Initiator/Solicitation Rebate Tier program by (1) amending the volume thresholds, (2) eliminating Tiers 5 and 6, (3) amending the current rebates and (4) clarifying that the program will apply to new fee code QO which will be appended to QCC Agency Professional orders. The Exchange first proposes to amend the volume thresholds as follows:

- To receive the rebate in Tier 1, a member must submit qualifying orders totaling 0–999,999 contracts per month.
- To receive the rebate in Tier 2, a member must submit qualifying orders totaling 1,000,000–1,999,999 contracts per month.
- To receive the rebate in Tier 3, a member must submit qualifying orders totaling 2,000,000–2,999,999 contracts per month.
- To receive the rebate in Tier 4, a member must submit qualifying orders totaling 3,000,000 or more contracts per month.

The Exchange also proposes to eliminate Tiers 5 and 6 and notes that no Members have historically hit such tiers. The Exchange also proposes to adopt a new rebate structure for Tiers 1 through 4. Particularly, the Exchange proposes to adopt two separate rebates that are available under each tier, depending on the market participants involved in a particular transaction. A qualifying order will receive the rebate under ''Rebate 1'' if one side of the transaction is of Non-Customer, Non-Professional capacity. A qualifying order will receive the rebate under ''Rebate 2'', if both sides of the transaction are of Non-Customer, Non-Professional capacity. Transactions where both sides of the transaction are Customers or Professionals will not receive a rebate. The proposed rebates and corresponding tiers are as follows:

Tier	Volume threshold (per month)	Rebate 1	Rebate 2
1	0 to 999,999 contracts	($0.14)	($0.22)
2	1,000,000 to 1,999,999 contracts	($0.15)	($0.23)
3	2,000,000 to 2,999,999 contracts	($0.16)	($0.24)
4	3,000,000+ contracts	($0.16)	($0.26)

The Exchange is proposing to increase the volume thresholds under the tiers in light of the proposed new (and much higher) enhanced rebates. Particularly, the Exchange believes the proposed thresholds are more appropriate and commensurate with the new proposed rebates. The Exchange notes that it also wishes to provide a lower enhanced rebate where only one side of a transaction is a Non-Customer, Non-Professional, as it receives less revenue as compared to when both sides of a transaction are Non-Customer, Non-Professionals. The Exchange believes the proposed rebates and rebate structure are competitive with rebates offered at another exchange for similar transactions.[17] Additionally, the proposed changes to the QCC Initiator/Solicitation Rebate Tiers are designed to incentivize Members to grow their QCC Initiator and/or Solicitation order flow to receive the enhanced rebates. The Exchange believes that incentivizing greater QCC Initiator and/or Solicitation order flow would provide more opportunities for participation in QCC trades or in the SAM Auction which icreases [sic] opportunities for price improvement.

Lastly, in connection with the adoption of a new fee code for QCC Professional orders, the Exchange proposes to add new fee code QO (QCC Agency Professional Order) to the lead-in sentence of footnote 7 and to append footnote 7 to fee code QO in the Fee Codes and Associated Fees table of the Fee Schedule. The Exchange notes that Professional QCC Agency orders already are included under Footnote 7, albeit represented by fee code QM, which will no longer be appended to Professional QCC Agency orders.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act,[18] in general, and furthers the requirements of Section 6(b)(4),[19] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

As stated above, the Exchange operates in a highly-competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The Exchange is only one of several options venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. The proposed fee

[16] Fee Code ''SA'' is appended to SAM Agency Non-Customer orders.

[17] *See* Box Options Fee Schedule, Section 1(D), which provides a $0.14 per contract rebate to the Agency Order where at least one party to the QCC transaction is a Broker-Dealer or Market-Maker (*i.e.,* a non-customer, non-professional) and a $0.22 per contract rebate where both parties to the QCC transaction are a Broker-Dealer or Market-Maker.

[18] 15 U.S.C. 78f.

[19] 15 U.S.C. 78f(b)(4).

changes reflect a competitive pricing structure designed to incentivize market participants, including Professionals, to direct their QCC order flow, which the Exchange believes would enhance market quality to the benefit of all Members.

Overall, the Exchange believes that its volume-based tiers for QCC and SAM Agency Orders is consistent with Section 6(b)(4) of the Act in that the proposed fees are reasonable, equitable and not unfairly discriminatory. The Exchange believes that the proposed fees and rebates are reasonable, equitable, and not unfairly discriminatory in that competing options exchanges offer substantially the same fees and credits in connection with QCC transactions as the Exchange now proposes.[20]

QCC Transaction Fees

In particular, the Exchange believes the proposal to not assess a fee for Professional QCC orders is reasonable because such market participants would not be subject to any fees for such transactions. The Exchange notes other Exchanges also waive fees for Professional QCC transactions.[21] The Exchange believes the proposed change to increase the fee for Non-Customer, Non-Professional QCC orders is reasonable because it is in line with the amounts assessed for similar orders at other exchanges.[22] Additionally, the proposed rate changes apply uniformly to similarly situated market participants.

Professional QCC Agency Orders and Designated Give Up

The Exchange believes that the proposal to add new fee code QO to the lead-in sentence of footnote 5 and to append footnote 5 to fee code QO is a reasonable and equitable allocation of fees and dues and is not unreasonably discriminatory because, as is currently the case pursuant to footnote 5 and Rule 21.12(b)(1), the proposal simply makes clear that a firm acting as a Routing Firm that routes Professional QCC Agency Orders to the Exchange will be provided applicable rebates, based on the Routing Firm's decision to route the order to the Exchange. Particularly, as noted above, Professional QCC Agency orders were already subject to footnote 5 of the fee schedule, albeit represented by footnote QM.

QCC Initiator/Solicitation Rebate Tiers

The Exchange believes the proposed changes to the existing QCC Initiator/Solicitation Rebate Tiers is reasonable because they continue to provide opportunities for Members to receive higher rebates by providing for incrementally increasing volume-based criteria they can reach for (albeit using more stringent criteria, but offering higher enhanced rebates). The Exchange believes the rebate tiers, as modified, continue to serve as a reasonable means to encourage Members to increase their liquidity on the Exchange, particularly in connection with additional QCC and/or Solicitation Agency Order flow to the Exchange in order to benefit from the proposed enhanced rebates. The Exchange believes that incentivizing greater QCC Initiator and/or Solicitation order flow would provide more opportunities for participation in QCC trades or in the SAM Auction which increases opportunities for price improvement. The Exchange also notes that any overall increased liquidity that may result from the proposed tier incentives benefits all investors by offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection. The Exchange again notes that volume-based incentives and discounts have been widely adopted by other exchanges, and believes that the proposed tiers are reasonable, equitable and non-discriminatory because they are open to all Members on an equal basis.

The Exchange believes eliminating current Tiers 5 and 6 is reasonable because the Exchange is not required to maintain these tiers and Members still have the opportunity to receive enhanced rebates under the existing Tiers 1–4. Moreover, no Member has historically achieved these tiers. The Exchange believes the proposal to eliminate these tiers is also equitable and not unfairly discriminatory because it applies to all Members.

The Exchange believes the proposed enhanced rebates are commensurate with the difficulty of the proposed criteria and that the tiers continue to provide an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher rebates for satisfying increasingly more stringent criteria. As noted above, the Exchange also believes the proposal to adopt two alternative rebates depending on the capacity of the parties to the transaction is reasonable. As discussed, the Exchange wishes to provide a lower enhanced rebate where only one side of a transaction is a Non-Customer, Non-Professional, as these transactions generally generate less revenue as compared to when both sides of a transaction are Non-Customer, Non-Professionals. The Exchange also believes the proposed rebates and rebate structure are competitive with rebates offered at another exchange for similar transactions.[23]

The Exchange believes that the proposed changes to Tiers 1–4 represent an equitable allocation of fees and is not unfairly discriminatory because Members will be eligible for these tiers and the corresponding enhanced rebates will apply uniformly to all Members that reach the proposed tier criteria. The Exchange believes that a number of market participants have a reasonable opportunity to satisfy the tiers' criteria, even as modified. The Exchange notes that currently no Members satisfy any of the Tiers' current criteria. While the Exchange has no way of knowing whether this proposed rule change would definitively result in any particular Member qualifying for the proposed tiers, the Exchange anticipates at least one to three Members meeting, or being reasonably able to meet, the proposed criteria under the rebate tiers. Particularly, the Exchange anticipates at least one firm to satisfy the criteria under each of Tiers 1, 2 and 3; however, the proposed tiers are open to any Member that satisfies the tiers' criteria. The Exchange also notes that the proposed changes will not adversely impact any Member's pricing or their ability to qualify for other rebate tiers. Rather, should a Member not meet the proposed criteria, the Member will merely not receive the corresponding enhanced rebates.

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

[20] *See e.g.,* BOX Options Fee Schedule, Section 1(D), Qualified Contingent Cross (''QCC'') Transactions. *See also* NYSE American Options Fee Schedule, Section 1(F), QCC Fees and Credits and Nasdaq ISE LLC Pricing Schedule, Options 7 Pricing Schedule, Section 1, ''Crossing Orders''.

[21] *See e.g.,* BOX Options Fee Schedule, Section 1(D), Qualified Contingent Cross (''QCC'') Transactions, which provides that no fees are assessed for Customer and Professional Customer QCC transactions. *See also* NYSE American Options Fee Schedule, Section 1(F), QCC Fees and Credits, which also provides that no fees are assessed for Customer and Professional Customer QCC transactions.

[22] *See e.g.,* Nasdaq ISE LLC Pricing Schedule, Options 7 Pricing Schedule, Section 1, ''Crossing Orders'', which provides that non-customer, non-professional QCC orders are assessed $0.20 per contract.

[23] *See* Box Options Fee Schedule, Section 1(D), which provides a $0.14 per contract rebate to the Agency Order where at least one party to the QCC transaction is a Broker-Dealer or Market-Maker (*i.e.,* a non-customer, non-professional) and a $0.22 per contract rebate where both parties to the QCC transaction are a Broker-Dealer or Market-Maker.

necessary or appropriate in furtherance of the purposes of the Act. Rather, as discussed above, the Exchange believes that the proposed change would encourage the submission of additional order flow to a public exchange, thereby promoting market depth, execution incentives and enhanced execution opportunities for all Members. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.''

The Exchange believes that the proposed rule change does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. First, the Exchange notes that the proposed changes apply uniformly to similarly situated Members. The Exchange believes that the proposed changes related to QCC and SAM transactions would not impose any burden on intramarket competition, but rather, serves to increase intramarket competition by incentivizing members, including Professionals, to direct their QCC and SAM orders to the Exchange, in turn providing for more opportunities to compete at improved prices. Additionally, the proposed rule change benefits all market participants as any overall increased liquidity that may result from the proposed fee and tier incentives benefits all investors by offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection.

Next, the Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues they may participate on and direct their order flow, including 15 other options exchanges. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single options exchange has more than 15% of the market share.[24] Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchanges and off-exchange venues if they deem fee levels at those other venues to be more favorable. As noted above, the Exchange believes that the proposed pricing rebates under the QCC Initiator/Solicitation Rebate Tiers is comparable to that of other exchanges offering similar QCC functionality. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''. Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [25] and paragraph (f) of Rule 19b–4 [26] 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–CboeEDGX–2020–061 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeEDGX–2020–061. 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

[24] *See supra* note 1 [sic].

[25] 15 U.S.C. 78s(b)(3)(A).

[26] 17 CFR 240.19b–4(f).

submissions should refer to File Number SR–CboeEDGX–2020–061 and should be submitted on or before January 7, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27724 Filed 12–16–20; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90651; File No. SR–PEARL–2020–33]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIAX PEARL Equities Fee Schedule To Adopt Connectivity Fees, Port Fees, a Technical Support Request Fee, and Historical Market Data Fee

December 11, 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 3, 2020, MIAX PEARL, LLC (''MIAX PEARL'' or ''Exchange''), filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX PEARL Equities Fee Schedule (the ''Fee Schedule'') by adopting fees applicable to participants trading equity securities on and/or using services provided by MIAX PEARL Equities.[3]

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.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On August 14, 2020, the Commission approved the Exchange's proposal to adopt rules governing the trading of equity securities, referred to as MIAX PEARL Equities.[4] The Exchange launched MIAX PEARL Equities on September 25, 2020. The Exchange proposes to adopt a Definitions section in the Fee Schedule as well as the following fees: (1) Connectivity fees for Equity Members[5] and non-Members; (2) Port fees (together with the proposed connectivity fees, the ''Proposed Access Fees''); (3) a Technical Support Request fee; and (4) a fee for Historical Market Data (collectively, the ''Proposed Fees'').

The Exchange initially filed the proposal on September 24, 2020.[6] The Exchange withdrew the First Proposed Rule Change on October 5, 2020 and submitted SR–PEARL–2020–19.[7] The Second Proposed Rule Change was published for comment in the **Federal Register** on October 20, 2020[8] and no comment letters were received. Nonetheless, the Exchange withdrew the Second Proposed Rule Change[9] and now replaces it with this filing to provide further clarification regarding the Exchange's cost analysis for the Proposed Fees.[10]

MIAX PEARL Equities, as a new entrant into the equity securities marketplace, has only begun generating revenue and has a very low market share. The Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. The Exchange believes this high standard is especially important when an exchange imposes various access fees for market participants to access an exchange's marketplace. The Exchange believes that it is important to demonstrate that these fees are based on its costs and reasonable business needs. Accordingly, the Exchange believes the Proposed Fees in general, and the Proposed Access Fees in particular, will allow the Exchange to offset a portion of the expenses the Exchange has and will incur and that the Exchange has provided sufficient transparency (as described below) into how the Exchange determined to charge such fees.

Definitions

The Exchange proposes to include a Definitions section at the beginning of the Fee Schedule, before the General Notes section. The purpose of the Definitions section is to provide market participants greater clarity and transparency regarding the applicability of fees and rebates by defining terms used within the Fee Schedule in a single location. The Exchange notes that other equities exchanges include Definitions sections in their respective fee schedules,[11] and the Exchange believes that including a Definitions section in the front of the Fee Schedule makes the Fee Schedule more user-friendly and makes the Fee Schedule more comprehensive.

Unless included in the Definition section, capitalized terms used in the Fee Schedule are defined in the MIAX PEARL Equities Rules. Each of the definitions proposed to be included in

[27] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Rule 1901. The Exchange notes that it submitted a separate filing with the Commission pursuant to Section 19(b)(3)(A) of the Act to establish the Fee Schedule and adopt transaction fees. *See* Securities Exchange Act Release No. 90102 (October 6, 2020), 85 FR 64559 (October 13, 2020) (SR–PEARL–2020–17).

[4] *See* Securities Exchange Act Release No. 89563 (August 14, 2020), 85 FR 51510 (August 20, 2020) (SR–PEARL–2020–03) (Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, To Establish Rules Governing the Trading of Equity Securities) (''Approval Order'').

[5] The term ''Equity Member'' means a Member authorized by the Exchange to transact business on MIAX PEARL Equities. *See* Exchange Rule 1901.

[6] The Exchange initially filed the proposed fee changes on September 24, 2020 (SR–PEARL–2020–18). *See* SR–PEARL–2020–18 (the ''First Proposed Rule Change'').

[7] *See* Securities Exchange Act Release No. 90186 (October 14, 2020), 85 FR 66656 (October 20, 2020) (SR–PEARL–2020–19) (the ''Second Proposed Rule Change'').

[8] *See id.*

[9] *See* letter from Chris Solgan, VP, Senior Counsel, the Exchange, dated November 20, 2020, notifying the Commission that the Exchange would withdraw SR–PEARL–2020–19.

[10] In this filing, the Exchange also corrects an error in the earlier filings by replacing references to the term ''Priority Purge Ports'' with simply ''Purge Ports.''

[11] *See* Cboe BZX Exchange, Inc. Fee Schedule, Definitions section; Cboe BYX Exchange, Inc., Definitions section; Cboe EDGA Exchange, Inc., Definitions section; Cboe EDGX Exchange, Inc., Definitions section.

the Fee Schedule are based on definitions included in the existing MIAX PEARL fee schedule applicable to options (''Options Fee Schedule'') [12] or those of another exchange. In particular, the Exchange propose to offer and define ports and interfaces that provide connectivity to MIAX PEARL Equities. The Exchange notes that each of these offerings are not novel or unique, are available on other equity exchanges, and are currently offered by the Exchange for options trading and provided for in the Exchange's Options Fee Schedule. The Exchange proposes to define the following terms in the Fee Schedule:

• ''Cross-connect'' occurs when the affected third-party system is sited at the same data center where MIAX PEARL Equities systems are sited, and the third-party connects to MIAX PEARL Equities through the data center, rather than connecting directly to MIAX PEARL Equities outside of the data center.

• ''Exchange System Disruption'' means an outage of a Matching Engine or collective Matching Engines for a period of two consecutive hours or more, during trading hours.

• ''Extranet Provider'' means a technology provider that connects with MIAX PEARL Equities systems and in turn provides such connectivity to MIAX PEARL Equities participants that do not connect directly with MIAX PEARL Equities.

• ''FIX Order by Order'' means a type of FXD Port that sends all order activities other than reject message, including Execution Reports and Trade Cancel/Correct messages. FIX Order by Order is currently offered by the Exchange for options trading and provided for in the Exchange's Options Fee Schedule.

• ''FIX Order Interface'' or ''FOI'' means the Financial Information Exchange interface for certain order types as set forth in Exchange Rule 2614. FOI is currently offered by the Exchange for options trading and provided for in the Exchange's Options Fee Schedule.

• ''FIX Port'' means a FIX port that allows Equity Members to send orders and other messages using the FIX protocol. FIX is currently offered by the Exchange for options trading and provided for in the Exchange's Options Fee Schedule.

• ''Full Service Port'' or ''FSP'' means an MEO port that supports all MEO order input message types. FSP is currently offered by the Exchange for options trading and provided for in the Exchange's Options Fee Schedule.

• ''FIX Drop Port'' or ''FXD'' means a messaging interface that provides real-time order activities of firms' MEO and FOI orders. MIAX PEARL Equities offers two types of FXD ports: (1) Standard FIX Drop; and (2) FIX Order by Order Drop. FXD Ports may be used by Equities Market Makers, Order Entry Firms and clearing firms. FXD is currently offered by the Exchange for options trading and provided for in the Exchange's Options Fee Schedule.

• ''MENI'' means the MIAX Express Network Interconnect, which is a network infrastructure which provides Equity Members and non-Members network connectivity to the trading platforms, market data systems, test systems, and disaster recovery facilities of the Exchange. The MENI consists of the low latency and ultra-low latency (''ULL'') connectivity options set forth in the Exchange's Fee Schedule. MENI is currently offered by the Exchange for options trading and provided for in the Exchange's Options Fee Schedule.

• ''MEO Interface'' or ''MEO'' means a binary order interface for certain order types as set forth in Rule 516 into the MIAX PEARL System. See Exchange Rule 100.

• ''Service Bureau'' means a technology provider that offers and supplies technology and technology services to a trading firm that does not have its own proprietary system.

• ''Standard FIX Drop'' means an FXD Port that only sends trade information, including Execution Reports and Trade Cancel/Correct messages. Standard FIX Drop is currently offered by the Exchange for options trading and provided for in the Exchange's Options Fee Schedule.

• ''Third Party Vendor'' means a subscriber of MIAX PEARL Equities' market and other data feeds, which they in turn use for redistribution purposes.

• ''Waiver Period'' means, for each applicable fee, the period of time from the initial effective date of the MIAX PEARL Equities Fee Schedule until such time that MIAX PEARL has an effective fee filing establishing the applicable fee. MIAX PEARL Equities will issue a Regulatory Circular announcing the establishment of an applicable fee that was subject to a Waiver Period at least fifteen (15) days prior to the termination of the Waiver Period and effective date of any such applicable fee.

Proposed Access Fees

To provide market participants with a better understanding of how the Exchange has established the levels of the Proposed Access Fees, the Exchange is providing information in this proposal regarding the costs incurred by the Exchange to provide services associated with the Proposed Access Fees, including the Exchange's cost allocation methodology (information that explains the Exchange's rationale for determining that it was reasonable to allocate certain expenses described in this filing towards the total cost to the Exchange to provide the services associated with the Proposed Access Fees). The Exchange is also providing an analysis of its expected revenues and profitability (following the proposed fee change) for the services associated with the Proposed Access Fees.

In order to determine the Exchange's costs for providing the services associated with the Proposed Access Fees, the Exchange conducted an extensive review in which the Exchange analyzed every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the services associated with the Proposed Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports those services. The sum of all such portions of expenses represents the total cost of the Exchange to provide the services associated with the Proposed Access Fees. For the avoidance of doubt, no expense amount was allocated twice.

Since MIAX PEARL Equities did not exist in 2019 (operations only just launched on September 25, 2020), the Exchange's most recent publicly available financial statement (2019 Audited Unconsolidated Financial Statement) is not an accurate reflection of the total annual costs associated with the development and operation of MIAX PEARL Equities. Accordingly, the Exchange believes it is more appropriate to justify its fees using cost figures that are isolated specifically for MIAX PEARL Equities on an annualized basis, utilizing its 2020 actual (to date) and projected (for the remainder) costs, as described herein. The purpose of presenting it in this manner is to provide greater transparency into the Exchange's actual and expected revenues, costs, and profitability associated with providing the services associated with the Proposed Access Fees. Based on this analysis, the Exchange believes that the Proposed Access Fees are fair and reasonable because they will permit recovery of less than all of the Exchange's costs for providing the services associated with the Proposed Access Fees and will not result in excessive pricing or supra-competitive profit when comparing the Exchange's total annual expense

[12] *See* the Options Fee Schedule *available at https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_PEARL_Fee_Schedule_11052020.pdf.*

associated with providing the services associated with the Proposed Access Fees versus the total projected annual revenue the Exchange will collect for providing those services.

Connectivity Fees

Specifically, proposed Sections 2a) and b) of the Fee Schedule describe network connectivity fees for the 1 Gigabit (''Gb'') ultra-low latency (''ULL'') fiber connection and the 10Gb ULL fiber connection, which are to be charged to both Equity Members and non-Members of MIAX PEARL Equities for connectivity to the Exchange's primary/secondary facility. The Exchange also proposes to adopt network connectivity fees for the 1Gb ULL and 10Gb ULL fiber connections for connectivity to the Exchange's disaster recovery facility.

The Exchange will offer to both Equity Members and non-Members various bandwidth alternatives for connectivity to MIAX PEARL Equities, to its primary and secondary facilities, which consists of a 1Gb ULL fiber connection and a 10Gb ULL fiber connection. The Exchange also offers to both Equity Members and non-Members various bandwidth alternatives for connectivity to the disaster recovery facility of MIAX PEARL Equities, which consists of a 1Gb ULL fiber connection and a 10Gb ULL connection.

The Exchange proposes to establish the monthly network connectivity fees for such connections for both Equity Members and non-Members. The Exchange proposes to adopt the following fees for connectivity to MIAX PEARL Equities' primary/secondary facility for both Equity Members and non-Members: (a) $1,000 for the 1Gb ULL connection; and (b) $3,500 for the 10Gb ULL connection. The Exchange proposes to adopt the following fees for connectivity to MIAX PEARL Equities' disaster recovery facility for both Equity Members and non-Members: (a) $1,000 for the 1Gb ULL connection; and (b) $3,000 for the 10Gb ULL connection.

Monthly network connectivity fees for Equity Members and non-Members for connectivity with the primary/secondary facility will be assessed in any month the Equity Member or non-Members is credentialed to use any of the MIAX PEARL Equities Application Programming Interfaces (''APIs'') or market data feeds in the production environment and will be pro-rated when an Equity Member or non-Member makes a change to the connectivity (by adding or deleting connections) with such pro-rated fees based on the number of trading days that the Equity Member or non-Member has been credentialed to utilize any of the MIAX PEARL Equities' APIs or market data feeds in the production environment through such connection, divided by the total number of trading days in such month multiplied by the applicable monthly rate. Monthly network connectivity fees for Equity Members and non-Members for connectivity to the Disaster Recovery Facility will be assessed in each month during which the Equity Member or non-Member has established connectivity to the Disaster Recovery Facility.

Proposed Section 2)c) of the Fee Schedule, Pass-Through of External Connectivity Fees, provides for the pass through of external connectivity fees (described below) to Equity Members and non-Members that establish connections with MIAX PEARL Equities through a third-party. Fees assessed to MIAX PEARL Equities by third-party external vendors on behalf of an Equity Member or non-Member connecting to MIAX PEARL Equities (including cross-connects), will be passed through to the Equity Member or non-Member. The external connectivity fees passed through can include one-time set-up fees, monthly charges, and other fees charged to MIAX PEARL Equities by a third-party for the benefit of an Equity Member or non-Member.

Port Fees

Proposed Section 2)d), Port Fees, of the Fee Schedule describes fees for access and services used by Equity Members and non-Members. MIAX PEARL Equities provides three Port types: (i) The Financial Information Exchange Port (''FIX Port''), which allows Equity Members to send orders and other messages using the FIX protocol; [13] (ii) the MIAX Express Orders Interface (''MEO Port''), which allows Equity Members order entry capabilities to all MIAX PEARL Equities Matching Engines; [14] and (iii) the FIX Drop Port (''FXD Port''), which provides real-time order activities firms' MEO and FOI orders. MIAX PEARL Equities offers two types of FXD ports: (1) Standard FIX Drop; [15] and (2) FIX Order by Order.[16] FXD Ports may be used by Equities Market Makers [17], Order Entry Firms [18] and clearing firms.

The Exchange proposes to assess monthly Port fees to Equity Members in each month the Equity Member is credentialed to use a Port in the production environment. MIAX PEARL Equities has primary and secondary data centers and a disaster recovery center. Each Port provides access to all Exchange data centers for a single fee. The Exchange notes that, unless otherwise specifically set forth in the Fee Schedule, the Port fees include the information communicated through the Port. That is, unless otherwise specifically set forth in the Fee Schedule, there is no additional charge for the information that is communicated through the Port apart from what the user is assessed for each Port. The Exchange proposes to assess Port Fees for FIX Ports, MEO Ports, and FXD Ports as set forth in the following table:

Type of port	Monthly port fees includes connectivity to the primary, secondary and disaster recovery data centers
FIX Port ^	Per Port: 1st–5th Fee Waived for the Waiver Period. 6th–10th Fee Waived for the Waiver Period. 11th–25th Fee Waived for the Waiver Period. 26th–50th $450.

[13] ''FIX Order Interface'' or ''FOI'' means the Financial Information Exchange interface for certain order types as set forth in Exchange Rule 2614. *See* the Definitions section of the Fee Schedule.

[14] Each MEO interface will have one Full Service Port (''FSP'') and one Purge Port. ''Full Service Port'' or ''FSP'' means an MEO port that supports all MEO order input message types. *See* the Definitions section of the Fee Schedule. Purge Ports are described in Exchange Rule 2618(a)(7)(b).

[15] ''Standard FIX Drop'' means an FXD Port that only sends trade information, including Execution Reports and Trade Cancel/Correct messages. *See* the Definitions section of the Fee Schedule.

[16] ''FIX Order by Order'' means a type of FXD Port that sends all order activities other than reject message, including Execution Reports and Trade Cancel/Correct messages. *See* the Definitions section of the Fee Schedule.

[17] The term ''Equities Market Maker'' shall mean an Equity Member that acts as a Market Maker in equity securities, pursuant to Chapter XXVI. *See* Exchange Rule 1901.

[18] The term ''Equities Order Entry Firm'', ''Order Entry Firm'', or ''OEF'', shall mean those Equity Members representing orders as agent on MIAX PEARL Equities and those non-Equity Market Maker Members conducting proprietary trading. *See* Exchange Rule 1901.

[19] Purge Ports are described in Exchange Rule 2618(a)(7)(b).

Type of port	Monthly port fees includes connectivity to the primary, secondary and disaster recovery data centers
MEO Port ^*	51st–75th $400. 76th–100th $350. 101st or more $300. Per Port: 1st–5th Fee Waived for the Waiver Period. 6th–10th Fee Waived for the Waiver Period. 11th–25th Fee Waived for the Waiver Period. 26th–50th $450. 51st–75th $400. 76th–100th $350. 101st or more $300.
FXD Port ^	Fee Waived for the Waiver Period.

^ Each port will have access to all Matching Engines.
* The rates set forth above for MEO Ports entitle an Equity Member to one (1) FSP and one (1) Purge Port[19] for all Matching Engines for a single port fee.

• MEO and FIX Ports are counted separately for the tiers in the table.

The Exchange proposes to waive the fee for the 1st through the 25th FIX Ports and MEO Ports that Equity Members are credentialed to use, as well as the fees for all FXD Ports, for the Waiver Period.[20] For all Port fees that the Exchange initially proposes to be subject to the Waiver Period, the Exchange will submit a rule filing to the Commission to establish the fee amount and any related requirements, and provide notice to terminate the applicable Waiver Period. Even though most of the Port fees are waived during the Waiver Period, the Exchange believes that is appropriate to provide market participants with the overall structure of the fee by outlining the structure on the Fee Schedule without setting forth a specific fee amount in certain areas, so that there is general awareness that the Exchange intends to assess such a fee in the future, should the Waiver Period terminate and the Exchange establish an applicable fee.

Equity Member and Non-Member Technical Support Request Fee

Proposed Section 2)e), Member and Non-Member Technical Support Request Fee, of the Fee Schedule describes the technical support request fee to be charged to both Equity Members and non-Members that request technical support at any of the MIAX PEARL Equities data centers. MIAX PEARL Equities proposes to charge a fee of $200 per hour for requested technical support. The Exchange intends to provide Equity Members and non-Members access to the Exchange's on-site data center personnel for technical support as a convenience to the Equity Members and non-Members to test or otherwise assess their connectivity to the Exchange. Currently, the Exchange charges the same fee amount for the same services for options trading, as well as at its affiliate option exchanges, Miami International Securities Exchange, LLC (''MIAX'') and MIAX Emerald, LLC (''MIAX Emerald'').[21]

Market Data Fees

Proposed Sections 3)a)–c) describe the fee to be charged for the Exchange's proprietary market data products. MIAX PEARL Equities intends to offer the following three proprietary market data products: (a) Top of Market (''ToM'') feed; (b) Depth of Market (''DoM'') feed; and (c) the Historical Market Data feed.

The ToM feed is a data feed that contains the price and aggregate size of displayed top of book quotations, order execution information, and administrative messages for orders entered on MIAX PEARL Equities. The DOM feed is a data feed that contains the displayed price and size of each order entered on MIAX PEARL Equities, as well as order execution information, order cancellations, order modifications, order identification numbers, and administrative messages.

The Exchange proposes to provide under Sections 3)a) and 3)b) of the Fee Schedule that the ToM and DoM would be offered free of charge during the Waiver Period. Even though the fees for the ToM and DoM data feeds are waived during the Waiver Period, the Exchange believes that is appropriate to provide market participants with notice of these feeds on the Fee Schedule without setting forth a specific fee amount, so that there is general awareness that the Exchange intends to assess such a fee in the future, should the Waiver Period terminate and the Exchange establish an applicable fee.

The Exchange will also offer Historical Data for MIAX PEARL Equities, which is a data product that offers historical market data for orders entered on MIAX PEARL Equities upon request. The Exchange proposes to charge a modest fee for the Historical Data, which will be based on the cost incurred by the Exchange in providing that data. Proposed Section 3)c) of the Fee Schedule describes the fee to be charged market participants that request Historical Data from MIAX PEARL Equities. Historical Data is intended to aid market participants in analyzing trade and volume data, evaluating historical trends in the trading activity of a particular security, and enabling those market participants to test trading models and analytical strategies. Specifically, Historical Data includes all data that is captured and disseminated on ToM and DoM feeds and is available on a T+1 basis.[22]

The Exchange will only assess the fee for Historical Data on a user (whether Equity Member or non-Member) that specifically requests such Historical Data. Historical Data will be uploaded onto an Exchange-provided device, which the Exchange will incur a cost to procure and provide to those that request the data.

The Exchange proposed to charge a flat fee of $500 per device requested. Each device shall have a maximum storage capacity of 8 terabytes. Users may request up to six months of

[20] ''Waiver Period'' means, for each applicable fee, the period of time from the initial effective date of the MIAX PEARL Equities Fee Schedule until such time that MIAX PEARL has an effective fee filing establishing the applicable fee. MIAX PEARL Equities will issue a Regulatory Circular announcing the establishment of an applicable fee that was subject to a Waiver Period at least fifteen (15) days prior to the termination of the Waiver Period and effective date of any such applicable fee. *See* the Definitions section of the Fee Schedule.

[21] *See* MIAX Fee Schedule, Section 5)f), Member and non-Member Technical Support Request Fee; MIAX PEARL Fee Schedule, Section 5)f), Member and non-Member Technical Support Request Fee; and MIAX Emerald Fee Schedule, Section 5)f), Member and non-Member Technical Support Request Fee.

[22] *See* Fee Schedule, Section 3)c).

Historical Data per device, subject to the device's storage capacity. Historical Data will be made available beginning from the time of launch of MIAX PEARL Equities on September 25, 2020 (always on a T+1 basis). However, only the most recent six months of Historical Data shall be available for purchase from the request date.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [23] in general, and furthers the objectives of Section 6(b)(4) of the Act [24] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among Exchange Members and issuers and other persons using any facility or system which the Exchange operates or controls. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act [25] in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest and is not designed to permit unfair discrimination between customer, issuers, brokers and dealers.

On March 29, 2019, the Commission issued its Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network (the ''BOX Order'').[26] On May 21, 2019, the Commission issued the Staff Guidance on SRO Rule Filings Relating to Fees.[27]

The Exchange believes that the Proposed Fees are consistent with the Act because they (i) are reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition; (ii) comply with the BOX Order and the Guidance; (iii) are supported by evidence (including data and analysis), constrained by significant competitive forces; and (iv) are supported by specific information (including quantitative information), fair and reasonable because they will permit recovery of the Exchange's costs (less than all) and will not result in excessive pricing or supra-competitive profit. Accordingly, the Exchange believes that the Commission should find that the Proposed Fees are consistent with the Act.

MIAX PEARL Equities launched trading on September 25, 2020. As of November 2020, MIAX PEARL Equities averaged only 0.05% daily market share of the U.S. equities market.[28] The Exchange is not aware of any evidence that a market share of approximately 0.05% provides the Exchange with anti-competitive pricing power. If the Exchange were to attempt to establish unreasonable pricing, then no market participant would join or connect, and existing market participants would disconnect.

Separately, the Exchange is not aware of any reason why market participants could not simply drop their connections to an exchange (or not connect to an exchange) if an exchange were to establish prices for its non-transaction fees that, in the determination of such market participant, did not make business or economic sense for such market participant to connect to such exchange. No market participant is required by rule, regulation, or competitive forces to be a Member of the Exchange or MIAX PEARL Equities. As evidence of the fact that market participants can and do disconnect from exchanges based on non-transaction fee pricing, R2G Services LLC (''R2G'') filed a comment letter after BOX's proposed rule changes to increase its connectivity fees (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04).[29] The R2G Letter stated, ''[w]hen BOX instituted a $10,000/month price increase for connectivity; we had no choice but to terminate connectivity into them as well as terminate our market data relationship. The cost benefit analysis just didn't make any sense for us at those new levels.'' [30] Accordingly, this example shows that if an exchange sets too high of a fee for connectivity and/or other non-transaction fees for its relevant marketplace, market participants can choose to disconnect from such exchange.

The Exchange believes its proposal to include a Definitions section in the Fee Schedule promotes just and equitable principles of trade, removes impediments to and perfects the mechanism of a free and open market and a national market system, and, in general protects investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers. The Exchange believes that the proposal to adopt a Definitions section in the beginning of the Fee Schedule will provide greater clarity to Equity Members, non-Members, market participants and the public regarding the Exchange's fees and rebates, and it is in the public interest for the Fee Schedule to be transparent, comprehensive and user-friendly so as to eliminate the potential for confusion.

The Exchange believes that its proposal is consistent with Section 6(b)(4) of the Act, in that the Proposed Fees are fair, equitable and not unreasonably discriminatory, because the fees, as proposed, are constrained by significant competitive forces. The U.S. equity securities markets are highly competitive (there are currently 16 equity markets) and a reliance on competitive markets is an appropriate means to ensure equitable and reasonable prices.

The Exchange believes that its proposal is consistent with Section 6(b)(4) of the Act because the Proposed Access Fees will permit recovery (less than all) of the Exchange's costs and will not result in excessive or supra-competitive profit. The Proposed Access Fees will allow the Exchange to recover a portion (less than all) of the costs incurred by the Exchange associated with providing and maintaining the necessary hardware and other infrastructure as well as network monitoring and support services in order to provide the services associated with the Proposed Access Fees. The Exchange believes that it is reasonable and appropriate to establish its fees charged for the services associated with the Proposed Access Fees at levels that will partially offset the costs to the Exchange associated with maintaining and enhancing a state-of-the-art exchange network infrastructure in the U.S. equities industry.

The costs associated with building out and maintaining a state-of-the-art network infrastructure are extensive. This is due to several factors, including costs associated with maintaining and expanding a team of highly-skilled network engineers, fees charged by the Exchange's third-party data center operator, costs associated with projects and initiatives designed to improve overall network performance and stability through the Exchange's

[23] 15 U.S.C. 78f(b).

[24] 15 U.S.C. 78f(b)(4).

[25] 15 U.S.C. 78f(b)(5).

[26] *See* Securities Exchange Act Release No. 85459 (March 29, 2019), 84 FR 13363 (April 4, 2019) (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04).

[27] *See* Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), at *https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees* (the ''Guidance'').

[28] *See* U.S. Equities Market Volume Summary *available at https://markets.cboe.com/us/equities/market_statistics/* (last visited November 30, 2020).

[29] *See* Letter from Stefano Durdic, R2G, to Vanessa Countryman, Acting Secretary, Commission, dated March 27, 2019 (the ''R2G Letter'').

[30] *See id.*

research and development (''R&D'') efforts, and costs associated with fully-supporting advances in infrastructure and expansion of network level services, including customer monitoring, alerting and reporting. The Exchange incurs significant technology expense related to establishing and maintaining Information Security services, enhanced network monitoring and customer reporting, as well as Regulation SCI mandated processes, associated with its network technology. While some of the expense is fixed, much of the expense is not fixed, and thus increases as the number of connections and ports increase. For example, new 1Gb ULL and 10Gb ULL connections require the purchase of additional hardware to support those connections as well as enhanced monitoring and reporting of customer performance that the Exchange and its affiliates provide. Further, 10Gb ULL connections require the purchase of specialized, more costly hardware. As the total number of all connections increase, the Exchange needs to increase its data center footprint and consume more power, resulting in increased costs charged by its third-party data center providers. Accordingly, the cost to the Exchange to provide access to its network and trading infrastructure is not entirely fixed.

Further, because the costs of operating a data center are significant and not economically feasible for the Exchange, the Exchange does not operate its own data centers, and instead contracts with a third-party data center provider. The Exchange notes that larger, well-established exchange operators own/operate their data centers, which offers them greater control over their data center costs. Because those exchanges own and operate their data centers as profit centers, the Exchange is subject to additional costs. Fees for the services associated with the Proposed Access Fees, which are charged for accessing the Exchange's data center network infrastructure, are directly related to the network and offset such costs.

Further, the Exchange invests significant resources in network R&D to continuously improve the overall performance and stability of its network. For example, the Exchange has a number of network monitoring tools (some of which were developed in-house, and some of which are licensed from third-parties), that continually monitor, detect, and report network performance, many of which serve as significant value-adds to Equity Members and enable the Exchange to provide a high level of customer service. These tools detect and report performance issues, and thus enable the Exchange to proactively notify an Equity Member (and the SIPs) when the Exchange detects a problem with an Equity Member's connectivity. In fact, the Exchange's affiliate options exchanges, MIAX and MIAX Emerald, often receive inquiries from other industry participants regarding the status of networking issues outside of the Exchange's own network environment that are impacting the industry as a whole via the SIPs, including inquiries from regulators, because the Exchange has a superior, state-of the-art network that, through its enhanced monitoring and reporting solutions, often detects and identifies industry-wide networking issues ahead of the SIPs. The Exchange also incurs costs associated with the maintenance and improvement of existing tools and the development of new tools.

Also, routine R&D projects to improve the performance of the network's hardware infrastructure result in additional cost. In sum, the costs associated with maintaining and enhancing a state-of-the-art exchange network in the U.S. equity securities industry is a significant expense for the Exchange that is projected to increase year-over-year, and thus the Exchange believes that it is reasonable to offset a portion of those costs through establishing the Proposed Access Fees, which are designed to recover those costs, as described herein. Overall, the Proposed Access Fees are projected to offset only a portion of the Exchange's services associated with the Proposed Access Fees. The Exchange invests in and offers a superior network infrastructure as part of its overall exchange services offering, resulting in significant costs associated with maintaining this network infrastructure, which are directly tied to the amount of the Proposed Access Fees that must be charged to access it, in order to recover those costs. The Exchange only has four primary sources of revenue: Transaction fees, access fees (of which the Proposed Access Fees constitute the majority), regulatory fees, and market data fees. Accordingly, the Exchange must cover all of its expenses from these four primary sources of revenue.

The Exchange believes that the Proposed Access Fees are fair and reasonable because they will not result in excessive pricing or supra-competitive profit, when comparing the total annual expense of MIAX PEARL Equities for providing the services associated with the Proposed Access Fees versus the total projected annual revenue of the Exchange for providing those services. For 2020, the total annual expense [31] for providing the services associated with the Proposed Access Fees for MIAX PEARL Equities is projected to be approximately $8.4 million. The $8.4 million in projected total annual expense is comprised of the following, all of which are directly related to the services associated with the Proposed Access Fees by MIAX PEARL Equities to its Equity Members and non-Members: (1) Third-party expense, relating to fees paid by MIAX PEARL Equities to third-parties for certain products and services; and (2) internal expense, relating to the internal costs of MIAX PEARL Equities to provide the services associated with the Proposed Access Fees. The $8.4 million in projected total annual expense is directly related to the services associated with the Proposed Access Fees and not any other product or service offered by the Exchange. It does not include general costs of operating matching systems and other trading technology, and no expense amount was allocated twice.

As discussed, the Exchange conducted an extensive review in which the Exchange analyzed every expense item in the Exchange's general expense ledger (this includes over 150 separate and distinct expense items) to determine whether each such expense relates to the services associated with the Proposed Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports those services, and thus bears a relationship that is, ''in nature and closeness,'' directly related to those services. The sum of all such portions of expenses represents the total cost of the Exchange to provide the services associated with the Proposed Access Fees.

For 2020, total actual and projected third-party expense, relating to fees paid by the Exchange to third-parties for certain products and services for the Exchange to be able to provide the services associated with the Proposed Access Fees, was $1,492,112. This includes, but is not limited to, a portion of the fees paid to: (1) Equinix, for data center services, for the primary, secondary, and disaster recovery locations of the MIAX PEARL Equities trading system infrastructure; (2) Zayo Group Holdings, Inc. (''Zayo'') for connectivity services (fiber and bandwidth connectivity) linking MIAX PEARL Equities' office locations in

[31] The Exchange notes that the total expense figures for each of the external and internal expenses described herein relate only to the Exchange's equities market. No expense relating to the Exchange's options market is included in this filing.

Princeton, New Jersey and Miami, Florida to all data center locations; (3) Secure Financial Transaction Infrastructure (''SFTI''), which supports connectivity and feeds for the entire equity securities industry; (4) various other services providers (including Thompson Reuters, NYSE, Nasdaq, Internap, and Options IT), which provide content, connectivity services, infrastructure services, and market data services; and (5) various other hardware and software providers (including Dell and Cisco, which support the production environment).

For clarity, only a portion of all fees paid to such third-parties is included in the third-party expense herein (only the portions that actually support the services associated with the Proposed Access Fees), and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire information technology and communication costs to the services associated with the Proposed Access Fees.

The Exchange believes it is reasonable to allocate such third-party expense described above towards the total cost to the Exchange to operate and support the network, including providing the services associated with the Proposed Access Fees. In particular, the Exchange believes it is reasonable to allocate the identified portions of the Equinix expense because Equinix operates the data centers (primary, secondary, and disaster recovery) that host the Exchange's network infrastructure, which enables the services associated with the Proposed Access Fees. This includes, among other things, the necessary storage space, which continues to expand and increase in cost, power to operate the network infrastructure, and cooling apparatuses to ensure the Exchange's network infrastructure maintains stability. Without these services from Equinix, the Exchange would not be able to operate and support the network and provide the services associated with the Proposed Access Fees to Equity Members and non-Members and their customers. The Exchange did not allocate all of the Equinix expense toward the cost of providing the services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to operating and supporting the network, approximately 73% of the total Equinix expense (68% allocated towards the cost of providing the provision of network connectivity and 5% allocated towards the cost of providing ports). The Exchange believes these allocations are reasonable because they represent the Exchange's actual cost to operate and support the network, and not any other service, as supported by its cost review.

The Exchange believes it is reasonable to allocate the identified portions of the Zayo expense because Zayo provides the internet, fiber and bandwidth connections with respect to the network, linking MIAX PEARL Equities with the Exchange's affiliates, MIAX and MIAX Emerald, as well as the data center and disaster recovery locations. As such, all of the trade data flow through Zayo's infrastructure over the Exchange's network. Without these services from Zayo, the Exchange would not be able to operate and support the network and provide the services associated with the Proposed Access Fees to Equity Members and non-Members and their customers. The Exchange did not allocate all of the Zayo expense toward the cost of providing the services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to operating and supporting the network, approximately 66% of the total Zayo expense (62% allocated towards the cost of providing the provision of network connectivity and 4% allocated towards the cost of providing ports). The Exchange believes these allocations are reasonable because they represent the Exchange's actual cost to operate and support the network, and not any other service, as supported by its cost review.

The Exchange believes it is reasonable to allocate the identified portions of the SFTI expense and various other service providers' (including Thompson Reuters, NYSE, Nasdaq, Internap, and Options IT) expense because those entities provide connectivity and feeds for the entire U.S. securities industry as well as the content, connectivity services, infrastructure services, and market data services for critical components of the network. Without these services from SFTI and various other service providers, the Exchange would not be able to operate and support the network and provide the services associated with the Proposed Access Fees to Equity Members and non-Members and their customers. The Exchange did not allocate all of the SFTI and other service providers' expense toward the cost of providing the services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to operating and supporting the network, approximately 94% of the total SFTI and other service providers' expense (89% allocated towards the cost of providing the provision of network connectivity and 5% allocated towards the cost of providing ports). The Exchange believes these allocations are reasonable because they represent the Exchange's actual cost to operate and support the network, and not any other service, as supported by its cost review.

The Exchange believes it is reasonable to allocate the identified portion of the other hardware and software provider expense because this includes costs for dedicated hardware licenses for switches and servers, as well as dedicated software licenses for security monitoring and reporting across the network. Without this hardware and software, the Exchange would not be able to operate and support the network and provide the services associated with the Proposed Access Fees to Equity Members and non-Members and their customers. The Exchange did not allocate all of the hardware and software provider expense toward the cost of providing the services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to operating and supporting the network, approximately 57% of the total hardware and software provider expense (54% allocated towards the cost of providing the provision of network connectivity and 3% allocated towards the cost of providing ports). The Exchange believes these allocations are reasonable because they represent the Exchange's actual cost to operate and support the network, and not any other service, as supported by its cost review.

For 2020, total projected internal expense, relating to the internal costs of the Exchange to provide the services associated with the Proposed Access Fees, is projected to be $6,905,858. This includes, but is not limited to, costs associated with: (1) Employee compensation and benefits for full-time employees that support the services associated with the Proposed Access Fees, including staff in network operations, trading operations, development, system operations, business, etc., as well as staff in general corporate departments (such as legal, regulatory, and finance) that support those employees and functions; (2) depreciation and amortization of hardware and software used to provide the services associated with the Proposed Access Fees, including equipment, servers, cabling, purchased software and internally developed software used in the production environment to support those services for trading; and (3) occupancy costs for leased office space for staff that support the services associated with the

Proposed Access Fees. The breakdown of these costs is more fully-described below.

For clarity, only a portion of all such internal expenses are included in the internal expense herein (only the portions that support the services associated with the Proposed Access Fees), and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire costs contained in those line items to the services associated with the Proposed Access Fees.

The Exchange believes it is reasonable to allocate such internal expense described above towards the total cost to the Exchange to operate and support the network, including providing the services associated with the Proposed Access Fees. In particular, MIAX PEARL Equities' employee compensation and benefits expense relating to providing the services associated with the Proposed Access Fees is projected to be $4,317,667, which is only a portion of the $13,492,708 total projected expense for employee compensation and benefits. The Exchange believes it is reasonable to allocate the identified portions of each expense because they include the time spent by employees of several departments, including Technology, Back Office, Systems Operations, Networking, Business Strategy Development (who create the business requirement documents that the Technology staff use to develop network features and enhancements), Trade Operations, Finance (who provide billing and accounting services relating to the network), and Legal (who provide legal services relating to the network, such as rule filings and various license agreements and other contracts). As part of the extensive cost review conducted by the Exchange, the Exchange reviewed the amount of time spent by each employee on matters relating to the operation and support of the network, including the services associated with the Proposed Access Fees. Without these employees, the Exchange would not be able to operate and support the network and provide the services associated with the Proposed Access Fees to Equity Members and non-Members and their customers. The Exchange did not allocate all of the employee compensation and benefits expense toward the cost of providing the services associated with the Proposed Access Fees, only that portion which the Exchange identified as being specifically mapped to operating and supporting the network, approximately 32% of the total employee compensation and benefits expense (29% allocated towards the cost of providing the provision of network connectivity and 3% allocated towards the cost of providing ports). The Exchange believes these allocations are reasonable because they represent the Exchange's actual cost to operate and support the network, and not any other service, as supported by its cost review.

MIAX PEARL Equities' depreciation and amortization expense relating to providing the services associated with the Proposed Access Fees is projected to be $2,131,411, which is only a portion of the $2,664,264 total projected expense for depreciation and amortization. The Exchange believes it is reasonable to allocate the identified portions of such projected expense because such expense includes the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network. Without this equipment, the Exchange would not be able to operate the network and provide the services associated with the Proposed Access Fees to Equity Members and non-Members and their customers. The Exchange did not allocate all of the projected depreciation and amortization expense toward the cost of providing the services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to operating and supporting the network, approximately 80% of the total depreciation and amortization expense (76% allocated towards the cost of providing the provision of network connectivity and 4% allocated towards the cost of providing ports). The services associated with the Proposed Access Fees would not be possible without relying on such equipment. The Exchange believes these allocations are reasonable because they represent the Exchange's actual cost to operate and support the network, and not any other service, as supported by its cost review.

MIAX PEARL Equities' occupancy expense relating to providing the services associated with the Proposed Access Fees is projected to be $456,780, which is only a portion of the $878,423 total projected expense for occupancy. The Exchange believes it is reasonable to allocate the identified portions of such projected expense because such expense represents the portion of the Exchange's cost to rent and maintain a physical location for the Exchange's staff who operate and support the network, including providing the services associated with the Proposed Access Fees. These amounts consist primarily of rent for the Exchange's Princeton, New Jersey office, as well as various related costs, such as physical security, property management fees, property taxes, and utilities. The Exchange operates its Network Operations Center (''NOC'') and Security Operations Center (''SOC'') from its Princeton, New Jersey office location. A centralized office space is required to house the staff that operates and supports the network. The Exchange currently has approximately 150 employees (and continues to increase its headcount to support the network as the Exchange, and its affiliates, grow the network). Approximately two-thirds of the Exchange's staff are in the Technology department, and the majority of those staff members have some role in the operation and performance of the network. Without this office space, the Exchange would not be able to operate and support the network and provide the services associated with the Proposed Access Fees to Equity Members and non-Members and their customers. Accordingly, the Exchange believes it is reasonable to allocate the identified portions of its occupancy expense because such amounts represent the Exchange's actual cost to house the equipment and personnel who operate and support the Exchange's network infrastructure for the services associated with the Proposed Access Fees. The Exchange did not allocate all of the projected occupancy expense toward the cost of providing the services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to operating and supporting the network, approximately 52% of the total occupancy expense (48% allocated towards the cost of providing the provision of network connectivity and 4% allocated towards the cost of providing ports). The Exchange believes these allocations are reasonable because they represent the Exchange's actual cost to operate and support the network, and not any other service, as supported by its cost review.

The Exchange's monthly revenue for the Proposed Access Fees is based on the following purchases by Equity Members and non-Members during the most recent billing cycle: (i) 12 1Gb ULL connections; (ii) 81 10Gb ULL connections; and (iii) 103 MEO Ports. The monthly revenue from Port fees is subject to change from month to month depending on the number of Ports purchased. Accordingly, the Exchange's total monthly Port revenue was $22,800

and total 1 Gb and 10Gb ULL connectivity was $288,000.

Accordingly, based on the facts and circumstances presented, the Exchange believes that its provision of the services associated with the Proposed Access Fees will not result in excessive pricing or supra-competitive profit. To illustrate, the Exchange's monthly revenue associated with the Proposed Access Fees was approximately $310,800 for its most recent billing cycle ($22,800 + 288,000 = $310,800). Total projected revenue associated with the Proposed Access Fees for the remaining one month of 2020 is approximately $300,000. Therefore, total revenue for the Exchange's most recent billing cycle for the provision of services associated with the Proposed Access Fees is $310,800. Total projected expense for the Exchange for the provision of services associated with the Proposed Access Fees is approximately $700,000. Accordingly, the provision of the services associated with the Proposed Access Fees will not result in excessive pricing or supra-competitive profit (rather, it will result in a monthly loss of $389,200 for its most recent billing cycle).

On a going-forward, fully-annualized basis, the Exchange projects that its annualized revenue for providing the services associated with the Proposed Access Fees would be approximately $3,600,000 per annum, based on a most recently completed billing cycle. The Exchange projects that its annualized expense for providing the services associated with the Proposed Access Fees would be approximately $8,400,000 per annum. Accordingly, on a fully-annualized basis, the Exchange believes its total projected revenue for the providing the services associated with the Proposed Access Fees will not result in excessive pricing or supra-competitive profit, as the Exchange will incur a loss of $4,800,000 on the Proposed Access Fees ($3.6 million − $8.4 million = ($4.8 million per annum)).

For the avoidance of doubt, none of the expenses included herein relating to the services associated with the Proposed Access Fees relate to any other services offered by MIAX PEARL Equities. Stated differently, no expense amount of the Exchange is allocated twice.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to allocate the respective percentages of each expense category described above towards the total cost to the Exchange of operating and supporting the network, including providing the services associated with the Proposed Access Fees, because the Exchange performed a line-by-line item analysis of all the expenses of the Exchange, and has determined the expenses that directly relate to operation and support of the network, including the services associated with the Proposed Access Fees. Further, the Exchange notes that, without the specific third-party and internal items listed above, the Exchange would not be able to operate and support the network, including the services associated with the Proposed Access Fees to Equity Members and non-Members and their customers. Each of these expense items, including physical hardware, software, employee compensation and benefits, occupancy costs, and the depreciation and amortization of equipment, have been identified through a line-by-line item analysis to be integral to the operation and support of the network. The Proposed Access Fees are intended to recover the Exchange's costs (less than all) of operating and supporting the network, including providing the services associated with the Proposed Access Fees.

Accordingly, the Proposed Access Fees are fair and reasonable because they do not result in excessive pricing or supra-competitive profit, when comparing the actual network operation and support costs to the Exchange versus the projected revenue for the services associated with the Proposed Access Fees.

The Exchange notes that other equities exchanges have similar connectivity alternatives for their participants, including similar low-latency connectivity. For example, the Nasdaq Stock Market LLC (''Nasdaq''), Nasdaq PHLX LLC (''Phlx''), and Nasdaq ISE, LLC (''ISE'') all offer a 1Gb, 10Gb and 10Gb low latency ethernet connectivity alternatives to each of their participants.[32] NYSE Arca, Inc. (''NYSE Arca''), NYSE American LLC (''NYSE American''), NYSE Chicago, Inc. (''NYSE Chicago'') and NYSE National, Inc. (''NYSE National'') all offer a 1Gb and 10Gb low latency ethernet connectivity alternatives to each of their participants.[33] The Exchange notes that all the other equities exchanges described above charge higher rates for such similar connectivity to primary and secondary facilities. While the Exchange's proposed connectivity fees are substantially lower than the fees charged by Nasdaq, Phlx, ISE, NYSE America, NYSE Arca, NYSE Chicago and NYSE National, the Exchange believes that it can offer significant value to Equity Members over other exchanges in terms of network monitoring and reporting, which the Exchange believes is a competitive advantage, and differentiates its access services versus access services at other exchanges. Additionally, the Exchange's proposed connectivity fees to its disaster recovery facility are within the range of the fees charged by other exchanges for similar connectivity alternatives.[34] The Exchange also notes that other equities exchanges have similar port alternatives for their participants, with similar or substantially higher fees.[35]

Historical Data

The Exchange believes the proposed fee for Historical Data is a reasonable allocation of its costs and expenses among its Equity Members and other persons using its facilities since it is recovering the costs associated with distributing such data should an Equity Member request Historical Data. Access to the Exchange is provided on fair and non-discriminatory terms. The Exchange believes the proposed fee for Historical Data is equitable and not unfairly discriminatory because the fee level results in a reasonable and equitable allocation of fees amongst users for similar services. Moreover, the decision as to whether or not to purchase Historical Data is entirely optional to all users. Potential purchasers are not required to purchase the Historical Data, and the Exchange is not required to make the Historical Data available. Purchasers may request the data at any time or may decline to purchase such data. The allocation of fees among users is fair and reasonable because, if the market deems the proposed fees to be unfair or

[32] *See* Nasdaq, Phlx and ISE General Rules, General 8, Section 1(b). Nasdaq, Phlx and ISE each charge a monthly fee of $2,500 for each 1Gb connection, $10,000 for each 10Gb connection and $15,000 for each 10Gb Ultra connection, which is the equivalent of the Exchange's 10Gb ULL connection.

[33] *See* NYSE American Fee Schedule, NYSE Arca Fee Schedule, NYSE Chicago Fee Schedule and NYSE National Fee Schedule, Co-Location Fees. NYSE American, NYSE Arca, NYSE Chicago and NYSE National each charge a monthly fee of $5,000 for each 1Gb circuit and $22,000 for each 10Gb LX circuit, which is the equivalent of the Exchange's 10Gb ULL connection.

[34] *See* Cboe EDGA Exchange, Inc. (''EDGA'') and Cboe EDGX Exchange, Inc. (''EDGX'') Fee Schedules, Physical Connectivity Fees, (charging a monthly fee of $2,000 for a 1Gb disaster recovery network access port and a monthly fee of $6,000 for a 10Gb disaster recovery network access port).

[35] *See* Nasdaq Fee Schedule, Equity Rules, Equity 7, Pricing Schedule, Ports (charging $575 per FIX port per month); Phlx Fee Schedule, Equity Rules, Equity 7, Pricing Schedule, Section 3 Nasdaq PSX Fees (charging $400 per FIX port per month); EDGX Fee Schedule, Logical Port Fees (charging $550 per Logical Port per month and $650 per Purge port per month).

inequitable, firms can diminish or discontinue their use of this data.

The Exchange believes that the proposed fee for Historical Data is consistent with Section 6(b)(4) of the Act because the Proposed Access Fees will permit recovery of the Exchange's costs and will not result in excessive or supra-competitive profit. The proposed fee for Historical Data will allow the Exchange to recover a portion (less than all) of the costs incurred by the Exchange associated with providing and maintaining the necessary hardware and other infrastructure as well as network monitoring and support services in order to provide Historical Data. The Exchange believes that it is reasonable and appropriate to establish a fee for Historical Data at a level that will partially offset the costs to the Exchange associated with maintaining and providing Historical Data. For example, Historical Market Data is uploaded onto an Exchange-provided device. Each device shall have a maximum storage capacity of 8 terabytes. The Exchange incurs costs in providing the device, storing the historical data, and utilizing resources to upload the data onto the device. Specifically, the device provided by the Exchange costs approximately $200 to $300. Moreover, the Exchange tracks the number of hours spent by Exchange personnel procuring Historical Data. Based on the Exchange's average cost per full-time employee (''FTE''), the Exchange represents that its cost to provide this service is reasonably related to (and often exceeds) the amount of the Historical Data fee the Exchange proposes to charge. Accordingly, the proposed fee would enable the Exchange to recover a material portion of such cost.

The Exchange also notes that its proposed fee is identical to that it charges today for options historical data and less than that charged by other exchanges for their own historical data. For example, all four of the Cboe equity exchanges charge a fee of $500 for one month of historical data and $2,500 for one terabyte drive of data.[36]

Further, in adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data:

> [E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.[37]

By removing ''unnecessary regulatory restrictions'' on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to broker-dealers at all, it follows that the price at which such data is sold should be set by the market as well.

In July, 2010, Congress adopted H.R. 4173, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act''), which amended Section 19 of the Act. Among other things, Section 916 of the Dodd-Frank Act amended paragraph (A) of Section 19(b)(3) of the Act by inserting the phrase ''on any person, whether or not the person is a member of the self-regulatory organization'' after ''due, fee or other charge imposed by the self-regulatory organization.'' As a result, all SRO rule proposals establishing or changing dues, fees or other charges are immediately effective upon filing regardless of whether such dues, fees or other charges are imposed on members of the SRO, non-members, or both. Section 916 further amended paragraph (C) of Section 19(b)(3) of the Act to read, in pertinent part, ''At any time within the 60-day period beginning on the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) [of Section 19(b)], the Commission summarily may temporarily suspend the change in the rules of the self-regulatory organization made thereby, 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 this title. If the Commission takes such action, the Commission shall institute proceedings under paragraph (2)(B) [of Section 19(b)] to determine whether the proposed rule should be approved or disapproved.''

The Exchange believes that these amendments to Section 19 of the Act reflect Congress's intent to allow the Commission to rely upon the forces of competition to ensure that fees for market data are reasonable and equitably allocated. Although Section 19(b) had formerly authorized immediate effectiveness for a ''due, fee or other charge imposed by the self-regulatory organization,'' the Commission adopted a policy and subsequently a rule stating that fees for data and other products available to persons that are not members of the self-regulatory organization must be approved by the Commission after first being published for comment. At the time, the Commission supported the adoption of the policy and the rule by pointing out that unlike members, whose representation in self-regulatory organization governance was mandated by the Act, non-members should be given the opportunity to comment on fees before being required to pay them, and that the Commission should specifically approve all such fees. The Exchange believes that the amendment to Section 19 reflects Congress's conclusion that the evolution of self-regulatory organization governance and competitive market structure have rendered the Commission's prior policy on non-member fees obsolete. Specifically, many exchanges have evolved from member-owned, not-for-profit corporations into for-profit, investor-owned corporations (or subsidiaries of investor-owned corporations). Accordingly, exchanges no longer have narrow incentives to manage their affairs for the exclusive benefit of their members, but rather have incentives to maximize the appeal of their products to all customers, whether members or non-members, so as to broaden distribution and grow revenues. Moreover, the Exchange believes that the change also reflects an endorsement of the Commission's determinations that reliance on competitive markets is an appropriate means to ensure equitable and reasonable prices. Simply put, the change reflects a presumption that all fee changes should be permitted to take effect immediately, since the level of all fees are constrained by competitive forces.

Selling proprietary market data, such as Historical Data, is a means by which exchanges compete to attract business. To the extent that exchanges are successful in such competition, they earn trading revenues and also enhance the value of their data products by increasing the amount of data they provide. The need to compete for business places substantial pressure upon exchanges to keep their fees for both executions and data reasonable.[38]

[36] *See, e.g.,* Cboe BZX Exchange, Inc. fee schedule *available at https://markets.cboe.com/us/equities/membership/fee_schedule/bzx/.*

[37] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

[38] *See* Sec. Indus. Fin. Mkts. Ass'n (SIFMA), Initial Decision Release No. 1015, 2016 SEC LEXIS 2278 (ALJ June 1, 2016) (finding the existence of

The Exchange therefore believes that the fees for Historical Data are properly assessed on Members and Non-Member users.

The decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition* v. *SEC,* No. 09–1042 (D.C. Cir. 2010), although reviewing a Commission decision made prior to the effective date of the Dodd-Frank Act, upheld the Commission's reliance upon competitive markets to set reasonable and equitably allocated fees for market data:

> In fact, the legislative history indicates that the Congress intended that the market system 'evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed' and that the SEC wield its regulatory power 'in those situations where competition may not be sufficient,' such as in the creation of a 'consolidated transactional reporting system.' [39]

The court's conclusions about Congressional intent are therefore reinforced by the Dodd-Frank Act amendments, which create a presumption that exchange fees, including market data fees, may take effect immediately, without prior Commission approval, and that the Commission should take action to suspend a fee change and institute a proceeding to determine whether the fee change should be approved or disapproved only where the Commission has concerns that the change may not be consistent with the Act.

Pass-Through of External Connectivity Fees

The Exchange believes that the proposed pass-through of external connectivity fees constitutes an equitable allocation of fees, and is not unfairly discriminatory, because it allows the Exchange to recover costs associated with offering access through the network connections, responding to customer requests, configuring MIAX PEARL Equities' systems, programming API user specifications and administering the various services. Access to the MIAX PEARL Equities market is offered on fair and non-discriminatory terms.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to pass-through External Connectivity fees to Equity Members and non-Members that establish connections with MIAX PEARL Equities through a third-party. MIAX PEARL Equities will only pass-through the actual costs it is charged by third-party external vendors. The Exchange believes it is reasonable and equitable to recover costs charged it on behalf of an Equity Member or non-Member that establishes connections with MIAX PEARL Equities through a third party. Other exchanges, including EDGX and EDGA, charge a fee for similar services to their members and non-members.

Technical Support Request Fee

The Exchange believes that the proposed Technical Support Request fee is fair, equitable and not unreasonably discriminatory, because it is assessed equally to all Equity Members and non-Members who request technical support. Furthermore, Equity Members and non-Members are not required to use the service but instead it is offered as a convenience to all Equity Members and non-Members. The proposed fee is reasonably designed because it will permit both Equity Members and non-Members to request the use of the Exchange's on-site data center personnel as technical support and as a convenience in order to test or otherwise assess their connectivity to the Exchange and the fee is within the range of the fee charged by other exchanges for similar services and is identical to the same fee assessed by the Exchange today for options as well as the Exchange's affiliates, MIAX and MIAX Emerald.

Further, The Exchange tracks the number of hours spent by Exchange personnel providing the aforementioned services. Based on the Exchange's average cost per FTE, the Exchange represents that its cost to provide this service is reasonably related to (and often exceeds) the amount of the proposed fee. Accordingly, the proposed fee would enable the Exchange to recover a material portion of such cost.

* * * * *

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must establish fees that are competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed fees in the MIAX PEARL Equities Fee Schedule appropriately reflect this competitive environment.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the Proposed Fees do not place certain market participants at a relative disadvantage to other market participants because the pricing of the Proposed Fees is associated with relative usage of the various market participants and does not impose a barrier to entry to smaller participants. The Exchange believes the Proposed Fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation of the Proposed Fees reflects the network and access resources consumed by various market participants.

The Exchange believes the Proposed Fees do not place an undue burden on competition on other SROs that is not necessary or appropriate. MIAX PEARL Equities launched trading operations on September 25, 2020 and has a market share of only approximately 0.05%, with significantly less members than other SROs. Additionally, other equity exchanges have similar connectivity and port alternatives for their participants, including similar low-latency connectivity, but with much higher rates to connect.[40] The Exchange is also unaware of any assertion that the Proposed Fees would somehow unduly impair its competition with other equities exchanges. To the contrary, if the fees charged are deemed too high by market participants, they can simply not connect to the Exchange or not use the services associated with the Proposed Access Fees.

While the Exchange recognizes the distinction between connecting to an exchange and trading at the exchange, the Exchange notes that it plans to operate in a highly competitive market in which market participants can readily connect and trade with venues they desire. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges. The Exchange believes that the Proposed Fees reflect this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[41] and Rule

vigorous competition with respect to non-core market data).

[39] *NetCoalition,* at 15 (quoting H.R. Rep. No. 94–229, at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 321, 323).

[40] *See supra* notes 32 through 36.

[41] 15 U.S.C. 78s(b)(3)(A)(ii).

19b–4(f)(2)[42] 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–2020–33 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–PEARL–2020–33. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PEARL–2020–33 and should be submitted on or before January 7, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[43]

J. Matthew DeLesDernier,

Assistant Secretary.

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[42] 17 CFR 240.19b–4(f)(2).

[43] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90645; File No. SR–IEX–2020–18]

Self-Regulatory Organizations; Investors Exchange LLC; Notice of Filing of Proposed Rule Change To Amend IEX Rule 11.510 To Reduce the Outbound Latency That Presently Applies to All Trading Messages Sent From IEX Back to Users of the Exchange

December 11, 2020.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 9, 2020, the Investors Exchange LLC (''IEX'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) under the Act,[4] and Rule 19b–4 thereunder,[5] IEX is filing with the Commission a proposed rule change to amend IEX Rule 11.510 to reduce the outbound latency that presently applies to all trading messages sent from IEX back to Users[6] of the Exchange to include only the actual geographic distance and related network connectivity, as well as to make conforming changes to the outbound latency that applies to all trading messages sent from the IEX System[7] to the System routing logic[8] with respect to routable orders. The text of the proposed rule change is available at the Exchange's website at *www.iextrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend IEX Rule 11.510 to reduce the outbound latency that presently applies to all trading messages sent from the IEX System at its primary data center back to Users of the Exchange to include only the actual geographic distance and related network connectivity, as well as to make conforming changes to the outbound latency that applies to all trading messages sent from the IEX System to the System routing logic with respect to routable orders.

The Exchange is not proposing to make any changes to the additional latency that applies in a symmetrical manner to all inbound order messages (*i.e.,* orders, modifications or cancellations) regardless of whether such orders are to make or take liquidity. This additional latency on inbound order messages, commonly referred to as the ''IEX Speedbump,'' continues to be a critical part of the IEX system and is designed to protect the interests of investors, brokers, and market makers that rest orders on IEX.

As described in more detail below, the additional latencies that are currently applied to both inbound and

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] 15 U.S.C. 78s(b)(1).

[5] 17 CFR 240.19b–4.

[6] *See* IEX Rule 1.160(qq).

[7] *See* IEX Rule 1.160(nn).

[8] *See* IEX Rule 2.220(a).

outbound messages between IEX and Users were put in place for completely different purposes. In contrast to the resting order protective design of the additional inbound latency, the additional outbound latency was designed simply to avoid potential information leakage about an execution on IEX that could reduce a Member's [9] ability to access liquidity on other markets after trading on IEX. As discussed more fully below, since the IEX exchange launch in 2016 there have been significant improvements in routing technology as well as reductions in Securities Information Processor (''SIP'') market data dissemination latencies, and as a result the Exchange believes that the additional outbound latency is no longer necessary.

The Exchange also notes that no other national securities exchanges currently provide for additional latency to outbound communications. Thus, IEX does not believe that the proposed changes raise any new or novel material issues that have not already been considered by the Commission in connection with the operations of other national securities exchanges, or that Members could not readily incorporate into their trading systems.

Background

Connectivity Description

Currently, all Users, which include Members and Sponsored Participants,[10] access IEX through the Exchange-provided network interface at the IEX Point-of-Presence [11] or ''POP,'' located in Secaucus, New Jersey.[12] After entering through the POP, a User's electronic message sent to the System traverses the IEX ''coil'' which is a box containing approximately 38 miles of compactly coiled optical fiber cable. After exiting the coil, the User's message travels an additional geographic or physical distance to the System, located at the Exchange's primary data center in Weehawken, New Jersey. The time required for a message to traverse the coil combined with the physical distance (and related networking) to the System equates to an equivalent 350 microseconds of latency, referred to herein as the ''inbound latency.'' [13] All inbound messages (*e.g.,* orders to buy or sell and any modification to a previously sent open order) from any User traverse this connectivity infrastructure, including the coil, in a symmetrical manner regardless of the type of message or whether the User is seeking to buy, sell, make or take liquidity.

Separately, all outbound messages from IEX back to a User (*e.g.,* confirmations of an execution that occurred on IEX), as well as messages from IEX's TOPS, DEEP and DROP data products [14] (collectively ''Data Products''), pass through the communication infrastructure in reverse, referred to herein as the ''outbound latency.'' [15]

Other incoming and outgoing messages to and from IEX are not subject to either the inbound or outbound latency. Instead, they are sent and received directly to and from the System, subject only to the latencies inherent in the geographic distances that the messages travel. These other messages include (i) incoming proprietary market data from other national securities exchanges and market data from the SIPs and (ii) outgoing messages to the SIPs (to disseminate IEX's quotation and last sale/execution information), the National Securities Clearing Corporation (to transmit executed transactions) and other national securities exchanges (to route orders for potential execution on such exchanges). In addition, all IEX Order Book [16] processing and order executions on the IEX Order Book occur within the System and are not subject to the inbound or outbound connectivity infrastructure.

IEX's affiliated broker-dealer, IEX Services LLC (''IEXS''), is a Member of the Exchange and is subject to the same inbound and outbound latency as other Members, as described in IEX Rules 2.220 and 11.510. If a User sends a routable order to the Exchange for potential execution on IEX, after traversing the inbound latency (including the coil) to reach the System, it is directed to the System routing logic rather than the IEX matching engine.[17] Upon receipt of a routable order, the System routing logic may route all or a portion of the order to the IEX Order Book or to another national securities exchange. Any such orders routed to the IEX Order Book by the System routing logic are subject to an additional 350 microsecond inbound latency between the IEX routing logic and the IEX Order Book. Similarly, the IEX routing logic may only receive IEX Data Products subject to the same 350 microsecond outbound latency as other data recipients. These additional inbound and outbound latency delays place IEXS in the same position as any Member that is a third-party routing broker in reaching the IEX Order Book, receiving outbound order messages, and receiving IEX Data Products, *i.e.,* IEXS has no speed or informational advantage compared to other Members and data recipients.

See IEX Rule 11.510 for a complete description of the manner in which Participants [18] and Extranet Providers [19] may connect to, access, and interact with the System including the applicable latencies.

The Critical Function of the ''Speedbump''

The IEX Speedbump, which applies additional latency to inbound order messages (including modifications and cancellations), is designed to enable IEX to more effectively manage and price orders resting on its book when the market moves. This is because (as described above) orders sent to IEX are delayed by 350 microseconds in reaching IEX's matching engine but IEX does not delay its own receipt of market data from other national securities exchanges and the SIPs. This approach is designed to enable IEX's matching engine to timely process price changes and to price or execute orders on the IEX Order Book at the most accurate prices possible. As the Commission noted in approval of IEX's application to operate as a national securities exchange in 2016:

> [T]he purpose of IEX's coil is to provide an intentional buffer that slows down incoming orders to allow IEX's matching engine to update the prices of resting ''pegged'' orders when away prices change to protect resting pegged orders from the possibility of adverse selection when the market moves to a new midpoint price. The allowable price of a ''pegged'' order will change whenever the best displayed price across all exchanges changes, but it takes time for IEX's system to receive other exchange data feeds and recalculate the price of each pegged order resting on its book. For various reasons, IEX's systems may not recalculate prices as fast as some of the fastest low-latency traders in the market are able to send orders accessing pegged orders resting on IEX at potentially ''stale'' prices. The Commission believes that the application of the POP/coil delay delays the ability of low-latency market participants to take a ''stale''-priced resting pegged order

[9] *See* IEX Rule 1.160(s).

[10] *See* IEX Rule 1.160(ll).

[11] A Point-of-Presence is the location at which customers of an exchange (or other technological system) can connect to the exchange.

[12] Please see discussion *infra* with respect to the connectivity infrastructure applicable to routable orders.

[13] *See* IEX Rule 11.510(b)(1).

[14] *See* IEX Rule 11.330(a).

[15] *See* IEX Rule 11.510(b)(2). IEX's backup data center, in Chicago, Illinois, which only consumes market data from the SIPs, does not have any inbound or outbound POP/coil latency, *see* IEX Rule 11.510 Supplementary Material .01, and is therefore unaffected by this proposed rule change.

[16] *See* IEX Rule 1.160(p).

[17] *See* IEX Rule 11.230(b).

[18] *See* IEX Rule 11.130(a).

[19] *See* IEX Rule 11.130(a).

on IEX (*i.e.,* before IEX finishes its process of re-pricing the pegged order in response to changes in the NBBO) based on those market participants' ability to more effectively digest direct market data feeds and swiftly submit an order before IEX finishes its process of updating the prices of pegged orders resting on its book. (internal citations omitted) [20]

In addition, with IEX's recent addition of its D-Limit order type, the IEX speed bump helps IEX re-price D-Limit orders in the few seconds of the day when IEX's Crumbling Quote Indicator [21] detects that the national best bid or offer is likely to move in a direction adverse to the User of the order within two milliseconds.[22]

This application of the IEX Speedbump, and the benefits therein, are distinct and different from the additional (and symmetrical) latency imposed on outbound trading messages which was designed to slightly delay news of an execution to the participants to the execution and to IEX's Data Products. The outbound latency thus enables a market participant using a serial routing technique [23] that executes a trade on IEX to avoid potential information leakage when subsequently seeking to access liquidity on other markets before news of the IEX execution could affect resting liquidity on those markets [24] (*e.g.,* potentially resulting in cancellations or re-pricing of such liquidity). Since the time of IEX's exchange approval in 2016 there have been a myriad of technology advances, including improvements in smart-order routing techniques and a reduction in SIP latencies.[25] Consequently, and as discussed more fully below and in the Statutory Basis section, IEX does not believe that the considerations that existed in 2016 necessitate continuing to impose additional latency on outbound order messages or IEX Data Products.

Proposal

The Exchange proposes to amend IEX Rule 11.510 to reduce the outbound latency that presently applies to all trading messages sent from IEX back to Users to the actual geographic distance and related network connectivity [26] between the Exchange System and the IEX POP. As proposed, all outbound communications (including execution and other order report messages, as well as TOPS, DEEP and DROP messages) would be treated in the same manner. The Exchange estimates that removal of the coiled optical fiber would reduce the outbound latency to 37 microseconds.

IEX is not proposing any changes to the additional latency applied to inbound orders, cancellations or modifications from any User, regardless of making or taking liquidity or any other factors, which will maintain the symmetry of IEX's Speedbump design for all Users. Users would still be required to connect to IEX at the POP. IEXS would continue to be subject to the existing additional inbound latency when the IEX routing logic sends an order to the IEX Order Book (a total delay of 700 microseconds for inbound routable orders) but would be subject to the reduced outbound latency in receiving execution and order messages as well as IEX Data Products in the same manner as those of other Members and data recipients. Therefore, reducing the outbound latency will have no impact on IEX's ability to provide the benefits of protection from certain trading strategies when using pegged or D-Limit orders.

In addition, based on informal feedback from Members, IEX understands that a reduction in the outbound latency would enhance Members' execution and risk management processes, including with respect to hedging and re-routing, by enabling them to receive reports of IEX executions sooner than is currently the case. Moreover, IEX believes that these benefits would apply to all Members, regardless of business model, by supporting overall execution and risk management. IEX further understands that receiving execution reports closer in time to when an execution occurred would enable Members and their clearing firms to incorporate the financial and other exposure of an execution into their risk management systems and thereby enable enhanced monitoring and control of applicable risks. IEX believes that these execution and risk management benefits outweigh the concerns that previously existed regarding the risk to serial routing techniques. As the Commission has noted, current and commonplace routing techniques seek to have orders arrive and execute simultaneously across multiple venues and are able to capture liquidity across multiple venues simultaneously without signaling those executions to the market in a way that would impact prices or available liquidity.[27] As a result, IEX believes that Members and other market participants can use such routing techniques instead of serial routing techniques to avoid potential information leakage when subsequently seeking to access liquidity on other markets after an IEX execution.

IEX also believes that its Data Products would be more useful if they were not subject to the additional outbound latency so that Members can more effectively use IEX market data in their execution and risk management decisions. Additionally, IEX notes that since its exchange launch in 2016 the SIPs have materially reduced their average latencies for dissemination of quote and trade messages, as discussed above.[28] Thus, IEX believes that these reduced latencies enable some market participants to receive IEX market data messages from the SIPs before they can receive such messages on TOPS and DEEP. In these circumstances delaying IEX's Data Products effectively renders them of limited utility. Consequently, as proposed, IEX Data Products will also be subject to the reduced outbound latency.

Accordingly, IEX proposes to amend IEX Rule 11.510 to reflect the changes described above as well as to streamline descriptions of the communications infrastructure for inbound and outbound latency. As proposed the changes are as follows:

• Add new language to paragraph (a) to add specificity to the reference to the POP, including that it is an abbreviation for the IEX point-of-presence and that its network address is specified in the Exchange's Connectivity Manual. In addition, clarifying language is added to specify and describe the latency for inbound and outbound communications between the System and the POP, including that outbound communications from the System to the POP do not traverse the distance provided by

[20] *See* Securities Exchange Act Release No. 34–78101 (June 17, 2016), 81 FR 41141, 41155 (June 23, 2016) (''Exchange Approval Order'').

[21] *See* IEX Rule 11.190(g).

[22] *See* Securities Exchange Act Release No. 89686 (August 26, 2020), 85 FR 54438 (September 1, 2020) (approving SR–IEX–2019–15) (''D-Limit Approval Order'').

[23] Serial routing entails routing an order first to one exchange, and then routing whatever shares remain in the order to other exchanges.

[24] *See* Exchange Approval Order, *supra* note 20.

[25] The SIPs are comprised of three plans: The CTA Plan (trade data on Tapes A&B), the CQ Plan (quote data on Tapes A&B), and the UTP Plan (trade and quote data on Tape C). Since IEX's exchange launch in September 2016, the average latencies for quote messages on the SIPs has dropped from 470 µs to 19.5 µs (CQ Plan) and from 762 µs to 13.2 µs (UTP Plan); and the average latencies for trade messages on the SIPs has dropped from 320 µs to 20 µs (CTA Plan) and from 619.7 µs to 15.7 µs (UTP Plan). See ''Key Operating Metrics of Tape A&B U.S. Equities Securities Information Processor (CTA SIP),'' available at *https://www.ctaplan.com/publicdocs/ctaplan/CTAPLAN_Processor_Metrics_3Q2020.pdf* and ''UTP Q3 2020—September Tape C Quote Metrics'' and ''September Tape C Trade Metrics,'' available at *https://www.utpplan.com/DOC/UTP_website_Statistics_Q3-2020-September.pdf*.

[26] Ordinary course network connectivity includes switches and cabling to connect the network access point at the POP to the System.

[27] *See* D-Limit Approval Order *supra* note 22 at 54441–42.

[28] *See supra* note 25.

coiled optical fiber and are subject to an equivalent 37 microseconds of latency due to traversing the geographic distribution and network connectivity between the System at the primary data center and the network access point of the POP. Conforming changes would be made to existing rule text to refer to inbound communications separately from outbound communications and replace the word ''with'' with ''to'' to be descriptive of the one-way communications referenced. Conforming changes to subparagraph (a)(1) would reflect that the Connectivity Manual was referenced and abbreviated previously. Subparagraph (a)(2) would be revised to replace the phrase ''traverse the POP'' with more descriptive language ''traverse the connectivity infrastructure between the System and the POP.''

- Paragraph (b) would be amended to replace the current heading, ''IEX POP Connectivity'' with ''IEX Connectivity Infrastructure'' which is more descriptive of the content of the paragraph. In addition, references to ''inbound POP latency'' and ''outbound POP latency'' would each delete the word ''POP'' to align with the clarifying changes to paragraph (a). Further, new language would be added to reference that connectivity between the System routing logic and the Order Book and the manner in which the System routing logic may receive IEX's Data Products are described in paragraph (c).
- Subparagraphs (b)(1) and (b)(2) would each also be amended to refer to the Exchange's connectivity infrastructure rather than the POP in describing the design goals of the inbound and outbound latency. Subparagraph (b)(2) would also be amended to specify the outbound latency and to update references to the types of messages included in the parenthetical examples.
- Paragraph (c)(1) would be amended to make conforming terminology changes to those proposed for paragraph (b). In addition, new language would be added to clarify and describe how the changes to the outbound latency apply to the System routing logic.
- Paragraph (c)(2) would be amended to make conforming terminology changes to those proposed for paragraph (b). In addition, new language would be added to specify that the System routing logic may only receive IEX Data Products subject to 37 microseconds of outbound latency, equivalent to the outbound latency applicable to all other data recipients.
- Paragraph (c)(3) would be amended to make conforming terminology changes to those proposed for paragraph (b) and to delete an extra space in a cross-reference to IEX Rule 11.240(d).
- Supplementary Material .02 would be amended to make conforming terminology changes (including deleting the term ''POP'' from the heading) to those proposed for paragraph (b), to reference the latency for the outbound latency, and to include the inbound and outbound latencies for routable orders in the description of which latencies are impacted by force majeure events.
- Supplementary Material .03 would be amended to clarify when the outbound versus inbound latency applies to routable orders.

Implementation

The Exchange plans to implement the proposed rule change in two steps. In the first step, the Exchange would reduce the outbound latency between the System and the POP from 350 to 37 microseconds, but would retain the existing outbound latency between the System and the System routing logic. In the second step, the Exchange would reduce the outbound latency between the System and the System routing logic from 350 to 37 microseconds. The purpose of the two-step implementation is to enable the IEX technology team to focus on each part separately, thereby mitigating potential risks, in a manner consistent with standard technology best practices. IEX is choosing to reduce the outbound latency to the System routing logic in the second step to avoid giving the System routing logic any preference over other Users. The Exchange expects that there will be several days between the two steps of the implementation and will provide at least ten (10) days' notice to Members and market participants of the implementation timeline.[29]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[30] in general, and furthers the objectives of Section 6(b)(5),[31] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Specifically, the Exchange believes that the proposed rule change is consistent with the protection of investors and the public interest because it is designed to enhance IEX Members' execution and risk management efforts. As described in the Purpose section, IEX believes that a reduction in the outbound latency would enhance Members' execution and risk management processes, including with respect to hedging and re-routing, by enabling them to receive reports of IEX executions sooner than is currently the case. IEX further believes that this reduction in outbound latency will enable Members and their clearing firms to incorporate the financial and other exposure related to IEX executions into their risk management systems and thereby enable enhanced monitoring and control of applicable risks. Moreover, IEX believes that these benefits would apply to all Members, regardless of the details or nature of a Member's business, by supporting overall execution and risk management. Further, IEX believes that these execution and risk management benefits outweigh the concerns that previously existed regarding the risk to serial routing techniques. As discussed in the Purpose section, and as the Commission has noted, current and commonplace routing techniques seek to have orders arrive and execute simultaneously across multiple venues and are able to capture liquidity across multiple venues simultaneously without signaling those executions to the market in a way that would impact prices or available liquidity.[32] As a result, IEX believes that Members and other market participants can use such routing techniques instead of serial routing techniques to avoid potential information leakage when subsequently seeking to access liquidity on other markets after an IEX execution.

Similarly, and as discussed in the Purpose section, IEX believes that its Data Products will be more useful for execution and risk management purposes if they are disseminated closer in time to the applicable execution or quote change. IEX believes that this is particularly true with the recent material reduction in SIP latencies, as detailed in the Purpose section.

Further, the Exchange believes that the proposed rule change is consistent with the protection of investors and the public interest because it will apply to all Members in the same manner. All outbound communications will be subject to the same reduction in latency on a fair and nondiscriminatory basis. Significantly, and as discussed in the Purpose section, execution and other order messages from the System to Users will be subject to the same latency as IEX's Data Products so that the parties to an execution do not receive information regarding the execution prior to other market participants. Although the existing delay in dissemination of its Data Products was designed to enable an order sender to avoid the potential for information

[29] After step one and before step two, all outbound communications between the System and the System routing logic will continue to be subject to an equivalent 350 microseconds of latency. Outgoing messages (*i.e.,* responses) from the System routing logic to Users (with respect to routable orders sent to IEX) would be subject to the proposed reduced outbound latency of 37 microseconds. Further, IEXS would be able to receive IEX Data Products subject to the same 37 microseconds of latency as other Members and data recipients.

[30] 15 U.S.C. 78f(b).

[31] 15 U.S.C. 78f(b)(5).

[32] *See supra* note 27.

leakage when accessing liquidity on other markets (as discussed in the Purpose section), the Exchange believes this purpose is clearly outweighed by the potential execution and risk management benefits to market participants in receiving market data and execution reports more quickly, and the concomitant benefit to efficient markets. Moreover, as discussed in the Purpose section, the Exchange believes that market participants routinely utilize routing strategies and techniques to avoid potential information leakage, by routing in a manner so that child orders arrive at multiple markets near-simultaneously and that the technology to do so is well established and has evolved since IEX was approved as an exchange in 2016.[33]

Additionally, the Exchange notes that IEXS, its routing broker, will continue to be on a level playing field compared to all other Members, as it will be subject to the same outbound latency reduction, except for the few days between stages one and two of the proposed implementation. With respect to these few days, the Exchange notes that the Act generally does not prohibit an exchange from treating its affiliated routing broker in a manner that is less preferential than other Members. Moreover, use of IEXS by other Members is optional and any Member that does not want to use IEXS may use other routers to route orders to away trading centers.[34]

The Exchange also notes that no other national securities exchanges currently provide for additional latency to outbound communications. Thus, IEX does not believe that the proposed changes raise any new or novel material issues that have not already been considered by the Commission in connection with the operations of other national securities exchanges. Moreover, because the Exchange does not believe that the proposed rule change is novel, it believes that IEX Members will be readily able to accommodate the reduced outbound latency into their trading systems.

Finally, and for clarification purposes, IEX is not proposing any changes to the additional latency applied to inbound orders, cancelations, and modifications or to those communications and processes that are not subject to the inbound or outbound latency, which continue to be critical to the protection of pegged and D-Limit orders, as described above.

[33] *See supra* note 22 at 54441.

[34] *See* IEX Rule 2.220(a)(3).

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. To the contrary, the proposal is designed to enable enhancement of Members' execution and risk management processes, as described in the Purpose and Statutory Basis sections.

The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because other exchanges offer similar functionality. Moreover, the proposed rule change would benefit other exchanges because it would enable them to receive IEX's Data Products sooner than is currently the case which could correspondingly enable them to update pegged orders more quickly. Similarly, as with other Exchange Members, their outbound routing brokers would receive order messages from IEX sooner than is currently the case and could more quickly incorporate such information into any further routing decisions.

The Exchange also does not believe that the proposed rule change will impose any burden on intramarket competition because it will apply to all Members in the same manner, except for the few days between stages one and two of the proposed implementation. With respect to these few days, as noted in the Statutory Basis section, the Exchange notes that the Act generally does not prohibit an exchange from treating its affiliated routing broker in a manner that is less preferential than other Members. Moreover, use of IEXS by other Members is optional and any Member that does not want to use IEXS may use other routers to route orders to away trading centers.

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

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–IEX–2020–18 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–IEX–2020–18. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public 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–IEX–2020–18 and should

be submitted on or before January 7, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[35]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27726 Filed 12–16–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, the Securities and Exchange Commission will hold an Open Meeting on Monday, December 21, 2020 at 10:00 a.m.

PLACE: The meeting will be held via remote means and/or at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

STATUS: This meeting will begin at 10:00 a.m. (ET) and will be open to the public via audio webcast only on the Commission's website at *www.sec.gov.*

MATTERS TO BE CONSIDERED:

1. The Commission will consider whether to authorize the execution of a Memorandum of Understanding and related documents with the Bundesanstalt für Finanzdienstleistungsaufsicht (''BaFin'') concerning consultation, cooperation and the exchange of information related to the supervision and oversight of certain cross-border over-the-counter derivatives entities in connection with the use of substituted compliance by such entities.

2. The Commission will consider whether to issue an Order, pursuant to Exchange Act Rule 3a71–6, granting conditional substituted compliance in connection with certain Exchange Act requirements related to risk control (but not including nonbank capital and margin requirements), internal supervision and compliance, counterparty protection, and books and records, in response to an application by BaFin.

3. The Commission will consider whether to issue a Notice, pursuant to Exchange Act Rule 0–13, seeking public comment on an application made by a foreign financial regulatory authority, pursuant to Exchange Act Rule 3a71–6, for a substituted compliance determination, and on a proposed order providing for the conditional availability of substituted compliance in connection with the application.

4. The Commission will consider whether to approve a proposed rule change by New York Stock Exchange LLC to amend Chapter One of the Listed Company Manual to modify the provisions relating to direct listings.

CONTACT PERSON FOR MORE INFORMATION: For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact Vanessa A. Countryman, Office of the Secretary, at (202) 551–5400.

Dated: December 14, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–27866 Filed 12–15–20; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34138; 812–14951]

KKR Income Opportunities Fund, et al.

December 11, 2020.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of application for an order under sections 17(d) and 57(i) of the Investment Company Act of 1940 (the ''Act'') and rule 17d–1 under the Act to permit certain joint transactions otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and rule 17d–1 under the Act.

Summary of Application: Applicants request an order to permit certain business development companies and closed-end management investment companies to co-invest in portfolio companies with each other and with certain affiliated investment funds and accounts.

Applicants: KKR INCOME OPPORTUNITIES FUND (''KIO''), KKR CREDIT OPPORTUNITIES PORTFOLIO (''KCOP''), KKR CREDIT ADVISORS (US) LLC (''KKR Credit''), KKR CREDIT ADVISORS (HONG KONG) LIMITED, KKR STRATEGIC CAPITAL MANAGEMENT LLC, KKR FI ADVISORS LLC, KKR FINANCIAL ADVISORS LLC, KKR FINANCIAL ADVISORS II, LLC, KKR CS ADVISORS I LLC, KKR MEZZANINE I ADVISORS LLC, KKR FI ADVISORS CAYMAN LTD., KAM ADVISORS LLC, KAM FUND ADVISORS LLC, KKR CREDIT FUND ADVISORS LLC, KKR ASSET MANAGEMENT, LTD., KKR CREDIT ADVISORS (IRELAND) UNLIMITED COMPANY, KKR CREDIT ADVISORS (EMEA) LLP, KKR CREDIT ADVISORS (SINGAPORE) PTE. LTD., KKR CAPITAL MARKETS HOLDINGS L.P., KKR CAPITAL MARKETS LLC, KKR CAPITAL MARKETS LIMITED, KKR CAPITAL MARKETS ASIA LIMITED, MCS CAPITAL MARKETS LLC, KKR CAPITAL MARKETS PARTNERS LLP, KKR CAPITAL MARKETS INDIA PRIVATE LIMITED, KKR CAPITAL MARKETS (IRELAND) LIMITED, KKR CAPITAL MARKETS JAPAN LIMITED, KKR RTV MANAGER LLC, KKR LOAN ADMINISTRATION SERVICES LLC, KKR CORPORATE LENDING LLC, KKR CORPORATE LENDING (CAYMAN) LIMITED, KKR CORPORATE LENDING (UK) LLC, MERCHANT CAPITAL SOLUTIONS LLC, MCS CORPORATE LENDING LLC, KKR ALTERNATIVE ASSETS LLC, KKR ALTERNATIVE ASSETS L.P., KKR ALTERNATIVE ASSETS LIMITED, KKR CORPORATE LENDING (CA) LLC, KKR CORPORATE LENDING (TN) LLC, KKR FINANCIAL HOLDINGS, INC., KKR FINANCIAL HOLDINGS, LTD., KKR FINANCIAL HOLDINGS II, LLC, KKR FINANCIAL HOLDINGS II, LTD., KKR FINANCIAL HOLDINGS III, LLC, KKR FINANCIAL HOLDINGS III, LTD., KKR FINANCIAL CLO HOLDINGS, LLC, KKR FINANCIAL CLO HOLDINGS II, LLC, KKR TRS HOLDINGS, LTD., KKR STRATEGIC CAPITAL INSTITUTIONAL FUND, LTD., KKR DEBT INVESTORS II (2006) IRELAND L.P., KKR DI 2006 LP, KKR EUROPEAN SPECIAL OPPORTUNITIES LIMITED, 8 CAPITAL PARTNERS L.P., KKR FINANCIAL CLO 2007–1, LTD., KKR FINANCIAL CLO 2012–1, LTD., KKR FINANCIAL CLO 2013–1, LTD., KKR FINANCIAL CLO 2013–2, LTD., KKR CLO 9 LTD., KKR CLO 10 LTD., KKR CLO 11 LTD., KKR CLO 12 LTD., KKR CLO 13 LTD., KKR CLO 14 LTD., KKR CLO 15 LTD., KKR CLO 16 LTD., KKR CLO 17 LTD., KKR CLO 18 LTD., KKR CLO 19 LTD., KKR CLO 20 LTD., KKR CLO 21 LTD., KKR CLO 22 LTD., KKR CLO 23 LTD., KKR CLO 24 LTD., KKR CLO 25 LTD., KKR CLO 26 LTD., KKR CLO 27 LTD., KKR CLO 28 LTD., KKR CLO 29 LTD., KKR CLO 30 LTD., KKR CLO 31 LTD., KKR CORPORATE CREDIT PARTNERS L.P., KKR MEZZANINE PARTNERS I L.P., KKR MEZZANINE PARTNERS I SIDE-BY-SIDE L.P., KKR–KEATS CAPITAL PARTNERS L.P., KKR–MILTON CAPITAL PARTNERS L.P., KKR–MILTON CAPITAL PARTNERS II L.P., KKR LENDING PARTNERS L.P., KKR LENDING PARTNERS II L.P., KKR–VRS CREDIT PARTNERS L.P., KKR PIP INVESTMENTS L.P., KKR SPECIAL SITUATIONS (DOMESTIC) FUND L.P.,

[35] 17 CFR 200.30–3(a)(12).

KKR SPECIAL SITUATIONS (OFFSHORE) FUND L.P., KKR SPECIAL SITUATIONS (DOMESTIC) FUND II L.P., KKR SPECIAL SITUATIONS (EEA) FUND II L.P., KKR STRATEGIC CAPITAL OVERSEAS FUND LTD., KKR–CDP PARTNERS L.P., KKR–PBPR CAPITAL PARTNERS L.P., KKR CREDIT SELECT (DOMESTIC) FUND L.P., KKR PRIVATE CREDIT OPPORTUNITIES PARTNERS II L.P., KKR PRIVATE CREDIT OPPORTUNITIES PARTNERS II (EEA) L.P., KKR PRIVATE CREDIT OPPORTUNITIES PARTNERS II (EEA) EURO L.P., KKR TACTICAL VALUE SPN L.P., KKR LENDING PARTNERS EUROPE (GBP) UNLEVERED L.P., KKR LENDING PARTNERS EUROPE (EURO) UNLEVERED L.P., KKR LENDING PARTNERS EUROPE (USD) L.P., KKR LENDING PARTNERS EUROPE (EURO) L.P., KKR EUROPEAN RECOVERY PARTNERS L.P., KKR REVOLVING CREDIT PARTNERS L.P., AVOCA CAPITAL CLO X DESIGNATED ACTIVITY COMPANY, AVOCA CLO XI DESIGNATED ACTIVITY COMPANY, AVOCA CLO XII DESIGNATED ACTIVITY COMPANY, AVOCA CLO XIII DESIGNATED ACTIVITY COMPANY, AVOCA CLO XIV DESIGNATED ACTIVITY COMPANY, AVOCA CLO XV DESIGNATED ACTIVITY COMPANY, AVOCA CLO XVI DESIGNATED ACTIVITY COMPANY, AVOCA CLO XVII DESIGNATED ACTIVITY COMPANY, AVOCA CLO XVIII DESIGNATED ACTIVITY COMPANY, AVOCA CLO XIX DESIGNATED ACTIVITY COMPANY, AVOCA CLO XX DESIGNATED ACTIVITY COMPANY, AVOCA CLO XXI DESIGNATED ACTIVITY COMPANY, AVOCA CLO XXIV DESIGNATED ACTIVITY COMPANY, KKR EUROPEAN FLOATING RATE LOAN FUND, ABSALON CREDIT DESIGNATED ACTIVITY COMPANY, GARDAR LOAN FUND, AVOCA CREDIT OPPORTUNITIES PLC, KKR EUROPEAN CREDIT OPPORTUNITIES FUND II, PRISMA SPECTRUM FUND LP, POLAR BEAR FUND LP, KKR TFO PARTNERS L.P., TACTICAL VALUE SPN—APEX CREDIT L.P., TACTICAL VALUE SPN–GLOBAL DIRECT LENDING L.P., KKR GLOBAL CREDIT OPPORTUNITIES MASTER FUND L.P., TACTICAL VALUE SPN–GLOBAL CREDIT OPPORTUNITIES L.P., KKR PRINCIPAL OPPORTUNITIES PARTNERSHIP L.P., KKR SPN CREDIT INVESTORS L.P., CDPQ AMERICAN FIXED INCOME III, L.P., KKR LENDING PARTNERS III L.P., LP III WAREHOUSE LLC, KKR ACS CREDIT FUND, KKR BESPOKE GLOBAL CREDIT OPPORTUNITIES (IRELAND) FUND, KKR CREDIT INCOME FUND, KKR DAF DIRECT LENDING FUND, KKR DAF GLOBAL OPPORTUNISTIC CREDIT FUND, KKR DAF PRIVATE CREDIT FUND, KKR DAF STERLING ASSETS FUND, KKR DAF SYNDICATED LOAN AND HIGH YIELD FUND, KKR DAF SECURITISED PRIVATE CREDIT FUND, KKR DRAGON CO–INVEST L.P., KKR EUROPEAN CREDIT OPPORTUNITIES FUND II DESIGNATED ACTIVITY COMPANY, KKR GLOBAL CREDIT DISLOCATION (CAYMAN) LTD., KKR DISLOCATION OPPORTUNITIES (DOMESTIC) FUND L.P., KKR DISLOCATION OPPORTUNITIES (EEA) FUND SCSP, KKR GOLDFINCH L.P., KKR LENDING PARTNERS EUROPE II (EURO) UNLEVERED SCSP, KKR LENDING PARTNERS EUROPE II (USD) SCSP, KKR MACKELLAR PARTNERS L.P., KKR PIP CREDIT INVESTORS LLC, KKR REVOLVING CREDIT PARTNERS EUROPE SCSP, KKR REVOLVING CREDIT PARTNERS II L.P., KKR SENIOR FLOATING RATE INCOME FUND, KKR US CLO EQUITY PARTNERS II L.P., KKR US CLO EQUITY PARTNERS L.P., KKR–BARMENIA EDL PARTNERS SCSP, KKR–CARDINAL CREDIT OPPORTUNITIES FUND L.P., KKR–DUS EDL PARTNERS SCSP, KKR–GENERALI PARTNERS SCSP SICAV–RAIF, KKR–MANDATE 2020 DIRECT LENDING FUND, KKR–MILTON CO–INVESTMENTS II L.P., KKRN EURO LOAN FUND 2018 FCP–RAIF, KKR–NYC CREDIT A L.P., KKR–NYC CREDIT B L.P., KKR–NYC CREDIT C L.P., KKR–UWF DIRECT LENDING PARTNERSHIP L.P., PRISMA PELICAN FUND LLC, RR–RW CREDIT L.P., SWISS CAPITAL KKR PRIVATE DEBT FUND L.P., KKR–JESSELTON HIF CREDIT PARTNERS L.P., KKR–MILTON CREDIT HOLDINGS L.P., KKR–MILTON OPPORTUNISTIC CREDIT FUND L.P., KKR CENTRAL PARK LEASING AGGREGATOR L.P., FS KKR CAPITAL CORP. (''FSK''), FS KKR CAPITAL CORP. II (''FSKR''), FS/KKR ADVISOR, LLC (''FS/KKR Advisor'').

Filing Dates: The application was filed on September 13, 2018, and amended on September 4, 2020, and December 3, 2020.

Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving applicants 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 applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, *Secretarys-Office@sec.gov.* Applicants: Noah Greenhill, KKR Credit Advisors (US) LLC, *Noah.Greenhill@kkr.com.*

FOR FURTHER INFORMATION CONTACT: Jennifer O. Palmer, Senior Counsel, at (303) 844–1012, or David J. Marcinkus, Branch Chief, at (202) 551–6825 (Chief Counsel's Office, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Introduction

1. The Applicants request an order of the Commission under Sections 17(d) and 57(i) and Rule 17d–1 thereunder (the ''Order'') to permit, subject to the terms and conditions set forth in the application (the ''Conditions''), one or more Regulated Entities [1] and/or one or

[1] ''Regulated Entities'' means the Existing Regulated Entities and any Future Regulated Entity. ''Existing Regulated Entities'' means FSK, FSKR, KCOP and KIO. ''Future Regulated Entity'' means a closed–end management investment company (a) that is registered under the Act or has elected to be regulated as a BDC and (b) whose investment adviser or sub-adviser is a KKR Credit Adviser that is registered as an investment adviser under the Act. ''KKR Credit Adviser'' means an Existing KKR Credit Adviser or any investment adviser that (i) is controlled by, or is a relying adviser of, KKR Credit, (ii) is registered as an investment adviser under the Advisers Act, and (iii) is not a Regulated Entity or a subsidiary of a Regulated Entity. ''Existing KKR Credit Adviser'' means KKR Credit, FS/KKR Advisor, and the investment advisory subsidiaries and relying advisers of KKR Credit set forth on schedule A of the application (''Schedule A'').

''Adviser'' means any KKR Credit Adviser; provided that a KKR Credit Adviser serving as a sub-adviser to an Affiliated Fund is included in this term only if (i) such KKR Credit Adviser controls the entity and (ii) the primary adviser to such Affiliated Fund is not an Adviser. The term Adviser does not include any other primary adviser to an Affiliated Fund or a Regulated Entity whose sub-adviser is an Adviser, except that such adviser is deemed to be an Adviser for purposes of Conditions 2(c)(iv), 14 and 15 only. Any primary adviser to an Affiliated Fund or a Regulated Entity whose sub-

more Affiliated Funds [2] to enter into Co-Investment Transactions with each other. ''Co-Investment Transaction'' means any transaction in which a Regulated Entity (or a Blocker Subsidiary, defined below) participated together with one or more other Regulated Entities and/or one or more Affiliated Investors in reliance on the Order or the Prior Order. ''Potential Co-Investment Transaction'' means any investment opportunity in which a Regulated Entity (or a Blocker Subsidiary) could not participate together with one or more other Regulated Entities and/or one or more Affiliated Investors [3] without obtaining and relying on the Order.[4]

Applicants

2. FS KKR Capital Corp. (''FSK'') and FS KKR Capital Corp. II (''FSKR'') are closed–end management investment companies that have elected to be regulated as business development companies (''BDCs'') under the Act.[5] FSK and FSKR were each organized under the General Corporation Law of the State of Maryland for the purpose of operating as an externally-managed, non-diversified, BDC. FSK and FSKR each have a Board [6] that is comprised of a majority of Independent Directors.[7]

3. KKR Income Opportunities Fund (''KIO'') and KKR Credit Opportunities Portfolio (''KCOP'') were organized as statutory trusts under the laws of the State of Delaware. KIO and KCOP are diversified, closed–end management investment companies registered under the Act. KCOP is a continuously offered closed–end fund that operates as an interval fund. KIO and KCOP each have a five member Board, of which four members are Independent Directors.

4. FS/KKR Advisor and KKR Credit are Delaware limited liability companies registered as investment advisers with the Commission. FS/KKR Advisor is controlled by KKR Credit. FS/KKR Advisor serves as the investment adviser to FSK and FSKR. KKR Credit, a subsidiary of KKR & Co., Inc. (''KKR''), serves as the investment adviser to KIO and KCOP. Each Regulated Entity will be advised or sub-advised by KKR Credit or another KKR Credit Adviser that is a registered investment adviser.

5. The Existing Affiliated Funds are the investment funds identified on Schedule A, together with their direct and indirect wholly-owned subsidiaries. Applicants represent that each investment fund identified on Schedule A is an entity that either (A) would be an investment company but for Section 3(c)(1) or 3(c)(7) of the 1940 Act or (B) relies on the Rule 3a-7 exemption from investment company status. Certain Existing Affiliated Funds are collateralized loan obligation (''CLO'') entities that rely on Rule 3a-7 under the Act in addition to Section 3(c)(7) thereof. These Existing Affiliated Funds are all advised by an Existing KKR Credit Adviser.

6. KKR Capital Markets Holdings L.P. and its capital markets subsidiaries set forth on Schedule A, each of which is an indirect, wholly- or majority-owned subsidiary of KKR, may, from time to time, hold various financial assets in a principal capacity (the ''Existing KCM Companies''). In addition, KKR Financial Holdings LLC, its wholly-owned subsidiaries set forth on Schedule A and its wholly-owned subsidiaries that may be formed in the future, and other indirect, wholly- or majority-owned subsidiaries of KKR set forth on Schedule A may, from time to time, hold various financial assets in a principal capacity (the ''Existing KKR Proprietary Accounts'').

7. Applicants state that any of the Regulated Entities may, from time to time, form a special purpose subsidiary (a ''Blocker Subsidiary'').[8] A Blocker Subsidiary would be prohibited from investing in a Co-Investment Transaction with any other Regulated Entity or Affiliated Investor because it would be a company controlled by the Regulated Entity for purposes of Section 57(a)(4) and rule 17d–1. Applicants request that a Blocker Subsidiary be permitted to participate in Co-Investment Transactions in lieu of its parent Regulated Entity and that the Blocker Subsidiary's participation in any such transaction be treated, for purposes of the Order, as though the parent Regulated Entity were participating directly.

Applicants' Representations

A. Allocation Process

8. Applicants state that opportunities for Potential Co-Investment Transactions may arise when advisory personnel of a KKR Credit Adviser become aware of investment opportunities that may be appropriate for a Regulated Entity, one or more other Regulated Entities and/or one or more Affiliated Investors. In such cases, Applicants state that the Adviser to a Regulated Entity will be notified of such Potential Co-Investment Transactions, and such investment opportunities may result in Co-Investment Transactions. For each such investment opportunity, the Adviser to a Regulated Entity will independently analyze and evaluate the investment opportunity as to its appropriateness for each Regulated Entity for which it serves as investment adviser taking into consideration the Regulated Entity's Objectives and Strategies [9] and any Board–Established

adviser is an Adviser will not source any Potential Co-Investment Transactions under the requested Order.

[2] ''Affiliated Fund'' means (a) any Existing Affiliated Fund or (b) any entity (i) whose investment adviser or sub-adviser is a KKR Credit Adviser and (ii) that either (A) would be an investment company but for Section 3(c)(1), 3(c)(5)(C) or 3(c)(7) of the Act or (B) relies on the Rule 3a-7 exemption from investment company status; provided that an entity sub-advised by a KKR Credit Adviser is included in this term only if (i) such KKR Credit Adviser serving as sub-adviser controls the entity and (ii) the primary adviser of such Affiliated Fund is not an Adviser. ''Existing Affiliated Fund'' means each investment fund set forth on Schedule A together with its direct and indirect wholly-owned subsidiaries.

[3] ''Affiliated Investor'' means any Affiliated Fund or any Proprietary Affiliate. ''Proprietary Affiliate'' means any KCM Company or any KKR Proprietary Account. ''KCM Company'' means (a) any Existing KCM Company (defined below) or (b) any entity that (i) is an indirect, wholly- or majority-owned subsidiary of KKR and (ii) is registered or authorized as a broker-dealer or its foreign equivalent. ''KKR Proprietary Account'' means (a) any Existing KKR Proprietary Account (defined below) or (b) any entity that (i) is an indirect, wholly- or majority- owned subsidiary of KKR, (ii) is advised by a KKR Credit Adviser and (iii) from time to time, may hold various financial assets in a principal capacity, as described in greater detail herein.

[4] All existing entities that currently intend to rely on the Order have been named as Applicants and any existing or future entities that may rely on the Order in the future will comply with the terms and Conditions of the Application.

[5] Section 2(a)(48) defines a BDC to be any closed–end investment company that operates for the purpose of making investments in securities described in Section 55(a)(1) through 55(a)(3) and makes available significant managerial assistance with respect to the issuers of such securities.

[6] ''Board'' means the board of directors or trustees of a Regulated Entity.

[7] ''Independent Director'' means the director or trustee of any Regulated Entity who is not an ''interested person'' within the meaning of Section 2(a)(19) of the Act. No Independent Director of a Regulated Entity will have a financial interest in any Co-Investment Transaction, other than indirectly through share ownership in one of the Regulated Entities.

[8] ''Blocker Subsidiary'' means an entity (a) whose sole business purpose is to hold one or more investments on behalf of a Regulated Entity; (b) that is wholly-owned by the Regulated Entity (with the Regulated Entity at all times holding, beneficially and of record, 100% of the voting and economic interests); (c) with respect to which the Regulated Entity's Board has the sole authority to make all determinations with respect to the Blocker Subsidiary's participation under the conditions to this Application; (d) that does not pay a separate advisory fee, including any performance-based fee, to any person; and (e) that is an entity that would be an investment company but for Section 3(c)(1) or 3(c)(7) of the Act.

[9] ''Objectives and Strategies'' means a Regulated Entity's investment objectives and strategies, as described in the Regulated Entity's registration statement on Form N–2, other filings the Regulated Entity has made with the Commission under the

Continued

Criteria.[10] If the Adviser to the Regulated Entity determines that the opportunity is appropriate for one or more Regulated Entities (and the applicable Adviser approves the investment for each Regulated Entity for which it serves as adviser), and one or more other Regulated Entities and/or one or more Affiliated Investors may also participate, the Adviser to a Regulated Entity will present the investment opportunity to the Eligible Directors [11] of the Regulated Entity prior to the actual investment by the Regulated Entity. As to any Regulated Entity, a Co-Investment Transaction will be consummated only upon approval by a required majority of the Eligible Directors within the meaning of Section 57(o) of such Regulated Entity (''Required Majority'').[12]

9. Applicants state that each Adviser, acting through an investment committee, will carry out its obligation under condition 1 to make a determination as to the appropriateness of the Potential Co-Investment Transaction for any Regulated Entity. In the case of a Potential Co-Investment Transaction, the applicable Adviser would apply its allocation policies and procedures in determining the proposed allocation for the Regulated Entity consistent with the requirements of condition 2(a). Applicants note that each Adviser, as a registered investment adviser with respect to the Regulated Entities and as a registered investment adviser or a relying adviser with respect to the Affiliated Funds, has developed a robust allocation process as part of its overall compliance policies and procedures. Applicants state that these procedures are in addition to, and not instead of, the procedures required under the conditions.

10. Applicants acknowledge that some of the Affiliated Investors may not be funds advised by an Adviser because they are KKR Proprietary Accounts or KCM Companies. KKR Proprietary Accounts are balance sheet entities advised by an Adviser pursuant to an investment management agreement that hold financial assets in a principal capacity. KCM Companies are regulated broker-dealers that may hold financial assets in a principal capacity. Applicants do not believe that the participation of Proprietary Affiliates in the co-investment program would raise any regulatory or mechanical concerns different from those discussed with respect to the Affiliated Investors that are clients.

11. Applicants represent that the Advisers have implemented a robust allocation process to ensure that each Regulated Entity is treated fairly in respect of the allocation of Potential Co-Investment Transactions. The initial amount proposed by an Adviser to be allocated to each applicable Regulated Entity is documented in a written allocation statement. If the amount proposed to be allocated to a Regulated Entity changes from the time the final written allocation statement is prepared and the date of settlement of the transaction, the updated allocation statement will also be recorded and reviewed by a member of the Regulated Entity's compliance team. Each Regulated Entity's Board will be provided with all relevant information regarding the Adviser's proposed allocations to such Regulated Entity and Affiliated Investors, including Proprietary Affiliates, as contemplated by the conditions hereof. With respect to Affiliated Investors that are relying on the Order, each Adviser is subject to the same robust allocation process. As a result, all Potential Co-Investment Transactions that are presented to an Adviser would also be presented to every other Adviser which, as required by condition 1, would make an independent determination of the appropriateness of the investment for the Regulated Entities.

B. Follow-On Investments

12. Applicants state that, from time to time, the Regulated Entities and Affiliated Investors may have opportunities to make Follow-On Investments [13] in an issuer in which a Regulated Entity, one or more other Regulated Entities and/or one or more Affiliated Investors previously have invested and continue to hold an investment.

13. Applicants propose that Follow-On Investments would be divided into two categories depending on whether the prior investment was a Co-Investment Transaction or a Pre-Boarding Investment.[14] If the Regulated Entities and Affiliated Funds (and potentially Proprietary Affiliates) have previously participated in a Co-Investment Transaction with respect to the issuer, then the terms and approval of the Follow-On Investment (a ''Standard Review Follow-On'') would be subject to the process described in Condition 9. If the Regulated Entities and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer but hold a Pre-Boarding Investment, then the terms and approval of the Follow-On Investment (an ''Enhanced Review Follow-On'') would be subject to the process described in Condition 10. All Enhanced Review Follow-Ons require the approval of the Required Majority. For a given issuer, the participating Regulated Entities and Affiliated Investors would need to comply with the requirements of Enhanced-Review Follow-Ons only for the first Co-Investment Transaction. Subsequent Co-Investment Transactions with respect to the issuer would be governed by the requirements of Standard Review Follow-Ons.

14. A Regulated Entity would be permitted to invest in Standard Review Follow-Ons either with the approval of the Required Majority under Condition

Securities Act of 1933, as amended (the ''1933 Act''), or under the Securities and Exchange Act of 1934, as amended (the ''1934 Act''), and the Regulated Entity's reports to shareholders.

[10] ''Board–Established Criteria'' means criteria that the Board of a Regulated Entity may establish from time to time to describe the characteristics of Potential Co-Investment Transactions regarding which each Adviser to the Regulated Entity should be notified under condition 1. The Board–Established Criteria will be consistent with a Regulated Entity's Objectives and Strategies. If no Board–Established Criteria are in effect, then each Adviser to a Regulated Entity will be notified of all Potential Co-Investment Transactions that fall within the Regulated Entity's then-current Objectives and Strategies. Board–Established Criteria will be objective and testable, meaning that they will be based on observable information, such as industry/sector of the issuer, minimum EBITDA of the issuer, asset class of the investment opportunity or required commitment size, and not on characteristics that involve a discretionary assessment. Each Adviser to a Regulated Entity may from time to time recommend criteria for the Board's consideration, but Board–Established Criteria will only become effective if approved by a majority of the Independent Directors. The Independent Directors of a Regulated Entity may at any time rescind, suspend or qualify its approval of any Board–Established Criteria, though Applicants anticipate that, under normal circumstances, the Board would not modify these criteria more often than quarterly.

[11] The term ''Eligible Directors'' means the directors or trustees who are eligible to vote under section 57(o) of the Act.

[12] In the case of a Regulated Entity that is a registered closed–end fund, the directors or trustees that make up the Required Majority will be determined as if the Regulated Entity were a BDC subject to Section 57(o).

[13] ''Follow-On Investment'' means an additional investment in an existing portfolio company, the exercise of warrants, conversion privileges or other similar rights to acquire additional securities of the portfolio company.

[14] ''Pre-Boarding Investments'' are investments in an issuer held by a Regulated Entity as well as one or more Affiliated Funds, one or more Proprietary Affiliates and/or one or more other Regulated Entities that were acquired prior to participating in any Co-Investment Transaction: (i) In transactions in which the only term negotiated by or on behalf of such funds was price in reliance on one of the JT No-Action Letters; or (ii) in transactions occurring at least 90 days apart and without coordination between the Regulated Entity and any Affiliated Fund or other Regulated Entity. ''JT No-Action Letters'' means SMC Capital, Inc., SEC No-Action Letter (pub. avail. Sept. 5, 1995) and Massachusetts Mutual Life Insurance Company, SEC No-Action Letter (pub. avail. June 7, 2000).

9(c) or without Board approval under Condition 9(b) if it is (i) a Pro Rata Follow-On Investment [15] or (ii) a Non-Negotiated Follow-On Investment.[16] Applicants believe that these Pro Rata and Non-Negotiated Follow-On Investments do not present a significant opportunity for overreaching on the part of any Adviser and thus do not warrant the time or the attention of the Board. Pro Rata and Non-Negotiated Follow-On Investments remain subject to the Board's periodic review in accordance with Condition 11.

C. Dispositions

15. Applicants propose that Dispositions [17] would be divided into two categories. If the Regulated Entities and Affiliated Funds (and potentially Proprietary Affiliates) holding investments in the issuer had previously participated in a Co-Investment Transaction with respect to the issuer and continue to hold any securities acquired in a Co-Investment Transaction for such issuer, then the terms and approval of the Disposition (a ''Standard Review Disposition'') would be subject to the process described in Condition 7. If the Regulated Entities and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer but hold a Pre-Boarding Investment, then the terms and approval of the Disposition (an ''Enhanced Review Disposition'') would be subject to the process described in Condition 8. Subsequent Dispositions with respect to the same issuer would be governed by the requirements of Standard Review Dispositions.[18]

16. A Regulated Entity may participate in a Standard Review Disposition either with the approval of the Required Majority under Condition 7(d) or without Board approval under Condition 7(c) if (i) the Disposition is a Pro Rata Disposition [19] or (ii) the securities are Tradable Securities [20] and the Disposition meets the other requirements of Condition 7(c)(ii). Pro Rata Dispositions and Dispositions of a Tradable Security remain subject to the Board's periodic review in accordance with Condition 11.

D. Delayed Settlement

17. Applicants represent that all Regulated Entities and Affiliated Investors participating in a Co-Investment Transaction will invest at the same time, for the same price and with the same terms, conditions, class, registration rights and any other rights, so that none of them receives terms more favorable than any other. However, the settlement date for an Affiliated Fund in a Co-Investment Transaction may occur up to ten business days after the settlement date for a Regulated Entity, and vice versa. Nevertheless, in all cases, (i) the date on which the commitment of the Affiliated Funds and Regulated Entities is made will be the same even where the settlement date is not and (ii) the earliest settlement date and the latest settlement date of any Affiliated Fund or Regulated Entity participating in the transaction will occur within ten business days of each other.

E. Holders

18. Under Condition 17, if an Adviser or its principals, or any person controlling, controlled by, or under common control with the Adviser or its principals, and any Affiliated Investor (collectively, the ''Holders'') own in the aggregate more than 25 percent of the outstanding voting shares of a Regulated Entity, then the Holders will vote such shares in the same percentages as the Regulated Entity's other shareholders (not including the Holders) when voting on matters specified in the Condition. Applicants believe this Condition will ensure that the Independent Directors will act independently in evaluating the co-investment program, because the ability of the Adviser or its principals to influence the Independent Directors by a suggestion, explicit or implied, that the Independent Directors can be removed will be limited significantly.

Applicants' Legal Analysis:

1. Section 17(d) of the 1940 Act generally prohibits an affiliated person (as defined in Section 2(a)(3) of the 1940 Act), or an affiliated person of such affiliated person, of a registered closed-end investment company acting as principal, from effecting any transaction in which the registered closed-end investment company is a joint or a joint and several participant, in contravention of such rules as the Commission may prescribe for the purpose of limiting or preventing participation by the registered closed-end investment company on a basis different from or less advantageous than that of such other participant. Rule 17d–1 under the 1940 Act generally prohibits participation by a registered investment company and an affiliated person (as defined in Section 2(a)(3) of the 1940 Act) or principal underwriter for that investment company, or an affiliated person of such affiliated person or principal underwriter, in any ''joint enterprise or other joint arrangement or profit-sharing plan,'' as defined in the rule, without prior approval by the Commission by order upon application.

2. Similarly, with regard to BDCs, Section 57(a)(4) makes it unlawful for any person who is related to a BDC in a manner described in Section 57(b),

[15] A ''Pro Rata Follow-On Investment'' is a Follow-On Investment (i) in which the participation of each Regulated Entity and each Affiliated Investor is proportionate to its outstanding investments in the issuer or security, as appropriate, immediately preceding the Follow-On Investment, and (ii) in the case of a Regulated Entity, a majority of the Board has approved the Regulated Entity's participation in the pro rata Follow-On Investments as being in the best interests of the Regulated Entity. The Regulated Entity's Board may refuse to approve, or at any time rescind, suspend or qualify, its approval of Pro Rata Follow-On Investments, in which case all subsequent Follow-On Investments will be submitted to the Regulated Entity's Eligible Directors in accordance with Condition 9(c).

[16] A ''Non-Negotiated Follow-On Investment'' is a Follow-On Investment in which a Regulated Entity participates together with one or more Affiliated Investors and/or one or more other Regulated Entities (i) in which the only term negotiated by or on behalf of the funds is price and (ii) with respect to which, if the transaction were considered on its own, the funds would be entitled to rely on one of the JT No-Action Letters.

[17] ''Disposition'' means the sale, exchange or other disposition of an interest in a security of an issuer.

[18] However, with respect to an issuer, if a Regulated Entity's first Co-Investment Transaction is an Enhanced Review Disposition, and the Regulated Entity does not dispose of its entire position in the Enhanced Review Disposition, then before such Regulated Entity may complete its first Standard Review Follow-On in such issuer, the Eligible Directors must review the proposed Follow-On Investment not only on a stand-alone basis but also in relation to the total economic exposure in such issuer (*i.e.,* in combination with the portion of the Pre-Boarding Investment not disposed of in the Enhanced Review Disposition), and the other terms of the investments. This additional review is required because such findings were not required in connection with the prior Enhanced Review Disposition, but they would have been required had the first Co-Investment Transaction been an Enhanced Review Follow-On.

[19] A ''Pro Rata Disposition'' is a Disposition (i) in which the participation of each Regulated Entity and each Affiliated Investor is proportionate to its outstanding investment in the security subject to Disposition immediately preceding the Disposition; and (ii) in the case of a Regulated Entity, a majority of the Board has approved the Regulated Entity's participation in pro rata Dispositions as being in the best interests of the Regulated Entity. The Regulated Entity's Board may refuse to approve, or at any time rescind, suspend or qualify, their approval of Pro Rata Dispositions, in which case all subsequent Dispositions will be submitted to the Regulated Entity's Eligible Directors.

[20] ''Tradable Security'' means a security that meets the following criteria at the time of Disposition: (i) It trades on a national securities exchange or designated offshore securities market as defined in rule 902(b) under the Securities Act; (ii) it is not subject to restrictive agreements with the issuer or other security holders; and (iii) it trades with sufficient volume and liquidity (findings as to which are documented by the Advisers to any Regulated Entities holding investments in the issuer and retained for the life of the Regulated Entity) to allow each Regulated Entity to dispose of its entire position remaining after the proposed Disposition within a short period of time not exceeding 30 days at approximately the value (as defined by Section 2(a)(41) of the 1940 Act) at which the Regulated Entity has valued the investment.

acting as principal, knowingly to effect any transaction in which the BDC (or a company controlled by such BDC) is a joint or a joint and several participant with that person in contravention of rules and regulations as the Commission may prescribe for the purpose of limiting or preventing participation by the BDC (or a controlled company) on a basis less advantageous than that of the other participant. Because the Commission has not adopted any rules expressly under Section 57(a)(4), Section 57(i) provides that the rules under Section 17(d) applicable to registered closed-end investment companies (*e.g.,* Rule 17d–1) are, in the interim, deemed to apply to transactions subject to Section 57(a).

3. Co-Investment Transactions would be prohibited by Sections 17(d) and 57(a)(4) and Rule 17d–1 without a prior exemptive order of the Commission to the extent that the Affiliated Investors and the other Regulated Entities fall within the categories of persons described by Section 17(d) and Section 57(b), as modified by Rule 57b–1 thereunder, vis-à-vis each Regulated Entity. Each Regulated Entity may be deemed to be affiliated persons of each other Regulated Entity within the meaning of Section 2(a)(3) if it is deemed to be under common control because a KKR Credit Adviser is or will be either the investment adviser or sub-adviser to each Regulated Entity. Section 17(d) and Section 57(b) apply to any investment adviser to a closed-end fund or a BDC, respectively, including the sub-adviser. Thus, a KKR Credit Adviser and any Affiliated Investors that it advises could be deemed to be persons related to Regulated Entities in a manner described by Sections 17(d) and 57(b) and therefore prohibited by Sections 17(d) and 57(a)(4) and Rule 17d–1 from participating in the co-investment program.

4. In addition, because all of the KKR Credit Advisers are ''affiliated persons'' of each other, Affiliated Investors advised by any of them could be deemed to be persons related to Regulated Entities (or a company controlled by a Regulated Entity) in a manner described by Sections 17(d) and 57(b) and also prohibited from participating in the Co-Investment Program.

5. Finally, because Proprietary Affiliates are under common control with each KKR Credit Adviser and, therefore, are ''affiliated persons'' of each KKR Credit Adviser, Proprietary Affiliates could be deemed to be persons related to Regulated Entities (or a company controlled by a Regulated Entity) in a manner described by Sections 17(d) and 57(b) and also prohibited from participating in the Co-Investment Program.

6. In passing upon applications under rule 17d–1, the Commission considers whether the participation by the investment company in such joint enterprise, joint arrangement, or profit-sharing plan on the basis proposed is consistent with the provisions, policies and purposes of the Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

7. Applicants submit that the fact that the Required Majority will approve each Co-Investment Transaction before investment (except for certain Dispositions or Follow-On Investments, as described in the conditions), and other protective conditions set forth in this Application, will ensure that a Regulated Entity will be treated fairly. Applicants state that the conditions to which the requested relief will be subject are designed to ensure that principals of the Advisers would not be able to favor the Affiliated Investors over a Regulated Entity through the allocation of investment opportunities among them. Further, Applicants state that the terms and conditions proposed herein will ensure that all such transactions are reasonable and fair to each Regulated Entity and the Affiliated Investors and do not involve overreaching by any person concerned, including a KKR Credit Adviser. Applicants submit that each Regulated Entity's participation in the Co-Investment Transactions will be consistent with the provisions, policies and purposes of the 1940 Act and on a basis that is not different from or less advantageous than that of other participants.

Applicants' Conditions

Applicants agree that the Order will be subject to the following Conditions:

1. Each time a KKR Credit Adviser considers a Potential Co-Investment Transaction for an Affiliated Investor or another Regulated Entity that falls within a Regulated Entity's then-current Objectives and Strategies and Board–Established Criteria, the Adviser to a Regulated Entity will make an independent determination of the appropriateness of the investment for the Regulated Entity in light of the Regulated Entity's then-current circumstances.

2. (a) If the Adviser to a Regulated Entity deems participation in any Potential Co-Investment Transaction to be appropriate for the Regulated Entity, the Adviser will then determine an appropriate level of investment for such Regulated Entity.

(b) If the aggregate amount recommended by the Adviser (to a Regulated Entity to be invested by the Regulated Entity in the Potential Co-Investment Transaction, together with the amount proposed to be invested by the other participating Regulated Entities and Affiliated Investors, collectively, in the same transaction, exceeds the amount of the investment opportunity, the amount of the investment opportunity will be allocated among the Regulated Entities and such Affiliated Investors, *pro rata* based on each participant's Available Capital for investment in the asset class being allocated, up to the amount proposed to be invested by each. The Adviser to a Regulated Entity will provide the Eligible Directors of a Regulated Entity with information concerning each participating party's Available Capital to assist the Eligible Directors with their review of the Regulated Entity's investments for compliance with these allocation procedures.

(c) After making the determinations required in conditions 1 and 2(a) above, the Adviser to the Regulated Entity will distribute written information concerning the Potential Co-Investment Transaction, including the amount proposed to be invested by each Regulated Entity and any Affiliated Investor, to the Eligible Directors for their consideration. A Regulated Entity will co-invest with one or more other Regulated Entities and/or an Affiliated Investor only if, prior to the Regulated Entities' and the Affiliated Investors' participation in the Potential Co-Investment Transaction, a Required Majority concludes that:

(i) The terms of the Potential Co-Investment Transaction, including the consideration to be paid, are reasonable and fair to the Regulated Entity and its shareholders and do not involve overreaching in respect of the Regulated Entity or its shareholders on the part of any person concerned;

(ii) the Potential Co-Investment Transaction is consistent with:

(A) The interests of the Regulated Entity's shareholders; and

(B) the Regulated Entity's then-current Objectives and Strategies and Board–Established Criteria;

(iii) the investment by any other Regulated Entity or an Affiliated Investor would not disadvantage the Regulated Entity, and participation by the Regulated Entity would not be on a basis different from or less advantageous than that of any other Regulated Entity or Affiliated Investor; *provided,* that the

Required Majority shall not be prohibited from reaching the conclusions required by this Condition 2(c)(iii) if:

(A) The settlement date for another Regulated Entity or an Affiliated Fund in a Co-Investment Transaction is later than the settlement date for the Regulated Entity by no more than ten business days or earlier than the settlement date for the Regulated Entity by no more than ten business days, in either case, so long as: (x) The date on which the commitments of the Affiliated Funds and Regulated Entities are made is the same; and (y) the earliest settlement date and the latest settlement date of any Affiliated Fund or Regulated Entity participating in the transaction will occur within ten business days of each other; or

(B) any other Regulated Entity or Affiliated Investor, but not the Regulated Entity itself, gains the right to nominate a director for election to a portfolio company's board of directors or the right to have a board observer, or any similar right to participate in the governance or management of the portfolio company so long as: (x) The Eligible Directors will have the right to ratify the selection of such director or board observer, if any; (y) the Adviser to the Regulated Entity agrees to, and does, provide periodic reports to the Regulated Entity's Board with respect to the actions of such director or the information received by such board observer or obtained through the exercise of any similar right to participate in the governance or management of the portfolio company; and (z) any fees or other compensation that any other Regulated Entity or any Affiliated Investor or any affiliated person of any other Regulated Entity or an Affiliated Investor receives in connection with the right of one or more Regulated Entities or Affiliated Investors to nominate a director or appoint a board observer or otherwise to participate in the governance or management of the portfolio company will be shared proportionately among the participating Affiliated Investors (who may, in turn, share their portion with their affiliated persons) and any participating Regulated Entity in accordance with the amount of each party's investment; and

(iv) the proposed investment by the Regulated Entity will not benefit the Advisers, any other Regulated Entity, or the Affiliated Investors or any affiliated person of any of them (other than the parties to the Co-Investment Transaction), except (A) to the extent permitted by condition 15, (B) to the extent permitted under Sections 17(e) and 57(k) of the 1940 Act, as applicable, (C) in the case of fees or other compensation described in condition 2(c)(iii)(B), or (D) indirectly, as a result of an interest in the securities issued by one of the parties to the Co-Investment Transaction.

3. A Regulated Entity will have the right to decline to participate in any Potential Co-Investment Transaction or to invest less than the amount proposed.

4. The Adviser to the Regulated Entity will present to the Board of each Regulated Entity, on a quarterly basis, a record of all investments in Potential Co-Investments made by any of the other Regulated Entities or any of the Affiliated Investors during the preceding quarter that fell within the Regulated Entity's then-current Objectives and Strategies and Board–Established Criteria that were not made available to the Regulated Entity, and an explanation of why the investment opportunities were not offered to the Regulated Entity. All information presented to the Board pursuant to this condition will be kept for the life of the Regulated Entity and at least two years thereafter, and will be subject to examination by the Commission and its staff.

5. Except for Follow-On Investments made in accordance with condition 9 and 10,[21] a Regulated Entity will not invest in reliance on the Order in any issuer in which a Related Party[22] is an existing investor.

6. A Regulated Entity will not participate in any Potential Co-Investment Transaction unless (i) the terms, conditions, price, class of securities to be purchased, the date on which the commitment is entered and registration rights will be the same for each participating Regulated Entity and Affiliated Investor and (ii) the earliest settlement date and the latest settlement date of any participating Regulated Entity or Affiliated Fund will occur as close in time as practicable and in no event more than ten business days apart. The grant to one or more Regulated Entities or Affiliated Investors, but not the Regulated Entity itself, of the right to nominate a director for election to a portfolio company's board of directors, the right to have an observer on the board of directors or similar rights to participate in the governance or management of the portfolio company will not be interpreted so as to violate this Condition 6, if Condition 2(c)(iii)(B) is met.

7. (a) If any Regulated Entity or Affiliated Investor elects to sell, exchange or otherwise dispose of an interest in a security that was acquired by one or more Regulated Entities and/or Affiliated Investors in a Co-Investment Transaction, the applicable Adviser(s)[23] will:

(i) Notify each Regulated Entity of the proposed Disposition at the earliest practical time; and

(ii) formulate a recommendation as to participation by the Regulated Entity in the Disposition.

(b) Each Regulated Entity will have the right to participate in such Disposition on a proportionate basis, at the same price and on the same terms and conditions as those applicable to the Affiliated Investors and any other Regulated Entity.

(c) A Regulated Entity may participate in such Disposition without obtaining prior approval of the Required Majority if:

(i)(A) The proposed participation of each Regulated Entity and each Affiliated Investor in such Disposition is proportionate to its outstanding investments in the issuer immediately preceding the Disposition;[24] (B) the Regulated Entity's Board has approved as being in the best interests of the Regulated Entity the ability to participate in such Dispositions on a *pro rata* basis (as described in greater detail in this Application); and (C) the Regulated Entity's Board is provided on a quarterly basis with a list of all Dispositions made in accordance with this condition; or

(ii) each security is a Tradable Security and (A) the Disposition is not to the issuer or any affiliated person of the issuer; and (B) the security is sold for cash in a transaction in which the

[21] This exception applies only to Follow-On Investments by a Regulated Entity in issuers in which that Regulated Entity already holds investments.

[22] ''Related Party'' means (i) any Close Affiliate and (ii) in respect of matters as to which any Adviser has knowledge, any Remote Affiliate. ''Close Affiliate'' means the Advisers, the Regulated Entities, the Affiliated Funds and any other person described in Section 57(b) (after giving effect to Rule 57b–1) in respect of any Regulated Entity (treating any registered investment company or series thereof as a BDC for this purpose) except for limited partners included solely by reason of the reference in Section 57(b) to Section 2(a)(3)(D). ''Remote Affiliate'' means any person described in Section 57(e) in respect of any Regulated Entity (treating any registered investment company or series thereof as a BDC for this purpose) and any limited partner holding 5% or more of the relevant limited partner interests that would be a Close Affiliate but for the exclusion in that definition.

[23] For purposes of the requested Order, any KCM Company that is not advised by an Adviser is itself deemed to be an Adviser for purposes of this Condition 7(a) and Conditions 8(a), 9(a) and 10(a).

[24] In the case of any Disposition, proportionality will be measured by each participating Regulated Entity's and Affiliated Investor's outstanding investment in the security in question immediately preceding the Disposition.

only term negotiated by or on behalf of the participating Regulated Entities and Affiliated Investors is price.

(d) In all other cases, the Adviser to the Regulated Entity will provide their written recommendation as to the Regulated Entity's participation to the Eligible Directors, and the Regulated Entity will participate in such disposition solely to the extent that a Required Majority determines that it is in the Regulated Entity's best interests.

8. (a) If any Regulated Entity or Affiliated Investor elects to sell, exchange or otherwise dispose of a Pre-Boarding Investment in a Potential Co-Investment Transaction and the Regulated Entities and Affiliated Investors have not previously participated in a Co-Investment Transaction with respect to the issuer:

(i) The Adviser to such Regulated Entity or Affiliated Investor will notify each Regulated Entity that holds an investment in the issuer of the proposed disposition at the earliest practical time;

(ii) the Adviser to each Regulated Entity that holds an investment in the issuer, will formulate a recommendation as to participation by such Regulated Entity in the disposition; and

(iii) the Advisers will provide to the Board of each Regulated Entity that holds an investment in the issuer all information relating to the existing investments in the issuer of the Regulated Entities and Affiliated Investors, including the terms of such investments and how they were made, that is necessary for the Required Majority to make the findings required by this condition.

(b) The Adviser will provide its written recommendation as to the Regulated Entity's participation to the Eligible Directors, and the Regulated Entity will participate in such disposition, solely to the extent that a Required Majority determines that:

(i) The disposition complies with Condition 2(c)(i), (ii), (iii)(A) and (iv); and

(ii) the making and holding of the Pre-Boarding Investments were not prohibited by Section 57 or Rule 17d–1, as applicable, and records the basis for the finding in the Board minutes.

(c) The Disposition may only be completed in reliance on the Order if:

(i) Each Regulated Entity has the right to participate in such disposition on a proportionate basis, at the same price and on the same terms and conditions as those applicable to the Affiliated Investors and any other Regulated Entity;

(ii) All of the Affiliated Investors' and Regulated Entities' investments in the issuer are Pre-Boarding Investments;

(iii) Independent counsel to the Board advises that the making and holding of the investments in the Pre-Boarding Investments were not prohibited by Section 57 (as modified by Rule 57b–1) or Rule 17d–1, as applicable;

(iv) All Regulated Entities and Affiliated Investors that hold Pre-Boarding Investments in the issuer immediately before the time of completion of the Co-Investment Transaction hold the same security or securities of the issuer. For the purpose of determining whether the Regulated Entities and Affiliated Investors hold the same security or securities, they may disregard any security held by some but not all of them if, prior to relying on the Order, the Required Majority is presented with all information necessary to make a finding, and finds, that: (i) Any Regulated Entity's or Affiliated Investor's holding of a different class of securities (including for this purpose a security with a different maturity date) is Immaterial [25] in amount, including Immaterial relative to the size of the issuer; and (ii) the Board records the basis for any such finding in its minutes. In addition, securities that differ only in respect of issuance date, currency, or denominations may be treated as the same security; and

(v) The Affiliated Investors, the other Regulated Entities and their affiliated persons (within the meaning of Section 2(a)(3)(C) of the 1940 Act), individually or in the aggregate, do not control the issuer of the securities (within the meaning of Section 2(a)(9) of the 1940 Act).

9. (a) If any Regulated Entity or Affiliated Investor desires to make a Follow-On Investment in a portfolio company whose securities were acquired by the Regulated Entity and the Affiliated Investor in a Co-Investment Transaction, the applicable Adviser(s) will:

(i) Notify the Regulated Entity of the proposed transaction at the earliest practical time; and

(ii) formulate a recommendation as to the proposed participation, including the amount of the proposed Follow-On Investment, by the Regulated Entity.

(b) A Regulated Entity may participate in such Follow-On Investment without obtaining prior approval of the Required Majority if:

(i)(A) The proposed participation of each Regulated Entity and each Affiliated Investor in such investment is proportionate to its outstanding investments in the issuer or the security at issue, as appropriate,[26] immediately preceding the Follow-On Investment and (B) the Regulated Entity's Board has approved as being in the best interests of such Regulated Entity the ability to participate in Follow-On Investments on a *pro rata* basis (as described in greater detail in this Application); or

(ii) it is a Non-Negotiated Follow-On Investment.

(c) In all other cases, the Adviser to the Regulated Entity will provide their written recommendation as to such Regulated Entity's participation to the Eligible Directors, and the Regulated Entity will participate in such Follow-On Investment solely to the extent that the Required Majority determines that it is in such Regulated Entity's best interests. If the only previous Co-Investment Transaction with respect to the issuer was an Enhanced Review Disposition, the Eligible Directors must complete this review of the proposed Follow-On Investment both on a stand-alone basis and together with the Pre-Boarding Investments in relation to the total economic exposure and other terms of the investment.

(d) If, with respect to any Follow-On Investment:

(i) The amount of a Follow-On Investment is not based on the Regulated Entities' and the Affiliated Investors' outstanding investments immediately preceding the Follow-On Investment; and

(ii) the aggregate amount recommended by the Adviser to a Regulated Entity to be invested by the Regulated Entity in the Follow-On Investment, together with the amount proposed to be invested by the other participating Regulated Entities and the Affiliated Investors in the same transaction, exceeds the amount of the opportunity; then the amount invested by each such party will be allocated

[25] In determining whether a holding is ''Immaterial'' for purposes of the Order, the Required Majority will consider whether the nature and extent of the interest in the transaction or arrangement is sufficiently small that a reasonable person would not believe that the interest affected the determination of whether to enter into the transaction or arrangement or the terms of the transaction or arrangement.

[26] To the extent that a Follow-On Investment opportunity is in a security or arises in respect of a security held by the participating Regulated Entities and Affiliated Investors, proportionality will be measured by each participating Regulated Entity's and Affiliated Investor's outstanding investment in the security in question immediately preceding the Follow-On Investment using the most recent available valuation thereof. To the extent that a Follow-On Investment opportunity relates to an opportunity to invest in a security that is not in respect of any security held by any of the participating Regulated Entities or Affiliated Investors, proportionality will be measured by each participating Regulated Entity's and Affiliated Investor's outstanding investment in the issuer immediately preceding the Follow-On Investment using the most recent available valuation thereof.

among them *pro rata* based on each participant's Available Capital for investment in the asset class being allocated, up to the amount proposed to be invested by each.

(e) The acquisition of Follow-On Investments as permitted by this condition will be considered a Co-Investment Transaction for all purposes and subject to the other conditions set forth in the Application.

10. (a) If any Regulated Entity or Affiliated Investor desires to make a Follow-On Investment in an issuer that is a Potential Co-Investment Transaction and the Regulated Entities and Affiliated Funds holding investments in the issuer have not previously participated in a Co-Investment Transaction with respect to the issuer:

(i) The Adviser to each such Regulated Entity or Affiliated Investor will notify each Regulated Entity that holds securities of the portfolio company of the proposed transaction at the earliest practical time;

(ii) the Adviser to each Regulated Entity that holds an investment in the issuer will formulate a recommendation as to the proposed participation, including the amount of the proposed investment, by such Regulated Entity; and

(iii) the Advisers will provide to the Board of each Regulated Entity that holds an investment in the issuer all information relating to the existing investments in the issuer of the Regulated Entities and Affiliated Investors, including the terms of such investments and how they were made, that is necessary for the Required Majority to make the findings required by this condition.

(b) The Adviser will provide its written recommendation as to the Regulated Entity's participation to the Eligible Directors, and the Regulated Entity will participate in such Follow-On Investment solely to the extent that a Required Majority reviews the proposed Follow-On Investment both on a stand-alone basis and together with the Pre-Boarding Investments in relation to the total economic exposure and other terms and makes the determinations set forth in condition 2(c). In addition, the Follow-On Investment may only be completed in reliance on the Order if the Required Majority of each participating Regulated Entity determines that the making and holding of the Pre-Boarding Investments were not prohibited by Section 57 (as modified by Rule 57b–1) or Rule 17d–1, as applicable. The basis for the Board's findings will be recorded in its minutes.

(c) The Follow-On Investment may only be completed in reliance on the Order if:

(i) All of the Affiliated Investors' and Regulated Entities' investments in the issuer are Pre-Boarding Investments; and

(ii) independent counsel to the Board advises that the making and holding of the investments in the Pre-Boarding Investments were not prohibited by Section 57 (as modified by Rule 57b–1) or Rule 17d–1, as applicable;

(iii) all Regulated Entities and Affiliated Investors that hold Pre-Boarding Investments in the issuer immediately before the time of completion of the Co-Investment Transaction hold the same security or securities of the issuer. For the purpose of determining whether the Regulated Entities and Affiliated Investors hold the same security or securities, they may disregard any security held by some but not all of them if, prior to relying on the Order, the Required Majority is presented with all information necessary to make a finding, and finds, that: (i) Any Regulated Entity's or Affiliated Investor's holding of a different class of securities (including for this purpose a security with a different maturity date) is Immaterial in amount, including Immaterial relative to the size of the issuer; and (ii) the Board records the basis for any such finding in its minutes. In addition, securities that differ only in respect of issuance date, currency, or denominations may be treated as the same security; and

(iv) the Affiliated Investors, the other Regulated Entities and their affiliated persons (within the meaning of Section 2(a)(3)(C) of the 1940 Act), individually or in the aggregate, do not control the issuer of the securities (within the meaning of Section 2(a)(9) of the 1940 Act); and

(d) If, with respect to any such Follow-On Investment:

(i) The amount of the opportunity proposed to be made available to any Regulated Entity is not based on the Regulated Entities' and the Affiliated Funds' outstanding investments in the issuer or the security at issue, as appropriate, immediately preceding the Follow-On Investment; and

(ii) the aggregate amount recommended by the Advisers to be invested in the Follow-On Investment by the participating Regulated Entities and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, then the Follow-On Investment opportunity will be allocated among them *pro rata* based on each participant's Available Capital for investment in the asset class being allocated, up to the amount proposed to be invested by each.

(e) The acquisition of Follow-On Investments as permitted by this condition will be considered a Co-Investment Transaction for all purposes and subject to the other conditions set forth in this Application.

11. The Independent Directors of each Regulated Entity will be provided quarterly for review all information concerning Potential Co-Investment Transactions and Co-Investment Transactions, including investments made by other Regulated Entities or Affiliated Investors that a Regulated Entity considered but declined to participate in, so that the Independent Directors may determine whether all investments made during the preceding quarter, including those investments which the Regulated Entity considered but declined to participate in, comply with the conditions of the Order. In addition, the Independent Directors will consider at least annually (a) the continued appropriateness for such Regulated Entity of participating in new and existing Co-Investment Transactions and (b) the continued appropriateness of any Board-Established Criteria.

12. Each Regulated Entity will maintain the records required by Section 57(f)(3) of the 1940 Act as if each of the Regulated Entities were a BDC and each of the investments permitted under these conditions were approved by a Required Majority under Section 57(f).

13. No Independent Director of a Regulated Entity will also be a director, general partner, managing member or principal, or otherwise an ''affiliated person'' (as defined in the 1940 Act) of any Affiliated Investor.

14. The expenses, if any, associated with acquiring, holding or disposing of any securities acquired in a Co-Investment Transaction (including, without limitation, the expenses of the distribution of any such securities registered for sale under the 1933 Act) shall, to the extent not payable by the applicable Adviser(s) under their respective advisory agreements with the Regulated Entities and the Affiliated Investors, be shared by the Regulated Entities and the Affiliated Investors in proportion to the relative amounts of the securities held or to be acquired or disposed of, as the case may be.

15. Any transaction fee (including break-up or commitment fees but excluding broker's fees contemplated by Section 17(e) or 57(k) of the 1940 Act,

as applicable)[27] received in connection with a Co-Investment Transaction will be distributed to the participating Regulated Entities and Affiliated Investors on a *pro rata* basis based on the amount they invested or committed, as the case may be, in such Co-Investment Transaction. If any transaction fee is to be held by an Adviser pending consummation of the transaction, the fee will be deposited into an account maintained by the Adviser at a bank or banks having the qualifications prescribed in Section 26(a)(1) of the 1940 Act, and the account will earn a competitive rate of interest that will also be divided *pro rata* among the participating Regulated Entities and Affiliated Investors based on the amount they invest in the Co-Investment Transaction. None of the other Regulated Entities, Affiliated Investors, the applicable Adviser(s) nor any affiliated person of the Regulated Entities or the Affiliated Investors will receive additional compensation or remuneration of any kind as a result of or in connection with a Co-Investment Transaction (other than (a) in the case of the Regulated Entities and the Affiliated Investors, the *pro rata* transaction fees described above and fees or other compensation described in condition 2(c)(iii)(B) and (b) in the case of the Advisers, investment advisory fees paid in accordance with the Regulated Entities' and the Affiliated Investors' investment advisory agreements).

16. The Advisers to the Regulated Entities and Affiliated Investors will maintain written policies and procedures reasonably designed to ensure compliance with the foregoing conditions. These policies and procedures will require, among other things, that each of the Advisers to each Regulated Entity will be notified of all Potential Co-Investment Transactions that fall within such Regulated Entity's then-current Objectives and Strategies and Board-Established Criteria and will be given sufficient information to make its independent determination and recommendations under conditions 1, 2(a), 7, 8, 9 and 10.

17. If the Holders own in the aggregate more than 25 percent of the Shares of a Regulated Entity, then the Holders will vote such Shares in the same percentages as the Regulated Entity's other shareholders (not including the Holders) when voting on (1) the election of directors; (2) the removal of one or more directors; or (3) any other matter under either the 1940 Act or applicable state law affecting the Board's composition, size or manner of election.

18. Each Regulated Entity's chief compliance officer, as defined in Rule 38a–1(a)(4), will prepare an annual report for its Board each year that evaluates (and documents the basis of that evaluation) the Regulated Entity's compliance with the terms and conditions of the application and the procedures established to achieve such compliance.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Matthew DeLesDernier,

Assistant Secretary.

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BILLING CODE 8011–01–P

[27] Applicants are not requesting and the Commission is not providing any relief for transaction fees received in connection with any Co-Investment Transaction.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90638; File No. SR–MIAX–2020–37]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule

December 11, 2020.

Pursuant to the provisions of 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, Miami International Securities Exchange LLC (''MIAX Options'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Options Fee Schedule (''Fee Schedule'').

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings,* at MIAX'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 Exchange proposes to (i) make a minor, corrective edit and clarifying change to one of the footnotes in Section 1)b)i) of the Fee Schedule; and (ii) amend the exchange groupings of options exchanges within the routing fee table in Section 1)c) of the Fee Schedule.

Fee Schedule Cleanup

First, the Exchange proposes to amend footnote ''!'' in Section 1)b)i) of the Fee Schedule to make a minor, corrective edit and clarifying change. Footnote ''!'' currently provides as follows: ''The SPIKES Combination portion of a SPIKES Combination Order will be charged at the Combination rate and other legs will be charged at the Complex rate. All fees are per contract per leg.'' Pursuant to Exchange Rule 518, Interpretation and Policy .07(a), a ''SPIKES Combination'' is a purchase (sale) of a SPIKES call option and sale (purchase) of a SPIKES put option having the same expiration date and strike price.[3] Further, a ''SPIKES Combo Order'' is an order to purchase or sell one or more SPIKES option series and the offsetting number of SPIKES Combinations defined by the delta.[4] The Exchange proposes to amend footnote ''!'' to delete the word ''Combination'' in the phrase ''SPIKES Combination Order'' and replace it with the word ''Combo.'' The purpose of this proposed change is to provide the correct name of the type of order in footnote ''!''.

[3] *See* Exchange Rule 518, Interpretation and Policy .07(a)(1).

[4] *See* Exchange Rule 518, Interpretation and Policy .07(a)(3).

Update Group of Certain Options Exchanges

Next, the Exchange proposes to amend the exchange groupings of options exchanges within the routing fee table in Section 1)c) of the Fee Schedule to adjust certain groupings of options exchanges.

Currently, the Exchange assesses routing fees based upon (i) the origin type of the order, (ii) whether or not it is an order for standard option classes in the Penny Interval Program [5] (''Penny classes'') or an order for standard option classes which are not in the Penny Interval Program (''Non-Penny classes'') (or other explicitly identified classes), and (iii) to which away market it is being routed. This assessment practice is identical to the routing fees assessment practice currently utilized by the Exchange's affiliates, MIAX PEARL, LLC (''MIAX PEARL'') and MIAX Emerald, LLC (''MIAX Emerald''). This is also similar to the methodologies utilized by other competing options exchanges, such as the Cboe BZX Exchange, Inc. (''Cboe BZX''), in assessing routing fees. Cboe BZX has exchange groupings in its fee schedule, similar to those of the Exchange, whereby several exchanges are grouped into the same category, dependent on the order's origin type and whether it is a Penny or Non-Penny class.[6]

As a result of conducting a periodic review of the current transaction fees and rebates charged by away markets, the Exchange has determined to amend the exchange groupings of options exchanges within the routing fee table to better reflect the associated costs of routing customer orders to those options exchanges for execution. In particular, the Exchange proposes to amend the seventh ''Routed, Public Customer that is not a Priority Customer, Non-Penny Program'' exchange grouping to move Nasdaq MRX from the seventh exchange grouping into the eighth ''Routed, Public Customer that is not a Priority Customer, Non-Penny Program'' exchange grouping. The impact of this proposed change will be that the routing fee for Public Customer orders that are not Priority Customer orders in the Penny Program, that are routed to Nasdaq MRX, LLC (''Nasdaq MRX''), will increase from $1.15 to $1.25. The Exchange notes that no options exchanges were removed from the routing fee table entirely, with the only change being the change in categorization for Nasdaq MRX. The purpose of the proposed rule change is to adjust the routing fee for certain orders routed to Nasdaq MRX to reflect the associated costs for that routed execution.

Accordingly, with the proposed change, the routing fee table will be as follows:

Description	Fees
Routed, Priority Customer, Penny Program, to: NYSE American, BOX, Cboe, Cboe EDGX Options, Nasdaq MRX, Nasdaq PHLX (except SPY), Nasdaq BX Options	$0.15
Routed, Priority Customer, Penny Program, to: NYSE Arca Options, Cboe BZX Options, Cboe C2, Nasdaq GEMX, Nasdaq ISE, NOM, Nasdaq PHLX (SPY only), MIAX Emerald, MIAX PEARL	0.65
Routed, Priority Customer, Non-Penny Program, to: NYSE American, BOX, Cboe, Cboe EDGX Options, Nasdaq ISE, Nasdaq MRX, Nasdaq PHLX, Nasdaq BX Options	0.15
Routed, Priority Customer, Non-Penny Program, to: NYSE Arca Options, Cboe BZX Options, Cboe C2, MIAX PEARL, MIAX Emerald, Nasdaq GEMX, NOM	1.00
Routed, Public Customer that is not a Priority Customer, Penny Program, to: NYSE American, NYSE Arca Options, Cboe BZX Options, BOX, Cboe, Cboe C2, Cboe EDGX Options, Nasdaq GEMX, Nasdaq ISE, Nasdaq MRX, MIAX PEARL, MIAX Emerald, NOM, Nasdaq PHLX, Nasdaq BX Options	0.65
Routed, Public Customer that is not a Priority Customer, Non-Penny Program, to: NYSE American, Cboe, Nasdaq PHLX, Nasdaq ISE, Cboe EDGX Options	1.00
Routed, Public Customer that is not a Priority Customer, Non-Penny Program, to: Cboe C2, BOX, Nasdaq BX Options, NOM, MIAX PEARL, MIAX Emerald	1.15
Routed, Public Customer that is not a Priority Customer, Non-Penny Program, to: Cboe BZX Options, NYSE Arca Options, Nasdaq GEMX, Nasdaq MRX	1.25

In determining to amend its Routing Fees, the Exchange took into account transaction fees and rebates assessed by the away markets to which the Exchange routes orders, as well as the Exchange's clearing costs,[7] administrative, regulatory, and technical costs associated with routing orders to an away market. The Exchange uses unaffiliated routing brokers to route orders to the away markets; the costs associated with the use of these services are included in the routing fees specified in the Fee Schedule. This routing fees structure is not only similar to the Exchange's affiliates, MIAX PEARL and MIAX Emerald, but is also comparable to the structures in place at other competing options exchanges, such as Cboe BZX.[8] The Exchange's routing fee structure approximates the Exchange's costs associated with routing orders to away markets. The per-contract transaction fee amount associated with each grouping closely approximates the Exchange's all-in cost (plus an additional, non-material amount) to execute that corresponding contract at that corresponding exchange. The Exchange notes that in determining whether to adjust certain groupings of options exchanges in the routing fee table, the Exchange considered the transaction fees and rebates assessed by away markets, and determined to amend the grouping of exchanges that assess transaction fees for routed orders within a similar range. This same logic and structure applies to all of the groupings in the routing fees table. By utilizing the same structure that is utilized by the Exchange's affiliates, MIAX PEARL and

[5] *See* Securities Exchange Act Release No. 88988 (June 2, 2020), 85 FR 35153 (June 8, 2020) (SR–MIAX–2020–13) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 404, Series of Option Contracts Open for Trading, Exchange Rule 510, Minimum Price Variations and Minimum Trading Increments, and Exchange Rule 516, Order Types Defined, To Conform the Rules to Section 3.1 of the Plan for the Purpose of Developing and Implementing Procedures Designed To Facilitate the Listing and Trading of Standardized Options).

[6] *See* Cboe BZX Fee Schedule under ''Fee Codes and Associated Fees.''

[7] The OCC amended its clearing fee from $0.01 per contract side to $0.02 per contract side. *See* Securities Exchange Act Release No. 71769 (March 21, 2014), 79 FR 17214 (March 27, 2014) (SR–OCC–2014–05).

[8] *See supra* note 6. The Cboe BZX fee schedule has exchange groupings, whereby several exchanges are grouped into the same category, dependent on the order's Origin type and whether it is a Penny or Non-Penny class. For example, Cboe BZX fee code RR covers routed customer orders in Non-Penny classes to NYSE Arca, Cboe C2, Nasdaq ISE, Nasdaq Gemini, MIAX Emerald, MIAX PEARL, or NOM, with a single fee of $1.25 per contract. *Id.*

MIAX Emerald, the Exchange's Members [9] will be assessed routing fees in a similar manner. The Exchange believes that this structure will minimize any confusion as to the method of assessing routing fees between the three exchanges. The Exchange notes that its affiliates, MIAX PEARL and MIAX Emerald, will file to make the same proposed routing fee change for Nasdaq MRX.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [10] in general, and furthers the objectives of Section 6(b)(4) of the Act [11] in particular, in that it is an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act [12] in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes the proposed change to make a minor, corrective edit and clarifying change to footnote ''!'' in Section 1)b)i) of the Fee Schedule promotes just and equitable principles of trade and removes impediments to and perfects the mechanism of a free and open market and a national market system because the proposed change will provide greater clarity to Members and the public regarding the Exchange's Fee Schedule. The Exchange believes that it is in the public interest for the Fee Schedule to be accurate and concise so as to eliminate the potential for confusion.

The Exchange believes the proposed change to the exchange groupings of options exchanges within the routing fee table furthers the objectives of Section 6(b)(4) of the Act and is reasonable, equitable and not unfairly discriminatory because the proposed change will continue to apply in the same manner to all Members that are subject to routing fees. The Exchange believes the proposed change to the routing fee table exchange groupings furthers the objectives of Section 6(b)(5) of the Act and is designed to promote just and equitable principles of trade and is not unfairly discriminatory because the proposed change seeks to recoup costs that are incurred by the Exchange when routing customer orders to away markets on behalf of Members and does so in the same manner to all Members that are subject to routing fees. The costs to the Exchange to route orders to away markets for execution primarily includes transaction fees and rebates assessed by the away markets to which the Exchange routes orders, in addition to the Exchange's clearing costs, administrative, regulatory and technical costs. The Exchange believes that the proposed re-categorization of certain exchange groupings would enable the Exchange to recover the costs it incurs to route orders to Nasdaq MRX. The per-contract transaction fee amount associated with each grouping approximates the Exchange's all-in cost (plus an additional, non-material amount) to execute the corresponding contract at the corresponding exchange.

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's proposal to make a minor, corrective edit and clarifying change to footnote ''!'' in Section 1)b)i) of the Fee Schedule is not a competitive change but rather is designed to remedy a minor non-substantive issue and provide added clarity to the Fee Schedule in order to avoid potential confusion on the part of market participants. In addition, the Exchange does not believe the proposal will impose any burden on inter-market competition as the proposal does not address any competitive issues and is intended to protect investors by providing further transparency regarding the Exchange's Fee Schedule.

The Exchange believes its proposed re-categorization of certain exchange groupings is intended to enable the Exchange to recover the costs it incurs to route orders to away markets, particularly Nasdaq MRX. The Exchange does not believe that this proposal imposes any unnecessary burden on competition because it seeks to recoup costs incurred by the Exchange when routing orders to away markets on behalf of Members and other exchanges have similar routing fee structures.[13]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[14] and Rule 19b–4(f)(2) [15] 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–MIAX–2020–37 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2020–37. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the

[9] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4).

[12] 15 U.S.C. 78f(b)(5).

[13] *See supra* note 6.

[14] 15 U.S.C. 78s(b)(3)(A)(ii).

[15] 17 CFR 240.19b–4(f)(2).

proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MIAX–2020–37, and should be submitted on or before January 7, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27719 Filed 12–16–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENTS: 85 FR 80875, December 14, 2020.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETINGS: Wednesday, December 16, 2020 at 10:00 a.m.

CHANGES IN THE MEETING: The following item will not be considered during the Open Meeting on Wednesday, December 16, 2020:

2. The Commission will consider whether to adopt amendments under the Investment Advisers Act of 1940 (the ''Advisers Act'') to update rules that govern investment adviser marketing to accommodate the continual evolution and interplay of technology and advice, while preserving investor protections. The Commission will also consider whether to adopt amendments to Form ADV to provide the Commission with additional information about advisers' marketing practices, and corresponding amendments to the books and records rule under the Advisers Act.

In addition, the following previously scheduled matter will be considered on December 21, 2020, during the Open Meeting:

3. The Commission will consider whether to approve a proposed rule change by New York Stock Exchange LLC to amend Chapter One of the Listed Company Manual to modify the provisions relating to direct listings.

CONTACT PERSON FOR MORE INFORMATION: For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact the Office of the Secretary at (202) 551–5400.

Dated: December 14, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–27867 Filed 12–15–20; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90650; File No. SR–NYSEAMER–2020–84]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the NYSE American Options Fee Schedule

December 11, 2020.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 7, 2020, NYSE American LLC (''NYSE American'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE American Options Fee Schedule (''Fee Schedule'') regarding credits and incentives relating to Complex Customer Best Execution Auctions. The Exchange proposes to implement the fee changes effective December 7, 2020.[4] The proposed change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to modify the Fee Schedule to (1) amend the criteria to qualify for a credit available to Initiating Participants in a Complex Customer Best Execution (''CUBE'') Auction,[5] and (2) eliminate an unused incentive that had been designed to encourage the use of Complex CUBE Auctions. The Exchange proposes to implement the rule changes on December 7, 2020.

Proposed Modifications to the Fee Schedule

Volume Qualification for Alternative Initiating Participant Rebate

Section I.G. of the Fee Schedule sets forth the rates for per contract fees and credits for executions associated with Single-Leg and Complex CUBE Auctions.[6] To encourage participants to utilize Complex CUBE Auctions, the Exchange offers rebates and credits on certain initiating Complex CUBE volume. Currently, the Exchange offers Initiating Participant Rebates for the first 1,000 contracts per leg of a Complex CUBE Order executed in a Complex CUBE Auction.[7] The Exchange offers an ACE Initiating Participant Rebate to ATP Holders that qualify for the American Customer Engagement

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange originally filed to amend the Fee Schedule on December 1, 2020 (SR–NYSEAMER–2020–82) and withdrew such filing on December 7, 2020.

[5] *See generally* Rule 971.2NY (regarding Complex CUBE Auctions). Unless otherwise specified, capitalized terms have the same meaning as the defined terms in Rule 971.2NY.

[6] *See* Fee Schedule, Section I.G., CUBE Auction Fees & Credits.

[7] *See id.,* Complex CUBE Auction, note 2 (setting forth both the ACE Initiating Participant Rebate and the Alternative Initiating Participant Rebate).

(''ACE'') Program [8] and an Alternative Initiating Participant Rebate (the ''Rebate'') for ATP Holders that execute a minimum of 5,000 contracts ADV in the Professional range, as defined in Section I.H., and also increase their Initiating CUBE Orders in Single-Leg CUBE Auctions by the greater of 40% over their August 2019 volume or 15,000 contracts ADV.[9]

The Exchange proposes to modify the Fee Schedule to amend the criteria for ATP Holders to qualify for the Rebate. Specifically, the Exchange proposes to require that ATP Holders execute both 5,000 contracts ADV in the Professional range, as defined in Section I.H., and a minimum of 15,000 contracts ADV from Initiating CUBE Orders in Single-Leg and/or Complex CUBE Auctions.[10] Because volume executed in Electronic auction mechanisms, such as the Complex CUBE, has increased across the industry, the Exchange believes that, with the proposed modification, the Rebate would encourage more ATP Holders to try to achieve this Rebate by directing more auction-eligible Single-Leg and Complex CUBE order flow to the Exchange.[11]

Elimination of the Complex CUBE Cap Incentive

Currently, the Exchange offers an incentive for ATP Holders that achieve an increase over their January 2019 Initiating Complex CUBE Volume of at least 0.15% of TCADV (the ''Incentive''). Specifically, Firms that meet that volume level may include Broker Dealer Manual transactions and Broker Dealer QCC transactions under the Firm Fee Monthly Cap.[12]

The Exchange adopted the Incentive as a voluntary program to encourage ATP Holders to use Complex CUBE Auctions. However, because the Incentive program is underutilized (and therefore did not achieve its intended effect), the Exchange proposes to eliminate the Incentive from the Fee Schedule. The Exchange also proposes to delete text in the Fee Schedule describing incremental service fees applicable to firms that qualify for the Incentive, as such fees would no longer be applicable following the elimination of the Incentive.

The Exchange believes that the elimination of the Incentive would impact some firms that occasionally qualified for the Incentive and would no longer receive this benefit; however, given that the Incentive was underutilized, the Exchange believes that most ATP Holders would not be impacted by its removal.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[13] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[14] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers, and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers, or dealers.

The Proposed Rule Change Is Reasonable

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and also recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [15]

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[16] Therefore, no exchange currently possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in August 2020, the Exchange had less than 10% market share of executed volume of multiply-listed equity and ETF options trades.[17]

The Exchange's fees are constrained by intermarket competition, as ATP Holders may direct their order flow to any of the 16 options exchanges, including those with similarly structured incentive programs for auction participants.[18] Thus, ATP Holders have a choice of where they direct their order flow, including auction volume which, as noted above, has increased in the last year. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue or reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain options exchange transaction fees. Stated otherwise, changes to exchange transaction fees and rebates can have a direct effect on the ability of an exchange to compete for order flow including auction volume which, as noted above, has increased in the last year.

The proposed rule change to modify the qualifying criteria for the Rebate is designed to continue to incent ATP Holders to direct liquidity to the Exchange in Electronic executions, similar to other exchange programs with competitive pricing programs, thereby promoting market depth, price discovery and improvement, and enhancing order execution opportunities for market participants. In particular, the Exchange believes it is reasonable to adjust the qualification criteria for the Rebate for Complex CUBE orders, as the incentive structure underlying the Rebate remains similar to credits and rebates offered by competing options exchanges for initiating auction participants and account for the increase in auction volume since late 2019.[19]

The proposed change is also reasonably designed to continue to encourage ATP Holders to participate in Complex CUBE Auctions and to continue to incent their Professional volume and their initiating Single-Leg

[8] *See* Fee Schedule, Section I.E., American Customer Engagement (''ACE'') Program.

[9] *See* Fee Schedule, Section I.G., Complex CUBE Auction, note 2.

[10] *See* proposed Fee Schedule, Section I.G., CUBE Auction Fees & Credits, Complex CUBE Auction, note 2.

[11] A daily analysis of OPRA trade codes indicates that auction volume has increased from 19.2% of all options industry volume at the end of 2019 to 23.4% at the end of June 2020. *See, e.g., https://www.nyse.com/data-insights/q2-2020-options-review.*

[12] *See* Fee Schedule, Section I.I., Firm Monthly Fee Cap.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(4) and (5).

[15] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7–10–04) (''Reg NMS Adopting Release'').

[16] The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, available at: *https://www.theocc.com/market-data/volume/default.jsp.*

[17] Based on OCC data, the Exchange's market share in equity and ETF-based options increased from 7.73% for the month of August 2019 to 8.18% for the month of August 2020. *See id.*

[18] *See e.g.,* Cboe Exchange Inc. (''Cboe''), Fee Schedule, Volume Incentive Program, available at: *https://cdn.cboe.com/resources/membership/Cboe_FeeSchedule.pdf* (providing per contract credits on orders executed electronically in AIM based on qualifying volume from simple and complex auctions).

[19] *See, e.g., supra* notes 10 [sic] and 17 [sic] (regarding increase in industry-wide auction volumes and Cboe's Volume Incentive Program, respectively).

and Complex CUBE Orders to qualify for the Rebate. The Exchange believes that modifying the qualification bases to achieve the Rebate will continue to encourage greater use of CUBE Auctions by all ATP Holders, which may lead to greater opportunities to trade—and for price improvement—for all participants. In addition, because ATP Holders would be required to execute a minimum volume of 5,000 contracts ADV in the Professional range and also 15,000 contracts from Initiating CUBE Orders in Single-Leg and/or Complex CUBE Auctions to qualify for the proposed Rebate, the Exchange believes the proposed change would continue to incent providers of order flow to direct that order flow to the Exchange to receive the Rebate, thereby enabling the Exchange to improve its overall competitiveness and strengthen its market quality for all market participants. To the extent that the proposed modification continues to encourage the submission of Complex CUBE Orders, all market participants stand to benefit from increased liquidity, opportunities for price improvement, and increased order flow, which promotes market depth, facilitates tighter spreads, and enhances price discovery.

The Exchange believes that the proposed rule change to eliminate the Incentive is reasonable because this program is underutilized and has generally not served to encourage ATP Holders to bring liquidity or increase Broker-Dealer Manual and QCC order executions on the Exchange.

Against the backdrop of the competitive environment in which the Exchange operates, the Exchange believes that the proposed rule changes are a reasonable attempt by the Exchange to maintain its market share relative to its competitors.

The Proposed Rule Change Is an Equitable Allocation of Fees and Rebates

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits. The proposed modification of the requirements to qualify for the Rebate is based on the amount and type of business transacted on the Exchange, and ATP Holders can opt to avail themselves of these incentives or not. Moreover, the proposal is designed to encourage ATP Holders to aggregate their executions at the Exchange as a primary execution venue. To the extent that the proposed change continues to attract more Complex CUBE (and Professional) volume to the Exchange, this increased order flow would continue to make the Exchange a more competitive venue for order execution. The proposed elimination of the Incentive is based on the underutilization of the Incentive to date. Accordingly, the Exchange believes that most ATP Holders would not be impacted, and the elimination of the Incentive program would make it unavailable to all ATP Holders alike. Thus, the Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, continue to attract more order flow to the Exchange, thereby improving market-wide quality and price discovery.

The Proposed Rule Change Is Not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory because the proposed modifications would be available to and impact all similarly situated market participants on an equal and non-discriminatory basis.

The Exchange's proposed modification to the Rebate is designed to continue to encourage greater use of the Complex CUBE Auctions, which may lead to greater opportunities to trade—and for price improvement—for all participants. The Exchange believes that the proposal is not unfairly discriminatory because it is based on the amount and type of business transacted by ATP Holders on the Exchange, and all ATP Holders are eligible for the Rebate if they meet the qualifying criteria but are under no obligation to achieve the Rebate. Rather, the proposal is designed to continue to encourage participants to utilize the Exchange as a primary trading venue (if they have not done so previously) or increase Electronic volume sent to the Exchange. To the extent that the proposed change continues to attract more executions to the Exchange, this increased order flow would continue to make the Exchange a more competitive venue for order execution. Thus, the Exchange believes the proposed rule change would continue to improve market quality for all market participants on the Exchange and, as a consequence, attract more order flow to the Exchange, thereby improving market-wide quality and price discovery. The resulting volume and liquidity would continue to provide more trading opportunities and tighter spreads to all market participants and thus would promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest.

The Exchange also believes that eliminating the Incentive program from the Fee Schedule is equitable and not unfairly discriminatory because the program would be eliminated in its entirety and would no longer be available to any ATP Holders.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act, the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed changes would continue to encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery, and transparency and enhancing order execution opportunities for all market participants. As a result, the Exchange believes that the proposed changes further the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [20]

Intramarket Competition. The proposed change to modify the criteria to qualify for the Rebate is designed to continue to attract order flow to the Exchange by offering competitive rates and credits based on increased volumes on the Exchange, which would enhance the quality of quoting and may increase the volumes of contracts traded on the Exchange. To the extent that this purpose is achieved, all of the Exchange's market participants should benefit from the continued market liquidity. Enhanced market quality and increased transaction volume that results from the increase in order flow directed to the Exchange will benefit all market participants and improve competition on the Exchange.

The Exchange believes that the proposed change to eliminate the Incentive would not affect intramarket competition because it has been underutilized, and thus most ATP Holders would not be impacted by its removal. Moreover, because only Firms that achieved a certain volume increase

[20] *See* Reg NMS Adopting Release, *supra* note 14 [sic], at 37499.

were eligible for the Incentive, the proposed elimination of the Incentive would remove a potential burden on competition in that it would level the playing field for all Firms operating on the Exchange.

Intermarket Competition. The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing option exchanges if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow to the Exchange. Based on publicly-available information, and excluding index-based options, no single exchange currently has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[21] Therefore, no exchange currently possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in August 2020, the Exchange had less than 10% market share of executed volume of multiply-listed equity and ETF options trades.[22]

The Exchange believes that the proposed rule change reflects this competitive environment because it modifies the Exchange's fees and rebates in a manner designed to encourage ATP Holders to direct trading interest to the Exchange, to provide liquidity and to attract order flow. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market quality and increased opportunities for price improvement. The Exchange also believes that the proposed rule change reflects this competitive environment because it removes an underutilized Incentive that did not achieve its intended purpose of attracting order flow.

The Exchange believes that the proposed changes could promote competition between the Exchange and other execution venues, including those that currently offer similar pricing incentives, by encouraging additional orders to be sent to the Exchange for execution.[23]

[21] *See supra* note 15 [sic].

[22] Based on OCC data, the Exchange's market share in equity-based options increased from 7.73% for the month of August 2019 to 8.18% for the month of August 2020. *See supra* note 16 [sic].

[23] *See, e.g., supra* note 17 [sic].

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[24] of the Act and subparagraph (f)(2) of Rule 19b–4[25] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[26] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEAMER–2020–84 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–2020–84. 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–NYSEAMER–2020–84, and should be submitted on or before January 7, 2021.

[24] 15 U.S.C. 78s(b)(3)(A).

[25] 17 CFR 240.19b–4(f)(2).

[26] 15 U.S.C. 78s(b)(2)(B).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27729 Filed 12–16–20; 8:45 am]

BILLING CODE 8011–01–P

[27] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90646; File No. SR–FINRA–2020–034]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change To Modify TRACE Dissemination Protocols for Agency Pass-Through MBS or SBA-Backed ABS Traded in Specified Pool Transactions

December 11, 2020.

I. Introduction

On October 15, 2020, the Financial Industry Regulatory Authority, Inc. (''FINRA'') 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 the Trade Reporting and Compliance Engine (''TRACE'') dissemination protocols for Agency Pass-Through Mortgage-Backed Securities or Small Business Administration (''SBA'')-Backed Asset-Backed Securities traded in Specified Pool Transactions. The proposed rule change was published for comment in the **Federal Register** on October 29, 2020.[3] The Commission received one comment letter in support of the proposed rule change.[4] This order approves the proposed rule change.

II. Description of the Proposal

FINRA commenced public dissemination of Specified Pool Transactions in 2013 after the Commission approved FINRA's proposal to do so in 2012.[5] FINRA's rules define a ''Specified Pool Transaction'' as a transaction in an Agency Pass-Through Mortgage-Backed Security (''Agency Pass-Through MBS'')[6] or an SBA-Backed Asset-Backed Security (''SBA-Backed ABS'')[7] requiring the delivery at settlement of a pool or pools that is identified by a unique pool identification number at the Time of Execution.[8] As described in the FINRA–2012–042 Approval, when disseminating information of a Specified Pool Transaction, FINRA does not identify the specific bond transacted by disclosing its CUSIP code.[9] Instead, FINRA disseminates more general information about the bond and the pool underlying the bond, including approximations of information widely used to project cash flows and prepayment rates of the underlying mortgages, such as loan-to-value (''LTV'') information.[10]

Under its public dissemination protocol for Specified Pool Transactions, FINRA groups the pools underlying the transacted bonds into cohorts, using data elements that are integral to describing and valuing the bonds based on these pools, such as the LTV ratio. The cohort groupings are established using rounded or truncated figures for the underlying data elements, so that numeric values within each cohort can be understood within defined ranges. Each cohort is assigned a unique identification number—the Reference Data Identifier (''RDID''). After a member reports a Specified Pool Transaction to TRACE, FINRA disseminates the corresponding RDID in lieu of disseminating the transacted bond's CUSIP code. The underlying data elements that correspond to each RDID are made available to members through the TRACE system.[11] FINRA rounds or truncates certain cohort groupings to reduce the risk that the specific bond traded and the market participant that engaged in the transaction might be identified.[12]

FINRA believes ''that the transaction information disseminated through TRACE should provide investors with sufficient information to assess the value and price of a security, which for Securitized Products, includes information necessary to make assumptions about cash flows and prepayment rates.''[13] The elements described above are intended to provide market participants with the information necessary to perform such an analysis.[14]

FINRA stated that, since commencing public dissemination of Specified Pool Transactions, it has continued to evaluate the relevant market and the value of the information disseminated to market participants.[15] As a result of these efforts, which included discussions with market participants, FINRA is now proposing changes to the LTV rounding convention used in the public dissemination of Specified Pool Transactions.[16] Specifically, FINRA proposes to create more granular cohorts for LTV to increase the precision of the information regarding the LTV of the pool traded. In place of the current LTV rounding convention, which is rounded down to the nearest 25%, FINRA will organize the cohorts such that each cohort represents the LTV as the upper limit of the applicable category, as follows:

1. For an LTV up to 20%, the cohorts would represent the LTV as 20% (such that an original LTV of 12% would be shown as 20%);

2. for an LTV between 21% and 40%, the cohorts would represent the LTV as 40% (such that an original LTV of 21% would be shown as 40%);

3. for an LTV between 41% and 60%, the cohorts would represent the LTV as 60% (such that an original LTV of 60% would be shown as 60%);

4. for an LTV between 61% and 80%, the cohorts would represent the LTV as 80% (such that an original LTV of 70% would be shown as 80%);

5. for an LTV between 81% and 93%, the cohorts would represent the LTV as

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 90264 (October 23, 2020), 85 FR 68607 (October 29, 2020) (''Notice'').

[4] *See* Letter from Wendell J. Chambliss, Vice President and Deputy General Counsel, Mission, Legislative and Regulatory Affairs, Legal Division, Freddie Mac, to J. Matthew DeLesDernier, Assistant Security, Commission, dated November 18, 2020 (''Freddie Mac Letter'').

[5] *See* Securities Exchange Act Release No. 68084 (October 23, 2012), 77 FR 65436 (October 26, 2012) (''FINRA–2012–042 Approval''). This filing provided for, among other things, public dissemination of transactions in Agency Pass-Through Mortgage-Backed Securities traded in specified pools and transactions in SBA-Backed Asset-Backed Securities traded in specified pools or to be announced, and reduced the reporting timeframe for such transactions.

[6] FINRA Rule 6710(v) defines an ''Agency Pass-Through MBS'' as ''a type of Securitized Product issued in conformity with a program of an Agency as defined in [FINRA Rule 6710(k)] or a Government-Sponsored Enterprise ('GSE') as defined in [FINRA Rule 6710(n)], for which the timely payment of principal and interest is guaranteed by the Agency or GSE, representing ownership interest in a pool (or pools) of mortgage loans structured to 'pass through' the principal and interest payments to the holders of the security on a pro rata basis.''

[7] FINRA Rule 6710(bb) defines an ''SBA-Backed ABS'' as ''a Securitized Product issued in conformity with a program of the SBA, for which the timely payment of principal and interest is guaranteed by the SBA, representing ownership interest in a pool (or pools) of loans or debentures and structured to 'pass through' the principal and interest payments made by the borrowers in such loans or debentures to the holders of the security on a pro rata basis.''

[8] *See* FINRA Rule 6710(x).

[9] *See* FINRA–2012–042 Approval, 77 FR at 65437.

[10] *See id.* FINRA stated that, in developing the approach to public dissemination described in the FINRA–2012–042 Approval, it considered industry feedback, including concerns that dissemination of the CUSIP code in a Specified Pool Transaction might result in information leakage regarding trading strategies, positions, and other sensitive information, which could negatively impact trading interest and liquidity in the market for these securities. *See* Notice, 85 FR at 68607.

[11] FINRA uses the following ten data elements to form the RDID cohorts that describe the security traded in a Specified Pool Transaction: (1) Issuer; (2) Product Type; (3) Amortization Type; (4) Coupon; (5) Original Maturity; (6) Weighted Average Coupon (''WAC''); (7) Weighted Average Maturity (''WAM''); (8) Weighted Average Loan Age (''WALA''); (9) Current Average Loan Size (''ALS''); and (10) Original LTV. For example, RDID #A1234 might represent: (1) Issuer = FNMA; (2) Product Type = Co-Op; (3) Amortization Type = ARM; (4) Coupon = 2.0; (5) Original Maturity = 360; (6) WAC = 2.5; (7) WAM = 200; (8) WALA = 160; (9) ALS = 100; and (10) Original LTV = 50. *See id.,* 85 FR at 68607–08.

[12] Currently, the rounding and truncation conventions that are used for Specified Pool Transactions are the following: (1) Coupon—Rounded down to the nearest quarter percentage point—*e.g.,* an interest rate of 5.12% is rounded to 5%; (2) Original Maturity—Rounded up to the nearest 10—*e.g.,* an original maturity of 358 months is rounded to 360 months; (3) WAC—Truncated to a single decimal—*e.g.,* a WAC of 7.13% is truncated to 7.1%; (4) WAM—Rounded down to the nearest 10—*e.g.,* a WAM of 87 months is rounded to 80 month; (5) WALA—Rounded up to the nearest 10—*e.g.,* a WALA of 163 months is rounded to 170 months; (6) ALS—Rounded down to the nearest 25—*e.g.,* an ALS of 113 (*i.e.,* $113,000 average loan size) is rounded to 100 (*i.e.,* $100,000 average loan size); and (7) LTV—Rounded down to the nearest 25—*e.g.,* an original LTV of 72% is rounded to 50%. *See id.,* 85 FR at 68608.

[13] *Id.*

[14] *See id.*

[15] *See id.*

[16] FINRA has not proposed changes to the rounding or truncation conventions utilized for the other data elements.

93% (such that an original LTV of 90% would be shown as 93%);

6. for an LTV between 94% and 100%, the cohorts would represent the LTV as 100% (such that an original LTV of 100% would be shown as 100%);

7. for an LTV between 101% and 120%, the cohorts would represent the LTV as 120% (such that an original LTV of 105% would be shown as 120%); and

8. for an LTV of 121% or greater, the cohorts would represent the LTV as 121+ (such that an original LTV of 125% would be shown as 121+).

Thus, as a result of the proposed rule change, FINRA will disseminate the LTV ratio cohorts at 20%, 40%, 60%, 80%, 93%, 100%, 120%, and 120%+. FINRA stated that, in developing the new LTV approach, it sought to balance the goal of making more detailed information available to the market against the potential risk of identifying the particular security being traded and the market participant that engaged in the transaction.[17] FINRA believes that the new LTV rounding convention is a ''measured change'' that will provide more granular and meaningful information on the LTV of the Specified Pool Transaction, which should increase the value of the disseminated information to market participants.[18] FINRA also anticipates that the new cohorts will improve how disseminated TRACE data reflects the role of LTV ratios in MBS valuations.[19]

FINRA has stated that it will announce the effective date of the rule change in a *Regulatory Notice* to be published no later than 60 days following a Commission approval, and the effective date will be no later than 270 days following publication of that *Regulatory Notice.*[20]

III. Discussion and Commission Findings

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[21] In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,[22] which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

When it issued the FINRA–2012–042 Approval, the Commission found that the protocols for publicly disseminating Specified Pool Transactions proposed by FINRA—specifically, eschewing dissemination of CUSIP codes and instead providing more generic information about the bond transacted and the underlying pool—were consistent with the Act.[23] The Commission stated that the dissemination protocols for the specified data elements ''strike an appropriate balance between providing meaningful post-trade transparency and, at the same time, reducing the potential for 'reverse engineering' of transaction data that could permit identification of a market participant and/or its trading strategy.'' [24] The Commission also noted that FINRA could in the future determine to propose dissemination of additional data elements that it believes would improve transparency for Specified Pool Transactions.[25]

FINRA is now proposing to revise the dissemination protocol for Specified Pool Transactions by increasing the precision of the LTV cohort groupings. In place of the current rounding convention used for LTV (*i.e.,* rounded down to the nearest 25%), FINRA will utilize eight cohorts, with each cohort representing the LTV as the upper limit of the applicable grouping. FINRA believes that the tighter bands around LTVs will benefit market participants by increasing the value of price information as it relates to LTV.[26]

The Commission finds that the current proposal is consistent with the Act because it represents a measured adjustment to the overall public dissemination protocols for Specialized Pool Transactions that the Commission previously found consistent with the Act in the FINRA–2012–042 Approval. Establishing additional cohorts utilizing the proposed LTV thresholds appears reasonably designed to provide market participants and other market observers with more useful information about the transacted bonds while minimizing the potential for adverse market impact. The Commission notes that it received no comments suggesting that the proposal would have adverse market impact; the one comment letter received on the proposal was supportive.[27] Moreover, FINRA has represented that it will continue to evaluate the market for Specified Pool Transactions and evaluate the conventions that it uses for disseminating information on these transactions.[28] The Commission also notes that, under this proposal, FINRA members will not incur any administrative burdens to report transactions differently; the creation and distribution of the new LTV cohorts will be performed by FINRA through the TRACE system.

Pursuant to Section 19(b)(5) of the Act,[29] the Commission consulted with and considered the views of the Treasury Department in determining to approve the proposed rule change. The Treasury Department indicated its support for the proposal.[30] Pursuant to Section 19(b)(6) of the Act,[31] the Commission has considered the sufficiency and appropriateness of existing laws and rules applicable to government securities brokers, government securities dealers, and their associated persons in approving the proposal. As discussed above, the proposed rule change appears reasonably designed to improve the value to market participants and other market observers of the LTV information disseminated for Specified Pool Transactions.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[32] that the proposed rule change (SR–FINRA–2020–034) is approved.

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[17] *See* Notice, 85 FR at 68608.

[18] *See id.,* 85 FR at 68609.

[19] *See id.,* 85 FR at 68608. FINRA stated, for example, that separating pools with LTV ratios at or below 80% from those with LTV ratios of 81% or higher delineates the pools with mortgages that might require mortgage insurance from those that might not require mortgage insurance. *See id.* Similarly, FINRA believes that the cohorts for LTV ratios of 81% or more are more consistent with the way mortgage originators view loan characteristics and the way that the market determines pricing. *See id.*

[20] *See id.,* 85 FR at 68609.

[21] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[22] 15 U.S.C. 78o–3(b)(6).

[23] *See* FINRA–2012–042 Approval, 77 FR at 65437–38.

[24] *Id.,* 77 FR at 65437.

[25] *See id.,* 77 FR at 65438.

[26] *See* Notice, 85 FR at 68610.

[27] *See* Freddie Mac Letter at 1 (stating that ''[a]dopting the proposed approach of segmenting LTV ratios into eight categories would align TRACE data with pooling practices and would enhance market transparency while maintaining sufficient anonymity'').

[28] *See* Notice, 85 FR at 68610.

[29] 15 U.S.C. 78s(b)(5) (providing that the Commission ''shall consult with and consider the views of the Secretary of the Treasury prior to approving a proposed rule filed by a registered securities association that primarily concerns conduct related to transactions in government securities, except where the Commission determines that an emergency exists requiring expeditious or summary action and publishes its reasons therefor'').

[30] Email from Treasury Department staff to Michael Gaw, Assistant Director, Division of Trading and Markets, Commission (November 30, 2020).

[31] 15 U.S.C. 78s(b)(6).

[32] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[33]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27727 Filed 12–16–20; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90644; File No. SR–NASDAQ–2020–069]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change, as Modified by Amendment No. 1, To Exclude Special Purpose Acquisition Companies From the Requirement That at Least 50% of a Company's Round Lot Holders Each Hold Unrestricted Securities With a Market Value of at Least $2,500

December 11, 2020.

On October 8, 2020, The Nasdaq Stock Market LLC (''Nasdaq'' or ''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 exclude special purpose acquisition companies from the requirement that at least 50% of a company's round lot holders each hold unrestricted securities with a market value of at least $2,500. On October 21, 2020, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the proposed rule change in its entirety. The proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on October 28, 2020.[3]

Section 19(b)(2) of the Act[4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is December 12, 2020. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates January 26, 2021, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change, as modified by Amendment No. 1 (File No. SR–NASDAQ–2020–069).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27725 Filed 12–16–20; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90642; File No. SR–CBOE–2020–115]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fees Schedule With Respect to Certain Fees Related to Qualified Contingent Cross Transactions the Exchange's LMM Incentive Programs

December 11, 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 December 4, 2020, Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to amend the Fees Schedule with respect to certain fees related to Qualified Contingent Cross transactions the Exchange's LMM incentive programs. The text of the proposed rule change is attached [sic] as 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

The Exchange proposes to amend its Fees Schedule with respect to Qualified Contingent Cross (''QCC'') transaction fees and the Exchange's Lead Market-Maker (''LMM'') programs.[3]

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 15% of the market share.[4] Thus, in such a low-concentrated and highly competitive market, no single options exchange possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month

[33] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 90245 (October 22, 2020), 85 FR 68400.

[4] 15 U.S.C. 78s(b)(2).

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange initially filed the proposed fee changes December 1, 2020 (SR–CBOE–2020–113). On December 4, 2020, the Exchange withdrew that filing and submitted this proposal.

[4] *See* Cboe Global Markets U.S. Options Monthly Market Volume Summary (November 25, 2020), available at *https://markets.cboe.com/us/options/market_statistics/.*

demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products in response to fee changes. Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. In response to competitive pricing, the Exchange, like other options exchanges, offers rebates and assesses fees for certain order types executed on or routed through the Exchange.

QCC Fees

By way of background, a QCC order is comprised of an 'initiating order' to buy (sell) at least 1,000 contracts, coupled with a contra-side order to sell (buy) an equal number of contracts and that for complex QCC transactions, the 1,000 contracts minimum is applied per leg. Currently, the Exchange assesses no fee for Customer (''C'' capacity) QCC transactions and $0.17 per contract side for non-Customer transactions. In addition, the Exchange provides a $0.10 per contract credit for the initiating order side, regardless of origin code. The Exchange proposes to eliminate the $0.17 transaction fee for Professional (''U'' capacity) QCC orders (*i.e.,* such transactions would be free).[5] The Exchange similarly proposes to provide that the $0.10 per contract credit for the initiating order side would not apply to (i) Professional to Professional executions or (ii) Professional to Customer executions, in light of the fact that the Exchange is proposing to waive the transaction fee for Professional QCC Orders. More specifically, since the Exchange is proposing to eliminate the fee for Professional QCC transactions, and since Customers already aren't assessed a fee for such transactions, the Exchange does not wish to provide a credit for transactions that do not generate any fees. The proposed change is consistent with the current Fees Schedule which provides that the QCC credit is not applied to Customer to Customer QCC executions. The purpose of the proposed change to waive fees for Professional QCC orders is to incentivize the sending of QCC orders to the Exchange by these market participants and compete with other Exchanges that similarly do not assess fees to QCC orders from Professional Customers.[6]

LMM Programs

The Exchange next proposes to amend each of its LMM Programs (*i.e.,* the MSCI LMM Incentive Program, the GTH VIX/VIXW LMM Incentive Programs, the GTH SPX/SPXW LMM Incentive Program and the RTH SPESG LMM Incentive Programs (collectively ''LMM Programs'')). The LMM Programs each currently provide a specified rebate where the LMM(s) in the respective classes meet certain prescribed heightened quoting standards as specified in the respective LMM Program tables in the Fees Schedule. The Exchange notes that the LMMs for each program are not currently obligated to satisfy the respective heightened quoting standards detailed in the Fees Schedule, but rather, are eligible to receive the respective rebates if they satisfy the prescribed heightened quoting standards, which the Exchange believes encourage LMMs to provide liquidity in their appointed classes. The Exchange also notes that the notes section for each LMM Program provides that the Exchange may consider exceptions to the prescribed quoting standards based on demonstrated legal or regulatory requirements or other mitigating circumstances. The Exchange proposes to adopt and codify another exception to the prescribed quoting standards for each LMM Program. Particularly, the Exchange wishes to provide that for each program, in calculating whether an LMM meets the heightened quoting standard each month, the Exchange will exclude from the calculation the LMM's worst quoting day in that month (*i.e.,* the business day on which the LMM met or exceeded the heightened quoting standard in the least amount of series).[7] The Exchange proposes to adopt this exception to provide further flexibility for LMMs. For example, the Exchange notes that there may be certain circumstances, such as a day of extreme volatility or where the LMM has a system issue, that may impact an LMM's ability to meet the heightened quoting standards for that day, which could result in the LMM no longer being able to satisfy the heightened quoting standard for the remainder of the month. The Exchange believes this proposed change will further encourage LMMs to continue to quote aggressively in a class throughout the entire month despite one poor performing day. For example, absent the proposed rule change, if an LMM has a poor performing day early in the month, the LMM may no longer have an incentive to continue to quote at the prescribed heightened levels for the remainder of the month as it would know it would no longer be eligible to receive the LMM rebate for that month even if it continued to meet or exceed the prescribed quoting standards. Accordingly, the Exchange believes the proposed rule change would eliminate the potential disincentive that could occur if one poor performing day prevented an LMM from meeting the heightened quoting standards.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[8] in general, and furthers the objectives of Section 6(b)(4),[9] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Trading Permit Holders (''TPHs'') and issuers and other persons using its facilities. The Exchange also believes that the proposed rule change is consistent with the objectives of Section 6(b)(5)[10] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and, particularly, is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

[5] Pursuant to this proposal, Professional Customer (Capacity U) QCC orders would receive fee code QC instead of fee code QN.

[6] *See e.g.,* BOX Options Fee Schedule, Section 1(D), Qualified Contingent Cross (''QCC'') Transactions, which provides that no fees are assessed for Customer and Professional Customer QCC transactions. *See also* NYSE American Options Fee Schedule, Section 1(F), QCC Fees and Credits, which also provides that no fees are assessed for Customer and Professional Customer QCC transactions.

[7] An LMM's ''worst'' quoting day will be based on the highest number of series missed and not the percentage of series missed. As an example, assume an LMM met the heightened quoting standard for all series every day of a given month except for two days. On ''day 1'' there were 100 available series and the LMM didn't meet the heightened quoting standard for 40 of those series (*i.e.,* missed 40% of the available series) and on ''day 2'' there were 50 available series and the LMM didn't meet the heightened quoting standard for 25 of those series (*i.e.,* missed 50% of the available series). In this scenario, the Exchange would omit from its calculation ''day 1'', because it missed a higher number of series (40 vs 25) even though the LMM missed a lower percentage of available series (40% vs 50%). The Exchange notes that if an LMM misses the same number of series on more than one day, it will still omit only one day to eliminate from the calculation.

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78f.(b)(5).

The Exchange believes that the proposed amendments to the Fees Schedule are reasonable, equitable and not unfairly discriminatory. In particular, the Exchange believes the proposal to not assess a fee for Professional QCC orders is reasonable because such market participants would not be subject to a transaction fee for such transactions. The Exchange notes other Exchanges also waive fees for Professional QCC transactions.[11] Additionally, the proposed change would apply to all Professional alike and the proposed fee changes reflect a competitive pricing structure designed to compete with other exchanges that similarly do not assess fees on these market participants. The Exchange believes the proposed rule change will also incentivize Professionals to direct their QCC order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all TPHs.

The Exchange believes it's reasonable to eliminate the credit on the initiating order side of a QCC transaction for (i) Professional to Professional and (ii) Professional to Customer QCC executions as the Exchange will no longer receive any transaction fees for such transactions in light of its proposal to eliminate a transaction fee for Professional QCC orders. The Exchange notes another exchange similarly waives QCC-related credits for similar transactions.[12] The Exchange believes the elimination of the proposed credit is equitable and not unfairly discriminatory because it applies to all Professionals and because such market participants will no longer be subject to transaction fees for QCC transactions.

The Exchange believes the proposed rule change to omit an LMM's worst quoting day each month is reasonable because it will encourage LMMs to quote aggressively in a class throughout the entire month despite one poor performing day. As discussed above, there may be days on which an LMM cannot quote aggressively (*e.g.,* LMM has a system issue) and in certain months, one poor performing day can prevent an LMM from meeting the heightened quoting standard required to receive the rebate under the LMM Program. Moreover, in such months where an LMM has a poor performing day, an LMM may be discouraged from quoting aggressively the remainder of the month if it knows it were no longer eligible to receive the rebate that month. This can be especially problematic if a poor performing day occurs early in the month. The Exchange notes that it adopted each of its LMM programs and corresponding financial incentives to ensure there was sufficient incentive for a TPH to undertake an obligation to quote at heightened levels, without which could result in lower levels of liquidity in the LMM Program classes. Accordingly, the Exchange believes the proposed rule change will encourage LMMs to quote aggressively in a class throughout the entire month (and thereby ensure sufficient liquidity), notwithstanding a poor performing day. The Exchange also notes that another exchange similarly omits a Market-Maker's worst quoting day each month under from one of its financial incentive programs.[13] The Exchange believes the proposed change is equitable and not unfairly discriminatory as it applies equally to all appointed LMMs.

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. First, the Exchange notes that the proposed changes apply uniformly to similarly-situated TPHs. The Exchange believes the proposed rule change serves to increase intramarket competition by incentivizing Professionals to direct their QCC orders to the Exchange, which will bring greater volume and liquidity, thereby benefitting all market participants by providing more trading opportunities and tighter spreads. Further, the Exchange notes that other Exchanges don't assess fees to Professional (or Customer) QCC transactions. The Exchange does not believe that the proposed rule change related to LMM Programs will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because it applies uniformly to any LMM appointed under these programs, which market participants play a crucial role in providing active and liquid markets in their respective assigned products.

Next, the Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. TPHs have numerous alternative venues they may participate on and direct their order flow, including 15 other options exchanges. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single options exchange has more than 15% of the market share. Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchanges and off-exchange venues if they deem fee levels at those other venues to be more favorable. As noted above, the Exchange believes that the proposed QCC transaction fee change is comparable to that of other exchanges offering similar QCC functionality. Also, while the proposed change to the LMM Programs applies only to the Exchange, another exchange provides for a similar exception as proposed for one of its financial incentive programs. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''. Accordingly, the Exchange does not believe its proposed fee change imposes any burden on

[11] *See e.g.,* BOX Options Fee Schedule, Section 1(D), Qualified Contingent Cross (''QCC'') Transactions, which provides that no fees are assessed for Customer and Professional Customer QCC transactions. *See also* NYSE American Options Fee Schedule, Section 1(F), QCC Fees and Credits, which also provides that no fees are assessed for Customer and Professional Customer QCC transactions.

[12] *See* NYSE American Options Fee Schedule, Section 1(F), QCC Fees and Credits, which provides Floor Brokers will not receive a credit for QCC trades that have a Customer or Professional Customer, or both, on both sides of the trade.

[13] *See* Nasdaq ISE LLC, Options 7 Pricing Schedule, Section 3, Regular Order Fees and Rebates, Footnote 5.

competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [14] and paragraph (f) of Rule 19b–4 [15] 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–2020–115 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–2020–115. 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2020–115 and should be submitted on or before January 7, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27723 Filed 12–16–20; 8:45 am]

BILLING CODE 8011–01–P

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90640; File No. SR–PEARL–2020–31]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule

December 11, 2020.

Pursuant to the provisions of 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, MIAX PEARL, LLC (''MIAX PEARL'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX PEARL Fee Schedule (the ''Fee Schedule'').

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.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule for the Exchange's options market to amend the exchange groupings of options exchanges within the routing fee table in Section 1)b) of the Fee Schedule.

Currently, the Exchange assesses routing fees based upon (i) the origin type of the order, (ii) whether or not it is an order for standard option classes in the Penny Interval Program [3] (''Penny classes'') or an order for standard option classes which are not in the Penny Interval Program (''Non-Penny classes'') (or other explicitly identified classes), and (iii) to which away market it is being routed. This assessment practice is identical to the routing fees assessment practice currently utilized by the Exchange's affiliates, Miami International Securities Exchange, LLC

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 88992 (June 2, 2020), 85 FR 35142 (June 8, 2020) (SR–PEARL–2020–06) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 404, Series of Option Contracts Open for Trading, and Rule 510, Minimum Price Variations and Minimum Trading Increments, To Conform the Rules to Section 3.1 of the Plan for the Purpose of Developing and Implementing Procedures Designed To Facilitate the Listing and Trading of Standardized Options).

(''MIAX'') and MIAX Emerald, LLC (''MIAX Emerald''). This is also similar to the methodologies utilized by other competing options exchanges, such as the Cboe BZX Exchange, Inc. (''Cboe BZX''), in assessing routing fees. Cboe BZX has exchange groupings in its fee schedule, similar to those of the Exchange, whereby several exchanges are grouped into the same category, dependent on the order's origin type and whether it is a Penny or Non-Penny class.[4]

As a result of conducting a periodic review of the current transaction fees and rebates charged by away markets, the Exchange has determined to amend the exchange groupings of options exchanges within the routing fee table to better reflect the associated costs of routing customer orders to those options exchanges for execution. In particular, the Exchange proposes to amend the seventh ''Routed, Public Customer that is not a Priority Customer, Non-Penny Program'' exchange grouping to move Nasdaq MRX from the seventh exchange grouping into the eighth ''Routed, Public Customer that is not a Priority Customer, Non-Penny Program'' exchange grouping. The impact of this proposed change will be that the routing fee for Public Customer orders that are not Priority Customer orders in the Penny Program, that are routed to Nasdaq MRX, LLC (''Nasdaq MRX''), will increase from $1.15 to $1.25. The Exchange notes that no options exchanges were removed from the routing fee table entirely, with the only change being the change in categorization for Nasdaq MRX. The purpose of the proposed rule change is to adjust the routing fee for certain orders routed to Nasdaq MRX to reflect the associated costs for that routed execution.

Accordingly, with the proposed change, the routing fee table will be as follows:

Description	Fees
Routed, Priority Customer, Penny Program, to: NYSE American, BOX, Cboe, Cboe EDGX Options, Nasdaq MRX, MIAX, Nasdaq PHLX (except SPY), Nasdaq BX Options	$0.15
Routed, Priority Customer, Penny Program, to: NYSE Arca Options, Cboe BZX Options, Cboe C2, Nasdaq GEMX, Nasdaq ISE, NOM, Nasdaq PHLX (SPY only), MIAX Emerald	0.65
Routed, Priority Customer, Non-Penny Program, to: NYSE American, BOX, Cboe, Cboe EDGX Options, Nasdaq ISE, Nasdaq MRX, MIAX, Nasdaq PHLX, Nasdaq BX Options	0.15
Routed, Priority Customer, Non-Penny Program, to: NYSE Arca Options, Cboe BZX Options, Cboe C2, Nasdaq GEMX, NOM, MIAX Emerald	1.00
Routed, Public Customer that is not a Priority Customer, Penny Program, to: NYSE American, NYSE Arca Options, Cboe BZX Options, BOX, Cboe, Cboe C2, Cboe EDGX Options, Nasdaq GEMX, Nasdaq ISE, Nasdaq MRX, MIAX Emerald, MIAX, NOM, Nasdaq PHLX, Nasdaq BX Options	0.65
Routed, Public Customer that is not a Priority Customer, Non-Penny Program, to: NYSE American, MIAX, Cboe, Nasdaq PHLX, Nasdaq ISE, Cboe EDGX Options	1.00
Routed, Public Customer that is not a Priority Customer, Non-Penny Program, to: Cboe C2, NOM, BOX, Nasdaq BX Options, MIAX Emerald	1.15
Routed, Public Customer that is not a Priority Customer, Non-Penny Program, to: Cboe BZX Options, NYSE Arca Options, Nasdaq GEMX, Nasdaq MRX	1.25

In determining to amend its Routing Fees, the Exchange took into account transaction fees and rebates assessed by the away markets to which the Exchange routes orders, as well as the Exchange's clearing costs,[5] administrative, regulatory, and technical costs associated with routing orders to an away market. The Exchange uses unaffiliated routing brokers to route orders to the away markets; the costs associated with the use of these services are included in the routing fees specified in the Fee Schedule. This routing fees structure is not only similar to the Exchange's affiliates, MIAX and MIAX Emerald, but is also comparable to the structures in place at other competing options exchanges, such as Cboe BZX.[6] The Exchange's routing fee structure approximates the Exchange's costs associated with routing orders to away markets. The per-contract transaction fee amount associated with each grouping closely approximates the Exchange's all-in cost (plus an additional, non-material amount) to execute that corresponding contract at that corresponding exchange. The Exchange notes that in determining whether to adjust certain groupings of options exchanges in the routing fee table, the Exchange considered the transaction fees and rebates assessed by away markets, and determined to amend the grouping of exchanges that assess transaction fees for routed orders within a similar range. This same logic and structure applies to all of the groupings in the routing fees table. By utilizing the same structure that is utilized by the Exchange's affiliates, MIAX and MIAX Emerald, the Exchange's Members[7] will be assessed routing fees in a similar manner. The Exchange believes that this structure will minimize any confusion as to the method of assessing routing fees between the three exchanges. The Exchange notes that its affiliates, MIAX and MIAX Emerald, will file to make the same proposed routing fee change for Nasdaq MRX.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act[8] in general, and furthers the objectives of Section 6(b)(4) of the Act[9] in particular, in that it is an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act[10] in that it is designed to

[4] *See* Cboe BZX Fee Schedule under ''Fee Codes and Associated Fees.''

[5] The OCC amended its clearing fee from $0.01 per contract side to $0.02 per contract side. *See* Securities Exchange Act Release No. 71769 (March 21, 2014), 79 FR 17214 (March 27, 2014) (SR–OCC–2014–05).

[6] *See supra* note 4. The Cboe BZX fee schedule has exchange groupings, whereby several exchanges are grouped into the same category, dependent on the order's Origin type and whether it is a Penny or Non-Penny class. For example, Cboe BZX fee code RR covers routed customer orders in Non-Penny classes to NYSE Arca, Cboe C2, Nasdaq ISE, Nasdaq Gemini, MIAX Emerald, MIAX PEARL, or NOM, with a single fee of $1.25 per contract. *Id.*

[7] The term ''Member'' means an individual or organization that is registered with the Exchange pursuant to Chapter II of Exchange Rules for purposes of trading on the Exchange as an ''Electronic Exchange Member'' or ''Market Maker.'' Members are deemed ''members'' under the Exchange Act. *See* the Definitions section of the Fee Schedule and Exchange Rule 100.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78f(b)(5).

promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes the proposed change to the exchange groupings of options exchanges within the routing fee table furthers the objectives of Section 6(b)(4) of the Act and is reasonable, equitable and not unfairly discriminatory because the proposed change will continue to apply in the same manner to all Members that are subject to routing fees. The Exchange believes the proposed change to the routing fee table exchange groupings furthers the objectives of Section 6(b)(5) of the Act and is designed to promote just and equitable principles of trade and is not unfairly discriminatory because the proposed change seeks to recoup costs that are incurred by the Exchange when routing customer orders to away markets on behalf of Members and does so in the same manner to all Members that are subject to routing fees. The costs to the Exchange to route orders to away markets for execution primarily includes transaction fees and rebates assessed by the away markets to which the Exchange routes orders, in addition to the Exchange's clearing costs, administrative, regulatory and technical costs. The Exchange believes that the proposed re-categorization of certain exchange groupings would enable the Exchange to recover the costs it incurs to route orders to Nasdaq MRX. The per-contract transaction fee amount associated with each grouping approximates the Exchange's all-in cost (plus an additional, non-material amount) to execute the corresponding contract at the corresponding exchange.

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 its proposed re-categorization of certain exchange groupings is intended to enable the Exchange to recover the costs it incurs to route orders to away markets, particularly Nasdaq MRX. The Exchange does not believe that this proposal imposes any unnecessary burden on competition because it seeks to recoup costs incurred by the Exchange when routing orders to away markets on behalf of Members and other exchanges have similar routing fee structures.[11]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[12] and Rule 19b–4(f)(2) [13] 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–2020–31 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–2020–31. 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–2020–31, and should be submitted on or before January 7, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27721 Filed 12–16–20; 8:45 am]

BILLING CODE 8011–01–P

[11] *See supra* note 6.

[12] 15 U.S.C. 78s(b)(3)(A)(ii).

[13] 17 CFR 240.19b–4(f)(2).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. IA–5646]

Notice of Intention to Cancel Registration Pursuant to section 203(H) of the Investment Advisers Act of 1940

December 14, 2020.

Notice is given that the Securities and Exchange Commission (the ''Commission'') intends to issue an order, pursuant to section 203(h) of the Investment Advisers Act of 1940 (the ''Act''), cancelling the registration of Family Office Partners, Inc. [File No. 801–110022], hereinafter referred to as the ''registrant.''

Section 203(h) of the Act provides, in pertinent part, that if the Commission finds that any person registered under section 203 of the Act, or who has pending an application for registration filed under that section, is no longer in existence, is not engaged in business as an investment adviser, or is prohibited from registering as an investment

adviser under section 203A of the Act, the Commission shall by order, cancel the registration of such person.

Section 203A of the Act prohibits an investment adviser from registering with the Commission under certain circumstances. Rule 203A–2(d) under the Act provides an exemption to this prohibition, permitting an adviser to register with the Commission if the adviser would otherwise be required to register as an investment adviser with 15 or more state securities authorities (''multi-state adviser exemption''). The registrant indicated on its most recently filed Form ADV that it is relying on the multi-state adviser exemption to register with the Commission and that it has no clients and no assets under management.[1] It appears that the registrant is not eligible for the multi-state adviser exemption because it is not required to register as an investment adviser with 15 or more state securities authorities. Therefore, it appears that the registrant is prohibited from registering as an investment adviser with the Commission. Furthermore, the registrant has not filed a Form ADV annual updating amendment as required by rule 204–1 under the Act.[2] Therefore, it appears that the registrant is not in existence or otherwise not engaged in business as an investment adviser. Accordingly, the Commission believes that reasonable grounds exist for a finding that the registrant is not eligible to be registered with the Commission as an investment adviser and that the registration should be cancelled pursuant to section 203(h) of the Act.

Notice is also given that any interested person may, January 8, 2021, at 5:30 p.m., submit to the Commission in writing a request for a hearing on the cancellation, accompanied by a statement as to the nature of his or her interest, the reason for such request, and the issues, if any, of fact or law proposed to be controverted, and he or she may request that he or she be notified if the Commission should order a hearing thereon. Any such communication should be emailed to the Commission's Secretary at *Secretarys-Office@sec.gov.*

At any time after January 8, 2021, the Commission may issue an order cancelling the registration, upon the basis of the information stated above, unless an order for a hearing on the cancellation shall be issued upon request or upon the Commission's own motion. Persons who requested a hearing, or who requested to be advised as to whether a hearing is ordered, will receive any notices and orders issued in this matter, including the date of the hearing (if ordered) and any postponements thereof. Any adviser whose registration is cancelled under delegated authority may appeal that decision directly to the Commission in accordance with rules 430 and 431 of the Commission's rules of practice (17 CFR 201.430 and 431).

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.*

FOR FURTHER INFORMATION CONTACT: Alexis Palascak, Senior Counsel at 202–551–6999; SEC, Division of Investment Management, Investment Adviser Regulation Office, 100 F Street NE, Washington, DC 20549–8549.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.[3]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27788 Filed 12–16–20; 8:45 am]

BILLING CODE 8011–01–P

[1] The registrant filed its most recent Form ADV, which was an ''other-than-annual amendment,'' on May 31, 2017.

[2] Rule 204–1 under the Act requires any adviser that is required to complete Form ADV to amend the form at least annually and to submit the amendments electronically through the Investment Adviser Registration Depository.

[3] 17 CFR 200.30–5(e)(2).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90652; File No. SR–NYSEArca–2020–77]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend NYSE Arca Rule 8.601–E To Adopt Generic Listing Standards for Active Proxy Portfolio Shares

December 11, 2020.

I. Introduction

On August 31, 2020, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NYSE Arca Rule 8.601–E to adopt generic listing standards for Active Proxy Portfolio Shares. The proposed rule change was published for comment in the **Federal Register** on September 21, 2020.[3] On October 30, 2020, pursuant to Section 19(b)(2) of the Exchange Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] The Commission has received no comments on the proposed rule change. The Commission is publishing this order to solicit comments on the proposed rule change from interested persons and to institute proceedings pursuant to Section 19(b)(2)(B) of the Act [6] to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposed Rule Change

Earlier this year, the Commission approved the Exchange's proposal to adopt listing standards for Active Proxy Portfolio Shares as set forth in NYSE Arca Rule 8.601–E.[7] Active Proxy Portfolio Shares are securities (a) issued by an investment company (''Investment Company'') registered under the Investment Company Act of 1940 (''1940 Act'') organized as an open-end management investment company that invests in a portfolio of securities selected by the Investment Company's investment adviser consistent with the Investment Company's investment objectives and policies; (b) issued in a specified minimum number of shares, or multiples thereof, in return for a deposit by the purchaser of the Proxy Portfolio [8] and/or cash with a value equal to the next determined net asset value (''NAV''); (c) when aggregated in the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89874 (September 15, 2020), 85 FR 59338 (''Notice'').

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 90296, 85 FR 70696 (November 5, 2020). The Commission designated December 20, 2020, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release Nos. 89185 (June 29, 2020), 85 FR 40328 (July 6, 2020) (SR–NYSEArca–2019–95) (Notice of Filing of Amendment No. 6 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 6, to Adopt NYSE Arca Rule 8.601–E to Permit the Listing and Trading of Active Proxy Portfolio Shares and To List and Trade Shares of the Natixis U.S. Equity Opportunities ETF Under Proposed NYSE Arca Rule 8.601–E) (''Active Proxy Portfolio Shares Approval Order'').

[8] Rule 8.601–E(c)(3) defines the term ''Proxy Portfolio'' as a specified portfolio of securities, other financial instruments and/or cash designed to track closely the daily performance of the Actual Portfolio of a series of Active Proxy Portfolio Shares as provided in the exemptive relief pursuant to the 1940 Act applicable to such series. Rule 8.601–E(c)(2) defines the term ''Actual Portfolio'' as identities and quantities of the securities and other assets held by the Investment Company that shall form the basis for the Investment Company's calculation of NAV at the end of the business day.

same specified minimum number of Active Proxy Portfolio Shares, or multiples thereof, may be redeemed at a holder's request in return for the Proxy Portfolio and/or cash to the holder by the issuer with a value equal to the next determined NAV; and (d) the portfolio holdings for which are disclosed within at least 60 days following the end of every fiscal quarter.[9] Further, a series of Active Proxy Portfolio Shares discloses its Proxy Portfolio on a daily basis,[10] and discloses its Actual Portfolio on a quarterly basis.[11]

NYSE Arca Rule 8.601–E, Commentary .01, currently requires that the Exchange submit a proposed rule change with the Commission to list and trade each new series of Active Proxy Portfolio Shares.[12] The Exchange proposes to amend NYSE Arca Rule 8.601–E to adopt ''generic'' listing standards that would allow the Exchange to approve the listing and trading (including pursuant to unlisted trading privileges) of series of Active Proxy Portfolio Shares that satisfy those generic listing standards pursuant to Rule 19b–4(e) under the Act.[13]

A. Proposed Amendments to Rule 8.601–E, Commentary .01

The Exchange proposes to amend Commentary .01 to Rule 8.601–E to state that the Exchange may approve Active Proxy Portfolio Shares for listing and/or trading (including pursuant to unlisted trading privileges) pursuant to Rule 19b–4(e) under the Act. The Exchange would also specify within Commentary .01 that components of a series of Active Proxy Portfolio Shares listed pursuant to Rule 19b–4(e) shall satisfy the criteria set forth in Rule 8.601–E upon initial listing and on a continual basis. In addition, the Exchange would specify that it will file separate proposals under Section 19(b) of the Act before the listing and trading of a series of Active Proxy Portfolio Shares with components that do not satisfy the criteria set forth in proposed amended Commentary .01 or components other than those specified in amended Commentary .01.[14]

Proposed Commentary .01(a) to Rule 8.601–E would provide that the Actual Portfolio and Proxy Portfolio for a series of Active Proxy Portfolio Shares would include only the following components:

(1) U.S. exchange-traded securities that are common stocks; preferred stocks; American Depositary Receipts; and real estate investment trusts;

(2) Foreign common stocks that (a) are listed on a foreign exchange that is a member of the Intermarket Surveillance Group or with which the Exchange has in place a comprehensive surveillance sharing agreement; and (b) trade on such foreign exchange contemporaneously with shares of a series of Active Proxy Portfolio Shares in the Exchange's Core Trading Session;

(3) U.S. exchange-traded funds that are listed under the following NYSE Arca rules: Investment Company Units (Rule 5.2–E(j)(3)); Exchange-Traded Fund Shares (Rule 5.2–E(j)(8)); Portfolio Depositary Receipts (Rule 8.100–E); Managed Fund Shares (Rule 8.600–E); Active Proxy Portfolio Shares (Rule 8.601–E); and Managed Portfolio Shares (Rule 8.900–E);

(4) Equity Gold Shares (listed under NYSE Arca Rule 5.2–E(j)(5));

(5) Index-Linked Securities (listed under NYSE Arca Rule 5.2–E(j)(6));

(6) Commodity-Based Trust Shares (listed under NYSE Arca Rule 8.201–E);

(7) Currency Trust Shares (listed under NYSE Arca Rule 8.202–E);

(8) The following securities, which are required to be organized as commodity pools: Commodity Index Trust Shares (listed under NYSE Arca Rule 8.203–E); Commodity Futures Trust Shares (listed under NYSE Arca Rule 8.204–E); Trust Units (listed under NYSE Arca Rule 8.500–E); and Managed Trust Securities (listed under NYSE Arca Rule 8.700–E);

(9) The following securities if organized as commodity pools: Trust Issued Receipts (listed under NYSE Arca Rule 8.200–E) and Partnership Units (listed under NYSE Arca Rule 8.300–E);

(10) U.S. exchange-traded futures that trade contemporaneously with shares of a series of Active Proxy Portfolio Shares in the Exchange's Core Trading Session; and

(11) Cash and cash equivalents, which cash equivalents would be limited to short-term U.S. Treasury securities, government money market funds, and repurchase agreements.

Proposed Commentary .01(b) to Rule 8.601–E would provide that a series of Active Proxy Portfolio Shares will not hold short positions in securities and other financial instruments referenced in the list of permitted investments in Commentary .01(a). Proposed Commentary .01(c) would provide that the securities referenced in proposed Commentary .01(a)(3)–(9) would also include securities listed on another national securities exchange pursuant to substantially equivalent listing rules.

The Exchange states that the securities and financial instruments enumerated in proposed Commentary .01(a) to Rule 8.601–E are consistent

[9] *See* NYSE Arca Rule 8.601–E(c)(1).

[10] Rule 8.601–E(d)(2)(A) requires for continued listing on the Exchange that each series of Active Proxy Portfolio Shares must make its Proxy Portfolio publicly available on its website at least once daily and must make it available to all market participants at the same time. Pursuant to Rule 8.601–E(c)(3), the website for each series of Active Proxy Portfolio Shares must disclose the information regarding the Proxy Portfolio as provided in the exemptive relief pursuant to the 1940 Act applicable to such series, including the following, to the extent applicable: (i) Ticker symbol; (ii) CUSIP or other identifier; (iii) description of holding; (iv) quantity of each security or other asset held; and (v) percentage weighting of the holding in the portfolio.

[11] Rule 8.601–E(d)(2)(A) requires for continued listing on the Exchange that each series of Active Proxy Portfolio Shares must publicly disseminate its Actual Portfolio within at least 60 days following the end of every fiscal quarter and must make it publicly available to all market participants at the same time.

[12] The Commission has approved the listing and trading on the Exchange of series of Active Proxy Portfolio Shares pursuant to NYSE Arca Rule 8.601–E. *See* Active Proxy Portfolio Shares Approval Order, *supra* note 7, Securities Exchange Act Release Nos. 89192 (June 30, 2020), 85 FR 40699 (July 7, 2020) (SR–NYSEArca–2019–96) (Notice of Filing of Amendment No. 5 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 5, to List and Trade Two Series of Active Proxy Portfolio Shares Issued by the American Century ETF Trust under NYSE Arca Rule 8.601–E) (''American Century Approval Order''); 89191 (June 30, 2020), 85 FR 40358 (July 6, 2020) (SR–NYSEArca–2019–92) (Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3, to List and Trade Four Series of Active Proxy Portfolio Shares Issued by T. Rowe Price Exchange-Traded Funds, Inc. under NYSE Arca Rule 8.601–E) (''T. Rowe Price Approval Order''); 89438 (July 31, 2020) (SR–NYSEArca–2020–51) (Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 2, to List and Trade Shares of Natixis Vaughan Nelson Select ETF and Natixis Vaughan Nelson MidCap ETF under NYSE Arca Rule 8.601–E) (''Natixis Approval Order,'' and collectively with the Natixis Approval Order, American Century Approval Order, and T. Rowe Price Approval Order, the ''Approval Orders'').

[13] 17 CFR 240.19b–4(e). Rule 19b–4(e)(1) under the Act provides that the listing and trading of a new derivative securities product by a self-regulatory organization (''SRO'') is not deemed a proposed rule change, pursuant to paragraph (c)(1) of Rule 19b–4, if the Commission has approved, pursuant to section 19(b) of the Act, the SRO's trading rules, procedures and listing standards for the product class that would include the new derivative securities product and the SRO has a surveillance program for the product class. See 17 CFR 240.19b–4(e)(1). Under Rule 19b–4(e), the term ''new derivative securities product'' means any type of option, warrant, hybrid securities product or any other security, other than a single equity option or a security futures product, whose value is based, in whole or in part, upon the performance of, or interest in, an underlying instrument. *See* 17 CFR 240.19b–4(e). Under Rule 19b–4(c)(1), a stated policy, practice, or interpretation of the SRO shall be deemed to be a proposed rule change unless it is reasonably and fairly implied by an existing rule of the SRO. 17 CFR 240.19b–4(c)(1). 17 CFR 240.19b–4(c)(1).

[14] For example, if the components of a series of Active Proxy Portfolio Shares included a security or asset that is not specified in proposed amended Commentary .01, the Exchange would file a separate proposed rule change with the Commission to list the series of Active Proxy Portfolio Shares.

with, and limited to, the ''permissible investments'' for series of Active Proxy Portfolio Shares previously approved by the Commission for Exchange listing and trading, as described in the Approval Orders,[15] and as permitted by their respective exemptive relief under the 1940 Act.

The Exchange states that the regulatory staff of the Exchange, or the Financial Industry Regulatory Authority, Inc. (''FINRA''), on behalf of the Exchange, will communicate as needed regarding trading in Active Proxy Portfolio Shares, other exchange-traded equity securities and futures contracts with other markets that are members of the Intermarket Surveillance Group (''ISG''), including U.S. and foreign exchanges on which the components are traded. In addition, the Exchange may obtain information regarding trading in Active Proxy Portfolio Shares from other markets that are members of the ISG, including all U.S. securities exchanges and futures exchanges on which the equity securities and futures contracts are traded, or with which the Exchange has in place a comprehensive surveillance sharing agreement. The Exchange represents that its surveillance procedures are adequate to continue to properly monitor the trading of Active Proxy Portfolio Shares in all trading sessions and to deter and detect violations of Exchange rules. Specifically, the Exchange intends to utilize its existing surveillance procedures applicable to derivative products, which will include Active Proxy Portfolio Shares, to monitor trading in the Active Proxy Portfolio Shares.

The Exchange states that the Active Proxy Portfolio Shares will conform to the initial and continued listing criteria under Rule 8.601–E. All Active Proxy Portfolio Shares listed and/or traded pursuant to Rule 8.601–E (including pursuant to unlisted trading privileges) are subject to all Exchange rules and procedures that currently govern the trading of equity securities on the Exchange. The issuer of a series of Active Proxy Portfolio Shares will be required to comply with Rule 10A–3 under the Act for the initial and continued listing of Active Proxy Portfolio Shares, as provided under NYSE Arca Rule 5.3–E.

Prior to listing pursuant to proposed amended Commentary .01 to Rule 8.601–E, an issuer would be required to represent to the Exchange that it will notify the Exchange of any failure by a series of Active Proxy Portfolio Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If a series of Active Proxy Portfolio Shares is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5–E(m).

III. Proceedings To Determine Whether To Approve or Disapprove SR–NYSEArca–2020–77 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[16] to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[17] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.[18]

The Exchange proposes to adopt generic listing standards for Active Proxy Portfolio Shares, which would allow the Exchange to list and trade Active Proxy Portfolio Shares that meet the requirements of Commentary .01 without filing a proposed rule change with the Commission. As noted above, however, the Commission only recently approved the listing and trading of Active Proxy Portfolio Shares on the Exchange.[19] Further, the Exchange states that only six series of Active Proxy Portfolio Shares are currently listed and traded on the Exchange.[20] Accordingly, the Commission and the Exchange, as well as the marketplace, more generally, have limited experience with respect to this type of new derivative securities product.[21] In the past, a new derivative securities product typically had a significant history of being listed and traded on an exchange before the Commission approved its generic listing standards. For example, the Commission approved the Exchange's listing standards for Managed Fund Shares in 2008, but did not approve the generic listing

[15] *See supra* note 12.

[16] 15 U.S.C. 78s(b)(2)(B).

[17] *Id.*

[18] 15 U.S.C. 78f(b)(5).

[19] *See supra* note 7 and accompanying text. The Commission notes that it also recently approved substantively similar rules for Cboe BZX Exchange, Inc.'s Tracking Fund Shares and The Nasdaq Stock Market LLC's Proxy Portfolio Shares. *See* Securities Exchange Act Release Nos. 88887 (May 15, 2020), 85 FR 30990 (May 21, 2020) (SR–CboeBZX–2019–107) (Notice of Filing of Amendment No. 5 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 5, to Adopt Rule 14.11(m), Tracking Fund Shares, and to List and Trade Shares of the Fidelity Blue Chip Value ETF, Fidelity Blue Chip Growth ETF, and Fidelity New Millennium ETF) and 89110 (June 22, 2020), 85 FR 38461 (June 26, 2020) (SR–NASDAQ–2020–032) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt Nasdaq Rule 5750 to List and Trade Proxy Portfolio Shares).

[20] The Exchange states that the following series of Active Proxy Portfolio Shares are currently listed and traded on the Exchange: American Century Mid Cap Growth Impact ETF, American Century Sustainable Equity ETF, T. Rowe Price Blue Chip Growth ETF, T. Rowe Price Dividend Growth ETF, T. Rowe Price Growth Stock ETF, and T. Rowe Price Equity Income ETF. *See* American Century Approval Order and T. Rowe Price Approval Order, *supra* note 12. The Commission notes that the three Natixis funds noted above have also been approved for listing and trading on the Exchange. *See supra* notes 7 and 12. In addition, shares of similar products have been approved or filed for immediate effectiveness for listing and trading on Cboe BZX Exchange, Inc. *See,* for example, *supra* note 19 and 90530 (November 30, 2020), 85 FR 78366 (December 4, 2020) (SR–CboeBZX–2020–085) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to List and Trade Shares of the Fidelity Growth Opportunities ETF, Fidelity Magellan ETF, Fidelity Real Estate Investment ETF, and Fidelity Small-Mid Cap Opportunities ETF Under Rule 14.11(m) (Tracking Fund Shares)).

[21] Under Rule 19b–4(e), the term ''new derivative securities product'' means any type of option, warrant, hybrid securities product, or any other security, other than a single equity option or a security futures product, whose value is based, in whole or in part, upon the performance of, or interest in, an underlying instrument. See 17 CFR 240.19b–4(e).

standards for the same until 2016.[22] Given the relatively short amount of time the Commission has had to oversee and observe Active Proxy Portfolio Shares and other similarly structured exchange traded products, the Commission is concerned that there is insufficient experience to determine that the proposal to permit generic listing and trading of Active Proxy Portfolio Shares is consistent with Section 6(b)(5) of the Act, including whether the proposal is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest.

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.'' [23] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[24] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[25] The Commission notes that the Exchange has provided no data or analysis to support the determination that, in the absence of significant market or regulatory experience, its proposal to permit the listing and trading of Active Proxy Portfolio Shares pursuant to a generic listing standards raises no new or novel concerns.

Accordingly, the Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including whether the proposal is consistent with the Act.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) [26] of the Act or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4 under the Act,[27] any request for an opportunity to make an oral presentation.[28]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by January 7, 2021. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by January 21, 2021. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice,[29] in addition to any other comments they may wish to submit about the proposed rule change.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2020–77 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2020–77. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2020–77 and should be submitted by January 7, 2021. Rebuttal comments should be submitted by January 21, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27731 Filed 12–16–20; 8:45 am]

BILLING CODE 8011–01–P

[22] *See* Securities Exchange Act Release No. 78397 (July 22, 2016), 81 FR 49320 (July 27, 2016 (SR–NYSEArca–2015–110) (Order Granting Approval of Proposed Rule Change, as Modified by Amendment No. 7 Thereto, Amending NYSE Arca Equities Rule 8.600 to Adopt Generic Listing Standards for Managed Fund Shares) and Securities Exchange Act Release No. 57619 (April 4, 2008), 73 FR 19544 (April 10, 2008) (Notice of Filing of Amendment No. 1 to Proposed Rule Change and Order Granting Accelerated Approval of Such Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to Rules Permitting the Listing and Trading of Managed Fund Shares, Trading Hours and Halts, Listing Fees Applicable to Managed Fund Shares, and the Listing and Trading of Shares of the PowerShares Active AlphaQ Fund, PowerShares Active Alpha Multi-Cap Fund, PowerShares Active Mega-Cap Portfolio, and the PowerShares Active Low Duration Portfolio).

[23] 17 CFR 201.700(b)(3).

[24] *See id.*

[25] *See id.*

[26] 15 U.S.C. 78f(b)(5).

[27] 17 CFR 240.19b–4.

[28] Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[29] *See* Notice, *supra* note 3.

[30] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34139; 812–15113]

Palmer Square Capital BDC Inc., et al.

December 14, 2020.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of application for an order (''Order'') under sections 17(d) and 57(i) of the Investment Company Act of 1940 (the ''Act'') and rule 17d–1 under the

Act to permit certain joint transactions otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and rule 17d–1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain business development companies and closed-end management investment companies to co-invest in portfolio companies with each other and with affiliated investment funds and accounts.

APPLICANTS: Palmer Square Capital BDC Inc. (the ''Company''), Palmer Square Opportunistic Income Fund (the ''Existing Registered Fund''), Guilford Capital Credit II L.P., Guilford Capital Credit L.P., Palmer Square Capital Special Situations Fund L.P., Palmer Square CLO 2014–1, LTD, Palmer Square CLO 2015–1, LTD, Palmer Square CLO 2015–2, LTD, Palmer Square CLO 2018–1, LTD, Palmer Square CLO 2018–2, LTD, Palmer Square CLO 2018–3, LTD, Palmer Square Loan Funding 2017–1, LTD, Palmer Square Loan Funding 2018–1, LTD, Palmer Square Loan Funding 2018–2, LTD, Palmer Square Loan Funding 2018–3, LTD, Palmer Square Loan Funding 2018–4, LTD, Palmer Square Loan Funding 2018–5, LTD, Palmer Square Opportunistic Credit Fund L.P., Palmer Square Senior Loan Fund, LLC, Palmer Square Ultra-Short Duration Investment Grade Fund, LLC, Palmer Square CLO 2019–1, LTD, Palmer Square Loan Funding 2019–1, LTD, Palmer Square Loan Funding 2019–2, LTD, Palmer Square Loan Funding 2019–3, LTD, Palmer Square Loan Funding 2019–4, LTD, Palmer Square Credit Funding 2019–1, LTD, Palmer Square Floating Rate Fund LLC, Palmer Square Income Plus Fund LLC, Palmer Square Income Plus Offshore Fund L.P., Palmer Square CLO 2020–1, LTD, BSL WH 1, LTD, BSL WH 2, LTD, BSL WH 4, LTD, BSL WH 5, LTD, Palmer Square Strategic Debt Fund LLC, Palmer Square TALF Opportunity Sub LLC, Palmer Square Loan Funding 2020–1, LTD, Palmer Square Loan Funding 2020–2, LTD, Palmer Square Loan Funding 2020–3, LTD, Palmer Square CLO 2020–2, LTD, Palmer Square CLO 2020–3, LTD, Palmer Square Loan Funding 2020–4, LTD, Palmer Square European Loan Funding 2020–1 DAC, Palmer Square European Loan Funding 2020–2 DAC (the ''Existing Affiliated Funds''), Palmer Square BDC Advisor LLC (''BDC Adviser'') and Palmer Square Capital Management LLC (''PSCM Adviser'').

FILING DATES: The application was filed on March 20, 2020, and amended on August 5, 2020 and October 21, 2020.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving Applicants with a copy of the request by email. Hearing requests should be received by the Commission by 5:30 p.m. on January 7, 2021, and should be accompanied by proof of service on the Applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary.

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: *compliance@palmersquarecap.com.*

Awaiting Response from Paul Stevens.

FOR FURTHER INFORMATION CONTACT: Bruce R. MacNeil, Senior Counsel, at 202–551–6817, or Kaitlin C. Bottock, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Introduction

1. The applicants request an order of the Commission under sections 17(d) and 57(i) under the Act and rule 17d–1 under the Act to permit, subject to the terms and conditions set forth in the application (the ''Conditions''), one or more Regulated Funds [1] and/or one or more Affiliated Funds [2] to enter into Co-Investment Transactions with each other. ''Co-Investment Transaction'' means any transaction in which one or more Regulated Funds (or its Wholly-Owned Investment Sub (defined below)) participated together with one or more Affiliated Funds and/or one or more other Regulated Funds in reliance on the Order. ''Potential Co-Investment Transaction'' means any investment opportunity in which a Regulated Fund (or its Wholly-Owned Investment Sub) could not participate together with one or more Affiliated Funds and/or one or more other Regulated Funds without obtaining and relying on the Order.[3]

Applicants

2. The Company is a Maryland corporation organized as a non-diversified closed-end management investment company that has elected to be regulated as a business development company (''BDC'') under the Act.[4] The Company is managed by a Board [5] currently comprised of five persons, three of whom are Independent Directors.[6]

[1] ''Regulated Funds'' means the Company, the Existing Registered Fund, the Future Regulated Funds and the BDC Downstream Funds. ''Future Regulated Fund'' means a closed-end management investment company (a) that is registered under the Act or has elected to be regulated as a BDC, (b) whose investment adviser is an Adviser, and (c) that intends to participate in the proposed co-investment program (the ''Co-Investment Program'').

''Adviser'' means BDC Adviser and PSCM Adviser together with any future investment adviser that (i) controls, is controlled by or is under common control with BDC Adviser and/or PSCM Adviser, (ii) is registered as an investment adviser under the Investment Advisers Act of 1940 (the ''Advisers Act'') and (iii) is not a Regulated Fund or a subsidiary of a Regulated Fund.

[2] ''Affiliated Fund'' means any Existing Affiliated Fund, any Future Affiliated Fund or any Palmer Square Proprietary Account. ''Future Affiliated Fund'' means any entity (a) whose investment adviser is an Adviser, (b) that either (A) would be an investment company but for Section 3(c)(1), 3(c)(5)(C) or 3(c)(7) of the Act or (B) relies on Rule 3a–7 exemption from investment company status, (c) that intends to participate in the Co-Investment Program, and (d) that is not a BDC Downstream Fund. Applicants represent that no Existing Affiliated Fund is a BDC Downstream Fund. ''Palmer Square Proprietary Account'' means any direct or indirect, wholly- or majority-owned subsidiary of BDC Adviser or PSCM Adviser that is formed in the future that, from time to time, may hold various financial assets in a principal capacity.

[3] All existing entities that currently intend to rely on the Order have been named as applicants and any existing or future entities that may rely on the Order in the future will comply with the terms and Conditions set forth in the application.

[4] Section 2(a)(48) defines a BDC to be any closed-end investment company that operates for the purpose of making investments in securities described in section 55(a)(1) through 55(a)(3) and makes available significant managerial assistance with respect to the issuers of such securities.

[5] ''Board'' means (i) with respect to a Regulated Fund other than a BDC Downstream Fund, the board of directors (or the equivalent) of the Regulated Fund and (ii) with respect to a BDC Downstream Fund, the Independent Party of the BDC Downstream Fund.

''Independent Party'' means, with respect to a BDC Downstream Fund, (i) if the BDC Downstream Fund has a board of directors (or the equivalent), the board or (ii) if the BDC Downstream Fund does not have a board of directors (or the equivalent), a transaction committee or advisory committee of the BDC Downstream Fund.

[6] ''Independent Director'' means a member of the Board of any relevant entity who is not an ''interested person'' as defined in section 2(a)(19) of the Act. No Independent Director of a Regulated Fund (including any non-interested member of an Independent Party) will have a financial interest in

Continued

3. The Existing Registered Fund is a Delaware statutory trust that is a non-diversified, closed-end management investment company that is registered under the Act. The Existing Registered Fund operates as an ''interval fund'' pursuant to Rule 23c–3 under the Act. The Existing Registered Fund is managed by a Board currently comprised of two persons, both of whom are Independent Directors.

4. PSCM Adviser, a Delaware limited liability company that is registered under the Advisers Act serves as the investment adviser to the Existing Affiliated Funds and the Existing Registered Fund. BDC Adviser, a Delaware limited liability company that is registered under the Advisers Act, serves as the investment adviser to the Company. BDC Adviser is a majority-owned and controlled subsidiary of PSCM Adviser and no other person controls BDC Adviser.

5. Applicants represent that each Existing Affiliated Fund is a separate and distinct legal entity and each would be an investment company but for section 3(c)(7) of the Act.

6. Applicants state that a Regulated Fund may, from time to time, form one or more Wholly-Owned Investment Subs.[7] Such a subsidiary may be prohibited from investing in a Co-Investment Transaction with a Regulated Fund (other than its parent) or any Affiliated Fund because it would be a company controlled by its parent Regulated Fund for purposes of section 57(a)(4) and rule 17d–1. Applicants request that each Wholly-Owned Investment Sub be permitted to participate in Co-Investment Transactions in lieu of the Regulated Fund that owns it and that the Wholly-Owned Investment Sub's participation in any such transaction be treated, for purposes of the Order, as though the parent Regulated Fund were participating directly.

Applicants' Representations

A. Allocation Process

1. Applicants represent that BDC Adviser and PSCM Adviser have established processes for allocating initial investment opportunities, opportunities for subsequent investments in an issuer and dispositions of securities holdings reasonably designed to treat all clients fairly and equitably. Further, applicants represent that these processes will be extended and modified in a manner reasonably designed to ensure that the additional transactions permitted under the Order will both (i) be fair and equitable to the Regulated Funds and the Affiliated Funds and (ii) comply with the Conditions.

2. If the requested Order is granted, the Adviser will establish, maintain and implement policies and procedures reasonably designed to ensure that when such opportunities arise, the Adviser to the relevant Regulated Funds is promptly notified and receives the same information about the opportunity as any other Adviser considering the opportunity for its clients. In particular, consistent with Condition 1, if a Potential Co-Investment Transaction falls within the then-current Objectives and Strategies[8] and any Board-Established Criteria[9] of a Regulated Fund, the policies and procedures will require that the Adviser to such Regulated Fund receive sufficient information to allow such Adviser's investment committee to make its independent determination and recommendations under the Conditions.

3. The Adviser to each applicable Regulated Fund will then make an independent determination of the appropriateness of the investment for the Regulated Fund in light of the Regulated Fund's then-current circumstances. If the Adviser to a Regulated Fund deems the Regulated Fund's participation in any Potential Co-Investment Transaction to be appropriate, then it will formulate a recommendation regarding the proposed order amount for the Regulated Fund.

4. Applicants state that, for each Regulated Fund and Affiliated Fund whose Adviser recommends participating in a Potential Co-Investment Transaction, such Adviser's investment committee will approve an investment amount to be allocated to each Regulated Fund and/or Affiliated Fund participating in the Potential Co-Investment Transaction. Applicants state further that, each proposed order amount may be reviewed and adjusted, in accordance with the Adviser's written allocation policies and procedures, by the Adviser's investment committee.[10] The order of a Regulated Fund or Affiliated Fund resulting from this process is referred to as its ''Internal Order.'' The Internal Order will be submitted for approval by the Required Majority of any participating Regulated Funds in accordance with the Conditions.[11]

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any Co-Investment Transaction, other than indirectly through share ownership in one of the Regulated Funds.

[7] ''Wholly-Owned Investment Sub'' means an entity (i) that is a wholly-owned subsidiary of a Regulated Fund (with such Regulated Fund at all times holding, beneficially and of record, 95% or more of the voting and economic interests); (ii) whose sole business purpose is to hold one or more investments on behalf of such Regulated Fund (and, in the case of an SBIC Subsidiary (defined below), maintains a license under the SBA Act (defined below) and issues debentures guaranteed by the SBA (defined below)); (iii) with respect to which such Regulated Fund's Board has the sole authority to make all determinations with respect to the entity's participation under the Conditions to the application; and (iv) (A) that would be an investment company but for Section 3(c)(1), 3(c)(5)(C), or 3(c)(7) of the Act, or (B) that qualifies as a real estate investment trust within the meaning of Section 856 of the Internal Revenue Code of 1986, as amended (''Code'') because substantially all of its assets would consist of real properties. The term ''SBIC Subsidiary'' means a Wholly-Owned Investment Sub that is licensed by the Small Business Administration (the ''SBA'') to operate under the Small Business Investment Act of 1958, as amended, (the ''SBA Act'') as a small business investment company.

[8] ''Objectives and Strategies'' means (i) with respect to any Regulated Fund other than a BDC Downstream Fund, its investment objectives and strategies, as described in its most current registration statement on Form N–2, other current filings with the Commission under the Securities Act of 1933 (the ''Securities Act'') or under the Securities Exchange Act of 1934, as amended, and its most current report to stockholders, and (ii) with respect to any BDC Downstream Fund, those investment objectives and strategies described in its disclosure documents (including private placement memoranda and reports to equity holders) and organizational documents (including operating agreements).

[9] ''Board-Established Criteria'' means criteria that the Board of a Regulated Fund may establish from time to time to describe the characteristics of Potential Co-Investment Transactions regarding which the Adviser to such Regulated Fund should be notified under Condition 1. The Board-Established Criteria will be consistent with the Regulated Fund's Objectives and Strategies. If no Board-Established Criteria are in effect, then the Regulated Fund's Adviser will be notified of all Potential Co-Investment Transactions that fall within the Regulated Fund's then-current Objectives and Strategies. Board-Established Criteria will be objective and testable, meaning that they will be based on observable information, such as industry/sector of the issuer, minimum EBITDA of the issuer, asset class of the investment opportunity or required commitment size, and not on characteristics that involve a discretionary assessment. The Adviser to the Regulated Fund may from time to time recommend criteria for the Board's consideration, but Board-Established Criteria will only become effective if approved by a majority of the Independent Directors. The Independent Directors of a Regulated Fund may at any time rescind, suspend or qualify its approval of any Board-Established Criteria, though Applicants anticipate that, under normal circumstances, the Board would not modify these criteria more often than quarterly.

[10] The reason for any such adjustment to a proposed order amount will be documented in writing and preserved in the records of each Adviser.

[11] ''Required Majority'' means a required majority, as defined in section 57(o) of the Act. In the case of a Regulated Fund that is a registered closed-end fund, the Board members that make up the Required Majority will be determined as if the Regulated Fund were a BDC subject to section 57(o). In the case of a BDC Downstream Fund with a board of directors (or the equivalent), the members that make up the Required Majority will be determined as if the BDC Downstream Fund were a BDC subject to section 57(o). In the case of a BDC Downstream Fund with a transaction committee or advisory

5. If the aggregate Internal Orders for a Potential Co-Investment Transaction do not exceed the size of the investment opportunity immediately prior to the submission of the orders to the underwriter, broker, dealer or issuer, as applicable (the ''External Submission''), then each Internal Order will be fulfilled as placed. If, on the other hand, the aggregate Internal Orders for a Potential Co-Investment Transaction exceed the size of the investment opportunity immediately prior to the External Submission, then the allocation of the opportunity will be made pro rata on the basis of the size of the Internal Orders.[12] If, subsequent to such External Submission, the size of the opportunity is increased or decreased, or if the terms of such opportunity, or the facts and circumstances applicable to the Regulated Funds' or the Affiliated Funds' consideration of the opportunity, change, the participants will be permitted to submit revised Internal Orders in accordance with written allocation policies and procedures that the Advisers will establish, implement and maintain.[13]

B. Follow-On Investments

6. Applicants state that from time to time the Regulated Funds and Affiliated Funds may have opportunities to make Follow-On Investments[14] in an issuer in which a Regulated Fund and one or more other Regulated Funds and/or Affiliated Funds previously have invested.

7. Applicants propose that Follow-On Investments would be divided into two categories depending on whether the prior investment was a Co-Investment Transaction or a Pre-Boarding Investment.[15] If the Regulated Funds and Affiliated Funds have previously participated in a Co-Investment Transaction with respect to the issuer, then the terms and approval of the Follow-On Investment would be subject to the Standard Review Follow-Ons described in Condition 8. If the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer but hold a Pre-Boarding Investment, then the terms and approval of the Follow-On Investment would be subject to the Enhanced-Review Follow-Ons described in Condition 9. All Enhanced Review Follow-Ons require the approval of the Required Majority. For a given issuer, the participating Regulated Funds and Affiliated Funds need to comply with the requirements of Enhanced-Review Follow-Ons only for the first Co-Investment Transaction. Subsequent Co-Investment Transactions with respect to the issuer would be governed by the requirements of Standard Review Follow-Ons.

8. A Regulated Fund would be permitted to invest in Standard Review Follow-Ons either with the approval of the Required Majority under Condition 8(c) or without Board approval under Condition 8(b) if it is (i) a Pro Rata Follow-On Investment[16] or (ii) a Non-Negotiated Follow-On Investment.[17] Applicants believe that these Pro Rata and Non-Negotiated Follow-On Investments do not present a significant opportunity for overreaching on the part of any Adviser and thus do not warrant the time or the attention of the Board. Pro Rata Follow-On Investments and Non-Negotiated Follow-On Investments remain subject to the Board's periodic review in accordance with Condition 10.

C. Dispositions

9. Applicants propose that Dispositions[18] would be divided into two categories. If the Regulated Funds and Affiliated Funds holding investments in the issuer have previously participated in a Co-Investment Transaction with respect to the issuer, then the terms and approval of the Disposition would be subject to the Standard Review Dispositions described in Condition 6. If the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer but hold a Pre-Boarding Investment, then the terms and approval of the Disposition would be subject to the Enhanced Review Dispositions described in Condition 7. Subsequent Dispositions with respect to the same issuer would be governed by Condition 6 under the Standard Review Dispositions.[19]

10. A Regulated Fund may participate in a Standard Review Disposition either with the approval of the Required Majority under Condition 6(d) or without Board approval under Condition 6(c) if (i) the Disposition is a Pro Rata Disposition[20] or (ii) the

committee, the committee members that make up the Required Majority will be determined as if the BDC Downstream Fund were a BDC subject to section 57(o) and as if the committee members were directors of the fund.

[12] The Advisers will maintain records of all proposed order amounts, Internal Orders and External Submissions in conjunction with Potential Co-Investment Transactions. Each applicable Adviser will provide the Eligible Directors with information concerning the Affiliated Funds' and Regulated Funds' order sizes to assist the Eligible Directors with their review of the applicable Regulated Fund's investments for compliance with the Conditions. ''Eligible Directors'' means, with respect to a Regulated Fund and a Potential Co-Investment Transaction, the members of the Regulated Fund's Board eligible to vote on that Potential Co-Investment Transaction under section 57(o) of the Act (treating any registered investment company or series thereof as a BDC for this purpose).

[13] The Board of the Regulated Fund will then either approve or disapprove of the investment opportunity in accordance with Condition 2, 6, 7, 8 or 9, as applicable.

[14] ''Follow-On Investment'' means an additional investment in the same issuer, including, but not limited to, through the exercise of warrants, conversion privileges or other rights to purchase securities of the issuer.

[15] ''Pre-Boarding Investments'' are investments in an issuer held by a Regulated Fund as well as one or more Affiliated Funds and/or one or more other Regulated Funds that were acquired prior to participating in any Co-Investment Transaction: (i) In transactions in which the only term negotiated by or on behalf of such funds was price in reliance on one of the JT No-Action Letters (defined below); or (ii) in transactions occurring at least 90 days apart and without coordination between the Regulated Fund and any Affiliated Fund or other Regulated Fund.

[16] A ''Pro Rata Follow-On Investment'' is a Follow-On Investment (i) in which the participation of each Affiliated Fund and each Regulated Fund is proportionate to its outstanding investments in the issuer or security, as appropriate, immediately preceding the Follow-On Investment, and (ii) in the case of a Regulated Fund, a majority of the Board has approved the Regulated Fund's participation in the pro rata Follow-On Investments as being in the best interests of the Regulated Fund. The Regulated Fund's Board may refuse to approve, or at any time rescind, suspend or qualify, its approval of Pro Rata Follow-On Investments, in which case all subsequent Follow-On Investments will be submitted to the Regulated Fund's Eligible Directors in accordance with Condition 8(c).

[17] A ''Non-Negotiated Follow-On Investment'' is a Follow-On Investment in which a Regulated Fund participates together with one or more Affiliated Funds and/or one or more other Regulated Funds (i) in which the only term negotiated by or on behalf of the funds is price and (ii) with respect to which, if the transaction were considered on its own, the funds would be entitled to rely on one of the JT No-Action Letters.

''JT No-Action Letters'' means SMC Capital, Inc., SEC No-Action Letter (pub. avail. Sept. 5, 1995) and Massachusetts Mutual Life Insurance Company, SEC No-Action Letter (pub. avail. June 7, 2000).

[18] ''Disposition'' means the sale, exchange or other disposition of an interest in a security of an issuer.

[19] However, with respect to an issuer, if a Regulated Fund's first Co-Investment Transaction is an Enhanced Review Disposition, and the Regulated Fund does not dispose of its entire position in the Enhanced Review Disposition, then before such Regulated Fund may complete its first Standard Review Follow-On in such issuer, the Eligible Directors must review the proposed Follow-On Investment not only on a stand-alone basis but also in relation to the total economic exposure in such issuer (*i.e.,* in combination with the portion of the Pre-Boarding Investment not disposed of in the Enhanced Review Disposition), and the other terms of the investments. This additional review is required because such findings were not required in connection with the prior Enhanced Review Disposition, but they would have been required had the first Co-Investment Transaction been an Enhanced Review Follow-On.

[20] A ''Pro Rata Disposition'' is a Disposition (i) in which the participation of each Affiliated Fund and each Regulated Fund is proportionate to its outstanding investment in the security subject to Disposition immediately preceding the Disposition;

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securities are Tradable Securities [21] and the Disposition meets the other requirements of Condition 6(c)(ii). Pro Rata Dispositions and Dispositions of a Tradable Security remain subject to the Board's periodic review in accordance with Condition 10.

D. Delayed Settlement

11. Applicants represent that under the terms and Conditions of the application, all Regulated Funds and Affiliated Funds participating in a Co-Investment Transaction will invest at the same time, for the same price and with the same terms, conditions, class, registration rights and any other rights, so that none of them receives terms more favorable than any other. However, the settlement date for an Affiliated Fund in a Co-Investment Transaction may occur up to ten business days after the settlement date for the Regulated Fund, and vice versa. Nevertheless, in all cases, (i) the date on which the commitment of the Affiliated Funds and Regulated Funds is made will be the same even where the settlement date is not and (ii) the earliest settlement date and the latest settlement date of any Affiliated Fund or Regulated Fund participating in the transaction will occur within ten business days of each other.

E. Holders

12. Under Condition 15, if an Adviser, its principals, or any person controlling, controlled by, or under common control with the Adviser or its principals, and the Affiliated Funds (collectively, the ''Holders'') own in the aggregate more than 25 percent of the outstanding voting shares of a Regulated Fund (the ''Shares''), then the Holders will vote such Shares in the same percentages as the Regulated Fund's other shareholders (not including the Holders) when voting on matters specified in the Condition.

Applicants' Legal Analysis

1. Section 17(d) of the Act and rule 17d–1 under the Act prohibit participation by a registered investment company and an affiliated person in any ''joint enterprise or other joint arrangement or profit-sharing plan,'' as defined in the rule, without prior approval by the Commission by order upon application. Section 17(d) of the Act and rule 17d–1 under the Act are applicable to Regulated Funds that are registered closed-end investment companies.

2. Similarly, with regard to BDCs, section 57(a)(4) of the Act generally prohibits certain persons specified in section 57(b) from participating in joint transactions with the BDC or a company controlled by the BDC in contravention of rules as prescribed by the Commission. Section 57(i) of the Act provides that, until the Commission prescribes rules under section 57(a)(4), the Commission's rules under section 17(d) of the Act applicable to registered closed-end investment companies will be deemed to apply to transactions subject to section 57(a)(4). Because the Commission has not adopted any rules under section 57(a)(4), rule 17d–1 also applies to joint transactions with Regulated Funds that are BDCs.

3. Co-Investment Transactions are prohibited by either or both of rule 17d–1 and section 57(a)(4) without a prior exemptive order of the Commission to the extent that the Affiliated Funds and the Regulated Funds participating in such transactions fall within the category of persons described by rule 17d–1 and/or section 57(b), as modified by rule 57b-1 thereunder, as applicable, vis-à-vis each participating Regulated Fund. Each of the participating Regulated Funds and Affiliated Funds may be deemed to be affiliated persons vis-à-vis a Regulated Fund within the meaning of section 2(a)(3) by reason of common control because (i) PSCM Adviser manages and may be deemed to control each of the Existing Affiliated Funds and an Adviser will manage and may be deemed to control any Future Affiliated Fund; (ii) PSCM Adviser manages and may be deemed to control the Existing Registered Fund, BDC Adviser manages the Company and an Adviser will manage any Future Regulated Fund; (iii) each BDC Downstream Fund [22] will be, deemed to be controlled by its BDC parent and/or its BDC parents' investment adviser; and (iv) the Advisers will control, be controlled by, or under common control with, PSCM Adviser and/or BDC Adviser. Thus, each of the Affiliated Funds could be deemed to be a person related to the Regulated Funds, including any BDC Downstream Fund in a manner described by section 57(b) and related to Future Regulated Funds in a manner described by rule 17d–1; and therefore the prohibitions of rule 17d–1 and section 57(a)(4) would apply respectively to prohibit the Affiliated Funds from participating in Co-Investment Transactions with the Regulated Funds. Each Regulated Fund would also be related to each other Regulated Fund in a manner described by 57(b) or rule 17d–1, as applicable, and thus prohibited from participating in Co-Investment Transactions with each other. In addition, because the Palmer Square Proprietary Accounts will be controlled by PSCM Adviser or BDC Adviser and, therefore, may be under common control with the Company, the Existing Registered Fund, any future Advisers, and any Future Regulated Funds, the Palmer Square Proprietary Accounts could be deemed to be persons related to the Regulated Funds (or a company controlled by the Regulated Funds) in a manner described by section 57(b) and also prohibited from participating in the Co-Investment Program.

4. In passing upon applications under rule 17d–1, the Commission considers whether the company's participation in the joint transaction is consistent with the provisions, policies, and purposes of the Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

5. Applicants state that in the absence of the requested relief, in many circumstances the Regulated Funds would be limited in their ability to participate in attractive and appropriate investment opportunities. Applicants state that, as required by rule 17d–1(b), the Conditions ensure that the terms on which Co-Investment Transactions may be made will be consistent with the participation of the Regulated Funds being on a basis that it is neither different from nor less advantageous than other participants, thus protecting

and (ii) in the case of a Regulated Fund, a majority of the Board has approved the Regulated Fund's participation in pro rata Dispositions as being in the best interests of the Regulated Fund. The Regulated Fund's Board may refuse to approve, or at any time rescind, suspend or qualify, its approval of Pro Rata Dispositions, in which case all subsequent Dispositions will be submitted to the Regulated Fund's Eligible Directors.

[21] ''Tradable Security'' means a security that meets the following criteria at the time of Disposition: (i) It trades on a national securities exchange or designated offshore securities market as defined in rule 902(b) under the Securities Act; (ii) it is not subject to restrictive agreements with the issuer or other security holders; and (iii) it trades with sufficient volume and liquidity (findings as to which are documented by the Advisers to any Regulated Funds holding investments in the issuer and retained for the life of the Regulated Fund) to allow each Regulated Fund to dispose of its entire position remaining after the proposed Disposition within a short period of time not exceeding 30 days at approximately the value (as defined by section 2(a)(41) of the Act) at which the Regulated Fund has valued the investment.

[22] ''BDC Downstream Fund'' means, with respect to any Regulated Fund that is a BDC, an entity (i) that the BDC directly or indirectly controls, (ii) that is not controlled by any person other than the BDC (except a person that indirectly controls the entity solely because it controls the BDC), (iii) that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act, (iv) whose investment adviser is an Adviser, (v) that is not a Wholly-Owned Investment Sub and (vi) that intends to participate in the Co-Investment Program.

the equity holders of any participant from being disadvantaged. Applicants further state that the Conditions ensure that all Co-Investment Transactions are reasonable and fair to the Regulated Funds and their shareholders and do not involve overreaching by any person concerned, including the Advisers. Applicants state that the Regulated Funds' participation in the Co-Investment Transactions in accordance with the Conditions will be consistent with the provisions, policies, and purposes of the Act and would be done in a manner that is not different from, or less advantageous than, that of other participants.

Applicants' Conditions

Applicants agree that the Order will be subject to the following Conditions:

1. *Identification and Referral of Potential Co-Investment Transactions.*

(a). The Advisers will establish, maintain and implement policies and procedures reasonably designed to ensure that each Adviser is promptly notified of all Potential Co-Investment Transactions that fall within the then-current Objectives and Strategies and Board-Established Criteria of any Regulated Fund the Adviser manages.

(b). When an Adviser to a Regulated Fund is notified of a Potential Co-Investment Transaction under Condition 1(a), the Adviser will make an independent determination of the appropriateness of the investment for the Regulated Fund in light of the Regulated Fund's then-current circumstances.

2. *Board Approvals of Co-Investment Transactions.*

(a). If the Adviser deems a Regulated Fund's participation in any Potential Co-Investment Transaction to be appropriate for the Regulated Fund, it will then determine an appropriate level of investment for the Regulated Fund.

(b). If the aggregate amount recommended by the Advisers to be invested in the Potential Co-Investment Transaction by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, the investment opportunity will be allocated among them pro rata based on the size of the Internal Orders, as described in section III.A.1.b. of the application. Each Adviser to a participating Regulated Fund will promptly notify and provide the Eligible Directors with information concerning the Affiliated Funds' and Regulated Funds' order sizes to assist the Eligible Directors with their review of the applicable Regulated Fund's investments for compliance with these Conditions.

(c). After making the determinations required in Condition 1(b) above, each Adviser to a participating Regulated Fund will distribute written information concerning the Potential Co-Investment Transaction (including the amount proposed to be invested by each participating Regulated Fund and each participating Affiliated Fund) to the Eligible Directors of its participating Regulated Fund(s) for their consideration. A Regulated Fund will enter into a Co-Investment Transaction with one or more other Regulated Funds or Affiliated Funds only if, prior to the Regulated Fund's participation in the Potential Co-Investment Transaction, a Required Majority concludes that:

(i). The terms of the transaction, including the consideration to be paid, are reasonable and fair to the Regulated Fund and its equity holders and do not involve overreaching in respect of the Regulated Fund or its equity holders on the part of any person concerned;

(ii). the transaction is consistent with:

(A). The interests of the Regulated Fund's equity holders; and

(B). the Regulated Fund's then-current Objectives and Strategies;

(iii). the investment by any other Regulated Fund(s) or Affiliated Fund(s) would not disadvantage the Regulated Fund, and participation by the Regulated Fund would not be on a basis different from, or less advantageous than, that of any other Regulated Fund(s) or Affiliated Fund(s) participating in the transaction; provided that the Required Majority shall not be prohibited from reaching the conclusions required by this Condition 2(c)(iii) if:

(A). The settlement date for another Regulated Fund or an Affiliated Fund in a Co-Investment Transaction is later than the settlement date for the Regulated Fund by no more than ten business days or earlier than the settlement date for the Regulated Fund by no more than ten business days, in either case, so long as: (x) The date on which the commitment of the Affiliated Funds and Regulated Funds is made is the same; and (y) the earliest settlement date and the latest settlement date of any Affiliated Fund or Regulated Fund participating in the transaction will occur within ten business days of each other; or

(B). any other Regulated Fund or Affiliated Fund, but not the Regulated Fund itself, gains the right to nominate a director for election to a portfolio company's board of directors, the right to have a board observer or any similar right to participate in the governance or management of the portfolio company so long as: (x) The Eligible Directors will have the right to ratify the selection of such director or board observer, if any; (y) the Adviser agrees to, and does, provide periodic reports to the Regulated Fund's Board with respect to the actions of such director or the information received by such board observer or obtained through the exercise of any similar right to participate in the governance or management of the portfolio company; and (z) any fees or other compensation that any other Regulated Fund or Affiliated Fund or any affiliated person of any other Regulated Fund or Affiliated Fund receives in connection with the right of one or more Regulated Funds or Affiliated Funds to nominate a director or appoint a board observer or otherwise to participate in the governance or management of the portfolio company will be shared proportionately among any participating Affiliated Funds (who may, in turn, share their portion with their affiliated persons) and any participating Regulated Fund(s) in accordance with the amount of each such party's investment; and

(iv). the proposed investment by the Regulated Fund will not involve compensation, remuneration or a direct or indirect [23] financial benefit to the Advisers, any other Regulated Fund, the Affiliated Funds or any affiliated person of any of them (other than the parties to the Co-Investment Transaction), except (A) to the extent permitted by Condition 14, (B) to the extent permitted by Section 17 (e) or 57(k), as applicable, (C) indirectly, as a result of an interest in the securities issued by one of the parties to the Co-Investment Transaction, or (D) in the case of fees or other compensation described in Condition 2(c)(iii)(B)(z).

3. *Right to Decline.* Each Regulated Fund has the right to decline to participate in any Potential Co-Investment Transaction or to invest less than the amount proposed.

4. *General Limitation.* Except for Follow-On Investments made in accordance with Conditions 8 and 9 below,[24] a Regulated Fund will not invest in reliance on the Order in any

[23] For example, procuring the Regulated Fund's investment in a Potential Co-Investment Transaction to permit an affiliate to complete or obtain better terms in a separate transaction would constitute an indirect financial benefit.

[24] This exception applies only to Follow-On Investments by a Regulated Fund in issuers in which that Regulated Fund already holds investments.

issuer in which a Related Party has an investment.[25]

5. *Same Terms and Conditions.* A Regulated Fund will not participate in any Potential Co-Investment Transaction unless (i) the terms, conditions, price, class of securities to be purchased, date on which the commitment is entered into and registration rights (if any) will be the same for each participating Regulated Fund and Affiliated Fund and (ii) the earliest settlement date and the latest settlement date of any participating Regulated Fund or Affiliated Fund will occur as close in time as practicable and in no event more than ten business days apart. The grant to one or more Regulated Funds or Affiliated Funds, but not the respective Regulated Fund, of the right to nominate a director for election to a portfolio company's board of directors, the right to have an observer on the board of directors or similar rights to participate in the governance or management of the portfolio company will not be interpreted so as to violate this Condition 5, if Condition 2(c)(iii)(B) is met.

6. *Standard Review Dispositions.*

(a). *General.* If any Regulated Fund or Affiliated Fund elects to sell, exchange or otherwise dispose of an interest in a security and one or more Regulated Funds and Affiliated Funds have previously participated in a Co-Investment Transaction with respect to the issuer, then:

(i). The Adviser to such Regulated Fund or Affiliated Fund [26] will notify each Regulated Fund that holds an investment in the issuer of the proposed Disposition at the earliest practical time; and

(ii). the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to participation by such Regulated Fund in the Disposition.

(b). *Same Terms and Conditions.* Each Regulated Fund will have the right to participate in such Disposition on a proportionate basis, at the same price and on the same terms and conditions as those applicable to the Affiliated Funds and any other Regulated Fund.

(c). *No Board Approval Required.* A Regulated Fund may participate in such a Disposition without obtaining prior approval of the Required Majority if:

(i). (A) The participation of each Regulated Fund and Affiliated Fund in such Disposition is proportionate to its then-current holding of the security (or securities) of the issuer that is (or are) the subject of the Disposition; [27] (B) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in such Dispositions on a pro rata basis (as described in greater detail in the application); and (C) the Board of the Regulated Fund is provided on a quarterly basis with a list of all Dispositions made in accordance with this Condition; or

(ii). each security is a Tradable Security and (A) the Disposition is not to the issuer or any affiliated person of the issuer; and (B) the security is sold for cash in a transaction in which the only term negotiated by or on behalf of the participating Regulated Funds and Affiliated Funds is price.

(d). *Standard Board Approval.* In all other cases, the Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors and the Regulated Fund will participate in such Disposition solely to the extent that a Required Majority determines that it is in the Regulated Fund's best interests.

7. *Enhanced Review Dispositions.*

(a). *General.* If any Regulated Fund or Affiliated Fund elects to sell, exchange or otherwise dispose of a Pre-Boarding Investment in a Potential Co-Investment Transaction and the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer:

(i). The Adviser to such Regulated Fund or Affiliated Fund will notify each Regulated Fund that holds an investment in the issuer of the proposed Disposition at the earliest practical time;

(ii). the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to participation by such Regulated Fund in the Disposition; and

(iii). the Advisers will provide to the Board of each Regulated Fund that holds an investment in the issuer all information relating to the existing investments in the issuer of the Regulated Funds and Affiliated Funds, including the terms of such investments and how they were made, that is necessary for the Required Majority to make the findings required by this Condition.

(b). *Enhanced Board Approval.* The Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors, and the Regulated Fund will participate in such Disposition solely to the extent that a Required Majority determines that:

(i). The Disposition complies with Condition 2(c)(i), (ii), (iii)(A), and (iv); and

(ii). the making and holding of the Pre-Boarding Investments were not prohibited by Section 57 or Rule 17d–1, as applicable, and records the basis for the finding in the Board minutes.

(c). *Additional Requirements:* The Disposition may only be completed in reliance on the Order if:

(i). *Same Terms and Conditions.* Each Regulated Fund has the right to participate in such Disposition on a proportionate basis, at the same price and on the same terms and Conditions as those applicable to the Affiliated Funds and any other Regulated Fund;

(ii). *Original Investments.* All of the Affiliated Funds' and Regulated Funds' investments in the issuer are Pre-Boarding Investments;

(iii). *Advice of counsel.* Independent counsel to the Board advises that the making and holding of the investments in the Pre-Boarding Investments were not prohibited by Section 57 (as modified by Rule 57b–1) or Rule 17d–1, as applicable;

(iv). *Multiple Classes of Securities.* All Regulated Funds and Affiliated Funds that hold Pre-Boarding Investments in the issuer immediately before the time of completion of the Co-Investment Transaction hold the same security or securities of the issuer. For the purpose of determining whether the Regulated Funds and Affiliated Funds hold the same security or securities, they may disregard any security held by some but not all of them if, prior to relying on the Order, the Required Majority is presented with all information necessary to make a finding, and finds, that: (x) Any Regulated Fund's or Affiliated Fund's holding of a different class of securities (including for this purpose a security with a different

[25] ''Related Party'' means (i) any Close Affiliate and (ii) in respect of matters as to which any Adviser has knowledge, any Remote Affiliate.

''Close Affiliate'' means the Advisers, the Regulated Funds, the Affiliated Funds and any other person described in section 57(b) (after giving effect to rule 57b–1) in respect of any Regulated Fund (treating any registered investment company or series thereof as a BDC for this purpose) except for limited partners included solely by reason of the reference in section 57(b) to section 2(a)(3)(D).

''Remote Affiliate'' means any person described in section 57(e) in respect of any Regulated Fund (treating any registered investment company or series thereof as a BDC for this purpose) and any limited partner holding 5% or more of the relevant limited partner interests that would be a Close Affiliate but for the exclusion in that definition.

[26] Any Palmer Square Proprietary Account that is not advised by an Adviser is itself deemed to be an Adviser for purposes of Conditions 6(a)(i), 7(a)(i), 8(a)(i) and 9(a)(i).

[27] In the case of any Disposition, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the security in question immediately preceding the Disposition.

maturity date) is immaterial [28] in amount, including immaterial relative to the size of the issuer; and (y) the Board records the basis for any such finding in its minutes. In addition, securities that differ only in respect of issuance date, currency, or denominations may be treated as the same security; and

(v). *No control.* The Affiliated Funds, the other Regulated Funds and their affiliated persons (within the meaning of Section 2(a)(3)(C) of the Act), individually or in the aggregate, do not control the issuer of the securities (within the meaning of Section 2(a)(9) of the Act).

8. *Standard Review Follow-Ons.*

(a). *General.* If any Regulated Fund or Affiliated Fund desires to make a Follow-On Investment in an issuer and the Regulated Funds and Affiliated Funds holding investments in the issuer previously participated in a Co-Investment Transaction with respect to the issuer:

(i). The Adviser to each such Regulated Fund or Affiliated Fund will notify each Regulated Fund that holds securities of the portfolio company of the proposed transaction at the earliest practical time; and

(ii). the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to the proposed participation, including the amount of the proposed investment, by such Regulated Fund.

(b). *No Board Approval Required.* A Regulated Fund may participate in the Follow-On Investment without obtaining prior approval of the Required Majority if:

(i). (A) The proposed participation of each Regulated Fund and each Affiliated Fund in such investment is proportionate to its outstanding investments in the issuer or the security at issue, as appropriate,[29] immediately preceding the Follow-On Investment; and (B) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in Follow-On Investments on a pro rata basis (as described in greater detail in the application); or

(ii). it is a Non-Negotiated Follow-On Investment.

(c). *Standard Board Approval.* In all other cases, the Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors and the Regulated Fund will participate in such Follow-On Investment solely to the extent that a Required Majority makes the determinations set forth in Condition 2(c). If the only previous Co-Investment Transaction with respect to the issuer was an Enhanced Review Disposition the Eligible Directors must complete this review of the proposed Follow-On Investment both on a stand-alone basis and together with the Pre-Boarding Investments in relation to the total economic exposure and other terms of the investment.

(d). *Allocation.* If, with respect to any such Follow-On Investment:

(i). The amount of the opportunity proposed to be made available to any Regulated Fund is not based on the Regulated Funds' and the Affiliated Funds' outstanding investments in the issuer or the security at issue, as appropriate, immediately preceding the Follow-On Investment; and

(ii). the aggregate amount recommended by the Advisers to be invested in the Follow-On Investment by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, then the Follow-On Investment opportunity will be allocated among them pro rata based on the size of the Internal Orders, as described in section III.A.1.b. of the application.

(e). *Other Conditions.* The acquisition of Follow-On Investments as permitted by this Condition will be considered a Co-Investment Transaction for all purposes and subject to the other Conditions set forth in the application.

9. Enhanced Review Follow-Ons.

(a). *General.* If any Regulated Fund or Affiliated Fund desires to make a Follow-On Investment in an issuer that is a Potential Co-Investment Transaction and the Regulated Funds and Affiliated Funds holding investments in the issuer have not previously participated in a Co-Investment Transaction with respect to the issuer:

(i). The Adviser to each such Regulated Fund or Affiliated Fund will notify each Regulated Fund that holds securities of the portfolio company of the proposed transaction at the earliest practical time;

(ii). the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to the proposed participation, including the amount of the proposed investment, by such Regulated Fund; and

(iii). the Advisers will provide to the Board of each Regulated Fund that holds an investment in the issuer all information relating to the existing investments in the issuer of the Regulated Funds and Affiliated Funds, including the terms of such investments and how they were made, that is necessary for the Required Majority to make the findings required by this Condition.

(b). *Enhanced Board Approval.* The Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors, and the Regulated Fund will participate in such Follow-On Investment solely to the extent that a Required Majority reviews the proposed Follow-On Investment both on a stand-alone basis and together with the Pre-Boarding Investments in relation to the total economic exposure and other terms and makes the determinations set forth in Condition 2(c). In addition, the Follow-On Investment may only be completed in reliance on the Order if the Required Majority of each participating Regulated Fund determines that the making and holding of the Pre-Boarding Investments were not prohibited by Section 57 (as modified by Rule 57b–1) or Rule 17d–1, as applicable. The basis for the Board's findings will be recorded in its minutes.

(c). *Additional Requirements.* The Follow-On Investment may only be completed in reliance on the Order if:

(i). *Original Investments.* All of the Affiliated Funds' and Regulated Funds' investments in the issuer are Pre-Boarding Investments;

(ii). *Advice of counsel.* Independent counsel to the Board advises that the making and holding of the investments in the Pre-Boarding Investments were not prohibited by Section 57 (as modified by Rule 57b–1) or Rule 17d–1, as applicable;

(iii). *Multiple Classes of Securities.* All Regulated Funds and Affiliated Funds that hold Pre-Boarding Investments in the issuer immediately

[28] In determining whether a holding is ''immaterial'' for purposes of the Order, the Required Majority will consider whether the nature and extent of the interest in the transaction or arrangement is sufficiently small that a reasonable person would not believe that the interest affected the determination of whether to enter into the transaction or arrangement or the terms of the transaction or arrangement.

[29] To the extent that a Follow-On Investment opportunity is in a security or arises in respect of a security held by the participating Regulated Funds and Affiliated Funds, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the security in question immediately preceding the Follow-On Investment using the most recent available valuation thereof. To the extent that a Follow-On Investment opportunity relates to an opportunity to invest in a security that is not in respect of any security held by any of the participating Regulated Funds or Affiliated Funds, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the issuer immediately preceding the Follow-On Investment using the most recent available valuation thereof.

before the time of completion of the Co-Investment Transaction hold the same security or securities of the issuer. For the purpose of determining whether the Regulated Funds and Affiliated Funds hold the same security or securities, they may disregard any security held by some but not all of them if, prior to relying on the Order, the Required Majority is presented with all information necessary to make a finding, and finds, that: (x) Any Regulated Fund's or Affiliated Fund's holding of a different class of securities (including for this purpose a security with a different maturity date) is immaterial in amount, including immaterial relative to the size of the issuer; and (y) the Board records the basis for any such finding in its minutes. In addition, securities that differ only in respect of issuance date, currency, or denominations may be treated as the same security; and

(iv). *No control.* The Affiliated Funds, the other Regulated Funds and their affiliated persons (within the meaning of Section 2(a)(3)(C) of the Act), individually or in the aggregate, do not control the issuer of the securities (within the meaning of Section 2(a)(9) of the Act).

(d). *Allocation.* If, with respect to any such Follow-On Investment:

(i). The amount of the opportunity proposed to be made available to any Regulated Fund is not based on the Regulated Funds' and the Affiliated Funds' outstanding investments in the issuer or the security at issue, as appropriate, immediately preceding the Follow-On Investment; and

(ii). the aggregate amount recommended by the Advisers to be invested in the Follow-On Investment by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, then the Follow-On Investment opportunity will be allocated among them pro rata based on the size of the Internal Orders, as described in section III.A.1.b. of the application.

(e). *Other Conditions.* The acquisition of Follow-On Investments as permitted by this Condition will be considered a Co-Investment Transaction for all purposes and subject to the other Conditions set forth in the application.

10. *Board Reporting, Compliance and Annual Re-Approval.*

(a). Each Adviser to a Regulated Fund will present to the Board of each Regulated Fund, on a quarterly basis, and at such other times as the Board may request, (i) a record of all investments in Potential Co-Investment Transactions made by any of the other Regulated Funds or any of the Affiliated Funds during the preceding quarter that fell within the Regulated Fund's then-current Objectives and Strategies and Board-Established Criteria that were not made available to the Regulated Fund, and an explanation of why such investment opportunities were not made available to the Regulated Fund; (ii) a record of all Follow-On Investments in and Dispositions of investments in any issuer in which the Regulated Fund holds any investments by any Affiliated Fund or other Regulated Fund during the prior quarter; and (iii) all information concerning Potential Co-Investment Transactions and Co-Investment Transactions, including investments made by other Regulated Funds or Affiliated Funds that the Regulated Fund considered but declined to participate in, so that the Independent Directors, may determine whether all Potential Co-Investment Transactions and Co-Investment Transactions during the preceding quarter, including those investments that the Regulated Fund considered but declined to participate in, comply with the Conditions.

(b). All information presented to the Regulated Fund's Board pursuant to this Condition will be kept for the life of the Regulated Fund and at least two years thereafter, and will be subject to examination by the Commission and its staff.

(c). Each Regulated Fund's chief compliance officer, as defined in rule 38a–1(a)(4), will prepare an annual report for its Board each year that evaluates (and documents the basis of that evaluation) the Regulated Fund's compliance with the terms and Conditions of the application and the procedures established to achieve such compliance. In the case of a BDC Downstream Fund that does not have a chief compliance officer, the chief compliance officer of the BDC that controls the BDC Downstream Fund will prepare the report for the relevant Independent Party.

(d). The Independent Directors (including the non-interested members of each Independent Party) will consider at least annually whether continued participation in new and existing Co-Investment Transactions is in the Regulated Fund's best interests.

11. *Record Keeping.* Each Regulated Fund will maintain the records required by Section 57(f)(3) of the Act as if each of the Regulated Funds were a BDC and each of the investments permitted under these Conditions were approved by the Required Majority under Section 57(f).

12. *Director Independence.* No Independent Director (including the non-interested members of each Independent Party) of a Regulated Fund will also be a director, general partner, managing member or principal, or otherwise be an ''affiliated person'' (as defined in the Act) of any Affiliated Fund.

13. *Expenses.* The expenses, if any, associated with acquiring, holding or disposing of any securities acquired in a Co-Investment Transaction (including, without limitation, the expenses of the distribution of any such securities registered for sale under the Securities Act) will, to the extent not payable by the Advisers under their respective advisory agreements with the Regulated Funds and the Affiliated Funds, be shared by the Regulated Funds and the participating Affiliated Funds in proportion to the relative amounts of the securities held or being acquired or disposed of, as the case may be.

14. *Transaction Fees.*[30] Any transaction fee (including break-up, structuring, monitoring or commitment fees but excluding brokerage or underwriting compensation permitted by Section 17(e) or 57(k)) received in connection with any Co-Investment Transaction will be distributed to the participants on a pro rata basis based on the amounts they invested or committed, as the case may be, in such Co-Investment Transaction. If any transaction fee is to be held by an Adviser pending consummation of the transaction, the fee will be deposited into an account maintained by an Adviser at a bank or banks having the qualifications prescribed in Section 26(a)(1), and the account will earn a competitive rate of interest that will also be divided pro rata among the participants. None of the Adviser, the Affiliated Funds, the other Regulated Funds or any affiliated person of the Affiliated Funds or the Regulated Funds will receive any additional compensation or remuneration of any kind as a result of or in connection with a Co-Investment Transaction other than (i) in the case of the Regulated Funds and the Affiliated Funds, the pro rata transaction fees described above and fees or other compensation described in Condition 2(c)(iii)(B)(z), (ii) brokerage or underwriting compensation permitted by Section 17(e) or 57(k) or (iii) in the case of the Adviser, investment advisory compensation paid in accordance with investment advisory agreements between the applicable Regulated

[30] Applicants are not requesting and the Commission is not providing any relief for transaction fees received in connection with any Co-Investment Transaction.

Fund(s) or Affiliated Fund(s) and its Adviser.

15. *Independence.* If the Holders own in the aggregate more than 25 percent of the Shares of a Regulated Fund, then the Holders will vote such Shares in the same percentages as the Regulated Fund's other shareholders (not including the Holders) when voting on (1) the election of directors; (2) the removal of one or more directors; or (3) any other matter under either the Act or applicable State law affecting the Board's composition, size or manner of election.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27811 Filed 12–16–20; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

ACTION: 60-Day notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intentions to request approval on a new and/or currently approved information collection.

DATES: Submit comments on or before February 16, 2021.

ADDRESSES: Send all comments regarding whether these information collections are necessary for the proper performance of the function of the agency, whether the burden estimates are accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collections, to Louis Cupp, New Markets Policy Analyst, Office of Investment and Innovation, Small Business Administration.

FOR FURTHER INFORMATION CONTACT: Louis Cupp, New Markets Policy Analyst, Office of Investment and Innovation, 202–619–0511

Curtis B. Rich, Management Analyst, 202–205–7030, *curtis.rich@sba.gov*

SUPPLEMENTARY INFORMATION: To obtain the information needed to carry out its program evaluation and oversight responsibilities. SBA requires small business investment companies (SBIC'S) to provide information on SBA Form 1031 each time financing is extended to a small business concern. SBA uses this information to evaluate how SBIC'S fill market financing gaps and contribute to economic growth, and to monitor the regulatory compliance of individual SBIC'S.

Title: ''Portfolio Financial Reports''.

Description of Respondents: Small Business Investment Companies.

Form Number: 1031.

Annual Responses: 2,695.

Annual Burden: 728.

Curtis Rich,

Management Analyst.

[FR Doc. 2020–27805 Filed 12–16–20; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #16692 and #16693; Delaware Disaster Number DE–00026]

Presidential Declaration Amendment of a Major Disaster for Public Assistance Only for the State of Delaware

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Delaware (FEMA–4566–DR), dated 10/02/2020.

Incident: Tropical Storm Isaias.

Incident Period: 08/04/2020 through 08/07/2020.

DATES: Issued on 12/02/2020.

Physical Loan Application Deadline Date: 12/01/2020.

Economic Injury (EIDL) Loan Application Deadline Date: 07/02/2021.

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: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Delaware, dated 10/02/2020, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: New Castle

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Cynthia Pitts,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2020–27751 Filed 12–16–20; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

Disaster Declaration #16807 and #16808; Texas Disaster Number TX–00587;Presidential Declaration of a Major Disaster for Public Assistance Only for the State of Texas

AGENCY: Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Texas (FEMA–4572–DR), dated 12/09/2020.

Incident: Hurricane Laura.

Incident Period: 08/23/2020 through 08/27/2020.

DATES: Issued on 12/09/2020.

Physical Loan Application Deadline Date: 02/08/2021.

Economic Injury (EIDL) Loan Application Deadline Date: 09/09/2021.

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 President's major disaster declaration on 12/09/2020, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications 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: Galveston, Jasper, Jefferson, Newton, Orange

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations With Credit Available Elsewhere	2.750
Non-Profit Organizations Without Credit Available Elsewhere	2.750
For Economic Injury:	
Non-Profit Organizations Without Credit Available Elsewhere	2.750

The number assigned to this disaster for physical damage is 168078 and for economic injury is 168080.

(Catalog of Federal Domestic Assistance Number 59008)

Cynthia Pitts,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2020–27745 Filed 12–16–20; 8:45 am]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #16809 and #16810; Alabama Disaster Number AL–00115]

Presidential Declaration of a Major Disaster for the State of Alabama

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for the State of Alabama (FEMA–4573–DR), dated 12/10/2020.

Incident: Hurricane Zeta.

Incident Period: 10/28/2020 through 10/29/2020.

DATES: Issued on 12/10/2020.

Physical Loan Application Deadline Date: 02/08/2021.

Economic Injury (EIDL) Loan Application Deadline Date: 09/10/2021.

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 President's major disaster declaration on 12/10/2020, 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 (Physical Damage and Economic Injury Loans): Clarke, Dallas, Marengo, Mobile, Perry, Washington, Wilcox

Contiguous Counties (Economic Injury Loans Only):

Alabama: Autauga, Baldwin, Bibb, Butler, Chilton, Choctaw, Greene, Hale, Lowndes, Monroe, Sumter

Mississippi: George, Greene, Jackson, Wayne

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners with Credit Available Elsewhere	2.375
Homeowners Without Credit Available Elsewhere	1.188
Businesses with Credit Available Elsewhere	6.000
Businesses Without Credit Available Elsewhere	3.000
Non-Profit Organizations with Credit Available Elsewhere	2.750
Non-Profit Organizations Without Credit Available Elsewhere	2.750
For Economic Injury:	
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	3.000
Non-Profit Organizations Without Credit Available Elsewhere.	

The number assigned to this disaster for physical damage is 168098 and for economic injury is 168100.

(Catalog of Federal Domestic Assistance Number 59008)

Cynthia Pitts,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2020–27747 Filed 12–16–20; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

ACTION: 60-Day notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intentions to request approval on a new and/or currently approved information collection.

DATES: Submit comments on or before February 16, 2021.

ADDRESSES: Send all comments regarding whether this information collection is necessary for the proper performance of the function of the agency, whether the burden estimates are accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collections, to Louis Cupp, New Markets Policy Analyst, Office of Investment and Innovation, Small Business Administration.

FOR FURTHER INFORMATION CONTACT:

Louis Cupp, New Markets Policy Analyst, 202–619–0511, *louis.cupp@sba.gov*

Curtis B. Rich, Management Analyst, 202–205–7030, *curtis.rich@sba.gov.*

SUPPLEMENTARY INFORMATION: To obtain the information needed to carry out its oversight responsibilities under the Small Business Investment Act, the Small Business Administration (SBA) requires Small Business Investment Companies (SBICs) to submit financial statements and supplementary information on SBA Form 468. SBA uses this information to monitor SBIC financial condition and regulatory compliance, for credit analysis when considering SBIC leverage applications, and to evaluate financial risk and economic impact for individual SBICs and the program as a whole.

Solicitation of Public Comments

SBA is requesting comments on (a) Whether the collection of information is necessary for the agency to properly perform its functions; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

Title: SBIC Financial Reports.

Frequency: On occasion.

SBA Form Numbers: 468.1, 468.2, 468.3, 468.4.

Description of Respondents: Small Business Investment Companies and Small Businesses.

Responses: 1,198.

Annual Burden: 29,041.

Curtis Rich,

Management Analyst.

[FR Doc. 2020–27809 Filed 12–16–20; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #16813 and #16814; New Jersey Disaster Number NJ–00059]

Presidential Declaration of a Major Disaster for Public Assistance Only for the State of New Jersey

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of New Jersey (FEMA–4574–DR), dated 12/11/2020.

Incident: Tropical Storm Isaias.

Incident Period: 08/04/2020.

DATES: Issued on 12/11/2020.

Physical Loan Application Deadline Date: 02/09/2021.

Economic Injury (EIDL) Loan Application Deadline Date: 09/13/2021.

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 President's major disaster declaration on 12/11/2020, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications 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: Atlantic, Bergen, Burlington, Cape May, Cumberland, Essex, Gloucester, Monmouth, Morris, Salem.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations With Credit Available Elsewhere ...	2.750
Non-Profit Organizations Without Credit Available Elsewhere	2.750
For Economic Injury:	
Non-Profit Organizations Without Credit Available Elsewhere	2.750

The number assigned to this disaster for physical damage is 168138 and for economic injury is 168140.

(Catalog of Federal Domestic Assistance Number 59008)

Cynthia Pitts,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2020–27777 Filed 12–16–20; 8:45 am]

BILLING CODE 8026–03–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2020–0019]

Privacy Act of 1974; Matching Program

AGENCY: Social Security Administration (SSA).

ACTION: Notice of a new matching program.

SUMMARY: In accordance with the provisions of the Privacy Act, as amended, this notice announces a new matching program with the Bureau of the Fiscal Service, Department of the Treasury (Fiscal Service). The matching agreement between SSA and Fiscal Service sets forth the terms, conditions, and safeguards under which Fiscal Service will disclose ownership of Savings Securities data to SSA. This disclosure will provide SSA with information necessary to verify an individual's self-certification of his or her financial status to determine eligibility for low-income subsidy assistance in the Medicare Part D prescription drug benefit program established under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003.

DATES: The deadline to submit comments on the proposed matching program is January 19, 2021. The matching program will be applicable on April 2, 2021, or once a minimum of 30 days after publication of this notice has elapsed, whichever is later. The matching program will be in effect for a period of 18 months.

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 No. SSA–2020–0019 so 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–2020–0019 and then submit your comments. The system will issue you a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each submission manually. It may take up to a week for your comments to be viewable.

2. *Fax:* Fax comments to (410) 966–0869.

3. *Mail:* Matthew Ramsey, Executive Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, G–401 WHR, 6401 Security Boulevard, Baltimore, MD 21235–6401, or emailing *Matthew.Ramsey@ssa.gov*. Comments are also 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: Interested parties may submit general questions about this matching program to Andrea Huseth, Division Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, G–401 WHR, 6401 Security Boulevard, Baltimore, MD 21235–6401, at telephone: (410) 966–5855, or send an email to *Andrea.Huseth@ssa.gov.*

SUPPLEMENTARY INFORMATION: None.

Matthew Ramsey,

Executive Director, Office of Privacy and Disclosure, Office of the General Counsel.

PARTICIPATING AGENCIES:

SSA and Fiscal Service.

AUTHORITY FOR CONDUCTING THE MATCHING PROGRAM:

Section 1860D–14 of the Social Security Act (42 U.S.C. 1395w–114) requires SSA to verify the eligibility of an individual who seeks to be considered as an Extra Help eligible individual under the Medicare Part D prescription drug benefit program and who self-certifies his or her income, resources, and family size.

PURPOSE(S):

The matching program establishes the conditions under which Fiscal Service will disclose ownership of Savings Securities data to SSA. This disclosure will provide SSA with information necessary to verify an individual's self-certification of his or her financial status to determine eligibility for low-income subsidy assistance in the Medicare Part D prescription drug benefit program established under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003.

CATEGORIES OF INDIVIDUALS:

The individuals whose information is involved in this matching program are those individuals who apply for low-income subsidy assistance in the Medicare Part D prescription drug benefit program established under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003.

CATEGORIES OF RECORDS:

SSA will disclose to Fiscal Service a finder file with the Social Security number (SSN) for each individual for whom SSA requests Savings Securities ownership information. When a match occurs on an SSN, Fiscal Service will disclose the following to SSA: The

denomination of the security; the serial number; the series; the issue date of the security; the current redemption value; and the return date of the finder file.

SSA will disclose to Fiscal Service a finder file with the SSN for each individual for whom it requests Savings Securities registration information. Fiscal Service bases the query on the SSN associated with the account and reports any subsequent account holdings. When a match occurs on an SSN, Fiscal Service will disclose the following to SSA: The purchase amount; the account number and confirmation number; the series; the issue date of the security; the current redemption value; and the return date of the finder file.

SYSTEM(S) OF RECORDS:

SSA will disclose to Fiscal Service a finder file consisting of SSNs extracted from SSA's Medicare Database (MDB) File System, 60–0321, fully published at 71 FR 42159 (July 25, 2006), as amended at 72 FR 69723 (December 10, 2007) and 83 FR 54969 (November 1, 2018). The MDB File System is a repository of Medicare applicant and beneficiary information related to Medicare Part A, Part B, Medicare Advantage Part C, and Medicare Part D.

Fiscal Service will match the SSNs from SSA's finder file with the SSNs in Fiscal Service system of records notice .014 (United States Securities and Access), fully published at 85 FR 11776 (February 27, 2020). System of records notice .014 (United States Securities and Access) is derived from legacy BPD systems of records notices .002 (United States Savings-Type Securities), .003 (United States Securities (Other than Savings-Type Securities)), and .008 (Retail Treasury Securities Access Application).

[FR Doc. 2020–27773 Filed 12–16–20; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice: 11272]

60-Day Notice of Proposed Information Collection: Request for Entry Into Children's Passport Issuance Alert Program

ACTION: Notice of request for public comment.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 60 days for public comment preceding submission of the collection to OMB.

DATES: The Department will accept comments from the public up to *February 16, 2021.*

ADDRESSES: You may submit comments by any of the following methods:

- *Web:* Persons with access to the internet may comment on this notice by going to *www.Regulations.gov.* You can search for the document by entering ''Docket Number: DOS–2020–0053'' in the Search field. Then click the ''Comment Now'' button and complete the comment form.
- *Email: OliPhantCE@state.gov.*
- *Phone Number:* 202–485–6020.
- *Regular Mail:* Send written comments to: U.S. Department of State, CA/OCS/MSU, SA–17, 10th Floor, Washington, DC 20522–1710. You must include the DS form number (if applicable), information collection title, and the OMB control number in any correspondence.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Clifton Oliphant at SA–17, 10th Floor, Washington, DC 20522–1710, who may be reached on 202–485–6020 or at *OliPhantCE@state.gov.*

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Request for Entry into Children's Passport Issuance Alert Program.
- *OMB Control Number:* 1405–0169.
- *Type of Request:* Revision of a previously approved information collection.
- *Originating Office:* Bureau of Consular Affairs, Overseas Citizens Services (CA/OCS).
- *Form Number:* DS–3077.
- *Respondents:* Concerned parents or their agents, institutions, or courts.
- *Estimated Number of Respondents:* 4,000.
- *Estimated Number of Responses:* 4,000.
- *Average Time per Response:* 30 minutes.
- *Total Estimated Burden Time:* 2,000 hours.
- *Frequency:* On Occasion.
- *Obligation to Respond:* Voluntary.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

The information requested will be used to support entry of the name of a minor (an unmarried, unemancipated person under 18 years of age) into the Children's Passport Issuance Alert Program (CPIAP). CPIAP provides a mechanism for parents or other persons with legal custody of a minor to obtain information regarding whether the Department has received a passport application for the minor. This program was developed as a means to prevent international parental child abduction and to help prevent other travel of a minor without the consent of a parent or legal guardian. If a minor's name and other identifying information has been entered into the CPIAP, when the Department receives an application for a new, replacement, or renewed passport for the minor, the application may be placed on hold for up to 90 days and the Office of Children's Issues may attempt to notify the requestor of receipt of the application. Form DS–3077 will be primarily submitted by a parent or legal guardian of a minor. This collection is authorized by 22 CFR 51.28, which is the regulation that implements the statutory two-parent consent requirement and prescribes the bases for an exception to the requirement.

Methodology

The completed Form DS–3077 can be filled out online and printed or completed by hand. The form must be manually signed and submitted to the Office of Children's Issues by email, fax or mail with supporting documentation.

Zachary Parker,

Director.

[FR Doc. 2020–27753 Filed 12–16–20; 8:45 am]

BILLING CODE 4710–06–P

SURFACE TRANSPORTATION BOARD

[Docket No. AB 1300X]

Cattaraugus Local Development Corp.—Abandonment Exemption—in Cattaraugus County, N.Y.

Cattaraugus Local Development Corp. (CLDC) has filed with the Surface Transportation Board (Board) a petition under 49 CFR 10502 for exemption from the prior approval requirements of 49 U.S.C. 10903 to abandon [1] approximately 12.14 miles of rail line extending from milepost 426.5, in the Town of New Albion, to the city line of the City of Salamanca in the Town of Salamanca, which is near milepost 414.1,[2] in Cattaraugus County, N.Y. (the Line).[3]

CLDC states that, based on information in its possession, the Line does not contain federally granted rights-of-way. Any documentation in CLDC's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979).

By issuing this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by March 17, 2021.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than 120 days after the filing of the petition for exemption, or 10 days after service of a decision granting the petition for exemption, whichever occurs sooner. Persons interested in submitting an OFA must first file a formal expression of intent to file an offer by December 28, 2020, indicating the type of financial assistance they wish to provide (*i.e.,* subsidy or purchase) and demonstrating that they are preliminarily financially responsible. *See* 49 CFR 1152.27(c)(1)(i).

Following abandonment, the Line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for interim trail use/rail banking under 49 CFR 1152.29 will be due no later than January 6, 2021.[4]

All pleadings, referring to Docket No. AB 1300X, should be filed with the Surface Transportation Board via e-filing on the Board's website. In addition, a copy of each pleading must be served on CLDC's representative, Robert J. McLaughlin, McLaughlin Law, P.C., 90 State Street, Suite 700, Albany, NY 12207. Replies to the petition are due on or before January 6, 2021.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238 or refer to the full abandonment regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis (OEA) at (202) 245–0305. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by OEA will be served upon all parties of record and upon any other agencies or persons who comment during its preparation. Other interested persons may contact OEA to obtain a copy of the EA (or EIS). EAs in abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA generally will be within 30 days of its service.

Board decisions and notices are available at *www.stb.gov.*

Decided: December 11, 2020.

By the Board, Allison C. Davis, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2020–27718 Filed 12–16–20; 8:45 am]

BILLING CODE 4915–01–P

[1] CLDC originally submitted a petition for declaratory order on March 4, 2020, requesting that the Board declare that the Line has been abandoned pursuant to 49 U.S.C. 10502, or, in the alternative, that CLDC may satisfy the requirements for an exempt abandonment pursuant to 49 U.S.C. 10502. By decision served on August 5, 2020, the Board docketed CLDC's petition under Docket No. AB 1300X for consideration under the Board's abandonment exemption procedures. *Cattaraugus Local Dev. Corp.—Pet. for Declaratory Order,* FD 36389, et al. (STB served Aug. 5, 2020). However, because CLDC had not obtained Board authority when it acquired the Line in 2000, the abandonment proceeding was held in abeyance to permit CLDC to seek authority after-the-fact for the acquisition. *Id.* at 3. CLDC did so, and the acquisition exemption became effective on October 8, 2020. *See Cattaraugus Local Dev. Corp.—Acquis. Exemption—Rail Line in Cattaraugus Cnty., N.Y.,* FD 36435 (STB served Sept. 24, 2020). In this abandonment docket, CLDC filed its environmental and historic report in on November 16, 2020, and a supplemental certificate of service on November 27, 2020. By publication of this notice, the abandonment proceeding is removed from abeyance, and the petition for exemption is deemed to have been filed on November 27, 2020.

[2] In the acquisition docket, CLDC noted that milepost 414.1 is the closest mile marker to the southern boundary of the Line but ''the actual [m]ilepost, if it existed,'' would be milepost 414.36. CLDC Suppl., Sept. 8, 2020, *Cattaraugus Local Dev. Corp.—Acquis. Exemption—Rail Line in Cattaraugus Cnty., N.Y.,* FD 36435.

[3] CLDC states that the Line has not been operational since at least 2000. (CLDC Pet. 5–6.)

[4] Filing fees for OFAs and trail use requests can be found at 49 CFR 1002.2(f)(25) and (27), respectively.

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2020–0093]

Petition for Waiver of Compliance

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that on December 2, 2020, the Brotherhood of Locomotive Engineers and Trainmen (BLET) and the Transportation Division of the International Association of Sheet Metal, Air, Rail, and Transportation Workers (SMART TD) petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR parts 240 and 242. FRA assigned the petition Docket Number FRA–2020–0093.

Paragraphs (c) and (d) of § 240.403 require petitions seeking review of a railroad's decision to deny or revoke a locomotive engineer's certification or recertification to be filed with FRA no more than 180 or 120 days, respectively, after the date of a railroad's decision. Paragraph (c) of § 242.503 requires petitions seeking review of a railroad's decision to revoke a conductor's certification to be filed with FRA no more than 120 days after a railroad's decision. Due to the coronavirus disease 2019 (COVID–19) public health emergency, FRA granted relief by letter dated April 7, 2020, and renewed that relief on June 3, 2020, July 30, 2020, and September 24, 2020. BLET and SMART TD once again request to renew this emergency relief. In light of the continued renewal requests, FRA now considers whether longer-term relief is necessary.

In support of their initial March 30, 2020, request for relief, petitioners noted FRA's March 25, 2020, waiver from certain requirements of 49 CFR parts 240 and 242 related to deadlines for responding to petitions submitted to FRA's Operating Crew Review Board granted to the Association of American Railroads, the American Short Line and Regional Railroad Association, and the American Public Transportation Association (together referred to as the

Associations).[1] BLET and SMART TD asserted that, as a result of the COVID–19 public health emergency, they and their members face ''even greater difficulty in timely filing petitions for review'' than the Associations and their members will have in responding to those petitions. In requesting a fourth renewal, the petitioners explain they ''continue to experience uncertainty of staff availability during [the] COVID–19 emergency'' and the resulting negative impact on their ability to gather additional relevant information and to draft proper petitions within the normal required time frames. FRA opened this docket to evaluate whether the requested emergency relief is necessary on a more long-term basis, similar to the Associations' requests.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* (Docket Number FRA–2020–0093).

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. 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 at *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Communications received by January 19, 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), the U.S. Department of Transportation (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. 2020–27735 Filed 12–16–20; 8:45 am]

BILLING CODE 4910–06–P

[1] On September 18, 2020, FRA renewed each Association's request for relief in separate, non-emergency dockets. See *https://www.regulations.gov/document?D=FRA-2020-0059-0004; https://www.regulations.gov/document?D=FRA-2020-0060-0005;* and *https://www.regulations.gov/document?D=FRA-2020-0063-0003.*

DEPARTMENT OF TRANSPORTATION

[Docket No. PHMSA–2019–0172]

Pipeline Safety: Information Collection Activities

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, PHMSA invites comments on proposed revisions to Form PHMSA F 7100.2–1, ''Annual Report for Natural and Other Gas Transmission and Gathering Pipeline Systems,'' and Form PHMSA F 7100.4–1, ''Underground Natural Gas Storage Facility Annual Report,'' both under Office of Management and Budget (OMB) Control No. 2137–0522; and Form PHMSA F 7100.2, ''Incident Report—Gas Transmission and Gathering Systems,'' under OMB Control No. 2137–0635.

DATES: Interested persons are invited to submit comments on or before February 16, 2021.

ADDRESSES: Comments may be submitted in the following ways:

E-Gov Website: http://www.regulations.gov. This site allows the public to enter comments on any **Federal Register** notice issued by any agency.

Fax: 1–202–493–2251.

Mail: Docket Management Facility; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590–0001.

Hand Delivery: Room W12–140 on the ground level of DOT, West Building, 1200 New Jersey Avenue SE, Washington, DC, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

Instructions: Identify the docket number, PHMSA–2019–0172 at the beginning of your comments. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. You should know that anyone is able to search the electronic form of all comments received into any of our 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.). Therefore, you may want to review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000, (65 FR 19477) or visit *http://www.regulations.gov* before submitting any such comments.

Docket: For access to the docket or to read background documents or comments, go to *http://www.regulations.gov* at any time or to Room W12–140 on the ground level of DOT, West Building, 1200 New Jersey Avenue SE, Washington, DC, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. If you wish to receive confirmation of receipt of your written comments, please include a self-addressed, stamped postcard with the following statement: ''Comments on: PHMSA–2019–0172.'' The Docket Clerk will date stamp the postcard prior to returning it to you via the U.S. mail. Please note that due to delays in the delivery of U.S. mail to Federal offices in Washington, DC, we recommend that persons consider an alternative method (internet, fax, or professional delivery service) of submitting comments to the docket and ensuring their timely receipt at DOT.

Privacy Act Statement: DOT may solicit comments from the public regarding certain general notices. 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–4 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Confidential Business Information: Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this notice contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this notice, it is important that you clearly designate the submitted comments as CBI. Pursuant to 49 CFR 190.343, you may ask PHMSA to give confidential treatment to information you give to the Agency by taking the following steps: (1) Mark each page of the original document submission containing CBI as

''Confidential''; (2) send PHMSA, along with the original document, a second copy of the original document with the CBI deleted; and (3) explain why the information you are submitting is CBI. Unless you are notified otherwise, PHMSA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this notice. Submissions containing CBI should be sent to Angela Hill, DOT, PHMSA, 1200 New Jersey Avenue SE, PHP–30, Washington, DC 20590–0001. Any commentary PHMSA receives that is not specifically designated as CBI will be placed in the public docket for this matter.

FOR FURTHER INFORMATION CONTACT: Angela Hill by telephone at 202–366–1246, by email at *Angela.Hill@dot.gov,* or by mail at DOT, PHMSA, 1200 New Jersey Avenue SE, PHP–30, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

I. Background

Section 1320.8(d), Title 5, Code of Federal Regulations, requires PHMSA to provide interested members of the public and affected entities an opportunity to comment on information collection and recordkeeping requests. This notice identifies the proposed changes to information collections under OMB Control Numbers 2137–0522 and 2137–0635 that PHMSA will submit to OMB for approval.

A. PHMSA F 7100.2–1 Annual Report for Natural and Other Gas Transmission and Gathering Pipeline Systems

PHMSA proposes to add a section to this Annual Report form to collect data about the number of miles of gas transmission pipelines in high consequence areas (HCA) categorized by the HCA determination method found at 49 CFR 192.903 and the type of risk model used. This proposal is in response to National Transportation Safety Board (NTSB) Recommendation P–15–15.

PHMSA proposes to add Part G1 to the Annual Report form to collect data on the number of relief valve lifts and compressor station emergency shutdown (ESD) events that occurred within a calendar year. PHMSA is adding the number of relief valve lifts and ESD events to the Annual Report because each represents a deviation from normal operations and may indicate the need for changes to equipment or processes. PHMSA also proposes amending the gas transmission and gathering incident report to exclude reporting of relief valve lifts and ESD events when the systems function as expected, which is a change in PHMSA's interpretation of ''intentional'' releases.

In January 2020, OMB approved changes to the Gas Transmission Annual Report form in conjunction with new regulations promulgated in a final rule titled ''Safety of Gas Transmission Pipelines, MAOP Reconfirmation, Expansion of Assessment Requirements and Other Related Amendments'' (84 FR 52180). During the OMB review period of the final rule, the American Gas Association, the American Petroleum Institute, the American Public Gas Association, and the Interstate Natural Gas Association of America, (the Associations) submitted joint comments on the proposed changes to the form. PHMSA's responses to the Associations' comments are as follows:

Comment: The Associations commented that collecting data on pipeline segments with a maximum allowable operating pressure (MAOP) of less than 30% of specified minimum yield strength (SMYS) offers little value and that PHMSA should specify, in the annual report instructions, that moderate consequence areas (MCA)-related reporting requirements (mileage, inspections, etc.) should only apply to pipelines with a MAOP that produces a hoop stress that is greater than or equal to 30% of SMYS.

Response: PHMSA is retaining this data collection element. PHMSA requires data on pipeline segments with a MAOP that is less than 30% SMYS to evaluate integrity issues in the pipeline operations. The data is also used to evaluate whether new safety requirements should be incorporated in the regulations.

Comment: Currently, Sections J through L of Part G of the Annual Report form require operators to submit data on both the baseline integrity assessment and the reassessment mileage for pipelines in class 1 or class 2 locations that are non-HCA or non-MCA. The Associations commented that it would be more appropriate for operators to report the total mileage of class 1 and class 2 non-HCA/non-MCA pipe segments assessed during the calendar year, rather than breaking down this mileage into ''baseline'' and ''reassessment.''

Response: PHMSA agrees that there is little value in having operators indicate whether they used the first or a subsequent assessment to provide the required data. PHMSA proposes to replace the current ''baseline assessment'' and ''reassessed'' categories with a single ''miles assessed'' data field.

Comment: Part Q of the form requires operators to identify whether class 1 and 2 location segments that are non-HCA or non-MCA have complete MAOP records. The Associations commented that collecting and evaluating MAOP records for completeness for segments that are outside the scope of § 192.624 adds a significant new regulatory requirement that was not proposed in the Notice of Proposed Rulemaking (NPRM) for the new regulations or discussed by the Technical Pipeline Safety Standards Committee, also referred to as the Gas Pipeline Advisory Committee. The Associations request that PHMSA exclude the requirement for reporting the completeness of MAOP records for class 1 and 2 segments that are non-HCA or non-MCA.

Response: PHMSA proposed this data collection requirement in conjunction with the NPRM and provided an opportunity for public comment. Having received no comments on the requirement during that time, PHMSA forwarded the collection requirement to OMB for review and subsequently obtained OMB's approval in conjunction with the final rule. Therefore, the data collection requirement is considered to be within scope of both the NPRM and the final rule. However, given the costs and burden associated with implementing the Gas Transmission rule requirements, PHMSA has decided to postpone implementation of this data collection requirement. PHMSA proposes to revise the Gas Transmission Annual Report form to repeal the requirement for class 1 and class 2 segments that are non-HCA or non-MCA to report whether their MAOP records are complete. PHMSA reserves the right to pursue this data collection at a later time, as it is determined to be part of the final rule, and maintains that having complete MAOP records is critical for pipeline safety.

Comment: Currently, operators are required to provide data for pressure test mileage within pressure test ranges: [≥1.5], [1.5 to ≥1.39], [1.39 to ≥1.25], [1.25 to ≥1.1], [1.1 to 1], and [no test]. The Associations commented that all tests performed below 1.1 times the MAOP would be considered invalid pressure tests under PHMSA's regulations. The Associations commented that they recommend PHMSA align the pressure test ranges in Part F with the pressure test factors specified in 49 CFR 192.619: [≥1.5], [<1.5 to ≥1.25], [<1.25 to ≥1.1], and [Less than 1.1 or no test].

Response: PHMSA agrees with the Associations. The lowest allowable pressure test, in accordance with 49

CFR 192.619(a)(2), is 1.1. PHMSA proposes revising the form to combine the ''1.1 to 1'' and ''no test'' categories into a single category.

Comment: The Associations commented that they recommend the removal of sections 3.1–3.3 from the Annual Report requirements. When a pressure test is used as an integrity assessment method, the specific pressure test factor is generally less relevant. The Associations suggest collecting mileage by individual test factor only in Part R of the form.

Response: PHMSA agrees with this comment and proposes to revise the Annual Report form to align with this change.

Comment: The Associations commented that they recommend the revised Annual Report form go into effect for the 2021 reporting year (due in March 2022), after operators have been required to identify those pipeline segments that are subject to the requirements of the final rule ''Safety of Gas Transmission Pipelines, MAOP Reconfirmation, Expansion of Assessment Requirements and Other Related Amendments.''

Response: PHMSA agrees with the timeframe and has already made the requested adjustments to the implementation schedule.

B. PHMSA F 7100.2 Incident Report for Gas Transmission and Gathering Systems

PHMSA proposes to revise the instructions to form PHMSA F 7100.2 to remove the requirement for operators to report relief valve lifts and compressor station ESD events when the systems function as expected. PHMSA understands that the intentional use of pressure relief systems does not necessarily constitute an incident and has revised the incident report instructions to reflect this. Under this revision, instead of reporting these occurrences as incidents, operators would submit data on intentional gas releases on the Gas Transmission and Gathering Annual Report form PHMSA F 7100.2–1.

During a previous update of form PHMSA F 7100.2, PHMSA inadvertently removed instructions regarding when questions G6 through G8 were required to be completed. Previously, the form was clear that these questions are only required to be completed when part A14 (''onshore pipeline . . .'' or ''offshore pipeline . . .'') is answered. PHMSA proposes to return these instruction details prior to question G6 on both the form and in the instructions.

C. PHMSA F 7100.4–1 Underground Natural Gas Storage Facility Annual Report

PHMSA proposes to clarify several instructions and to modify the reporting of well counts on PHMSA F 7100.4–1. The proposed clarifications and modifications are detailed below:

1. Part B1. Facility Name

PHMSA proposes to instruct operators to use the facility name registered with federal or state government agencies. This change would provide a more consistent facility name for stakeholders.

2. Part B3. Facility Location

PHMSA proposes to clarify the instructions for a facility located in multiple counties and for providing details about the format of the latitude and longitude coordinates of such facilities.

3. Part B4. Energy Information Administration (EIA) Gas Field Code

PHMSA proposes to correct the website link to EIA gas field codes.

4. Part B5. Working Gas Capacity

PHMSA proposes to clarify the instructions by specifying the design working gas capacity, rather than the current working gas capacity.

5. Part B6. Base Gas

PHMSA proposes to clarify the instructions for reporting the volume of base gas by specifying that native gas is included in base gas. This clarification is to promote consistency in how this data is reported.

6. Part B8. and B9. Volumes for Calendar Year

PHMSA proposes to clarify the instructions for entering the value of the volume of natural gas withdrawn from or injected into the facility to specify that the volume must be measured with a meter. This clarification is to promote accuracy in this reported data.

7. Part C1. Reservoir Name

PHMSA proposes to clarify the instructions to collect the salt dome name rather than individual cavern name(s). This clarification is to promote accuracy in the reported data.

8. Part C4. Maximum Wellhead Surface Pressure

PHMSA proposes to clarify the instructions by replacing the term ''indicator'' with ''representative'' when referring to the specific well. Feedback from industry indicates that representative well is a more widely recognized term than indicator well.

9. Part C5. and C6. Reservoir Depths

PHMSA proposes to clarify the instructions by replacing the term ''grade'' with ''ground level'' and replacing the term ''geologic storage formation'' with ''cavern(s).'' This clarification will eliminate confusion for cavern operators and provide consistency in the reported data.

10. Part C7. and C8. Number of Wells

PHMSA proposes to revise the form and instructions to collect the number of wells placed into storage operation in 5-year ranges. The change is proposed for both injection/withdraw and monitoring wells. The date a well was placed into storage operation can be indicative of its integrity.

11. Part C10. Wells Plugged and Abandoned

Currently, wells plugged and abandoned are reported as a single number. Since some wells may be plugged, but not abandoned, PHMSA proposes to collect counts separately. This change would provide better clarity on the status of wells.

12. Part C11. and C12. Well Safety Valves

PHMSA proposes to clarify the form and instructions to reflect that only automated safety valves are to be reported. This clarification will promote accuracy in reporting. Reporting is not needed for manual safety valves.

13. Part C21. Through C23. Well Tests

PHMSA proposes to modify the form and instructions to use testing terminology more familiar to the pipeline industry.

II. Summary of Impacted Collection

Section 1320.8(d), Title 5, Code of Federal Regulations, requires PHMSA to provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. This notice identifies an information collection request that PHMSA will submit to OMB for revision.

The following information is provided for this information collection: (1) Title of the information collection; (2) OMB control number; (3) Current expiration date; (4) Type of request; (5) Abstract of the information collection activity; (6) Description of affected public; (7) Estimate of total annual reporting and recordkeeping burden; and (8) Frequency of collection.

PHMSA will request a 3-year term of approval for this information collection

activity. PHMSA requests comments on the following information:

1. *Title:* Annual and Incident Reports for Gas Pipeline Operators.

OMB Control Number: 2137–0522.

Current Expiration Date: 1/31/2023.

Type of Request: Revision.

Abstract: This mandatory information collection covers the collection of data from operators of natural gas pipelines, underground natural gas storage facilities, and liquefied natural gas facilities for annual reports. 49 CFR 191.17 requires operators of underground natural gas storage facilities, gas transmission systems and gas gathering systems to submit an annual report by March 15, for the preceding calendar year. This revision includes changes to the form and instructions for PHMSA F 7100.4–1, ''Underground Natural Gas Storage Facility Annual Report,'' and revisions to the form and instructions for PHMSA F 7100.2–1, ''Gas Transmission and Gathering Systems Annual Report.'' The revisions to the Underground Natural Gas Storage Facility Annual Report form are to provide clarity on submitting data and include no new data elements. The revisions to the Gas Transmission and Gathering Systems Annual Report form include collecting the number of miles in high consequence areas in accordance with 49 CFR 192.903 and the type of risk model used; collecting data on the number of relief valve lifts and compressor station ESD events that occurred within a calendar year; and to reorganize some data fields to streamline the reporting of certain data elements.

Affected Public: Operators of Natural Gas Pipelines, Underground Natural Gas Storage Facilities, and Liquefied Natural Gas Facilities.

Annual Reporting and Recordkeeping Burden:

Annual Responses: 10,547.

Annual Burden Hours: 80,101.

Frequency of Collection: Annually and on occasion.

2. *Title:* Incident Reporting for Natural Gas Pipeline Operators and LNG Facilities.

OMB Control Number: 2137–0635.

Current Expiration Date: 1/31/2023.

Type of Request: Revision.

Abstract: PHMSA proposes to revise the instructions for the Incident Report—Natural and Other Gas Transmission and Gathering Pipeline System (PHMSA F 7100.2) to remove the requirement for operators to submit data regarding intentional gas releases via the incident report.

Affected Public: Natural Gas Pipeline Operators and Operators of LNG Facilities.

Annual Reporting and Recordkeeping Burden:

Estimated Number of Responses: 301.

Estimated Annual Burden Hours: 3,612.

Frequency of Collection: On occasion.

Comments are invited on:

(a) The need for the renewal and revision of these collections of information for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(b) The accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.48.

Issued in Washington, DC, on December 10, 2020, under authority delegated in 49 CFR 1.97.

Alan K. Mayberry,

Associate Administrator for Pipeline Safety.

[FR Doc. 2020–27712 Filed 12–16–20; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Submission for OMB Review; OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995 (PRA). In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and the 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 is soliciting comment concerning the renewal of its information collection titled, ''OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches.'' The OCC also is giving notice that it has sent the collection to OMB for review.

DATES: Comments must be submitted on or before January 19, 2021.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Chief Counsel's Office, Attention: Comment Processing, 1557–0321, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Fax:* (571) 465–4326.

Instructions: You must include ''OCC'' as the agency name and ''1557–0321'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

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.

You may review comments and other related materials that pertain to this information collection [1] following the close of the 30-day comment period for this notice by the following method:

- *Viewing Comments Electronically:* Go to *www.reginfo.gov.* Click on the ''Information Collection Review'' tab. Underneath the ''Currently under Review'' section heading, from the drop-down menu select ''Department of

[1] On October 5, 2020 the OCC published a 60-day notice for this information collection, 85 FR 62802.

Treasury'' and then click ''submit.'' This information collection can be located by searching by OMB control number ''1557–0321'' or ''OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches.'' Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.

• For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.

• *Viewing Comments Personally:* You may personally inspect comments at the OCC, 400 7th Street SW, Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, OCC Clearance Officer, (202) 649–5490, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from OMB for each collection of information that they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. The OCC requests that OMB extend its approval of the following information collection:

Title: OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches.

OMB Control No.: 1557–0321.

Description: The OCC's guidelines, codified in 12 CFR part 30, appendix D, establish minimum standards for the design and implementation of a risk governance framework for insured national banks, insured Federal savings associations, and insured Federal branches of a foreign bank (banks). The guidelines apply to a bank with average total consolidated assets: (i) Equal to or greater than $50 billion; (ii) less than $50 billion if that bank's parent company controls at least one insured national bank or insured Federal savings association that has average total consolidated assets of $50 billion or greater; or (iii) less than $50 billion, if the OCC determines such bank's operations are highly complex or otherwise present a heightened risk as to warrant the application of the guidelines (covered banks). The guidelines also establish minimum standards for a board of directors in overseeing the framework's design and implementation. These guidelines were finalized on September 11, 2014.[2] The OCC is now seeking to renew the information collection associated with these guidelines.

The standards contained in the guidelines are enforceable under section 39 of the Federal Deposit Insurance Act (FDIA),[3] which authorizes the OCC to prescribe operational and managerial standards for insured national banks, insured Federal savings associations, and insured Federal branches of a foreign bank.

The guidelines formalize the OCC's heightened expectations program. The guidelines also further the goal of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 to strengthen the financial system by focusing management and boards of directors on improving and strengthening risk management practices and governance, thereby minimizing the probability and impact of future financial crises.

The standards for the design and implementation of the risk governance framework, which contain collections of information, are as follows:

Standards for Risk Governance Framework

Covered banks should establish and adhere to a formal, written risk governance framework designed by independent risk management. The framework should include delegations of authority from the board of directors to management committees and executive officers and risk limits for material activities. The framework should be approved by the board of directors or the board's risk committee, and it should be reviewed and updated, at least annually, by independent risk management.

Front Line Units

Front line units should take responsibility and be held accountable by the chief executive officer (CEO) and the board of directors for appropriately assessing and effectively managing all of the risks associated with their activities. In fulfilling this responsibility, each front line unit should, either alone or in conjunction with another organizational unit that has the purpose of assisting a front line unit: (i) Assess, on an ongoing basis, the material risks associated with its activities and use such risk assessments as the basis for fulfilling its responsibilities and for determining if actions need to be taken to strengthen risk management or reduce risk given changes in the unit's risk profile or other conditions; and (ii) establish and adhere to a set of written policies that include front line unit risk limits. Such policies should ensure risks associated with the front line unit's activities are effectively identified, measured, monitored, and controlled, consistent with the covered bank's risk appetite statement, concentration risk limits, and all policies established within the risk governance framework. Front line units should also establish and adhere to procedures and processes, as necessary to maintain compliance with the policies described in (ii); and adhere to all applicable policies, procedures, and processes established by independent risk management. Front line units should also develop, attract, and retain talent and maintain staffing levels required to carry out the unit's role and responsibilities effectively; establish and adhere to talent management processes; and establish and adhere to compensation and performance management programs.

Independent Risk Management

Independent risk management should oversee the covered bank's risk-taking activities and assess risks and issues independent of the front line units. In fulfilling these responsibilities, independent risk management should: (i) Take responsibility and be held responsible by the CEO and the board of directors for designing a comprehensive written risk governance framework that meets the guidelines and is commensurate with the size, complexity, and risk profile of the covered bank; (ii) identify and assess, on an ongoing basis, the covered bank's material aggregate risks and use such risk assessments as the basis for fulfilling its responsibilities and for determining if actions need to be taken to strengthen risk management or reduce risk given changes in the covered

[2] 79 FR 54518.

[3] 12 U.S.C. 1831p–1. Section 39 was enacted as part of the Federal Deposit Insurance Corporation Improvement Act of 1991, Public Law 102–242, section 132(a), 105 Stat. 2236, 2267–70 (Dec. 19, 1991).

bank's risk profile or other conditions; (iii) establish and adhere to enterprise policies that include concentration risk limits that state how aggregate risks within the covered bank are effectively identified, measured, monitored, and controlled, consistent with the covered bank's risk appetite statement and all policies and processes established within the risk governance framework; (iv) establish and adhere to procedures and processes, as necessary, to ensure compliance with policies in (iii); (v) identify and communicate to the CEO and the board of directors or the board's risk committee material risks and significant instances where the independent risk management's assessment of risk differs from that of a front line unit and significant instances where a front line unit is not adhering to the risk governance framework; (vi) identify and communicate to the board of directors or the board's risk committee material risks and significant instances where independent risk management's assessment of risk differs from that of the CEO and significant instances where the CEO is not adhering to, or holding front line units accountable for adhering to, the risk governance framework; and (vii) develop, attract, and retain talent and maintain the staffing levels required to carry out the unit's role and responsibilities effectively while establishing and adhering to talent management processes and compensation and performance management programs.

Internal Audit

Internal audit should ensure that the covered bank's risk governance framework complies with the guidelines and is appropriate for the size, complexity, and risk profile of the covered bank. It should maintain a complete and current inventory of all of the covered bank's material processes, product lines, services, and functions and assess the risks, including emerging risks, associated with each, which collectively provide a basis for the audit plan. It should establish and adhere to an audit plan that is periodically reviewed and updated, takes into account the covered bank's risk profile, emerging risks, and issues and establishes the frequency with which activities should be audited. The audit plan should require internal audit to evaluate the adequacy of and compliance with policies, procedures, and processes established by front line units and independent risk management under the risk governance framework. Significant changes to the audit plan should be communicated to the board's audit committee. Internal audit should report, in writing, conclusions, material issues, and recommendations from audit work carried out under the audit plan to the board's audit committee. Reports should identify the root cause of any material issues and include: (i) A determination of whether the root cause creates an issue that has an impact on one or more organizational units within the covered bank; and (ii) a determination of the effectiveness of front line units and independent risk management in identifying and resolving issues in a timely manner. Internal audit should establish and adhere to processes for independently assessing the design and ongoing effectiveness of the risk governance framework on at least an annual basis. The independent assessment should include a conclusion on the covered bank's compliance with the standards set forth in the guidelines. Internal audit should identify and communicate to the board's audit committee significant instances where front line units or independent risk management are not adhering to the risk governance framework. Internal audit should establish a quality assurance program that ensures internal audit's policies, procedures, and processes comply with applicable regulatory and industry guidance, are appropriate for the size, complexity, and risk profile of the covered bank, are updated to reflect changes to internal and external risk factors, emerging risks, and improvements in industry internal audit practices, and are consistently followed. Internal audit should develop, attract, and retain talent and maintain staffing levels required to effectively carry out its role and responsibilities. Internal audit should establish and adhere to talent management processes and compensation and performance management programs that comply with the guidelines.

Strategic Plan

The CEO, with input from front line units, independent risk management, and internal audit, should be responsible for the development of a written strategic plan that covers, at a minimum, a three-year period. The board of directors should evaluate and approve the plan and monitor management's efforts to implement the strategic plan at least annually. The plan should: (i) Include a comprehensive assessment of risks that currently impact the covered bank or that could have an impact on the covered bank during the period covered by the strategic plan; (ii) articulate an overall mission statement and strategic objectives for the covered bank with an explanation of how the covered bank will update the risk governance framework to account for changes to its risk profile projected under the strategic plan; and (iii) be reviewed, updated, and approved due to changes in the covered bank's risk profile or operating environment that were not contemplated when the plan was developed.

Risk Appetite Statement

A covered bank should have a comprehensive written statement that articulates its risk appetite that serves as the basis for the risk governance framework. The statement should contain both qualitative components that describe a safe and sound risk culture and how the covered bank will assess and accept risks and quantitative limits that include sound stress testing processes and address earnings, capital, and liquidity.

Risk Limit Breaches

A covered bank should establish and adhere to processes that require front line units and independent risk management to: (i) Identify breaches of the risk appetite statement, concentration risk limits, and front line unit risk limits; (ii) distinguish breaches based on the severity of their impact; (iii) establish protocols for when and how to inform the board of directors, front line unit management, independent risk management, internal audit, and the OCC regarding a breach; (iv) provide a written description of the breach resolution; and (v) establish accountability for reporting and resolving breaches that include consequences for risk limit breaches that take into account the magnitude, frequency, and recurrence of breaches.

Concentration Risk Management

The risk governance framework should include policies and supporting processes appropriate for the covered bank's size, complexity, and risk profile for effectively identifying, measuring, monitoring, and controlling the covered bank's concentrations of risk.

Risk Data Aggregation and Reporting

The risk governance framework should include a set of policies, supported by appropriate procedures and processes, designed to provide risk data aggregation and reporting capabilities appropriate for the covered bank's size, complexity, and risk profile and to support supervisory reporting requirements. Collectively, these policies, procedures, and processes should provide for: (i) The design,

implementation, and maintenance of a data architecture and information technology infrastructure that support the covered bank's risk aggregation and reporting needs during normal times and during times of stress; (ii) the capturing and aggregating of risk data and reporting of material risks, concentrations, and emerging risks in a timely manner to the board of directors and the OCC; and (iii) the distribution of risk reports to all relevant parties at a frequency that meets their needs for decision-making purposes.

Talent and Compensation Management

A covered bank should establish and adhere to processes for talent development, recruitment, and succession planning. The board of directors or appropriate committee should review and approve a written talent management program. A covered bank should also establish and adhere to compensation and performance management programs that comply with any applicable statute or regulation.

Board of Directors Training and Evaluation

The board of directors of a covered bank should establish and adhere to a formal, ongoing training program for all directors. The board of directors should also conduct an annual self-assessment.

Type of Review: Regular review.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 23.

Estimated Burden per Respondent: 3,776 hours.

Estimated Total Annual Burden: 86,848 hours.

Comments: The OCC issued a notice for 60 days of comment on October 5, 2020, 85 FR 62802. No comments were received. Comments continue to be invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the burden of the information collection;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Bao Nguyen,

Principal Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2020–27704 Filed 12–16–20; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF VETERANS AFFAIRS

Reasonable Charges for the National Average Administrative Prescription Drug Charge Calendar Year (CY) 2021 Update

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: This Department of Veterans Affairs (VA) notice identifies the website where updates to the National Average Administrative Prescription Charge is located for purposes of calculating VA's costs for prescription drugs not administered during treatment, but provided or furnished by VA.

DATES: This adjustment is effective January 1, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Romona Greene, Office of Community Care (OCC), Revenue Operations, Payer Relations and Services, Rates and Charges (13RO1), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420. The telephone number is 202–382–2521 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Section 17.101(m) of title 38 CFR establishes the charges for prescription drugs not administered during treatment, as part of medical care or services provided or furnished by VA to a Veteran under 38 CFR 17.101(a)(1) for a nonservice-connected disability for which the Veteran is entitled to care (or the payment of expenses for care) under a health plan contract; for a nonservice-connected disability incurred incident to the Veteran's employment and covered under a worker's compensation law or plan that provides reimbursement or indemnification for such care and services; or for a nonservice-connected disability incurred as a result of a motor vehicle accident in a state that requires automobile accident reparations insurance.

As indicated in 38 CFR 17.101(m), when VA provides or furnishes prescription drugs not administered during treatment, within the scope of care described in section 17.101(a)(1), charges billed separately for such prescription drugs will consist of the amount that equals the total of the actual cost to VA for the drugs and the national average of VA administrative costs associated with dispensing the drugs for each prescription. Section 17.101(m) further describes the methodology for calculating the national average administrative cost for prescription drug charges not administered during treatment.

VA determines the amount of the national average administrative cost annually for the prior fiscal year (October through September) and then applies the charge at the start of the next calendar year.

Consistent with section 17.101(a)(2), the national average administrative cost calculated by VA under section 17.101(m) will be posted online on VA's OCC website at *https://www.va.gov/communitycare/revenue_ops/payer_rates.asp* under the heading ''Reasonable Charges Rules, Notices, and **Federal Register** and identified as CY 21 National Average Administrative Cost (PDF)'', to be effective on January 1, 2021. The national average administrative cost posted will be effective until changed by a subsequent **Federal Register** notice.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Brooks D. Tucker, Assistant Secretary for Congressional and Legislative Affairs, performing the delegable duties of the Chief of Staff, approved this document on December 10, 2020 for publication.

Jeffrey M. Martin,

Assistant Director, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

[FR Doc. 2020–27804 Filed 12–16–20; 8:45 am]

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FEDERAL REGISTER

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34 CFR Parts 75 and 76

Department of Homeland Security

6 CFR Part 19

Department of Agriculture

7 CFR Part 16

Agency for International Development

6 CFR Part 19

Department of Housing and Urban Development

24 CFR Parts 5, 92, et al.

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28 CFR Part 38

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38 CFR Parts 50, 61, et al.

Department of Health and Human Services

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45 CFR Part 87

Administration for Children and Families

45 CFR Part 1050

Equal Participation of Faith-Based Organizations in the Federal Agencies' Programs and Activities; Final Rule

DEPARTMENT OF EDUCATION

2 CFR Part 3474

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[ED–2019–OPE–0080]

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6 CFR Part 19

[DHS–2019–0049]

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[AID–2020–0001]

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24 CFR Parts 5, 92, and 578

[HUD–2020–0017]

RIN 2501–AD91

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28 CFR Part 38

[DOJ–OAG–2020–0001; A.G. Order No. 4925–2020]

RIN 1105–AB58

DEPARTMENT OF LABOR

29 CFR Part 2

[DOL–2019–0006]

RIN 1291–AA41

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 50, 61, and 62

[VA–2020–VACO–0003]

RIN 2900–AQ75

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Part 87

Administration for Children and Families

45 CFR Part 1050

[HHS–OS–2020–0001]

RIN 0991–AC13

Equal Participation of Faith-Based Organizations in the Federal Agencies' Programs and Activities

AGENCY: Department of Education, Department of Homeland Security, Department of Agriculture, Agency for International Development, Department of Housing and Urban Development, Department of Justice, Department of Labor, Department of Veterans Affairs, Department of Health and Human Services.

ACTION: Final rule.

SUMMARY: This rule amends the regulations of the agencies listed above (''the Agencies'') to implement Executive Order 13831 of May 3, 2018 (Establishment of a White House Faith and Opportunity Initiative). This rule provides clarity about the rights and obligations of faith-based organizations participating in the Agencies' Federal financial assistance programs and activities. This rulemaking is intended to ensure that the Agencies' Federal financial assistance programs and activities are implemented in a manner consistent with the requirements of Federal law, including the First Amendment to the Constitution and the Religious Freedom Restoration Act.

DATES: This final rule becomes effective on January 19, 2021.

FOR FURTHER INFORMATION CONTACT: For information regarding each Agency's implementation of these final regulations, the contact information for that Agency follows. If you use a telecommunications device for the deaf (''TDD'') or a text telephone (''TTY''), call the Federal Relay Service (''FRS''), toll free, at 800–877–8339:

- *Department of Education:* Lynn Mahaffie, Assistant General Counsel, Division of Regulatory Services, Office of the General Counsel, 202–453–7862, *Lynn.Mahaffie@ed.gov.*
- *Department of Homeland Security:* Peter Mina, Deputy Officer for Programs and Compliance, Office for Civil Rights and Civil Liberties, 202–401–1474 (phone), 202–401–0470 (TTY).
- *Department of Agriculture:* Emily Tasman, Assistant General Counsel, Office of the General Counsel, 202–720–3351, *emily.tasman@usda.gov.*
- *Agency for International Development:* Brian Klotz, Deputy Director, Center for Faith & Opportunity Initiatives, 202–712–0217, *bklotz@usaid.gov*.
- *Department of Housing and Urban Development:* Richard Youngblood, Director, Center for Faith-Based and Neighborhood Partnerships, 202–402–5958.
- *Department of Justice:* Michael L. Alston, Director, Office for Civil Rights, Office of Justice Programs, 202–514–2000, *EO_13831@ojp.usdoj.gov.*
- *Department of Labor:* Mark Zelden, Director, Centers for Faith & Opportunity Initiatives, 202–693–6017, *Zelden.Mark.A@dol.gov.*
- *Department of Veterans Affairs:* Conrad Washington, Director, Center for Faith and Opportunity Initiatives, Office of Public and Intergovernmental Affairs, 202–461–7865.
- *Department of Health and Human Services:* Shannon O. Royce, Director, Center for Faith and Opportunity Initiatives, 202–260–6501.

SUPPLEMENTARY INFORMATION:

I. Background

Shortly after taking office in 2001, President George W. Bush signed Executive Order 13199, 66 FR 8499 (Jan. 29, 2001) (Establishment of White House Office of Faith-Based and Community Initiatives). That Executive Order sought to ensure that ''private and charitable groups, including religious ones, . . . have the fullest opportunity permitted by law to compete on a level playing field'' in the delivery of social services. To do so, it created an office within the White House, the White House Office of Faith-Based and Community Initiatives, with primary responsibility to ''establish policies, priorities, and objectives for the Federal Government's comprehensive effort to enlist, equip, enable, empower, and expand the work of faith-based and other community organizations to the extent permitted by law.''

On December 12, 2002, President Bush signed Executive Order 13279, 67 FR 77141 (Dec. 12, 2002) (Equal Protection of the Laws for Faith-Based and Community Organizations). Executive Order 13279 set forth the principles and policymaking criteria to guide Federal agencies in formulating and implementing policies with implications for faith-based organizations and other community organizations, to ensure equal protection of the laws for faith-based and community organizations, and to expand opportunities for, and strengthen the capacity of, faith-based and other community organizations to meet social needs in America's communities. In addition, Executive Order 13279 directed specified agency heads to review and evaluate existing policies that had implications for faith-based and community organizations relating to their eligibility for Federal financial assistance for social service programs and, where appropriate, to implement new policies that were consistent with and necessary to further the fundamental principles and policymaking criteria articulated in the Executive Order.

In 2004, the Department of Veterans Affairs (''VA'') promulgated regulations at 38 CFR part 61 consistent with Executive Order 13279. VA Homeless

Providers Grant and Per Diem Program; Religious Organizations, 69 FR 31883 (June 8, 2004). The Department of Education similarly promulgated regulations at 34 CFR parts 74, 75, 76, and 80. Participation in Education Department Programs by Religious Organizations; Providing for Equal Treatment of All Education Program Participants, 69 FR 31708 (June 4, 2004). In 2003 and 2004, the Department of Housing and Urban Development (''HUD'') promulgated three final rules to implement Executive Order 13279. *See* Providing for Equal Treatment of All Program Participants, 69 FR 62164 (Oct. 22, 2004); Equal Participation of Faith-Based Organizations, 69 FR 41712 (July 9, 2004); Participation in HUD's Native American Programs by Religious Organizations; Participation in HUD Programs by Faith-Based Organizations; Providing for Equal Treatment of all HUD Program Participants, 68 FR 56396 (Sept. 30, 2003). In 2004, the Department of Justice (''DOJ''), Department of Agriculture (''USDA''), Department of Labor (''DOL''), Department of Health and Human Services (''HHS''), and Agency for International Development (''USAID'') issued regulations through notice-and-comment rulemaking implementing Executive Order 13279. *See* Participation in Justice Department Programs by Religious Organizations; Providing for Equal Treatment of All Justice Department Program Participants, 69 FR 2832 (Jan. 21, 2004); Equal Opportunity for Religious Organizations, 69 FR 41375 (July 9, 2004); Equal Treatment in Department of Labor Programs for Faith-Based and Community Organizations; Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries, 69 FR 41882 (July 12, 2004); Participation in Department of Health and Human Services Programs by Religious Organizations; Providing for Equal Treatment of All Department of Health and Human Services Program Participants, 69 FR 42586 (July 16, 2004); Participation by Religious Organizations in USAID Programs, 69 FR 61716 (Oct. 20, 2004). DOL subsequently issued guidance detailing the process for recipients of financial assistance to obtain exemptions from religious nondiscrimination requirements under the Religious Freedom Restoration Act (''RFRA''), 42 U.S.C. 2000bb through 2000bb–4.[1] DHS issued a Notice of Proposed Rulemaking (''NPRM'' or ''proposed rule'') in 2008, *see* Nondiscrimination in Matters Pertaining to Faith-Based Organizations, 73 FR 2187 (Jan. 14, 2008); however, DHS did not issue a final rule related to the participation of faith-based organizations in its programs prior to 2016.

President Obama maintained President Bush's program but modified it in certain respects. Shortly after taking office, President Obama signed Executive Order 13498, 74 FR 6533 (Feb. 5, 2009) (Amendments to Executive Order 13199 and Establishment of the President's Advisory Council for Faith-Based and Neighborhood Partnerships). This Executive Order changed the name of the White House Office of Faith-Based and Community Initiatives to the White House Office of Faith-Based and Neighborhood Partnerships, and it created the President's Advisory Council on Faith-Based and Neighborhood Partnerships, which subsequently submitted recommendations regarding the work of the Office.

On November 17, 2010, President Obama signed Executive Order 13559, 75 FR 71319 (Nov. 17, 2010) (Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations). Executive Order 13559 made various changes to Executive Order 13279, which included: Making minor and substantive textual changes to the fundamental principles; adding a provision requiring that any religious social service provider refer potential beneficiaries to an alternative provider if the beneficiaries objected to the first provider's religious character; adding a provision requiring that the faith-based provider give notice of potential referral to potential beneficiaries; and adding a provision that awards must be free of political interference and not be based on religious affiliation or lack thereof. An interagency working group was tasked with developing model regulatory changes to implement Executive Order 13279, as amended by Executive Order 13559, including provisions that clarified the prohibited uses of direct financial assistance, allowed religious social service providers to maintain their religious identities, and distinguished between direct and indirect assistance.

These efforts eventually resulted in DHS's promulgating regulations and the other Agencies promulgating amendments to their regulations. In April 2016, the Agencies promulgated a joint final rule through notice-and-comment rulemaking to ensure consistency with Executive Order 13279, as amended by Executive Order 13559. *See* Federal Agency Final Regulations Implementing Executive Order 13559: Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations, 81 FR 19355 (April 4, 2016).

The revised regulations defined ''indirect Federal financial assistance'' in a way that sought to indicate that the aid must flow to a beneficiary from a religious provider only through the genuine and independent choice of the beneficiary. *See, e.g.,* 81 FR at 19381 (describing ''indirect'' assistance programs as those in which the benefits under the program are provided as a result of a ''genuine and independent choice''); *id.* at 19406–07 (defining ''indirect Federal financial assistance'' in terms of whether, inter alia, the ''organization receives the assistance as the result of the decision of the beneficiary, not a decision of the government''). The rules also provided that aid would be considered ''indirect'' only if beneficiaries had at least one secular option as an alternative to the faith-based provider. *See id.* at 19407. Further, the rules not only required that faith-based providers give the notice of the right to an alternative provider specified in Executive Order 13559, but also required faith-based providers, but not other providers, to give written notice to beneficiaries and potential beneficiaries of programs funded with direct Federal financial assistance of various protections, including nondiscrimination based on religion, the requirement that participation in any religious activities must be voluntary and that they must be provided separately from the federally funded activity, and that beneficiaries may report violations. *E.g., id.* at 19423.

President Trump has given new direction to the program established by President Bush and continued by President Obama. On May 4, 2017, President Trump issued Executive Order 13798, 82 FR 21675 (May 4, 2017) (Promoting Free Speech and Religious Liberty). Executive Order 13798 states that ''Federal law protects the freedom of Americans and their organizations to exercise religion and participate fully in civic life without undue interference by the Federal Government. The executive branch will honor and enforce those protections.'' It directed the Attorney General to ''issue guidance interpreting religious liberty protections in Federal law.'' Pursuant to this instruction, the Attorney General subsequently published guidance in the **Federal**

[1] *See* DOL, Guidance Regarding Federal Grants and Executive Order 13798, *https://www.dol.gov/agencies/oasam/grants/religious-freedom-restoration-act.*

Register. *See* Federal Law Protections for Religious Liberty, 82 FR 49668 (Oct. 26, 2017) (''the Attorney General's Memorandum'').

The Attorney General's Memorandum emphasizes that individuals and organizations do not give up religious liberty protections by providing government-funded social services, and that ''government may not exclude religious organizations as such from secular aid programs . . . when the aid is not being used for explicitly religious activities such as worship or proselytization.'' *Id.* at 49669.

On May 3, 2018, President Trump signed Executive Order 13831, 83 FR 20715 (May 3, 2018) (Establishment of a White House Faith and Opportunity Initiative), amending Executive Order 13279, as amended by Executive Order 13559, and other related Executive Orders. Among other things, Executive Order 13831 changed the name of the ''White House Office of Faith-Based and Neighborhood Partnerships'' as established in Executive Order 13498, to the ''White House Faith and Opportunity Initiative''; changed the way that the initiative is to operate; directed departments and agencies with ''Centers for Faith-Based and Community Initiatives'' to change those names to ''Centers for Faith and Opportunity Initiatives''; and ordered that departments and agencies without a Center for Faith and Opportunity Initiatives designate a ''Liaison for Faith and Opportunity Initiatives.'' Executive Order 13831 also eliminated the alternative provider referral requirement and requirement of notice thereof in Executive Order 13559 described above.

On January 17, 2020, DHS, USDA, USAID, DOJ, DOL, VA, HHS, and ED issued NPRMs with proposed regulatory amendments to implement Executive Order 13831 and conform more closely to the Supreme Court's current First Amendment jurisprudence; relevant Federal statutes such as RFRA; Executive Order 13279, as amended by Executive Orders 13559 and 13831; and the Attorney General's Memorandum. Equal Participation of Faith-Based Organizations in DHS's Programs and Activities: Implementation of Executive Order 13831, 85 FR 2889 (Jan. 17, 2020); Equal Opportunity for Religious Organizations in U.S. Department of Agriculture Programs: Implementation of Executive Order 13831, 85 FR 2897 (Jan. 17, 2020); Equal Participation of Faith-Based Organizations in USAID's Programs and Activities: Implementation of Executive Order 13831, 85 FR 2916 (Jan. 17, 2020); Equal Participation of Faith-Based Organizations in Department of Justice's Programs and Activities: Implementation of Executive Order 13831, 85 FR 2921 (Jan. 17, 2020); Equal Participation of Faith-Based Organizations in the Department of Labor's Programs and Activities: Implementation of Executive Order 13831, 85 FR 2929 (Jan. 17, 2020); Equal Participation of Faith-Based Organizations in Veterans Affairs Programs: Implementation of Executive Order 13831, 85 FR 2938 (Jan. 17, 2020); Ensuring Equal Treatment of Faith-Based Organizations, 85 FR 2974 (Jan. 17, 2020); Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program, 85 FR 3190 (Jan. 17, 2020). On February 13, 2020, HUD issued a parallel NPRM. Equal Participation of Faith-Based Organizations in HUD Programs and Activities: Implementation of Executive Order 13831, 85 FR 8215 (Feb. 13, 2020). These NPRMs proposed to do the following:

- Remove the notice-and-referral requirements that were required of faith-based organizations but were not required of other organizations;
- Require the Agencies' notices or announcements of award opportunities and notices of awards or contracts to include language clarifying the rights and obligations of faith-based organizations that apply for and receive Federal funding. ED, DHS, USDA, DOJ, DOL, HUD, VA, and HHS proposed specific language in these notices to clarify that, among other things, a faith-based organization may apply for awards on the same basis as any other organization, the Agencies will not discriminate in selection on the basis of the organization's religious exercise or affiliation, a participating faith-based organization retains its independence and may carry out its mission consistent with—and may be able to seek an accommodation under—religious freedom protections in Federal law, and a faith-based organization may not discriminate against beneficiaries on certain religious bases;
- Clarify that accommodations are available to faith-based organizations under existing Federal law and directly reference the definition of ''religious exercise'' from RFRA;
- Update the prohibitions against the Agencies (and, for some Agencies, their intermediaries) discriminating in selection and disqualifying an organization, so as to prohibit such conduct on the basis of religious exercise and affiliation;
- Update the definition of ''indirect Federal financial assistance'' to align more closely with the Supreme Court's decision in *Zelman* v. *Simmons-Harris,* 536 U.S. 639 (2002), by removing the requirement that beneficiaries have at least one secular option;
- Clarify the existing provision that a faith-based organization participating in an indirect Federal financial assistance program or activity need not modify its program to accommodate a beneficiary, so that it expressly states that such an organization need not modify its policies that require attendance in ''all activities that are fundamental to the program;''
- Clarify that faith-based organizations participating in Agency-funded programs shall retain their autonomy, right of expression, religious character, and independence;
- Clarify that none of the guidance documents that the Agencies or their intermediaries use in administering the Agencies' financial assistance shall require faith-based organizations to provide assurances or notices where similar requirements are not imposed on secular organizations, and that any restrictions on the use of grant funds shall apply equally to faith-based and secular organizations;
- Clarify that faith-based organizations need not remove, conceal, or alter any religious symbols or displays;
- Clarify the standard for permissible discrimination on the basis of religion with respect to employment or board membership, as relevant;
- Clarify the methods that can be used to demonstrate nonprofit status;
- Update the terminology to refer to ''faith-based organizations,'' not ''religious organizations;'' and
- Clarify that the Agencies and their intermediaries cannot advantage or disadvantage faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects.

These final regulations are effective on January 19, 2021. In light of the public comments and as explained further below, the Agencies are making the following changes from the NPRMs:

- Update the prohibitions against the Agencies (and, for some Agencies, their intermediaries) discriminating in selecting and disqualifying an organization, so as to prohibit such conduct on the basis of religious character and affiliation, and add such a prohibition against discrimination on the basis of religious exercise with

additional language based on the applicable Free Exercise Clause and RFRA standards; and

• Update the notices in the appendices for ED, DHS, USDA, DOJ, DOL, HUD, VA, and HHS to reflect that these prohibitions apply to discrimination on the basis of religious character, affiliation, or exercise. These Agencies are also updating such notices to indicate that the listed Federal laws provide religious freedom ''and conscience'' protections.

Unless otherwise specified in the discussion below, these final regulations amend existing regulations or establish new regulations to do the following, consistent with the NPRMs:

• Remove the notice-and-referral requirements that were required of faith-based organizations but were not required of other organizations;

• Require the Agencies' notices or announcements of award opportunities and notices of awards or contracts to include language clarifying the rights and obligations of faith-based organizations that apply for and receive Federal funding. ED, DHS, USDA, DOJ, DOL, HUD, VA, and HHS are also including specific language in these notices to clarify that, among other things, a faith-based organization may apply for awards on the same basis as any other organization; a participating faith-based organization retains its independence and may carry out its mission consistent with—and may be able to seek an accommodation under—religious freedom (and conscience) protections in Federal law; [2] and a faith-based organization may not discriminate against beneficiaries on certain religious bases;

• Clarify that accommodations are available under existing Federal law and directly reference the definition of ''religious exercise'' from RFRA;

• Update the definition of ''indirect Federal financial assistance'' to align more closely with the Supreme Court's decision in *Zelman,* 536 U.S. at 639, by removing the requirement that beneficiaries have at least one secular option;

• Clarify the existing provision that a faith-based organization participating in an indirect Federal financial assistance program or activity need not modify its program to accommodate a beneficiary, so that it expressly states that such an organization need not modify its policies that require attendance in ''all activities that are fundamental to the program;''

• Clarify that faith-based organizations participating in Agency-funded programs shall retain their autonomy, right of expression, religious character, and independence;

• Clarify that none of the guidance documents that the Agencies or their intermediaries use in administering the Agencies' financial assistance shall require faith-based organizations to provide assurances or notices where similar requirements are not imposed on secular organizations, and that any restrictions on the use of grant funds shall apply equally to faith-based and secular organizations;

• Clarify that faith-based organizations need not remove, conceal, or alter any religious symbols or displays;

• Clarify the standard for permissible discrimination on the basis of religion with respect to employment or board membership, as relevant;

• Clarify the methods that can be used to demonstrate nonprofit status;

• Update the terminology to refer to ''faith-based organizations,'' not ''religious organizations;'' and

• Clarify that the Agencies and their intermediaries cannot advantage or disadvantage faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects.

Additionally, in its NPRM, ED proposed to add severability clauses to each part of its regulations, and it is finalizing those severability clauses. USDA, DOL, DOJ, and HHS are also adding a severability provision indicating that, to the extent that any provision of this regulation is declared invalid by a court of competent jurisdiction, the Agency intends for all other provisions that are capable of operating in the absence of the specific provision that has been invalidated to remain in effect. They are making this addition because they conclude that each of the regulations discussed in this preamble would serve one or more important, related, but distinct purposes, as demonstrated by the extensive discussion of each provision below and in the USDA, DOL, DOJ, and HHS NPRMs. This provision is not a substantive addition, so the Agencies do not believe that notice and comment is required. Even if notice and comment were required, the absence of notice and comment for this provision would not be prejudicial, as commenters received an opportunity to provide their views on all substantive aspects of the rule. Hence, although the issue of severability was not raised in the USDA, DOL, DOJ, or HHS NPRMs, commenters were able to evaluate the practical impact of each facet of the proposed rules, and finalizing the proposed rules with a severability provision will not meaningfully alter the rules' impact on commenters. The Agencies accordingly have concluded that they will not re-notice the rules to raise the issue of severability. *See First Am. Discount Corp.* v. *CFTC,* 222 F.3d 1008, 1015 (D.C. Cir. 2000) (declining to decide whether additional notice was required where petitioner suffered no prejudice).

The Agencies received over 95,000 comments in response to their NPRMs. The major cross-cutting issues raised in those comments are discussed in the Joint Preamble (Part II). Many commenters filed similar or identical comments with some or all of the Agencies. Thus, unless otherwise noted in response to a particular comment, the responses in this joint preamble are adopted by all Agencies, regardless of whether a particular Agency received a particular comment.

Within each discussion of a category of comments, there are subheadings entitled ''Summary of Comments,'' ''Response,'' ''Changes,'' and ''Affected Regulations.'' Under the ''Changes'' subheading, the Agencies describe the types of changes, if any, that they are making to the proposed rules as a result of the comments. Under the ''Affected Regulations'' subheading, the Agencies list the actual sections of the regulations that they have changed.

Comments that raised issues specific to an Agency or that required an explanation of how a cross-cutting issue affects an Agency are addressed in the Agency-Specific Preambles (Part III).

Following is the organization of this rulemaking:

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a. Notice and Referral to Alternative Provider
b. Other Notices
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a. In General

[2] In this rulemaking, the word ''accommodation'' refers both to provisions of relief from the burdens that a generally applicable law might impose on religious exercise, such as RFRA and the Religious Land Use and Institutionalized Persons Act (''RLUIPA,'' 42 U.S.C. 2000cc *et seq.*), and to protections of conscience more generally, such as the Coats-Snowe Amendment (42 U.S.C. 238n), the Weldon Amendment (a rider in HHS's annual appropriation, *see, e.g.,* Further Consolidated Appropriations Act, 2020, Pub. L. 116–94, div. A, sec. 507(d), 133 Stat. 2534, 2607 (Dec. 20, 2019)), the Church Amendments (42 U.S.C. 300a–7), and 42 U.S.C. 18113.

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Department of Housing and Urban Development
Department of Justice
Department of Labor
Department of Veterans Affairs
Department of Health and Human Services

II. Joint Preamble

A. General Support and Opposition

Summary of Comments: Several commenters, including Members of Congress, agreed with the proposed rules and said that they protect religious liberty for faith-based organizations, including as guaranteed by the First Amendment to the U.S. Constitution. These commenters added that faith-based organizations are allowed to participate in Federal funding programs. Some commenters disagreed, however, arguing that no Federal funds should be given to faith-based organizations, including because such organizations are exempt from paying taxes. Some commenters argued that such faith-based organizations should be taxed.

Several commenters supported the proposed rules because, they said, faith-based organizations should be allowed to compete on equal footing with secular organizations, without any discriminatory or unfair restrictions imposed based on religious character, affiliation, or exercise, which would raise constitutional problems. Some of these commenters also stated that such equal treatment aligns the proposed rules with *Trinity Lutheran Church of Columbia, Inc.* v. *Comer,* 137 S. Ct. 2012 (2017). A common theme among these commenters was that organizations should not be forced to check their faith at the door when participating in government programs. Other commenters argued, however, that faith-based organizations have no entitlement to receive discretionary Federal financial assistance from the Agencies. Rather, these commenters argued that faith-based organizations need to be made aware of their obligations to comply with program requirements and with beneficiaries' constitutional protections. Some commenters said that faith-based organizations can exercise religion fully with private funds but need to serve all if they choose to accept Federal funds. One of these commenters stated that the proposed rules presented a solution in search of a problem, arguing that there is no indication faith-based organizations were harmed under the prior rule.

Some commenters supported the proposed rules because they would clarify and reinforce existing Federal law regarding faith-based organizations' rights to freely exercise their religion and participate in civic life. They argued that the proposed rules were not a radical shift in policy. Some of these commenters also noted that the proposed rules would provide faith-based organizations with clarity regarding these rights. These commenters argued that such rights were unclear, given what they perceived as conflicts between the prior rule and Federal law, including constitutional rights to be free from discrimination

based on religious character when participating in the Agencies' programs. For example, some commenters noted that the prior rule forced only faith-based organizations (and no other organizations) to give assurances and notices, which, they argued, was a violation of the Free Exercise Clause.

Some commenters argued that the proposed rules, by creating greater clarity and removing burdens, would enhance faith-based organizations' participation in Federal programs, thus expanding the scope of social services provided to people in need. Some of these commenters also emphasized the role that faith-based organizations play in promoting the public good and human flourishing in the public square, including teaching, providing medical services, serving underserved communities, and participating in the foster care system. One commenter relied on data estimating the large dollar amounts—over one trillion dollars in total, and billions by specific groups and denominations—that religious organizations contribute to the economy annually. One commenter to HUD supported the proposed rules because equal participation by faith-based organizations is ''essential to revitalizing communities,'' including to ''bridge the gap between communities and government.''

Other commenters argued that the proposed rules would violate the Establishment Clause. They argued that the proposed rules could create impermissible third-party harms, could lead to religious coercion or proselytizing, could result in the use of taxpayer funds to favor certain religions over others, could create divisiveness, and could further entangle government and religion. Some of these commenters were also concerned that the proposed rules would allow the use of taxpayer funding for religious exercise or programming, contrary to taxpayers' consciences. These commenters argued that such funding would be contrary to the views of James Madison, as expressed in the *Memorial and Remonstrance Against Religious Assessments* (''*Memorial and Remonstrance*'') in 1785, and of Thomas Jefferson, as expressed in a bill that ultimately became the Virginia Statute for Religious Freedom in 1786 (''*Bill for Religious Freedom*'').[3]

Numerous commenters were concerned that the proposed rules did not place enough emphasis on the interests of, and the impact on, beneficiaries. Several of these commenters argued that the proposed rules would favor faith-based organizations over beneficiaries, especially vulnerable beneficiaries. Commenters emphasized that beneficiaries are the focus of these government-funded programs and deserve consideration equal to, if not greater than, that afforded to faith-based organizations.

Several of these commenters were concerned that the proposed rules could cause harms to beneficiaries, including discrimination and denial of services. These commenters were particularly concerned about discrimination against groups that these commenters identified as vulnerable, marginalized, or underserved, including people from minority religions or professing no religion, women, LGBTQ[4] people, people with low incomes, and people with disabilities. Commenters were concerned that beneficiaries' access to services would be impacted and that providers could impose religious litmus tests. Commenters were also concerned about removal of beneficiaries' religious liberty protections. One commenter also expressed concern regarding potential discrimination against volunteers.

Some commenters impugned the motives behind the proposed rules. Some commented that the proposed rules were designed—consciously or unconsciously—to give preferences, and ensure aid flows, to specific officials' religious denominations. One commenter argued that the proposed rules were designed to further discrimination under the guise of promoting faith-based organizations' religious freedom.

Response: The Agencies agree with the comments that said the proposed rules (and this final rule) protect the religious liberty of faith-based organizations. The First Amendment allows faith-based organizations to participate, and compete on equal footing with secular organizations, in neutral government funding programs. *See, e.g., Espinoza* v. *Mont. Dep't of Revenue,* 140 S. Ct. 2246, 2254 (2020) (''We have repeatedly held that the Establishment Clause is not offended when religious observers benefit from neutral government programs.''). This final rule applies to such neutral Federal financial assistance programs and activities, removes burdens that were imposed solely on faith-based organizations, prohibits the imposition of additional such burdens, and more clearly conforms these regulations with existing Federal law, including constitutional law.

Contrary to some comments, the tax-exempt status of faith-based organizations does not preclude them from participating in Federal financial assistance programs and activities. *See* 26 U.S.C. 501(c)(3). The Agencies also note that these programs are open to tax-exempt secular organizations and, as discussed in Part III.G.2 below, to faith-based organizations that pay taxes.

To be sure, the Agencies agree with commenters that faith-based organizations, like all other organizations, have no entitlement to receive discretionary Federal financial assistance from the Agencies. But this final rule does not provide for any such entitlement. This final rule merely removes barriers to equal competition. It does not require any faith-based organization to be awarded Federal financial assistance in any program. Under this final rule, such award decisions will be made on neutral terms, consistent with Federal law.

The Agencies also agree with the comment that the added accommodation language merely clarifies and reinforces Federal law regarding faith-based organizations' rights to exercise their religion and participate in civic life. Federal law requires or permits certain accommodations, *see, e.g.,* 42 U.S.C. 2000bb–1, and this final rule merely clarifies the application of this law, as discussed in Part II.E. Similarly, the changes discussed in Parts II.D, II.F, II.G, and II.H bring these regulations into clearer conformity with existing Federal religious liberty law in those areas. The other changes ensure that faith-based organizations are eligible on equal terms with other organizations, which is consistent with and alleviates tension with the First Amendment and RFRA, as discussed in Parts II.C and II.G.

The Agencies also agree with the comment that said it is important to give faith-based organizations notice of their obligation to comply with program requirements and beneficiaries' protections. This final rule provides for such notice, as discussed in Parts II.C and II.G.3 below.

[3] *See* James Madison, To the Honorable the General Assembly of the Commonwealth of Virginia: A Memorial and Remonstrance (ca. June 20, 1785), Founders Online, National Archives, *https://founders.archives.gov/documents/Madison/01-08-02-0163* (''*Memorial and Remonstrance*''); Thomas Jefferson, A Bill for Establishing Religious Freedom (June 18, 1779), Founders Online, National Archives, *https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082* (''*Bill for Religious Freedom*'').

[4] This rule uses the term ''LGBTQ'' to refer to people identifying as lesbian, gay, bisexual, transgender, transsexual, queer, questioning, intersex, asexual, allied, pansexual, or otherwise, regardless of whether commenters used alternative acronyms such as LGBTQ+ or LGBTIA.

The Agencies disagree with the comment that said this final rule is a solution in search of a problem. Each provision in this final rule is being issued to address valid concerns, as discussed throughout this preamble. If anything, the alternative provider notice-and-referral requirements were solutions in search of a problem because, as discussed in Part II.C, there is no indication anyone sought a referral under those provisions, and there is no indication anyone has ever sought a referral under a separate HHS program where a statute mandates reporting of all referral requests.

The Agencies disagree with the commenters that said this final rule violates the Establishment Clause. As discussed in each relevant section below, each change is consistent with the Establishment Clause. Third-party harms are discussed extensively in Parts II.C, II.D, and II.F, and this final rule retains the prohibition on religious coercion and proselytizing. Also, as demonstrated throughout this Joint Preamble, there is no indication that this final rule will lead to any improper use of taxpayer funds to favor certain religions, to create divisiveness, or to entangle government and religion.

The Agencies also disagree with the commenters that the proposed rule would allow the use of taxpayer funds for religious exercise or programming in any improper way. This final rule retains the prohibition on explicitly religious activities in programs and activities funded with direct Federal financial assistance. Although indirect Federal financial assistance may be used for explicitly religious activities under this rule, the same was true under the prior rule, *see, e.g.,* 81 FR at 19358, 19361–62, 19419. This practice is consistent with Federal religious liberty laws, including the Religion Clauses of the First Amendment, as discussed in Part II.D.

The Agencies' conclusions are not affected by Madison's *Memorial and Remonstrance* or Jefferson's *Bill for Religious Freedom.* As they discuss throughout, this final rule is consistent with the Constitution and with governing statutes, as interpreted by the Federal courts. Any inconsistency with a pre-constitutional writing or State statute would not affect this final rule. Indeed, both documents cited by commenters contain several arguments that would not be considered appropriate for a government under current constitutional doctrine.[5]

Regardless, this final rule is consistent with the broader principles animating Madison's *Memorial and Remonstrance* and Jefferson's *Bill for Religious Freedom.* Madison's *Memorial and Remonstrance* criticized a 1784 bill that would have provided for non-neutral funding—it mandated a tax to fund Christian teachers, with categorical exemptions for specific denominations.[6] Thus, similar to this final rule and current constitutional doctrine, Madison's *Memorial and Remonstrance* did not reflect opposition to faith-based organizations receiving neutral government funding on the same terms as other organizations.[7]

Additionally, Jefferson's *Bill for Religious Freedom* denounced the power of the Government—as embodied by the ''magistrate''—to dictate permissible religious expression. For example, Jefferson's bill said that the civil magistrate cannot be allowed ''to restrain the profession or propagation of principles on supposition of their ill tendency,'' calling that ''a dangerous fa[l]lacy, which at once destroys all religious liberty.'' That sentiment is consistent with the added language in this final rule regarding faith-based organizations' religious autonomy and expression, as discussed in Part II.G.5.

The Agencies agree with the comments that said this final rule provides greater clarity regarding faith-based organizations' religious liberties within the affected Federal financial assistance programs and activities. These rights were unclear under the prior rule, and improving clarity will increase participation for beneficiaries, including in unserved and underserved communities, as explained in the relevant Parts below. The Agencies also agree that these outcomes will help satisfy the needs of the beneficiaries of these programs, a consideration on which the Agencies place significant emphasis when designing and implementing these programs. And the Agencies recognize the contributions that both faith-based and secular organizations make to such beneficiaries, which contributions warrant allowing such organizations to compete on equal terms for Federal financial assistance. As discussed in detail throughout this preamble, the Agencies disagree that this final rule de-emphasizes, disfavors, or harms beneficiaries at the expense of faith-based organizations.

There is no indication that any aspect of this final rule will lead to the harms asserted by commenters, including discrimination and denial of service, as explained in each section below. Because this final rule retains the prohibition on faith-based organizations discriminating against beneficiaries on religious bases, such organizations cannot impose a religious litmus test on beneficiaries. Faith-based organizations must comply with any other nondiscrimination provisions that apply to each program. This final rule does not change that requirement. The only relevant aspect of this final rule is the added accommodation language, which merely clarifies that otherwise binding Federal law applies. The accommodation language added in this final rule does not create any new bases for broader accommodations that would authorize discrimination or the denial of service, as discussed in Part II.E.

Additionally, the treatment of volunteers is beyond the scope of this final rule. The prior rule, Executive Order 13831, and the NPRMs did not address volunteers. Therefore, the Agencies are not addressing volunteers directly in this final rule. To the extent that volunteers are impacted indirectly by any provision in this final rule, that provision is appropriate for the reasons discussed in the relevant Part below.

Finally, this final rule is being promulgated for the reasons discussed throughout this preamble. The Agencies disagree with the comments that question the motivation behind this final rule. Because this final rule applies equally to all faith-based organizations, there is no basis for the comment that this rule is motivated by the desire to favor any specific religious denomination. Similarly, this final rule does not permit discrimination by faith-based organizations, indicating that a desire to allow for such discrimination was not a motive for the rule.

Changes: None.

Affected Regulations: None.

B. Regulatory History and Legal Background

As explained in the NPRMs, the primary purpose of this final rule is to implement Executive Order 13831, the most recent in a series of executive

[5] *See, e.g., Memorial and Remonstrance* (objecting to bill as ''adverse to the diffusion of the light of Christianity'' because it should be the ''first wish of those who enjoy this precious gift'' to be that it ''may be imparted to the whole race of mankind''); *Bill for Religious Freedom* (stating that ''Almighty God hath created the mind''); *id.* (rejecting certain coercive civil actions as ''a departure from the plan of the holy author of our religion'').

[6] *Memorial and Remonstrance* (charging that the 1784 bill ''violates equality by subjecting some to peculiar burdens'' and ''by granting to others peculiar exemptions'').

[7] *See, e.g., Rosenberger* v. *Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 854 (1995) (Thomas, J., concurring) (''Madison's objection to the assessment bill did not rest on the premise that religious entities may never participate on equal terms in neutral government programs. . . . Madison's comments are more consistent with the neutrality principle[.]'').

orders that address issues that affect faith-based and community organizations. As discussed in Part I above, the NPRMs provided a summary of those executive orders, as well as the Attorney General's Memorandum that was drafted and published pursuant to Executive Order 13798. Because many of the commenters who addressed Executive Order 13798 also referenced the Attorney General's Memorandum, the Agencies respond to those comments in the discussion of Executive Order 13798 below.

1. Executive Orders 13199 and 13279

Summary of Comments: A number of commenters who supported and opposed the proposed rules referenced President George W. Bush's Executive Orders 13199 and 13279. Some commenters stated that the proposed rules were consistent with Executive Order 13279, which helped to ensure that faith-based organizations have equal protection and opportunity under the law as they work to meet the social needs of American communities.

Other commenters stated that removing the alternative provider requirements would stray greatly from tradition, current practice, and consensus in this area. They noted that ''Charitable Choice'' laws, which were precursors to the George W. Bush administration's faith-based regulations, included alternative provider requirements. *See, e.g.,* 42 U.S.C. 290kk–1(f), 300x–65(e), 604a(e). One commenter stated that the NPRMs would stray from Executive Orders 13199 and 13279 by reducing the efficacy of distributing Federal funding. Another commenter stated that repealing or weakening the core beneficiary protections in the 2016 final rule is inconsistent with Executive Order 13279, which continues to bind the Agencies.

One commenter objected that these executive orders sidestepped the bipartisan process and allowed for government-funded religious discrimination. Some commenters also expressed the sentiment that Executive Order 13279 and this final rule were contrary to the ''separation of church and state.''

Response: The Agencies disagree that removing the alternative provider notice-and-referral requirements undermines principles of equal treatment or strays from tradition. To the contrary, removing these requirements serves to remove unnecessary regulatory barriers to enable faith-based organizations to compete for, and participate fully in, Federal financial assistance without impairing their independence, autonomy, expression, or religious character. Additionally, removal of the notice-and-referral requirements does not ''stray greatly from tradition.'' First, doing so merely reinstates the status quo prior to 2016. Second, although there may be a pre-2016 practice of requiring referrals in the programs to which the Charitable Choice statutes cited by the commenters are applicable, the Agencies are not aware that any beneficiary has ever sought such a referral under one of those statutes, or that any beneficiary ever sought a referral under analogous provisions of the prior rule. *See* Part II.C. The Agencies' experience thus demonstrates that maintaining the referral requirements is not necessary to avoid harm to beneficiaries.

Additionally, the Agencies disagree that these final rules are inconsistent with any portions of Executive Orders 13199 and 13279 that are currently in effect. Executive Order 13199 was revoked by Executive Order 13831 on May 3, 2018. 83 FR at 20717. Even so, this rule would have been consistent with Executive Order 13199, which directed the predecessor White House Office of Faith-Based and Community Initiatives (now replaced by the White House Faith and Opportunity Initiative) ''to eliminate unnecessary . . . regulatory[] and other bureaucratic barriers that impede effective faith-based and other community efforts to solve social problems.'' 66 FR at 8500. This final rule removes unnecessary regulatory barriers to enable faith-based organizations to compete for, and participate fully in, Federal financial assistance programs and activities without impairing their independence, autonomy, expression, or religious character.

Executive Order 13279 remains in effect, as amended by Executive Order 13559 and further amended by Executive Order 13831. Executive Order 13279 currently provides that faith-based organizations should be eligible to compete for Federal financial assistance used to support social service programs and to ''participate fully in [such programs] without impairing their independence, autonomy, expression, or religious character.'' 67 FR at 77142. This final rule fulfils that directive by removing unnecessary regulatory barriers that applied only to faith-based organizations that wished to participate in federally funded social service programs.

The Agencies furthermore do not believe that this final rule will reduce the efficacy of awarding Federal funding. Rather, it will enable faith-based organizations to participate equally in competing for Federal funding with secular organizations. If anything, removal of unnecessary administrative burdens will improve the efficiency and efficacy of awarding Federal funding. Reduced compliance burdens may free more resources for beneficiaries, and the removal of requirements that chill faith-based organizations' participation in Federal assistance programs may result in a broader, more diverse, and more competitive pool of grant recipients. Moreover, this final rule provides greater clarity on several issues, as discussed in Parts II.C, II.D, II.E, II.G, II.G, and II.H.

The Agencies also disagree that Executive Orders 13199 and 13279 allow for government-funded religious discrimination. The opposite is true. Although it is no longer effective, the Agencies note that Executive Order 13199 stated that the delivery of social services in the United States ''should value the bedrock principles of pluralism, nondiscrimination, evenhandedness, and neutrality.'' 66 FR at 8499. Similarly, Executive Order 13279 currently provides that all organizations that receive Federal financial assistance under social services programs should be prohibited ''from discriminating against beneficiaries or prospective beneficiaries of the social services programs on the basis of religion or religious belief,'' and that such organizations, in their service-provision and outreach programs using Federal financial assistance, ''should not be allowed to discriminate against current or prospective program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice.'' 67 FR at 77142. This final rule maintains the regulatory prohibition on such religious discrimination.

The Agencies also do not believe that it is sensible to charge that an executive order has sidestepped the bipartisan process. An executive order is the President's exercise of constitutional authority, and the Agencies have carried out Executive Order 13831 in accordance with established rules of administrative process that provide full opportunity for input from people of all parties and perspectives. The Agencies have carefully reviewed and considered each of the comments they have received. In most cases, the Agencies are not even aware of, and in all cases are indifferent to, a commenter's partisan affiliation. The Agencies have considered each comment based on its

independent merit. Additionally, to the extent the comment about the bipartisan process was referring to the 2010 President's Advisory Council on Faith-Based and Neighborhood Partnerships, the Agencies incorporate their discussion of that process from Part II.C.

Finally, the Agencies disagree that these executive orders and this final rule are contrary to ''the separation of church and state.'' Some of these comments refer to and quote extensively from President Thomas Jefferson's letter of January 1, 1802 to the Baptist Association of Danbury, Connecticut, which letter described the First Amendment as ''building a wall of separation between Church & State.'' Thomas Jefferson, Letter for the Danbury Baptist Association (Jan. 1, 1802), Founders Online, National Archives, *https://founders.archives.gov/documents/Jefferson/01-36-02-0152-0006.* The precise meaning and usefulness of this metaphor for constitutional adjudication remains unclear. As Justice Frankfurter cautioned, ''the mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer. This is so because the meaning of a spacious conception like that of separation of Church from State is unfolded as appeal is made to the principle from case to case.'' *McCollum* v. *Bd. of Educ.,* 333 U.S. 203, 212–13 (1948) (Frankfurter, J., joined by Jackson, Rutledge, and Burton, JJ.). It is thus critical to recognize that, in actual cases, the Supreme Court has ''repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs.'' *Espinoza,* 140 S. Ct. at 2254. That result is what this final rule achieves, as explained throughout this preamble.

Allowing for such participation is also consistent with many interpretations of Jefferson's letter, including that the wall of separation was intended to protect religion from the state, which this final rule does.[8] Furthermore, the relevance of that letter to constitutional law jurisprudence has been questioned repeatedly, including because President Jefferson at times invoked religion in his official actions and approved the use of Federal Government funds for religious purposes.[9] Significantly, and consistent with the Supreme Court's statement in *Espinoza,* then-Justice Rehnquist explained that, even when considering Jefferson's wall metaphor, ''[t]he Establishment Clause did not . . . prohibit the Federal Government from providing nondiscriminatory aid to religion.'' *Wallace* v. *Jaffree,* 472 U.S. 92, 106 (1985) (Rehnquist, J., dissenting). In short, ''[t]he metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.'' *Lynch* v. *Donnelly,* 465 U.S. 668, 673 (1984)).

Changes: None.

Affected Regulations: None.

2. Executive Orders 13498 and 13559

Summary of Comments: A number of commenters—some who supported and some who opposed the proposed rules—referenced President Barack Obama's Executive Orders 13498 and 13559. Commenters who supported the proposed rules stated that the Obama Administration's changes to the equal treatment rule had placed extra and unfair burdens on faith-based entities, discriminated against such entities (including by allowing religious participation in indirect-aid programs only if there was a secular alternative without imposing a reverse requirement on secular providers), treated such entities as suspect purely because of their religious nature, and ignored the gravity of religious complicity-based objections, contrary to the First Amendment, RFRA, Supreme Court precedent, and binding legal principles described in the Attorney General's Memorandum.

One commenter also asserted that the notice-and-referral requirements established by Executive Order 13559 were unconstitutional compelled speech under *National Institute of Family Life Advocates* v. *Becerra,* 138 S. Ct. 2361 (2018), because they required only faith-based organizations to give the scripted disclosure.

Commenters who objected to the proposed rules drew attention to President Obama's 2016 Executive Order 13559, which they characterized as putting significant safeguards for beneficiaries into place based on consensus recommendations of the President's Advisory Council on Faith-Based and Neighborhood Partnerships, a body composed of religious and community leaders from a wide range of faiths and organizations.

A commenter from a faith-based organization supported the notice-and-referral requirements of Executive Order 13559 as striking the right balance between ensuring the continuation of public-private partnerships with faith-based organizations to provide social services, consistent with the Constitution, RFRA, and Supreme Court precedent, and ensuring that millions of beneficiaries of these programs were not subject to proselytizing by publicly funded service providers and that viable secular alternatives are available and accessible.

Finally, one commenter protested that the proposed rules would allow organizations that accept ''indirect'' aid to require beneficiaries to participate in religious activities, in conflict with Executive Order 13559.

Response: The Agencies agree with the commenters who stated that the notice-and-referral requirements of Executive Order 13559 were in tension with Supreme Court precedent, RFRA, and free exercise principles, as explained in Part II.C.

The Agencies disagree with the suggestions that they must follow the recommendations in the Final Report of the President's Advisory Council on Faith-Based and Neighborhood Partnerships (''Advisory Council Report''), although the Agencies have certainly given those recommendations all due consideration. As discussed at greater length in Part II.C, those recommendations were just that and are not controlling. The Agencies are promulgating this final rule after carefully considering over 95,000 public comments from a wide array of sources, including private citizens, advocacy groups, religious organizations, public policy organizations, State and local governments, and Members of Congress. That process reflects a diversity of input no less than did the recommendations of the Advisory Council comprising ''not more than 25 members appointed by the President'' in 2009. *See* 74 FR at 6534.

[8] *See, e.g.,* Noah Feldman, *Divided By God* 40 (2007) (arguing that the ''Jefferson who drafted the Virginia statute'' was ''focus[ed] . . . on protecting religion from government, not the other way around'').

[9] *See, e.g., Wallace* v. *Jaffree,* 472 U.S. 92, 103 & n.5 (1985) (Rehnquist, J., dissenting) (observing that a treaty entered into by the Jefferson administration ''provided annual cash support for [a Native American tribe's] Roman Catholic priest and church''); *Engel* v. *Vitale,* 370 U.S. 421, 446–49 & n.3 (1962) (Stewart, J., dissenting); *McCollum,* 333 U.S. at 245–47 (Reed, J., dissenting); *see also* Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State* 21–23 (2003) (noting that, although Jefferson declined to issue religious proclamations of thanksgiving, nonetheless, ''as the nation's head of state, he personally encouraged and symbolically supported religion by attending public church services in the Capitol'' and ''attend[ing] worship services on government property''); *id.* at 29–30 (explaining the argument that the letter in which Jefferson expressed the wall metaphor was a ''political manifesto,'' rather than an attempt to define Establishment Clause jurisprudence). *See generally* Philip Hamburger, *Separation of Church and State* (2002).

Further, the Advisory Council Report cited minimal justification for requiring religious organizations to make referrals based on objections to the provider's religious character. The Agencies did not find this justification persuasive, as discussed in Part II.C below. There is also no indication that any beneficiary sought such a referral, before or after the referral requirement was imposed in 2016, or that any beneficiary would be harmed by removing the referral requirement. The Agencies disagree that the referral requirement was a critical religious liberty protection and that it must be retained in order to put primary emphasis on the needs of beneficiaries.

The Agencies respond to the comments regarding RFRA, free exercise, and related Supreme Court precedents at length elsewhere in this final rule, especially in Parts II.C, II.E, II.F, and II.G. They incorporate that analysis by reference here. The Agencies also clarify that they are not relying on the Free Speech Clause as a basis for removing the notice requirement. The Agencies do not rely on *Becerra,* 138 S. Ct. 2361. That case is different for several reasons, including because the law in that case did not impose a notice requirement on recipients of government funding.

Finally, the Agencies disagree that the updated definition of ''indirect Federal financial assistance'' in this final rule conflicts with Executive Order 13559 because it would permit organizations receiving indirect aid, such as vouchers, to require religious observance as part of their activities. Indirect Federal financial assistance, by definition, permits the beneficiary to choose where to use the assistance. Executive Order 13559 recognized ''the distinction between 'direct' and 'indirect' Federal financial assistance,'' 75 FR at 71321, and it did not restrict what an organization at which a beneficiary chose to use the indirect assistance might require of the beneficiary in terms of religious observance. It imposed restrictions only on organizations receiving direct assistance, stating that organizations that engage in explicitly religious activities must perform such activities and offer such services outside of programs that are supported with ''direct'' Federal financial assistance; that such organizations must do so separately in time or location from any such programs or services supported with ''direct'' Federal financial assistance; and that participation in any such explicitly religious activities must be voluntary for the beneficiaries of the social service program supported with ''such'' Federal financial assistance.'' *Id.* at 73120. The updated definition of ''indirect Federal financial assistance'' is valid for all of the reasons discussed in Part II.D below.

Changes: None.

Affected Regulations: None.

3. Executive Orders 13798 and 13831 and the Attorney General's Memorandum

Summary of Comments: A number of commenters—some who supported and some who opposed—the proposed rules referenced President Donald Trump's Executive Orders 13798 and 13831, as well as the Attorney General's Memorandum. Several commenters stated that the proposed rules were consistent with the provisions of Executive Orders 13798 and 13831, the Attorney General's Memorandum, and the Constitution because of their equal treatment of religious groups. They said that these Executive Orders and the proposed rules restore constitutional freedoms, respect the rights of religious taxpayers and beneficiaries, and allow religious organizations to further support the community rather than focus on additional federally mandated burdens. Several commenters expressed their support for Executive Order 13831, including one organization that concluded that neutral treatment by government not only allows religious organizations to operate in accordance with their faith but also promotes the flourishing of the common good.

A comment provided jointly by 21 current members of the House of Representatives stated that the final rule implementing Executive Order 13831 ''will restore an environment of religious freedom across the country'' because ''an organization's religious affiliation will no longer subject individuals to unequal treatment by Federal, state, and local governments.''

Other commenters contended that the proposed rules were contrary to Executive Order 13831 because they exhibited favoritism toward religious organizations for purely political reasons. One commenter charged that the proposed rules were inconsistent with Executive Order 13798 because they would limit end-of-life care options for people with terminal illnesses.

Another commenter said that Executive Order 13831 contradicted Executive Order 13798, which states that Federal law protects the freedom of Americans and their organizations to exercise religion and participate fully in civic life without undue interference by the Federal Government.

One commenter stated that the Agencies' reliance on the Attorney General's Memorandum was misplaced, and that the Memorandum violated the Establishment Clause, had questionable legal authority, and was an expansion of religious freedom exemptions and protections that allowed religious institutions to discriminate and harm others. Another commenter said that Executive Order 13831 was contrary to the separation of church and state.

Response: The Agencies agree that this final rule is consistent with Executive Order 13798, which states that the Federal Government will honor the ''freedom of Americans and their organizations to exercise religion and participate fully in civic life without undue interference by the Federal Government.'' 82 FR at 21675. The final rule fulfills this promise.

The Agencies agree that the final rule is consistent with Executive Order 13831 as well. Executive Order 13831 charged the White House Faith and Opportunity Initiative with identifying ways to reduce ''burdens on the exercise of religious convictions and legislative, regulatory, and other barriers to the full and active engagement of faith-based and community organizations'' in Government-funded programs, in accordance ''with Executive Order 13798 and the Attorney General's Memorandum.'' 83 FR at 20716.

The Agencies disagree that there is any contradiction between Executive Orders 13798 and 13831. The Agencies further believe that the final rule is consistent with Executive Order 13798 and will not have any discernable impact on individuals with terminal illnesses because, as explained more fully in Part II.C.2, the rule will not negatively impact beneficiaries.

The Agencies also agree that this final rule is consistent with the Attorney General's Memorandum, which summarizes current jurisprudence on religious liberty, including the First Amendment prohibition against discrimination based on religious character and RFRA protections. That Memorandum accurately canvasses the legal authorities governing executive branch agencies' treatment of religion, including the Constitution, Supreme Court precedents, Federal statutes (*e.g.,* RFRA, Title VII of the Civil Rights Act of 1964, including the religious exemption to Title VII, the Religious Land Use and Institutionalized Persons Act, and the American Indian Religious Freedom Act), numerous executive orders, and the Guidelines on Religious Exercise and Religious Expression in the Federal Workplace, which President Clinton issued on August 14, 1997. Parts II.C, II.D, II.E, II.G.1, II.G.2, and II.J explain how the final rule is consistent with the principles articulated in the Attorney General's Memorandum. For

the same reasons, the Agencies do not believe their reliance on the Attorney General's Memorandum is misplaced. And because the final rule works to re-establish government neutrality toward religion, the Agencies do not agree that it favors religious organizations for political reasons.

Finally, the Agencies disagree that Executive Order 13831 is contrary to separation of church and state, for the reasons discussed in Part II.B.1 above.

Changes: None.

Affected Regulations: None.

C. Notice-and-Referral Requirements

All of the Agencies' existing regulations, with the exception of USAID's, require each religious organization receiving direct Federal financial assistance to give written notice to all beneficiaries that: (1) The religious organization could not discriminate against them based on religion or religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice; (2) the organization could not require them to participate in explicitly religious activities and any such participation had to be voluntary; (3) the organization had to separate explicitly religious activities from the funded program in time or location; (4) beneficiaries could object to the organization's ''religious character'' and the organization would then be required to undertake reasonable efforts to identify an alternative provider to which they did not object, though there was no guarantee such an alternative would be available; and (5) beneficiaries could report any violation of these protections through a specified process. The regulations of DOJ, USDA, DOL, HHS, HUD, ED, VA, and DHS required religious organizations to provide this notice to prospective beneficiaries as well. The Agencies prescribed the specific wording of this notice on forms attached in Appendices to their regulations in the Code of Federal Regulations.

If a beneficiary were to object to receiving services or benefits from an organization with a religious character, the Agencies' regulations required the religious organization to exert reasonable efforts to refer them to an alternative provider of comparable services to whom they had no objection and to make a record of the referral. DOJ, USDA, DOL, HUD, ED, and DHS applied this referral requirement to organizations receiving direct Federal financial assistance. HHS and VA applied this referral requirement to organizations receiving both direct and indirect Federal financial assistance. Secular organizations were not subject to any equivalent notice-and-referral requirements.

All of the Agencies' NPRMs proposed amending their regulations to eliminate the notice-and-referral requirements, as well as the prescribed notice text in the corresponding Appendices. Because USAID never adopted the notice-and-referral requirements, 81 FR 19384–85, the comments in this section do not apply to USAID, unless otherwise noted.

Removal of the notice-and-referral requirements was discussed more extensively in the comments than any other issue in the Agencies' NPRMs. The Agencies, therefore, have decided to describe these comments in detail and respond to them at length. Many of the commenters were not precise in the scope of their comment, including with respect to what aspect or aspects of the notice-and-referral requirement they were addressing. The Agencies endeavor to respond to them as best as possible.

1. Beneficiary Rights

a. Notice and Referral to Alternative Provider

Summary of Comments: The majority of comments regarding beneficiaries' rights focused on the referral requirement and the related aspect of the notice requirement, which are here referred to collectively as the ''alternative provider notice-and-referral requirements,'' or simply the ''notice-and-referral requirements.'' Many commenters supported removal of these requirements for the reasons discussed in Part II.C.2 below. Multiple commenters argued that the existing notice-and-referral requirements struck the appropriate balance between religious-freedom interests and the need to fulfil each Agency's mission. One commenter said that the requirements struck the appropriate balance between beneficiaries' right to access care and providers' right to maintain their faith-based principles. Other commenters said that the requirements helped maintain a balance between protecting beneficiaries' religious freedom and expanding service delivery through faith-based organizations. Some commenters also noted that the Advisory Council had agreed that the needs of the people seeking services must be the primary concern.

Several commenters opposed removal of these requirements, arguing that they were important, necessary, ''critical,'' and longstanding protections for the religious liberties of beneficiaries. Many based this argument on the recommendations of the President's Advisory Council on Faith-Based and Neighborhood Partnerships' 2010 report. *See* President's Advisory Council on Faith-Based and Neighborhood Partnerships, A New Era of Partnerships: Report of Recommendations to the President at viii, 140–41 (Mar. 2010), *https://obamawhitehouse.archives.gov/sites/default/files/docs/ofbnp-council-final-report.pdf* (''2010 Advisory Council Report''). These commenters argued—independently and based on the Advisory Council Report—that these protections were part of current practice for respecting religious liberties, relying on the Charitable Choice statutes that govern the Substance Abuse and Mental Health Services Administration (''SAMHSA'') and the Temporary Assistance for Needy Families (''TANF'') program; the regulations implementing those statutes; proposed legislation that contained a referral requirement, including ''signature legislation backed by President Bush''; and a statement from the Administration of President George W. Bush that the Charitable Choice provisions ''protect the religious freedom of beneficiaries.'' Other commenters reasoned that the referral requirement represents an important, though unexplained, principle that should be maintained.

Some commenters argued that the alternative provider notice-and-referral requirements should be retained in their entirety because they were pillars of the ''consensus'' and common-ground religious liberty recommendations from the 2010 Advisory Council. *See* 2010 Advisory Council Report at 140–41. They said that retaining these requirements would strengthen the partnerships that the Government had formed and would help build future consensus that would lead to stronger and more enduring rules. They also said that the 2010 Advisory Council Report's recommendations should be preserved because that report claimed to reflect the first consensus recommendation on these matters from such a diverse group of participants. Some commenters expressed concern that removing these requirements would negate this consensus. Some commenters opined that the Agencies offered no reasonable explanation for their decision to abandon this careful, consensus-based effort. The Chair of the 2010 Advisory Council (hereinafter the ''Council Chair''), who later became the Special Assistant to the President and Executive Director of the White House Office of Faith-Based and Neighborhood

Partnerships, and served as the main point of contact for the 2016 final rule, 81 FR 19355, argued in a comment that this change would disserve beneficiaries, induce policy shifts on ''hotly contested'' issues from administration to administration, and make it harder to achieve such diverse consensus in the future. Instead, the Council Chair argued that there should be minimal changes. Some commenters expressed concern that consensus-based rules were being replaced with new rules that they claimed were polarizing and problematic and that put ideology above providing services to people in need.

Several commenters claimed that the alternative provider referral requirement protected beneficiaries' right not to be ''uncomfortable'' receiving services from religious providers or in religious settings, even in programs that complied with secular content requirements. Several commenters said that beneficiaries ''might feel unwelcome'' if the provider was known to espouse views that characterized the beneficiaries as sinful or deviant. Some commenters argued that this referral requirement was imposed solely on faith-based organizations to protect beneficiaries from risks that do not exist when secular providers administer benefits.

Some commenters argued that beneficiaries had a right to alternative provider notice to make them aware of their ability to object when the service provider was religious, had a religious affiliation, or exhibited a religious viewpoint. They emphasized the importance of alternative provider notice-and-referral requirements when the provider worked to promote, or was associated with, a faith known to espouse religious views or values contrary to beneficiaries' or that deemed beneficiaries as sinful or deviant. They said these requirements were also important in cases when certain providers alerted beneficiaries that the provider was exempt from certain Federal regulations and could not or would not help beneficiaries in some situations. They said that these notice-and-referral requirements enabled beneficiaries to seek services from providers that they knew would be required to adhere to all Federal regulations. One commenter said that potential beneficiaries needed the alternative provider notice-and-referral requirements to make them aware of alternatives when they encountered ''impractical or inconvenient services.''

Finally, some commenters questioned the Agencies' bases for removing the alternative provider notice-and-referral requirements when, according to them, nothing had changed since 2016. Some recognized the subsequent decision in *Trinity Lutheran* but argued that it did not change the analysis because of the beneficiary harms discussed in Part II.C.2.a.

Response: The Agencies work hard to safeguard beneficiaries' religious liberties. The Agencies disagree, however, that the alternative provider notice-and-referral requirements meaningfully protected those rights. The vast majority of commenters did not cite any legal basis for their claim, offering only an unexplained ''principle.'' Moreover, the 2010 Advisory Council Report and those commenters that did cite a legal basis for their claim relied on statutes and implementing regulations specific to certain programs, such as SAMHSA and TANF, that require government entities to make referrals. However, this final rule removes a different notice-and-referral requirement from other programs to which those statutes do not apply, as the 2016 final rule acknowledged, *see* 81 FR 19399. The 2010 Advisory Council Report and these commenters also relied on legislation that had been introduced but was never enacted, as well as a generic statement from the Administration of President George W. Bush referring to religious liberty protections generally. These sources do not establish a general right to the alternative provider notice and referral.

The Agencies also disagree that the alternative provider notice-and-referral requirements were ''long-standing.'' Apart from the program-specific statutes, these requirements became part of Federal law only through the 2016 rulemaking, based on language added to Executive Order 13279 by Executive Order 13559 in 2010. In 2018, Executive Order 13831 removed that language. The Agencies appreciate the hard work, compromise, and consensus-building that went into the 2010 Advisory Council Report's recommendation and the 2016 final rule. The Agencies do not doubt that the 2010 Advisory Council Report's recommendation to create notice-and-referral requirements was made in good faith. The Agencies disagree, however, with the contention that the 2010 Advisory Council Report made a sufficiently persuasive case that requiring only faith-based organizations to make such notices and referrals was necessary to protect the rights of beneficiaries. Also, the Agencies' experience with the alternative provider notice-and-referral requirements has led to the conclusion that they were not needed and, in fact, raise a number of legal and policy concerns, as discussed later in Part II.C.

Stakeholders should have flexibility to draw different lines at different times based on differing policy priorities, and no governing principle limits the Agencies to only minimal changes. The Agencies trust that diverse stakeholders will work on any future rulemakings in good faith, just as they have in commenting on this proposed rule and in countless other contexts. If anything, the changes from the 2016 final rule to this final rule should narrow the scope of hotly contested issues in this area. The Agencies, of course, are retaining several of the 2010 Advisory Council Report's recommendations that were incorporated into the 2016 final rule, including those recommendations concerning nondiscrimination and explicitly religious activities. *See* 2010 Advisory Council Report at 129–33.

Accommodating objections to a provider's ''religious character'' did not and does not fit well within existing legal frameworks for beneficiaries' rights under provisions such as the Establishment Clause, the Free Exercise Clause, and RFRA. Beneficiaries have no Establishment Clause right to a referral if they object to a provider's religious character. Rather, the Supreme Court has ''repeatedly held that the Establishment Clause'' allows faith-based providers to receive and use Federal funding on neutral terms. *Espinoza,* 140 S. Ct. at 2254 (citing *Locke* v. *Davey,* 540 U.S. 712, 719 (2004); *Rosenberger* v. *Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 839 (1995)). It did not condition these holdings on a requirement that the faith-based provider in a government-funded program refer a beneficiary to another provider in the event that the beneficiary objects to the provider's religious character. Moreover, the Agencies did not base these requirements on the Establishment Clause when they initially imposed them in 2016.

The alternative provider notice-and-referral requirements also did not vindicate beneficiaries' rights under the Free Exercise Clause and RFRA, except perhaps in exceptional circumstances better addressed if and when they arise. Instead, they privileged mere discomfort with a provider's general religious character, irrespective of the beneficiary's religious status or exercise. The requirement to make a referral extended to objections with no basis in religious status or exercise, such as objections based on raw anti-religious animus. For example, a beneficiary could have objected to being served by a Muslim organization based on a biased

and secular view that Islam was to blame for terrorism. There is no Free Exercise Clause or RFRA right to be referred to another provider based on such an objection.

At the same time, the referral requirement ignored a religious beneficiary's objection to receiving federally funded social services from a secular provider when the beneficiary was uncomfortable with the secular environment. From the beneficiary's perspective, such discomfort is no less a concern. In both cases, the discomfort is based on receiving services from an entity that does not share the beneficiary's religious beliefs. No interpretation of the Free Exercise Clause or RFRA requires that a beneficiary's objection to a provider's religious character should have greater salience than a beneficiary's objections to a provider's non-religious character. Furthermore, many citizens routinely accept burdensome conditions so that the Government can protect others' First Amendment rights. Although the Agencies want all beneficiaries to be comfortable, they do not believe potential discomfort over the identity of a provider is of sufficient magnitude to warrant blanket application of the alternative provider referral requirement. And with no right to referral, there is also no right to notice of a referral right.

It is also not clear to what extent the referral requirement actually reduced the discomfort an objecting beneficiary might feel. To obtain a referral, the objecting beneficiary (if indeed there were any) had to disclose the objection to someone affiliated with the same religious organization the beneficiary considered objectionable. Moreover, in order for the provider to successfully refer the beneficiary to a provider to which the beneficiary had no objection, the objecting beneficiary likely needed to inform the objectionable organization of the nature of the objection and the scope of the needed services. Commenters provided the example of an unmarried pregnant woman who might not seek services from a religious provider that disapproves of sexual relations outside of marriage. Under the 2016 final rule, this provider could not have provided an appropriate referral unless the beneficiary disclosed that she was seeking pregnancy services and needed a referral to another provider that did not disapprove of women having children outside of marriage. It is not clear that a beneficiary would feel more comfortable making such a disclosure than receiving the service from the religious provider or finding an alternative provider through independent means.

There is an even greater disconnect reflected in one commenter's claim that the referral requirement was warranted to protect beneficiaries who encountered ''impractical or inconvenient services.'' Those objections have nothing to do with the religious character of the provider, and they apply equally to nonreligious providers, which have never had a referral obligation towards people who found their services impractical or inconvenient. The referral requirement simply was not designed to address those kinds of objections.

The Agencies disagree that the alternative provider notice-and-referral requirements were necessary to warn beneficiaries that the religious provider might be exempt from Federal regulations and to enable the beneficiary to seek services from another provider that adhered to all Federal regulations. The Federal regulations themselves provided no such notice and did not reference exemptions from Federal program requirements. Indeed, the 2016 final rule explicitly rejected calls to include information on ''any services or information that the provider refuses to provide due to religious or moral objections.'' 81 FR 19363; *see also id.* at 19365. If anything, such notice could have been misleading because it would have listed requirements without indicating any possibility of exceptions, even though faith-based organizations could have sought accommodations from those requirements under the First Amendment, RFRA, and Uniform Administrative Requirements, Cost Principles, and Audit Requirements that all the Agencies have adopted. *See* 2 CFR 200.102 (Office of Management and Budget (''OMB'') guidance permitting the issuance of exceptions from grant requirements); *see also, e.g.,* 2 CFR 2800.101 (DOJ). If it is appropriate for an exempt organization to provide notice and referrals, that requirement can be attached to an exemption, offering a more tailored solution that does not require all faith-based providers—including those that adhere to all Federal regulations—to give notice and referrals to all beneficiaries.

The Agencies also do not believe it generally appropriate to require notice or referrals merely because a beneficiary might disagree with the religious beliefs of the service provider or its affiliates. Under such a rule, a beneficiary could object, for example, to receiving services from nuns—providing purely secular services and taking no position on the objectionable issues—solely because those nuns were affiliated with a church that took positions to which the beneficiary objected. Beneficiaries are free to reject services from a provider because of that objection, but they do not have a right to demand that the provider assist in finding an alternative provider.

For all of these reasons, the Agencies reach different conclusions about the alternative provider notice-and-referral requirement than they did in 2016. Their experiences with the 2016 final rule, their desire to avoid legal concerns over the alternative provider notice-and-referral requirement created by recent Supreme Court cases, *see* Part II.C.2, and their skepticism about the wisdom of imposing categorical requirements in this area all factor into this decision. Removing the alternative provider notice-and-referral requirements is the appropriate legal and policy choice.

Changes: None.

Affected Regulations: None.

b. Other Notices

Summary of Comments: Several commenters also addressed the other notices, namely, notice of the prohibition on certain religion-based discrimination, of the restrictions on explicitly religious activity, and of the opportunity to report violations of these provisions. Several commenters argued that these other notices should not be removed because they were necessary to make beneficiaries, especially vulnerable beneficiaries, aware of their rights and able to exercise or seek enforcement of those rights. Commenters said that such notices were part of beneficiaries' underlying rights to be free from discrimination based on religion and to receive services separate from explicitly religious activities. Some of these commenters also argued that nothing had changed since the Agencies' determination in 2016, 81 FR 19365, that beneficiaries needed notice of these other ''valuable protections.''

Regarding the need for the other notices, commenters disagreed about whether faith-based organizations were as likely as other organizations to follow the law. Some commenters agreed with the Agencies that such notices imposed unjustified additional administrative burdens that singled out faith-based providers. These commenters agreed with the explanation—in the NPRMs of DOJ, DOL, HHS, HUD, ED, VA, and DHS—that beneficiaries do not need ''prophylactic protections that create administrative burdens on faith-based providers and that are not imposed on other providers.'' 85 FR 2891 (DHS), 2924 (DOJ), 2932 (DOL), 2941 (VA), 2977 (HHS) 3195 (ED), 8219 (HUD). Other commenters argued, however,

that this rationale did not support the wholesale repeal of the other notice requirements. One commenter claimed that these notices were valuable to reassure qualified beneficiaries that the religious organization would follow the law. The commenter provided the hypothetical example of qualified beneficiaries who had had negative encounters with religious organizations and who would be inclined to refuse services from a faith-based organization but might overcome that reluctance due to the assurances in the notice.

Several commenters also charged that the Agencies had conceded the importance of these other notices by proposing to provide notices to faith-based organizations of their eligibility to seek and receive Federal funds. They said that beneficiaries should receive the same courtesy as potential applicants. Similarly, one commenter argued that Federal agencies had recognized the importance of notices in implementation of civil rights laws, pointing to HHS regulations regarding notice in 45 CFR 80.6(d), which have remained unchanged since their issuance in 1964 and are accompanied by model notice documents on the HHS website.

Response: The Agencies understand that illegal discrimination can be harmful to beneficiaries and can result in their forgoing services. The Agencies are committed to fighting illegal discrimination and ensuring that all beneficiaries have equitable access to the benefits provided by the federally funded programs and services governed by this final rule. This final rule reaffirms each Agency's regulatory provisions prohibiting providers—faith-based or secular, recipients of direct or indirect aid—from discriminating against beneficiaries based on religion. Additionally, for direct aid programs, this final rule retains the provisions prohibiting use of funds for explicitly religious activity and requiring any beneficiary's participation in explicitly religious activity to be voluntary.

The Agencies do not agree, however, that the other notices were vital to make beneficiaries aware of, and able to protect or seek enforcement of, these protections. No law mandates that beneficiaries receive such notice, and none was cited by the 2010 Advisory Council Report, the 2016 final rule, or the commenters on these proposed rules. As discussed in Part II.C.3.c, the Agencies believe the substantive provisions are adequate to protect beneficiaries' rights.

The Agencies also disagree that it is justified to require only faith-based organizations receiving direct Federal financial assistance to provide notice of the other protections. Any provider—faith-based or secular—is capable of discriminating on the basis of religion or of incorporating religious elements into its programs, such as the 12-step addiction recovery program that commenters cited as explicitly religious and that is discussed in Part II.C.2.b. (Many government-issued manuals promote 12-step programs, and many secular organizations conduct them as well.) Yet none of the secular providers were required to provide notices of these other protections. None of USAID's program participants—faith-based or secular—was required to provide such notices under the 2016 rule. And no provider in USDA's Child Nutrition Programs, including its school lunch program, was required to provide such notices.[10] The Agencies thus have already recognized that many beneficiaries do not need the other notices, in order to be aware of, and able to exercise, their corresponding rights.

The Agencies furthermore disagree that the other notice requirements can be justified as a measure to allay the fears of beneficiaries who might have had bad experiences with religious organizations. Beneficiaries might have had similar bad experiences with secular providers. Because the other notice requirements applied solely to religious organizations, they stigmatized religious organizations and risked stoking unnecessary fears by suggesting that religious organizations were more prone to violate program obligations that apply to all providers. A beneficiary who received the notices from a faith-based provider but not a secular provider of similar services might assume that the former was a serial violator, or that the latter was not subject, for example, to the nondiscrimination obligations. Additionally, research cited by some commenters found that people with an expectation of rejection or discrimination would feel that way ''whatever others profess'' to the contrary.[11] That research undermines the supposition that a form notice required by the Government would meaningfully allay beneficiaries' fears that they would be subject to discrimination.

Similarly, notice requirements that apply to other programs do not demonstrate that the Agencies should retain the notice requirement from the 2016 final rule. Commenters pointed to the notice in the HHS regulation at 45 CFR 80.6(d). That provision mandates that ''[e]ach recipient'' of funding ''shall make available to participants, beneficiaries, and other interested persons'' information regarding regulations effectuating Title VI of the Civil Rights Act of 1964 that bar discrimination based on race, color, or national origin. 45 CFR 80.1, 80.2, 80.3, 80.6(d). The HHS notice applies comprehensively to all recipients and was designed to help eradicate racial discrimination by any provider. This stands in contrast to the notice requirement from the 2016 final rule, which compelled only faith-based organizations to provide notice of certain beneficiary protections without evidence that faith-based organizations violated those protections more regularly than other providers, if at all. This final rule is meant to enable faith-based organizations to participate equally in the Agencies' federally funded programs. Removing the notice requirement takes one step toward achieving that purpose. This analysis is further bolstered by HHS's response in Part III.I regarding the distinctions between this final rule and HHS's recent final rule, *Protecting Statutory Conscience Rights in Health Care,* 84 FR 23170 (May 21, 2019).

Ultimately, the justification for imposing these notice requirements solely on faith-based providers participating in certain direct aid programs was prophylactic, perhaps based on the assumption that these providers were less likely to follow the law. But there is no basis on which to presume that faith-based providers are less likely than other providers to comply with their legal obligations. And any narrative to the contrary smacks of the now-repudiated Establishment Clause doctrine stating that ''pervasively sectarian'' institutions could not receive government funds, even for secular purposes, because they could not be trusted to prevent the diversion of government funds to religious uses. *Cf. Agostini* v. *Felton,* 521 U.S. 203, 224 (1997) (noting the Supreme Court's rejection of the idea that ''solely because of her presence on private school property, a public employee will be presumed to inculcate religion in the students''). Because, among other things, the Agencies now recognize that any such prophylactic concerns were

[10] The 2016 rule deemed the Child Nutrition programs indirect aid for purposes of exempting them from the notice (and referral) requirements, even though these programs otherwise meet the definition of ''direct Federal financial assistance.'' 81 FR at 19381; *see also id.* at 19413–14 (§ 16.4(a), (g), (h)).

[11] Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence,* 129(5) Psychol. Bull. 674, (Sept. 2003), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2072932/.*

exaggerated as well as selectively applied, the Agencies are changing the 2016 final rule.

As discussed in Part II.G.3, the Agencies will provide notice to potential applicants and awardees of their obligations under federally funded social service programs, including notice of the prohibitions on religion-based discrimination and explicitly religious activities. Those notices will ensure that the underlying requirements are incorporated into organizations' applications and compliance programs. Those notices are also consistent with *Trinity Lutheran* and RFRA, and they ensure that organizations are aware of their obligations under law—and of the Agencies' commitment to enforcement of these obligations—before applying for and accepting an award. Requiring these notices to faith-based providers does not conflict with removing the requirement to provide the other notices to beneficiaries. This final rule requires the Agencies and intermediaries to integrate such notices to faith-based organizations into the comprehensive program requirement materials already distributed to providers. This practice is materially different—for reasons discussed throughout Parts II.C and II.G.3—from requiring only faith-based providers to give the other notices to beneficiaries, especially notices that stigmatized faith-based providers by implying that they were more likely than their secular peers to violate the law. Additionally, beneficiaries who received the other notices would already have been communicating with the faith-based provider, and they could have asked the provider questions to ensure their eligibility and understand the scope of available benefits. The other notices thus provided little marginal utility to beneficiaries. Rather, notices to providers are a more appropriate way to achieve compliance with legal obligations, consistent with the constitutional and other concerns discussed throughout Part II.C that the Agencies are seeking to avoid.

Changes: None.

Affected Regulations: None.

2. Beneficiary Harms

a. In General

Summary of Comments: Several commenters claimed that removing all of the notice requirements, as well as the referral requirement, would cause various harms, burdens, and costs to beneficiaries. Some said that beneficiaries would no longer be aware of, and able to avail themselves of, the underlying religious liberty protections. Many claimed that removing the notice requirements would especially affect groups that commenters characterized as disadvantaged, including women, religious minorities, people of color, LGBTQ people, people with lower incomes, people with disabilities, and people in rural communities. Additionally, some commenters argued that the Agencies had not attempted to quantify the costs to beneficiaries associated with removal of these requirements.

Several commenters were concerned that removing the all of the notice requirements and the referral requirement would expose beneficiaries to increased religious discrimination, denial of services, proselytization, bias, or coercion. Several commenters, including advocacy organizations and Members of Congress, anticipated that these harms would increase because beneficiaries would no longer be aware of, and able to safeguard, their rights. Some commenters added concerns that beneficiaries might be more vulnerable to efforts to coerce them to participate in religious activities if they mistakenly believed such activities were necessary to access support. Other commenters were concerned about impacts on vulnerable groups, such as women, adherents of minority faiths, and LGBTQ people. And some local governments claimed that certain faith-based providers openly discriminate on the basis of gender identity or sexual orientation.

Some commenters argued that the Agencies had not adequately examined whether removing the notice would increase discrimination. They said the Agencies needed to provide evidence of other reliable, systematic ways to notify beneficiaries of these protections. Without such efforts, commenters claimed, these vulnerable beneficiaries—including refugees, human trafficking victims, and homeless youth—would be cut off from the one guaranteed way to ensure they know about these key protections.

Multiple commenters claimed that removing the alternative provider notice-and-referral requirements would harm beneficiaries by requiring them to take on the burden of identifying alternatives. These commenters noted that DOJ, DOL, HHS, HUD, VA, DHS, and USDA had acknowledged in their NPRMs that there could be a cost to objecting beneficiaries from having to locate alternative providers on their own. 85 FR 2894 (DHS), 2903 (USDA), 2926 (DOJ), 2935 (DOL), 2944 (VA), 2983 (HHS), 8221 (HUD). Commenters argued that beneficiaries would ''potentially'' have to miss work, find childcare, pay for transportation, and visit various other organizations to find alternative options, which would be ''extremely taxing'' or ''insensitive'' to the people the organizations are meant to support. And some commenters were concerned that objecting beneficiaries might not be aware that alternative services exist or be able to identify those alternatives.

Some commenters argued that the Agencies did not explain why low-income program participants would be better positioned than provider grantees to identify alternatives. These commenters argued that the Agencies' proposals to remove the alternative provider notice-and-referral requirements were inconsistent with their determination in the 2016 final rule that faith-based providers would ''generally be in the best position to identify alternative providers in reasonable geographic proximity and to make a successful referral of objecting beneficiaries to those alternative providers.'' 81 FR 19366. Additionally, some commenters disagreed with placing the burdens of investigation on vulnerable beneficiaries, arguing that vulnerable beneficiaries were less likely to understand their rights than faith-based organizations were to understand their rights to seek and receive Federal funding.

Some commenters argued that the Agencies could not assume that any faith-based providers would make referrals if the requirements were removed. The Council Chair suggested that such an assumption is comparable to the assumption that the religious freedom of faith-based organizations would be protected. Two umbrella groups of faith-based organizations who otherwise opposed removal of the referral requirement commented that group members were ''willing and able'' to provide referrals upon request; others believed they had a ''moral obligation'' to make referrals to alternative providers upon request.

Some commenters argued that, even if referrals were rare, the alternative provider notice-and-referral requirements should still be maintained to prevent harm to objecting beneficiaries. They argued that placing a burden on even one beneficiary would be significant.

One comment asserted that beneficiaries who have objected to faith-based providers in specific circumstances have sought referrals to alternative providers from organizations that share the beneficiaries' values rather than from the objected-to providers. As relevant here, the comment posited that beneficiaries may be less likely to seek alternatives—even

from these sources outside the prescribed process—if the alternative provider notice-and-referral requirements were eliminated. The comment also suggested that religious people might desire referrals to like-minded organizations but lack the resources to find them. As a result, they might be forced to endure violations of their religious freedoms or forgo essential social services.

Several commenters were concerned that, without the notice-and-referral requirements, beneficiaries would be forced to compromise their religious rights and identities. Some described this as a choice between accepting objectionable services and forgoing benefits. Others described it as a choice between accessing needed services and retaining religious freedom protections. Two umbrella groups of faith-based organizations expressed concern that members of minority religions seeking services from federally funded faith-based organizations of other religions could have their critical safety net benefits effectively conditioned on religious beliefs. Some of these commenters provided examples; one noted that veterans may be ''forced'' to accept ministry services from a religious group that they ''revile.'' Other examples are outlined in detail in the discussion of the comments in Part II.C.2.b and include harms to beneficiaries seeking opioid use disorder treatment, domestic violence shelters, and veteran job training services.

Some commenters claimed that beneficiaries would be blindsided by the provider's religious character in the absence of notice that the provider was religious, religiously affiliated, or promoted religious values, which would violate the constitutional principle that American government must remain secular. Another commenter suggested, however, that notice was not necessary because beneficiaries often know about a provider's religious character from the organization's title and can pursue a secular provider if they are uncomfortable with the provider's religious character.

Numerous commenters were concerned that beneficiaries, especially vulnerable beneficiaries, would lose access to benefits or forgo services without the benefits of notice and referral; some characterized the lack of notice and referral as a potentially insurmountable hurdle to beneficiaries' obtaining the help they need. They claimed that this would constitute a follow-on effect from all of the other harms discussed above, especially increased discrimination, lack of notice that discrimination based on religion is prohibited, absence of referrals, difficulty identifying alternatives, and lack of notice regarding alternatives and referrals. Some commenters were concerned that removing notice of the prohibition on discrimination would prevent beneficiaries afraid of such discrimination from seeking needed services. Other commenters were particularly concerned that shifting the burden of investigating alternatives onto beneficiaries with limited resources would leave them with no services or no ability to access services. One of these commenters claimed that ''millions of Americans'' might forgo vital services if they were unable to locate alternative providers. Multiple commenters emphasized that these protections were being denied to some of society's most vulnerable and marginalized, who have no choice but to use government-funded social services and may find it harder without the notice and referral to get the services they need. Some commenters characterized the Agencies' proposals to remove the requirements as ''unconscionable and unethical,'' ''indefensible,'' and ''hurtful and discriminatory.'' Commenters also argued that removing the notice-and-referral requirements would undermine the goals of reducing poverty, empowering low-income populations, and providing services to all who need them in the most effective and efficient manner possible, as articulated in existing Federal laws, regulations, and Executive Orders, including Executive Order 13279.

Some commenters focused on the final rule's combined effect of removing the notice requirement, removing the referral requirement, and allowing for religious accommodations. They were concerned that such changes would permit or increase the risk of discrimination or denial of service based on beneficiaries' protected statuses, such as sex, sexual orientation, gender identity, religion, and race. Some commenters said that this rule would roll back Federal protections against religious discrimination and thereby embolden, rather than deter, such discrimination. A few commenters were concerned that these changes would increase the need for referral, such as if a faith-based provider denied services to an eligible beneficiary, at the same time that these changes made referrals optional and, therefore, less likely to occur. Some argued that there would be increased costs to State regulatory agencies from an increase in complaints alleging discrimination in the provision of social services and medical care. That comment also referenced State nondiscrimination laws.

Similarly, other commenters claimed that the notice-and-referral requirements were even more critical because the Agencies proposed to expand religious exemptions and alter the requirements for faith-based recipients of indirect aid.

Response: For the reasons that follow, the Agencies disagree with the view that removal of the notice-and-referral requirements will cause the harms alleged, including discrimination, proselytization, bias, and coercion; burdens of investigating alternatives; choice between protecting religious liberties and accepting services; forgoing services altogether; and difficulty reporting violations of the provisions regarding discrimination and explicitly religious activities.

First, the public comments do not point to a single actual instance of past harm or negative consequence—with no evidence to support claims of discrimination, proselytizing, bias, coercion, or other harm—that occurred in these programs before the introduction of the alternative provider notice-and-referral requirements in 2016 and attributable to the absence of those requirements. That is addressed in greater detail in Part II.C.2.b. Indeed, the prohibition on explicitly (or inherently) religious activities in directly funded social service programs has existed in some form since Executive Order 13279 was issued in 2002, and commenters did not point to any actual harms from beneficiaries' lack of notice for the 14 years from 2002 through the issuance of the 2016 final rule.

Additionally, the notice-and-referral requirements never applied to any USAID program or to USDA's Child Nutrition Programs, including the school lunch program, which USDA deemed indirect aid for purposes of exempting them from those requirements. 81 FR 19381, 19384–85. Yet numerous comments catalogued hypothetical harms to beneficiaries that would occur if the notice or referral requirements were removed from USAID's programs and USDA's school lunch program. No comment to USAID or USDA cited an instance of actual harm that occurred over the past four years in the absence of these requirements in USAID or USDA programs. Despite their failure to point to concrete examples of harm, some of the same commenters still presented the same parade of horribles that would befall beneficiaries if the Agencies eliminated their nonexistent notice-and-referral requirements. The Agencies do not find this speculation persuasive.

Second, the Agencies believe that removing the notice-and-referral requirements will cause negligible, if any, risk of harm. Secular organizations use Federal funds to provide social services to the same needy and vulnerable beneficiaries as their faith-based counterparts, beneficiaries who are just as likely to be unaware of their rights or afraid of discrimination. Commenters do not claim any harm, however, from the absence of notice and referral by secular providers. The Agencies correctly determined in 2016 that secular organizations did not need to provide these notices in order to protect beneficiaries from any serious risk of harm. Now, they extend that same determination to faith-based organizations. Beneficiaries in all programs will be equally well aware of their rights and equally well positioned to protect and safeguard those rights, including by reporting any violations.

Third, the allegations that removing the referral requirement will harm beneficiaries are undermined by the Agencies' experience; referrals were rarely, if ever, sought under the prior rule. In fact, the Agencies are not aware of any actual instance of a request for a referral under the 2016 final rule or under SAMHSA programs, as discussed in Part II.C.3.c, and commenters did not cite any instance of a beneficiary who had sought such a referral. Removing the referral requirement also does not mean that a provider will refuse to make a referral if a beneficiary requests one. Service providers remain free to continue to make voluntary referrals to other providers. Indeed, some faith-based providers said they were willing and able to provide alternative-provider referrals, including one comment with over 7,000 signatures professing a ''moral obligation'' to do so. Other publicly available resources and mechanisms for referral also exist, including like-minded organizations, locators, and hotlines. These resources and mechanisms are discussed in the following paragraphs.

Fourth, the Agencies disagree that beneficiaries face any serious risk of harm from the process of finding alternatives themselves—either from any search costs or from choosing to forgo services completely. No evidence supports the speculative assertion that beneficiaries would need to miss work, obtain childcare, pay transportation costs, or visit various organizations in-person to find an alternative provider. Beneficiaries can learn about alternative providers from numerous sources, including through the internet or telephone, providers' marketing, and government outreach programs. The Agencies, State and local governments, advocacy groups, and service providers offer hotlines and online locators for many of these services; these tools can be found quickly with rudimentary online searches. The Agencies' websites provide easy means to locate providers, including providers of the services listed in the commenters' hypothetical examples (some of which may not be subject to this final rule): Opioid use disorder treatment (*https://findtreatment.samhsa.gov/*), domestic violence shelters, (*https://www.justice.gov/ovw/local-resources*), and veteran job-training services (*https://www.dol.gov/veterans/findajob/*). *See also https://www.hud.gov/findshelter* (homeless assistance and shelter locator); *https://www.acf.hhs.gov/otip/victim-assistance/national-human-trafficking-hotline* (human trafficking hotline and referral directory).

The Agencies also provide broader resources for beneficiaries and potential beneficiaries, including resources available on their main websites. For example, DOL's main website, *https://www.dol.gov,* has easy-to-find links to a wide variety of programs, a toll-free contact line at 866–4–USA–DOL (866–487–2365), and a general contact page at *https://www.dol.gov/general/contact.*

As ED explained in its NPRM: ''Beneficiaries need not rely on providers for information about other secular or faith-based organizations that provide social services. Beneficiaries are consumers of public information and are capable of researching available providers and making informed decisions about whether to choose to receive social services from secular or faith-based organizations.'' 85 FR 3194. Providers and advocacy groups create numerous materials that contain information regarding alternative providers. One commenter submitted an attachment authored by Justice in Aging that listed organizations willing to provide referrals to local advocates for individuals who may face bias or discrimination in a nursing home or assisted living facility.[12]

The Agencies thus no longer believe, as they did in 2016, that faith-based providers are ''generally . . . in the best position to identify alternative providers in reasonable geographic proximity and to make a successful referral of objecting beneficiaries to those alternative providers.'' 81 FR 19366. That position is not consistent with the Agencies' experience, which reveals that beneficiaries rarely invoke the referral requirement and that the resources to locate alternatives are readily available to beneficiaries. Additionally, beneficiaries know the scope of their needs and the sorts of organizations from which they may object to receiving services. Consequently, they will often be in the best position to find a suitable provider.

Fifth, the Agencies disagree that they need to conduct further analysis to better understand the costs to beneficiaries to independently locate acceptable alternative providers. It is difficult to quantify these potential costs with any precision, but the information the Agencies have available suggests that any costs would be minimal and no greater than any parallel costs already borne by beneficiaries of program providers that are not required to provide referrals. Additionally, the Agencies invited commenters to provide data and suggest further ways to assess any ''potential cost'' of the change, *see* 85 FR 2894 (DHS), 2935 (DOL), 2944 (VA); *see also* 2903 (USDA), 2926 (DOJ), 2983–84 (HHS). None of the over 95,000 comments received by the Agencies provided any data or insights on assessment methodologies that would meaningfully supplement the information the Agencies already have or demonstrate that costs would be more than minimal. The issue of costs and benefits is addressed in more detail in Part II.K.1.

Sixth, the Agencies disagree that, without the notice requirement, beneficiaries will be blindsided by the religious nature of the Government-funded services they may receive from program providers. In 2016 as today, all federally funded services offered by the programs must be secular. Beneficiaries do not need a warning of the religious nature of federally funded services when religious federally funded services are specifically prohibited.

Seventh, the Agencies disagree that removing the requirement of the notices (regarding nondiscrimination rights and the like) would inhibit beneficiaries from reporting violations. As discussed, there is no indication that beneficiaries need notice of how to report violations of these rights. In fact, as discussed, beneficiaries have not received such notice from many other providers. Rather than relying on beneficiaries to safeguard their own rights, the Agencies prefer to put the onus on the providers, by giving them express notice of their obligations and making clear that the Agencies will enforce those obligations.

[12] Justice in Aging, LGBT Older Adults in Long-Term Care Facilities: Stories from the Field 28 (updated June 2015), *www.justiceinaging.org.customers.tigertech.net/wp-content/uploads/2015/06/Stories-from-the-Field.pdf.*

Eighth, the Agencies disagree that the referral requirement should be retained because the need for referrals will increase due to provisions in this final rule that allow for certain accommodations to faith-based organizations. Any request for an accommodation will be assessed based on a context-specific analysis that will balance all of the relevant considerations, including whether the particular provider receiving the accommodation will be required to provide notice and referrals. For example, if a Sabbath-observant food pantry sought an accommodation to participate in a food pantry program while remaining closed on its Sabbath, the Agency would consider—as part of its inquiry into the burden on the food pantry weighed against the Government's justification and ability to accomplish its goals through means less restrictive of religious exercise—whether the pantry should give notice of this practice and should make referrals to ensure that beneficiaries can receive services on the pantry's Sabbath. The Agencies believe this case-by-case approach will better serve both providers and beneficiaries.

Finally, the Agencies understand that invidious discrimination can be harmful to beneficiaries and can result in their forgoing services. The Agencies are committed to fighting such illegal discrimination and ensuring that all beneficiaries have equitable access to benefits from the federally funded programs and services governed by this final rule. This final rule reaffirms each Agency's rule prohibiting providers from discriminating against beneficiaries based on religion.

However, the Agencies disagree that eliminating the notice requirements as well as the referral requirement threatens to increase discrimination based on sex, sexual orientation, gender identity, and race. This final rule does not roll back any such existing protections or allow faith-based organizations receiving direct aid to condition the receipt of benefits on acceptance of their religious beliefs. Moreover, other laws will continue to dictate the balance between providers' rights and beneficiaries' rights, including the right to be free from discrimination on the basis of sex.[13] For example, in USDA's program to fund facilities for public use, regulations prohibit grant recipients from discriminating against beneficiaries on several grounds, including on the basis of sex. *See, e.g.,* 7 CFR 1942.17(e), 3570.61(f), 3575.20(e).

The prior rule did not touch on those issues at all. It did not require informing beneficiaries that they could not be subject to discrimination based on sex, nationality, or any other protected classification. If anything, singling out religious discrimination in the notice could have implied that beneficiaries would not receive protection from other forms of discrimination. This final rule will touch on such issues only when a provider seeks a religious accommodation under the First Amendment or RFRA, in which case the Agencies will carefully review and balance the competing claims and apply relevant law, as discussed in Parts II.C.2, II.E, and II.F. This is the appropriate legal and policy choice to ensure that these rights are appropriately balanced and that religious liberty protections are not swept away by categorical rules. The Agencies have no reason to believe the notice requirements are necessary to promote the goals of reducing poverty, empowering low-income populations, and providing services to all who need them.

Changes: None.

Affected Regulations: None.

b. Specific Examples, Studies, and Hypotheticals

Summary of Comments: Commenters offered a number of examples in an effort to show the harms discussed in Part II.C.2.a, based on court cases, surveys, studies, and personal experiences—either by the commenter or reported directly to the commenter. Although most of the examples cited by commenters were hypothetical, some relied on actual instances or studies. The most significant actual instances were provided in a comment by a national legal organization that represents LGBTQ people in litigation, policy advocacy, and public education. It cited actual instances of LGBTQ people experiencing discrimination or denial of service when ''accessing services of the sort provided by federally funded social service programs.'' It cited one of its transgender clients who was scheduled for a hysterectomy at a religious hospital but had the procedure cancelled due to the hospital's religious objection. It also described actual instances of beneficiaries feeling uncomfortable receiving services from faith-based organizations. Many of this commenter's examples involved religious individuals with no indication that they were affiliated with any faith-based organizations, much less a faith-based organization receiving Federal funding. This commenter's examples, amicus briefs, and studies also cited comparable examples of discrimination by secular organizations, without indicating which secular organizations may have received Federal funding.

Another commenter cited court cases involving concrete examples of discrimination or denial of service that transgender people have faced in programs that offer alternatives to incarceration, such as probation. The commenter cited an example where, as part of a guilty plea, a transgender person was placed in a residential substance abuse treatment program; the person believed they were placed with the wrong sex and were ultimately transferred out of the program. As a result, this person failed to meet the terms of the plea agreement and was sentenced to another two and a half years in prison. *See Wilson* v. *Phoenix House,* No. 10–cv–7364, 2011 WL 3273179 (S.D.N.Y. Aug. 1, 2011); *Wilson* v. *Phoenix House,* 978 N.Y.S.2d 748 (Sup. Ct. 2013). The commenter also cited the case of a person who was denied eligibility by a halfway house in 2010 due to transgender status. *Kaeo-Tomaselli* v. *Butts,* No. 11–cv–00670, 2012 WL 5996436 (D. Haw. Nov. 30, 2012). Without citation, another commenter claimed actual instances of transgender people being sent back to prison when re-entry programs refused to serve them.

Some commenters cited surveys and studies chronicling actual instances of discrimination against specific vulnerable groups. Several commenters relied on a 2015 survey of transgender people in the United States, conducted by the National Center for Transgender Equality.[14] Commenters relied on this 2015 survey's examples of actual claimed instances of transgender people being misgendered intentionally, made to feel unsafe, and made to forgo further medical care. Commenters added that one transgender person who had been sexually assaulted reported in the 2015

[13] *See, e.g., Bostock* v. *Clayton Cty.,* 140 S. Ct. 1731, 1753–54 (2020) (acknowledging the potential applications of the ''express statutory exception for religious organizations'' in Title VII; of the First Amendment, which ''can bar the application of employment discrimination laws'' in certain cases; and of RFRA, ''a kind of super statute,'' which ''might supersede Title VII's commands in appropriate cases,'' and noting that ''how these doctrines protecting religious liberty interact with Title VII are questions for future cases too''); *Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n,* 138 S. Ct. 1719, 1732 (2018) (recognizing that many such disputes ''await further elaboration in the courts'').

[14] Sandy E. James, et al., National Center for Transgender Equality, The Report of the 2015 U.S. Transgender Survey (Dec. 2016), *https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.*

survey that their case was not investigated; they were denied a rape kit; and authorities, including a university, threatened them with punishment for reporting the assault, which caused them to live in fear. Commenters highlighted that some of the survey respondents stated that they were admonished that they deserved to be raped or should return to their birth gender to receive services. One commenter also noted the 2015 survey's finding that, of transgender people who had visited a public assistance or government benefits office in the past year, 11 percent reported being denied equal treatment or service and 9 percent reported being verbally harassed.

One commenter also provided specific reports that it collected of medical errors and misdiagnoses due to transgender status, transgendered people being turned away by doctors who claimed religious reasons, or being treated in a ''hateful'' way that included embarrassing the person in front of others due to transgender status. The commenter relayed other reports of medical mistreatment, including medical examinations halted in the middle when transgender status was revealed and hospitals placing transgender people in isolation. The commenter also described an older transgender adult who reported to a social worker having experienced sexual abuse and verbal harassment from nurse aides but did not want to report the incidents out of fear of retaliation and disclosure of transgender status to the patient's family.

Some commenters cited surveys and studies indicating that experience with discrimination leads to other harms. One commenter said that HHS had identified discrimination against beneficiaries as harmful to the health of vulnerable populations, citing a study entitled Healthy People 2020.[15] Others applied this general point to the LGBTQ community, noting that LGBTQ people report being or feeling unwelcome at social service providers, being subjected to discrimination, and forgoing care and services as a result. One of these comments pointed to a Center for American Progress national survey of LGBTQ adults published in 2017 that found 17 percent of respondents who had experienced anti-LGBTQ discrimination in the past year reported avoiding getting services that they or their family needed out of fear of facing further discrimination.[16] By removing the requirement that providers take reasonable steps to refer beneficiaries to alternative providers, the commenters argued, this final rule would expose many LGBTQ people who use human services programs to discrimination and apprehension of discrimination, which will in turn lead to many forgoing care and services for which they are qualified. Other commenters made the similar point—based on experience rather than studies—that the LGBTQ community has faced a history of discrimination, denial of service, harassment, and pressure to compromise their authentic selves in order to receive equal access to social programs. Without a proactive referral requirement, they argued, this community would rely on its past experience to inform the relationship with service providers.

Some of these commenters cited studies showing people had negative experiences in certain sectors or with certain categories of service providers. A commenter cited a then-unpublished 2019 American Atheists national survey of 34,000 nonreligious individuals, many of whom reported ''negative experiences'' due to their secular or nonreligious beliefs within the previous three years: 17.7 percent reported such negative experiences when receiving mental health services, 15.2 percent in substance abuse services, 10.7 percent in other health services, 6.2 percent in public benefits, and 4.5 percent in housing.[17]

Several commenters cited studies showing LGBTQ people had difficulty finding medical care providers. A commenter pointed to a 2018 Center for American Progress Survey (''2018 CAP Survey'') that, it asserted, demonstrated the difficulties LGBTQ individuals face in receiving services, including 17 percent of respondents (and 31 percent of non-metro respondents) saying it would be ''very difficult'' or ''not possible'' to find the same type of service they were seeking from a different community health center or clinic at a different provider.[18] Another commenter relayed reports of one transgender person's taking years to find a primary care physician willing to treat them and another transgender person's residing in a rural and lower-income area, struggling to attain basic healthcare.

Some commenters cited studies showing certain groups experience increased negative health outcomes that, these commenters claimed, would be exacerbated by removing the notice requirements and the referral requirement while providing for religious accommodations. A commenter cited studies indicating that LGBTQ individuals have negative health outcomes that have been termed ''minority stress.'' This commenter relied on studies indicating that gender-based discrimination against transgender people, especially in health care settings, is associated with increased rates of negative health outcomes, including depression, attempted suicide, and substance use. This commenter then argued that removing the notice and referral protections (as well as providing new accommodations) could contribute to significant health costs based on the direct medical and mental health impacts of discrimination alone. Similarly, another commenter claimed that older LGBTQ adults face pronounced health disparities and higher poverty rates compared to their peers, due in large part to historical and ongoing discrimination.[19]

A commenter focused on medical care for Bhutanese Hindu refugees. This commenter said that people in this group have already suffered immense trauma from forcible eviction from their home country due to their culture and religion, and they have experienced particular difficulty retaining their cultural and religious identity in the United States. The commenter claimed that removal of the notice-and-referral requirements would strip this vulnerable group of protections against discrimination, proselytization, or religious coercion in government-funded social services. The commenter claimed that Bhutanese Hindu refugees have a particular need to know their rights fully and to access health services, including mental health

[15] Office of Disease Prevention and Health Promotion, Healthy People 2020 (last updated Oct. 8, 2020), *https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/discrimination.*

[16] Sejal Singh and Laura E. Durso, Center for American Progress, Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways (May 2, 2017), *https://www.americanprogress.org/issues/lgbtq-rights/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/.*

[17] American Atheists, Reality Check: Being Nonreligious in America 23–24 & fig.14 (2019), *https://static1.squarespace.com/static/5d824da4727dfb5bd9e59d0c/t/5ec6d6d8e8da850b30521353/1590089442015/Reality+Check+-+Being+Nonreligious+in+America.*

[18] Shabab Ahmed Mirza and Caitlin Rooney, Center for American Progress, Discrimination Prevents LGBTQ People from Accessing Healthcare (Jan. 18, 2018), *https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/.*

[19] *See* Karen Fredriksen-Goldsen et al., The Aging and Health Report: Disparities and Resilience Among Lesbian, Gay, Bisexual, and Transgender Older Adults (November 2011), *www.lgbtagingcenter.org/resources/resource.cfm?r=419.*

services, because their rates of suicide and mental health conditions are higher than those of the rest of the population. Additionally, without being informed of their rights, the commenter expressed concern that these refugees may feel pressured to convert to Christianity or attend Christian religious services because they incorrectly believe those actions are required to continue receiving services. The commenter claimed that these outcomes would risk exacerbating the group members' already-concerning health trends.

Some of these commenters cited studies indicating that certain groups are more likely to receive government services, from which the commenters inferred that these groups are more likely to be harmed by removal of the notice-and-referral requirements. One commenter cited the 2018 CAP Survey to demonstrate that LGBTQ people are more likely to participate in a wide range of public programs. That commenter claimed this 2018 CAP Survey found that LGBTQ people with disabilities were especially likely to rely on government benefit programs, such as Supplemental Nutrition Assistance Program (''SNAP''), Medicaid, unemployment, and housing assistance. As a result, this commenter argued that ensuring access to federally funded social services programs by mandating referrals to alternative providers is vital for members of this vulnerable population. Another commenter stated that LGBTQ youth are at a higher risk of homelessness, citing Chapin Hall, Missed Opportunities: Youth Homelessness in America (2017), which reported LGBTQ youth at a 120 percent higher risk of homelessness than other young adults.

Other commenters made similar statistical claims without providing the basis for their claims. Commenters claimed that 20–40 percent of homeless youth are ''LGBT-identified'' and that LGBT youth disproportionately represent 40 percent of the homeless youth population in New York City. One of these commenters also said that most homeless families are headed by unmarried women and that these families are not well situated to absorb the burdens from the changes in this final rule. Another commenter claimed that people with disabilities and their families face a national shortage of accessible and affordable housing, particularly the lowest-income people with disabilities, and that removing these requirements could impose another barrier to housing programs for this population, such as Section 811 Supportive Housing for Persons with Disabilities.

One commenter argued that LGBTQ senior citizens have a particular need for the notice-and-referral requirements to access long-term services and supports because they do not have traditional support systems in place and are therefore more likely to rely on personal care aides or enter care facilities.[20] This commenter also conducted a survey that found LGBT older adults experienced discrimination in long-term care facilities ranging from verbal and physical harassment, to visiting restrictions and isolation, to denial of basic care such as a shower or being discharged or refused admission. They also cited examples of LGBT older adults being ''prayed over'' without their consent or being told they would go to hell. This commenter attached its report to the comment.[21] This commenter was concerned that eliminating the notice-and-referral requirements would make these types of discriminatory actions more common and make it harder for victims to seek recourse.

Additionally, a retired physician commented that she had experience with end-of-life issues and that patients and families who do not wish to receive ''futile or heroic treatments'' from religious doctors should be referred for another opinion.

Numerous commenters provided hypothetical examples of the harms they claimed would befall beneficiaries following removal of these notice-and-referral requirements. For example, two commenters to ED cited their extensive experience representing students in Federal court cases and administrative cases but claimed only that removing the notice-and-referral requirements ''would likely make it harder for beneficiaries to access programs serving marginalized young people,'' without citing any actual instances.

The Council Chair insisted that the alternative-provider referral requirement was essential. She asked the Agencies to ''imagine'' a victim of human trafficking who does not speak English, is in an unfamiliar location, is a single parent, and does not have reliable internet, yet has to research an alternative provider while working and caring for young children. This commenter claimed it is ''insufficient to assume'' that this beneficiary would be given assistance, just as, the commenter claimed, it is insufficient to assume that the rights of faith-based organizations would be protected.

Some of these commenters claimed removing the notice-and-referral requirements would especially harm beneficiaries in medical contexts. Multiple commenters expressed concern that critical care, including medical care, would be delayed or denied without a referral upon request. Commenters argued that removal of the referral requirement would impede access to medical care for beneficiaries who do not feel comfortable obtaining care from religious providers in rural areas that have medical care shortages and that often require farther travel, on poorer roads, with less access to public transportation than in urban areas. Commenters also highlighted concerns for children in the foster care, child welfare, and juvenile justice systems.

Commenters highlighted other social service areas as well, as outlined in the bullet points below. One commenter argued that discrimination in access to social services would reduce timely access to critical social services. It provided the hypothetical example of discrimination that delays shelter for someone experiencing homelessness or housing insecurity, which would cause prolonged homelessness, poor health, victimization, and negative interactions with law enforcement. The commenter noted that a day in a shelter costs less than a day in jail or an emergency room visit, citing a study on the costs of homelessness.

Some of these commenters claimed removing the alternative provider notice-and-referral requirements would harm beneficiaries from specific groups, which the commenters identified as vulnerable populations. Commenters argued that removing referrals would limit access and would disproportionately affect low-income communities, themselves already disproportionately made up of women, immigrants and refugees, LGBTQ people, and people with disabilities. These commenters argued that access is particularly important for these groups, which benefit from programs that help increase employment, alleviate poverty, and alleviate homelessness. According to these commenters, removing the referral requirement will only increase the likelihood of negative outcomes for these groups and will perpetuate the cycle that ties discrimination to an increased likelihood of unemployment and poverty.

Many commenters claimed that removal of the referral requirement

[20] *See* SAGE and Movement Advancement Project, Improving the Lives of LGBT Older Adults (March 2010), *https://www.lgbtmap.org/file/improving-the-lives-of-lgbt-older-adults.pdf.*

[21] Justice in Aging, LGBT Older Adults in Long-Term Care Facilities: Stories from the Field (updated June 2015), *www.justiceinaging.org.customers.tigertech.net/wp-content/uploads/2015/06/Stories-from-the-Field.pdf.*

would particularly burden LGBTQ beneficiaries. Some of these commenters claimed that referrals are ''vital'' for LGBTQ beneficiaries because they have unique difficulty obtaining secular or welcoming alternative service providers. Some of these commenters also argued that LGBTQ people may not be comfortable fully accessing the services they need in a religious environment. A comment on behalf of a local government suggested that LBGTQ people who already have concerns about their physical and emotional safety in accessing services—even in relatively welcoming communities, like San Francisco—will face further inequities because, the commenter believes, the proposed rules will encourage discrimination against LGBTQ people. Another commenter suggested that ''a job-training organization could refuse to assist a transgender individual with resume editing or professional wardrobe development consistent with their gender identity.'' That commenter argued that removing the notice and referral protections would empower organizations operating critical social services to refuse to fully serve LGBTQ people if those providers believe that recognizing an individual's gender identity or same-sex relationship violates their religious belief. That commenter also argued that people in the LGBTQ community have faced a history of discrimination and, without proactive notice of their rights, they would rely on their past experience to inform relationships with service providers. This commenter added that unwillingness of an organization to recognize and respect LGBTQ identities is tantamount to a denial of care altogether, with the same negative outcomes.

Commenters also argued that eliminating the notice-and-referral requirements would especially burden beneficiaries with disabilities who rely on service providers such as a case manager to coordinate necessary services, a transportation provider to attend appointments, and a personal care attendant to help with medications and managing daily activities. These commenters were concerned that such beneficiaries' access to services would be eliminated if such providers refused to provide a service and then refused to provide a referral for the beneficiary to obtain the service. These commenters were also concerned that beneficiaries with disabilities who are also in other historically disadvantaged groups were most likely to be refused service and would face greater challenges to receive accommodations.

Some commenters hypothesized that faith-based organizations could deny services outright based on sex; could claim religious interpretations to avoid providing services based on prejudice, bias, or stigma (a point addressed in Part II.E); and could delay or deny services during emergencies. Others crafted more specific hypothetical examples:

- LGBTQ individuals might not have the same opportunities to return to their communities if they are denied access to a Second Chance Reentry Initiative program due to their sexual orientation or gender identity, and they might not be given referrals to alternative providers.
- A same-sex couple could be refused family housing in the wake of a natural disaster, or a transgender shelter seeker could be refused gender appropriate housing by a FEMA grantee. The shelter could also be empowered to refuse access to medically necessary care.
- A FEMA grantee could claim a right to refuse to assist a same-sex couple in requesting Federal disaster-relief benefits.
- A transgender woman could risk being turned away from a woman's emergency shelter or a same-sex couple could be refused family housing at a HUD-funded provider.
- People seeking treatment for opioid use disorder might be prevented from receiving such treatment.
- A woman seeking safety for herself and her family from domestic violence could be prevented from finding a shelter.
- A veteran re-entering the civilian workforce could be prevented from receiving job training.
- A woman could be denied benefits based on a provider's religious belief that women should not work outside the home.
- LGBTQ homeless teenagers might not seek housing, food, or counseling services they need, including from a facility funded with HUD's Emergency Shelter Grant (''ESG'') program, because they know the religion of the faith-based provider condemns them for being gay.
- A single mother or same-sex couple could be turned away from assistance with buying their first home or preventing foreclosure.
- A pregnant or parenting teenager who is unmarried or divorced might avoid a faith-based provider or leave a faith-based group home that she thinks will condemn her or because she is uncomfortable in the religious setting.
- Muslim people might forgo affordable housing funded by HUD's Housing Opportunities for Persons with AIDS (''HOPWA'') program because they feel uncomfortable at a facility with Christian iconography throughout, even though receipt of HOPWA funds requires that program content be secular.
- A ''kid'' or ''young adult'' seeking HHS's Transitional Living for Homeless Youth program services like a bed, educational opportunities, or job training might be forced to receive services from a faith-based provider and have no way to access an alternative provider.
- Unaccompanied minors might have no recourse to seek an alternative provider if they were denied services because of the provider's opposition to those services on religious grounds, such as denial of transportation or interpretation services to attend a medical appointment contrary to the provider's religious beliefs.
- A nonreligious veteran at risk of homelessness seeking help with case management who also wants services, including education, crisis intervention, and counseling might feel ''very uncomfortable'' at a faith-based provider and not be aware of alternatives.
- A homeless veteran seeking job training to gain employment might be forced to receive those services from a faith-based provider but feel uncomfortable because the program takes place in a room adorned with religious banners, Bible verses, and religious symbols.
- Victims of human trafficking seeking vital services to build lives away from their traffickers, like housing or financial assistance, might feel uncomfortable getting services from a faith-based provider and drop out of the program, putting their safety at risk.
- An older LGBTQ person receiving food packages under the USDA Commodity Supplemental Food Program could be forced to pick them up in a church that he knows labels him as a sinner, when LGBTQ seniors already struggle to access culturally-competent support services.
- A student who identifies as LGBTQ or who is a child of LGBTQ parents might be confronted with open anti-LGBTQ hostility by an ED-funded social service program partnering with their public school to provide healthcare screening, transportation, shelter, clothing, or new immigrant services.
- Local food distribution agencies, such as food pantries or soup kitchens, might seek to deny services to vulnerable populations, including atheists, transgender people, single mothers and their children, and immigrants.

• An atheist required to attend a substance use disorder program might be compelled to attend a 12-step program that requires the recognition of a higher power and, without notice of her rights, might attend the program unsuccessfully, or forgo services, because she thinks all programs will require adherence to a higher power.

Response: The Agencies believe that all people should be treated with dignity and respect and should be given every protection afforded by the Constitution and the laws passed by Congress. The Agencies do not condone the unjustified denial of needed medical care or social services, and they are committed to fully and vigorously enforcing all of the nondiscrimination statutes for which Congress has granted them jurisdiction. The Agencies take seriously the examples commenters have cited, both real and hypothetical, as well as the studies commenters referenced.

The Agencies, however, disagree that harms discussed in these examples and studies overcome the reasons not to retain the notice requirements and the referral requirement. None of these harms, actual or hypothetical, arose in circumstances where those requirements would necessarily have had, or did necessarily have, any effect. The examples fail to show that these harms, if and when they occur, will necessarily increase in the absence of, or have been appreciably reduced because of, the notices and referrals required by the 2016 final rule. It will always be possible to imagine a circumstance where these requirements might have an effect, but the empirical data do not demonstrate that the requirements had any measurable impact in actual cases in which beneficiaries sought federally funded social services from religious providers.

Commenters' most direct examples came from the national legal organization that cited its clients and several studies. But even those cases and studies do not involve the precise issues here. They do not show harm unique to faith-based organizations receiving direct Federal financial assistance attributable to beneficiaries' (1) not receiving notice of a prohibition on discrimination based on religion (nor on other grounds), (2) not receiving notice regarding explicitly religious activities, (3) not receiving notice regarding referrals based on objections to the provider's religious character, or (4) not receiving a referral from the faith-based organization if the beneficiaries object to the organization's religious character. The vast majority of commenters' examples did not even involve faith-based organizations providing services in connection with direct Federal financial assistance. The cited harms are far beyond the scope of this final rule and would not have been prevented by the notice requirements and the referral requirement. Also, to the extent that these examples raise conflicts between beneficiaries' rights and the religious liberties of faith-based providers, resolution will depend on context-specific analyses of those underlying rights, as discussed in Parts II.C.3, II.E, and II.F.

For example, the national legal organization cited a case in which one of its transgender clients was scheduled for a hysterectomy at a religious hospital but had the procedure cancelled due to the hospital's religious objection. The client did not allege that the surgery was going to be provided through a Federal financial assistance program or activity, did not allege that the hospital had used direct Federal financial assistance for any explicitly religious activity, and did not allege anything else that would have been covered by the notice requirement. Complaint, *Conforti* v. *St. Joseph's Healthcare Sys.,* No. 17–cv–50 (D.N.J. Jan. 5, 2017), ECF No. 1. Moreover, this client raised the alleged discrimination with the commenting legal organization, which filed a complaint with HHS's Office for Civil Rights within six months. *Id.* ¶¶ 8, 80. Also, this client alleged a desire to have the surgery at the religious hospital where the client had received previous care, without indicating any objection to the hospital's religious character, *id.* ¶¶ 49–50, 58–72. It is thus unclear how the alternative-provider notice-and-referral requirements would have assisted this client.

The court cases cited by another commenter involving discrimination and denial of service in the criminal-justice system are even less persuasive. There is no indication that the treatment provider in either case was a faith-based organization or that the potential beneficiary objected based on the religious character of the treatment provider. Additionally, the conduct in those cases would not have been covered by the other aspects of the notice because those cases did not allege a claim of discrimination based on religion or a claim related to explicitly religious activities. In *Wilson* v. *Phoenix House,* a defendant supervisor in New York's Drug Treatment Alternative to Prison program had denied a transgender client access to a support group. 2011 WL 3273179, at *1 (S.D.N.Y. Aug. 1, 2011). In *Kaeo-Tomaselli* v. *Butts,* a librarian at the women's correctional center sought a halfway house for a transgender prisoner who had not yet been released from prison, and the defendants had refused the librarian's request. 2013 WL 5295710, at *1 (D. Haw. Sept. 17, 2013). Again, it is unclear how the notice-and-referral requirements would have helped these individuals.

The example of Bhutanese Hindu refugees is especially telling. The Agencies recognize the challenges faced by many immigrant and minority-faith communities, including Bhutanese Hindu refugees. The Agencies are concerned about the statistics and health risks cited by the commenter, and the Agencies are proud that their programs serve this vulnerable population. But this group, like all others, continues to be protected from religious discrimination [22] and, in direct Federal financial assistance programs and activities, from being required to participate in explicitly religious activities.

The Agencies are not aware of any causal connection between this group's negative health outcomes and the notice or referral requirements. In fact, several studies have analyzed the causes of this group's increased risks and none attributed them to faith-based service providers, lack of notice of religious liberty protections, or the absence of a referral from a religious organization to a provider that the beneficiary (or the commenter) deemed unobjectionable.[23] The concerns for Bhutanese Hindu refugees raised by these studies are beyond the scope of this final rule, and the Agencies have already begun to address them in other appropriate ways. For example, the Refugee Health Technical Assistance Center—funded by HHS's Office of Refugee Resettlement—

[22] *See, e.g.,* 8 U.S.C. 1522(a)(5) (expressly requiring States to provide assistance and services to refugees without regard to religion, race, or nationality in domestic resettlement programs).

[23] *See, e.g.,* Trong Ao et al., *Suicidal Ideation and Mental Health of Bhutanese Refugees in the United States,* 18(4) J. Immig. & Minor. Health, 828 (Aug. 2016), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4905789/;* Ashley K. Hagaman et al., *An Investigation into Suicides Among Bhutanese Refugees Resettled in the United States Between 2008 and 2011,* 18(4) J. Immigr. Minor. Health 819 (Jan. 2016), *https://www.researchgate.net/publication/290197605_An_Investigation_into_Suicides_Among_Bhutanese_Refugees_Resettled_in_the_United_States_Between_2008_and_2011;* Jennifer Cochran et al., *Suicide and Suicidal Ideation Among Bhutanese Refugees—United States, 2009–2012,* 62(26) Morbidity & Mortality Weekly Rep. 533 (July 5, 2013), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4604782/;* International Organization for Migration, Who Am I? Assessment of Psychosocial Needs and Suicide Risk Factors Among Bhutanese Refugees in Nepal and After Third Country Resettlement (2011), *https://www.iom.int/sites/default/files/our_work/DMM/Migration-Health/MP_infosheets/Bhutanese-Mental-Health-Assessment-Nepal-23-March_0.pdf.*

responds to the tragedy of suicide within refugee communities through both prevention and targeted intervention, with resources dedicated to Bhutanese refugees.[24] And current research that proposes models to address these issues suggests that religious connection is beneficial but does not suggest that notice of religious liberty protections in federally funded programs would have any impact on suicide rates.[25] The Agencies, therefore, have determined that removing the notice requirement will not harm this community and may assist this community by reducing barriers to entry into programs that address the causes of negative health impacts identified in the studies, including financial stresses, gender-based violence, mental health, alcohol abuse, and other vulnerabilities.

Some of the studies and reports cited by commenters claimed to demonstrate that LGBTQ beneficiaries have unique needs for which it is difficult to find alternative medical providers. If that is so, then notice and referrals are correspondingly less likely to be effective. Indeed, the cited studies identified the likely causes of these issues and prescribed solutions, but those studies did not mention notice of religious liberty protections or mandatory referrals by faith-based organizations as part of the problem or solution.[26]

The American Atheists Survey is even less relevant.[27] In addition to the general points that apply to many studies, that study analyzed self-reported ''negative experiences'' in specific ''locations'' without any indication that the negative experience was caused by the service provider. Additionally, while the study showed that between 4.5 percent and 17.7 percent of atheists have negative experiences in certain service locations, 54.5 percent of those same respondents indicated such negative experiences when interacting with their own families and 19.1 percent of the respondents reported negative experiences when accessing ''private businesses.'' This survey does not demonstrate any harm that would result from removal of the notice-and-referral requirements. To the extent this survey identifies a broader societal problem, the solution is beyond the scope of this final rule.

Similarly, some of these comments focused on the challenges of service availability in rural areas, based on the 2018 CAP Survey and other commenters' reports. The lower demand and fewer resources in rural areas can lead to provider shortages that result in beneficiaries having to travel farther, on poorer roads, with limited access to public transportation. The Agencies agree that obtaining services from an alternative provider can be more difficult in rural areas than in urban areas, and the relevant Agencies are working to address those concerns with rules, programs, and services apart from this final rule. But these challenges predated both the 2016 final rule and this final rule, and the Agencies disagree that the notice requirements and the referral requirement addressed these challenges in any meaningful way. Indeed, the preamble to the 2016 final rule recognized that it may be ''impossible'' to guarantee an alternative provider for services provided in a ''remote location.'' 81 FR 19364; *see also id.* at 19368 (''The Agencies believe that, in some cases, due to the location of the organization, availability of resources, the nature of the program, or other factors, a referral option may not be available.''). As a result, the referral requirement might be even less valuable to beneficiaries in rural areas. Whatever marginal value it might afford would not outweigh the other reasons given for eliminating the referral requirement.

Many of the studies did not analyze the critical issues necessary to draw relevant conclusions regarding the alternative provider notice-and-referral requirements. Those studies did not involve or specifically address federally funded programs, and the statistics cited by commenters differ from Federal data reported by grantees.[28] The studies did not analyze the incidents of harms by faith-based providers as opposed to other providers. Also, they did not identify problems attributable to the absence of, or that would be remedied by, the notice-and-referral requirements. Instead, many of these studies raise broader concerns regarding issues that are beyond the scope of this final rule, such as discrimination and the balance between LGBTQ rights and religious liberties. Finally, many of the studies have methodological limitations, recognized the possibility that other factors could account for the observed behaviors, and called for further research.[29]

[24] *See* Refugee Health Technical Assistance Center, Suicide Prevention, *https://refugeehealthta.org/physical-mental-health/mental-health/suicide/suicide-prevention/; see also* Prangkush Subedi et al., *Mental Health First Aid Training for the Bhutanese Refugee Community in the United States,* Int'l J. Mental Health Sys. 9:20 (2015), *https://ijmhs.biomedcentral.com/track/pdf/10.1186/s13033-015-0012-z;* Suicide Prevention Resources Center, Bhutanese Community Leaders Work to Prevent Suicide Among Refugees in New Hampshire (May 16, 2014), *http://www.sprc.org/news/bhutanese-community-leaders-work-prevent-suicide-among-refugees-new-hampshire* (describing targeted programming based on a survey of Bhutanese refugees living in that community).

[25] Jonah Meyerhoff et al., Suicide and Suicide-Related Behavior Among Bhutanese Refugees Resettled in the United States, 9(4) Asian Am. J. Psychol. 270 (Dec. 2018), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6980157/.*

[26] *See, e.g.,* Jaclyn M. White Hughto et al., Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms, and Interventions, HHS Public Access, Author Manuscript at 5 (published in final edited form at 147 Soc. Sci. Med. 222 (Dec. 2015)), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4689648/pdf/nihms739646.pdf* (study cited by commenters, attributing the limited availability of appropriate transgender medical care primarily to lack of trained healthcare providers); *id.* at 11–12 (prescribing education and inter-group contact for providers).

[27] *See* American Atheists, Reality Check: Being Nonreligious in America (2020), *https://static1.squarespace.com/static/5d824da4727dfb5bd9e59d0c/t/5ec6d6d8e8da850b30521353/1590089442015/Reality+Check+-+Being+Nonreligious+in+America* (referenced in the comments as unpublished and reviewed by the Agencies subsequent to publication).

[28] For example, with regard to youth homelessness, one percent of unaccompanied youth self-identified as LGBT nationwide. HUD Exchange, HUD, PIT and HIC Data Since 2007 (Jan. 2020), *https://www.hudexchange.info/resource/3031/pit-and-hic-data-since-2007.* Also, a runaway and homeless youth site in New York reported 23.3 percent of the youth homeless population it served to be LGBT. Administration for Children and Families, HHS, Final Report—Street Outreach Program Data Collection Study (Apr. 12, 2016), *https://www.acf.hhs.gov/archive/fysb/resource/street-outreach-program-data-collection-study.*

[29] *See, e.g.,* American Atheists, Reality Check: Being Nonreligious in America (2020), *https://static1.squarespace.com/static/5d824da4727dfb5bd9e59d0c/t/5ec6d6d8e8da850b30521353/1590089442015/Reality+Check+-+Being+Nonreligious+in+America* (published after submission of comments); Office of Disease Prevention and Health Promotion, Healthy People 2020 (last updated Oct. 8, 2020), *https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/discrimination;* Caitlin Rooney et al., Center for American Progress, Protecting Basic Living Standards for LGBTQ People (2018) *https://www.americanprogress.org/issues/lgbt/reports/2018/08/13/454592/protecting-basic-living-standards-lgbtq-people/;* Sejal Singh andLaura E. Durso, Center for American Progress, Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways (May 2, 2017), *https://www.americanprogress.org/issues/lgbtq-rights/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/;* Chapin Hall, Missed Opportunities: Youth Homelessness in America 10 (2017), *https://voicesofyouthcount.org/wp-content/uploads/2017/11/VoYC-National-Estimates-Brief-Chapin-Hall-2017.pdf* (mentioning the need to identify at-risk youth and initiate ''service referrals'' to an initial provider, with no mention of faith-based providers or objections to any provider); Sandy E. James et al., National Center for Transgender Equality, The Report of the 2015 U.S. Transgender Survey (Dec. 2016), *https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf;* Jaclyn M. White Hughto et al., *Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms, and Interventions,* 147 Soc. Sci. Med. 222 (Dec. 2015), *https://www.ncbi.nlm.nih.gov/*

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Similarly, the example of end-of-life issues is not relevant. End-of-life issues and the balance of rights between patients, healthcare employees, and affiliated organizations are governed by a complex set of statutes and regulations that fall outside the scope of this rulemaking. There is no reason to believe that the notice-and-referral requirements would affect the situation raised by the comment about disagreements over when it is appropriate to end aggressive treatments for a patient. The 2016 final rule did not require the notice to describe the religious character or tenets of the provider, such as a hospital's connection to the Roman Catholic Church or its adherence to ethical directives of the Catholic Church. The notice would not have conveyed in any helpful detail how a particular physician or treatment facility would approach an end-of-life scenario. That information is more likely to be discernible from the provider's name, especially when combined with the information on the provider's website, and other informational materials unaffected by this final rule.

The Agencies also disagree that various groups' prevalent use of federally funded programs would translate into disproportionate harms to those groups from removal of the notice-and-referral requirements. The Agencies are proud that these comments, including ones supported by research, demonstrate that people with unique needs and challenges benefit from the Agencies' programs and services. The Agencies will continue to support appropriate programming for all communities in need. But for the reasons discussed in Part II.C, a community's widespread participation in federally funded programming does not show that the removal of the notice-and-referral requirements would increase the likelihood of negative outcomes, such as increased poverty and unemployment, among this population. None of the surveys or reports discussed in comments makes such a showing. Moreover, these surveys rely on programs not directly relevant here. For example, commenters relied on the portion of the 2018 CAP Survey that cited instances in indirect-aid programs, such as SNAP and some housing assistance programs, that were never subject to the notice-and-referral requirement. 81 FR 19363, 19386, 19414. As such, these sources cannot support the contention that the notice-and-referral requirements alleviated instances of alleged harm—or that the removal of such requirements would increase the risk of instances of such harm.

All of these responses apply with equal or greater force to the commenters' hypothetical claims of harms. Many of the programs cited by the commenters operate in contexts that further minimize the risk of harm to beneficiaries. For example, several commenters claimed there were unique needs for objections to religious character by victims and survivors of human trafficking. As suggested by the Council Chair, the Agencies can certainly imagine a victim of human trafficking who does not speak English, is in an unfamiliar location, is a single parent and does not have reliable internet; who has to research an alternative provider while working and caring for young children; and who needs guaranteed assistance finding an alternative provider. The relevant Agencies are working very hard to support and provide services for victims of human trafficking, including those with any of the listed characteristics. Research shows that human trafficking victims and survivors face many substantial and documented hurdles to receiving care, especially those victims and survivors residing in regions that have limited resources. However, and even though many studies have included faith-based service providers, the Agencies are not aware of any research indicating that objections to the religious character of the provider is a hurdle for potential beneficiaries at all, let alone a substantial hurdle.[30] Instead of addressing hypothetical harms that seem to arise infrequently at best, the Agencies and experts in the field are moving toward incorporating first-person victim experiences into trafficking policy, programs, research, evaluation, and responses, with safeguards to minimize re-victimization or re-traumatization.[31] These data, in short, do not indicate a need for the notice requirements or the referral requirement.

The Agencies, moreover, recognize that faith-based providers have been integral to the national and international efforts to address human trafficking and to respond to the needs of victims and survivors.[32] There is no suggestion that these faith-based organizations, which are committed to the fight against human trafficking and the care of trafficking victims and survivors, would further traumatize those individuals by seeking to convert them. The Agencies also recognize that some studies indicate that alternatives to traditional therapies, including ''offering organized religious or spiritual activities to help victims connect to something that will last beyond the program timeframe,'' are ''considered important adjunct therapies for this population.'' [33] Human trafficking victims often interact with multiple agencies, including law enforcement agencies, that can provide referrals to alternative providers if the

pmc/articles/PMC4689648/pdf/nihms739646.pdf; Justice in Aging, LGBT Older Adults in Long-Term Care Facilities: Stories from the Field 11 (updated June 2015), *www.justiceinaging.org.customers.tigertech.net/wp-content/uploads/2015/06/Stories-from-the-Field.pdf* (citing examples of patients being ''prayed over'' or told they would go to hell but without referencing key factors, including whether the provider was faith-based (or whether it was a religiously motivated staff person who caused the issue)); Karen Fredriksen-Goldsen et al., The Aging and Health Report: Disparities and Resilience Among Lesbian, Gay, Bisexual, and Transgender Older Adults 17–18, 38, 47 (Nov. 2011), *https://www.lgbtagingcenter.org/resources/pdfs/LGBT%20Aging%20and%20Health%20Report_final.pdf* (noting that 38 percent of respondents ''currently attend spiritual or religious services or activities at least once a month''—and identifying ''referral services'' as a needed service, apparently referencing initial provider referrals—and making no mention of objections); SAGE and Movement Advancement Project, Improving the Lives of LGBT Older Adults 52, 60 (Mar. 2010), *https://www.lgbtmap.org/file/improving-the-lives-of-lgbt-older-adults.pdf* (indicating that LGBT advocates should provide information and referrals, including to ''local LGBT-friendly experts'').

[30] *See, e.g.,* U.S. Department of State, *Trafficking in Persons Report* 20–21, 28–33 (20th ed. June 2020), *https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf* (describing the challenges of ''trauma bonding,'' extraterritorial abuse and exploitation, the many ways providers need to ''reengineer[ ]'' health care for survivors, and the intersection between trafficking and addiction); Elzbieta Gozdziak and Lindsay Lowell, *After Rescue: Evaluation of Strategies to Stabilize and Integrate Adult Survivors of Human Trafficking to the United States* 5, 10–29 (Apr. 2016), *https://www.ncjrs.gov/pdffiles1/nij/grants/249672.pdf* (describing the challenges of survivors' needs and survivor stabilization facing programs, including ones run by faith-based organizations before the referral requirement was promulgated); Laura Simich et al., *Improving Human Trafficking Victim Identification—Validation and Dissemination of a Screening Tool* 12, 184–87 (June 2014), *https://www.ncjrs.gov/pdffiles1/nij/grants/246712.pdf* (describing many of the challenges of meeting the needs of human trafficking victims and survivors in a study that worked with faith-based providers).

[31] *See, e.g.,* National Institute of Justice, Expert Working Group on Trafficking in Persons Research Meeting 13–17 (Apr. 24–25, 2014), *https://www.ncjrs.gov/pdffiles1/nij/249914.pdf.*

[32] *See, e.g.,* U.S. Department of State, *Trafficking in Persons Report* 24–25 (20th ed. June 2020), *https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf* (describing faith-based organizations' efforts to combat human trafficking and the reasons such organizations ''are powerful and necessary forces in the fight against human trafficking'').

[33] Heather Clawson et al., *Treating the Hidden Wounds: Trauma Treatment and Mental Health Recovery for Victims of Human Trafficking* 7 (Mar. 15, 2008) (describing the many challenges of treating human trafficking victims), *https://aspe.hhs.gov/system/files/pdf/75356/ib.pdf.*

victim would like one. Also, human trafficking service providers commonly have informational materials available in multiple languages, which reference national and regional hotlines that can otherwise provide referrals to any beneficiary who cannot undertake research or labor-intensive efforts to locate a provider. The Agencies determine, in their policy discretion, that it is appropriate to direct their funding and related requirements toward meeting the documented needs of human trafficking victims and survivors rather than an undocumented need to address objections to providers' religious character.

Commenters' hypothetical example of a faith-based organization acting with open hostility toward an LGBTQ public school student is similarly inapt. There is no basis to conclude that faith-based providers would show such anti-LGBTQ hostility in an ED-funded program run through a public school. Yet even so, it is unclear how the notice-and-referral requirements would have helped the student. Students subjected to such hostility would most likely seek redress or referral to an alternative provider through their public school, not from the provider.

The hypotheticals, provided in the comments, also relied on claims of discrimination on bases other than religion in reentry programs, disaster relief programs, food pantries, substance use disorder programs, medical care programs, women's emergency shelters, and HUD housing programs, without explaining how those harms were connected to, or were addressed by, the notice-and-referral requirements. The same is true for the hypotheticals suggesting that providers would deny services based on sex; delay or deny services during emergencies; deny services to unaccompanied minors; make beneficiaries uncomfortable; or claim religious interpretations to avoid providing services based on prejudice, bias, or stigma. For example, many domestic violence shelters admit women with male children only below a certain age to protect victims and minimize re-traumatization. Other laws and policies determine whether and when such a shelter must admit a transgender person. These policies are unrelated to the alternative provider notice-and-referral requirements. Nonetheless, for completeness, the Agencies note that, if such admission were required contrary to a faith-based provider's sincerely held religious beliefs, it could seek an accommodation under this final rule, which would be handled in a context-specific analysis that is explained in Part II.E. Otherwise, however, this issue is beyond the scope of this final rule regarding equal participation of faith-based organizations and, in all events, was not addressed by the notice-and-referral requirements.

Many of these examples raise forms of discrimination or other conduct that are prohibited by other provisions within the Agencies' regulations but were not addressed by the notice-and-referral requirements. For instance, commenters' examples include a hypothetical beneficiary who seeks to participate in the Second Chance Act Reentry Initiative administered by DOJ's Office of Justice Programs but is excluded based on sexual orientation or gender identity. Like all DOJ grants, providers in this program must comply with several nondiscrimination provisions, including the prohibition on discrimination on the basis of sex under section 901 of Title IX of the Education Amendments of 1972.[34] How those requirements would apply is beyond the scope of the final rule and entirely unaffected by removal of the notice-and-referral requirements. To the extent these commenters raise concerns about the use of religion as a pretext for unlawful discrimination, the Agencies address these concerns in Part II.E.

For all of these reasons, the Agencies determine that removing the notice requirements and the referral requirement will not unduly harm beneficiaries, including beneficiaries from the populations identified by commenters, and will not make it more likely that such vulnerable groups do not receive needed services. Removing these requirements is also appropriate to address the tension with the Free Exercise Clause and with RFRA, discussed next. To the extent any of these hypotheticals demonstrate that broader substantive protections are necessary, they should apply to non-faith-based providers as well as faith-based providers, and they are therefore beyond the scope of this final rule.

Changes: None.

Affected Regulations: None.

3. Tension With the Free Exercise Clause and RFRA

a. Unequal Burdens

Summary of Comments: Several commenters said that, under the Free Exercise Clause, strict scrutiny applies to government funding programs that discriminate against, or impose special burdens on, faith-based organizations because of their religious character or status, as outlined in *Trinity Lutheran Church of Columbia, Inc.* v. *Comer,* 137 S. Ct. 2012 (2017); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520 (1993); Executive Order 13831; and the Attorney General's Memorandum. These commenters, including 21 current members of the House of Representatives and a State attorney general, argued that the notice-and-referral requirements should be removed because they imposed unfair and discriminatory burdens on faith-based organizations that either violated or were in tension with this Free Exercise Clause standard.

Some commenters argued that the holding in *Trinity Lutheran* did not provide a sufficient justification for the removal of the notice-and-referral requirements due to the dissimilarities discussed throughout this section that commenters perceived between the prior rule and issues presented in *Trinity Lutheran*—namely, that the notice-and-referral requirements did not exclude faith-based organizations from participation in federally funded government programs; that the requirements were justified on the basis of religious activity, not religious character; and that the holding in *Trinity Lutheran* was not applicable, given its perceived limitation to the facts before the Court.

Some commenters argued that the alternative provider notice-and-referral requirements violated *Trinity Lutheran*'s holding by facially discriminating on the basis of religious character. These commenters reasoned that the notice-and-referral requirements applied explicitly based on the providers' ''religious character.'' In one public comment, the Council Chair—who opposed removal of these requirements—agreed that these requirements applied only to religious organizations because they were based on ''a beneficiary's objection to an organization's 'religious character.' '' And the other aspects of the notice requirement applied solely to faith-based organizations based on that status.

Some commenters argued that strict scrutiny would apply to the notice-and-referral requirements under *Trinity Lutheran*—both as unequal treatment and as special burdens—because those requirements were imposed on faith-based, but not secular, organizations. Some of these commenters added that this unequal treatment stigmatized faith-based providers as inferior, offensive, or ''second class citizens.'' Another commenter added that these

[34] *See, e.g.,* Office of Justice Programs, Department of Justice Grants and Cooperative Agreements: Statutes and Regulations Related to Civil Rights and Nondiscrimination (updated Mar. 2018), *https://www.ojp.gov/program/civil-rights/statutes-regulations.*

requirements created the impression that the Government considers religious people inherently suspect because of their faith, suggesting that the Government believes Americans are more likely to find religious providers objectionable than secular providers.

Some of these commenters supported removal of these requirements to create a level playing field for faith-based and secular organizations, consistent with *Trinity Lutheran.* Some added that removing the requirements would restore an environment of religious freedom across the country and ensure that faith-based organizations are free to offer services, help their communities, and follow their missions unhindered by burdensome government regulations.

Several commenters, however, argued that the Free Exercise Clause requirement to treat secular and religious organizations equally only applies when a rule ''categorically exclude[s]'' religious organizations from receiving grants or other benefits ''solely'' because of their religious character. Some of these commenters argued that *Trinity Lutheran* and *McDaniel* v. *Paty,* 435 U.S. 618 (1978) (plurality opinion), apply only when the benefit at issue was denied in its entirety, or the organization was deemed ineligible solely because of its religious character. These commenters argued that this standard does not apply to laws that allow faith-based organizations to participate in a program with safeguards to protect beneficiaries' religious liberty. A few advocacy organizations argued that *Locke* v. *Davey,* 540 U.S. 712 (2004), allows exclusions based on factors other than the religious character of an organization or program. They pointed to *Locke*'s upholding a law barring state funding, even in an otherwise neutral indirect-aid program, for an ''essentially religious endeavor.'' In contrast, they said, *Trinity Lutheran* only applies to exclusions based solely on religious character.

These commenters argued that the notice-and-referral requirements did not violate this standard because faith-based organizations were still allowed to compete to participate in the Agencies' programs as providers. They characterized the notice-and-referral requirements as appropriate safeguards balanced to protect the competing interests of providers and beneficiaries. Some said the requirements were applied only to faith-based providers to protect the religious rights of the people they serve, not to disfavor those providers for their religious character. Some commenters also claimed that the requirements did not create constitutional problems because, as they saw it, the 2016 final rule generally allowed faith-based organizations to receive grants on ''the same basis as'' secular organizations. *See* 81 FR at 19358 (describing this requirement).

Several commenters argued that the notice-and-referral requirements had the effect of excluding faith-based organizations only if they declined to provide the required notice or referral, not because of their religious character. These commenters added that no Agency had pointed to evidence that any faith-based organization had actually been excluded because it had run afoul of these requirements. Some also noted that the 2016 final rule expressly stated that providers could not be excluded from participation in programs because of their religious character. Commenters added that, if an agency excluded a faith-based organization for refusing to comply with the rule, the Agencies could make clear that the exclusion was because of the organization's religious activity, not its religious character.

One commenter argued that the notice-and-referral requirements were ''simply one practical way to ensure that rules are understood and respected'' and that similar notices were required by the Fair Labor Standards Act (FLSA), 29 CFR 516.4; the Equal Employment Opportunity Act (EEOA), 29 CFR 1601.30; and the Family Medical Leave Act (FMLA), 29 CFR 825.300(a). Another commenter made the same point based on a poster requirement that applies to ''all persons subject to section 804'' of the National Housing Act, 24 CFR 110.10.

Several commenters asserted that *Trinity Lutheran*'s holding applies only to the specific facts of that case—''discrimination based on religious identity with respect to playground resurfacing''—because of a footnote in the plurality portion of the opinion. 137 S. Ct. at 2024 n.3. These commenters relied on the footnote's statement that the decision did not ''address religious uses of funding or other forms of discrimination.'' *Id.* Some added that cases decided by the U.S. Court of Appeals for the Third Circuit and District of Maine—*Real Alternatives* v. *Sec'y HHS,* 867 F.3d 338, 361 n.29 (3d Cir. 2017), and *Carson* v. *Makin,* 401 F. Supp. 3d 207, 211 (D. Me. 2019)—interpreted this footnote as limiting *Trinity Lutheran* to its facts. Several commenters argued that excluding a faith-based organization from a program to fund resurfacing material for playgrounds is very different from requiring a faith-based organization to comply with the notice-and-referral requirements.

Finally, one commenter cited *Employment Division, Department of Human Resources of Oregon* v. *Smith,* 494 U.S. 872, 878–79, 885 (1990), to argue that the notice-and-referral requirements were constitutionally permissible because the First Amendment does not provide individuals with an unconditional right to act in accordance with their religion.

Response: The Agencies agree with the commenters who argued that the notice-and-referral requirements were in tension with the Supreme Court's subsequent decisions in *Trinity Lutheran Church of Columbia, Inc.* v. *Comer,* 137 S. Ct. 2012 (2017), and *Espinoza* v. *Montana Department of Revenue,* 140 S. Ct. 2246, 2255–26 (2020). Under *Trinity Lutheran,* government-funded programs that ''single out the religious for disfavored treatment'' are subject to the ''strictest'' or ''most exacting scrutiny.'' 137 S. Ct. at 2019, 2021. This standard ''protects religious observers against unequal treatment'' and from ''laws that target the religious for 'special disabilities' based on their 'religious status,''' *id.* at 2019, and is echoed in Executive Order 13831 and the Attorney General's Memorandum. The Supreme Court recently reaffirmed the central holding of *Trinity Lutheran* and made clear that the decision is not limited to the facts of that case but more broadly addressed discrimination on the basis of religious status. *Espinoza,* 140 S. Ct. at 2255–56 (quoting *Trinity Lutheran* and citing cases).

It is unclear whether the holdings in these cases are limited to categorical exclusion from government-funded programs or benefits on account of religious character. To be sure, the facts of *Espinoza* and *Trinity Lutheran* involved such exclusions.[35] But the Supreme Court also stated that a law may not ''*regulate* or outlaw conduct because it is religiously motivated'' or '' 'impose[ ] *special disabilities* on the basis of religious status.' '' *Trinity Lutheran,* 137 S. Ct. at 2021 (emphasis added) (quoting *Lukumi,* 508 U.S. at 533). *Trinity Lutheran* described ''the 'injury in fact' '' in such cases as ''the inability to compete on an equal footing in the bidding process, not the loss of a contract.'' *Id.* at 2022 (quoting *Ne. Fla. Chapter, Associated Gen. Contractors of Am.* v. *Jacksonville,* 508 U.S. 656, 666 (1993)). In *Espinoza,* after repeating that

[35] *See, e.g., Espinoza,* 140 S. Ct. at 2260 (''When otherwise eligible recipients are disqualified from a public benefit 'solely because of their religious character,' we must apply strict scrutiny.'') (quoting *Trinity Lutheran,* 137 S. Ct. at 2021).

''status-based discrimination is subject to the 'strictest scrutiny,' '' the Court hastened to add that ''[n]one of this is meant to suggest . . . that some lesser degree of scrutiny applies to discrimination against religious uses of government aid,'' an issue the Court declined to reach in that case. 140 S. Ct. at 2257 (quoting *Trinity Lutheran,* 137 S. Ct. at 2022).[36] Most recently, in *Roman Catholic Diocese of Brooklyn* v. *Cuomo,* 590 U.S. __, No. 20A87, 2020 WL 6948354 (Nov. 25, 2020) (per curiam), the Supreme Court granted an application for preliminary injunctive relief from a governor's COVID–19 order that applied stricter limits in certain zones on the numbers of people who could gather in ''houses of worship'' than on the numbers who could gather in ''essential'' businesses. *See id.* at *3 (''Because the challenged restrictions are not 'neutral' and of 'general applicability' they must satisfy 'strict scrutiny' . . . .'').

Because these Supreme Court decisions suggest that the forbidden discrimination covers more than just categorical exclusions, the Agencies conclude that the notice-and-referral requirements are at least in tension with the Supreme Court's subsequent decisions in *Trinity Lutheran* and *Espinoza.* As the Council Chair acknowledged, these requirements applied solely to religious organizations, and the organizations' obligation to make a referral was triggered solely by beneficiaries' objections to their ''religious character.'' *See Espinoza,* 140 S. Ct. at 2255–56 (holding the provision at issue was based on religious character because it applied ''solely by reference to religious status''). The notice requirement applied to ''religious organizations,'' ''faith-based organization[s],'' or all ''religious organizations, regardless of beliefs or conduct.'' [37] The referral requirement was triggered by objections to the organization's ''religious character.'' [38]

The Agencies also disagree that *Locke* necessarily implies that the notice-and-referral requirements were permissible regulations of religious activity. The challenged law in *Locke* prohibited the use of State scholarship funds for ''religious training'' in ''devotional theology.'' 540 U.S. at 719–21. The program denied funds to a recipient because of what the recipient ''proposed to *do*—use the funds to prepare for the ministry.'' *Trinity Lutheran,* 137 S. Ct. at 2023–24; *see also Espinoza,* 140 S. Ct. at 2257 (distinguishing *Locke*). The Court in *Locke* drew a distinction based on conduct—the ''essentially religious endeavor'' of ''[t]raining someone to lead a congregation.'' 540 U.S. at 721. In contrast, the notice-and-referral requirements were triggered by an organization's religious character alone, not its religious conduct, and applied to a use of funds that is required by the rule to be secular.

Moreover, the Agencies disagree that notice-and-referral obligations borne solely by faith-based organizations cannot ever rise to the level of discrimination or impose special burdens. To be sure, the costs of compliance may have been minimal, particularly in view of the Agencies' experience that beneficiaries have almost never—and perhaps have never—sought to invoke the referral option. But the imposition of the notice-and-referral requirements arguably denied faith-based organizations the opportunity ''to compete with secular organizations'' on a level playing field, *Trinity Lutheran,* 137 S. Ct. at 2022, and may have cast doubt on the suitability of religious organizations to provide the social service in question. The requirements gave the impression that such religious providers were not favored or trusted to provide the particular social service in accordance with the general requirements of the law, were more likely to discriminate, or were more likely to be objectionable. The Agencies, therefore, disagree that the required notice and concomitant referral obligation could not have the effect of denigrating or casting a negative light on faith-based providers.

The Agencies further disagree with commenters' suggestions that these negative implications were tempered in any meaningful way by the general assurances in the rule that religious organizations could compete ''on the same basis as'' secular organizations and would not be subject to discrimination based on their religious character. Those general statements did not change the specific terms and effects of the notice-and-referral requirements. The fact still remained that only religious organizations bore those burdens.

The Agencies acknowledge that the notice-and-referral requirements were not meant to denigrate or punish religious organizations but to protect beneficiaries. The holdings in *Trinity Lutheran* and *Espinoza,* however, did not turn on the intent of the Government. Because of the uncertainty expressed above about what, if any, benefit the notice-and-referral requirements provided beneficiaries, the Agencies are not confident that the requirements would always survive the ''strictest'' or ''most exacting scrutiny'' as applied to particular cases. The Agencies, therefore, conclude that prudential considerations justify the rescission of these requirements.

The notice-and-referral requirements in the 2016 final rule were materially different from the notices required by laws such as the FMLA, EEOA, FLSA, and National Housing Act. Those laws required all covered employers to provide comprehensive notice of employees' rights irrespective of religious character. *See, e.g.,* 29 CFR 516.4 (FLSA), 1601.30 (EEOA), 825.300(a) (FMLA); 24 CFR 110.10 (National Housing Act). Employees receive those standard notices from every employer, and the content of the notices provides no reason to believe that their employer could be viewed with suspicion, or may be in some way objectionable, on account of any unique status.

The Agencies also disagree with the comments that interpreted the plurality's footnote 3 to limit *Trinity Lutheran's* holding to the facts of that case—*viz.,* playground resurfacing. As mentioned above, the Supreme Court recently confirmed in *Espinoza* that the '' 'strictest scrutiny' '' applies to status-based discrimination on the basis of religion in the context of a different government benefit—tax credits for donations to organizations awarding scholarships.[39] Nothing in the logic or discussion of *Trinity Lutheran* or *Espinoza* suggests that the nondiscrimination principle was limited to the facts of either case.

This is consistent with the Agencies' understanding of *Trinity Lutheran.* The Court's discussion of the principles it articulated pointed to applicability beyond the facts immediately before it. *See, e.g.,* 137 S. Ct. at 2022 (''[T]he Free Exercise Clause protects against indirect

[36] *See also Central Rabbinical Congress of the U.S. & Can.* v. *N.Y. City Dep't of Health & Mental Hygiene,* 763 F.3d 183, 194–95 (2d Cir. 2014) (applying strict scrutiny to law that singled out specific religious conduct performed by a particular religious group).

[37] 81 FR at 19406–09 (ED, §§ 3474.15(c)(1), 75.712, 76.712)); *id.* at 19411 (DHS, § 19.6(a)); *id.* at 19414 (USDA, § 16.4(f)); *id.* at 19417 (HUD, § 5.109(g)); *id.* at 19420 (DOJ, § 38.6(c)); *id.* at 19423 (DOL, 29 CFR 2.34(a)); *id.* at 19425 (VA, § 50.2(a); *id.* at 19428 (HHS, § 87.3(i)(1)); *see also* 81 FR at 19406–09 (ED, §§ 3474.15(c)(1), 75.713, 76.713 (applying referral requirement to only ''a faith-based organization'')).

[38] 81 FR at 19407–09 (ED, §§ 75.713(b)(1), 76.713(b)(1)); *id.* at 19412 (DHS, § 19.7(b)); *id.* at 19414 (USDA, § 16.4(g)(1)); *id.* at 19417 (HUD, § 5.109(g)(3)(ii)); *id.* at 19421 (DOJ, § 38.6(d)(2)); *id.* at 19423 (DOL, § 2.35(b)); *id.* at 19425 (VA, § 50.3(b)); *id.* at 19428 (HHS, § 87.3(j)).

[39] *Espinoza,* 140 S. Ct. at 2257 (citing *Trinity Lutheran,* 137 S. Ct. at 2021); *see also id.* at 2254 (''The Free Exercise Clause . . . protects religious observers against unequal treatment and against laws that impose special disabilities on the basis of religious status'').

coercion or penalties on the free exercise of religion, not just outright prohibitions.'' (citing *Lyng,* 485 U.S. at 450)); *id.* at 2026 n.3 (Gorsuch, J., concurring, joined by Thomas, J.) (''I worry that some might mistakenly read [footnote 3] to suggest that only 'playground resurfacing' cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court's opinion.''). The lower court cases that the commenters cited reaching contrary conclusions—*Real Alternatives* and *Carson*—pre-date *Espinoza* and no longer have persuasive value with respect to the meaning of footnote 3.

The Agencies also disagree that the Supreme Court's decision in *Employment Division* v. *Smith* insulated the notice-and-referral requirements from Free Exercise Clause concern. The notice-and-referral requirements were neither generally applicable (since they applied only to religious organizations) nor religion-neutral (since they required referrals based on objections to religious character, but not other characteristics of the provider). *See* Part II.F.2 (discussing the standard in *Lukumi,* which clarifies the meaning of *Smith*); *see also Roman Catholic Diocese,* 2020 WL 694354, at *2 (''Because the challenged restrictions are not 'neutral' and of 'general applicability,' they must satisfy 'strict scrutiny,' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest.'' (quoting *Lukumi,* 508 U.S. at 546)).

In sum, the Agencies' position in this rulemaking is an exercise of discretion and prudence, informed by principles of constitutional avoidance. *Cf. Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988). The Agencies have discretion under their authorizing statutes to remove the notice-and-referral requirements to avoid the constitutional issues raised by the tension between those requirements and the Free Exercise Clause. *Espinoza* left open additional issues, including ''whether there is a meaningful distinction between discrimination based on use or conduct and that based on status.'' 140 S. Ct. at 2257. The Agencies make the reasonable decision, within their discretion, to eliminate this tension and avoid the burdens and uncertainty of litigating these unresolved issues. In so doing, the Agencies do not believe they have triggered any countervailing Establishment Clause concerns. The Supreme Court has ''repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs.'' *Id.* at 2254 (citing *Locke,* 540 U.S. at 719, and *Rosenberger* v. *Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 839 (1995)). Indeed, while upholding the prohibition on use of scholarships for training to become clergy in *Locke,* the Supreme Court emphasized that the Government could also have funded allowed such uses, consistent with the Establishment Clause. 540 U.S. at 719 (''[T]here is no doubt that the State could, consistent with the Federal Constitution, permit . . . [students funded by the program] to pursue a degree in devotional theology.'').

For all of these reasons, the Agencies disagree with the commenters who suggest that relying on constitutional concerns potentially raised by *Trinity Lutheran* and *Espinoza* as one of the justifications for eliminating the notice-and-referral requirements is arbitrary and capricious.

Changes: None.

Affected Regulations: None.

b. Substantial Burdens

Summary of Comments: Some commenters argued that the notice-and-referral requirements imposed, or could impose, substantial burdens on faith-based organizations' religious exercise under RFRA. These commenters argued that faith-based organizations could have complicity-based objections to providing such notice and referral, and that those objections should be respected, as were the complicity-based objections in *Burwell* v. *Hobby Lobby,* 573 U.S. 682 (2014). One religious organization commented that many religions prohibit complicity in sin and argued that the previous administration mistakenly had tried to downplay the gravity of such religious objections. Another commenter said that, by singling out faith-based providers, the notice-and-referral requirements were in tension with RFRA and the related principles in the Attorney General's Memorandum. Some commenters contended that it was irrelevant to the substantial burden analysis whether an organization could exercise its religious beliefs in other ways.

Several commenters argued that the Agencies could not rely on RFRA because they had not actually asserted that, or adequately explained how, notice-and-referral requirements imposed a substantial burden under RFRA. They charged that the Agencies were unable to point to any specific situation where these requirements had imposed substantial burdens on providers, including any situation where a faith-based organization claimed that the requirements compelled it to violate its sincerely held beliefs. As a result, some of these commenters argued that the Agencies' analysis was inadequate to support removal of these requirements based on RFRA.

Some commenters relied on a court of appeals decision holding that a substantial burden requires '' 'substantial pressure on an adherent to modify his behavior and to violate [their] beliefs.' '' *Kaemmerling* v. *Lappin,* 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting *Thomas* v. *Review Bd.,* 450 U.S. 707, 718 (1981)). Others cited language from a different court of appeals that a substantial burden ''is one that forces the adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs.'' *Civil Liberties for Urban Believers* v. *City of Chi.,* 342 F.3d 752, 761 (7th Cir. 2003) (''*C.L.U.B.*'') (citation omitted); *see also id.* (holding that a law ''that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary and fundamental responsibility for rendering religious exercise . . . effectively impracticable'').

Many commenters argued that the burdens imposed by the notice-and-referral requirements did not meet these legal standards. Some commenters argued that the notice-and-referral requirements could not have imposed a substantial burden because the burden of compliance was ''de minimis,'' imposed only ''minor costs,'' or was only a ''minimal imposition.'' They reasoned that faith-based organizations only had to provide a notice, reproduce language provided by the Agencies, exert ''reasonable'' efforts to find an alternative provider when requested, and notify the awarding agency if they were unable to find an alternative. Some argued that there was no substantial burden because the costs of compliance were offset by the Government's funding that the religious service providers had accepted. Others argued that participation in government-funded programs was voluntary, so faith-based organizations could decline the funding and avoid the associated requirements. Multiple commenters argued that the Agencies' position that the referral requirement was rarely invoked is at odds with the position that it imposed a substantial burden.

Several commenters cited RFRA cases to discredit the notion that the notice-and-referral requirements could raise complicity-based objections. Some distinguished *Hobby Lobby* because it did not involve a referral requirement or because it concerned a privately held corporation whose employees were not obligated to work. According to these commenters, faith-based organizations freely choose to seek Federal funding for the programs governed by this rule and understand that they serve a ''captive audience'' whose religious liberty must be protected by the Constitution. Another commenter argued that the act of referral cannot create a substantial burden because the organization is actually objecting to ''what follows from'' the referral, meaning the conduct that the beneficiary might engage in with the alternate provider. The commenter argued that two appellate decisions [40] involving objections to what is colloquially referred to as the contraceptive mandate demonstrate that faith based organizations ''have no recourse'' for such an objection. Some commenters argued that any faith-based organization refusing to provide a referral to an alternative provider was not truly religious, was not being faithful to its religious beliefs, or was not ''truly Christian.''

Some organizations argued that the notice-and-referral requirements did not impose a substantial burden because of countervailing interests. For example, a faith-based organization argued that referral requirements did not ''substantially burden'' the ''religious exercise'' of faith-based organizations because the requirements were ''clearly tied'' to the objectives of a government service that the organization voluntarily provides. Similarly, other commenters pointed to a passage from the preamble to the 2016 final rule that the required notice language ''does not place an undue burden on recipients of Federal financial assistance, particularly when balanced against the notice's benefit—informing beneficiaries of valuable protections of their religious liberty.'' Some commenters relied on *Locke* v. *Davey,* which found that a condition on funding imposed a ''relatively minor burden.'' 540 U.S. at 725 (2004).

Response: The Agencies disagree with any contention that the notice-and-referral requirements categorically did or did not impose a substantial burden. Rather, the Agencies take the position that these requirements were in tension with RFRA because they *could have* imposed a substantial burden in certain circumstances, as the Agencies explained in the NPRMs.

A regulation imposes a substantial burden when it (1) requires a person to take, or abstain from, an action contrary to the person's sincerely held religious exercise (2) under substantial pressure to comply. *Hobby Lobby,* 573 U.S. at 720–24; *Sherbert,* 374 U.S. at 405–06. For the first element, the believer's sincerely held religious understanding determines the scope of the religious exercise and whether compliance violates that exercise. This applies with full force to compliance that would make an organization complicit in the activity of others that it believes would violate its religious exercise, just as it would apply to compliance that would make the organization undertake such action directly. *Little Sisters of the Poor Saints Peter & Paul Home,* 140 S. Ct. 2367, 2383–84 (2020) (''*Little Sisters*''); *Hobby Lobby,* 573 U.S. at 723–25. A Catholic women's shelter, for example, might sincerely believe that referring a prospective client to another organization that provides birth control or abortions would render the Catholic shelter complicit in grave sin.

The Agencies thus disagree with the commenters who relied on the contrary attenuation theory. Under that theory, a religious believer or organization cannot be substantially burdened by ''what follows from'' the required conduct, including when the organization's action triggers activity by others that ultimately violates the organization's religious exercise. The Supreme Court has repeatedly rejected this view. In *Little Sisters,* the Supreme Court said that Federal agencies ''must accept the sincerely held complicity-based objections of religious entities.'' 140 S. Ct. at 2383. In *Hobby Lobby,* the Supreme Court rejected the argument that a complicity-based objection was ''simply too attenuated.'' 573 U.S. at 723. The Supreme Court stated that ''federal courts have no business addressing whether the religious belief asserted in a RFRA case is reasonable.'' *Id.* at 724.[41] ''Where to draw the line in a chain of causation that leads to objectionable conduct is a difficult moral question, and our cases have made it clear that courts cannot override the sincere religious beliefs of an objecting party on that question.'' *Little Sisters,* 140 S. Ct. at 2391 (Alito, J., concurring).

Although the Agencies do not identify here any religion with such a complicity-based objection to the notice-and-referral requirements, the Agencies cannot rule out the possibility. Many religions sincerely believe that complicity in certain actions they consider immoral is similar (morally speaking) to committing the underlying action itself. The Agencies cannot agree with comments that a complicity-based objection to a referral is not ''truly'' religious, or that such an objection cannot be sincerely held.[42] No principle articulated in *Little Sisters, Hobby Lobby, Thomas* or any other relevant Supreme Court decision precludes the possibility that the notice-and-referral requirements could on this basis give rise to a substantial burden on the exercise of religion.

For the second element of what constitutes a ''substantial burden,'' there are myriad ways that a law could exert substantial pressure for a person or organization to abandon its religious beliefs. As relevant here, it could constitute substantial pressure when the Government conditions an organization's receipt of Federal funds to administer a social service on taking actions that would contravene the organization's religious beliefs. Such a condition would force the organization ''to choose between the exercise of a First Amendment right and participation in an otherwise available public program.'' [43] In 1963, the Supreme Court held it was ''too late in the day to doubt'' that this kind of conditional government benefit could constitute a substantial burden on religious exercise.[44] Thus, the

[40] *See California* v. *U.S. Dep't of Health & Human Servs.,* 941 F.3d 410 (9th Cir. 2019), *vacated by Dep't of Health & Human Servs.* v. *California,* No. 19–1038, 2020 WL 3865243 (July 9, 2020); *Pennsylvania* v. *Trump,* 930 F.3d 543, 573 (3d Cir. 2019), *rev'd by Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania,* 140 S. Ct. 2367 (July 8, 2020) (''*Little Sisters*'').

[41] *See also Thomas,* 450 U.S. at 715 (crediting Jehovah's Witness who objected that making tank turrets would be participating in war in violation of his sincere religious exercise, even though he was willing to make raw materials for the tanks).

[42] *See, e.g., United States* v. *Ballard,* 322 U.S. 78, 87 (1944) (Under the Constitution, ''[m]an's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views.'').

[43] *Thomas,* 450 U.S. at 716; *see also id.* at 717–18 (''Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.'').

[44] *Sherbert* v. *Verner,* 374 U.S. 398, 404 (1963); *see* 42 U.S.C. 2000bb(b) (''The purposes of this [Act] are—(1) to restore the compelling interest test as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.'').

Department of Justice determined that RFRA was reasonably construed to require an exemption from a requirement not to discriminate on the basis of religion in employment under a Department-funded social service program when the grantee sincerely believed that employment of people who did not adhere to its core beliefs would undermine its religious mission. *See Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act,* 31 Op. O.L.C. 162 (2007) (''*World Vision*'').

As mentioned above, some commenters argued that the notice-and-referral requirements did not rise to the level of ''substantial pressure on an adherent to modify his behavior and to violate [his] beliefs,'' *Kaemmerling,* 553 F.3d at 678, or could not be said to ''bear[ ] direct, primary and fundamental responsibility for rendering religious exercise effectively impracticable,'' *C.L.U.B.,* 342 F.3d at 761. The burden, they contended, was at best de minimis. In *Kaemmerling* and *C.L.U.B.,* however, the conditions for participating in a government benefit program were not at issue. *C.L.U.B.* arose in the land-use context. Further, *C.L.U.B.* required the land-use regulation to burden ''a central tenet'' of the believer's faith, 342 F.3d at 761, which is contrary to the definition of ''religious exercise'' in both RLUIPA and RFRA, *see* 42 U.S.C. 2000cc–5(7)(A); *id.* 2000bb–2(4). The Seventh Circuit has also abandoned the ''effectively impracticable'' standard from *C.L.U.B.,* recognizing that *Hobby Lobby* and a more recent RLUIPA case, *Holt* v. *Hobbs,* 574 U.S. 352 (2015), ''articulate[d] a standard much easier to satisfy'' than the ''effectively impracticable'' standard. *Jones* v. *Carter,* 915 F.3d 1147, 1149 (7th Cir. 2019) (citation omitted).

The notice-and-referral requirements, imposed as conditions for receiving grants to carry out social services, could place substantial pressure on faith-based organizations to abandon or modify their beliefs. The grants under the programs covered by the rule were otherwise generally available on a religion-neutral basis to qualifying entities. It does not matter whether the organization could choose not to accept the grant.[45] What would make the burden on religious exercise ''substantial'' is the pressure from the inability to acquire that Federal funding. An organization might in those circumstances feel compelled either to bend its beliefs or forgo the Federal funding altogether. It is irrelevant that the organization might be able to practice its religion in other ways. *See, e.g., Holt,* 574 U.S. at 361–62 (rejecting the argument that alternative forms of religious exercise are relevant to the substantial burden analysis); *see also* Attorney General Memorandum, Principles 4 and 10.

The Agencies also disagree with the commenters who contended that countervailing interests, such as the benefit of providing notices and referrals to beneficiaries of the social service program, would ameliorate any substantial burden imposed by those requirements on an organization's religious exercise. Countervailing interests are relevant to the next stage of the inquiry: Whether the Government has a compelling interest that might justify the imposition of a substantial burden on the recipient of a grant. *See, e.g., United States* v. *Lee,* 455 U.S. 252, 257–58 (1982) (finding a burden sufficient to reach strict scrutiny and only then considering the impact on third parties).

For all of these reasons, the Agencies recognize the possibility that the alternative provider notice-and-referral requirements would impose a substantial burden on faith-based organizations with sincerely held complicity-based objections to those requirements. The Agencies are obligated to ''overtly consider'' this possibility when promulgating rules that raise concerns regarding ''the sincerely held complicity-based objections of religious entities.'' *Little Sisters,* 140 S. Ct. at 2383. Failure to consider it could make the Agencies ''susceptible to claims that the rules were arbitrary and capricious for failing to consider an important aspect of the problem.'' *Id.* at 2384. Supreme Court precedent does not require the Agencies to determine conclusively that a regulation would always impose a substantial burden in order for the Agencies to address such concerns proactively, as explained further in Part II.C.3.d. It is consistent with—though not required by—the fact- and context-specific nature of RFRA for the Agencies to decline to state definitively whether the notice-and-referral requirements constitute a substantial burden in this context, and instead to promulgate a prophylactic rule that avoids the imposition of any burden that, for reasons discussed in the next section, do not seem justified by a compelling interest.

Changes: None.

Affected Regulations: None.

c. Compelling Interests

Summary of Comments: Some commenters agreed with the Agencies that the lack of evidence of actual instances of a beneficiary's seeking a referral under the 2016 rule undermined any compelling interest—under both the Free Exercise Clause and RFRA—in imposing the notice-and-referral requirements. *See* 85 FR at 2891 (DHS); *id.* at 2900 (USDA); *id.* at 2923 (DOJ); *id.*at 2931 (DOL); *id.* at 2940 (VA); *id.* at 2977 (HHS); *id.* at 3194 (ED). A national religious organization confirmed that it was also not aware of any instance of a referral request. Other commenters, however, argued that the Agencies did not have adequate documentation to prove that beneficiaries were not seeking referrals because the Agencies were not tracking successful referral requests. They claimed that the Agencies' inadequate documentation could not prove that the Government lacked a compelling interest and thus did not meet the Agencies' burden to justify removing the notice-and-referral requirements, making this proposed rule arbitrary and capricious. Other commenters similarly argued that the Agencies had not conducted a thorough analysis of the frequency with which beneficiaries requested referrals.

One organization claimed that, under the existing regulations, it and similar organizations had received complaints from nonreligious beneficiaries claiming that religious providers were denying them services or violating their religious freedom. In its comment to HUD, this commenter said it had found an alternative provider for a beneficiary who had contacted the organization to find an alternative to a 12-step program in a Medicaid-funded emergency shelter administered by a faith-based organization. The commenter argued that such programs were pervasively religious, based on *Inouye* v. *Kemna,* 504 F.3d 705 (9th Cir. 2007), and *Hazle* v. *Crofoot,* 727 F.3d 983 (9th Cir. 2013), and claimed that another secular organization had regularly received similar complaints from shelter residents.

One commenter also argued that HHS and the other Agencies were not entitled to remove the notice-and-referral requirements based on HHS's experience with the notice-and-referral

[45] *Thomas,* 450 U.S. at 716 (''[A] person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program.''); *Sherbert,* 374 U.S. at 412 (Douglas, J., concurring) (This inquiry ''turns not on the degree of injury, which may indeed be nonexistent by ordinary standards. The harm is the interference with the individual's scruples or conscience—an important area of privacy which the First Amendment fences off from government.'').

requirement in the SAMHSA programs. Under those requirements, participating faith-based organizations must report all referrals, *see* 85 FR 2984, but to date the Agency has received no such report. The commenter stated that the Agencies should not generalize from this experience to all of the programs affected by this final rule without conducting a rigorous statistical analysis of the Agencies' programs more broadly. Additionally, some commenters argued that there was tension in claiming that the notice-and-referral requirements imposed a substantial burden while denying that a compelling interest exists due to the absence of beneficiaries seeking referrals.

Some commenters contended that the notice-and-referral requirements would survive strict scrutiny because they furthered some combination of the compelling government interests in (1) protecting third-party beneficiaries' religious liberty and (2) providing critical services effectively to millions of vulnerable people. The commenters argued that these interests outweighed the burdens on faith-based organizations.

Regarding the first putative interest, commenters argued that the notice-and-referral requirements served a compelling interest in protecting beneficiaries' fundamental religious liberty. They contended that this interest outweighed any burden on faith-based organizations, which as previously noted they variously characterized as ''de minimis,'' as imposing only ''minor costs,'' or as only a ''minimal imposition.'' *See* Part II.K.1 (Regulatory Impact Analysis). They reasoned that the burden imposed on faith-based organizations to comply with these requirements was not ''undue'' when weighed against the benefit of informing beneficiaries of their religious rights, as the 2016 final rule concluded. They also said the cost to providers of notice and referral was minimal compared to the cost to beneficiaries of seeking out alternative service providers. *See id.*

The second interest was presented with some variations. Some commenters said the interest was in ensuring that federally funded social-services programs effectively serve the vulnerable populations that the programs were created to help. Others said the interest was in ensuring that no unnecessary obstacles would prevent beneficiaries from receiving needed services.

Response: Although they do not dismiss the argument out of hand, the Agencies do not believe it to be clear that the notice-and-referral requirements would serve any compelling interest, let alone that they would do so in the particularized way required by RFRA. Under that statute, the burden is not on the Government to disprove the existence of a compelling interest. Rather, assuming that a social service provider could show that the notice-and-referral requirements imposed a substantial burden on its religious exercise, the burden would shift to the Government to prove that a compelling interest exists. ''Only the gravest abuses, endangering paramount interests'' could ''give occasion'' to satisfy this test. *Sherbert,* 374 U.S. at 406; *see also Yoder,* 406 U.S. at 215 (''[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.''). Additionally, to demonstrate a compelling interest under RFRA, the Agencies would need to show that their interest was compelling with regard to the application of these requirements ''to the person'' affected. 42 U.S.C. 2000bb–1(b). This ''rigorous standard'' requires a particularized showing. *See, e.g., Holt,* 574 U.S. at 363–64; *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal,* 546 U.S. 418, 431–32 (2006). For example, Congress's determination that an illegal hallucinogen was exceptionally dangerous with no medical use and a high risk of abuse was not sufficient to show a compelling interest in applying that ban to a specific religious use in *Gonzales.* 546 U.S. at 432–34. It is not clear that either putative compelling interest cited by commenters could meet these standards.

While the Agencies recognize that protecting the religious liberty of third-party beneficiaries can be compelling, they do not believe it is clear that the notice-and-referral requirements were always protecting beneficiaries' religious liberties. *See* Part II.C.1. The referral requirement enabled objections based on feelings of discomfort, dislike, and even rank prejudice against particular religious groups for providing social services that the rule required, and will still require, to be free of any religious content. Furthermore, the rule required, and still requires, a social service provider to keep any religious activities that it conducts with its own funds separate in time or place from the Government-funded program, and to ensure that beneficiary participation in such activities is voluntary. If, in a particular case, the environment in which a religious provider delivered a federally funded social service was so overwhelming as to actually infringe on a beneficiary's religious liberty, the Agency or its intermediary could be required by RFRA to make an appropriate accommodation, which might include referring the beneficiary elsewhere. As discussed more below, the Agencies believe from their experience that this circumstance is sufficiently rare that it does not warrant imposing a potentially burdensome, possibly stigmatizing, across-the-board rule on all religious providers. It is within the Agencies' legal and policy discretion to address any such concern as the case arises.

For at least three reasons, it is not clear that the notice-and-referral requirements furthered a compelling interest in providing services effectively to vulnerable beneficiaries. First, the notice-and-referral requirements addressed a problem that rarely arises. Second, the notice-and-referral requirements did not apply to many organizations. Third, with occasional exceptions for specific programs, Congress itself has not applied these requirements to the Agencies.

Under the prior rule, religious social service providers were permitted to fulfill their referral obligation by making referrals to non-federally funded providers, which the Government could not have ensured were providing the services in a manner as effective as the programs it was funding. And, as discussed above and in the paragraphs that follow, there is no indication that any individual beneficiary actually sought a referral. To be compelling, an interest must have a ''high degree of necessity,'' *Brown* v. *Entm't Merchs. Ass'n,* 564 U.S. 786, 804 (2011), which means there must be ''an 'actual problem' in need of solving, and the curtailment of [the right] must be actually necessary to the solution.'' *Id.* at 799 (citation omitted); *Korte* v. *Sebelius,* 735 F.3d 654, 685 (7th Cir. 2013) (applying this test to RFRA); *see also Sherbert,* 374 U.S. at 403 (the regulated conduct must ''pose[ ] some substantial threat to public safety, peace[,] or order''). The same is true with regard to the First Amendment, to the extent strict scrutiny applies, as discussed in Part II.F below.

Seven of the eight Agencies said in their 2020 NPRMs that they were not aware of any circumstance in which a beneficiary ''actually sought an alternative provider'' since the requirement went into effect in 2016. *See* 85 FR at 2891 (DHS); *id.* at 2900 (USDA); *id.* at 2923 (DOJ); *id.* at 2931 (DOL); *id.* at 2940 (VA); *id.* at 2977 (HHS); *id.* at 3194 (ED). All eight Agencies now confirm that they are not aware of any such referrals, based on their experiences while the notice-and-

referral requirements were in effect. The Agencies' employees who have administered and provided legal support to the relevant programs throughout this time period confirmed that they were not aware of any such referral requests. For example, VA's Supportive Services for Veteran Families program has not received a single request or concern from a beneficiary of any provider—faith-based or not—seeking an alternative provider. And, in VA's review of records, it found no record of a single report or referral indicating that any beneficiary requested a referral under the prior rule. *Cf.* 81 FR 19368 (discussing recordkeeping and reporting requirements). Similarly, while preparing this final rule, HUD confirmed that it was not aware of any faith-based organization that had reported a request for a referral.

The Agencies' experience is consistent with SAMHSA's. As the Agencies recognized when promulgating the 2016 final rule, that program requires all referrals to be reported. The Agencies said that HHS had received no reports of referrals in the SAMHSA programs, so ''the Agencies believe[d] that the number of requests for referrals [would] be minimal.'' 81 FR 19366. In its January 2020 NPRM, HHS reaffirmed that no referrals had been reported for the SAMHSA programs and that ''few if any referrals have been requested'' in the other programs to which the 2016 rule applied. 85 FR at 2984. HHS reaffirms that there have been no reported referral requests in the SAMHSA programs. As they did in 2016, the Agencies believe that the SAMHSA experience is relevant. It is a helpful data point because all referrals must be reported, and those regulations have been in place since 2003.

Furthermore, although the Agencies have said multiple times in the public record—in the 2016 final rule and the 2020 NPRMs—that referrals were rarely or never used, not one comment (among the more than 95,000 public comments received) cited or described an actual instance of a referral requested under the rule. In fact, the only comment on actual practice connected to the prior rule was from a national faith-based organization that said it had not experienced any such referral request. Another commenter referred to a practice of beneficiaries' calling like-minded organizations for referrals, but these referrals seem to have occurred outside the context of the referral requirement at issue here. There is no indication that the beneficiaries seeking these referrals had previously sought services from a faith-based provider receiving direct Federal financial assistance or that they had sought referrals from such providers. If anything, the comment demonstrated that unofficial or non-government-imposed processes were sufficient for beneficiaries to obtain referrals, without the need to impose the burden on faith-based organizations. As discussed in Part II.C, it also makes sense that beneficiaries who will not accept benefits from a faith-based organization would seek a referral from an organization that they do not find objectionable, rather than the one to which they objected.

For all of these reasons, the Agencies have a sufficient basis to conclude that referrals were rarely (if ever) sought under the notice-and-referral requirements. That conclusion diminishes the Government's interest in these requirements because it shows that, in practice, these requirements have turned out to be merely symbolic, which would mean they ''cannot suffice to abrogate'' religious liberty. *Smith,* 494 U.S. at 911 (Blackmun, J., dissenting) (applying the standard that was restored by RFRA).

The Agencies disagree that this conclusion is in tension with their finding that complying with the notice-and-referral requirements could impose a substantial burden. To be clear, the Agencies are not saying that the notice-and-referral requirements always and in every case posed a substantial burden on the religious exercise of faith-based organizations or categorically violated RFRA. As explained in Part II.C.3.b, conditioning a benefit on a faith-based organization's willingness to give a notice or a referral could exert substantial pressure to forgo complicity-based beliefs. That is true even if no beneficiary ultimately seeks a referral, but the Agencies recognize that not all faith-based organizations necessarily share such beliefs or face that difficult choice. The Agencies nevertheless do not see the need to create even the prospect of such a choice, and force potential applicants to rely on obtaining case-specific exemptions under RFRA, given that the need for imposing the notice-and-referral requirements is slight. Some otherwise-qualified organizations might simply decline to apply for a grant, for fear that the Government would not grant them the exemption when the need arises. The Agencies wish to avoid that chilling effect.

Additionally, secular organizations were exempt from the notice-and-referral requirements despite similar risks of harm to the allegedly compelling interests in protecting beneficiaries from discrimination and receiving a social service in an environment that made them uncomfortable. The notice-and-referral requirements also did not apply to any USAID programs, or to USDA's school lunch program, even though that program otherwise met the definition of ''direct Federal financial assistance.'' 81 FR at 19381; *see also id.* at 19413–14 (sections 16.4(a), (g), (h)). The notice requirement did not apply to any faith-based organizations receiving indirect Federal financial assistance, nor did the referral requirement, except for organizations receiving indirect aid from VA or HHS. As discussed in Part II.C, those providers posed the same supposed risks of harm to beneficiaries' religious liberty protections and receipt of services. *See Espinoza,* 140 S. Ct. at 2261 (proffered interest in promoting public schools was undermined because secular private schools would have the same impact, yet could receive funding). A law does not serve a compelling interest when it exempts conduct that would serve the ''supposedly vital interest.'' *Lukumi,* 508 U.S. at 547 (citation omitted); *Gonzales,* 546 U.S. at 433 (citation omitted).

Moreover, Congress itself did not see fit to impose notice-and-referral requirements in most of the social service programs covered by this rule, whereas it did in the Charitable Choice statutes that apply to the SAMHSA and TANF programs. *See* 42 U.S.C. 290kk-1(f)(1); *id.* 604a(e); *id.* 300x-65(e)(1). As the 2016 final rule recognized, the applicable Charitable Choice statutes ''govern[ ]'' and ''take precedence over these regulations,'' and ''the Government will continue to bear the full burden of making referrals as specified in those statutes.'' 81 FR at 19366. That remains true today and will continue to remain true after this final rule takes effect. Congress's decision to impose the referral requirement only in the Charitable Choice statutes undercuts the interest in imposing the referral requirements on faith-based organizations in the programs governed by this final rule. ''[I]t was Congress, not the Departments, that declined to expressly require'' notice and referral here and ''that has failed to provide the protection'' that the commenters seek. *Little Sisters,* 140 S. Ct. at 2382.

In short, the Agencies conclude that they have insufficient evidence to determine that imposing the notice-and-referral requirements on all religious social service providers would in all cases serve a compelling government interest.

Changes: None.

Affected Regulations: None.

d. Least Restrictive Means and Appropriate Remedy

Summary of Comments: Some commenters argued that striking the notice-and-referral requirements was the appropriate remedy for the tension with the Free Exercise Clause and RFRA, including because there was little indication that these requirements would be necessary for either faith-based or secular providers. For example, an organization representing over 720 schools commented that barriers to participation, like referral requirements, should be removed for all providers. That commenter added that removing this requirement was ''crucial'' to protect religious freedom and ensure that religious organizations could continue working to improve society.

Some commenters argued, however, that the notice-and-referral requirements should not be altered because they were narrowly tailored to the interests discussed in Part II.C.3.c above. They said that the requirements were narrowly tailored because they imposed minimal costs and required only ''reasonable efforts'' to find another provider for a beneficiary who requested one.

Some commenters argued generally that the Agencies should provide substitute mechanisms to ensure that beneficiaries are aware of their rights and can receive services from a nonreligious provider. Commenters also argued that the Agencies should provide evidence about what alternative, reliable mechanisms exist. Several commenters argued that the Agencies were instead required by RFRA to conduct a fact-specific inquiry on a case-by-case basis and not to impose broader exemptions or changes of policy. These commenters relied on *California,* 941 F.3d at 427–28; *Real Alternatives, Inc.* v. *Sec'y of Health & Human Servs.,* 867 F.3d 338, 358 & n.23 (3d Cir. 2017); and *EEOC* v. *R.G. & G.R. Harris Funeral Homes, Inc.,* 884 F.3d 560, 588 (6th Cir. 2018), *aff'd on other grounds, Bostock* v. *Clayton Cty.,* 140 S. Ct. 1731 (2020).

Commenters suggested four potential regulatory alternatives that they believed would be less restrictive than removing the requirements altogether. *First,* several commenters argued that it would be less restrictive for the Agencies to expand these notice-and-referral requirements to secular providers. Some argued that this ''modification'' would achieve equal treatment of religious and secular organizations, including to remove any stigma, without eliminating the beneficiary protections. Some commenters noted that HHS's NPRM said this was the ''clearest alternative approach.'' 85 FR at 2984. These commenters stated that notice-and-referral requirements could properly be developed and tailored for the parallel issues that beneficiaries would likely encounter with secular providers. Some of these commenters argued that secular organizations already receiving Federal funding could easily absorb the de minimis burden of such notice-and-referral requirements. Another commenter, however, said that expanding these requirements to secular organizations would be ''on its face . . . ridiculous'' because these measures were meant to prevent religious coercion and, by definition, such organizations would be incapable of religious coercion.

Second, multiple commenters suggested that it would be less restrictive for the Government or an intermediary to provide the notice and make the referrals, which would remove the burden from faith-based organizations while preserving the benefit for beneficiaries. Commenters added that this would be consistent with the Charitable Choice statutes and how such provisions operated before the 2016 rule. Multiple commenters contended that Government control would improve administration and safeguards of stakeholders' rights and that the Agencies would have superior knowledge of which other providers in the area were also being funded and would be able to provide the services being sought. Commenters also contended that, because the Agencies asserted that few referrals had been requested to date, there would be minimal burden on the Government to respond to such referrals.

Third, multiple commenters suggested combining the first two alternatives by having the Government provide the notice and referral for all providers. These commenters argued that this alternative would eliminate the alleged status-based discrimination while expanding the supposed benefits of the rule.

Fourth, an advocacy organization suggested that the Agencies could also consider allowing individual requests for exemptions to the notice-and-referral requirements.

Response: The Agencies agree with the commenters who said that the Agencies can and should remedy the tension with *Trinity Lutheran* and RFRA by striking the notice-and-referral requirements. If there is no compelling interest, then there is also no need to analyze the least restrictive means to achieve that interest.[46] Even assuming the notice-and-referral requirements served a compelling government interest, it is not clear that any of the alternatives proposed by commenters would qualify as the least restrictive means of furthering any of the interests discussed above. ''An infringement of First Amendment rights,'' assuming there is one, ''cannot be justified by a State's alternative view that the infringement advances religious liberty.'' *Espinoza,* 140 S. Ct. at 2260. The Supreme Court has held that the least restrictive means is an ''exceptionally demanding'' standard. *Hobby Lobby,* 573 U.S. at 728. To meet this standard, an agency must ''sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion.'' *Id.* But an alternative is less restrictive only when it would both further the compelling interest as effectively as the existing requirement and alleviate the burden that triggered strict scrutiny.[47]

First, it is unclear that extending the notice-and-referral requirements to secular providers would be a less restrictive means. The Agencies agree that this may be the clearest way to achieve equal treatment under *Trinity Lutheran* and that costs to individual secular providers would likely be minimal, as they are for individual faith-based providers. But it would not alleviate the tension with RFRA. *See, e.g., Hobby Lobby,* 573 U.S. at 728 (a less restrictive means achieves the compelling interest ''without imposing a substantial burden''). Applying these requirements to all providers would extend any potential substantial burden to faith-based organizations that were exempt from these requirements under the 2016 final rule. Additionally, as explained in ED's NPRM, the Agencies do not want to affect beneficiaries' receipt of secular services when no religious alternative is available and do not want to impose burdens on any secular organizations that oppose referrals to religious alternatives. 85 FR 3194. Also, beneficiaries have access to public information regarding potential

[46] *See, e.g., Gonzales,* 546 U.S. at 429 (''[T]he Government failed on the first prong of the compelling interest test, and did not reach the least restrictive means prong.''); *see also World Vision,* 31 Op. O.L.C. at 184 (not addressing least restrictive means because compelling interest was not satisfied).

[47] *See, e.g., Hobby Lobby,* 573 U.S. at 731 (holding the accommodation was a less restrictive means for those plaintiffs because ''it does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well'').

secular or religious alternatives. *Id.; see also* Part II.C.2.a (describing and citing examples of public information).

Second, it is not clear that it is a less restrictive means for the Agencies or their intermediaries to assume responsibility to provide the notices and referrals. The Agencies agree that this might alleviate the potential substantial burden under RFRA—assuming the faith-based provider was not involved in a way that raised complicity-based objections—while preserving whatever benefit inures to beneficiaries. But it would retain the tension with *Trinity Lutheran* because these requirements would continue applying solely to faith-based organizations based on their religious character. Additionally, requiring Government entities to handle such referrals raises additional problems, such as assessing the religious character of the alternatives in order to make appropriate referrals. It is also unclear that the Agencies would have uniquely helpful information to make referrals. Many of the Agencies' programs have thousands of participants that are funded by intermediaries. The Agencies will not necessarily know what providers are funded in any given area. For other programs, the Agencies or other stakeholders have helpful publicly available resources that list the alternative providers and are easily accessible to beneficiaries, as discussed in Part II.C.2.a above. Although few or no referrals have been requested under the prior rule, the Agencies would still bear burdens to implement across all of these programs notice and referral systems that would be accessible and available to all in compliance with all other applicable Federal laws.

Third, the Agencies recognize that the combined alternative proposal—extending these notice-and-referral requirements to secular organizations and requiring the Government or its intermediary to assume the responsibility to carry them out—could alleviate the tension with both *Trinity Lutheran* and RFRA. But it would have to avoid involving faith-based organizations in ways that would elicit complicity-based objections, which it is not clear can be accomplished. Even if that could be accomplished, the Agencies would still exercise their discretion not to impose that combined alternative proposal for all of the other reasons discussed regarding the individual proposals.

Fourth, the Agencies do not believe it is a less restrictive means to retain a rarely invoked rule and require objecting faith-based organizations instead to make individual requests for exemptions under RFRA. Such a regime still shifts the burden to the organization to demonstrate that the possibility of having to make a referral would affect its religious exercise. The remedy of requiring all faith-based organizations to follow the rule and request individualized exemptions when necessary would not be narrowly tailored to serve a government interest that is speculative at best.

In any event, the Agencies elect to exercise their discretion to remove the notice-and-referral requirements rather than implement these alternatives, for all of the reasons discussed throughout this section. The Agencies have discretion to determine how to alleviate the tension with the Free Exercise Clause. Removing these requirements is well within the Agencies' discretion of ''room for play in the joints'' to decide how to fashion appropriate religious accommodations and exemptions. *Walz* v. *Tax Comm'n of City of New York,* 397 U.S. 664, 669 (1970); *Texas Monthly, Inc.* v. *Bullock,* 489 U.S. 1, 18 n.8 (1989) (Establishment Clause allows regulatory exemptions beyond those required by Free Exercise Clause). This is especially so given uncertainty about whether the Government even has a compelling interest in applying the notice-and-referral requirements. And it is also within the Agencies' discretion to avoid serious constitutional issues and the burdens of related litigation. *Cf. DeBartolo,* 485 U.S. at 575.

The Agencies have similar discretion under RFRA and disagree with the comments that RFRA does not allow them to change a regulation to eliminate a requirement that potentially burdens the exercise of religion. *See Little Sisters,* 140 S. Ct. at 2383–84. Instead, the Agencies believe that they have discretion to determine how to avoid potential or actual RFRA violations, including discretion to determine whether to impose a categorical rule or address concerns on a case-by-case basis. RFRA directs the ''[g]overnment'' to comply with its terms, 42 U.S.C. 2000bb–1(a) to (b), with regard to ''the implementation'' of ''all Federal law.'' 42 U.S.C. 2000bb–2(a). When an Agency determines that its mode of implementing Federal law might in certain cases burden an organization's exercise of religion, the Agency has discretion to modify its implementation to avoid any violations of RFRA. That is consistent with the executive branch's responsibility to ''take [c]are'' that the [l]aws be faithfully executed.'' U.S. Const. art. II, sec. 3.

That is also consistent with the most recent Supreme Court decisions on these issues. In *Little Sisters,* the Court held that agencies must consider sincere complicity-based objections when promulgating rules and that failure to do so can make the rule arbitrary and capricious. 140 S. Ct. at 2383–84. Several Justices separately ''appear[ed] to agree'' that a regulatory agency has ''authority under RFRA to 'cure' any RFRA violations caused by its regulations.'' *Id.* at 2382 n.11.[48] Indeed, Justice Ginsburg recognized that ''[n]o party argues that agencies can act to cure violations of RFRA only after a court has found a RFRA violation, and this opinion does not adopt any such view.'' *Id.* at 2407 n.17 (Ginsburg, J., dissenting).

RFRA would be unworkable if it did not permit accommodations beyond what it affirmatively required. Under such a rule, the Agencies would have to guess the exact accommodation that courts would approve. A little less accommodation than necessary would violate RFRA. A little more accommodation than necessary would exceed the Agency's authority. That cannot be the standard, especially when the Government has traditionally been granted ''room for play in the joints'' to decide the scope of religious accommodations under both the First Amendment and RFRA. *Walz,* 397 U.S. at 669.[49] That would also be inconsistent with the Supreme Court's recent reaffirmation that ''RFRA 'provide[s] very broad protection for religious liberty,' '' *Little Sisters,* 140 S. Ct. at 2483 (quoting *Hobby Lobby,* 573 U.S. at 693 (alteration in original)), and with the definition of ''religious exercise'' in RFRA and RLUIPA that Congress mandated ''be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.'' 42 U.S.C. 2000cc–3(g) (RLUIPA); *id.* 2000bb–2(4) (RFRA); *Hobby Lobby,* 573 U.S. at 696 & n.5. RFRA empowers courts to provide relief when the Government has exceeded RFRA's bounds. 42 U.S.C. 2000bb–1(c). But nothing in RFRA requires the Government to implement

[48] *See also id.* at 2395 (Alito, J., concurring) (''Once it is recognized that the prior accommodation violated RFRA in some of its applications, it was incumbent on the Departments to eliminate those violations, and they had discretion in crafting what they regarded as the best solution.''); *id.* at 2400 (Kagan, J., concurring in the judgment) (those agencies ''have wide latitude over exemptions, so long as they satisfy the requirements of reasoned decisionmaking''); *id.* at 2407 (Ginsburg, J., dissenting) (''The parties here agree that federal agencies may craft accommodations and exemptions to cure violations of RFRA.'' (citations and footnote omitted)).

[49] *See also World Vision,* 31 Op. O.L.C. at 168; *Texas Monthly,* 489 U.S. at 18 n.8 (Establishment Clause allows regulatory exemptions beyond those required by the Free Exercise Clause).

or maintain regulations that go right up to the line of what courts would find acceptable.

Moreover, RFRA and the Agencies' organic statutes do not ''prescribe the remedy by which the government must eliminate'' a substantial burden. 83 FR 57545. The Agencies' choice to remove the notice-and-referral requirements is reasonable given the legal uncertainty as to whether those requirements might in some cases violate RFRA.[50] When it has found that a regulation violated RFRA, the Supreme Court has let the regulatory agency determine the correct remedy.[51] The same should be true for potential violations. As a result, the Agencies have discretion to determine the appropriate accommodation. As Justice Alito recently explained, RFRA ''does not require . . . that an accommodation of religious belief be narrowly tailored to further a compelling interest. . . . Nothing in RFRA requires that a violation be remedied by the narrowest permissible corrective.'' *Little Sisters,* 140 S. Ct. at 2396 (Alito, J., concurring).

Commenters rely on contrary cases from the United States Courts of Appeals that preceded *Little Sisters.* But those cases cannot override the rule in *Little Sisters* that the Agencies should consider potential complicity-based objections. Indeed, one of those cases, the Ninth Circuit's *California* v. *Trump* decision, was expressly vacated and remanded in light of *Little Sisters. See* 140 S. Ct. 2367. The Third Circuit's *Real Alternatives* decision did not address the scope of any agency's regulatory discretion under RFRA, 867 F.3d 338, 358 & n.23, and its reasoning was essential to *Pennsylvania* v. *Trump,* 930 F.3dat 573 & n.30, which *Little Sisters* reversed and remanded. Accordingly, in light of *Little Sisters,* the Agencies do not believe that those cases remain good law.

Additionally, the Agencies question the continued vitality of the Sixth Circuit's decision regarding RFRA in *Harris Funeral Homes.* Most significantly, the substantial-burden reasoning in *Harris Funeral Homes,* which was relied on by some commenters, was based on the attenuation theory from HHS Mandate cases, including *Michigan Catholic Conference. Harris Funeral Homes,* 884 F.3d at 589–90, *aff'd on other grounds, Bostock* v. *Clayton Cnty.,* 140 S. Ct. 1731 (2020). As discussed in Part II.C.3.b, the Supreme Court has expressly rejected that theory as contrary to RFRA. *Little Sisters,* 140 S. Ct. at 2383; *Hobby Lobby,* 573 U.S. at 723–25; *see also Little Sisters,* 140 S. Ct. at 2389–91 (Alito, J., concurring). Removing the notice-and-referral requirements is justified more directly by *Little Sisters, Hobby Lobby,* and the other Supreme Court cases on which they rely. *See also* Part II.E (further discussing *Harris Funeral Homes*).

In sum, the Agencies exercise their discretion to remove notice-and-referral requirements because it is their position that doing so is the appropriate administrative response to the Free Exercise Clause and RFRA issues that those requirements created. In the Agencies' view, eliminating these requirements is a more effective means of alleviating the tension with the First Amendment and RFRA than the alternatives proposed by commenters. This view is informed by the Agencies' experience that they are not aware of any actual referral requests under the prior rule. Also, eliminating the notice-and-referral requirements avoids the potential for litigation that could burden and delay the issuance of grants to eligible organizations. Moreover, the Agencies are acting within their discretion because, as discussed in Part II.C.1, ''it was Congress, not the Departments, that declined to expressly require'' notice and referral in the vast majority of program statutes that govern the Agencies here, and ''that has failed to provide the protection'' for beneficiary objections to a provider's religious exercise that the commenters seek. *Little Sisters,* 140 S. Ct. at 2382.

Finally, the Agencies may provide information voluntarily to beneficiaries as they deem appropriate within existing frameworks. For example, DOL and VA noted in their NPRMs that they ''could supply information to beneficiaries seeking an alternate provider'' when they ''make[ ] publicly available information about grant recipients that provide benefits under its programs.'' 85 FR at 2931 (DOL), 2940 (VA). The other Agencies agree that this is a possibility for some of the programs that they fund. Under this final rule, the provision of such information remains, as it has always been, an option but not a requirement.

Changes: None.

Affected Regulations: None.

e. Third-Party Harms

Summary of Comments: Several commenters argued that the Free Exercise Clause and RFRA cannot justify removing the notice-and-referral requirements because of the potential impacts on beneficiaries. These commenters argued that this change fails to protect beneficiaries' interests based on a number of cases—*Bd. of Ed. of Kiryas Joel Village Sch. Dist.* v. *Grumet,* 512 U.S. 687 (1994); *Estate of Thornton* v. *Caldor,* 472 U.S. 703 (1985); *Texas Monthly; Hobby Lobby;* and *Cutter* v. *Wilkinson,* 544 U.S. 709 (2005)—which held that religious exemptions that can harm third parties implicate the Establishment Clause. Some of these commenters argued that *Hobby Lobby* assumed no burden on third parties and that any third-party harm precludes a Government accommodation under the Free Exercise Clause or RFRA. The Agencies incorporate the summary of such comments from Part II.E.

These commenters argued that beneficiaries would be subject to the third-party harms discussed in the comments summarized in Part II.C.2. For example, some said that beneficiaries would not be able to make informed decisions without knowledge of the religious character of the service provider. Some claimed that removing the notice-and-referral requirements would impose ''significant'' hardships on beneficiaries—specifically, the costs of searching for alternative providers, including ''potentially missing work, finding childcare, paying for transportation, and visiting various other organizations.'' Commenters also expressed concern that these burdens may be especially harmful to the beneficiaries of programs designed to help those with limited resources and facing poverty or other deprivations.

Finally, one commenter argued that this change in the final rule would treat faith-based and secular organizations equally, which, according to this commenter, violates the Establishment Clause.

Response: The Agencies disagree that removing the notice-and-referral requirements will unlawfully or inappropriately burden third parties.

Third-party burdens are part of the Establishment Clause analysis but do not preclude accommodations or removal of beneficiary protections. This is true even when the Free Exercise Clause does not require the accommodation or exemption.[52] Under

[50] *Cf. Ricci* v. *DeStefano,* 557 U.S. 557, 585 (2009) (holding an employer need only have a strong basis to believe that an employment practice violates Title VII's disparate impact ban in order to take certain types of remedial action that would otherwise violate Title VII's disparate-treatment ban).

[51] *See, e.g., Hobby Lobby,* 573 U.S. at 726, 731, 736; 79 FR at 51118 (2014) (proposed modification in light of *Hobby Lobby*); 80 FR 41324 (final rule explaining that ''[t]he Departments believe that the definition adopted in these regulations complies with and goes beyond what is required by RFRA and *Hobby Lobby*'').

[52] *See, e.g., Texas Monthly,* 489 U.S. at 18 n.8; *see also Cutter,* 544 U.S. at 713 (''[T]here is room for

Continued

controlling Supreme Court precedent, the Establishment Clause allows accommodations that remove a burden of government rules from religious organizations, reduce the chilling effect on religious conduct, or reduce government entanglement. *See Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos,* 483 U.S. 327, 334–39 (1987). Any third-party burdens that might result from such accommodations are attributable to the organization that benefits from the accommodation, not to the Government, and, as a result, do not violate the Establishment Clause. *Id.* at 337 n.15. In the *Sherbert* line of Free Exercise Clause cases that later became the basis of RFRA, dissents and concurrences routinely pointed to such burdens on third parties but did not persuade the majorities of any Establishment Clause violation.[53]

The Supreme Court has applied this principle to allow accommodations that litigants claimed caused significant third-party harms. For example, the Supreme Court upheld the Title VII exemption for religious employers—discussed in Part II.H—despite the alleged significant harms of expressly permitting discrimination against employees on the basis of religion. *See Texas Monthly,* 489 U.S. at 18 n.8 (citing *Amos,* 483 U.S. at 327).[54] This is consistent with *Hobby Lobby,* which expressly held that a burden lawfully may be removed from a religious organization even if it allows such a religious objector to withhold a benefit from third parties. Ultimately, government action that removes such a benefit merely leaves the third party in the same position in which it would have been had the Government not regulated the religious objector in the first place. Otherwise, any accommodation could be framed as burdening a third party. That would ''render[ ] RFRA meaningless.'' *Hobby Lobby,* 573 U.S. at 729 n.37. ''[F]or example, the Government could decide that all supermarkets must sell alcohol for the convenience of customers (and thereby exclude Muslims with religious objections from owning supermarkets), or it could decide that all restaurants must remain open on Saturdays to give employees an opportunity to earn tips (and thereby exclude Jews with religious objections from owning restaurants).'' *Id.; see also* Attorney General's Memorandum, Principle 15, 82 FR at 49670.

The Agencies are acting consistently with these principles here. Removing the notice-and-referral requirements will not impose greater burdens on third parties than the Title VII exemption that was upheld in *Amos.*[55] A beneficiary who does not receive notice or referral from a faith-based direct aid recipient ''is not the victim of a burden imposed by the rule''; rather, that person ''is simply not the beneficiary of something that federal law does not provide.'' *Little Sisters,* 140 S. Ct. at 2396 (Alito, J., concurring). The Agencies are merely returning to a status quo that existed until 2016, that remains for USAID funding recipients, and that has always existed for most Agencies' indirect funding recipients. The Agencies have reasonably concluded that removing the notice-and-referral requirements will not unlawfully burden third parties.

The other cases cited by commenters do not warrant a different result. In those cases, the Supreme Court found Establishment Clause violations because the law at issue both singled out a specific religious practice or sect for special treatment and imposed obligations without considering the impacts on third parties.[56] But the Agencies have assessed the burdens on third parties here, and the Establishment Clause permits the Government to alleviate government-imposed burdens on religious exercise through accommodations available to all religions equally.[57] As in *Amos,* this final rule alleviates the Government-imposed burdens of the notice-and-referral requirements and applies equally to all religious organizations. Indeed, removal of the notice-and-referral requirements does not go as far as *Amos* did when it provided an exemption to religious organizations from an otherwise generally applicable law. Rather, the change in this final rule ensures equal treatment of faith-based and secular organizations, and it does not obligate or enable any grantee under the rule to impose burdens on beneficiaries that did not exist before with respect to the social service program in question.

Finally, the Agencies disagree that treating faith-based and secular organizations on the same terms could violate the Establishment Clause. To the contrary, the Supreme Court has ''repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs.'' *Espinoza,* 140 S. Ct. at 2254 (citing *Locke,* 540 U.S. at 719, and *Rosenberger,* 515 U.S. at 839). Treating faith-based and secular organizations equally under this rule does not violate the Establishment Clause.

Changes: None.

Affected Regulations: None.

D. Indirect Federal Financial Assistance

1. Definition of ''Indirect Federal Financial Assistance''

Existing regulations included in their definition of ''indirect Federal financial assistance'' a requirement that beneficiaries have at least one adequate secular option for use of the Federal financial assistance. The notices of proposed rulemaking proposed to amend those regulations to eliminate this secular alternative requirement.

a. Consistency With Zelman v. Simmons-Harris

Summary of Comments: Several commenters contended that eliminating the secular alternative requirement would be inconsistent with the Supreme Court's decision in *Zelman* v. *Simmons-Harris,* 536 U.S. 639 (2002). These commenters argued that *Zelman* and its predecessor cases interpreted the Establishment Clause to require that voucher programs include a secular option. Without secular options, these

play in the joints between the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause.'' (internal quotation omitted)).

[53] *See, e.g., Thomas,* 450 U.S. at 723 n.1 (Rehnquist, J., dissenting) (citing several burdens on the system and other beneficiaries, including that ''[w]e could surely expect the State's limited funds allotted for unemployment insurance to be quickly depleted''); *Yoder,* 406 U.S. at 240 (White, J., concurring) (outlining the State's legitimate interest in educating Amish children, especially those who leave their community, but finding the evidence of harm insufficient); *id.* at 245 (Douglas, J., dissenting) (arguing that the decision ''imperiled'' the ''future'' of the Amish children, not their parents).

[54] *Hobby Lobby,* 573 U.S. at 729 n.37 (''Nothing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals.'').

[55] *See Amos,* 483 U.S. at 337 n.15 (''Undoubtedly [the employee's] freedom of choice in religious matters was impinged upon'' by the church gymnasium's exemption from the religious nondiscrimination requirement in Title VII'').

[56] *Kiryas Joel,* 512 U.S. at 706–07; *Estate of Thornton,* 472 U.S. at 709–10; *see also Cutter,* 544 U.S. at 722 (explaining that the Court in *Estate of Thornton* ''struck down'' the statute at issue ''because it 'unyieldingly weighted' the interests of Sabbatarians 'over all other interests' '' and required employers to privilege employee requests for Sabbath accommodations (alterations omitted)).

[57] *See, e.g., Amos,* 483 U.S. at 334–39; *id.* at 337 n.15 (distinguishing *Estate of Thornton*); *cf. Hobbie* v. *Unemployment Appeals Comm'n of Fla.,* 480 U.S.136, 145 n.11 (1987) (distinguishing *Estate of Thornton* because the provision of unemployment benefits to people fired for any religious reason ''does not single out a particular class of such persons for favorable treatment and thereby have the effect of implicitly endorsing a particular religion''); *see also Cutter,* 544 U.S. at 720, 722, 724 (upholding RLUIPA under the Establishment Clause despite alleged burdens).

commenters argued, beneficiaries cannot make a genuine and independent private choice of a religious provider. According to these commenters, that interpretation did not change in subsequent cases. Other commenters contended that certain factors emphasized in the *Zelman* decision do not make sense unless there exists at least one adequate secular option. These commenters contended that, for the programs at issue here, the proposed change will not guarantee that secular options exist, unlike in *Zelman* where public school options were mandated.

Some commenters claimed that eliminating the alternative provider requirement would undercut *Zelman.* These commenters also argued that—combined with elimination of the written notice requirement, which, according to these commenters, would allow religious service providers to ''hide their religious character''—such a change would render beneficiaries unable to ''engage in 'true private choice' when the very nature of that choice is hidden from them.''

Some of these commenters characterized the proposed change as contrary to *Zelman's* requirement that indirect aid be neutral toward religion. These commenters claimed that the proposed change would effectively design programs in such a way that only religious providers are available as options, and thus it would be the Government, not the beneficiary, that is determining that the government aid reaches inherently religious programs.

Other commenters questioned *Zelman* itself. Some commenters contended that the *Zelman* decision was not unanimous and that it conflicted with earlier Supreme Court precedent. Some characterized *Zelman* as an ''already questionable rule.''

Other commenters, however, opined that eliminating the secular alternative requirement would align with *Zelman.* Some of these commenters observed that *Zelman* upheld the tuition-assistance program that it reviewed because the program conferred assistance on a broad class of individuals without reference to religion, and the Court rejected an argument that the program was unconstitutional simply because religiously affiliated schools received a majority of the vouchers. These commenters further argued that, under *Zelman,* the constitutionality of an indirect-aid program cannot turn on whether a secular provider chooses to establish a location within the geographic area of religious providers.

Response: The Agencies agree with commenters who observed that the proposed elimination of the secular alternative requirement would be consistent with Supreme Court precedent, and the Agencies disagree with commenters who argued otherwise.

In *Zelman,* the Supreme Court rejected an Establishment Clause challenge to a tuition-assistance program in which a large majority of the participating schools were religious, and nearly all of the beneficiaries chose to expend the aid on tuition at religious schools. The Court observed that ''[a]ny private school, whether religious or nonreligious,'' could participate in the program provided that it met the program's religion-neutral criteria, 536 U.S. at 645, and it was undisputed that the program ''was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system,'' *id.* at 649. The Court then summarized its decisions as having held that ''where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious [providers] wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.'' *Id.* at 652.

The Court upheld the tuition-assistance program at issue in *Zelman* because it was ''neutral in all respects toward religion''; it ''confer[red] educational assistance directly to a broad class of individuals defined without reference to religion'' (*i.e.,* parents of schoolchildren); it ''permit[ted] the participation of *all* schools within the district, religious or nonreligious''; and the Government did nothing to ''skew the program toward religious schools'' because the aid was ''allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion'' and was ''made available to both religious and secular beneficiaries on a nondiscriminatory basis.'' *Id.* at 653–54 (emphasis in original, internal quotation marks and alteration omitted). The Supreme Court further reasoned that ''[a]ny objective observer familiar with the full history and context of the . . . program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.'' *Id.* at 655.

The indirect-aid programs covered by the modified definition in this rulemaking will share these characteristics. They will be neutral in all respects toward religion. They will allow organizations—both faith-based and secular—to participate as service providers, so long as they meet the programs' religion-neutral criteria. And they will make aid available on the basis of secular, nondiscriminatory criteria to religious and non-religious beneficiaries alike. Thus, the statutory programs that meet the definition of ''indirect Federal financial assistance'' as modified by this rulemaking will do nothing to skew the programs toward religious providers or services toward religious beneficiaries. To the extent the endorsement test still applies as it did in *Zelman,* any reasonable observer familiar with such programs would reasonably view them as efforts to provide assistance to the program's beneficiaries, rather than as endorsements of religion. In sum, the terms of the modified definition are consistent with, and do not move these programs out of compliance with, *Zelman.*

Although the *Zelman* Court did note the availability of secular schools in the program that it reviewed, *id.* at 655, it did not say that secular options must be available in a given geographic area in order for an indirect-aid program to satisfy the Establishment Clause. Indeed, the Court specifically declined to rest its holding on the geographically varying distribution of religious and secular schools. As the Court explained, the distribution of religious and non-religious schools ''did not arise as a result of the program,'' and resting its holding on that distribution ''would lead to the absurd result that a neutral school-choice program might be permissible in some parts of Ohio . . . but not in'' others. *Id.* at 656–57. ''The constitutionality of a neutral . . . aid program simply does not turn on whether and why, in a particular area, at a particular time, most private [providers] are run by religious organizations, or most recipients choose to use the aid at a religious [provider].'' *Id.* at 658. Because the secular alternative requirement made the definition of ''indirect Federal financial assistance'' hinge on the geographically varying availability of secular providers, it went beyond what the Establishment Clause requires and actually created the result that the *Zelman* Court deemed ''absurd.''

The Agencies also disagree with commenters who contended that, in a geographic area lacking a secular provider, a choice to expend aid on a faith-based provider cannot be a genuine and independent choice of private individuals under *Zelman.* As the *Zelman* Court summarized, the mechanism by which indirect aid reaches religious programs—''numerous

private choices, rather than the single choice of a government,'' *id.* at 652–53 (internal quotation marks omitted)—drives the Establishment Clause analysis. Under this final rule, private choices will continue to be the mechanism by which aid reaches religious programs. The programs covered by the modified definition of indirect aid will be open to administration by secular and faith-based providers alike. Moreover, beneficiaries participating in a program in one geographic area may spur new alternatives to serve that area and, as the experience of the COVID–19 pandemic has evidenced, many services can be obtained remotely from other geographic areas. Therefore, it cannot be said that a single government choice determines the distribution of aid in the programs.

The Agencies likewise disagree with a commenter's suggestion that elimination of the written notice requirement will preclude the programs at issue in this rulemaking from qualifying as indirect-aid programs. Nowhere in *Zelman,* or in the cases on which *Zelman* relied, did the Supreme Court suggest, much less hold, that indirect-aid programs must require providers to post or provide notices regarding their religious character and the availability of other providers. *See Zelman,* 536 U.S. 639; *see also Zobrest* v. *Catalina Foothills Sch. Dist.,* 509 U.S. 1 (1993); *Witters* v. *Wash. Dep't of Servs. for the Blind,* 474 U.S. 481 (1986); *Mueller* v. *Allen,* 463 U.S. 388 (1983).

One commenter suggested that *Zelman* is distinguishable because it arose in the education context (where certain public school options had to exist by law). The Agencies are unpersuaded that the distinction amounts to a difference. As already explained, *Zelman* summarized the Establishment Clause inquiry as whether it is ''numerous private choices, rather than the single choice of a government,'' that determines the flow of aid to religious providers. 536 U.S. at 652–53. Under the definition the Agencies adopt today, beneficiary and provider choices, rather than a single government choice, will determine the flow of indirect aid.

Changes: None.

Affected Regulations: None.

b. Rights of Beneficiaries and Providers

Summary of Comments: The Agencies received both supportive and opposing comments regarding the impacts of the proposal to eliminate the secular alternative requirement on the rights of beneficiaries and providers. Some commenters argued that elimination of the requirement would violate the constitutional rights of some beneficiaries by leaving them with no choice but to attend a program that includes explicitly religious content, or by effectively adding a religious test for receipt of government services. Similarly, others contended that elimination of the secular alternative requirement would put certain religious beneficiaries to the choice of adhering to their faith while refusing benefits or participating in religious activities against their faith to obtain the benefits.

On the other hand, one commenter opined that eliminating the secular alternative requirement was necessary to bring the Agencies' regulations into compliance with *Trinity Lutheran,* RFRA, and the Attorney General's Memorandum. Specifically, the commenter argued that by precluding religious beneficiaries in certain geographic areas from expending indirect aid on religious service providers of their choice, the requirement imposed an impermissible burden on those beneficiaries in violation of *Trinity Lutheran* and RFRA.

Other commenters, including groups representing minority religions, supported the proposal and pointed to a perception of disfavored treatment of faith-based providers in the existing definition of indirect Federal financial assistance. These commenters observed that, under the 2016 rule, secular providers could be considered indirect-aid recipients where beneficiaries lacked an adequate religious alternative, but faith-based providers could not be considered indirect-aid recipients where beneficiaries lacked an adequate secular alternative.

Response: The Agencies again do not agree that eliminating the secular alternative requirement would preclude genuine and independent choices of private individuals under *Zelman* or would result in involuntary or compulsory participation in religious activities. As already explained, beneficiaries' use of indirect aid to participate in programs with religious content will remain a function of private choice. Any participation requirements that a faith-based provider might impose on a beneficiary who chooses to expend indirect aid on that provider's program would result from private choice rather than government action and, therefore, would not implicate the beneficiary's constitutional rights.[58]

[58] *Cf. Manhattan Cmty. Access Corp.* v. *Halleck,* 139 S. Ct. 1921, 1928 (2019) (''In accord with the text and structure of the Constitution, this Court's state-action doctrine distinguishes the government from individuals and private entities.'').

The Agencies agree with the commenters who argued that, at least under some circumstances, the secular alternative requirement was in tension with providers' and beneficiaries' rights under the Free Exercise Clause of the First Amendment. Under *Trinity Lutheran* and *Espinoza,* disparate treatment of secular and faith-based providers is in tension with the Free Exercise Clause. In *Espinoza,* the Supreme Court reaffirmed its holding in *Trinity Lutheran* that ''disqualifying otherwise eligible recipients from a public benefit solely because of their religious character imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny.'' *Espinoza,* 140 S. Ct. at 2255 (quoting *Trinity Lutheran,* 137 S. Ct. at 2021 (internal quotation marks omitted)).

The secular alternative requirement resulted in some level of distinction between secular and religious providers based solely on religious character. When a secular provider option was not present, this requirement precluded ''otherwise eligible recipients''—the beneficiaries and the providers—from accessing a public benefit ''solely because of'' the provider's ''religious character.'' A secular organization in the same position, where it was the only provider, would still be eligible to provide services. The validity of such a distinction has been called into question by *Trinity Lutheran* and *Espinoza.* Furthermore, the secular alternative requirement may burden the free exercise rights of both beneficiaries and providers. In *Espinoza,* the Supreme Court addressed claims brought by the parents of school-aged children, who were the beneficiaries. 140 S. Ct. at 2251–52. The opinion, however, addressed not only the parents' liberty interests, but also those of the religious schools, which were the providers. The Court found that excluding religious provider options from the State-run program ''burdens not only religious schools but also the families whose children attend or hope to attend them.'' *Id.* at 2261.

For these reasons, the Agencies have concluded that the secular alternative requirement was in tension with *Trinity Lutheran* and *Espinoza* and may burden the free exercise rights of beneficiaries and providers under the First Amendment and RFRA. *See* Attorney General's Memorandum, 82 FR at 49674.

Changes: None.

Affected Regulations: None.

c. Harms to Beneficiaries and Providers

Summary of Comments: Some commenters argued that the proposed

new definition of ''indirect Federal financial assistance'' would harm beneficiaries in various ways. They argued that it would leave some beneficiaries with only programs that include explicitly religious content and program requirements; force some beneficiaries to participate in, or be subjected to, religious activities that make them uncomfortable or that violate their own religious beliefs; and subject beneficiaries to discrimination or bias, including on the basis of religion. Commenters argued that these consequences would be experienced by religious minorities, by female-led households, by racial minorities, by individuals who identify as transgender, and by individuals who are lesbian, gay, or bisexual.

Response: The Agencies do not agree that the new definition of ''indirect Federal financial assistance'' will adversely impact beneficiaries who are religious minorities, racial minorities, lesbian, gay, bisexual, transgender, or in female-led households. The comments predicting mistreatment of, or discrimination against, beneficiaries lacked supporting evidence, anecdotal or otherwise. Moreover, faith-based providers, like other providers, will be required to follow the requirements and conditions applicable to the grants and contracts they receive and will be forbidden to deny services in violation of these requirements. There is no basis on which to presume that faith-based providers are less likely than other providers to comply with their obligations. *See Mitchell* v. *Helms,* 530 U.S. 793, 856–57 (2000) (O'Connor, J., concurring in the judgment). And in any event, the distinction between direct and indirect aid has no bearing on the scope and substance of programs' nondiscrimination requirements; rather, the distinction governs whether faith-based providers may use Federal financial assistance to engage in, and may require beneficiaries to participate in, explicitly religious activities or, instead, must separate their explicitly religious activities from the supported programs.

In this rulemaking, the Agencies have sought to retain all necessary protections for beneficiaries while removing barriers to the full and equal participation of faith-based organizations in federally supported programs. In so doing, the Agencies recognize that, for many faith-based organizations, the provision of services to those in need is an exercise of their religious beliefs, and many faith-based organizations therefore view their explicitly religious activities as integral parts of the programs and services that they provide. The Agencies also are mindful that an unduly restrictive definition of indirect Federal financial assistance—the definition that controls whether and when federally supported programs may incorporate explicitly religious activities—could discourage such faith-based organizations from participating in federally supported programs. This result would harm not only faith-based organizations whose religious activities are fundamental to their programs and services, but also beneficiaries by discouraging such faith-based organizations from operating in unserved and underserved communities.

Indeed, elimination of the secular alternative requirement will make a difference only in circumstances where there is no adequate secular provider in a geographic area. It is better, in the Agencies' view, for beneficiaries in such unserved or underserved communities to have a faith-based option to receive indirect-aid services—even one that incorporates explicitly religious activities in which the beneficiaries otherwise might prefer not to participate—than to have no option at all. At the same time, the Agencies recognize that some beneficiaries may wish not to participate in explicitly religious activities that make them uncomfortable or that are inconsistent with their own religious beliefs. The Agencies, however, believe that this interest is served by this final rule, which will place the choice of service provider in the hands of beneficiaries and will not require them to accept the services of faith-based providers. Although the Agencies recognize that, in unserved or underserved communities, beneficiaries' needs for services may motivate them to choose service providers that they otherwise might not prefer, the Agencies believe they are better served by having an option, rather than having no option at all. It will still be their choice, not the Government's, to accept services from the faith-based provider.

This conclusion is consistent with the Court's reasoning in *Espinoza,* which rejected the argument that the ''no-aid provision'' at issue ''actually *promotes* religious freedom'' by ''keeping the government out of [religious organizations'] operations.'' 140 S. Ct. at 2260 (emphasis in original). That some potential recipients might decline to participate does not justify ''eliminating any option to participate in the first place,'' *id.* at 2261, and certainly does not provide support for ''disqualifying otherwise eligible recipients from a public benefit solely because of their religious character,'' *id.* at 2255 (internal quotation marks omitted), as some commenters would have the Agencies do.

Moreover, the purposes of this final rule include ensuring that otherwise eligible faith-based providers can participate on equal terms as secular providers and are not deterred from applying due to unnecessary or unclear rules, including fear of litigation. Faith-based providers might not have participated in indirect-aid programs because they were unaware of existing secular alternative providers or were unsure whether the existing secular providers would be deemed ''adequate.'' Although these instances and harms are difficult to quantify, beneficiaries in unserved and underserved areas would have been harmed by the absence of any federally funded programming.

In sum, the Agencies are exercising their discretion to finalize this amended definition of ''indirect Federal financial assistance,'' in order to avoid potential constitutional problems and to achieve the policy goals of expanding the availability of federally funded services to beneficiaries and of limiting obstacles to the equal participation of religious providers in those programs.

Changes: None.

Affected Regulations: None.

2. Required Attendance at Religious Activities

Under eight of the Agencies' current regulations, a religious organization ''that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program.'' *E.g.,* 28 CFR 38.5(c). HUD's current regulations have slightly different wording, stating that ''this section does not require any organization that only receives indirect Federal financial assistance to modify its program or activities to accommodate a beneficiary that selects the organization to receive indirect aid.'' 24 CFR 5.109(h).

The NPRMs proposed amending this language to clarify that this extends to an organization's attendance policies, where such policies require attendance at ''all activities that are fundamental to the program.'' HUD proposed to keep its unique language and to add the new language at the end of the provision.

a. Establishment Clause

Summary of Comments: Some comments opposed the proposed change on the ground that allowing any providers in an indirect-aid program to include required religious elements in their programs violates the

Establishment Clause. Other comments supported the change and viewed the change as consistent with established precedent.

Some commenters argued that this proposal violates the Establishment Clause when considered alongside the proposed elimination of the adequate secular alternative requirement from the definition of ''indirect Federal financial assistance.'' As the commenters characterized this interplay, the changes taken together would have the effect of allowing providers to impose religious exercise on beneficiaries in circumstances in which no adequate secular alternative is available, effectively conditioning government aid on participation in a religious activity and, thereby advancing religion. A commenter cited *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints* v. *Amos,* 483 U.S. 327, 334–35 (1987), as support for this position.

Response: The Agencies disagree with the commenters who argued that allowing providers to require attendance at all activities that are fundamental to an indirect-aid program violates the Establishment Clause. The Supreme Court has repeatedly upheld government programs in which aid, directed by private choice, is used by the beneficiary to attend programs with a required religious element.[59] The Court upheld the use of government funds in these programs because the ''link between government and religion [was] attenuated by private choices.'' *Espinoza,* 140 S. Ct. at 2261. The beneficiary's voluntary use of such aid is not ''*state* action sponsoring or subsidizing religion.'' *Witters,* 474 U.S. at 488 (emphasis in original). ''Nor does the mere circumstance that [a beneficiary] has chosen to use neutrally available state aid'' for a religious program ''confer any message of state endorsement of religion.'' *Id.* at 488–89. Allowing beneficiaries in an indirect-aid program to choose to use aid on programs that may require attendance at religious ''activities that are fundamental to the program'' thus does not contravene the Establishment Clause.

The Agencies also disagree with commenters who argue that the interplay between the new definition of indirect aid and the prospect that a program at which the beneficiary uses indirect aid will require participation at religious activities creates an Establishment Clause problem. As discussed in the preceding paragraphs, under the Supreme Court's indirect-aid cases, allowing beneficiaries in an indirect-aid program to choose to use aid on programs that may require attendance at religious ''activities that are fundamental to the program'' does not conflict with the Establishment Clause because there is no government endorsement of religion, much less coercion. And, as explained in Part II.D.1, use of indirect aid by programs with required religious participation will remain a function of private choice, no matter what alternatives might be available. In an area where the only provider of a certain social service happens to be a faith-based organization that requires participation in religious activities, it would make no sense to deny the availability of the Federal aid altogether, instead of at least giving beneficiaries in the area the choice whether to use it at that organization. The result of such a rule would be to discriminate in the availability of indirect Federal assistance along regional lines. *See Zelman,* 536 U.S. at 657–58. Absent the Government endorsing or coercing beneficiaries to accept the social service in question, the Agencies do not believe that the two provisions, taken together, give rise to Establishment Clause violations.

Amos lends no support to the commenters' position. In the passage the commenters cited, the Supreme Court noted that accommodation of religion ''may devolve into an unlawful fostering of religion.'' 483 U.S. at 334–35 (internal quotation marks omitted). But, according to the Supreme Court in *Amos,* for a government accommodation to have such ''forbidden 'effects,' . . . it must be fair to say that the *government itself* has advanced religion through its own activities and influence.'' *Id.* at 337 (emphasis in original). As discussed in Part II.D.1.a, such is not the case with indirect Federal financial assistance, which is not so much a religious accommodation as an allowance for participation by all qualified providers. Any religious or non-religious use of the funds is attributable to the beneficiary's choice—not the Government's. The same analysis holds true with respect to the presence or the absence of providers in a locale, for the reasons given in Part II.D.1.b and the previous paragraph. Therefore, the Agencies do not believe there is any conflict with the Establishment Clause.

Finally, for consistency and uniformity, HUD finalizes its regulation with language similar to what the other Agencies are using: ''an organization that participates in a program funded by indirect Federal financial assistance need not modify its program or activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program and may require attendance at all activities that are fundamental to the program.'' HUD notes that it did not receive any comments regarding its language.

Changes: HUD is adopting language consistent with that used by the other Agencies.

Affected Regulations: 24 CFR 5.109(g).

b. Clarification

Summary of Comments: Some commenters praised the proposals in the NPRMs—including this proposed change—that remove incentives for religious organizations to modify the degree of their religious expression, reducing burdens on the free exercise of religion. Some also highlighted the religious liberty interests a beneficiary may have in choosing to participate in a program that includes required religious activities that are fundamental to the program. Other commenters argued that the changes are not necessary to promote religious liberty.

Some commenters argued that the proposed clarifying language contravened the nondiscrimination requirements of Executive Order 13559, which applied to providers of both direct and indirect Federal financial assistance. One commenter supported this argument by referencing the 2016 final rule in which the Agencies chose not to include language similar to the current proposal because Executive Order 13559 purportedly prohibited it.

Response: The Agencies agree with the comments suggesting that restricting beneficiaries from accessing, or providers from maintaining, indirect-aid programs that include religious activities may burden the free exercise rights of both beneficiaries and faith-based providers. Since *Sherbert* v. *Verner,* 374 U.S. 398 (1963), the Supreme Court has held that conditioning neutrally available benefits on action contrary to religious exercise can place a substantial burden on a person's free exercise rights.[60] Although

[59] *See, e.g., Zelman,* 536 U.S. 639; *Zobrest,* 509 U.S. 1 (holding that the Establishment Clause did not bar a public school district from providing an interpreter to a deaf student attending Catholic high school); *Witters,* 474 U.S. 481 (finding no bar to State rehabilitation program used to assist blind man to train for ministry); *Mueller,* 463 U.S. 388 (finding no bar to State tax deduction for education expenses incurred by parents of children attending parochial schools).

[60] *See Sherbert,* 374 U.S. at 404–06 (''It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.''); *see also Hobbie,* 480 U.S. at 141 (''Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated

the Supreme Court subsequently curtailed the application of these cases for Free Exercise Clause purposes in *Employment Division* v. *Smith,* 494 U.S. 872, Congress chose in RFRA to impose the same protections in Federal programs. *See* Attorney General's Memorandum, 82 FR at 49674. Conditioning a religious organization's ability to participate in an indirect-aid program on its willingness to modify attendance requirements for activities fundamental to the program may, in similar fashion, impose a ''unique disability upon those who exhibit a defined level of intensity or involvement in protected religious activity.'' *McDaniel,* 435 U.S. at 632 (Brennan, J., concurring in the judgment). It would also deprive beneficiaries who would otherwise choose to participate in a program with religious activities of that option. As previously discussed in Part II.D, whether beneficiaries in a given locality have available the full range of potential options, secular or religious, should not be reason to deprive beneficiaries of the choice offered even in cases where the menu of options might be more limited. In the Agencies' view, some choice will be better than none.

The Agencies do not interpret the current regulations to require an organization at which beneficiaries choose to use their indirect aid to modify its programs to eliminate required participation in explicitly religious activities. As the preamble to the 2016 final rule makes clear, Executive Order 13559 provided that organizations receiving Federal financial assistance ''shall not, in providing services or in outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.'' 81 FR at 19361. At the same time, the 2016 rule added that ''an organization that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program.'' *Id.* Using a 12-step program as an example, the 2016 preamble explained that a program funded through indirect aid that ''includes religious content that is *integral to the program* would not be required to alter its program to accommodate an objector who pays for the program with indirect aid.'' *Id.* (emphasis added). Requiring that such programs include the ability to opt out of religious activity does not make sense given their inherently religious character and the fact that the beneficiaries will have freely chosen the program with that religious content. The Agencies did not believe that an organization declining to undertake such a modification would have violated the nondiscrimination provisions of Executive Order 13559 or those of the Agencies' rule in 2016. The Agencies view the issue the same way today.

However, given the comments received arguing that the prior regulations required such an organization to undertake such a modification, the Agencies believe it appropriate to include language clarifying this issue in the final rule. The final rule includes language to eliminate any uncertainty over this issue in the future. Religious providers at which beneficiaries choose to use indirect aid will not be required to alter any fundamental program elements that require participation in religious activities.

Changes: None.

Affected Regulations: None.

E. Accommodations for Faith-Based Organizations

DHS's existing regulations provided that ''[n]othing in this part shall be construed to preclude DHS or any of its components from accommodating religious organizations and persons to the fullest extent consistent with the Constitution and laws of the United States.'' 6 CFR 19.3(d). Additionally, DOL's existing regulations specified that its provision prohibiting religion-based discrimination against beneficiaries did not ''preclude'' DOL or its intermediaries ''from accommodating religion in a manner consistent with the Establishment Clause of the First Amendment to the Constitution.'' 29 CFR 2.33(a). The other Agencies' existing regulations did not contain parallel provisions that explicitly addressed religious accommodations for faith-based organizations.

All of the Agencies proposed to add express language regarding accommodations. When providing that faith-based organizations are eligible on the same basis as any other organization, they all proposed adding that eligibility is subject to the Agencies' ''considering'' accommodations. All eight of the Agencies that proposed specific text for notices to faith-based organizations—DHS, DOJ, DOL, ED, HHS, HUD, VA, and USDA—also proposed to include specific language in those notices indicating that religious accommodations may also be sought under many of the listed Federal laws. Additionally, when providing that all organizations are required to carry out all eligible activities in accordance with all program requirements, DHS, DOJ, DOL, ED, HHS, HUD, and VA proposed to add that this is ''subject to'' any accommodations. USDA proposed to add more generally that ''[t]he requirements established in this part do not prevent a USDA awarding agency or any State or local government or other intermediary from accommodating religion in a manner consistent with [F]ederal law and the Religion Clauses of the First Amendment to the U.S. Constitution.''

Within these provisions, DHS, DOJ, ED, HHS, USAID, and USDA proposed that such accommodations be ''appropriate under'' or ''consistent with'' the U.S. Constitution and Federal laws. HUD proposed to expressly reference RFRA.

Summary of Comments: To the extent that the comments regarding the scope and application of RFRA discussed in Parts II.C and II.F are relevant to the added accommodation language discussed in this section, the Agencies incorporate those comments and responses from Parts II.C and II.F. Similarly, some of the examples and hypotheticals discussed in Part II.C were repeated by other commenters, or could be construed broadly, as comments on the proposed accommodation language discussed in this section. Therefore, the Agencies incorporate any such relevant examples here.

Several commenters supported the accommodation language in the proposed rules because it provides expressly for accommodations that the Agencies were already required or permitted to grant under existing Federal law, including RFRA. Most of these commenters explained that adding this language was important to make clear—to faith-based organizations, the Agencies, State and local governments, and any other intermediaries—that faith-based providers do not lose their rights to seek such accommodations in the Federal funding process. One of these commenters added that this accommodation language recognizes and clarifies that existing law protects religious exercise, not just religious identity. One of these commenters also outlined specific principles from RFRA

by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.' '' (quoting *Thomas,* 450 U.S. at 717–18 (emphasis omitted))).

and Free Exercise Clause cases that should guide the accommodation inquiry, and these principles are listed in the response section below.

The Agencies solicited comments on whether to define the terms that they each proposed to describe such accommodations. Some commenters stated that the Agencies should not define the term because there is an accepted legal usage of ''accommodation'' that would be difficult to capture in a single definition. Certain national religious medical organizations proposed that the Agencies define an accommodation as ''a provision made by the [F]ederal government for the free exercise of religion of a [F]ederal-funded recipient, who collaborates with the [F]ederal government in meeting the health or social service needs of a specific population, but the intent for which [F]ederal dollars are not explicitly allocated and expended.''

Several other commenters argued that the terms used by the Agencies to describe accommodations were vague and would only create confusion, including because the Agencies did not provide any explanation of the meaning of those terms. Some of these commenters argued that this accommodation language would create confusion because there are no clear lines in this area and because the Agencies do not identify any real-world or hypothetical examples of an accommodation that would be granted. One of these commenters noted that Congress has used the term ''reasonable accommodation'' differently in various statutes but it has almost always been accompanied by the express or implicit requirement that it not impose an ''undue hardship'' on others, citing 42 U.S.C. 2000e, 42 U.S.C. 12112(b)(5)(A), and *Shapiro* v. *Cadman Towers, Inc.,* 51 F.3d 328, 334–35 (2d Cir. 1995).

Some of these commenters argued that the accommodation language would create confusion by suggesting that faith-based organizations could seek accommodations from program requirements, including to refuse to provide the program's services to eligible beneficiaries. They were particularly concerned about accommodations from requirements that are very important to any government-funded program. Some of these commenters also argued that the proposed references to accommodations in multiple sections of the proposed rules would create additional confusion for providers and beneficiaries. One of these commenters argued that the Agencies had not identified any evidence or analysis for why this vague new language is needed at this time.

Several commenters argued that the Agencies were creating new accommodations where none should be granted. Some of these commenters argued that such accommodations would be contrary to, or not required by, *Trinity Lutheran* because they would give faith-based organizations exemptions and preferential treatment, whereas *Trinity Lutheran* requires a level playing field. One of these commenters added that this accommodation language was not required by operative—though uncited—legal authority and should be rejected.

Some of these commenters argued that the accommodation language contradicted other aspects of this final rule. They argued that it was internally contradictory for the Agencies to provide that faith-based organizations are eligible ''on the same basis as any other organization'' while adding ''subject to'' accommodations that give preferential exemptions from rules. One of these commenters argued that applying these accommodation standards solely to faith-based organizations contradicted the Agencies' assertion that they removed ''certain standards'' because those standards applied solely to faith-based organizations. One of these commenters added that allowing accommodations for faith-based organizations was contrary to the provision in this final rule that an organization receiving indirect Federal financial assistance does not need to modify its program or activities to accommodate a beneficiary.

Multiple commenters opposed any exemption of faith-based organizations from laws and regulations that otherwise apply universally. Some of these commenters argued that accommodations are not permitted from generally applicable laws that prohibit discrimination because religiously motivated conduct does not receive special protection from general, neutrally applied legal requirements under *Fulton* v. *City of Philadelphia,* 922 F.3d 140, 159 (3d Cir. 2019), *cert. granted,* 140 S. Ct. 1104 (U.S. Feb. 24, 2019). Similarly, other commenters argued that the Supreme Court had either rejected or had not adopted a general rule that faith-based organizations could deny individuals service under a public accommodations law in *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission,* 138 S. Ct. 1719 (2018).

One commenter argued that religious accommodations are unnecessary because providing the federally funded services is not a ''fundamental'' or ''central'' religious activity and faith-based organizations are not obligated to participate in Federal programs or funding. Several commenters argued that faith-based organizations should either comply with nondiscrimination laws or forgo taxpayer money.

Several commenters argued that the added accommodation language would grant new or expanded accommodations from program requirements that would be inappropriate. Some of these commenters argued that exempting grantees from program requirements would be contrary to Congressional intent in establishing these programs because the legislation under which these programs are authorized does not allow discriminatory denial of service by the entities receiving funding. Similarly, multiple commenters argued that providing accommodations from program requirements would undermine the central goal of these programs, which is to provide people with the services they need.

Some commenters argued that the Agencies had not adequately accounted for the costs of accommodations that beneficiaries would bear. They argued that the NPRMs did not discuss the need to protect the program beneficiaries' religious freedom or their access to services, especially beneficiaries for whom these services may be a matter of life and death. These commenters were concerned that additional accommodations would further threaten the health and well-being of individuals across the country because faith-based organizations could flout established applicable guidelines, bypass standards of care, discriminate against clients or potential clients, or deny evidence-based services or treatments. Some commenters also argued that beneficiaries could be uncomfortable or forgo services, as discussed in Part II.C. Some of these commenters also argued that a faith-based organization's religious beliefs should not be the basis to deny needed services to beneficiaries.

Some of these commenters argued that any such third-party harms should preclude accommodations under the Establishment Clause, citing *Hobby Lobby, Cutter, Texas Monthly, Kiryas Joel, Amos,* and *Estate of Thornton.* They argued that *Hobby Lobby* was premised on the accommodation's imposing no third-party harms. Other commenters argued that third-party harms implicate, but do not categorically violate, the Establishment Clause under the cases cited above. One of these commenters also disagreed with the statement in the Attorney General's

Memorandum that ''the fact that an exemption would deprive a third party of a benefit does not categorically render an exemption unavailable.'' 82 FR at 49670.

Some of these commenters argued that the accommodation language does not acknowledge the constitutional limits on such exemptions when they cause harm to others. One of these commenters claimed that the accommodation language puts the interests of faith-based providers above those of the program beneficiaries whose rights and access to needed program services will be put at risk. Another commenter argued that such explanation was absent from the proposed regulatory text but acknowledged that the Agencies had recognized these limits on accommodations in the NPRMs.

Some of these commenters also argued that the Agencies do not explain why they are providing express accommodations for faith-based organizations, but not for beneficiaries. These commenters argued that it is just as legitimate to accommodate beneficiaries as faith-based providers. Another commenter argued that it was arbitrary to claim that accommodations for faith-based organizations are warranted because ''few will need them,'' while claiming accommodations for beneficiaries' religious freedom are not warranted because ''few will need them.''

Several commenters argued that expanded accommodations from program requirements would allow faith-based providers to seek accommodations to discriminate against beneficiaries or refuse to provide services that are otherwise required. Some of these commenters argued categorically that faith-based organizations should not be able to obtain accommodations or exemptions from nondiscrimination laws. One of these commenters argued that courts have long rejected arguments that faith-based organizations can be exempt from antidiscrimination requirements, citing *Bob Jones University* v. *United States,* 461 U.S. 574 (1983), *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968), *Dole* v. *Shenandoah Baptist Church,* 899 F.2d 1389 (4th Cir. 1990), and *Hamilton* v. *Southland Christian School, Inc.,* 680 F.3d 1316 (11th Cir. 2012). These commenters were concerned that faith-based providers would seek and obtain such accommodations more often than they had before.

Some of these commenters argued that providing services without discrimination is key to an organization's ability to effectively carry out the Agencies' objectives. Some of these commenters pointed to other areas where the Agencies had recognized the existence of, and harm from, discrimination. One of these commenters argued that denial of service or care in healthcare settings can be deadly.

A few commenters argued that the added accommodation language would enable faith-based providers to limit their services to co-religionists or those who share the organizations' beliefs. Some commenters argued that the Agencies had not adequately explained the reason for creating what they described as vast new exemptions that may allow religious providers to avoid providing the services for which they are accepting taxpayer funds. A commenter argued that, to the extent these accommodations would allow organizations to discriminate on the basis of a beneficiary's religious belief or practice, or lack thereof, it would conflict with the prohibition on such discrimination in Executive Order 13279.

Some commenters were concerned that faith-based organizations would use religion as a pretext to discriminate against beneficiaries. These commenters argued that the Government should not endorse and fund such discrimination against religious minorities, LGBTQ people, and others who do not act in accordance with the organization's religious beliefs, such as not attending religious services, marrying a person of the same sex, getting divorced, using birth control, or engaging in sexual relations when unmarried. One of the commenters opposing this language recognized that RFRA sometimes allows the denial of services but this commenter considered that to be improper discrimination. Some commenters argued categorically that requiring compliance with Federal civil rights laws does not infringe anyone's freedom of conscience or demand anyone change their religious beliefs.

Some commenters argued that faith-based organizations could not satisfy the RFRA standard to warrant an accommodation that would allow discrimination. Some commenters argued that there is no RFRA substantial burden for being required to serve LGBTQ people because the Sixth Circuit held that mere toleration of transgender characteristics is not tantamount to official endorsement or support of those traits, which would be necessary to establish a substantial burden. *Harris Funeral Homes,* 884 F.3d at 587–88. These commenters also argued that the Agencies would be able to satisfy strict scrutiny for prohibitions on such discrimination based on *Harris Funeral Homes, Fulton,* and *Norwood* v. *Harrison,* 413 U.S. 455 (1973). According to these commenters, these cases held that eradicating and prohibiting discrimination are compelling interests and that mandating compliance with nondiscrimination laws is the least restrictive means of pursuing such interests.

Several commenters argued that allowing discrimination in taxpayer-funded programs would violate other principles. Some of these commenters were concerned that allowing such discrimination would violate the Establishment Clause by providing direct financial support for religion. One of these commenters argued that this would amount to giving faith-based organizations ''the right to use taxpayer money to impose [their beliefs] on others,'' quoting *ACLU of Massachusetts* v. *Sebelius,* 821 F. Supp. 2d 474 (D. Mass. 2012), which is discussed in Part II.F.2.a. Another commenter argued that the U.S. Constitution bars the Government from directly funding or providing aid to private institutions that engage in discrimination, citing *Norwood,* 413 U.S. at 465–66. *See also Christian Legal Soc.* v. *Martinez,* 561 U.S. 661, 682 (2010). Some individual commenters argued that it would violate their religious liberties if they were forced to fund—through taxpayer dollars—organizations that discriminate in the provision of federally funded services.

Other commenters were worried that the accommodation language was based on the Attorney General's Memorandum. These commenters argued that the Attorney General's Memorandum potentially violated the Establishment Clause because it did not put any checks on religious exercise, seemed to elevate the right to religious exemptions above other legal and constitutional rights, and said that organizations, not just people, have religious freedom. These commenters argued that the added accommodation language based on the Attorney General's Memorandum dangerously expands the ability for religious entities to request special treatment that may enable discrimination against beneficiaries.

Several commenters were particularly concerned, including based on their experiences, that the accommodation language could allow entities to discriminate against or deny service to traditionally marginalized groups and underserved communities, including women (especially women of color), persons with disabilities, LGBTQ

persons, and those living in rural communities. These commenters were concerned that denial of care could exacerbate existing disparities for these groups. Some of these commenters were also concerned that these communities could face added barriers to accessing services in religious spaces, which would cause further harm.

Some commenters pointed to past examples to support or oppose this accommodation language. One commenter pointed to a court's granting a religious exemption to a faith-based shelter for homeless women when a city tried to force it to comply with a local public accommodation law that was contrary to the shelter's religious mission and message. *See Downtown Soup Kitchen* v. *Municipality of Anchorage,* 406 F. Supp. 3d 776 (D. Alaska 2019). This commenter argued that the accommodations language in the rule would make clear that faith-based organizations could be protected from such requirements in federally funded programs.

Another commenter pointed to an example where HHS granted an exemption to allow a Protestant child welfare agency that received Federal funding to deny services to women from other religions.[61] This commenter argued that the exemption for the provider's ''religious identity'' was used to rob the women of their religious freedom, deny them the ability to become foster parents, and dictate that a group of children from all backgrounds be placed exclusively in Protestant homes.

Other commenters relied on hypothetical examples, including many of the ones listed in Part II.C. Additionally, some commenters were concerned that faith-based organizations could deny reproductive health access for women and girls, including contraception for unwed adolescent girls. They were similarly concerned about denials of condoms to men who have sex with men and to transgender individuals in HIV treatment and prevention programs, which would undermine the overall program goals. Another commenter, however, said it would be appropriate, for example, to exempt a Muslim food kitchen from providing pork on its menu.

A commenter argued that the Agencies had considered RFRA when adopting the 2016 final rule and presented no reasoned analysis for discarding those conclusions now.

[61] *See* Frank J. Bewkes et al., Center for American Progress, *Welcoming All Families* (Nov. 20, 2018) *https://www.americanprogress.org/issues/lgbtq-rights/reports/2018/11/20/461199/welcoming-all-families.*

Some commenters argued that the accommodation language, in combination with the provisions that permit religious organizations to maintain their religious character and expression, could result in faith-based organizations proselytizing or expressing religious views in connection with providing federally funded services. One of these commenters speculated that such activities could discourage LGBTQ individuals from seeking critical services and could create unnecessary discomfort for beneficiaries who disagree.

Another commenter was also concerned that the accommodation language—combined with the other changes addressed in Parts II.F and II.G—would increase preferential treatment for religious organizations.

Finally, some commenters argued that the accommodation language was unwarranted, arbitrary, and capricious.

Response: The Agencies agree with the comments that supported the accommodation language. The constitutional and statutory accommodations addressed by this language were required or permitted under the prior rule. The same is true for the other Federal laws that require accommodations or that prohibit discrimination based on conscience, including 42 U.S.C. 238n, 42 U.S.C. 300a–7, 42 U.S.C. 2000e–1(a) and 2000e–2(e), 42 U.S.C. 12113(d), 42 U.S.C. 18113, and the Weldon Amendment, *see, e.g.,* Further Consolidated Appropriations Act, 2020, Public Law 116–94, div. A, sec. 507(d), 133 Stat. 2534, 2607 (Dec. 20, 2019). Protections under these constitutional and statutory provisions were available under the 2016 final rule and continue to be available. Also, the Agencies were always obligated to consider the RFRA implications of their program requirements, as discussed in Part II.C. *See, e.g., Little Sisters,* 140 S. Ct. at 2383–84 (failure to consider such RFRA rights could make the Agencies ''susceptible to claims that the rules were arbitrary and capricious for failing to consider an important aspect of the problem''). The accommodation language in this final rule merely recognizes that governing law; it is not a ''substantive change,'' as HHS explained in its NPRM. 85 FR at 2979, 2981.

The Agencies determine that it is important to add clarifying language to ensure that this existing law is clear to faith-based organizations, the Agencies, State and local governments, any other intermediaries, and any potential challengers to faith-based organizations' participation. Based on various Agencies' experience and research, faith-based organizations with accommodation needs have been deterred from participating, sued when they participated, and denied participation in Federal financial assistance programs or activities. *See, e.g., Franciscan Alliance, Inc.* v. *Burwell,* 227 F. Supp. 3d 660, 691–93 (N.D. Tex. 2016) (holding in the alternative that faith-based health care providers were likely to succeed on the merits of their claim to a RFRA accommodation to refuse to perform, refer for, or cover gender reassignment surgeries or abortions that had been required by a nondiscrimination provision connected to receipt of Federal financial assistance); *cf. Exclusion of Religiously Affiliated Schools from Charter-School Grant Program,* 44 Op. O.L.C. _____, *6 (Feb. 18, 2020), *https://www.justice.gov/olc/file/1330966/download* (''Forbidding charter schools under the program from affiliating with religious organizations discriminates on the basis of religious status.''); *Religious Restrictions on Capital Financing for Historically Black Colleges and Universities,* 43 Op. O.L.C. _____, *9 (Aug. 15, 2019), *https://www.justice.gov/olc/file/1200986/download* (''*Religious Restrictions*'') (''The Establishment Clause permits the Government to include religious institutions, along with secular ones, in a generally available aid program that is secular in content.'').

Also, some have challenged the premise that the Agencies may proactively grant accommodations to religious providers. The persistence of such arguments was demonstrated by the public comments on this final rule and by litigation on the issue, including *Little Sisters.* Although substantive disagreements regarding the scope of such accommodations will continue, the Agencies determine to add express accommodation language at this time to ensure that faith-based organizations know their religious exercise can, in appropriate circumstances, be protected and accommodated in federally funded programs, to ensure that such accommodations are proactively requested and considered in the application process, and to help eliminate disputes regarding the availability of such accommodations. The Agencies agree with commenters that faith-based organizations are more likely to seek such accommodations under this final rule.

The Agencies determine that this clarity is also appropriate because of how some accommodations have been handled recently by State and local

governments where RFRA and other Federal protections do not apply. In an example cited by commenters, the City of Philadelphia cancelled a contract with a faith-based foster care agency that could not certify same-sex couples consistent with its religious beliefs. The faith-based organization was willing to refer any same-sex couple to one of the many other agencies in the city. The city has argued that it ''has no authority to grant exemptions to the contract's nondiscrimination requirement.'' Br. for City Respondents at 35, *Fulton* v. *City of Philadelphia,* No. 19–123 (U.S. Aug. 1, 2020). This final rule makes clear that, when it comes to Federal financial assistance programs and activities, the Agencies and their intermediaries do have such authority where permitted by existing Federal laws. The Agencies also note that the *Fulton* case is pending at the U.S. Supreme Court, *see* 140 S. Ct. 1104, and any relevant decision will be incorporated into the accommodation analysis going forward.

One commenter gave the example of an HHS exemption involving a Protestant child welfare agency. But HHS granted that exemption to the State of South Carolina, to be applied with respect to certain similarly situated faith-based providers, and not directly to the faith-based provider itself. It was also based on a provision that applies equally to requests for deviations or exceptions by secular organizations;[62] and it was based on an appropriate context-specific analysis of the religious freedom rights of faith-based providers under RFRA. In addition, that exemption did not deny anyone the ability to become a foster parent, and did not dictate that children be placed in Protestant homes. Indeed, the exempt agency (or another similarly situated agency) was required to refer prospective foster parents with whom it could not work to another child placement agency or to the State program. This example thus demonstrates the reasonable outcomes from applying the appropriate accommodation analysis, as discussed in Part II.C. The accommodation language in this final rule makes clear that such accommodations are available but does not change the substance of that accommodation analysis. For these reasons, the Agencies are adding this accommodation language now, although they chose not to include such language in the 2016 final rule. *See* 81 FR at 19370–71 (concluding that a RFRA-based process for employment exemptions was beyond the scope of the 2016 final rule).

The Agencies agree with the comments that said the Agencies should not further define the terms regarding these accommodations. As demonstrated by the proposed definition submitted by a commenter and by the list of principles in the next paragraph, it is difficult to fully capture all of the nuances in a single definition. It would also be difficult for any single definition to capture the nuances among the available types of accommodations, as well as the full current case law, let alone retain flexibility to incorporate future developments in Federal statutes and case law.

Many of the comments that opposed the accommodation language did so based on incorrect or inapplicable legal standards. This language is not being added based on *Trinity Lutheran.* That case reaffirmed that faith-based organizations cannot be disfavored based on religious character. That is a basis for the aspects of this final rule that provide for equal treatment, as discussed in Parts II.C, II.D, II.F, and II.G. But other First Amendment principles and Federal statutes mandate or permit accommodations that enable faith-based organizations to act in accordance with their religious beliefs and consciences. For example, the Federal Government can permit such organizations to participate in federally funded programs without substantial burdens to their religious exercise. The accommodation language incorporates those legal principles. As a result, there is no contradiction between mandating eligibility ''on the same basis as any other organization'' consistent with *Trinity Lutheran,* while also providing that this is ''subject to'' accommodations consistent with the other binding legal principles. For the same reasons, it is not internally inconsistent to remove the alternative provider notice-and-referral requirements that applied solely to faith-based organizations, in tension with *Trinity Lutheran* and RFRA, while also providing expressly for accommodations that are required or mandated by existing Federal law, including RFRA.

Commenters also mistakenly argued that accommodations are not available from neutral laws of general applicability. This final rule applies to Federal financial assistance programs that are governed by RFRA and other existing Federal laws that require or permit certain accommodations even from neutral laws of general applicability. These commenters relied on *Fulton* and *Masterpiece Cakeshop,* but those cases involved State and local governments that were not subject to RFRA or the other Federal laws addressed here. And, as discussed elsewhere, current Free Exercise Clause and Establishment Clause jurisprudence does not preclude permissive accommodations.

Additionally, future RFRA accommodations are not precluded by the Sixth Circuit's decision in the *Harris Funeral Homes* case cited by commenters. That case applied a substantial burden standard that is arguably inconsistent with *Hobby Lobby* and prior cases, as discussed in Part II.C.3.d. *See, e.g., Hobby Lobby,* 573 U.S. at 723–25; *see also Little Sisters,* 140 S. Ct. at 2383 (explaining that, in *Hobby Lobby,* ''we made it abundantly clear that, under RFRA, the Departments must accept the sincerely held complicity-based objections of religious entities''). Moreover, *Harris Funeral Homes* must be considered alongside the Supreme Court's opinion in *Bostock.* In that case, the Court acknowledged the potential application of Title VII's ''express statutory exception for religious organizations''; of the First Amendment, which ''can bar the application of employment discrimination laws'' in certain cases; and of RFRA, ''a kind of super statute'' which ''might supersede Title VII's commands in appropriate cases.'' 140 S. Ct. at 1754 (noting that ''how these doctrines protecting religious liberty interact with Title VII are questions for future cases too'').

Commenters also mistakenly argued that accommodations are foreclosed because participation in these Federal financial assistance programs and activities is not ''fundamental'' or ''central'' to any religious activity or obligation. None of the applicable accommodation statutes requires the religious activity or obligation to be central or fundamental. Doing so would put the Government in the difficult position of making inherently religious judgments. *See, e.g., Emp't Div., Dep't of Human Res. of Ore.* v. *Smith,* 494 U.S. 872, 887 (1990) (''Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims.'' (internal quotation marks omitted)). The definition of ''religious exercise'' that applies to RLUIPA and RFRA ''includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'' 42 U.S.C. 2000cc–5(7)(A) (RLUIPA); 42 U.S.C. 2000bb–2(4) (RFRA incorporating the definition from RLUIPA). And RFRA accommodations are available whether or not participation is fundamental or central,

[62] *See* 2 CFR 200.102 (OMB uniform guidance for executive branch agencies).

even if the conduct is voluntary, as discussed in Parts II.C and II.F.

Contrary to commenters' assertions, any accommodation analyses conducted in connection with the requirements of this final rule will consider all relevant Establishment Clause principles and any relevant impact on taxpayers' religious liberties. There is no basis to claim that the Agencies and their intermediaries will not follow Federal law, including the Establishment Clause. Indeed, DHS, DOJ, ED, HHS, HUD, USAID, and USDA are all adding regulatory text in these provisions with express references to constitutional limits, RFRA, and other Federal laws. Additionally, the eight Agencies with prescribed text for notices to faith-based organizations all expressly reference these Federal laws, as discussed in Part II.G.3. Also, as discussed in Part II.F.2.a, the Agencies disagree with the commenter that relied on *ACLU of Massachusetts* v. *Sebelius,* which is distinguishable on legal and factual grounds but does show how a faith-based organization can receive an appropriate accommodation as the highest ranking applicant under one version of a program but not receive an accommodation under another version where other providers rank higher. *See ACLU of Mass.* v. *U.S. Conference of Catholic Bishops,* 705 F.3d 44, 49–51 (1st Cir. 2013) (summarizing facts).

For similar reasons, the Agencies disagree that these accommodations should not be based on the Attorney General's Memorandum. The Attorney General's Memorandum accurately describes existing Federal law, including the relevant Establishment Clause principles and the checks on religious exercise. Contrary to these commenters' claims, it is well established that faith-based organizations, not just individuals, are entitled to religious freedom. *See, e.g., Hobby Lobby,* 573 U.S. at 707–09 (recognizing that corporations can exercise religion under the Free Exercise Clause and RFRA).

Commenters also mistakenly argued that the accommodation language is foreclosed by third-party harms. As discussed in Part II.C.3.e, third-party burdens do not categorically preclude accommodations under RFRA. Indeed, *Hobby Lobby* rejected this argument. 573 U.S. at 729 n.37. That case was the basis for the statement in the Attorney General's Memorandum that ''the fact that an exemption would deprive a third party of a benefit does not categorically render an exemption unavailable.'' 82 FR at 49670, 49675 (citing *Hobby Lobby*).

The Agencies also disagree that the addition of accommodation language to this final rule will create any third-party burdens beyond what current law, as discussed above, already allows and, in some cases, mandates. To the extent that third-party burdens are relevant to a specific accommodation determination, the Agencies and their intermediaries will consider such burdens. The Agencies and their intermediaries will consider, for example, the impact on the health and well-being of beneficiaries when determining whether there is a compelling interest in a particular program requirement and whether less restrictive means are available. The Agencies also incorporate their discussions of these issues in Parts II.C and II.F.

The Agencies disagree that nondiscrimination laws categorically bar accommodations. Rather, like any other accommodation, they are available in particular cases, based on context and applicable Federal law. *See, e.g., Hobby Lobby,* 573 U.S. at 729 n.37; *World Vision,* 31 Op. O.L.C. 162 (concluding that RFRA was reasonably construed to require that an organization be exempt from a statute's religious nondiscrimination provision).

The Agencies oppose discrimination and seek to protect beneficiaries from it. The Agencies reiterate that this final rule continues to expressly prohibit discrimination against beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. The Agencies' other program requirements bar discrimination on other protected bases. If an accommodation were sought from those requirements based on a sincerely held religious belief, the Agencies and their intermediaries would evaluate it appropriately under existing law, including without ''religious hostility.'' *Masterpiece Cakeshop,* 138 S. Ct. at 1724, 1729–31.

Although evaluation of accommodation requests is context-dependent, the Agencies cannot conceive of granting such an accommodation to discriminate based on race. As the Supreme Court has recognized, there is a compelling interest in eradicating racial discrimination, and the Court has frequently upheld outright prohibitions on such discrimination. *Bob Jones Univ.,* 461 U.S. 574; *see also Newman,* 390 U.S. 400 (private lawsuit to enjoin racial discrimination at restaurants was ''vindicating a policy that Congress considered of the highest priority''). The Agencies recognize that ''[r]acial bias is distinct.'' *Pena-Rodriguez* v. *Colorado,* 137 S. Ct. 855, 868 (2017). Indeed, a long history of the Supreme Court's ''decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns.'' *Id.*

The Agencies will evaluate any other accommodation request under the applicable law and will not prejudge the outcome of that context-specific analysis. Accommodations are available from certain nondiscrimination provisions in certain contexts, as the *World Vision* opinion explained. *See* Part II.C. Under RFRA, for example, it is possible that there is no compelling governmental interest in imposing the burden at issue, that a general compelling interest is not compelling ''to the person,'' or that there is a less restrictive means of furthering the interest. The Agencies and their intermediaries will consider all of these factors and the impact of any accommodation, as appropriate under existing law.

For context, the Agencies have considered the example of a Jewish ritual bath, known as a ''mikveh.'' In addition to the ritual aspects of the mikveh, it provides a unique setting for a trusted female community member to identify signs of domestic violence and medical conditions, including cancers, on religious women who often dress in religiously modest clothing at all other times. *See, e.g.,* Anna Behrmann, *I Spotted a Lump when Preparing for My Ritual Bath,* BBC News, July 2, 2019, *https://www.bbc.com/news/world-middle-east-47734665.* However, a mikveh will often exclude some people based on the sponsoring organization's sincerely held religious beliefs, such as serving only co-religionists.

Like all faith-based organizations, the added accommodation language tells an organization that runs such a mikveh that it can apply for Federal financial assistance related to identifying domestic violence or cancer, even if its religious exercise did not permit compliance with all program requirements. The relevant Agency would then consider the accommodation request in the context of that program, as required or permitted under existing Federal accommodation laws. Whether the Agency grants the accommodation will depend on the facts and circumstances. Whether the mikveh organization receives the award will ultimately depend on even more facts and circumstances, including the quality and impact of the proposed use of funds. But refusal to consider such a request—as some commenters would have the Agencies do—would be

contrary to Federal law. The accommodation language in this final rule follows existing law in allowing context-specific determinations.

The accommodation language is consistent with the other cases cited by commenters. Commenters mistakenly rely on *Christian Legal Society* v. *Martinez,* 561 U.S. 661, for the principle that the U.S. Constitution bars the Government from directly funding or providing aid to private institutions that engage in discrimination. *Martinez* held only that the First Amendment does not preclude a State university from applying an ''accept-all-comers'' policy to any group seeking access to a limited public forum, including a religious group. *Id.* at 667–69, 675–90. It did not hold that the First Amendment precluded the State university from granting an accommodation to a religious group, and it did not address the application of an accommodation statute such as RFRA. *See id.* at 697 n.27 (explaining that the student group's Free Exercise Clause claim was unsuccessful under *Smith*).

Commenters also relied on *Norwood* v. *Harrison,* which did not involve any claim for religious accommodation. 413 U.S. at 464–66. The Supreme Court recognized in *Norwood* that its analysis regarding providing textbooks to non-sectarian private schools that racially discriminate was different from the applicable analysis for providing textbooks or funding to religious schools. *Id.* at 468–70. As the Court recognized, when it comes to assisting religious schools, ''our constitutional scheme leaves room for 'play in the joints,' '' meaning the Government often has discretion to provide assistance to religious entities that is neither required by the Free Exercise Clause nor prohibited by the Establishment Clause. *Id.* at 469. The Court concluded that religious beliefs are afforded protections not afforded to bias on other grounds. *Id.* at 470. That is consistent with the accommodation language in this final rule.

Commenters also relied on *Dole* v. *Shenandoah Baptist Church,* 899 F.2d at 1392, which further demonstrates the need for context-specific analyses. In that case, a religious school argued that it was entitled to an accommodation—applying the free exercise test prevailing at the time, which is now incorporated into RFRA—that would allow the school to pay male teachers more than female teachers, rather than comply with the FLSA. *Id.* at 1397. The court evaluated the contours of the articulated religious beliefs, but found that they would be minimally burdened by complying with the FLSA, found a compelling governmental interest in that context, found that granting an exemption would be contrary to that compelling interest, and found that compliance with the FLSA was the least restrictive means of achieving the Government's aims. *Id.* at 1397–99. That reinforces the appropriateness of the context-specific analyses that the Agencies and their intermediaries will conduct under this final rule, which they were required to conduct under existing Federal law even without the accommodation language.

The Agencies also note that the analysis in *Dole* pre-dated RFRA, so some of the specific considerations may no longer apply. For example, it is not appropriate under RFRA to require that the challenged requirement ''cut to the heart of [the organization's] beliefs.'' *Id.* at 1397. The Agencies further note that *Dole* applied the ministerial exception in 1990, *id.* at 1396–97, without the benefit of recent Supreme Court cases, which could affect the analysis. *See Our Lady of Guadalupe Sch.* v. *Morrissey-Berru,* 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC,* 565 U.S. 171 (2012). Moreover, the *Dole* case recognized that accommodations and exemptions—such as the ones referenced in this final rule—can be ''constitutionally permissible.'' 899 F.2d at 1396 (citing cases).

The Agencies disagree that the accommodation language will allow faith-based organizations to use religious faith as a pretext for discrimination. Existing accommodation principles appropriately screen for pretext while balancing respect for religious autonomy. For example, commenters relied on *Hamilton* v. *Southland Christian School, Inc.,* 680 F.3d 1316 (11th Cir. 2012), in which the appeal hinged on whether the teacher had been fired because she had premarital sexual relations or because of her pregnancy. *Id.* at 1319–21. The court found a genuine issue of fact on that issue and remanded the case for further proceedings. Also, the Supreme Court has explained that the compelling interest test prevents discrimination on the basis of race in hiring from being ''cloaked as religious practice to escape legal sanction.'' *Hobby Lobby,* 573 U.S. at 733.

The Agencies note that, in rare but appropriate cases, pretext can be screened by challenging the religiosity or sincerity of a claimed religious exercise.[63] To be sure, such challenges should be narrow, rare, and subject to all of the other protections of the Religion Clauses and RFRA, including that the Government cannot question the truth or reasonableness of the believer's line-drawing. *See, e.g., United States* v. *Ballard,* 322 U.S. 78, 86–88 (1944) (observing that the First Amendment prohibits evaluating ''the truth or falsity of the religious beliefs or doctrines''); Attorney General's Memorandum, 82 FR at 49674 (citing cases).

Contrary to certain comments, the Agencies cannot conclude that compliance with nondiscrimination laws will never substantially burden a faith-based organization's sincerely held religious beliefs. The *World Vision* opinion (discussed above and in Part II.C) and the examples discussed above demonstrate that nondiscrimination laws can impose such burdens. The Agencies cannot dismiss requests for accommodations from nondiscrimination laws categorically. *See, e.g., Thomas* v. *Review Bd. of Indiana Employment Sec. Div.,* 450 U.S. 707, 713–16 (1981).

Some commenters criticized potential accommodations that would exempt faith-based providers from various laws in various contexts, including reproductive health requirements. Such requirements tend to arise in the context of programs funded or administered by HHS, many under the Public Health Service Act, 42 U.S.C. 201 *et seq.* There are Federal conscience protection statutes, for example, specific to the recipients of funds under the Public Health Service Act, or to programs administered by the Secretary of HHS, that bar discrimination against health care entities or personnel that refuse to participate in certain health services or research activities on the basis of religious belief or moral conviction.[64]

[63] *See, e.g., Ballard,* 322 U.S. at 79–83 (affirming jury instruction asking whether fraud defendants ''honestly and in good faith believe[d]'' that they were ''divine messengers'' who could heal ailments and diseases and had done so hundreds of times); *United States* v. *Quaintance,* 608 F.3d 717, 721–23 (10th Cir. 2010) (Gorsuch, J.) (explaining that extensive evidence showed criminal defendants who sold large quantities of marijuana ''were motivated by commercial or secular motives rather than sincere religious conviction,'' including inducting a co-conspirator into the religion which they founded in order to ''insulate their drug transactions from confiscation'').

[64] For example, the Church Amendments, 42 U.S.C. 300a–7, apply to entities funded under the Public Health Service Act and two other laws administered by HHS and protect the conscience rights of individuals and entities that object to performing or assisting in the performance of abortion or sterilization procedures if doing so would be contrary to the provider's religious beliefs or moral convictions. The Church Amendments also prohibit (1) recipients of HHS funds for biomedical or behavioral research from discriminating against health care personnel who

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Because of the applicable prohibitions, these Federal conscience provisions may effectively require religious or moral accommodations with respect to reproductive health requirements in certain circumstances. The Agencies also note that accommodations from such reproductive health requirements are discussed further in Part II.F.2.a below.

Other accommodation statutes require context-specific analysis. Under RFRA, for example, the Agencies and intermediaries would consider the sincerity of the professed belief, the pressure to compromise that belief posed by conditioning the Federal financial assistance on compliance with the program requirement, the scope of the program requirement, the Government's interest in that requirement, any exemptions or accommodations that would make the interest less compelling, and the availability of less restrictive means to achieve that interest. Based on that analysis, they will determine whether a faith-based organization must comply with the requirement as written, can comply in a different way, must provide a referral if appropriate, or must take some other action in order to justify the accommodation. Where there is no compelling interest in the service or program requirement, the faith-based organization may be able to deny the service or provide the service without that requirement. Where there is a compelling interest in the service or program requirement, the Agency or intermediary will ensure that the compelling interest is satisfied, either through the faith-based organization or some other less restrictive means. Some accommodation requests will have to be denied. That is how RFRA has always worked. This final rule does not change that analysis or prejudge the outcome in any case.

The Agencies disagree that their accommodation language is vague or creates confusion. Consistent with the legal standards discussed above and in Parts II.C and II.F, the Agencies are ensuring that context-specific considerations, including countervailing considerations, are analyzed whenever determining whether to grant any accommodations. As part of this analysis, the Agencies will consider ''undue hardship'' whenever it is relevant. This final rule mentions some potential accommodations but does not contain specific examples due to the context-specific nature of that analysis.

Additionally, the Agencies disagree that they created confusion by adding two references to religious accommodations. This language is being added in the two places where it applies: (1) Eligibility and (2) compliance. Rather than creating confusion, this wording creates greater clarity. This added language provides expressly that accommodations are available to alleviate burdens on faith-based providers from program requirements, where warranted under existing Federal law. As explained, all of the commenters' concerns regarding such accommodations—including discrimination, denial of service, discomfort, importance of the requirement to the government program, and compelling interest—will be considered and addressed when the Agencies and intermediaries determine whether to grant an accommodation. With regard to very important program requirements, a faith-based organization may be less likely to receive an accommodation, but circumstances may still warrant one, as discussed above and in Parts II.C and II.F. Such accommodations are not contrary to Congressional intent. For example, RFRA ''operates as a kind of super statute, displacing the normal operation of other Federal laws,'' *Bostock,* 140 S. Ct. at 1754, unless Congress expressly provides otherwise.

The Agencies are committed to protecting the religious liberty of faith-based organizations and beneficiaries equally. But express accommodations for beneficiaries are beyond the scope of this final rule. This final rule addresses accommodations that relieve government-imposed burdens on faith-based organizations. For reasons discussed elsewhere, the Agencies do not believe that this final rule is likely to impose substantial burdens on beneficiaries, *see* Parts II.C.1, II.C.2, and II.C.3.e, particularly in the context of indirect Federal financial assistance, *see* Part II.D, although the Agencies do not rule out that possibility in any particular case. Also, the Agencies did not claim that beneficiary accommodations were not warranted because ''few will need them.'' They expressly disavow such reasoning. Beneficiaries are entitled to accommodations, where appropriate, from government-imposed burdens.

Only DOL and DHS addressed accommodations in the 2016 final rule. They did so in a manner consistent with this final rule. DOL retained a provision that provided for accommodations consistent with the Constitution, which ''means that otherwise valid religious accommodations do not violate the religious nondiscrimination requirement in this regulation.'' 81 FR at 19393; *id.* at 19422 (DOL, 29 CFR 2.33(a)). DHS added a similar provision in the 2016 final rule. *Id.* at 19411 (DHS, 6 CFR 19.3(d)); *see also* 80 FR 47284, 47297 (Aug. 6, 2015) (proposing such language); 73 FR 2187, 2189 (Jan. 14, 2008) (proposing such language initially). No commenter has pointed to any issues or harms due to those provisions.

The Agencies also disagree that the accommodation language in this final rule, in combination with provisions that permit religious organizations to maintain their religious character and expression, will necessarily result in faith-based organizations' improperly proselytizing or expressing religious views while providing federally funded

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refuse to perform or assist in the performance of any health care service or research activity on the grounds that their performance or assistance in the performance of such service or activity would be contrary to their religious beliefs or moral convictions, and (2) individuals from being required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by HHS if their performance or assistance in the performance of such part of such program or activity would be contrary to their religious beliefs or moral convictions.

Section 245 of the Public Health Service Act, 42 U.S.C. 238n, prohibits the Federal Government and any State or local government receiving Federal financial assistance from discriminating against any health care entity (which includes both individuals and institutions) on the basis that the entity (1) refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions; (2) refuses to make arrangements for such activities; or (3) attends (or attended) a post-graduate physician training program, or any other program of training in the health professions, that does not (or did not) perform induced abortions or require, provide, or refer for training in the performance of induced abortions, or make arrangements for the provision of such training.

The Weldon Amendment, a rider in HHS's annual appropriation, provides that ''[n]one of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.'' *E.g.,* Further Consolidated Appropriations Act, 2020, Public Law 116–94, div. A, sec. 507(d), 133 Stat. 2534, 2607 (Dec. 20, 2019).

Section 1303(b)(4) of the Affordable Care Act, 42 U.S.C. 18023(b)(4), provides that ''[n]o qualified health plan offered through an Exchange may discriminate against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions.'' Section 1553(a) of that Act, 42 U.S.C. 18113(a), provides that ''[t]he Federal Government, and any State or local government or health care provider that receives Federal financial assistance under this Act (or under an amendment made by this Act) or any health plan created under this Act (or under an amendment made by this Act), may not subject an individual or institutional health care entity to discrimination on the basis that the entity does not provide any health care item or service furnished for the purpose of causing, or for the purpose of assisting in causing, the death of any individual, such as by assisted suicide, euthanasia, or mercy killing.''

services. Each Agency has retained its prohibition on proselytizing in direct Federal financial assistance programs and activities, and the Agencies do not foresee granting accommodations that would exempt faith-based organizations from that prohibition. As discussed in Part II.D, recipients of indirect Federal financial assistance are permitted to engage in explicitly religious activities, including proselytization, within such programs, as they were under the 2016 final rule. Also, faith-based recipients of both direct and indirect programs retain their rights of expression, including to express religious views, as discussed in Part II.G.5. The accommodation language does not change these aspects of the Agencies' rules.

The Agencies also disagree that the accommodation language—combined with the other changes addressed in Parts II.F and II.G—will increase preferential treatment for religious organizations. As explained, the accommodation language merely clarifies existing law. Whatever preferential treatment might result would have resulted anyway under existing law.

For all of these reasons, the Agencies' addition of the accommodation language is reasonable and not unwarranted, arbitrary, or capricious.

Changes: None.

Affected Regulations: None.

F. Discrimination on the Basis of Religious Character or Exercise

Existing regulations required eight of the Agencies and their intermediaries not to discriminate in selection of service providers based on ''religious character'' or ''affiliation.'' VA's existing parallel provision barred discrimination based on ''religion or religious belief or lack thereof.'' 38 CFR 50.4. Existing regulations for DHS, USAID, DOJ, DOL, and HHS also required any grant, document, agreement, covenant, memorandum of understanding, policy, or regulation used by the Agencies (and, for some Agencies, their intermediaries) not to ''disqualify'' any organization based on its ''religious character'' or ''affiliation.'' USDA, VA, ED, and HUD did not have such an existing provision on disqualification.

In the NPRMs, all Agencies proposed changes relating to such provisions. With regard to discrimination, DHS and HUD proposed to include prohibitions when based on religious ''character,'' ''affiliation,'' or ''exercise,'' while the other Agencies proposed to include a prohibition when based on religious ''exercise'' or ''affiliation'' but not religious ''character.'' With regard to disqualification, eight Agencies proposed to include prohibitions when based on ''religious exercise'' or ''affiliation,'' USDA omitted that language from its proposal, and no Agency proposed a prohibition when based on ''religious character.'' Eight Agencies proposed to add that ''religious exercise'' for multiple provisions, including these provisions, incorporates the statutory definition from RLUIPA that also applies to RFRA.

HHS's NPRM provided the most extensive explanation for these proposed changes. It explained that it was proposing to delete ''religious character'' from these provisions because there was not a body of law providing legal guidance on that standard and because the phrases ''religious character'' and religious ''affiliation'' created confusion. 85 FR at 2979. HHS explained that it was proposing to change the language to ''religious exercise'' because that phrase is defined by Congress in RLUIPA and used in RFRA and RLUIPA, and because there is an ''extensive legal framework'' and ''body of law'' providing legal guidance on that standard. *Id.* HHS also expressed concern that the phrase ''religious character'' created confusion because the phrase would presumably have a different meaning than ''religious affiliation'' or ''exercise,'' but ''it is unclear what that distinction would be.'' *Id.*

1. ''Religious Character''

Summary of Comments: Several commenters stated that these provisions should continue to prohibit discrimination and disqualification based on ''religious character,'' which is the standard in *Trinity Lutheran.* They explained that *Trinity Lutheran* outlined the Free Exercise Clause's ''blanket ban'' on discrimination based on ''religious character.''

With respect to HHS's explanation, some commenters responded that there is a well-established body of law regarding the definition of ''religious character,'' including that this term was a central focus of *Trinity Lutheran.* Commenters also stated that the terms religious ''character'' and ''exercise'' have unique meanings, as articulated in *Trinity Lutheran* and other First Amendment cases. They then pointed to the language in *Trinity Lutheran* that the bright-line bar applies to laws that ''single out the religious for disfavored treatment,'' 137 S. Ct. at 2021, which the commenters interpreted to mean discrimination based on religious character.

Response: The Agencies agree that *Trinity Lutheran* subjects discrimination based on ''religious character'' to the ''most exacting scrutiny.'' 137 S. Ct. at 2021. After the comment period closed, the Supreme Court reaffirmed that holding in *Espinoza,* 140 S. Ct. at 2255. The body of law confirming this First Amendment principle has thus developed even further. The Agencies also note that DHS and HUD had proposed to keep the phrase ''religious character'' in their nondiscrimination provisions. 85 FR at 2896 (DHS, 19.3(b)); *id.* at 8223 (HUD, 5.109(c)).

Nevertheless, the Agencies continue to be concerned that the term ''religious character'' may not be entirely clear. The Supreme Court has not defined ''religious character.'' It has held, however, that discrimination against ''any [grant] applicant owned or controlled by a church, sect, or denomination of religion,'' *Trinity Lutheran,* 137 S. Ct. at 2017, 2021, or any school ''owned or controlled in whole or in part by any church, sect, or denomination,'' *Espinoza,* 140 S. Ct. at 2252, 2255, constitutes discrimination on the basis of ''religious character.'' In some cases, the Court has also appeared to equate ''religious character'' and ''religious status,'' without explaining whether there are any differences between the two concepts. *Espinoza,* 140 S. Ct. at 2255, 2260 (''character''); *id.* at 2254–57, 2262 (''status''); *Trinity Lutheran,* 137 S. Ct. at 2021, 2022, 2024 (''character''); *id.* at 2019, 2020, 2021 (''status''). The Court has contrasted those terms with religious ''use,'' which is a similarly undefined reference to religious conduct. *Espinoza,* 140 S. Ct. at 2255–57. Also, some Justices have questioned the ability of courts—let alone regulatory agencies and their intermediaries—to apply the distinction between ''religious character'' and ''religious use.'' [65]

Despite these concerns, the Agencies agree with the commenters that there is a body of case law protecting against discrimination based on ''religious character.'' To avoid tension with this case law, all of the Agencies finalize these provisions to include the phrase ''religious character.'' For purposes of these provisions, the Agencies interpret discrimination based on ''religious character'' to mean distinctions based on the organization's religious status, including as a church, sect, denomination, or comparable classification of any religion; the organization's control by a church, sect, or denomination; the organization's identification as religious; or the

[65] *See Espinoza,* 140 S. Ct. at 2257; *id.* at 2275–78 (Gorsuch, J., concurring); *Trinity Lutheran,* 137 S. Ct. at 2025–26 (Gorsuch, J., concurring in part, joined by Thomas, J.) (questioning ''the stability of such a line'').

organization's operation based on religious principles. An agency would violate these provisions if it used an applicant's religious character as a basis to deny the application for Federal financial assistance entirely, or to penalize the applicant by, for example, awarding it fewer points in scoring that might be part of determining who will receive the assistance.

The Agencies also include the word ''affiliation'' in their final rules, prohibiting discrimination based on an organization's affiliation with—even if it is not controlled by—a religious denomination, sect, umbrella organization, or other faith-based organization. *See* Attorney General's Memorandum, Principles 6, 8. Certain organizations might not describe themselves as religious but still could be affiliated with a religious entity. Discrimination against such organizations on the basis of their affiliation raises many of the same concerns and issues raised by discrimination against the religious affiliates directly. *See Exclusion of Religiously Affiliated Schools from Charter-School Grant Program,* 44 Op. O.L.C. __, *3 (Feb. 18, 2020) (''The religious-affiliation restriction in [20 U.S.C. 7221i(2)(E)] broadly prohibits charter schools in the program from associating with religious organizations. . . . That is discrimination on the basis of religious status.''). By prohibiting discrimination based on both religious ''character'' and ''affiliation,'' the Agencies create consistency across their final rules.

The Agencies disagree, however, that *Trinity Lutheran* imposes a ''blanket ban'' that is qualitatively different from other Free Exercise Clause and RFRA standards that trigger strict scrutiny. The Supreme Court left open in *Trinity Lutheran* whether discrimination on the basis of religious character amounted to discrimination on the basis of religious belief, which '' 'is never permissible.' '' 137 S. Ct. at 2024 n.4 (quoting *Lukumi,* 508 U.S. at 533); *see also Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n,* 138 S. Ct. 1719, 1731–32 (2018) (government ''cannot impose regulations that are hostile to the religious beliefs of affected citizens''). Instead, as noted, the Court applied the ''most rigorous scrutiny,'' *Trinity Lutheran,* 137 S. Ct. at 2024 (internal quotation marks omitted), and determined that the discrimination in that case could not ''survive strict scrutiny in any event,'' *id.* at 2024 n.4. *See also Espinoza,* 140 S. Ct. at 2260 (''When otherwise eligible recipients are disqualified from a public benefit 'solely because of their religious character,' we must apply strict scrutiny.'') (quoting *Trinity Lutheran,* 137 S. Ct. at 2021). The Agencies do not in this final rule take a position on whether the First Amendment categorically prohibits discrimination against religious character.

Finally, for consistency and completeness, any Agency that requires notice of these provisions using prescribed text whose terms were included in an Appendix to the regulatory text in the Code of Federal Regulations is also adding ''religious character'' to that notice.

Changes: All Agencies include ''religious character'' in these substantive provisions in this final rule, as DHS and HUD had proposed regarding discrimination, and in any applicable notice. USDA also includes religious ''affiliation'' in its substantive provision prohibiting disqualification.

Affected Regulations: 2 CFR 3474.15(b)(2), (b)(4), 34 CFR 75.52(a)(2), (a)(4), 76.52(a)(2), (a)(4), 34 CFR part 75 Appendix A (ED); 6 CFR 19.3(e), 19.4(c), 6 CFR part 19 Appendix A (DHS); 7 CFR 16.3(a), (d)(3), 7 CFR part 16 Appendix A (USDA); 22 CFR 205.1(a), (f) (USAID); 24 CFR 5.109(h), 24 CFR part 5 Appendix A (HUD); 28 CFR 38.4(a), 38.5(d), 28 CFR part 38 Appendix A (DOJ); 29 CFR 2.32(a), (c), 29 CFR part 2 Appendix A (DOL); 38 CFR 50.2(a), (e), 38 CFR part 50 Appendix A (VA); 45 CFR 87.3(a), (e), 45 CFR part 87 Appendix A (HHS).

2. ''Religious Exercise''

a. Scope of ''Religious Exercise''

Summary of Comments: The Agencies received a variety of comments on the proposal to prohibit discrimination in selection and disqualification on the basis of ''religious exercise.'' Several commenters argued that these provisions should not use the phrase ''religious exercise'' from RFRA because some discrimination is permitted based on ''religious exercise.'' They reasoned that RFRA applies a case-specific test that allows awarding agencies to discriminate based on ''religious exercise,'' when there is no substantial burden or when the law satisfies strict scrutiny. They argued that the bright-line nondiscrimination rule from *Trinity Lutheran* should not apply to ''religious exercise'' without RFRA's fact-specific inquiry.

Some commenters recognized the body of case law regarding the definition of ''religious exercise,'' which HHS referenced in its preamble, but argued that using ''religious exercise'' for a blanket ban on discrimination here does not ''reflect'' that body of law. Some commented that there was no confusion in the provisions because ''religious exercise'' and ''character'' have distinct meanings, as articulated in *Trinity Lutheran* and other First Amendment cases. They then pointed to the language in *Trinity Lutheran,* 137 S. Ct. at 2021, that distinguished neutral laws of general applicability that implicate ''religious exercise''—which commenters said can take many forms and against which discrimination may be allowed—from laws that discriminate based on religious character. Such neutral laws of general applicability that burden ''religious exercise'' are subject to the fact-sensitive test from RFRA that, commenters said, can be difficult to apply and requires consideration of the burden on the religious entity, of the Government's interest, and of available alternative means.

Some commenters argued that these provisions barring discrimination in selection of service providers for Agency programs can use ''religious exercise'' only if they have RFRA-related limiting language. Without such limiting language, commenters claimed that these provisions would lead to blanket exemptions that are not required by the Free Exercise Clause or RFRA. Commenters expressed concern that such exemptions would tilt the balance ''far too heavily in the direction of catering to religious service providers rather than to program beneficiaries,'' which would be contrary to these programs' central goal of providing services to people in need. A few commenters argued that this change to ''religious exercise'' would likely infringe on the religious-freedom rights and well-being of program beneficiaries, with some adding that government programs can be a matter of life and death for some beneficiaries. Other commenters were concerned that the use of ''religious exercise'' without any limiting language would enable faith-based organizations to receive Federal funding even if they are unwilling to abide by any program requirement, no matter how essential it is to furthering a compelling governmental interest and no matter how narrowly tailored. Multiple commenters said, for example, that organizations could opt out of providing services to individuals who do not adhere to the provider's religious beliefs, including denying access to condoms in an HIV-prevention program to people whose relationships the provider deems sinful, or might make non-religious beneficiaries ''uncomfortable'' accessing the federally funded services. Another commenter argued that it is not discrimination to

exclude faith-based organizations whose religious exercise precludes fulfilling program requirements to an extent that would harm beneficiaries, just as the Agencies can exclude any non-religious providers that will not fulfill such program requirements.

Several commenters were concerned that this change would impose burdens on third parties contrary to RFRA and the Establishment Clause. Some of these commenters argued that religious exemptions and accommodations are not permitted when they harm third parties—citing *Hobby Lobby,* 573 U.S. 682, Justice Kennedy's concurrence in *Hobby Lobby,* 573 U.S. at 736, Justice Ginsburg's concurrence in *Holt* v. *Hobbs,* 574 U.S. at 370, and *Estate of Thornton,* 472 U.S. 703—and added, without citation, that this is ''all the more true where the harm is government funded.'' Others added that *Hobby Lobby* emphasized that accommodation was appropriate where beneficiaries continued receiving the benefits and faced minimal hurdles, whereas an exemption from a program requirement may be inappropriate if it failed to protect beneficiaries as effectively as non-accommodation. One commenter added that the Agencies must not create exemptions that give grantees the right to decline to provide services, which amounts to giving them ''the right to use taxpayer money to impose [their beliefs] on others,'' quoting *ACLU of Massachusetts* v. *Sebelius,* 821 F. Supp. 2d 474, 488 n.26 (D. Mass. 2012), *vacated as moot, ACLU of Mass.* v. *U.S. Conference of Catholic Bishops,* 705 F.3d 44 (1st Cir. 2013). Some commenters argued that such exemptions would violate the Establishment Clause by ''devolv[ing] into something unlawful'' under *Corporation of Presiding Bishop,* 483 U.S. 327, ''overrid[ing] other significant interests,'' or ''impos[ing] unjustified burdens on other[s]'' under *Cutter,* 544 U.S. at 722, 726. Some also commented that the Agencies failed to acknowledge or address the economic and non-economic costs this change would create for beneficiaries and taxpayers.

For these reasons, some of these commenters added that using the RFRA phrase ''religious exercise'' in this context fosters confusion and is vague.

Several other commenters supported the change. These commenters agreed with using the definition of ''religious exercise'' from RFRA and RLUIPA. Some of these commenters argued that adding the phrase ''religious exercise'' emphasizes the important place that RFRA continues to occupy in protecting claims of religious infringement, including because it applies to ''any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'' 42 U.S.C. 2000cc–5(7)(A) (definition of ''religious exercise'' in RLUIPA, incorporated by reference into definition of ''exercise of religion'' in RFRA, 42 U.S.C. 2000bb–2(4)). One of these commenters argued that this change (along with others) ''send[s] a strong message . . . and will enhance the participation of faith-based entities in administering Federal programs, thereby providing more assistance to more needy Americans.'' Another commenter argued that ''religious exercise'' adds protection for the ''public dimension of religious activity'' whereas ''religious character'' applies only to the ''private dimension.''

Response: The Agencies agree that their regulations should be updated to protect faith-based organizations from improper discrimination based on their ''religious exercise,'' including to protect the public dimension of religious activity. But they also agree with the commenters that additional language is appropriate to clarify the scope of this prohibition, tether it more closely to the applicable Religion Clauses and RFRA standards, and ensure that this provision only creates exemptions from program requirements based on RFRA when there is proper case-specific balancing.

By ''discriminate'' in the selection process on the basis of an organization's religious ''exercise'' and by ''disqualify'' faith-based or religious organizations because of their religious ''exercise,'' the Agencies' NPRMs intended to capture forms of discrimination that may be more subtle than outright rejection of an organization because of its religious character. The Supreme Court has long held that ''a law targeting religious beliefs as such is never permissible'' and that ''if the object of a law is to infringe upon or restrain practices because of their religious motivation,'' the law is subject to the most rigorous form of scrutiny. *Lukumi,* 508 U.S. at 533. The Court has also recognized that governmental hostility toward religion can be ''masked as well as overt,'' and has thus instructed courts to survey meticulously laws that burden religious exercise to determine whether they are neutral and generally applicable. *Id.* at 534. ''Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied.'' *Id.* at 531. Failure to satisfy either requirement triggers strict scrutiny. *Id.* at 546; *see also Central Rabbinical Congress,* 763 F.3d at 194–95 (holding that strict scrutiny must be applied to law that singled out specific religious conduct). A law is not neutral if it singles out particular religious conduct for adverse treatment; treats the same conduct as lawful when undertaken for secular reasons but unlawful when undertaken for religious reasons; visits ''gratuitous restrictions on religious conduct;'' or ''accomplishes . . . a 'religious gerrymander,' an impermissible attempt to target [certain individuals] and their religious practices.'' *Lukumi,* 508 U.S. at 535, 538 (citation omitted); *see Smith,* 494 U.S. at 878. A law is not generally applicable if, ''in a selective manner [it] impose[s] burdens only on conduct motivated by religious belief,'' including by ''fail[ing] to prohibit nonreligious conduct that endangers [its] interest in a similar or greater degree than . . . does'' the prohibited conduct. *Lukumi,* 508 U.S. at 543. Even a neutral law of general applicability can run afoul of the First Amendment if the Government interprets or applies the law in a manner that discriminates against religious exercise. *See Lukumi,* 508 U.S. at 537; *Fowler* v. *Rhode Island,* 345 U.S. 67, 69–70 (1953) (government discriminatorily enforced ordinance prohibiting meetings in public parks against a religious group). In recognition of this case law and as the appropriate policy choice, the Agencies expressly prohibit discrimination and disqualification based on ''religious exercise.'' The Agencies do not believe that they have any legitimate interest in disqualifying or discriminating against an organization for engaging in conduct for religious reasons that the Agencies would tolerate if engaged in for secular reasons.

Independently, the Agencies' NPRMs also intended that these provisions apply so as to avoid RFRA issues. RFRA applies to these regulations. *See* Parts II.C and II.E; *World Vision,* 31 Op. O.L.C. 162. Discrimination against an organization at the selection phase, or disqualification of an organization from a federally funded social service program, based on conditions of participation that conflict with an organization's sincerely held religious beliefs, may constitute a substantial burden under RFRA by placing substantial pressure on the organization to abandon those beliefs. Then, as with the First Amendment standards discussed above, RFRA would trigger strict scrutiny. Where religious conduct can be accommodated such that the organization can meet the program requirements in a way that is appropriate under the circumstances, the Agencies do not believe that they will have a compelling governmental

interest in refusing to consider potential accommodations as part of their grant application process. RFRA thus supports this provision.

To delineate the scope of protected religious conduct, the Agencies agree with the comments that supported adopting the definition of ''religious exercise'' that applies to RFRA and RLUIPA. This definition of ''religious exercise'' is set out clearly in RLUIPA, 42 U.S.C. 2000cc–5(7)(A), and incorporated by reference into RFRA, 42 U.S.C. 2000bb–2(4). This definition has been applied in an extensive body of cases and is appropriate to complement the protections for religious ''character'' and ''affiliation.'' *See* Part II.F.1. Although the Agencies recognize that the Supreme Court has tried to distinguish between religious ''character'' and ''use,'' including in *Trinity Lutheran,* 137 S. Ct. at 2021–24, they observe that the Court has also, as noted above, recognized protection for religious exercise apart from restrictions that burden religious character. *See Lukumi,* 508 U.S. at 533–34, 537, 543. The definition also reflects that RFRA provides broader protection for religious exercise than the Supreme Court's current Free Exercise Clause doctrine.

But the Agencies also recognize that many commenters apparently interpreted the proposed addition of ''religious exercise'' more broadly than intended. The Agencies did not intend in their NPRMs to suggest that faith-based organizations must be deemed eligible for grants when they are unable or unwilling to meet a particular program's requirements under the circumstances, even with an appropriate accommodation. Thus, a grant-awarding agency may decide, for example, to disqualify a faith-based organization that, taking into account any appropriate accommodation, cannot meet the program's requirements. By the same token, it is not discrimination in favor of religious exercise to grant an appropriate accommodation; the effect is to allow both religious and secular organizations to participate as service providers on terms that advance the purposes of the program. Moreover, as discussed in greater detail in Parts II.C.3 and II.E, an appropriate accommodation of religious exercise does not violate the Establishment Clause, *see, e.g., Cutter,* 544 U.S. at 713–14, 719–24; *Amos,* 483 U.S. at 334–34, and the Agencies exercise their discretion to include accommodations in these provisions. The Agencies apply the same analysis and discretion to their provisions that prohibit disqualifying faith-based organizations because of their religious exercise.

The Agencies view appropriate accommodations to include any that would be required by RFRA or other law, as well as any that would be permitted by law and not be significantly burdensome for beneficiaries and the Agency. The Agencies determine that there is no compelling interest in denying such accommodations. By including express language regarding such accommodations, the Agencies further their policy determination to prohibit disqualification and discrimination in the selection of providers based on religious exercise. The Agencies have discretion to adopt this approach to avoid potential RFRA issues, as discussed in greater detail in Parts II.C.3 and II.E above (discussing *Little Sisters* and other authority). Moreover, as outlined below, the Agencies expressly limit these provisions to accommodations that are consistent with the Religion Clauses. The Agencies use the term ''appropriate accommodation'' to be clear that they do not incorporate the standards for reasonable accommodations of disabilities or for workplace accommodation of religion, such as the no-more-than-de-minimis standard.

The Agencies also clarify that these provisions prohibit discrimination in selection and disqualification from participation in programs, but do not mandate that any faith-based organization receive a grant, which would depend on all of the other relevant factors. The Agencies provide for appropriate accommodation because they have concluded that it is possible, and indeed beneficial, for a program to afford such accommodations where appropriate in light of all the circumstances. But the Agencies do not intend to create blanket exemptions that could improperly favor faith-based organizations. Accommodations should be granted only after case-specific analysis and balancing.

In sum, the Agencies add language to these provisions in this final rule to make clear that these nondiscrimination and non-disqualification provisions prohibit discrimination against an organization on the basis of religious exercise, which means disfavoring an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect: (i) Because of conduct that would not be considered grounds to disfavor a secular organization, (ii) because of conduct that must or could be granted an appropriate accommodation in a manner consistent with RFRA or the Religion Clauses of the First Amendment to the Constitution, or (iii) because of the actual or suspected religious motivation of the organization's religious exercise. *See* Attorney General's Memorandum, Principles 5, 7. That additional language is supported by the Free Exercise Clause and RFRA, and it ensures that the nondiscrimination provisions do not unreasonably supplant program requirements that apply equally to faith-based and non-faith-based organizations. Just like with ''religious character,'' this language ensures that the prohibitions on discrimination and disqualification apply where strict scrutiny would otherwise apply, and the Government has determined that this scrutiny standard would not be met. For all of these reasons, the Agencies conclude that prohibiting such discrimination and disqualification does not improperly turn a case-specific standard into a blanket exemption.

The Agencies believe that this additional language also addresses the commenters' concerns regarding harms to beneficiaries' religious liberty and well-being, including the concerns about third-party harms. The Agencies disagree with the comments that religious exemptions and accommodations are prohibited categorically when they impose any burdens on third parties. Third-party burdens are relevant to evaluating the least restrictive means under the First Amendment and RFRA, and such burdens can be relevant to the Establishment Clause analysis. But third-party burdens are not an automatic bar to accommodations and exemptions, as *Hobby Lobby* held explicitly. 573 U.S. at 729 n.37 (discussed in greater detail in Part II.C.3.e above).

The Agencies also disagree, as a factual matter, that these changes would create cognizable economic or non-economic burdens on third parties. Beneficiaries have no right to demand that the Government work with any particular applicant for a grant, and certainly have no right to demand that the Government discriminate against any applicant on the basis of religion or religious exercise. Subsections (i) and (iii) of these provisions, based on free exercise principles, merely prohibit discrimination in selection or disqualification that involves targeting or singling out religious exercise for disparate treatment from comparable secular conduct. Such mandated equal treatment does not impose impermissible burdens on third parties. Similarly, subsection (ii) of these provisions, based on RFRA, merely

prohibits discrimination in selection or disqualification when there is an appropriate accommodation, which, as discussed above, necessarily addresses these concerns. The Agencies note that these provisions are parallel to the provisions that prohibited discrimination based on religious character, which did not impose burdens on third parties, and which no commenter claimed had imposed such burdens. And the Agencies determine that these provisions are the appropriate policy choice.

For the same reasons, the Agencies conclude that these provisions are consistent with the Establishment Clause. Additionally, subsections (i) and (iii) add standards for ''religious exercise'' that are supported by the Free Exercise Clause and that alleviate burdens on religious exercise, without burdening third parties to a degree that counsels against providing the exemptions. *See* Part II.C.3 and II.E. Subsection (ii) likewise alleviates burdens on religious exercise consistent with the authority found in RFRA and expressly incorporates the limits imposed by the Religion Clauses, which includes the Establishment Clause. That language also resolves any comments that opposed the proposed rules based on Establishment Clause and RFRA cases regarding third-party burdens. Additionally, the Agencies have maintained other limits addressing Establishment Clause concerns, including limits on direct Federal funding of explicitly religious activities. Based on their experience administering grant programs and the comments received on this rulemaking, the Agencies do not believe that these changes will create any third-party burdens that would warrant further limiting such accommodations.

Based on their experience, the Agencies also disagree with comments that these changes would permit grantees inappropriately to withhold services or impose their religious beliefs on others. The Agencies have been subject to RFRA since 1993. In that time, there is no indication that any accommodation adopted under that statute resulted in such harms, and no commenter has pointed to any instance of such actual harms, as discussed in greater detail in Parts II.C and II.E. HHS, for example, has responded to numerous accommodation requests in that time and is not aware of any actual instance of these hypothetical issues described by commenters. The *ACLU of Massachusetts* case cited by commenters, which challenged an HHS contract to a faith-based organization, does not demonstrate any such harms, is distinguishable on many legal and factual grounds, and shows how a faith-based organization can receive an appropriate accommodation as the highest ranking applicant under one version of a program but not receive one under another version where other providers rank higher. *See* 705 F.3d at 49–51. The Agencies conclude that these provisions ensure equal treatment for faith-based organizations in the selection and disqualification processes for participation in federally funded programs. And these provisions prohibit discrimination or disqualification where ''appropriate accommodations'' are available. Such accommodations would not allow organizations to inappropriately withhold services or impose their religious beliefs on others. These organizations, if selected, will also be bound to comply with the applicable prohibitions of discrimination against a beneficiary on the basis of religion and of engaging in explicitly religious activities. *See, e.g.,* 2 CFR 3474.15(f); 34 CFR 75.532(a)(1), 76.532(a)(1).

A commenter's example of denying access to condoms in an HIV-prevention program is instructive. A program that required grantees to provide condoms as part of the funded services would violate this final rule if—on its face or as implemented—it disqualified or discriminated against a grantee based on its religious character or affiliation, it allowed secular but not religious grantees to opt out of that program requirement, or it disqualified or discriminated against a grantee based on its religious motivations for objecting to that requirement. If the requirement did not violate those principles, however, then the requirement to provide condoms could be imposed on all organizations, unless it was determined that there was an appropriate accommodation for a faith-based organization to decline to provide such condoms. That determination would hinge on a fact-specific inquiry into the relevant factors, such as the burden on the faith-based organization's religious exercise from distributing the condoms, the importance of condoms to the Government and the government program, the demand for the faith-based organization to provide condoms contrary to its religious exercise, the availability of condoms from other sources, and the availability of alternatives to meet the program's goals that would not violate the faith-based organization's religious beliefs (*e.g.,* other HIV-prevention methods or referral to entities that will provide condoms). RFRA already requires the Agencies and their intermediaries to engage in such analysis. These provisions in this final rule merely reiterate that requirement. These provisions also establish that the Agencies and their intermediaries must grant both required and permissible accommodations, as appropriate.

In addition to all of the other reasons outlined in this section, the Agencies determine that these provisions will benefit program beneficiaries by removing eligibility barriers for qualified faith-based organizations. In the Agencies' experience, some faith-based organizations do not apply for grants when their eligibility is unclear, both to avoid wasting time on applications when the grants at issue could be denied for reasons related to their religion and to avoid litigation regarding any grant they are awarded. These provisions help to make such faith-based organizations' eligibility clearer.

Together, all of these changes strike the proper balance between protecting faith-based organizations against discrimination or disqualification based on established First Amendment and RFRA case law, protecting beneficiaries, and ensuring that program requirements are met with appropriate accommodations that are consistent with the First Amendment and RFRA. Additionally, the Agencies define their terms and explain how these standards complement each other. As a result, these changes also address the commenters' concerns regarding vagueness and confusion. Recognizing this protection for religious exercise also ensures that there is no confusion for the Agencies, States, local governments, other pass-through entities, applicants, grantees, or beneficiaries.

Finally, because these standards align with constitutional and statutory requirements that already applied to the prior provisions, the Agencies determine that they would impose negligible additional costs to beneficiaries and taxpayers. If anything, these changes will save beneficiaries and taxpayers the costs of litigation and confusion from the prior provisions' omission of the constitutional and RFRA standards. And beneficiaries will benefit from the services that faith-based organizations can provide without threat of unconstitutional discrimination or disqualification. Even if these changes would impose additional costs on beneficiaries and taxpayers, the Agencies would still exercise their discretion to make these changes because this is the appropriate policy choice.

Changes: All Agencies have added regulatory language to clarify that these discrimination and disqualification provisions prohibit discrimination on the basis of the organization's religious exercise, which means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect: (i) Because of conduct that would not be considered grounds to disfavor a secular organization, (ii) because of conduct that must or could be granted an appropriate accommodation in a manner consistent with RFRA or the Religion Clauses of the First Amendment to the Constitution, or (iii) because of the actual or suspected religious motivation of the organization's religious exercise.

Affected Regulations: 2 CFR 3474.15(b)(2), (b)(4), 34 CFR 75.52(a)(2), (a)(4), (c)(3); 34 CFR 76.52(a)(2), (a)(4), (c)(3) (ED); 6 CFR 19.3(b), (e), 19.4(c) (DHS); 7 CFR 16.2, 16.3(a), (d)(3) (USDA); 22 CFR 205.1(a), (f) (USAID); 24 CFR 5.109(c), (h) (HUD); 28 CFR 38.4(a), 38.5(d) (DOJ); 29 CFR 2.32(a), (c), (d) (DOL); 38 CFR 50.2(a), (e) (VA); 45 CFR 87.3(a), (e) (HHS).

b. Clarified Basis for Protecting ''Religious Exercise''

Summary of Comments: One commenter criticized multiple Agencies for justifying the Agencies' proposals to protect faith-based organizations from disqualification or discrimination on the basis of ''religious exercise'' by reference to *Trinity Lutheran.* The commenter asserted that *Trinity Lutheran* provided no justification for such protections because it barred only discrimination based on ''religious character,'' not ''religious exercise.'' This commenter cited the preamble sections that described the changes to the discrimination and disqualification provisions.

Response: While the Agencies believe that their changes in this regard are consistent with *Trinity Lutheran,* the Agencies did not intend to suggest that the changes were necessarily required by that decision. *See* 85 FR 2893 (DHS, § 19.3(e)); *id.* at 2901 (USDA, § 16.3(a)); *id.* at 2918 (USAID, § 205.1(a)); *id.* at 2925 (DOJ, § 38.4(a)); *id.* at 2933 (DOL, § 2.32(a)); *id.* at 2942 (VA, § 50.2(a)); *id.* at 2979 (HHS, § 87.3(a)); *id.* at 8220 (HUD, § 5.109(c)). Rather, the changes are warranted to alleviate tension with the First Amendment and RFRA principles outlined in Part II.F.2.a above, as well as tension with the related Principles 6, 8, 10–15, and 20 in the Attorney General's Memorandum. *See* 85 FR 2892–93 (DHS, § 19.3(b), § 19.4(c)); *id.* at 2901 (USDA, § 16.3(d)); *id.* at 2925 (DOJ § 38.5(d)); *id.* at 2918 (USAID, § 205.1(f)); *id.* at 2933 (DOL, § 2.32(c)); *id.* at 2942 (VA, § 50.2(e)); *id.* at 2981 (HHS, § 87.3(e)); *id.* at 3201 (ED, § 3474.15(b)(2), (b)(4)); *id.* at 3203–04 (ED, § 75.52(a)(2), (a)(4), § 76.52(a)(2), (a)(4)); *id.* at 8220 (HUD, § 5.109(h)).

Changes: None.

Affected Regulations: None.

G. Rights of Faith-Based Organizations

1. Religious Symbols

For both direct and indirect Federal financial assistance, existing regulations expressly allowed faith-based organizations to use space in their facilities to provide federally funded social services without removing religious art, icons, scriptures, or other religious symbols from those facilities. DOL and ED regulations also provided that such symbols need not be ''alter[ed],'' and DHS regulations provided that the symbols need not be ''conceal[ed].'' In the NPRMs, all Agencies proposed changes to adopt a uniform standard and clarify that faith-based organizations may use space in their facilities to provide federally funded social services without removing, altering, or concealing religious symbols.

Summary of Comments: Several commenters stated that the display of religious symbols could make some beneficiaries feel uncomfortable, and that this might lead those beneficiaries to forgo needed social services. In particular, commenters suggested that religious minorities, non-believers, or LGBT individuals might feel unwelcome in the presence of certain art, iconography, or scripture, including symbols or messages that might be interpreted as critical of their beliefs or conduct. Some commenters also argued that the presence of religious symbols would convey a message of government endorsement of religion, in violation of the Constitution's Establishment Clause. One commenter argued that *Trinity Lutheran* was already satisfied by the regulations and that requiring beneficiaries to receive federally funded services in a place with religious iconography is a ''far cry'' from the playground resurfacing in *Trinity Lutheran.*

Other commenters supported the Agencies' changes. One commenter stated that the changes helpfully clarify that faith-based organizations are protected against not only the removal of religious symbols, but also their alteration or concealment. Another commenter noted that many Americans find comfort in religious artifacts and suggested that the presence of such symbols could be part of a holistic approach to meeting the social service needs of vulnerable populations.

Response: Although the Agencies wish for each beneficiary to be comfortable receiving social services, they disagree that the proposed changes to these provisions would appreciably add to any beneficiary discomfort or cause government endorsement of religion, to the extent endorsement remains a measure of a government establishment of religion. Instead, this final rule merely fleshes out the existing regulatory principle that faith-based organizations are permitted to use their facilities to provide Agency-funded social services even though their facilities display religious art, icons, scriptures, or other religious symbols. The Agencies generally do not limit other displays by other organizations receiving Federal funding.

The Agencies' regulations already allowed displays of religious symbols, consistent with existing Federal statutes and regulations. In accord with Executive Order 13279, and Federal statutes such as 42 U.S.C. 290kk–1(d)(2)(B), all Agencies already had regulations that expressly permitted faith-based organizations to provide services without removing religious symbols. Some Agencies also expressly permitted the display of religious symbols without their alteration or concealment. None of the Agencies' regulations required the removal, alteration, or concealment of religious symbols. As noted in the 2016 final rule, such a requirement would be inconsistent with ''the general practice of Agencies that do not otherwise limit art or symbols that recipients of Federal financial assistance may display in the structures where agency-funded activities are conducted.'' 81 FR at 19372. The Agencies' proposed changes thus helpfully clarify the rights of faith-based organizations without imposing meaningfully greater burdens on beneficiaries and bring the Agencies' treatment of faith-based organizations' displays into line with their treatment of secular organizations' displays.

The Agencies disagree with the commenters who said that this change would be improper because religious symbols might make some beneficiaries feel uncomfortable. As a factual matter, in the Agencies' experience, discomfort with religious symbols has not been a significant issue for beneficiaries. For example, the Agencies are not aware of any beneficiaries that availed themselves of the alternative provider

referral requirement on that basis. *See* Part II.C.3.c. Moreover, even if the commenters could show that some beneficiaries would be uncomfortable with religious symbols, the commenters do not identify any authority supporting a constitutional or other legal right to be free from such discomfort. Indeed, it is unclear whether any beneficiary would even have grounds to challenge such a display based on such offense, objection, or disagreement, no matter how '' 'sharp and acrimonious it may be.' '' *Am. Legion* v. *Am. Humanist Ass'n,* 139 S. Ct. 2067, 2098 (2019) (Gorsuch, J., concurring in judgment) (quoting *Diamond* v. *Charles,* 476 U.S. 54, 62 (1986)); *see Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.,* 454 U.S. 464, 485 (1982).

Furthermore, in addition to breaking with longstanding practice, singling out religious providers for censorship of art or symbols would be in tension with First Amendment principles, RFRA, the binding legal principles summarized in the Attorney General's Memorandum and Executive Order 13559. *See, e.g.,* E.O. 13559, 75 FR at 71320 (''Among other things, faith-based organizations that receive Federal financial assistance may use their facilities to provide social services supported with Federal financial assistance, without removing or altering religious art, icons, scriptures, or other symbols from these facilities.''). Such targeted censoring of faith-based organizations would risk imposing ''special disabilities'' on religious groups based purely on their religious status and imposing a substantial burden on such groups' religious exercise. *Trinity Lutheran,* 137 S. Ct. at 2019; 42 U.S.C. 2000bb–1; Attorney General's Memorandum, Principle 6, 82 FR at 49669. As explained in Part II.C.3.a, the Supreme Court has made clear in *Espinoza* that the First Amendment prohibition of discrimination on the basis of religious character from *Trinity Lutheran* is a general principle not limited to grants for playground resurfacing.

Even if some beneficiaries might theoretically prefer not to encounter religious art or symbols, the same issue may arise with respect to certain non-religious art or symbols. For example, a beneficiary may be uncomfortable receiving services in a facility adorned with secular art or symbols that reflect values inconsistent with his or her moral, political, or religious beliefs. A blanket ban on all symbols that cause discomfort would be beyond the scope of the final rules, has not been suggested by any commenter, and would have additional First Amendment implications. Permitting the display of religious symbols is therefore consistent with the Agencies' practices, with the principle of freedom of speech, and with the principle of government neutrality toward religion. Even if the Agencies' clarifying amendments could impose some additional burdens on beneficiaries, the Agencies would still exercise their discretion to make these changes because they believe the burden would be slight compared to the burden a contrary rule would impose on religious organizations.

Moreover, the Agencies have concluded that allowing religious displays can benefit both beneficiaries and providers. As one commenter noted (and as with non-religious symbols), many Americans find comfort in religious artifacts and the presence of such symbols could be part of a holistic approach to meeting the social services needs of vulnerable populations. Others certainly might have different feelings, but going so far as to order the removal, alteration, and concealment of a religious group's cherished symbols may well lead to that religious group feeling uncomfortable or unwelcome at the hands of the Government. As the Supreme Court recently observed, eliminating religious symbols (or requiring their alteration or concealment) may appear ''hostile to religion'' rather than ''neutral.'' *Am. Legion,* 139 S. Ct. at 2084–85. There is a particular risk of the Agencies displaying such hostility if they required such elimination, alteration, or concealment here because they do not generally restrict parallel secular displays, no matter how offensive to certain beneficiaries.

The Agencies disagree that the display of religious symbols by faith-based organizations constitutes a government endorsement of religion in violation of the Establishment Clause. As an initial matter, the Supreme Court has declined to apply the ''endorsement'' test in recent Establishment Clause cases, and several Justices have questioned its vitality, including in cases challenging official displays of religious symbols. *See, e.g., Am. Legion,* 139 S. Ct. at 2080–82 (plurality); *id.* at 2092 (Kavanaugh, J., concurring); *id.* at 2100–02 (Gorsuch, J., concurring); *Van Orden* v. *Perry,* 545 U.S. 677, 698–705 (Breyer, J., concurring in judgment). Instead, the Court has interpreted the Establishment Clause ''by reference to historical practices and understandings.'' *Town of Greece* v. *Galloway,* 572 U.S. 565, 576 (2014) (internal quotation marks omitted).[66] The Agencies are not aware of any history or tradition of prohibiting religious displays by private faith-based organizations that receive Federal funding, and no commenter pointed to any.

To the extent that the ''endorsement'' test survives, moreover, there is no reason to think it would require the removal, alteration, or concealment of religious symbols in this context. Unlike in a typical Establishment Clause case that involves a religious display on government property, *see, e.g., Cty. of Allegheny* v. *ACLU Greater Pittsburgh Chapter,* 492 U.S. 573, 579 (1989) (barring crèche in the ''most public'' part of a county courthouse), the provisions at issue here concern the display of religious symbols by private organizations on private property. A reasonable observer would understand that such a display—considered alongside the displays, both religious and secular, by all the other private organizations that help to administer Federal social service programs—does not convey a message of endorsement by the Federal Government. In this context, where the Government is not sponsoring the display and the Government-funded programs are open to a variety of religious and non-religious participants, a ban on the display of religious symbols might even constitute an impermissible viewpoint-based regulation of private religious expression. *Cf. Capitol Square Review & Advisory Bd.* v. *Pinette,* 515 U.S. 753, 759–63 (1995). The government does not endorse religion in general, or a faith in particular, by allowing a faith-based organization to participate equally in delivering federally funded services and to maintain a display that reflect its religious identity, especially when a secular organization does not need to remove a comparable display.

Changes: None.

[66] *See also Am. Legion,* 139 S. Ct. at 2087 (same) (plurality); *id.* at 2090–91 (Breyer, J., concurring) (stating that ''I have long maintained that there is no single formula for resolving Establishment Clause challenges,'' and ''[t]he Court appropriately looks to history for guidance'') (internal quotation marks omitted); *id.* at 2092 (Kavanaugh, J., concurring) (''Consistent with the Court's case law, the Court today applies a history and tradition test.''); *id.* at 2094 (Kagan, J., concurring in part) (''I agree that rigid application of the *Lemon* test does not solve every Establishment Clause problem[.] . . . I too look to history for guidance.'') (alteration and internal quotation marks omitted); *id.* at 2096 (Thomas, J., concurring in judgment) (''[T]he plaintiff must demonstrate that he was actually coerced by government conduct that shares the characteristics of an establishment as understood at the founding.''); *id.* at 2101 (Gorsuch, J., concurring in judgment) (''[W]hat matters . . . is whether the challenged practice fits within the tradition of this country.'') (internal quotation marks omitted).

Affected Regulations: None.

2. Nonprofit Status

Existing regulations for DOJ, DOL, ED, HHS, and USAID provided that, where eligibility for funding is limited to nonprofit organizations, nonprofit status can be demonstrated by several means: (1) Proof that the IRS currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code; (2) a statement from a State taxing body or the State secretary of state certifying that the organization is a nonprofit organization operating within the State and that no part of its net earnings may lawfully benefit any private shareholder or individual; (3) a certified copy of the applicants' certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant; or (4) any of the foregoing methods of proof if applicable to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

Under the proposed rules, DHS, HUD, and VA would adopt the same four provisions. Also, DHS, DOJ, DOL, ED, HHS, HUD, and VA would add a fifth provision stating that, if an entity has a sincerely held religious belief that it cannot apply for a determination as tax-exempt under section 501(c)(3), the entity may demonstrate nonprofit status by submitting ''evidence sufficient to establish that the entity would otherwise qualify as a nonprofit organization'' under the four provisions. Because USAID and USDA did not propose any changes to their existing regulations regarding determination of nonprofit status, the discussion below does not apply to them, unless otherwise noted.

Summary of Comments: A few commenters criticized the Agencies' proposed changes. One commenter to ED and HHS characterized the changes as allowing faith-based organizations to ''self-certify their nonprofit status,'' whereas in the commenter's view, a ''formal determination of tax-exempt status'' promotes greater accountability by ensuring the record-keeping and transparency needed to monitor grant compliance. The same commenter suggested that alternative pathways for demonstrating nonprofit status are unnecessary because, in the commenter's view, requiring 501(c)(3) status imposes no substantial burden on religion. The commenter cited for support *Locke* v. *Davey,* 540 U.S. 712, which the commenter characterized as holding that denying government funding for ''religious activity'' does not infringe religious freedom. Finally, this commenter asserted that there is ''no evidence that the current requirement is burdensome'' to faith-based organizations that receive Federal financial assistance to provide social services.

Another commenter asserted in cursory fashion that the proposed accommodation ''means that anything goes for a religious organization,'' that it constitutes ''special treatment,'' and that it amounts to an unconstitutional ''establishment of religion.''

One commenter supported the Agencies' changes, stated that the changes provide ''an accommodation for those religious nonprofits whose sincerely held religious beliefs impede or bar their application'' for 501(c)(3) status, and stated that this clarification is appropriate and commendable.

Response: The Agencies disagree that the addition of language providing alternative means for demonstrating nonprofit status would reduce transparency and accountability. The Agencies' grants and programs have appropriate record-keeping requirements and mechanisms for monitoring compliance that apply regardless of 501(c)(3) status. Moreover, in the Agencies' experience, formal determination of tax-exempt status is of little relevance in facilitating grant transparency and accountability. Indeed, many faith-based 501(c)(3) organizations are exempt from those record keeping requirements. For example, the Agencies issue grants to 501(c)(3) entities that are exempt from filing Form 990s, such as churches, integrated auxiliaries, and certain schools affiliated with churches. 26 CFR 1.6033–2(g). Five of the Agencies already allowed three of these alternatives for demonstrating nonprofit status—(2), (3), and (4) listed above—without any evidence of transparency or accountability issues. And the new fifth alternative requires evidence sufficient to establish one of the other alternatives, so it should not lower the bar. Additionally, the organizations that meet these alternatives may be subject to State or other oversight that imposes further transparency and accountability.

The Agencies also disagree with the comment regarding entities self-certifying their nonprofit status. This comment appears to misunderstand the proposed changes. None of the Agencies proposes to allow faith-based organizations to ''self-certify'' their nonprofit status. Rather, an organization can submit formal documentation of its own State nonprofit status, its incorporation, or its parent organization's national or State nonprofit status. Again, five of the Agencies already allowed those methods of proof. Additionally, for seven Agencies, this final rule adds an option permitting a faith-based organization with a sincere religious belief that prevents it from obtaining tax-exempt status under section 501(c)(3) of the Internal Revenue Code to submit other documentary evidence that ''is sufficient to establish'' that the organization operates as a nonprofit. This is not a mere self-certification.

The Agencies also disagree with the commenter's suggestion that the alternative pathways are unnecessary because obtaining 501(c)(3) status does not impose a substantial burden on religion. As a preliminary matter, the Agencies exercise their discretion to allow alternative ways to show that an organization is a nonprofit because that is the appropriate policy decision for the reasons discussed in the NPRMs and throughout this section. They do not need to show a substantial burden to do so.

The commenter's reliance on *Locke* v. *Davey* is misplaced. *Locke* held only that, in the unique context of the historically sensitive issue of government funding for the training of clergy, the Free Exercise Clause did not compel a State to include funding for theology degrees in a scholarship aid program. *See* 540 U.S. at 725. The Court did not hold that denying funding to religious organizations can never infringe religious liberty or that funding of religious organizations can be justified only to relieve them of a substantial burden. In fact, the Court held expressly that the Government has discretion to fund religious organizations in many programs, including in the unique context of training for clergy, where funding is not constitutionally required. *See id.* at 718–19; *see also* Part II.C.3.a (discussing *Locke*).

Furthermore, the Agencies agree with the commenter that said faith-based organizations may have sincere religious beliefs that prevent them from meeting certain prerequisites for 501(c)(3) status. For these organizations, requiring a formal determination of 501(c)(3) status could impose a meaningful burden. Accordingly, in the Agencies' judgment, adding an alternative for such organizations, while requiring evidence sufficient to meet one of the other alternatives, will promote consistency with the principles of religious liberty set forth in RFRA, Supreme Court precedent, and the Attorney General's Memorandum.

As one commenter pointed out, existing regulations for several Agencies, including ED and HHS, already provided alternatives to 501(c)(3) registration for demonstrating nonprofit status. The Agencies agree that those provisions are helpful, so DHS, HUD, and VA are adopting them. DHS, HUD, VA, DOJ, DOL, ED, and HHS are also adding the alternative mechanism for entities with specific sincerely held religious objections to ensure that such objections do not prevent them from otherwise demonstrating nonprofit status. Additionally, in the Agencies' experience, faith-based organizations may be reluctant to apply for grants when it is unclear whether they are eligible or when there is a risk that they could be subject to litigation if awarded the grant. The Agencies believe that the additional provision may be helpful in eliminating any potential doubt that alternative methods of proof are available when eligibility to apply for a grant is limited to (or includes) nonprofit organizations, including organizations whose objection to 501(c)(3) registration is grounded in sincere religious belief. This additional provision also clarifies that evidence that would otherwise be used to demonstrate nonprofit status as part of the 501(c)(3) registration process may be sufficient to demonstrate nonprofit status for purposes of the grant application.

Finally, the Agencies disagree with the assertion that the proposed changes constitute special treatment for religious organizations or violate the Establishment Clause. Under the final rule, any organization with a sincerely held religious belief that it cannot apply for 501(c)(3) status, faith-based or secular, may demonstrate nonprofit status by methods other than providing proof of 501(c)(3) status. The changes are consistent with most Agencies' existing regulations, and simply help to ensure equal treatment of faith-based organizations with sincere religious beliefs that may warrant an accommodation. Moreover, the final subsection does not relieve faith-based organizations of the obligation to demonstrate nonprofit status; rather, it clarifies the type of evidence required to establish such status. No commenter has even attempted to explain how this modest accommodation could amount to an unconstitutional establishment of religion, and the Agencies do not believe there is any plausible doctrinal basis for such a claim.

Changes: None.

Affected Regulations: None.

3. Notice to Faith-Based Organizations

Existing regulations did not require specific notice to faith-based organizations regarding their eligibility to participate on equal terms in the programs governed by these regulations and regarding their obligations to beneficiaries.

All of the Agencies proposed to require such notice. In its notices or announcements of award opportunities, USAID proposed to require notice indicating that faith-based organizations are eligible on the same basis as any other organization, subject to the protections and requirements of Federal law. In their notices or announcements of award opportunities, the other eight Agencies proposed to require notice ''substantially similar'' to the language in a relevant Appendix A, which explained that: (1) Faith-based organizations may apply on the same basis as any other organization as set forth in each Agency's section of these regulations and in RFRA; (2) the Agency will not discriminate in selection on the basis of religious exercise or affiliation; (3) a faith-based organization that participates in the program will retain its independence from the Government and may continue to carry out its mission consistent with the religious freedom protections in Federal laws, including the Free Speech Clause, the Free Exercise Clause, RFRA, and other statutes; (4) religious accommodations ''may also be sought'' under many of these religious freedom protection laws; (5) faith-based organizations may not use direct Federal financial assistance to support or engage in any explicitly religious activities, except when consistent with the Establishment Clause and any other applicable requirements; and (6) a faith-based organization may not, in providing services funded by the Agencies, discriminate against a program beneficiary or prospective beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. In their notices of award or contract, seven Agencies—not including USAID and HUD—proposed notices ''substantially similar'' to the language in an Appendix B, which was the same as items 3 through 6 from Appendix A.

Summary of Comments: The Agencies incorporate the comments addressed in Parts II.C.1 and II.E that are relevant to the importance of notice to faith-based organizations compared to notice to beneficiaries.

Some commenters said that the proposed notice for faith-based organizations embeds equality in these programs and clarifies that the Agencies will not discriminate against faith-based organizations. Multiple commenters recognized that notice to faith-based organizations of the prohibition against discrimination based on religious character, exercise, and affiliation is consistent with the First Amendment rights discussed in Part II.F.

Some commenters, including 34 Members of Congress, generally opposed providing special notices for faith-based organizations that invite accommodation requests, including from generally applicable civil rights laws. Most of these commenters argued that this notice of the availability of accommodations will encourage or pave the way for providers to refuse to provide key services and to discriminate in taxpayer-funded programs, as discussed in Part II.E. One of these commenters disagreed that this final rule adds clarity, arguing that this notice's reference to accommodations eliminates clear lines by suggesting that faith-based providers can be excused from rules that apply to other providers. Commenters also argued that such notice of the availability of accommodations puts the interests of faith-based organizations over the needs of people who depend on the services.

A commenter argued that the Agencies acknowledged the limits on the duty to accommodate but failed to reflect those limits in their proposed new notices.

One commenter argued that the proposal to give notice that faith-based organizations retain independence from the Government is inconsistent with the Religion Clauses and Article IV, Section 4 of the U.S. Constitution because, in this commenter's view, faith-based organizations should be treated differently than, and essentially worse than, secular organizations. This commenter argued that the First Amendment mandates that '' 'Faith Based' entities are not the same as secular entities and are not to be treated the same for fear that they would create the problems they have created throughout history.'' This commenter reasoned that the First Amendment's references to religion implied that equal treatment was not intended.

This commenter also argued, regarding notice of faith-based organizations retaining their independence consistent with the Free Speech Clause, that Free Speech is not an absolute right. This commenter added that the Government and ''government surrogates'' cannot minister to recipients, so faith-based organizations' Free Speech rights should

not include ministering to beneficiaries when performing a government function.

Response: The Agencies incorporate the discussion of the notice and accommodation requirements in Parts II.C.1 and II.E above. Additionally, the Agencies agree with comments that this notice helps effectuate the religious liberty protections for beneficiaries in these programs and clarifies that the Agencies and their intermediaries will not discriminate against faith-based organizations based on religious character, affiliation, or exercise. The nondiscrimination provision is consistent with the First Amendment and RFRA, as discussed in Part II.F.

The Agencies disagree that this notice to faith-based organizations will invite any improper denials of service or discrimination. As discussed in Parts II.C, II.E, and II.F, the Free Exercise Clause and other Federal laws, including RFRA, required or permitted certain accommodations under the 2016 final rule. The notice provided for in this final rule does not change that substantive law regarding accommodations. This notice merely ensures that faith-based organizations, the Agencies, intermediaries, and advocacy organizations are aware of that governing Federal law regarding accommodations. To the extent that the Agencies accommodate a faith-based organization with regard to a generally applicable requirement, including allowing the faith-based organization to engage in conduct that might otherwise be considered discrimination or denial of service, that accommodation would be governed by the Free Exercise Clause and other Federal laws, including RFRA, not by this notice requirement. The comments that disagree with this notice appear to disagree with the underlying Federal law regarding accommodations. The Agencies exercise their discretion to notify faith-based providers (and others, including the Agencies' intermediaries) of that governing Federal law regarding accommodations to protect those rights, ensure that the Agencies and their intermediaries recognize and protect those rights, minimize erroneous lawsuits challenging whether those rights apply in these programs, and eliminate the confusion created by the absence of any such reference in the 2016 final rule.

The Agencies also disagree with the commenter that claimed these notices do not reference the limitations on accommodations. In fact, all of the prescribed notice texts expressly refer to the constitutional and statutory bases for these accommodations, each of which contain their own limits.

Additionally, the Agencies believe a commenter was mistaken to argue, in essence, that the Religion Clauses and Article IV, Section 4 of the U.S. Constitution require faith-based organizations to be treated worse than secular entities and thus that providing notice of rights and obligations to faith-based organizations would be unconstitutional. To the contrary, as discussed throughout this preamble, the Establishment Clause permits, and the Free Exercise Clause and RFRA sometimes require, and other times permit, the Government to provide special accommodations for religious exercise. Moreover, Article IV, Section 4 of the U.S. Constitution guarantees to every State a ''Republican Form of Government,'' protection against ''Invasion,'' and, on application, protection against ''domestic Violence.'' The Agencies do not see how this constitutional provision is implicated by providing notices to faith-based organizations.

The Agencies agree that the Free Speech Clause is not absolute and that there are circumstances in which funding explicitly religious activities is prohibited as part of direct Federal financial assistance programs and activities. But this final rule requires notice of such limitations on speech, including limitations on explicitly religious activities, in addition to notice that faith-based organizations retain their free speech rights. Also, the notice of the right to expression merely clarifies that such existing rights are retained, not expanded, as discussed in Part II.G.5 below. The Agencies have determined in their discretion that such a comprehensive notice appropriately balances the rights of beneficiaries and faith-based organizations.

In addition to all of the other reasons outlined in this section and in Parts II.C, II.E, and II.F, this additional notice to faith-based organizations will maximize the services available to beneficiaries. For example, this notice will ensure that faith-based organizations are aware that they can apply to participate in these programs on neutral terms and should not face lawsuits challenging such awards. At the same time, these notices make clear to faith-based organizations—when applying for and accepting an award—that they cannot discriminate against beneficiaries based on religion and that they cannot incorporate explicitly religious activities into the funded programs, unless consistent with the Establishment Clause. Moreover, these notices will be provided by the Agencies or intermediaries, as part of notices that were already being sent and that already describe other eligibility and program requirements. And, these notices are appropriate to clarify the law in light of the confusion—including confusion by intermediaries and pass-through entities—created by the 2016 final rule. Indeed, the 2016 final rule did not provide for accommodations for faith-based organizations, even though the First Amendment and RFRA permitted certain accommodations when that rule applied. The Agencies have determined in their discretion that this is the appropriate means to protect faith-based organizations and beneficiaries, as well as to maximize the availability of appropriate federally funded services.

Finally, ED, DHS, USDA, HUD, DOJ, DOL, VA, and HHS are adding clarifying language to these notices regarding conscience protections. The notices refer to the listed ''protections in Federal law'' as ''religious freedom protections.'' To ensure there is no confusion regarding the listed conscience clauses—such as the Coats-Snowe Amendment (42 U.S.C. 238n), the Weldon Amendment, and 42 U.S.C. 18113, some of which might not be viewed as religious freedom protections only—the Agencies are adding clarifying language to indicate that these are both ''religious freedom and conscience protections in Federal law.'' This does not change the substance or scope of the notices. This does not apply to USAID, which is not providing an Appendix with language for its notice.

Changes: ED, DHS, USDA, HUD, DOJ, DOL, VA, and HHS include ''and conscience'' protections in their notices. *See also* Part II.F.1 (discussing these Agencies' addition of ''religious character'').

Affected Regulations: 34 CFR part 75 Appendices A & B (ED); 6 CFR part 19 Appendices A & B (DHS); 7 CFR part 16 Appendices A & B (USDA); 24 CFR part 5 Appendix A (HUD); 28 CFR part 38 Appendices A & B (DOJ); 29 CFR part 2 Appendices A & B (DOL); 38 CFR part 50 Appendices A & B (VA); 45 CFR part 87 Appendices A & B (HHS). *See also* Part II.F.1 above.

4. Same Requirements for Faith-Based and Secular Organizations

Existing regulations for DOJ, DOL, HHS, and USAID provided that no grant document, agreement, covenant, memorandum of understanding, policy, or regulation that these Agencies or their intermediaries used to administer financial assistance from these Agencies shall require only faith-based organizations to provide certain

assurances that they would not use funding for explicitly religious activities. DHS, ED, HUD, USDA, and VA did not have specific parallel requirements.

All of the Agencies proposed to modify their existing provision or to add language to provide that none of the documents listed above shall require faith-based organizations to provide any assurances or notices where such assurances or notices are not required of non-religious organizations.

Summary of Comments: Some commenters, including a State attorney general, agreed with the Agencies' addition of the provision barring any required additional assurances from faith-based organizations that are not required from secular organizations. These commenters explained that this provision is consistent with the Religion Clauses, including under *Trinity Lutheran;* ensures faith-based organizations can receive Federal funding on the same footing as other organizations; and eliminates confusion.

One commenter argued to multiple Agencies, however, that the provision barring additional assurances or notices from faith-based organizations that are not required from secular organizations violates the First Amendment's Free Exercise and Establishment Clauses, as well as Article IV, Section 4 of the U.S. Constitution.

Another commenter to USAID argued that prohibiting such unique assurances, in combination with the changes discussed in Part II.F, threatens the rights of marginalized populations.

Another commenter to HUD argued that additional assurances may be necessary to ensure that the faith-based provider can offer the services required under the program. This commenter provided the hypothetical example of an organization affiliated with a religion that, according to the commenter, has a history of ''anti-LGBTQ'' sentiment and action being required to provide additional assurances of nondiscrimination based on sexual orientation or that its physical space would be welcoming to LGBTQ individuals.

Response: The Agencies agree that this modified or added prohibition is consistent with the Religion Clauses, including under *Trinity Lutheran;* ensures faith-based organizations can receive Federal funding on the same footing as other organizations; and eliminates confusion. The Agencies do not see any reason to preserve the language that limited this prohibition to explicitly religious activities when all of the other substantive provisions apply equally to faith-based and non-faith-based providers within each program. If notice or assurance is warranted to ensure services are provided under a program, such notice or assurance should be equally warranted for all providers that are subject to the underlying requirement, as explained in detail in Part II.C. There is no indication that barring the requirement of such unique assurances from faith-based organizations would threaten the rights of any beneficiaries.

This conclusion is bolstered by the commenter's hypothetical example of a specific faith-based organization with a history of what the commenter called ''anti-LGBTQ'' sentiment. The Agencies could require any participant with a history of anti-beneficiary sentiment to provide additional assurances. This final rule would permit such a requirement, if applied neutrally to all providers without engaging in viewpoint discrimination. But there is no reason to require such assurances only from religious organizations without requiring the same from similarly situated secular organizations. This change in the final rule provides merely that such assurance and notice requirements be applied neutrally, which ensures that these requirements are imposed to protect beneficiaries, not to discriminate against or stigmatize faith-based organizations. Similarly, there is no indication that there would be any harm from combining this provision with the provisions prohibiting discrimination against faith-based organizations that were discussed in II.F.

Finally, as discussed in Part II.G.3, the Agencies disagree with commenters who contended that equal treatment of faith-based and non-faith-based organizations is inconsistent with the Religion Clauses and Article IV, Section 4 of the U.S. Constitution.

Changes: None.

Affected Regulations: None.

5. Religious Autonomy and Expression

ED's existing regulations provided that a faith-based organization participating in its programs ''may retain its independence, autonomy, right of expression, religious character, and authority over its governance.'' 2 CFR 3474.15(e)(1); 34 CFR 75.52(d)(1), 76.52(d)(1). Existing regulations applicable to the other Agencies provided that a religious organization participating in a Federal financial assistance program or activity will retain its independence, and ''may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs.'' Additionally, the existing regulations for DOJ, DOL, and HHS provided that a faith-based organization retains such ''independence from Federal, State, and local governments.''

DHS, DOJ, DOL, HHS, HUD, USDA, and VA proposed to amend the rights retained by a participant in such programs to be consistent with ED, such that a faith-based organization retains its ''autonomy; right of expression; religious character;'' and ''independence,'' and may continue to carry out its mission, including the expression of its religious beliefs. Additionally, DHS, USDA, and VA proposed to add language clarifying that a faith-based organization retains such independence ''from Federal, State, and local governments,'' which DOJ, DOL, and HHS proposed to retain. USAID proposed to add language that a faith-based organization retains its ''autonomy, religious character, and independence'' and may continue to carry out its mission ''consistent with religious freedom protections in Federal law,'' including expression of its religious beliefs.

Summary of Comments: Several commenters supported these changes to clarify that faith-based organizations retain these rights, including multiple commenters who opposed other provisions of this final rule. One commenter specified that this clarification describes the First Amendment's broad protections for the freedom to exercise religion, for the sphere of religious autonomy in which government cannot interfere, and from government entanglement with religion.

Many of these commenters stated that this clarification was important to ensure faith-based providers can participate in these programs without fear of having to abandon their autonomy and rights that are protected by other Federal laws and that should not be checked at the door when interacting with the Government. One commenter argued that faith-based organizations' autonomy and expression are interests of the highest order. Some commenters argued that this is one of the changes in this final rule that will help restore an environment of religious freedom across the country.

Some commenters opposed this clarification for varying reasons. Some commenters argued generally that this clarification was problematic and would endanger beneficiaries' rights. One commenter recognized that faith-based organizations should be able to retain their autonomy, right of expression, religious character, and independence but argued that, if they accepted government contracts or financing, those organizations should not be able

to force their opinions or choices on beneficiaries. One commenter expressed concern that Federal funding suggests government support of the funding recipient's message.

One commenter argued that the wording being added by DHS, USDA, and VA that faith-based organizations retain their ''independence from Federal, State, and local governments'' is irrational because everyone is bound by the Governments' laws, with the commenter listing specific criminal laws of murder, fraud, trespass, and theft.

One commenter argued that adding the language that a faith-based organization may carry out its mission, including the ''definition, development, practice, and expression of its religious beliefs'' would expand the ability of federally funded organizations to attack the rights of their beneficiaries. This commenter provided the example of an organization receiving HIV prevention funding claiming that anti-LGBTQ activities were an expression of religious beliefs, which could undermine the organization's ability to become a trusted service provider within the community.

One commenter to HHS cited survey respondents that claimed negative experiences with health professionals who expressed religiously grounded bias toward LGBT patients, which was discussed in detail in Part II.C.2.b.

Response: The Agencies agree with the comments that this added autonomy language clarifies the rights retained by faith-based organizations. This language expressly does not create any new rights, it merely clarifies that these pre-existing religious liberties are not waived by participation in these Federal financial assistance programs or activities. This approach is appropriate because these are existing core religious liberties that faith-based organizations should not have to, and should not be asked to, waive in order to participate in Federal financial assistance programs or activities. The Agencies agree that this clarification will help restore an environment of religious freedom.

The Agencies disagree that this added autonomy language will be problematic or endanger beneficiaries. Faith-based organizations will still have to comply with the other requirements in this final rule, including prohibitions against explicitly religious activities, which expressly include proselytizing. Also, as discussed throughout this final rule, the Agencies are not supporting the message of any organization that participates in these Federal financial assistance programs or activities. If they were, the Agencies would also need to regulate the autonomy and expression of secular organizations.

The addition by DHS, USDA, and VA that the retained independence is ''from Federal, State and local governments,'' is rational. This language does not create any new independence. It merely clarifies that faith-based organizations' independence is not sacrificed merely by participating in a Federal financial assistance program or activities. Civil and criminal laws still apply to the extent they did before. Additionally, this provision makes the language used by DHS, USDA, and VA consistent with the language used by DOJ, DOL, and HHS. 81 FR at 19419 (DOJ, 28 CFR 38.5(b)); *id.* at 19422 (DOL, 29 CFR 2.32(b)); *id.* at 19427 (HHS, 45 CFR 87.3(c)). And no commenter pointed to any issue created by this language in the regulations of DOJ, DOL, or HHS.

The prior rule contained the language that carrying out a faith-based organization's mission includes the ''definition, development, practice, and expression of its religious beliefs.'' 81 FR at 19406 (ED, 2 CFR 3474.15(e)(2)(ii)); *id.* at 19412 (DHS, 6 CFR 19.8(a)); *id.* at 19415 (USAID, 22 CFR 205.1(c)); *id.* at 19416 (HUD, 24 CFR 5.109(d)(1)); *id.* at 19419 (DOJ, 28 CFR 38.2(a), 38.5(b)); *id.* at 19422 (DOL, 29 CFR 2.32(b)); *id.* at 19424 (VA, 38 CFR 50.1(a)); *see also id.* at 19413 (USDA, 7 CFR 16.3(b)); *id.* at 19427 (HHS, 45 CFR 87.3(c)). Thus, contrary to the understanding of the commenter that opposed the addition of this language, the Agencies are not adding this language in this final rule. The Agencies are merely retaining it from the 2016 final rule. Moreover, this language is an appropriate description of what it means for a faith-based organization to carry out its mission.

Also, contrary to this commenter's claim, this final rule is not the appropriate mechanism for ensuring that each provider becomes a trusted service provider within the community. Any such concern should also apply equally to all providers. Any organization's expression could alienate, or cause negative experiences for, beneficiaries by taking a position on any controversial issue.

Additionally, this analysis is not affected by the study that a commenter cited regarding negative experiences. The Agencies incorporate the discussion of that study from Part II.C.2.b, including that it did not show harms specific to faith-based organizations receiving Federal financial assistance. And the added language discussed in this section does not affect the scope of permissible religious expression, so any negative experiences will be attributable to the existing protections of such expression.

Changes: None.

Affected Regulations: None.

H. Employment and Board Membership

Existing regulations for eight of the Agencies provided that, by receiving Federal financial assistance, a religious organization did not forfeit its protection under section 702 of the Civil Rights Act of 1964 (''section 702 exemption''), which allowed it to hire persons ''of a particular religion'' to carry out work connected with the organization. VA was the only Agency that did not have any language specifically addressing the section 702 exemption in its existing regulation. VA's regulation simply stated that faith-based organizations participating in a social service program supported with Federal financial assistance retained their independence and could continue to carry out their missions. 38 CFR 50.1(a).

VA proposed to join the other Agencies by adding explicit language stating that the section 702 exemption continues to apply when a religious organization receives Federal financial assistance. ED, HHS, HUD, DOL, USAID, and VA proposed adding language to clarify that allowing the hiring of persons on the basis that they are ''of a particular religion'' under section 702 includes allowing hiring of persons on the basis of their acceptance of or adherence to particular religious tenets.

Similarly, existing regulations for DHS, HUD, DOJ, and other Agencies provided that a religious organization receiving Federal funding retained its right to select its board members ''on a religious basis.'' *See, e.g.,* 28 CFR 38.5(b) (DOJ). DHS, HUD, and DOJ proposed clarifying that choosing board members of the organization based on religion allowed selecting members based on their acceptance of or adherence to particular religious tenets.

1. Preserving the Section 702 Exemption

Summary of Comments: Many comments opposed allowing employers that receive Federal funding to invoke the section 702 exemption at all. Some stated that allowing an organization receiving Federal funding to claim the section 702 exemption violates the Constitution's Establishment Clause. Others expressed concern that this provision disadvantages religious minorities and the nonreligious. Some commenters expressed concern that this provision would lead to a decrease in available jobs and would harm the economy and called for this economic

effect to be considered in the cost-benefit analysis of the rules.

Many other commenters supported VA's proposed addition and the other Agencies' existing rules that specified that the section 702 exemption is preserved when religious organizations accept Federal funding. They stated that these provisions help preserve the autonomy and identities of religious organizations. Some commenters stressed that this is particularly important for minority religious organizations seeking to preserve their identities, in light of the fact that the broader labor pool is overwhelmingly not of the same faith as the minority religious organizations.

Response: The Agencies disagree that the Establishment Clause prohibits religious organizations from claiming the section 702 exemption when providing federally funded services. That argument has been rejected expressly. *See, e.g., Lown* v. *Salvation Army, Inc.,* 393 F. Supp. 2d 223, 249 (S.D.N.Y. 2005) (''[T]he notion that the Constitution would compel a religious organization contracting with the state to secularize its ranks is untenable in light of the Supreme Court's recognition that the government may contract with religious organizations for the provision of social services.'' (citing *Bowen* v. *Kendrick,* 487 U.S. 589, 609 (1988))). Moreover, to force faith-based charities to forgo their statutory right under Title VII to hire coreligionists because they accept Federal funding for part of their operations would effectively exclude many religious organizations from providing federally supported services. This would undermine the purpose of these rules to allow religious organizations to participate on an equal footing with nonreligious organizations in the provision of needed social services. It also might violate RFRA to deny certain recipients the ability to claim the exemption as a condition of receiving Federal funds, as explained in the *World Vision* opinion.

The section 702 exemption is critical to preserve faith-based organizations' religious autonomy and identities, and the comments showed that this is particularly true for minority religions and denominations. Section 702 is a long-standing statutory exemption, so any impact on employees or potential employees was caused by that statute, not by regulations making clear that this statutory right is preserved. The Agencies thus agree with those commenters who said that it is important to preserve the section 702 exemption that Congress provided to religious organizations, whether or not they participate in the provision of federally funded services.

The Agencies disagree with the comments that said this provision would harm the economy by reducing the number of jobs. At most, this provision presents a question of the distribution of jobs and who will provide federally funded services. This provision would not reduce the net number of jobs or the amount of federally funded services. The reduction of barriers to faith-based organizations participating in providing federally funded services may in fact increase overall the national capacity for provision of services and thus the total number of jobs. *See* Part II.K.

Changes: None.

Affected Regulations: None.

2. Acceptance of or Adherence to Religious Tenets

a. Employment [67]

Summary of Comments: Many commenters opposed the proposals of six Agencies to specify that, for purposes of section 702, hiring ''individuals of a particular religion'' allows for requiring ''acceptance of or adherence to the religious tenets of the organization.'' Many expressed fear that this change could lead to discrimination based on race, sex (including pregnancy), sexual orientation, or transgender status. Some said it conflicted with the Equal Employment Opportunity Commission (''EEOC'') Compliance Manual. Some commenters inferred from the contrast between the Americans with Disabilities Act, which specifies that employees may be required to ''conform to the religious tenets'' of a religious organization, 42 U.S.C. 12113(d)(2), and section 702, which does not have such express language, that Title VII was not intended to permit religious employers to discriminate on the basis of adherence to their religious tenets.

Other commenters supported this change, saying it would make clear that religious organizations have the ability to preserve their identities and autonomy. A State attorney general added that this change would ensure that the people who carry out a faith-based organization's programs (employees) will share the organization's faith.

Response: The ordinary meaning of the phrase ''of a particular religion'' in the section 702 exemption encompasses the language that these six Agencies proposed, ''acceptance of or adherence to religious tenets.'' Religion as ordinarily understood is more than a label people use to self-identify or which others may use to identify them or their backgrounds. It encompasses profound beliefs about the nature of all things and about how one should live based on those beliefs. *See, e.g., EEOC* v. *Abercrombie & Fitch Stores, Inc.,* 135 S. Ct. 2028, 2033 (2015) (''Congress defined 'religion,' for Title VII's purposes, as 'includ[ing] all aspects of religious observance and practice, as well as belief.'" (quoting 42 U.S.C. 2000e(j)); *Burwell* v. *Hobby Lobby Stores, Inc.,* 573 U.S. 682, 710 (2014) (''exercise of religion involves not only belief and profession but the performance of (or abstention from) physical acts that are engaged in for religious reasons'' (internal quotations omitted)); *Widmar* v. *Vincent,* 454 U.S. 263, 272 n.11 (1981) (''many and various beliefs meet the constitutional definition of religion'' (internal quotation omitted)). Adherence to or acceptance of a set of religious beliefs is encompassed within the phrase ''of a particular religion'' and is thus a natural application of the statutory term.

Accordingly, courts have consistently interpreted ''of a particular religion'' in Title VII to encompass adherence to or acceptance of particular religious beliefs. *See, e.g., Hall* v. *Baptist Mem'l Health Care Corp.,* 215 F.3d 618, 624 (6th Cir. 2000) (''The decision to employ individuals 'of a particular religion' . . . has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer.''); *Little* v. *Wuerl,* 929 F.2d 944, 951 (3d Cir. 1991) (upholding termination of employee for violations of ''Cardinal's Clause,'' which included ''*entry by a teacher into a marriage which is not recognized by the Catholic Church*''); *Maguire* v. *Marquette Univ.,* 627 F. Supp. 1499, 1503 (E.D. Wis. 1986), *aff'd in part and vacated in part,* 814 F.2d 1213 (7th Cir. 1987) (professor who was Catholic but was fired for views on abortion barred by section 702 exemption from bringing religious discrimination claim because ''[s]uch an inquiry would require the Court to immerse itself not only in the procedures and hiring practices of the theology department of a Catholic University but, further, into definitions of what it is to be a Catholic''). The Agencies' determination that ''of a particular religion'' encompasses adherence to or acceptance of a set of religious beliefs is, thus, supported by

[67] The discussion in Part III.H.2.a is solely on behalf of the six Agencies—ED, HHS, HUD, DOL, USAID, and VA—that proposed to explicate the section 702 exemption in this way.

the case law in addition to the ordinary meaning of the words.

The Agencies agree with commenters that this change makes clear that faith-based organizations can preserve their autonomy and identities when participating in federally funded programs. Religious organizations function through their employees, and the purpose of the 1972 revision of the section 702 exemption was to respect the organizations' religious autonomy and identities with regard to all employees. Indeed, when upholding that 1972 amendment, the Supreme Court expressly referenced the impact of ''religious tenets'' on faith-based organizations' ''religious mission.'' *Amos,* 483 U.S. at 336. Faith-based organizations' religious autonomy and identities would be diminished substantially if those organizations could not ensure that their staffs accepted and adhered to their religious tenets. The Agencies thus agree with the State attorney general's comment that this change ensures that the people who carry out programs (employees) will share the organization's faith.

The Agencies disagree with comments that said this provision permits discrimination on grounds other than religion, such as race, sex, or sexual orientation. Existing protections for non-religious classes remain in force. For example, where a tenet of a religious organization forbids engaging in sexual conduct outside of marriage, the section 702 exemption permits dismissing employees who violate this tenet, but it would prohibit discharging only women who had engaged in such conduct and not men. *See Cline* v. *Catholic Diocese of Toledo,* 206 F.3d 651, 658 (6th Cir. 2000) (''[C]ourts have made clear that if the school's purported 'discrimination' is based on a policy of preventing nonmarital sexual activity which emanates from the religious and moral precepts of the school, and if that policy is applied equally to its male and female employees, then the school has not discriminated based on pregnancy in violation of Title VII.''); *Redhead* v. *Conference of Seventh-Day Adventists,* 440 F. Supp. 2d 211, 223 (E.D.N.Y. 2006) (''[W]here religious school employers have asserted fornication as a reason for terminating a pregnant unmarried woman, courts have held that an employer enforcing such a policy unevenly—*e.g.,* only against women or only by observing or having knowledge of a woman's pregnancy—is evidence of pretext.''). Additionally, the Agencies incorporate their discussions from Parts II.C and II.E of the context-specific analysis and the unique treatment of discrimination on the basis of race.

Commenters who said that the proposed rules conflicted with the EEOC Compliance Manual are mistaken. That manual merely says that the section 702 exemption does not provide an exemption from prohibitions against other forms of discrimination, such as race or sex discrimination. That is completely consistent with the Agencies' interpretation of the rule, as explained above.

The Agencies also disagree with drawing inferences from the fact that Title VII does not specifically include the ''tenets'' language, while the Americans with Disabilities Act (''ADA'') does. The section 702 exemption was enacted in 1964. The ADA was enacted in 1990 and included a provision that tracked the Title VII ''individuals of a particular religion'' language, 42 U.S.C. 12113(d)(1), and then added a provision clarifying that ''[u]nder this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization,'' *id.* 12113(d)(2). That Congress added this language is no less evidence that ''individuals of a particular religion'' meant something different 26 years earlier in Title VII than that Congress wished to confirm its understanding of what the phrase already meant. *See, e.g., Jackson* v. *Birmingham Bd. of Educ.,* 544 U.S. 167, 175–77 (2005) (not drawing negative inference from fact that Title IX prohibition of sex discrimination did not include an express prohibition of retaliation for complaint of sex discrimination, whereas Title VII prohibition of sex discrimination did). If anything, the clarifying language here is consistent with the ADA clarifying language.

Changes: None.

Affected Regulations: None.

b. Board Membership [68]

As noted, DHS, DOJ, and HUD proposed to make clear that a faith-based organization participating in a federally funded social service program could, as part of retaining its independence and consistent with the prohibition on using direct Federal financial assistance to engage in explicitly religious activities, continue to hire its board members on the basis of acceptance of or adherence to the religious tenets of the organization.

Summary of Comments: Some commenters raised the same concerns discussed in Part II.H.2.a with regard to this proposal. Other commenters supported this proposal, saying it would enable religious organizations to preserve their identities and autonomy. A State attorney general observed that this proposal was beneficial in ensuring that the leaders of the organization would actually advance its religious mission.

Response: These three Agencies determine that the added ''acceptance of or adherence to'' language is appropriate for board members. The comments that expressed the same concerns discussed in Part II.H.2.a miss the mark here because, while the revisions discussed in Part II.H.2.a interpreted the Title VII exemption for faith-based organizations ''with respect to employment of individuals of a particular religion,'' the changes made by these three Agencies do not purport to comment on the applicability of employment nondiscrimination provisions. Instead, they clarify that part of faith-based organizations' maintaining their independence when accepting Federal assistance is that, in general and subject to nondiscrimination requirements in program statutes for which the First Amendment and RFRA do not provide an exception, those organizations may continue to select their board members consistent with the organizations' religious views. Ensuring that the board members of a religious organization heed its ''religious tenets and sense of mission,'' *Amos,* 483 U.S. at 336, is particularly significant because board members shape the policy and governance of the organization. It would be catastrophic if a faith-based organization that was organized, for example, to put its religious beliefs on abortion—pro or con—into effect could not exclude board members who did not adhere to such beliefs. Appointing leaders who would undercut the organization's essential religious charter is tantamount to institutional apostasy. The Agencies thus agree with the State attorney general that this clarification is important.

Changes: None.

Affected Regulations: None.

I. Conflicts With Other Federal Laws, Programs, and Initiatives

Summary of Comments: Multiple comments claimed that the NPRMs could create inconsistency with numerous Federal statutes. They also charged, without any additional specifics or elaboration, that the NPRMs failed ''to consider conflicts with applicable nondiscrimination statutes, including Titles VI and VII of the 1964 Civil Rights Act, the Americans with

[68] The discussion in Part II.H.2.b is solely on behalf of the three Agencies: DHS, DOJ, and HUD.

Disabilities Act, Section 504 of the Rehabilitation Act, Title IX of the Education Amendments of 1972, Section 1557 of the Affordable Care Act, the Fair Housing Act, the Violence Against Women Act, the Victims of Crime Act, the Omnibus Crime Control and Safe Streets Act, the Family Violence Prevention Services Act, and Executive Order 11246.''

One commenter claimed that the NPRMs were improper because they violated the Treasury and General Government Appropriations Act of 1999, Public Law 105–277, div. A, 101(h) [title VI, 654], codified at 5 U.S.C. 601 note, by failing to include a Family Policymaking Assessment, which, in certain circumstances, requires agencies to assess the impact of proposed agency actions on family well-being. The commenter critiqued the NPRMs because the Agencies failed to determine whether a proposed regulatory action ''strengthens or erodes the stability or safety of the family'' or ''increases or decreases disposable income or poverty of families and children.''

A commenter stated that the NPRMs would burden the constitutional rights to privacy that extend to sexual and reproductive choices as enshrined in *Lawrence* v. *Texas,* 539 U.S. 558 (2003), *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), and *Roe* v. *Wade,* 410 U.S. 113 (1973).

The Agencies received comments that the NPRMs would create inconsistencies with numerous major interagency and government-wide initiatives, including Federal strategies to promote the health of the nation and address homelessness, HIV, opioid abuse, and related illnesses and deaths.

Response: The Agencies disagree with the comments that this final rule creates inconsistency with any Federal statutes, much less the nondiscrimination statutes identified by commenters. To the contrary, as stated in the NPRMs, one of the purposes of this final rule is to align the Federal regulations governing several executive branch agencies more closely with Federal statutes (*e.g.,* RFRA, 42 U.S.C. 2000bb *et seq.,* and RLUIPA, 42 U.S.C. 2000cc *et seq.*). The Agencies believe that, if anything, the rule makes existing regulations *more* consistent with statutes such as the Family Violence Prevention Services Act, which contains an express statutory prohibition on discrimination on the basis of religion. 42 U.S.C. 10406(c)(2)(B)(i). Further, the Agencies drafted the NPRMs in part to alleviate tension with the Free Exercise Clause's prohibition on discrimination against religious organizations by removing requirements that were not imposed equally on secular organizations. Additionally, as discussed in Parts II.C, II.E, and II.G, this final rule does not affect the applicability of those other nondiscrimination laws. Therefore, the contention that this final rule conflicts with any Federal nondiscrimination statute is facially unconvincing. Moreover, as discussed in Part II.H, the Agencies making each change in that section believe that this final rule is consistent with Title VII.

Section 5(b) of Executive Order 13831 clearly requires that the order be ''implemented consistent with applicable law.'' The Agencies have been mindful of this requirement in drafting the NPRMs, in evaluating the thousands of public comments received, and in drafting this final rule. It is the position of the Agencies that this final rule satisfies that requirement. The Agencies note that the argument that the NPRMs violated a number of statutes consists predominantly of merely identifying statutes by title without specific legal analysis as to which sections have been allegedly violated, which specific provisions of the NPRMs are involved, and what the nature of the violations might be.

The Agencies disagree that the NPRMs violated 5 U.S.C. 601 note in failing to conduct a Family Policymaking Assessment. Such assessments are only required prior to an agency's implementation of ''policies and regulations that may affect family well-being.'' 5 U.S.C. 601 note. Under that provision, the term ''family'' is defined as ''a group of individuals related by blood, marriage, adoption, or other legal custody who live together as a single household'' and ''any individual who is not a member of such group, but who is related by blood, marriage, or adoption to a member of such group, and over half of whose support in a calendar year is received from such group.'' *Id.* The Agencies have determined that this Assessment does not apply to this final rule because it does not focus on a ''family,'' and indeed makes no reference to such.

The Agencies disagree that this final rule will harm privacy and reproductive rights as protected by *Roe* v. *Wade* and other Supreme Court jurisprudence. This final rule does not change the scope of any such rights or jurisprudence, and commenters did not identify any such harm.

The Agencies have considered the comment that the NPRMs would create inconsistencies with numerous major interagency and government-wide initiatives, including Federal strategies to promote the health of the nation and address homelessness, opioid abuse and related illnesses and deaths, and HIV infection. The Agencies conclude that the opposite is true. This final rule will benefit those important Federal initiatives, in addition to others. Indeed, for each initiative, the commenters simply speculate that there would be a conflict. But that speculation is incorrect because, as discussed in Parts II.C, II.D, II.E, II.F, and II.G, this final rule alleviates burdens placed on faith-based organizations that hindered them from applying for, or participating in, these federally funded programs. Moreover, each of the programs discussed by this comment actually cited the benefits of participation by faith-based organizations, so it is unclear how expanding eligibility of faith-based organizations would be contrary to those programs. When more organizations are eligible to compete for Federal funds, the Agencies believe that the quality of the resulting recipients and the services provided increases.

Regarding homelessness, the comment was made that the NPRMs would conflict with the objectives of a 2018 report[69] adopted by the U.S. Interagency Council on Homelessness (''USICH''), of which most of the Agencies are members. But the very 2018 report cited by the commenter consistently relied on the proposition that faith-based organizations play an important role in helping the nation alleviate homelessness.

The commenter cited this report ten separate times, each time omitting the references to the role of the faith community in addressing homelessness. The report stated that social services to address homelessness ''and other federal, state, and local programs, must be well-coordinated among themselves, and with the business, philanthropic, *and faith communities* that can supplement and enhance them.'' *Id.* at 3 (emphasis added).

Objective 1.1 in that report was to ''collaboratively build lasting systems that end homelessness.'' *Id.* at 11. To achieve that objective, the report recommended that ''leaders from all levels of government and the private, nonprofit, *and faith sectors* can come together to'' make critical advancements, including building momentum behind a common vision, understanding the scope of the problem, gathering relevant data, and

[69] United States Interagency Council on Homelessness, Home, Together: The Federal Strategic Plan to Prevent and End Homelessness (2018), *https://www.usich.gov/resources/uploads/asset_library/Home-Together-Federal-Strategic-Plan-to-Prevent-and-End-Homelessness.pdf.*

implementing solutions. *Id.* at 11–12 (emphasis added).

Objective 1.2 was to ''increase capacity and strengthen practices to prevent housing crises and homelessness.'' *Id.* at 12. To achieve that objective, the report noted the importance of targeted assistance, which it said ''may include a combination of financial assistance, mediation and diversion, housing location, legal assistance, employment services, or other supports—many of which can be provided by public, nonprofit, *faith-based,* and philanthropic programs within the community.'' *Id.* at 13 (emphasis added).

The report highlighted the important role that faith-based service providers play for those in need who reject other sources of help. It stated:

> Many individuals experiencing homelessness are disengaged from—and may be distrustful of—public and private programs, agencies, and systems, and they may be reluctant to seek assistance. Helping individuals to overcome these barriers often requires significant outreach time and effort, and can take months or even years of proactive and creative engagement to build trust. In order to comprehensively identify and engage all people experiencing homelessness, partnerships across multiple systems and sectors are critically important, particularly among homelessness service systems and health and behavioral health care providers, schools, early childhood care providers and other educators—including higher education institutions—child welfare agencies, TANF agencies, law enforcement, criminal justice system stakeholders, workforce systems, *faith-based organizations,* and other community-based partners.'' *Id.* at 16 (emphasis added).

Objective 2.3 of the report was to ''implement coordinated entry to standardize assessment and prioritization processes and streamline connections to housing and services.'' *Id.* at 19. In support of that objective, the report stated, ''[c]oordinated entry systems also create the opportunity to bring non-traditional partners and resources to the table as part of a broad and collaborative community effort that engages other public programs and community- *and faith-based organizations* in preventing and ending homelessness.'' *Id.* (emphasis added).

It might also be noted that the 2015 report by the USICH [70] placed even greater emphasis on the role of faith-based organizations in addressing homelessness in America. The very first recommendation made in the report was to increase leadership, collaboration, and civic engagement. One of the key strategies the report identified for this recommendation was to ''[i]nclude people with firsthand experience with homelessness, businesses, nonprofits, *faith-based organizations,* foundations, and volunteers.'' *Id.* at 33 (emphasis added). The report also stated:

- The homeless assistance system alone cannot address the nation's critical shortage of affordable housing for people who live in poverty. With 7.7 million low-income households experiencing ''worst case housing needs,'' it is inevitable that many of these households will experience housing crises, and will turn to family, friends, *faith-based and community organizations,* and government programs for assistance. *Id.* at 30 (emphasis added).
- Throughout the nation, collaborations involving VA Medical Centers, public housing agencies, housing providers, *faith-based and community organizations,* local governments, the private sector, and other partners have come together in organized efforts to reach and engage Veterans and the most vulnerable and unsheltered people experiencing homelessness to link them to permanent housing with needed supports. *Id.* at 15 (emphasis added).
- Successful implementation occurs when there is broad support for the strategies—this is evidenced by the involvement of business and civic leadership, local public officials, *faith-based volunteers,* and mainstream systems that provide housing, human services, and health care. *Id.* at 32 (emphasis added).
- Working together, we will continue to harness public and private resources—consistent with principles of ''value for money''—to finish the effort started by mayors, governors, legislatures, nonprofits, *faith-based and community organizations,* and business leaders across our country to end homelessness. *Id.* at 60 (emphasis added).

The revised Federal strategic plan published by the USICH in 2020 continues to support engagement with faith-based and community partners as part of the whole-of-government response to homelessness.[71]

Regarding opioid abuse, a comment noted that the NPRMs ''could'' conflict with the objectives of HHS's recent Strategy to Combat Opioid Abuse, Misuse, and Overdose (2017), *https://www.hhs.gov/opioids/sites/default/files/2018/09/opioid-fivepoint-strategy-20180917/508compliant.pdf* (''HHS Strategy''). However, the very HHS Strategy cited by the commenter provided direct support for the important role that faith-based organizations play in helping the nation address abuse of opioids and other drugs. The first strategy presented by HHS was to ''[i]mprove access to prevention, treatment, and recovery support services to prevent the health, social, and economic consequences associated with opioid misuse and addiction, and to enable individuals to achieve long-term recovery.'' *Id.* at 3. The HHS Strategy's implementation relied on faith-based organizations for prevention, treatment of addiction to opioids and other drugs, and recovery, making a recommendation to ''[e]ngage community and *faith-based organizations* to use evidence-based messages on prevention, treatment, and recovery.'' *Id.* (emphasis added). It also added this component regarding recovery from abuse of opioids and other drugs: ''[e]nhance discharge coordination for people leaving inpatient treatment facilities who require linkages to home and community-based services and social supports, including case management, housing, employment, food assistance, transportation, medical and behavioral health services, *faith-based organizations,* and sober/transitional living facilities.'' *Id.* at 5 (emphasis added).

Regarding HIV, a comment said that ''[w]eakening beneficiary protections could create inconsistency with the President's *Ending the HIV Epidemic: A Plan for America* initiative (''EHE Initiative''), which seeks to reduce new HIV infections by 75% in five years and by 90% in ten years.'' [72] The same web page announcing the EHE Initiative declares the importance of faith-based organizations in reducing HIV infections nationwide. It states:

> Achieving EHE's goals will require a whole-of-society effort. In addition to the coordination across federal agencies, the success of this initiative will also depend on

[70] USICH, Opening Doors: Federal Strategic Plan to Prevent and End Homelessness, *https://www.usich.gov/resources/uploads/asset_library/USICH_OpeningDoors_Amendment2015_FINAL.pdf.*

[71] USICH, Expanding the Toolbox: The Whole-of-Government Response to Homelessness 19 (Oct. 2020), *https://www.usich.gov/resources/uploads/asset_library/USICH-Expanding-the-Toolbox.pdf;* see also Administration for Children and Families, HHS, 2019 ACF Regional Listening Sessions on Family Homelessness (Feb. 2020), *https://www.acf.hhs.gov/fysb/resource/2019-acf-regional-listening-sessions-on-family-homelessness* (''We will continue to work across ACF programs and with other federal agencies and *faith-based and community partners* to strengthen our efforts to address family and youth homelessness.'' (emphasis added)).

[72] HHS, Overview, About Ending the HIV Epidemic: Plan for America, *https://www.hiv.gov/federal-response/ending-the-hiv-epidemic/overview.*

dedicated partners working at all sectors of society, including people with HIV or at risk for HIV; city, county, tribal, and state health departments and other agencies; local clinics and healthcare facilities; healthcare providers; providers of medication-assisted treatment for opioid use disorder; professional associations; advocates; *community- and faith-based organizations;* and academic and research institutions, among others. Engagement of community in developing and implementing jurisdictional EHE plans as well as in the planning, design, and delivery of local HIV prevention and care services are vital to the initiative's success.

(Emphasis added.)

When the Agency programs highlight the benefits of participation by faith-based organizations, it is hard to see how it is contrary to those programs to ensure that such organizations are eligible to participate in those programs on equal terms with secular organizations and subject to accommodations provided for in existing Federal laws. The objectives of these programs are consistent with this final rule and could not override the First Amendment and RFRA concerns that are part of the basis for this final rule. And to be clear, in the event of any unanticipated conflict between the final rule and an applicable program statute for which the First Amendment, RFRA, or another Federal law do not provide an exception, the Agencies will follow the requirements of the program statute.

Changes: None.

Affected Regulations: None.

J. Procedural Requirements

1. Comment Period

HUD provided a 60-day comment period for its NPRM. The eight other Agencies provided a 30-day comment period.

Summary of Comments: Some commenters argued that the other Agencies' comment periods should have been longer because the proposed rules were complex, pointing out that OMB designated this coordinated rulemaking a significant regulatory action. Some comments asserted that the APA, 5 U.S.C. 551 *et seq.;* Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735, and Executive Order 13563 of January 18, 2011, Improving Regulation and Regulatory Review, 76 FR 3821; and ''agency precedents'' provide that comment periods should generally be at least 60 days, and courts hold that a shorter period must be justified by the ''good cause'' exception in the APA. Some comments also cited *Housing Study Group* v. *Kemp,* 736 F. Supp. 321, 334 (D.D.C. 1990). Some comments asserted that the Agencies had worked on the proposals for ''many months,'' so the public should have more than 30 days to respond. Some comments pointed out that HUD allowed 60 days for comments, so the other Agencies also should have provided that many days, or should at least consider the comments made to HUD.

Response: The APA does not specify a minimum public comment period. *See* 5 U.S.C. 553(b). Executive Orders 12866 and 13563 encourage agencies to provide comment periods of at least 60 days, but do not mandate this. And, aside from HUD, no ''agency precedents'' bind the Agencies to 60-day comment periods. In contrast, HUD, pursuant to its unique rule on rulemaking at 24 CFR 10.1, requires a 60-day comment period. And HUD complied with that requirement here.

The Agencies disagree that *Housing Study Group* applies here. That case addressed an interim final rule that was promulgated after a 30-day notice-and-comment period. 736 F. Supp. at 334. But the court recognized later in the same case that the 60-day requirement is based on HUD's unique regulations. *See Housing Study Group* v. *Kemp,* 739 F. Supp. 633, 635 n.6 (D.D.C. 1990) (citing 24 CFR 10.1).

The eight other Agencies that selected a 30-day comment period provided sufficient opportunity for interested persons to meaningfully review the proposed rules and provide informed comment. The large number of comments received, many of which were substantive and detailed, show that the comment period was adequate.[73] Moreover, the existing regulations are not lengthy or complex. For example, DOJ's regulations in 28 CFR part 38 (including the two short appendices) consist of a few pages of text. Also, the NPRMs are not lengthy and are mostly repetitive. For example, the NPRMs for DHS, USDA, USAID, DOJ, DOL, VA, HHS, and HUD are each between 6 and 14 pages, with the regulatory text appearing on 2 to 4 pages. To be sure, ED's NPRM is longer, but it also separated out the unique aspects of its proposed rules into a separate final rule that has already been promulgated. Direct Grant Programs, State-Administered Formula Grant Programs, Non Discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Developing Hispanic-Serving Institutions Program, Strengthening Institutions Program, Strengthening Historically Black Colleges and Universities Program, and Strengthening Historically Black Graduate Institutions Program, 85 FR 59916 (Sept. 23, 2020).

Although OMB designated the proposed rules as significant regulatory actions, such a designation, in itself, is not necessarily indicative of how much time is needed to review and comment on that rule. *See* E.O. 12866, sec. 3(f) (setting out a variety of factors for designation). Similarly, the length of time an agency works on a proposed rule does not necessarily correspond to the length of time an agency should allow for comment. Here, the coordination prior to publication resulted in a rule coordinated (and generally consistent) across several Agencies, thus reducing complexity for commenters. The Agencies considered all comments submitted in response to the concurrent rulemaking, including those submitted to HUD during its 60-day comment period, as commenters recommended. In fact, most of the comments on the HUD version overlap with those submitted to DOJ, suggesting that additional time was not required for robust review and comment.

Changes: None.

Affected Regulations: None.

2. Arbitrariness and Capriciousness

Summary of Comments: Some commenters, including a local government and advocacy organizations, asserted that the proposed rules violated the APA because the proposed changes were ''arbitrary and capricious.'' They reasoned that the Agencies did not establish a ''rational connection'' between the underlying facts and their policy choices and did not offer a ''reasoned explanation'' for their changes to existing requirements, citing *Motor Vehicle Manufacturers Ass'n of the United States* v. *State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 43 (1983). Some advocacy organizations stated that the proposed rules were contrary to the APA because the Agencies ''failed to consider an important aspect of the problem'' when they issued the proposed rules. *Id.* A few advocacy organizations warned that agency actions based on arguments ''counter to the evidence'' do not meet the requirements of the APA. *Id.*

Similarly, another organization criticized the Agencies for offering little explanation or the required rational connection for changes that could adversely affect individuals. One organization asserted that the Agencies

[73] *Cf. Nat'l Lifeline Ass'n* v. *FCC,* 921 F.3d 1102, 1117 (D.C. Cir. 2019) (''When substantial rule changes are proposed, a 30-day comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment.'' (citations omitted)).

did not fulfill their obligations under the APA to support each proposed change from the status quo with a ''reasoned analysis,'' *Motor Vehicle Mfrs.,* 463 U.S. at 42; *Washington* v. *Azar,* 376 F. Supp. 3d 1119, 1131 (E.D. Wash. 2019), *vacated and remanded sub nom. Becerra* v. *Azar,* 950 F.3d 1067 (9th Cir. 2020), that addresses the facts and arguments underlying the existing provision, *Encino Motorcars, LLC* v. *Navarro,* 136 S. Ct. 2117, 2125–26 (2017); *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009), and clearly justifies the reversal. The commenter described a presumption against changes lacking support in the rulemaking record, *Motor Vehicle Mfrs.,* 463 U.S. at 42, and warned that, although Executive Order 13831 overturned the Government-wide notice-and-referral requirements of Executive Order 13279, as amended, the Agencies must still justify the corresponding changes to the regulations. The commenter stated that the Agencies offered ''no evidence'' in the proposed rules that the provisions were not functioning and required replacement. A different organization argued that when agencies propose material changes in policy, adherence to APA requirements is of greater significance because of the potential harm to ''serious reliance interests,'' *Fox Television Stations,* 556 U.S. at 515, and commented that failure to explain a departure from standing policy could constitute ''an arbitrary and capricious change from agency practice,'' *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.,* 545 U.S. 967, 981 (2005). The commenter also stated that, because the Agencies did not scrutinize the proposed rules' effect on beneficiaries or employees, the proposed rules did not meet the reasoned analysis standard under the APA.

Some advocacy organizations criticized the rationales provided for the proposed revisions as inadequate. One organization commented that the Agencies neglected to identify what problems of administration the proposed rules were meant to correct and lacked support for the claim that the notice-and-referral requirements burdened providers. Additionally, the commenter argued that the Agencies failed to justify the expansion of religious exemptions for providers and did not account for how coercion or lack of alternatives would affect beneficiaries. A different organization, citing the Agencies' statements in the NPRMs that they could not quantify the cost of the referral requirement and welcomed data that would aid in developing such estimates, concluded that the Agencies could not provide an adequate basis for rescinding the requirement. The commenter criticized the Agencies' reliance on RFRA and *Trinity Lutheran* for support as ''cursory and flawed,'' and maintained that the Agencies had not met their burden under the APA to offer a reasoned explanation for the change, citing *Fox Television Stations,* 556 U.S. at 515. Addressing other proposed revisions, the commenter stated that the proposals to broaden religious exemptions and redefine indirect assistance also lacked sufficient rationales as the Agencies' arguments concerning alignment with the First Amendment and RFRA were inadequate.

Response: The Agencies disagree with comments that suggested the proposed rulemaking was ''arbitrary and capricious'' in violation of the APA because it ''failed to present a reasoned analysis'' for a substantial change in policy and ''failed to articulate a rational connection between the facts found and the choices made.'' Under the APA, courts review the Agencies' exercise of discretion under the deferential ''arbitrary and capricious'' standard. *See* 5 U.S.C. 706(2)(A). The court's review is ''narrow,'' and the court may review the Agencies' exercise of discretion only to determine if the Agencies ''examined 'the relevant data' and articulated 'a satisfactory explanation' for [the] decision, including a rational connection between the facts found and the choice made.'' *Dep't of Commerce* v. *New York,* 139 S. Ct. 2551, 2569 (2019) (citations omitted). Courts may not substitute their judgments for the Agencies', ''but instead must confine [them]selves to ensuring that [the Agencies] remained 'within the bounds of reasoned decision-making.' '' *Id.* (citation omitted).

The Supreme Court has recognized that agencies may change policy when such changes are ''permissible under the statute, . . . there are good reasons for [them], and . . . the agency *believes* [them] to be better'' than prior policies. *Fox Television Stations,* 556 U.S. at 515. Courts also have noted that agencies are not bound by prior policies or interpretations of their statutory authority.[74] In addition, an agency need not prove that the new interpretation is the best interpretation but should acknowledge that it is making a change, provide a reasoned explanation for the change, and indicate why it believes the new interpretation of its authority is better. *See generally Fox Television Stations,* 556 U.S. 502.

The Agencies easily meet these requirements of the APA by providing detailed and reasoned explanations for their proposed changes. As the Agencies explained in proposing the amendments, the proposed changes implement Executive Order 13831 and conform the regulations more closely to the Supreme Court's current First Amendment jurisprudence; relevant Federal statutes such as RFRA; Executive Order 13279, as amended by Executive Orders 13559 and 13831; and the Attorney General's Memorandum.

The NPRMs explained that, in order to be consistent with these authorities, the proposed rules would conform to Executive Order 13279, as amended, by deleting the requirement that faith-based social service providers refer beneficiaries objecting to receiving services from them to an alternative provider and the requirement that faith-based organizations provide notices that are not required of secular organizations. As the NPRMs also explained, President Obama's Executive Order 13559 imposed notice and referral burdens on faith-based organizations that are not imposed on secular organizations. Section 1(b) of Executive Order 13559 had amended section 2 of Executive Order 13279 in pertinent part by adding a new subsection (h) to section 2. As amended, section 2(h)(i) provided that if a beneficiary or a prospective beneficiary of a social service program supported by Federal financial assistance objected to the religious character of an organization that provided services under the program, that organization was required, within a reasonable time after the date of the objection, to refer the beneficiary to an alternative provider. Section 2(h)(ii) directed the Agencies to establish policies and procedures to ensure that referrals would be timely and would follow privacy laws and regulations; that providers notify the Agencies of and track referrals; and that

[74] *See, e.g., Rust* v. *Sullivan,* 500 U.S. 173, 186–87 (1991) (acknowledging that changed circumstances and policy revision may serve as a valid basis for changes in agency interpretations of statutes); *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 863–64 (1984) (''The fact that the agency has from time to time changed its interpretation of the term 'source' does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.''); *Motor Vehicle Mfrs.,* 463 U.S. at 42 (agencies ''must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances' '' (quoting *Permian Basin Area Rate Cases,* 390 U.S. 747, 784 (1968))).

each beneficiary ''receive [] written notice of the protections set forth in this subsection prior to enrolling in or receiving services from such program.'' The reference to ''this subsection'' rather than to ''this section'' indicated that the notice requirement of section 2(h)(ii) was referring only to the alternative provider provisions in subsection (h), not all of the protections in section 2.

When revising their regulations in 2016, the Agencies explained that the revisions would implement the alternative provider provisions in Executive Order 13559. Executive Order 13831, however, has removed the alternative provider requirements articulated in Executive Order 13559. The Agencies also previously took the position that the alternative provider provisions would protect religious liberties of social service beneficiaries. But such methods of protecting those rights were not required by the Constitution or any applicable law. Indeed, the selected methods were in tension with more recent Supreme Court precedent—including *Espinoza* and *Trinity Lutheran*—regarding nondiscrimination against religious organizations, with the binding legal principles discussed in the Attorney General's Memorandum, and with RFRA, as explained in the NPRMs and in detail in Part II.C. The Agencies also now disagree that these requirements meaningfully protected any beneficiary's religious liberties, as discussed in Part II.C.1. And the Agencies incorporate their analysis of the costs and benefits from Part IV below.

Executive Order 13831 chose to eliminate the alternative provider requirement for good reason. This decision avoids tension with the nondiscrimination principles articulated in *Trinity Lutheran* and summarized in the Attorney General's Memorandum, avoids problems that may arise under RFRA, and fits within the Administration's broader deregulatory agenda. Moreover, as explained in detail in Part II.C, the Agencies exercise their discretion to remove the alternative provider requirement because that is the appropriate legal and policy choice.

Similarly, the Agencies have provided reasoned explanations throughout this preamble for all of the other clarifications, additions, and changes in this final rule, which they incorporate here.

Thus, the Agencies disagree that this rulemaking is ''arbitrary and capricious,'' has not been explained or adequately supported, or otherwise has violated the requirements of the APA.

Changes: None.

Affected Regulations: None.

K. Regulatory Certifications

1. Regulatory Impact Analysis (Executive Orders 12866 and 13563)

Summary of Comments: Commenters argued that the proposed rules did not adequately or accurately assess all costs and benefits associated with the proposed rules. A few advocacy organizations commented that ''reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions,'' citing *Michigan* v. *EPA,* 576 U.S. 743, 753 (2015). Another commenter relied on the principles that, to achieve compliance with the APA, an agency ''must examine the relevant data and articulate a satisfactory explanation,'' and that agency action may be arbitrary and capricious if it ''failed to consider an important aspect of the problem.'' *Motor Vehicle Mfrs.,* 463 U.S. at 43. Commenters added that Executive Orders 12866 and 13563 require the Agencies to accurately assess the costs and benefits of a proposed rule—both quantifiable and unquantifiable—and then make a reasoned determination that the benefits justify the costs and that the regulation is tailored ''to impose the least burden on society.'' Additionally, commenters emphasized that Executive Order 12866 requires agencies to ''assess all costs and benefits'' and to ''select those approaches that maximize net benefits.''

Applying these standards, commenters argued that the Agencies did not adequately address the costs to beneficiaries and employees from the regulatory changes. Some commenters argued that the Agencies had not recognized non-quantifiable benefits (avoided costs or burdens) for beneficiaries from the prior rule. Multiple commenters argued that the Agencies failed to quantify the costs of removing the notice-and-referral requirements, including failing to consider all relevant economic and non-economic costs, failing to substantiate the claimed cost savings with data, and asserting without support that removing a protection would benefit beneficiaries.

One commenter listed categories of potential costs to beneficiaries from removing the notice-and-referral requirements that, this commenter claimed, the Agencies had not addressed. Specifically, these potential costs included: Experiencing discrimination and barriers to access; health costs due to discrimination; health costs from the stigmatizing message of rules that permit discrimination; cost shifting to other service agencies; increased confusion, familiarization, administrative, and legal costs; and decreased fairness, dignity, and respect for the religious freedom and constitutional rights of beneficiaries. This commenter argued that the Agencies should use available data and research on the costs of discrimination and the benefits of nondiscrimination protections to try to quantify the true impacts. The commenter claimed that depression is associated with the stress of having faced discrimination and cited research purporting to show that reducing the disparity in incidents of depression among LGBTQ adults by 25 percent could yield cost savings in Michigan, Arizona, Florida, and Texas of between $78 million and $290 million annually, each.[75] The commenter argued that the Agencies' economic analyses were ''fundamentally flawed'' due to their failure to take into account these costs.

Commenters also argued that the Agencies only acknowledged, but did not attempt to quantify, the discrete costs to objecting beneficiaries that need to identify alternative providers due to removal of the referral requirement. This commenter urged the Agencies to consider all of the costs and benefits of the proposed rules, as well as the possibility that the costs would outweigh the benefits.

One of these commenters argued that the Agencies had also failed to quantify the costs of the employment law changes discussed in Part II.H.

Additionally, one commenter asserted that the Agencies relied on ''increased clarity'' as a benefit of the proposed rules but had not recognized that beneficiaries would not benefit from such ''increased clarity.'' 85 FR at 2935.

Commenters also discussed the benefits to faith-based organizations from this final rule. Several commenters argued that faith-based organizations

[75] Christy Mallory et al., The Impact of Stigma and Discrimination Against LGBT People in Michigan 66 (Williams Institute 2019) (''Michigan Study''), *https://williamsinstitute.law.ucla.edu/wp-content/uploads/Michigan-Economic-Impact-May-2019.pdf;* Christy Mallory et al., The Impact of Stigma and Discrimination Against LGBT People in Arizona 63 (Williams Institute 2018) (''Arizona Study''), *https://williamsinstitute.law.ucla.edu/wp-content//Arizona-Impact-Discrimination-March-2018.pdf;* Christy Mallory et al., The Impact of Stigma and Discrimination Against LGBT People in Florida 64 (Williams Institute 2017) (''Florida Study''), *https://.law.ucla.edu//impact-lgbt-discrimination/;* Christy Mallory et al., The Impact of Stigma and Discrimination Against LGBT People in Texas 67 (Williams Institute 2017)) (''Texas Study''), *https://williamsinstitute.law.ucla.edu/wp-content//Impact-of-Stigma-and-Discrimination-Report-April-2017.pdf.*

were not harmed by the notice-and-referral requirements. Some of these commenters argued that the Agencies did not present sufficient evidence—beyond assumptions or ''vague references'' to administrative burden and costs—that the notice-and-referral requirements had unduly burdened religious service providers either economically or in their practical ability to provide help for the needy in accord with their faiths. Some of these commenters argued that the Agencies had not presented any actual or even hypothetical examples of how this requirement meaningfully burdened faith-based organizations or interfered with their abilities to service program beneficiaries. Another commenter said that the regulations were working well and that the Agencies had not provided any supported reason for their changes.

Some commenters argued that there was no burden to religious service providers because providing referrals should have been seen as part of the services for which such providers were receiving taxpayer funds. Another commenter claimed that the notice requirement imposed no burden at all on faith-based providers because they were being funded by taxpayer dollars to serve the beneficiaries.

Several commenters argued that the notice-and-referral requirements imposed only minimal burdens on faith-based providers. Some of these commenters emphasized that the Agencies had indicated that the costs of the referral requirement were minimal, nonexistent, or unquantifiable. Multiple commenters emphasized that the cost of notice was minimal because each Agency estimated such cost to be no more than $200 per religious organization, with some estimating the costs to be lower, in the 2016 or 2020 rulemakings. For all of these reasons, these commenters concluded that removal of the notice requirement would not result in substantial savings for faith-based organizations.

Some of these commenters disagreed with the Agencies' claims that removing the notice-and-referral requirements could create cost savings that faith-based providers could re-allocate to increase services or that could incentivize them to increase their participation in federally funded programs. These commenters argued that, because compliance required minor efforts and costs, removing these requirements would neither make significant extra resources available nor result in significant additional providers. Some of these commenters claimed that the Agencies had not demonstrated that any religious organization was not participating in these programs because of these requirements, or that there were insufficient providers to meet the programs' needs. Some commenters also argued that it was contradictory or inconsistent for the Agencies to claim that the cost savings from removing the notice-and-referral requirements could trigger a noticeable increase in services, *see, e.g.,* 85 FR at 2935, 8221–22, but then to claim that beneficiaries did not use referrals.

For these reasons, commenters argued that cost savings to faith-based organizations cannot justify removal of the notice-and-referral requirements. One commenter to multiple Agencies, however, explained that removal of the notice-and-referral requirements would enable religious organizations to continue working towards strengthening society.

Commenters also compared the benefits and burdens to beneficiaries against the benefits and burdens to faith-based organizations. Several commenters argued that any burdens on faith-based organizations imposed by the notice-and-referral requirements were outweighed by the benefits they provided to beneficiaries. Relying on the discussions in this section and in Part II.C, these commenters compared the various described burdens to faith-based organizations, which they claimed were minimal or non-existent, to the various claimed benefits to beneficiaries, which they claimed were significant. Some of these commenters stated that the unquantified costs to beneficiaries associated with removal of the notice-and-referral requirements could offset or exceed any savings for providers. One commenter argued that the Agencies provided ''no evidence'' that any of the changes to beneficiaries' protections would result in net benefits because of the high costs to beneficiaries and society.

Some commenters expressed concern that the Agencies appeared to value the religious liberty of providers above that of beneficiaries and urged the Agencies to evaluate them equally. These commenters criticized the Agencies for proposing several measures to remove ''any possible burden'' or lack of clarity for providers while eliminating ''the only means'' for beneficiaries to receive notice of their rights as well as the requirement to be given a referral upon request.

Some commenters argued that nothing had changed since 2016 to justify the Agencies' changed positions regarding the balance of benefits and burdens. In 2016, the Agencies concluded that the notice requirement was ''designed to limit the burden on'' providers while being ''justified by the value to beneficiaries'' (*i.e.,* ''valuable protections of their religious liberty''). 81 FR at 19365. Additionally, in 2016, the Agencies determined that there was no ''undue burden'' from requiring notice of such ''valuable protections'' of beneficiaries' ''religious liberty.'' *Id.* These commenters argued that it was ''contradictory'' to claim now that the burdens of these requirements justify their removal and that the Agencies had dismissed these conclusions without evidence or reasoned analysis.

Other commenters pointed to the 2010 Advisory Council Report that, they claimed, had recognized the notice-and-referral requirements could impose significant monetary costs on providers but still concluded that those costs were necessary to adequately protect beneficiaries' unquantifiable fundamental religious liberties. Advisory Council Report at 141.

Finally, a commenter argued that the reasoned explanation standard was not met when eight of the Agencies (all except HHS) stated that they based removal of the notice-and-referral requirements (and other regulatory provisions) on a ''reasoned determination'' that the proposal would significantly decrease costs for providers, citing 85 FR at 2894 (DHS); *id.* at 2902–03 (USDA); *id.* at 2919 (USAID); *id.* at 2925–26 (DOJ); *id.* at 2935 (DOL); *id.* at 2944 (VA); *id.* at 3215, 3219 (ED); *id.* at 8221–22 (HUD).

Response: In this final rule, the Agencies adequately and appropriately consider the costs and benefits of this final rule, as well as the balance between them, to select the approaches that maximize net benefits and that impose the smallest burdens on society. The Agencies disagree with the comments to the contrary.

In the relevant sections above for each regulatory provision, the Agencies have addressed the specific comments regarding the potential impact on beneficiaries or employees that were raised in the comments, including by explaining the Agencies' experiences over the past four years, where relevant. Most of these comments focus on removal of the notice-and-referral requirements. The Agencies have considered the alleged harms to beneficiaries from removing these requirements as described in great detail in Part II.C, including detailed analyses of commenters' actual examples, studies, surveys, and hypothetical examples. For all of the reasons discussed there, the Agencies disagree that removing the notice-and-referral requirements will cause the harms

claimed by commenters. Indeed, as discussed, there is no indication by any Agency or commenter that anyone actually sought a referral at any time during the last four years.

Part II.C addresses in detail the reasons that removal of the notice-and-referral requirements will not lead to increased discrimination against any beneficiaries. Additionally, the studies cited by a commenter regarding the impact of reducing LGBTQ depression do not indicate that there will be any increase in discrimination or depression due to removal of the notice-and-referral requirements, that faith-based providers have higher incidents of discrimination, or that any discrimination or depression would be prevented or reduced by notice and referral. For example, those surveys point to the prevalence of LGBT people using Federal programs, such as SNAP, but do not point to prevalent discrimination in those programs, let alone discrimination particular to faith-based providers in such programs.[76] Moreover, those studies specifically did not discuss Federal protections in the programs governed by this final rule that prohibit discrimination based on sex, including under Title VII, because that was ''outside the scope of'' each study.[77] The Agencies have, thus, considered these costs and reasonably determined that specific calculations are not warranted.

As a result, and as discussed in Part II.C, the Agencies determine that removal of these notice-and-referral requirements will not cause the harms to beneficiaries cited by commenters. Because removing these requirements will not increase discrimination, there will not be increased costs to beneficiaries from experiencing discrimination and barriers to access, health costs due to discrimination, health costs from the stigmatizing message of rules that permit discrimination, or cost shifting to other service agencies. Additionally, there is no reason to believe that beneficiaries will experience increased confusion, familiarization costs, administrative costs, or legal costs, just as there is no reason to believe that they have experienced such costs when receiving services from the providers that were exempt from these requirements. And there is no reason to believe that removal will cause decreased fairness, dignity, and respect for the religious freedom and constitutional rights of beneficiaries, which are not affected by this rule change, as discussed in Part II.C. Also, as discussed in Parts II.C, II.E, II.F, and II.G.3, the Agencies address any such burdens within their notices to faith-based organizations of the applicable beneficiary protections and within the context-specific accommodation analyses under other existing Federal laws that are explicitly recognized in this final rule.

Moreover, beneficiaries may benefit from removal of these notice-and-referral requirements. As discussed in Part II.C, this final rule removes the various confusing aspects of these requirements, including the implications that they applied only to faith-based organizations, that accommodations were not available, contrary to the Free Exercise Clause and RFRA (which overrode any such implication in the regulations), and that discrimination on grounds other than religion was not prohibited. At the very least, these beneficiaries will be in the same position as beneficiaries of providers that were never subject to these requirements.

The Agencies have also considered the costs for beneficiaries, if they object based on religious character, to identify an alternative provider. The Agencies incorporate their discussion of this alleged burden from Part II.C, including that they have no indication that anyone sought a referral under the prior rule and that there are readily available ways for any such beneficiary to locate a substitute, to the extent one is available. Additionally, the Agencies expressly invited comments on any data by which they could calculate such costs, *see, e.g.,* 85 FR at 2926 (DOJ), but no commenter provided any such information. The Agencies invited similar information regarding how they could better assess other actual costs and benefits of the prior rule but did not receive any responses that provided a reliable methodology for such assessments. The Agencies have considered these issues and reasonably determine that further calculations are not warranted.

In contrast, the Agencies conclude that the notice-and-referral requirements imposed substantial non-monetary burdens on faith-based organizations due to unequal treatment, in tension with the Free Exercise Clause and RFRA, and concerns that could have deterred faith-based organizations from applying to participate in such grant programs, as discussed in Part II.C. Additionally, the notice requirement created confusion because it omitted any discussion of accommodations, was inconsistent with the provisions in four Agencies' regulations that no additional assurance or notice be required from faith-based organizations regarding explicitly religious activities as discussed in Part II.G.4, and was in tension with each Agency's general provision in the rule promising that faith-based organizations retained their independence. In combination with all of the other changes in this final rule, removing the notice-and-referral requirements provides much-needed clarity that faith-based organizations can participate in these programs on equal terms with secular organizations, consistent with the Religion Clauses and RFRA. And, as discussed in Parts II.E and II.F above, otherwise eligible faith-based organizations have been abstaining from applying for these programs, have been excluded from these programs, or have been challenged for participating in these programs due to the lack of clarity in the 2016 rule. As discussed in Part II.C, these notice-and-referral requirements stigmatized faith-based organizations as most likely to be objectionable or to violate beneficiaries' rights. Although the Agencies agree that they cannot quantify these burdens, they do not agree that these unquantifiable burdens are insufficient bases for rule changes. Also, the supportive comments demonstrate that some faith-based providers were burdened by the notice-and-referral requirements, including the stigmatization that such requirements caused.

The Agencies disagree with the contention that mandatory referrals by only specific faith-based organizations should be seen as part of the federally funded service. The Federal financial assistance is for the provision of services, whereas referral was the non-provision of services. To assert that mandatory referrals constituted a part of the federally funded service misunderstands the nature of Federal funding, where a Federal grant award supports particular enumerated activities to be undertaken by a recipient. Commenters making this claim did not provide any indication that such mandatory referrals were included as an enumerated activity to be undertaken by any Agency with Federal funding. Further, referral as part of the service is hard to reconcile with the referral requirement's function of allowing objecting beneficiaries to avoid receiving any services from a provider. If the referral were part of the provider's service, then the referral would undermine the claimed protection and could make the referral itself objectionable. Under this final rule, religious organizations remain free to

[76] Michigan Study at 41–42; Arizona Study at 36–37; Florida Study at 40–41; Texas Study at 39–40.

[77] Michigan Study at 16 n.67; Arizona Study at 12 n.47; Florida Study at 13 n.43; Texas Study at 13 n.50.

make such referrals if they choose, and some commenters indicated that they will continue to do so.

Similarly, the Agencies disagree that there can be no burden on the faith-based providers because they were receiving taxpayer funding and must adhere to religious freedom safeguards. Receipt of taxpayer funding does not cause faith-based organizations to waive their constitutional and statutory religious liberties, just as it does not waive such rights for beneficiaries. These comments directly contradict *Espinoza, Trinity Lutheran,* many applications of RFRA, and countless other Supreme Court cases that allowed faith-based providers to participate in government-funded programs without surrendering their religious character or liberty. Additionally, the Agencies determine that the notice-and-referral requirements did not safeguard beneficiaries' religious freedoms, as discussed in Part II.C.

The Agencies agree with the comments that said the notice-and-referral requirements likely imposed minimal monetary costs on faith-based organizations and that removal will not create significant financial savings for faith-based organizations. Neither notices nor referrals were particularly expensive, as the Agencies noted in the 2016 rule and in their 2020 NPRMs. Also, there is no indication anyone actually requested a referral under the prior rule, as discussed in Part II.C.3.c. Nevertheless, based on their experiences and the comments they received, the Agencies have re-evaluated the number of known faith-based organizations receiving their grants and estimated the cost savings for those providers from removal of the notice-and-referral requirements. An updated analysis of these costs and benefits is set out below in the Regulatory Certifications section addressing Executive Orders 12866 and 13563.

The Agencies expressly conclude that those cost savings will not be substantial and are not the basis for removal of the notice-and-referral requirements in this final rule. Although the cost savings from removing the notice requirement are not significant and will not make available significant funding for significant increases in services, the Agencies also exercise their discretion to allow faith-based providers, like other providers, to save those costs and be able to allocate any savings toward providing additional services to beneficiaries. It is consistent to conclude that these savings are minimal and that they can be allocated toward providing services to beneficiaries.

Additionally, the Agencies disagree that their conclusion here regarding the burden of referrals is inconsistent with their conclusion that beneficiaries rarely or never sought referrals. For both, the Agencies conclude that referrals were rarely or never sought. As discussed above, the Agencies are not claiming substantial savings to faith-based providers from removing the referral requirement, including because there were few, if any, requests for such referrals. But that does not diminish the constitutional and other non-quantified burdens on faith-based organizations that are the bases for removing the referral requirement. Moreover, faith-based service providers that are subject to these regulations will save costs as a result of removing the notice requirement.

The Agencies conclude that removing the notice-and-referral requirements reaches the appropriate balance between benefits and burdens for all stakeholders and society, for all of the reasons discussed throughout this final rule, including in this section. As discussed above, the Agencies conclude that such removal will substantially benefit faith-based organizations, may benefit beneficiaries, and will not harm beneficiaries. Additionally, the Agencies are further accounting for beneficiaries' rights by separately giving express notice to faith-based providers that they must comply with the applicable beneficiary protections and providing for context-specific accommodations that further balance stakeholder interests, which may result in targeted and appropriate notices and referrals. That is the appropriate policy choice for all of the reasons discussed throughout Parts II.C, II.E, and II.G.3.

Since 2016, the Agencies have re-evaluated their analyses on this balancing of interests with respect to the notice-and-referral requirements for all of the reasons explained throughout this section and Part II.C, including their experiences of no known actual instances of referrals (and, thus, the lack of need for such requirement) and the developments in First Amendment and RFRA case law, such as the Supreme Court's decisions in *Little Sisters, Espinoza,* and *Trinity Lutheran.* Additionally, this final rule is a deregulatory action under Executive Order 13771 of January 30, 2017, Reducing Regulation and Controlling Regulatory Costs, 82 FR 9339, with the cost savings of this rulemaking at $190,409 (in 2016 dollars) when annualized over a perpetual time horizon at a 7 percent discount rate.

The Agencies note that a commenter misquoted the Advisory Council Report. The commenter claimed that the Advisory Council Report acknowledged there would be significant monetary costs to ''providers'' from such notice-and-referral requirements. However, the cited page of the Advisory Council Report actually said there would be significant monetary costs to the Government. Advisory Council Report at 141. The Agencies acknowledge that they have absorbed costs due to those recommendations. But, as discussed above, the Agencies do not find, and do not base this final rule on, substantial costs to providers (or to themselves) from these requirements.

Even if the burdens on beneficiaries from removing the notice-and-referral requirements were to outweigh the benefits to faith-based organizations, the Agencies find ample bases to exercise their discretion to remove these requirements for all of the other reasons discussed in Part II.C, especially to alleviate the tension with the Free Exercise Clause and with RFRA. Those bases do not improperly prioritize faith-based organizations over beneficiaries. Even the 2010 Advisory Council recommended that Executive Order 13279 be amended ''to make it clear that fidelity to constitutional principles is an objective that is as important as the goal of distributing Federal financial assistance in the most effective and efficient manner possible.'' Advisory Council Report at 127 (Recommendation 4). The Agencies agree. Serving beneficiaries is an important goal of these programs, but the programs serving beneficiaries must be operated consistent with constitutional principles, including protection of the religious liberty of organizations that implement them.

The Agencies have also considered the costs and benefits of the other changes in this final rule. The Agencies do not anticipate harm to beneficiaries from the modifications to indirect Federal financial assistance for the reasons discussed in Part II.D. Beneficiaries select those providers through genuine independent choice, beneficiaries are free to decide whether or not to accept such services from faith-based organizations, and other protections continue to apply. The minimal or nonexistent harms to beneficiaries are justified by the benefits of this final rule, as described in Part II.D, including the non-quantifiable qualitative benefits of reconciling the tension between this provision and the constitutional standard, ensuring that faith-based organizations are not discouraged from participating in Federal financial assistance programs and activities, and ensuring that

services are available in unserved and underserved communities. Additionally, as discussed in Part II.D, this provision is the appropriate policy choice, including because the Agencies prioritize making services available in unserved and underserved communities.

Similarly, the benefits and burdens of the other changes are addressed above in Parts II.E, II.F, II.G, and II.H. As discussed in Parts II.E and II.F, the Agencies are retaining the constitutional and statutory accommodation and nondiscrimination standards, which do not cause any new burden to beneficiaries. Any burden caused by each standard would exist whether or not that standard is expressly incorporated into this final rule. Also, those existing standards incorporate context-specific balancing that evaluates the costs and benefits as appropriate. As discussed in Part II.F, the Agencies have also considered the comments regarding burdens on beneficiaries due to the proposed language in the NPRMs for the RFRA standard and have modified the regulatory text to ensure the appropriate balance with regard to prohibiting discrimination based on religious exercise. The benefits of clearly applying these standards and ensuring faith-based providers can participate on equal terms justify the potential burdens.

For similar reasons and as discussed in Part II.G, the benefits justify the potential burdens—and the Agencies do not anticipate burdens—from clarifying the scope of allowed religious displays, clarifying how an organization can demonstrate nonprofit status, giving notice to faith-based organizations, barring unique assurances or notices solely from faith-based organizations, and clarifying that faith-based organizations retain their autonomy and expression rights. Indeed, those clarifications will protect both faith-based organizations and beneficiaries from uncertainty. And the notice to faith-based organizations will make clear their obligations to protect beneficiaries' rights, as discussed in Parts II.C and II.G.3.

Finally, and as explained in Part II.H, ED, HHS, HUD, DOL, USAID, and VA conclude that the benefits justify any burdens from clarifying that faith-based organizations retain their Title VII exemption regarding acceptance of and adherence to religious tenets. This well-established Title VII standard was subsumed within the prior rule. This final rule merely adds clarity, ensures faith-based organizations can preserve their autonomy and identities, and does not alter protections against discrimination on other bases, as discussed in II.H.2.a. Additionally, DHS, DOJ, and HUD conclude that the benefits of clarifying that faith-based organizations' independence generally allows them to select board members based on acceptance of or adherence to religious tenets justifies any costs that such change might cause, as discussed in II.H.2.b.

For all of these reasons, the Agencies' NPRMs and this final rule reasonably assess the costs and benefits associated with this rule, pay attention to the advantages and disadvantages of this rule, examine the relevant data and articulate a satisfactory explanation, and consider the important aspects of the problem. The Agencies have considered all comments submitted, including those addressing costs and benefits, in publishing this final rule.

Changes: None.

Affected Regulations: None.

2. Economic Significance Determination (Executive Order 12866)

Summary of Comments: A commenter asserted that the proposed rules would be economically significant under Executive Order 12866, both because the costs would total over $100 million per year, and because it ''may . . . adversely affect in a material way . . . public health or safety, or State, local, or tribal governments or communities.'' This commenter argued that the Agencies' cost analyses were too narrow, excluding potentially significant costs to third parties (*e.g.,* beneficiaries, communities, and funded organizations) because of the scale of programs affected by the proposed rules.

Response: The Office of Information and Regulatory Affairs (''OIRA'') within OMB determined that this final rule is a significant, but not an economically significant, regulatory action subject to review by OMB under section 3(f) of Executive Order 12866. As discussed in the updated Regulatory Impact Analysis in Part IV below and in Parts II.C and II.K.1 above, this final rule will not create new marginal costs from the status quo, even though the underlying programs involve government spending. In fact, this final rule will result in de minimis cost savings, and it is deregulatory because it reduces qualitative burdens. Consequently, it does not approach the threshold for being an economically significant rule (annual effect of $100 million or more) under Executive Order 12866, nor, for the reasons set out in detail in the other sections, does it adversely affect in a material way the other items listed in section 3(f)(1) of that order.

Changes: None.

Affected Regulations: None.

3. Deregulatory Action Determination (Executive Order 13771)

Summary of Comments: A commenter criticized multiple Agencies for concluding that removal of the notice-and-referral requirements promotes the Administration's deregulatory agenda. The commenter argued that doing so privileges policy goals above religious freedom.

Response: Removing the notice-and-referral requirements promotes the Administration's deregulatory agenda, which is a desirable policy outcome for the Agencies. But that is not the primary basis for removing them. The Agencies base the removal of the notice-and-referral requirements on all of the reasons discussed throughout Parts II.C and II.K.1 above, including that those requirements were imposed solely on faith-based organizations, creating tension with the Free Exercise Clause and RFRA, and that there was no evidence anybody had actually sought a referral in one of the programs covered by the rule.

Changes: None.

Affected Regulations: None.

4. Federalism (Executive Order 13132)

Summary of Comments: A commenter criticized multiple Agencies' federalism analyses as flawed, arguing that because the proposed rules introduced loopholes and overturned the existing regulatory regime, State and local jurisdictions would have a harder time protecting their workers and enforcing nondiscrimination laws of general applicability. Additionally, the commenter asserted that the proposed rules would burden State governments by increasing unemployment and, therefore, the need for State-funded welfare benefits, because more people will be turned down for employment. Similarly, the commenter maintained that both State and local governments would face higher demands for the social services they fund because beneficiaries will experience barriers to access in programs funded by the Agencies. The commenter warned that the proposed rules violated the APA because the Agencies' determinations regarding federalism implications were not based on a reasoned analysis.

Response: Executive Order 13132 of August 4, 1999, Federalism, 64 FR 43255, directs that, to the extent practicable and permitted by law, an agency shall not promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on State and local governments, and that is not

required by statute, or any regulation that preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. None of the changes made by this rule has federalism implications as defined in the Executive Order, nor imposes direct compliance costs on State and local governments. None of the changes made by this rule preempts State or local law within the meaning of the Executive Order, as stated expressly regarding Executive Orders 12988 and 13132. *See* Part IV below (regarding both Executive Orders); 85 FR at 2895 (DHS); *id.* at 2904 (USDA); *id.* at 2920 (USAID); *id.* at 2927 (DOJ); *id.* at 2935–36 (DOL); *id.* at 2944 (VA); *id.* at 2985 (HHS); *id.* at 8222 (HUD). The Agencies do not expect that this rule will increase unemployment or unlawful discrimination in any way (see the detailed analysis in Parts II.C, II.E, and II.H), and thus the commenter's hypothesized effects on State welfare benefits and social services are unlikely to materialize.

Moreover, it is not clear that any of the costs cited in the comments would qualify as ''direct'' under Executive Order 13132. The express terms of this final rule do not require State or local governments to pay any costs to comply. Rather, the comments pointed to indirect costs from theoretical alleged consequences of this final rule. Consequently, although Executive Order 13132 does not create any privately enforceable rights, the Agencies conclude that this final rule does not violate provisions in that Executive Order.

Changes: None.

Affected Regulations: None.

5. Unfunded Mandates Reform Act

Summary of Comments: Some commenters asserted that the Agencies incorrectly claimed an exemption from the requirement, in the Unfunded Mandates Reform Act of 1995 (''UMRA''), to assess a proposal's costs and benefits for States and local governments and the private sector, arguing that *Trinity Lutheran* and RFRA do not enforce statutory rights prohibiting discrimination. Some of these commenters added that *Trinity Lutheran* does not meet this standard because it is merely case law and that RFRA does not meet this standard because it permits individuals to seek relief from burdens on religious exercise but does not establish a categorical right against religious discrimination. One commenter urged multiple Agencies to conduct an UMRA analysis before issuing a final rule.

Response: Section 4 of UMRA, 2 U.S.C. 1503(1)–(2), excludes from coverage under that Act any proposed or final Federal regulation that ''enforces constitutional rights'' or ''establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.'' The provisions of the proposed rule, and of this final rule, are designed in substantial part to maintain a full protection of the constitutional and statutory rights to be free from discrimination on the basis of religion—set forth in the First Amendment to the U.S. Constitution, and numerous other statutes, including 42 U.S.C. 2000bb *et seq.,* 42 U.S.C. 18113, 42 U.S.C. 2000e–1(a) and 2000e–2(e), and 42 U.S.C. 12113(d). For example, the core protection of this rule, which has been in place since 2004, is that Agencies may not discriminate for or against an organization on the basis of its religious character or affiliation. The Supreme Court has since confirmed, in its 2017 decision in *Trinity Lutheran* and its 2020 decision in *Espinoza,* that this nondiscrimination right is grounded in the Free Exercise Clause. The clarifications that the Agencies provide to protect organizations from certain forms of discrimination on the basis of ''religious exercise'' are designed to give full effect to this protection and to the protections of RFRA that, as the Supreme Court has made clear in its 2014 decision in *Hobby Lobby* and in its 2020 decision in *Little Sisters,* extend to organizations as well as individuals. And the clarifications that certain of the Agencies have provided regarding the scope of the Title VII exemption is designed to enforce that statute.

Furthermore, this final rule does not impose any Federal mandate that will result in the expenditure of funds by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Most, if not all, expenditures by such governments—for example, as primary recipients of Federal financial assistance—will be directly funded by the Federal program and will be mandated by the underlying program, not this final rule.

For the foregoing reasons, the Agencies disagree that they are required to take any action under the provisions of UMRA.

Changes: None.

Affected Regulations: None.

III. Agency-Specific Preambles

A. Department of Education [78]

1. Comments in Support

Summary of Comments: Commenters noted that the proposed rule would reinforce Americans' religious liberties and the rule of law. Some commenters argued that the proposed rule appropriately eliminates potentially unequal treatment of religious institutions when applying for Department grants and restores fairness.

One commenter emphasized that First Amendment religious freedom rights for faith-based institutions and for students are essential to the operation and success of America's rich and diverse educational system. This commenter also asserted that faith-based organizations and faith-based schools may offer meaningful services to those in need.

Another commenter acknowledged that some may believe the proposed rule would have the effect of permitting schools to discriminate against the LGBTQ community, women, and pregnant students. However, this commenter emphasized that to categorically prohibit Federal funding to religiously affiliated organizations and schools would unfairly marginalize them. The commenter suggested that such organizations and schools can effectively serve marginalized groups.

Response: The Department appreciates the comments in support of the proposed rule. We agree that the proposed rule would appropriately protect religious liberty and prevent discrimination against faith-based

[78] The remainder of the proposed provisions in the Department of Education's NPRM, including proposed changes to 34 CFR 75.500, 34 CFR 75.700, 34 CFR 76.500, 34 CFR 76.700, 34 CFR 106.12(c), 34 CFR 606.10, 34 CFR 607.10, 34 CFR 608.10, and 34 CFR 609.10 as well as the addition of a severability clause in 34 CFR 75.684, 34 CFR 75.741, 34 CFR 76.684, 34 CFR 76.784, 34 CFR 606.11, 34 CFR 607.11, 34 CFR 608.12, 34 CFR 609.12, already have been promulgated through a different rulemaking. Office of Postsecondary Education, U.S. Department of Education, Direct Grant Programs, State-Administered Formula Grant Programs, Non-Discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Developing Hispanic-Serving Institutions Program, Strengthening Institutions Program, Strengthening Historically Black Colleges and Universities Program, and Strengthening Historically Black Graduate Institutions Program, 85 FR 59,916–82 (Sept. 23, 2020) (''Religious Liberty and Free Inquiry Final Rule''). To the extent that any comments such as comments about the length of the public comment period and requests for extension of the public comment period included in the Religious Liberty and Free Inquiry Final Rule concern the regulations in this final rule, the Department of Education refers to those comments and its responses to those comments in the Religious Liberty and Free Inquiry Final Rule. *Id.*

organizations. Furthermore, we acknowledge that faith-based organizations and schools make meaningful contributions to the richness and diversity of our Nation's educational system. And such entities also provide critical services to vulnerable populations and those in need.

We wish to emphasize that it is certainly not the intent of the Department to encourage discrimination, including against the LGBTQ community, women, or pregnant students, and we do not believe that these final regulations do so. Grantees provide secular services to all persons and are precluded from discriminating against beneficiaries on the basis of religion or religious belief, a refusal to hold a religious belief, or refusal to attend or participate in a religious practice.[79] We also agree with the commenter that faith-based organizations may effectively serve diverse groups of people, including marginalized groups. As one commenter correctly observed, the proposed rule was aimed at redressing the unfair treatment of faith-based organizations. In short, the final rule will have the effect of leveling the playing field such that faith-based organizations and religious individuals would not be treated any differently than other organizations or individuals.

Changes: None.

Affected Regulations: None.

2. Comments in Opposition

a. Concerns Regarding Discrimination and Impact on Programs

Summary of Comments: Many commenters expressed concern that the proposed rule would unfairly eliminate religious freedom protections in college preparatory and work-study programs intended to help low-income high school students prepare for college. One commenter clarified a concern that the proposed rule would eliminate religious freedom protections for non-religious participants in those programs.

Commenters also warned that the proposed rule may negatively impact federally funded afterschool and summer learning programs for students in high-poverty and low-performing schools. Some commenters argued that the proposed rule would undermine access to critical services for youth such as school lunch programs, 4–H development, youth mentoring programs, youth career development, and employment opportunity programs.

Commenters asserted that, in America, no individual's ability to receive an education should depend on whether he or she shares the religious beliefs of government-funded organizations.

Several commenters believed the proposed rule would result in unfair discrimination and expressed a concern that the separation of church and state would be undermined by the proposed rule.

One commenter, a veteran, wrote that he completed a Department-funded program called Veteran's Upward Bound to complete his GED and college preparation. This commenter noted that, with the services he received that were delivered without regard for religion or involving religious organizations, including the ''old G.I. bill'' and Pell grants, he was able to earn his undergraduate and graduate degrees. The commenter asserted that, had these programs engaged in discrimination, then he may not have been able to continue his education.

One commenter stated that, under the proposed rule, an unmarried pregnant student might be refused services by a government-funded social service agency partnering with a public school to provide healthcare screening, transportation, or other services. Similarly, another commenter believed that under the proposed rule an LGBTQ student or child of LGBTQ parents could be confronted with open anti-LGBTQ hostility by a Department-funded social service program partnering with their public school to provide important services such as healthcare screening, transportation, shelter, clothing, or new immigrant services.

One commenter argued that a fundamental responsibility of the Department is to provide equal access to all people and freedom from discrimination. This commenter suggested that no taxpayer money go to schools that discriminate, including those that discriminate out of sincerely held religious beliefs.

Another commenter stated that the proposed rule would allow providers to discriminate on the basis of religion. For example, this commenter claimed a Jewish or Muslim student might be turned away from a 21st Century Community Learning Center but may not be aware of alternative providers.

Response: The Department disagrees with commenters who suggest that the rule will eliminate religious freedom protections for non-religious participants in college preparatory and work-study programs intended to help low-income high school students. The regulation expressly prohibits all organizations (including faith-based organizations who are grantees or who contract with grantees or subgrantees) from discriminating against beneficiaries on the basis of religion or religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.[80] Neither will the new regulations allow providers administering the Veteran's Upward Bound program to discriminate against beneficiaries based on religion; such discrimination would violate the conditions of the organization's Federal grant. Further, under the proposed rules, any faith-based organization that provides such social services must offer its religious activities separately in time or location from any programs or services funded by the Department, and any attendance or participation in such explicitly religious activities by beneficiaries supported by the programs must be voluntary.[81]

The Department notes that commenters arguing that the new regulations will have a detrimental impact on critical youth services do not explain how the new regulations will harm school lunch programs, 4–H development, youth mentoring programs, youth career development, employment opportunity programs, after school programs, and summer learning programs. To the contrary, these regulations provide stringent religious liberty protections for their beneficiaries. Indeed, as previously discussed, providers may not discriminate against beneficiaries on the basis of religion, and their federally funded services may not contain religious programming or activities.

The Department emphasizes that the final regulations' restriction against discriminating on the basis of religion or religious belief applies equally to faith-based organizations and secular organizations. Thus, no individual's ability to receive an education depends on whether they share the religious beliefs of the Government-funded organization, and access to government services is broadened, not undermined. On the other hand, to deny Federal funding to faith-based organizations because they hold sincerely held religious beliefs is unconstitutional under the Supreme Court's decision in *Trinity Lutheran Church of Columbia, Inc.* v. *Comer.*[82] A beneficiary will never

[79] 2 CFR 3474.15(f); 34 CFR 75.52(e); 34 CFR 76.52(e).

[80] 2 CFR 3474.15(f); 34 CFR 75.52(e); 34 CFR 76.52(e).

[81] 2 CFR 3474.15(d)(1); 2 CFR 75.52(c)(1); 2 CFR 76.52(c)(1).

[82] 137 S. Ct. 2012, 2019 (2017) (internal quotation marks omitted) (''denying a generally available

Continued

be required to attend a religious activity in direct aid programs, and a beneficiary through a genuine, independent choice may use a voucher, certificate, or other means of government-funded payment, which is considered ''Indirect Federal financial assistance,'' for a private organization that may require attendance or participation in a religious activity.[83] This latter result would only happen because of the independent choice of the beneficiary, not coercion or pressure from the Department.

The Department notes that a government-funded social service agency partnering with a public school may not refuse services to an unmarried pregnant student. In fact, such a student at a public school receives express protections under Title IX.[84] The changes under the new regulations will not impact any student seeking social services from a social service agency partnering with a public school. Under the new regulations, a private organization that contracts with a grantee or subgrantee, including a State, may not discriminate against any student on the basis of religion or religious belief.[85]

The Department reiterates that, under the new regulations, no providers receiving Federal funds may discriminate on the basis of religion. A federally funded learning center that turns away a Jewish or Muslim student because of his or her sincerely held religious beliefs, as described in the commenter's hypothetical, would be in violation of a material condition of its grant and risks consequences as a result of such a material breach.[86]

Lastly, no wall of separation between church and state is offended by the new regulations. Rather, preventing faith-based institutions from receiving grant money based on their religious nature would violate the Constitution, as discussed elsewhere in this preamble and in the preamble of the Department's NPRM.[87] The Supreme Court has explained that the Constitution does not ''require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.'' [88] Indeed, this ''metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it.'' [89] The Department is not making any revisions to 34 CFR 75.532 and 34 CFR 76.532, which prohibit the use of a grant to pay for religious worship, religious instruction, or proselytization, and also prohibit the use of a grant to pay for any equipment or supplies to be used for such activities. The new regulations do not establish a church or anything approaching it; instead, they require faith-based institutions to keep their religious activities separate from any federally funded programs and mandate equal treatment of faith-based and secular institutions.

Changes: None.

Affected Regulations: None.

b. Concerns Regarding Appropriate Use of Taxpayer Dollars

Summary of Comments: One commenter asserted that Department grant programs should be implemented no differently than Federal funding for other industries under contracts that require non-discriminatory practices as a condition of receiving those funds.

Several commenters expressed opposition to the idea of using taxpayer funds to support religious or private schools, such as through school vouchers. Commenters believed that taxpayer money should only go to public schools. One commenter asserted that funding for public schools should increase so public school teachers earn incomes comparable with faculty at institutions of higher education.

The commenter also believed that all schools providing accredited degrees or diplomas should be required to follow a base curriculum of non-negotiable lessons provided by the Department. Another commenter expressed opposition to taxpayer dollars going to charter schools and argued that charter schools are often intertwined with the religious community and tend to prioritize religious dogma in their instruction over scientific evidence.

Response: The Department responds that its grant programs already require adherence to principles of nondiscrimination, subject to exemptions rooted in countervailing constitutional considerations. Indeed, several provisions of the new regulations condition the award of Federal funds on public institutions not engaging in discrimination. For example, faith-based organizations are eligible to contract with grantees and subgrantees, including States, on the same basis as any other private organization, with respect to contracts for which such other organizations are eligible, and considering any permissible accommodation.[90] And, as discussed at length previously, all organizations—public, charter, private, and/or faith-based—are required to refrain from discrimination on the basis of religion in offering social services. These provisions are intended to prevent institutions that receive Federal funds from engaging in discrimination. This also means that the Department may lawfully provide Federal funds to charter schools, regardless of these organizations' ties to the religious community, on the condition that those schools do not use the funds for explicitly religious purposes.[91]

The Department reiterates that denying religious schools public benefits afforded to public schools because of their religious status, as one commenter suggested, is a violation of the Free Exercise Clause and Supreme Court precedent in *Trinity Lutheran.*[92] With respect to vouchers, the Supreme Court has supported their application to religious institutions, reasoning that ''where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.'' [93]

The Department further responds that it is not within the authority of the Department to establish a national curriculum or regulate teacher incomes. Indeed, in creating the Department of Education, Congress specified that:

> No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, over any accrediting agency or association, or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law.[94]

benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order.'').

[83] *See* 34 CFR 75.52(c)(3)(ii) and 34 CFR 76.52(c)(3)(ii).

[84] *See, e.g.,* 34 CFR 106.21(c); 34 CFR 106.40; 34 CFR 106.51; 34 CFR 106.57.

[85] 2 CFR 3474.15(f); 34 CFR 75.52(e); 34 CFR 76.52(e).

[86] *Id.*

[87] 85 FR 3190, 3191–96, 3200–10.

[88] *Lynch* v. *Donnelly,* 465 U.S. 668, 673 (1984).

[89] *Id.*

[90] 2 CFR 3474.15(b).

[91] *See, e.g.,* 34 CFR 75.532; 34 CFR 76.532.

[92] 137 S. Ct. 2021–25.

[93] *Zelman* v. *Simmons-Harris,* 536 U.S. 639, 652 (2002).

[94] Public Law 96–88, sec. 103(b), 93 Stat. 668, 670–71 (1979).

Curricula and setting teacher salaries are responsibilities handled by the various States and districts as well as by public and private organizations of all kinds, not by the Department.

Changes: None.

Affected Regulations: None.

c. Concerns Regarding Potential for Religious Compulsion

Summary of Comments: One commenter expressed concern that, under the proposed rule, a low-income student participating in an Upward Bound program may be forced to accept services from a faith-based service provider that repeatedly invites them to participate in additional religious activities. This commenter noted the student may find such pressure uncomfortable but would not know that they can access an alternative provider nor how to find one.

Another commenter asserted that, under the proposed rule, an LGBTQ student participating in an Upward Bound college preparation program may be forced to select a faith-based provider who forces the student to participate in religious programming that may be hostile to the LGBTQ community. And one commenter expressed concern that the proposed rule would undermine important safeguards for beneficiaries of voucher programs and explicitly allow service providers to require individuals in voucher programs to participate in religious activities. The commenter explained that religious minorities who have to use a voucher to obtain services and have no available secular option to choose from may effectively be coerced into participating in religious activities. For example, a Hindu American who is forced to utilize a voucher for a religious school may be forced into taking part in Christian religious services and face pressure to compromise or hide his own religious beliefs. The commenter concluded that a voucher program that offers no genuine and independent private choices that are secular would violate basic constitutional protections against the establishment of religion and the Government funding of religious programs.

Response: The Department clarifies that Upward Bound programming is prohibited from containing religious content or religious activities, even if the Upward Bound programming is provided by a faith-based provider. Indeed, faith-based providers are required to hold their religious activities separately in time or location from activities or services associated with the Upward Bound project, and the providers may not force or pressure beneficiaries to participate in these religious activities. The secular content of Upward Bound programming, which does not include religious programming or activities of any kind, is codified at 34 CFR 645.11

It is possible that a faith-based organization may be the only servicer providing an Upward Bound program to a geographic region of beneficiaries, but this faith-based organization would be providing only secular content. Moreover, the Department has received no complaints regarding a situation in which this has occurred. In any event, as discussed, that faith-based provider is required to keep its Upward Bound programming independent from its religious activities, is prohibited from pressuring students to engage in religious programming, and must also refrain from discriminating against any beneficiaries on the basis of religion or religious belief. Additionally, a beneficiary may research available providers and make an informed decision about whether to choose to receive social services from a secular or faith-based organization.

With respect to vouchers, which are a form of indirect Federal financial assistance, the Department has received no complaints about any voucher programs in which there are no secular alternatives, nor did the commenter who expressed concern about this refer to any existing voucher program in which this is presently occurring. The Department reiterates that it cannot force beneficiaries to engage in religious activities or coerce beneficiaries to choose the services of a faith-based organization, nor do these final regulations do so.

Changes: None.

Affected Regulations: None.

d. Concerns Regarding Modifications

Summary of Comments: One commenter requested that the Department amend 2 CFR 3474.15(a) such that ''contractors'' would replace ''subgrantees.'' This commenter believed that, despite clearly established law, public institutions of higher education continue to violate the First Amendment rights of students and professors, and often by targeting minority viewpoints for discriminatory treatment. The commenter did not further clarify why this change should be made. Another commenter expressed a general concern that the proposed rule may not go far enough to protect the deferment of loan payments when a former student is engaged in religious activities with a nonprofit religious organization.

Response: The commenter who suggested that 2 CFR 3474.15(a) be amended to reinforce First Amendment rights may have misunderstood the proposed rules. The provisions of the proposed rules that relate to the First Amendment and free inquiry matters are contained in §§ 75.500, 75.700, 76.500, and 76.700 of title 34 of the Code of Federal Regulations, which were promulgated through a different rulemaking. It is unclear how amending the proposed rule's language as suggested by the commenter would affect free speech rights. Changing ''subgrantees'' to ''contractors'' would not affect the entity that must comply with 2 CFR 3474.15(a). The Department also wishes to clarify that loan deferment is outside the scope of the proposed rule. Indeed, the Department specifically addressed the loan deferment matters that the commenter raised in a separate rulemaking.[95]

Changes: None.

Affected Regulations: None.

e. Severability Clauses

Summary of Comments: None.

Response: The Department proposed adding severability clauses in 2 CFR 3474.21, 34 CFR 75.63, 34 CFR 76.53, 34 CFR 75.741, and 34 CFR 76.784, in the NPRM.[96] We believe that each of the regulations discussed in this final rule would serve one or more important and related but distinct purposes. Each provision would provide a distinct value to the Department, grantees, subgrantees, recipients, students, beneficiaries, the public, taxpayers, the Federal Government, and institutions of higher education separate from, and in addition to, the value provided by the other provisions. To best serve these purposes, we included this administrative provision in the final regulations to make clear that the regulations are designed to operate independently of each other and to convey the Department's intent that the potential invalidity of one provision should not affect the remainder of the provisions. Similarly, the validity of any of the regulations, which were proposed in ''Part 1—Religious Liberty'' of the NPRM, should not affect the validity of any of the regulations, which were proposed in ''Part 2—Free Inquiry'' of the NPRM.

As the Department already promulgated the severability clauses in 34 CFR 76.784 and 34 CFR 75.741 through a different rulemaking that also finalizes the remainder of the regulations proposed in the NPRM, the

[95] Office of Postsecondary Education, U.S. Department of Education, Notice of Proposed Rulemaking, 84 FR 67778 (Dec. 11, 2019).

[96] 85 FR 3201, 3204, 3205.

Department does not include those severability clauses in this rulemaking. Nonetheless, those severability clauses apply to the relevant final regulations in this rulemaking.

Changes: None.

Affected Regulations: None.

B. Department of Homeland Security

DHS did not identify any comments or issues unique to the Department; accordingly, DHS is making no further changes to its regulations beyond those explained above.

C. Department of Agriculture

USDA did not identify any comments or issues unique to the Department; accordingly, USDA is making no further changes to its regulations beyond those explained above.

D. Agency for International Development

USAID received a total of 28,518 comments on its January 17, 2020 NPRM, and did not consider any comments received after that comment end date of February 18, 2020. Of the comments received, 28,044 were identical or nearly identical to other comments received, leaving 474 comments that were unique or representative of a group of substantially similar comments. In addition, many of those comments were identical to comments provided to the other Agencies and addressed above in the Joint Preamble, and most of these cross-cutting comments did not directly apply, or did not apply in the same way, to USAID. Some of those cross-cutting comments included additional remarks or references specific to USAID's proposed rule.

As reflected below, unless otherwise specified, for those comments received by USAID that are addressed fully in the Joint Preamble, USAID adopts those responses to the extent applicable to USAID's regulations. We address in this Part III.D of the preamble the USAID-specific comments not addressed elsewhere in the preamble and provide the USAID-specific findings and certifications.

Some of the cross-cutting comments addressed in the Joint Preamble were not received by USAID, but are nevertheless applicable to the USAID regulations. Unless noted either in the Joint Preamble or this agency-specific Part III.D, we concur in the resolution of the issues in that part of the preamble.

1. Notice and Alternative Provider Requirements

USAID does not adopt the discussion of the cross-cutting comments related to the notice and alternative provider requirements in Part II.C. Instead, USAID addresses the comments it received on that topic in the following discussion.

Summary of Comments: USAID received comments both criticizing and supporting the elimination of provisions (a) requiring service providers to provide written notice of beneficiary protections, and (b) requiring referrals to alternative providers for beneficiaries who object to the religious character of a service provider. USAID did not receive any comments on these issues that were different from or more specific than the applicable cross-cutting comments that are summarized in Section 3 of this preamble.

Response: Unlike various domestic agencies, USAID never adopted notice and alternative provider requirements in response to Executive Order 13559. The reasons for this, many of which relate to the international context in which USAID operates, are detailed in the 2016 joint final rule (81 FR 19,355). Accordingly, the comments regarding the elimination of those requirements are not applicable to USAID.

Changes: None.

Affected Regulations: None.

2. ''Religious Organizations'' to ''Faith-Based Organizations''

Summary of Comments: USAID received comments about its change of the term ''Religious Organizations'' in certain instances to ''Faith-Based Organizations,'' expressing concern that the change could result in a broader pool of organizations that are eligible to participate in USAID programs, or that may be entitled to the exemptions and protections listed in the rule.

Response: USAID makes the regulatory changes noted below to make the terminology in its regulation consistent with that in Executive Order 13831. Because USAID does not recognize a qualitative difference between the terms, USAID does not believe that choosing one term over the other will change the pool of organizations that are eligible to participate in USAID programs, or that may be entitled to the exemptions and protections listed in the rule.

Changes: Revise 22 CFR 205.1(a), (c), and (f) to replace the term ''religious organizations'' with ''faith-based organizations.''

Affected Regulations: 22 CFR 205.1(a), (c), and (f).

3. Reasonable Accommodations

Summary of Comments: USAID did not receive any comments on the issue of reasonable accommodations that were different from or more specific than the applicable cross-cutting comments that are summarized in Part II.E.

Response: USAID makes the regulatory changes noted below, consistent with the explanation provided in the applicable cross-cutting comments that are summarized in Part II.E.

Changes: Revise 22 CFR 205.1(a) to clarify the text by stating explicitly the applicability of the First Amendment and the Religious Freedom Restoration Act, under which accommodations for faith-based organizations could be available.

Affected Regulations: 22 CFR 205.1(a).

4. Religious Character and Religious Exercise

Summary of Comments: USAID did not receive any comments regarding the change from ''religious character'' to ''religious exercise'' that were different from or more specific than the applicable cross-cutting comments that are summarized in Part II.F.

Response: USAID makes the regulatory changes noted below, consistent with the explanation provided in the applicable cross-cutting comments that are summarized in Part II.F.

Changes: Revise 22 CFR 205.1(a) and (f) to note that USAID and/or USAID grantees will not discriminate against potential service providers on the basis of their ''religious exercise'', rather than their ''religious character,'' as previously stated.

Affected Regulations: 22 CFR 205.1(a) and (f).

5. Exemption From Title VII Prohibitions for Qualifying Organizations Hiring Based on Acceptance of, or Adherence to, Religious Tenets

Summary of Comments: USAID did not receive any comments regarding the religious employment exemption that were different from or more specific than the applicable cross-cutting comments that are summarized in Part II.H.

Response: USAID makes the regulatory changes noted below, consistent with the explanation provided in the applicable cross-cutting comments that are summarized in Part II.H.

Changes: Revise 22 CFR 205.1(g) to state that an organization that qualifies for an exemption from discriminatory hiring practices based on religion may select its employees on the basis of their acceptance of, and/or adherence to, the religious tenets of the organization.

Affected Regulations: 22 CFR 205.1(g).

6. Assurances From Religious Organizations With Sincerely Held Religious Beliefs

Summary of Comments: One commenter proposed that religious organizations partnering with USAID that take anti-LGBTI stances should be required to provide assurances that they will provide services without prejudice and do so in conditions that respect the privacy and dignity of all individuals. The commenter expressed that this proposed action is necessary because of a heightened potential for religious organizations to discriminate against potential LGBTI beneficiaries, caused by the inclusion of language regarding ''reasonable accommodation'' and the change in certain instances of the term ''religious character'' to ''religious exercise.''

Response: Regarding the assertion that the addition of the phrase ''reasonable accommodation'' and the substitutions of certain instances of the term ''religious character'' with ''religious exercise'' could allow religious organizations to discriminate against any beneficiaries, USAID adopts the explanation provided in Parts II.E and II.F in response to the cross-cutting comments of this nature. Regarding the proposal to require certain assurances from religious organizations, USAID notes that, consistent with the First Amendment and the Religious Freedom Restoration Act, USAID's rule emphasizes that notices and assurances shall not be required by faith-based organizations if they are not also required of secular organizations. Accordingly, any proposed assurances could not be limited to faith-based organizations. Nor does the concern raised—the impact of sincerely held religious beliefs on an organization's ability to serve beneficiaries—appear to be one that is necessarily specific to religious organizations. Therefore, USAID does not view this rule as the appropriate vehicle through which to address the proposal.

USAID is committed to ensuring that all beneficiaries have equitable access to the benefits of development assistance. USAID's rule requires that all organizations that participate in USAID programs must carry out eligible activities in accordance with all program requirements and other applicable requirements that govern the conduct of USAID-funded activities. Agency policy further requires that grant recipients not discriminate against any beneficiaries in the implementation of their awards, including on the basis of sex. These requirements are included as standard provisions in all of USAID's grants to NGOs, and must be flowed down to any sub-recipients.

Changes: None.

Affected Regulations: None.

7. Findings and Certifications

a. Regulatory Flexibility Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), USAID has considered the economic impact of the regulations. USAID certifies that the regulations will not have a significant economic impact on a substantial number of small entities.

b. Paperwork Burden

These regulations do not impose any new recordkeeping requirements, nor do they change or modify an existing information collection activity. Thus, the Paperwork Reduction Act does not apply to these final regulations.

E. Department of Housing and Urban Development

1. Other Conflicting Laws

Summary of Comments: One commenter stated that the proposed rule's removal of the written notice-and-referral requirements conflicts with HUD's obligation to comply with the Fair Housing Act by prohibiting discrimination in sale, rental, or financing housing based on race, color, religion, sex, disability, familial status, or national origin. The commenter also stated that the references to definitions of ''religious exercise'' and ''indirect Federal financial assistance'' violate the Fair Housing Act and go beyond Congressional Authority without explanation, statutory basis, or compelling reason.

Another commenter stated the proposed rule suggests that religious accommodations could be made that would exempt faith-based organizations from generally applicable laws and regulations prohibiting discrimination, including the Fair Housing Act of 1968 and its regulations. The commenter stated that the proposed rule completely dismantles the protections in the Fair Housing Act and the 2012 and 2016 Equal Access Rules that currently protect LGBTQ individuals. It would be discriminatory and harmful to allow programs to opt out of these provisions based on the religious beliefs of the housing or homeless services provider. For example, the 2012 Equal Access Rule defines a family regardless of gender identity or sexual orientation of the family members. A religious exemption from this definition of family by a provider who objects to same-sex marriage would result in otherwise impermissible discrimination.

Response: HUD does not agree that this rule conflicts with the Fair Housing Act. Removing the written notice requirement does not affect an individual's ability to file a complaint with HUD under the Fair Housing Act, nor will it affect HUD's administration of such complaints. A complaint of discrimination based on religion or any other protected characteristic may be investigated and enforced under the Fair Housing Act. Complaints can be filed online through HUD's Office of Fair Housing and Equal Opportunity (''FHEO'').[97] HUD also disagrees that references to definitions of ''religious exercise'' and ''indirect Federal financial assistance'' violate the Fair Housing Act. These references ensure that HUD's programs and activities are consistent with the First Amendment to the Constitution and the requirements of Federal law, including the Religious Freedom Restoration Act.

More specifically, the rule is designed to treat religious organizations the same as non-religious organizations by subjecting all organizations to the same requirements. As made clear in the proposed rule, HUD will not, in the selection of recipients, discriminate against an organization based on the organization's religious exercise or affiliation. Furthermore, religious freedom protections make clear that a faith-based organization retains its independence from the Government and may continue to carry out its mission even when it participates in a Federal program, including a HUD program. Nevertheless, alleged cases of discrimination, including discrimination on the basis of ''sex,'' are evaluated based on current law and court interpretation and discrimination on the basis of gender identity or sexual orientation would be evaluated under HUD's program specific requirements.

Changes: None.

Affected Regulations: None.

2. Conflicting Agency Programs and Policies

Summary of Comments: One commenter stated the proposed rule would be contrary to HUD's mission of ''ensuring access to housing for all Americans.'' Another commenter also said HUD should not be responsible for upholding this executive order as it is outside the scope of HUD's programs.

[97] U.S. Department of Housing and Urban Development, *File a Complaint, https://www.hud.gov/program_offices/fair_housing_equal_opp/online-complaint.* Additionally, FHEO intake specialists can be reached by calling 800–669–9777 or 800–877–8339.

The commenter stated that this program will in no way be of any use to HUD and should not be implemented because it is not providing any type of relief or assistance and that if there are disputes over religious bias, it should be taken up with the courts, not dictated by a US Federal department that does not normally deal with religion.

Commenters also stated that HUD money should not be funding religion because it is not HUD's purpose, nor does it have to do with HUD's activities, while another commenter said they were opposed to religious interference in the implementation of HUD procedures. Some commenters said HUD social services programs affected by the Proposed Rule would include, but not be limited to, housing counseling grants, continuum of care programs, supportive housing for the elderly and persons with disabilities, emergency shelters, CDBG, and housing opportunities for persons with HIV (HOPWA), and the proposed rule runs counter to these programs' intended purpose by increasing the likelihood of inefficiencies, exposing beneficiaries to potential harms, and hindering access to vital government services.

According to one commenter, the Proposed Rule is wholly inconsistent with HUD's core mission and preventing discrimination because it authorizes faith-based organizations to obtain religious accommodations that could lead to such federally funded providers discriminating against, or electing not to assist, LGBTQ individuals—or other individuals with whom they might disagree—based on asserted religious grounds.

Response: HUD believes that this rule is consistent with HUD's mission to ensure housing for all Americans. As stated in this preamble, the purpose of the rule is to treat religious organizations equally with non-religious organizations by subjecting all organizations to the same requirements. HUD believes that in doing so, it is further strengthening its mission by ensuring that religious organizations can participate in HUD's program. This rule guarantees that these organizations will maintain their liberty protections found in the Constitution and Federal law and eliminate the fear that they will compromise their sincerely held religious beliefs or will lose their independence.

Furthermore, HUD does not agree that allowing religious organizations to maintain their independence as dictated by the Constitution and Federal statutes amounts to funding religion, nor does HUD believe that religious organizations participating in a HUD program or religious organizations receiving Federal funds for non-religious activities amounts to HUD adopting, supporting, or otherwise promoting the religious beliefs of the participating organization.

The purpose of the proposed rule is to ensure that HUD's programs and activities are consistent with the First Amendment to the Constitution and the requirements of Federal law, including the Religious Freedom Restoration Act. In order for HUD's programs and activities to be consistent, HUD will not, in the selection of recipients, discriminate against an organization based on the organization's religious exercise or affiliation. HUD does not believe this rule will interfere with the implementation of HUD programs nor will it increase inefficiencies, create potential harms, or create a hinderance to access HUD programs as suggested by the commenter. The rule will actually provide more opportunities for participation by faith-based organizations, provide religious organizations the ability to participate on equal footing with other organizations, and will allow more participation and therefore greater availability of services.

Moreover, the rule does not affect an individual's ability to file a complaint with HUD alleging discrimination under the Fair Housing Act, nor will it affect HUD's administration of such complaint. Cases of discrimination are evaluated based on current law and court interpretation. Therefore, HUD believes that it is appropriate to issue regulations that guarantee religious protections across HUD's programs.

Changes: None.

Affected Regulations: None.

3. Procedural Issues

a. Comment Period

Summary of Comments: Some commenters requested the comment period on this proposed rule be extended beyond the COVID–19 emergency prior to any effort to proceed with this proposed rule. Commenters wrote to Secretary Carson to request that all rulemakings unrelated to response to the COVID19 emergency or other critical health, safety, and security matters be halted. Halting such rulemakings will permit HUD staff to focus on America's response to the coronavirus's health and economic effects. Doing so also would permit the public adequate time to provide meaningful comments on proposals that effect important functions of our government. Interested organizations and individual members of the public should not be deprived of the opportunity to comment on these matters as they struggle to cope with the effects of a pandemic on our society.

Response: HUD's Federal rulemaking policies and procedures are described in 24 CFR part 10. According to the regulation, it is HUD's policy that its notices of proposed rulemaking generally afford the public not less than 60 days for submission of comments (24 CFR 10.1). These notice and comment procedures, including the time period, are consistent with Executive Order 12866, and the APA (5 U.S.C. 553). Pursuant to these policies, HUD published a notice on February 13, 2020, ''Equal Participation of Faith-Based Organizations in HUD Programs and Activities: Implementation of Executive Order 13831'' (FR–6130–P–01). That notice provided for 60 days of public comment, which ended on April 13, 2020. HUD received over 2,495 comments in response to the proposed rule. HUD's provision of 60 days for submission of comments is adequate. HUD notes that public comments can be, and usually are, submitted electronically at *www.regulations.gov*. In view of the comment period beginning 30 days before the President's March 13, 2020 Declaration of a National Emergency and the public's continued ability to comment electronically, HUD determined that the public had adequate time to comment.

Changes: None.

Affected Regulations: None.

b. Rulemaking Authority

Summary of Comments: Commenters stated that the language ''in the event of any conflict, will control over any HUD guidance document'' should not be adopted because it is an indication that HUD is overreaching and attempting to act beyond its authority. The commenters also stated that the language ''intended to be consistent with E.O. 13891, Oct. 9, 2019, which provides guidance documents lack force of law, except as authorized by law or as incorporated into a contract'' should not be adopted because it is government overreach without explanation of how the change relates to HUD's congressional purpose or any statutory objective related to housing. The commenters stated that the entire proposed rule is an abuse of discretion by HUD, should be viewed with scrutiny, and should not be adopted.

Response: The language to which the commenters referred was located in the proposed rule's preamble, not within the proposed regulatory text. This language will not be codified in the final regulation, but rather explained the proposed rule's relationship with guidance documents and Executive

Order 13891. The language, however, is consistent with the APA, 5 U.S.C. 551, *et seq.,* and Executive Order 13891. HUD believes that the proposed rule was promulgated under proper authority.

Changes: None.

Affected Regulations: None.

c. RIA/Administrative Sections

Summary of Comments: According to commenters, HUD failed to meet its burden under the APA because it did not explain why the Proposed Rule was necessary, nor did it consider the burden on beneficiaries. The commenters stated regulations based on Executive Order 13559 have been working well since 2016, and HUD has not provided any reason for the Proposed Rule except that it assumes, without evidence, that there is a significant burden to religious organizations. The commenters referenced that HUD previously estimated a cost to providers ''of no more than 2 burden hours and $100 annual materials cost for notices and 2 burden hours per referral'' in the 2016 final rule. HUD now concedes that the burden per notice is no more than 2 minutes. According to the commenters, while HUD estimates a cost savings of $656,128 for the elimination of these vital protections, it provides no analysis on how much was actually spent on notice-and-referral requirements, nor does it provide reasoning for its inflated estimate. The commenters said HUD recognizes that the removal of the notice-and-referral requirements could impose some costs on beneficiaries who will now need to find alternative providers on their own if they object to the religious character of a potential provider. The commenters argued HUD's baseless estimates of cost savings do not justify the increased burden on beneficiaries nor the risk to their vital constitutional protections.

The commenters continued that employment discrimination has numerous costs for workers and society, including lost wages and benefits, lost productivity, and negative impacts on mental and physical health. According to the commenters, HUD fails to acknowledge the potential costs the proposed rule could generate, and this is a case law manipulation to allow organizations to discriminate under false pretenses and deny access to reproductive health care. The commenters argued HUD fails to account for economic and noneconomic costs to employees in the form of lost wages and benefits, out of pocket medical expenses, costs associated with job searches, and costs related to negative mental and physical health consequences of discrimination.

Response: As HUD explained in the proposed rule, Executive Order 13831 eliminated the alternative provider referral requirement and requirement of notice established in Executive Order 13559. In addition, HUD cited recent Supreme Court decisions that addressed freedom and anti-discrimination protections that must be afforded religious organizations and individuals under the U.S. Constitution and Federal law since the current regulations implementing Executive Order 13559 were promulgated. HUD removed the alternative provider referral requirement and notice requirement because it placed a burden on religious organizations, whereas there was no corresponding burden on non-religious organizations.

As for the commenters' concerns regarding beneficiaries' burden, HUD considered the cost to potential beneficiaries to be minimal and such cost and benefits are discussed above in the joint-agency response. Beneficiaries prior to the 2016 rule and after this rule will continue to seek alternative providers for many different reasons and requests for such alternatives from HUD offices and grantees can continue without placing a specific burden on religious organizations. As for costs, this rule removes the requirement that all faith-based organizations under the 2016 rule were required to provide notices to every beneficiary which is a determinable cost for which HUD can estimate burden reduction. HUD also incorporates the discussion of costs and benefits from Part II.K.1 above.

As for the concern regarding employment discrimination, HUD is not making any changes to its regulation concerning the exemption for Title VII employment discrimination requirements that was in this prior to the 2016 regulation at 24 CFR 5.109(i).

Changes: None.

Affected Regulations: None.

F. Department of Justice

DOJ did not identify any comments or issues unique to the Department; accordingly, DOJ is making no further changes to its regulations beyond those explained above.

G. Department of Labor

1. Beneficiary Harms

Summary of Comments: One commenter to the Department of Labor's proposed rule addressed underlying disparities in the need for social services that would make transgender people more vulnerable to discrimination following the removal of certain beneficiary protections. More specifically, the commenter addressed disparities in the following areas that are relevant to Department programs: Unemployment and employment opportunities (Employment and Training Administration programs); disability-related needs (Employment and Training Administration programs); incarceration and re-entry supports (Reentry Employment Opportunities program); and veterans assistance (Homeless Veterans' Reintegration Program). In addition, some faith-based advocacy organizations warned that the proposed rule would disserve a wide range of Federal programs, including the Department's Senior Community Service Employment Program and Homeless Veterans' Reintegration Program.

Response: While these commenters focused on specific Department of Labor programs, the assertion that the removal of beneficiary protections would be harmful or would disserve beneficiaries was also raised by commenters on proposed rules other than the Department of Labor's and was addressed previously at Parts II.C.2.a, II.C.2.b, and II.C.3.e. The Department of Labor does not believe that removing the alternative provider notice-and-referral requirements unlawfully or inappropriately burdens third parties as the Department maintains that the final rule does not change any existing requirements regarding the services provided to beneficiaries.

Changes: None.

Affected Regulations: None.

2. Notice Requirement

Summary of Comments: An advocacy organization commented that the Department's rationale that faith-based organizations are not less likely than other providers to follow the law did not justify the repeal of the notice requirement. This advocacy organization referred to the inconsistency among Federal Agencies' citation of alignment with RFRA in repealing notice requirements.

In addition, an individual commenter requested that the Department provide evidence about alternative, reliable mechanisms to ensure that beneficiaries are aware of their rights. The Council Chair also commented that the Department, in the present rulemaking, had not considered alternative methods of ensuring that beneficiaries receive notice of their rights or referrals to alternative providers, such as requiring governmental bodies to provide such notice and make referrals upon request.

Response: The first comment assumes that the Department is obligated to justify the removal of a burden on religious persons. But RFRA provides just the opposite: ''Government shall *not* substantially burden a person's exercise of religion'' unless it can justify imposing the burden. 42 U.S.C.2000bb–1(a) (emphasis added). Even absent RFRA, the Department sees no reason to continue imposing additional requirements solely on religious groups without evidence that they are different, such as by being more prone to violate the law—for which the Department has no evidence. As previously discussed in Part II.C, the prior regulations singled out religious groups, placing burdens on them that were not otherwise placed on non-religious groups. This final rule eliminates extraneous burdens on faith-based organizations and will ensure that federally funded social service programs are implemented in a manner that is consistent with the requirements of Federal law.

As previously discussed in Part II.C.3.d, the Department is within its discretion to resolve the tension between rights here, especially in light of the uncertainty about whether there is a compelling interest in applying the alternative provider notice-and-referral requirements solely to religious organizations. And it is also within the Agencies' discretion to avoid serious constitutional issues and the burdens of related litigation. While it remains questionable what rights beneficiaries have to a secular provider under the *Zelman* v. *Simmons-Harris* standard, in any event, however, the Department's Civil Rights Center continues to enforce civil rights protections for applicants, participants, and beneficiaries of programs and activities that receive Federal financial assistance from the Department, as well as programs and activities funded or otherwise financially assisted under Title I of the Workforce Innovation and Opportunity Act.

Alternative notice arrangements were previously discussed in Part II.C.3.d. In addition, the Department did not propose imposing such requirements on governmental bodies, but it did note that ''the Department could supply information to beneficiaries seeking an alternate provider'' when it ''makes publicly available information about grant recipients that provide benefits under its programs.'' 85 FR 2931. Imposing notice-and-referral requirements on governmental bodies when faith-based organizations provide services would conflict with the nondiscrimination principle articulated in *Trinity Lutheran* and the Attorney General's Memorandum and, moreover, would be inconsistent with the Administration's broader deregulatory agenda. Under the final rule, the provision of such information remains an option but not a requirement.

Changes: None.

Affected Regulations: None.

3. Deregulatory Action Determination (Executive Order 13771)

Summary of Comments: The Council Chair objected to the Department's conclusion that notice-and-referral requirements conflict with the administration's deregulatory agenda, because doing so privileges policy goals above religious freedom.

Response: The Department disagrees that removing the notice-and-referral requirements privileges policy goals above religious freedom. On the contrary, the removal of those requirements is intended to protect and enhance religious liberty, *see Burwell* v. *Hobby Lobby Stores, Inc.,* 573 U.S. 682, 709 (2014) (furthering organizations' ''religious freedom also furthers individual religious freedom'' (quotation marks omitted)), consistent with the Administration's policy goals. With regard to the E.O. 13771 determination, deregulatory actions are measured by the presence or absence of government mandates. The final rule will relieve faith-based organizations in the private sector of the regulatory mandates of notice and referral, thereby reducing government-imposed requirements placed on the private sector. It is therefore deregulatory.

Changes: None.

Affected Regulations: None.

4. General Comments

Summary of Comments: An individual commented that the Department's goal in issuing the proposed rule appeared to be using faith-based organizations to privatize government services. Another individual commenter suggested that organizations with interests that go against U.S. foreign policy objectives, domestic policy agendas, agencies, or regulations should be ineligible to apply. Finally, an anonymous commenter asked how the proposal would affect the quantity and quality of government services, what data collection measures would be used to independently monitor and assess the changes, and where the public could find annual reports on how well the proposed changes worked.

Response: The Department's purpose in promulgating this rule is not to privatize services. It is to implement the nondiscrimination principle articulated in *Trinity Lutheran* and the Attorney General's Memorandum—that is, to level the playing field, not to favor or disfavor faith-based organizations. Any concern about ''privatization'' of government services could apply equally to any government grant where a private, non-government entity, regardless of its religious character, offers services to the public using grant funding. In addition, neither the proposal nor the final rule would change the extent of so-called privatization or the amount or allocation of grants. The rule is aimed only at clarifying faith-based organizations' ability to participate equally in the Department's programs and activities. It does not change eligibility criteria for grants or disfavor applicants of particular agendas.

Unless the quantity of grants changes, the Department does not expect the final rule to change the overall quantity or quality of services offered. However, the Department does expect an increase in the capacity of faith-based providers to provide services, both because these providers will be able to shift resources otherwise spent fulfilling the notice-and-referral requirements to providing services and because more faith-based social service providers may participate in the marketplace under these streamlined regulations. It is entirely possible that the participation by additional organizations may enhance competition to provide services to the public and that this could result in higher quality government services, but the Department is not claiming that such a result will necessarily result from this change to reduce the unequal burden on faith-based providers. No mechanisms for data collection, monitoring, or reporting were proposed or are included in the final rule. However, recipients of financial assistance from the Department remain subject to financial and performance reporting requirements and audit requirements to ensure proper grants management practices. *See, e.g.,* 2 CFR parts 200, 2900. In addition, recipients of financial assistance under WIOA Title I must collect and maintain data and information related to nondiscrimination. See 29 CFR 38.41 through 38.45.

Changes: None.

Affected Regulations: None.

H. Department of Veterans Affairs

Summary of Comments: VA received a comment seeking clarification on who will benefit from the new rule and what motivated the new rule. Two commenters asked how the new rule will affect the quality or quantity of

government services and whether government services will improve. Another commenter asked whether data collection measures will be used to independently monitor and assess the changes and if the public will have access to annual reports on how well the proposed change worked.

Response: Faith-based organizations will likely benefit from the new rule because it provides clarity about the rights and obligations of faith-based organizations participating in the Department's social services programs and removes burdensome requirements only imposed on faith-based organizations. It will promote fairness and wider participation in VA programs by ensuring that faith-based organizations can participate on an equal footing with other entities. To the extent that the removal of this burden encourages faith-based organizations to apply to participate in the Department's programs, it may encourage participation in those programs, leading to improved quality or quantity of services provided. Notwithstanding the removal of the burdensome requirements on faith-based organizations, grantees will still assist Veterans in accessing needed services either from within the current provider or through referrals to an alternative provider as needed.

In addition, VA does not anticipate the need for monitoring the changes or compiling annual reports. Grantees will still be bound by the rules and policies of the grant program. Any issues or questions about the changes will be addressed by the relevant program office as they arise.

Changes: VA has revised the final regulatory text for clarity and accuracy. The final regulatory text will state ''VA program'' instead of ''VA awarding agency''.

Affected Regulations: 38 CFR 50.2(a), (b), (c), (e), (f), (g), (h), (j), 61.64(a), (d), (e), 62.62(e).

I. Department of Health and Human Services

1. Nondirective Mandate

Summary of Comments: One commenter said that the Proposed Rule violates Congress's nondirective mandate in the Title X program. The commenter stated that, in appropriations bills since 1996, Congress has mandated that ''all pregnancy counseling'' in Title X family planning projects ''shall be nondirective.'' The commenter argued that, when faith-based organizations provide or offer referrals for certain services but not others—like abortion or to obtain contraception—the omission of medical options flies in the face of the nondirective mandate.

Response: HHS disagrees that the final rule conflicts with the non-directive pregnancy counseling rider applicable to the Title X program, which provides funding for preconception family planning services. The Title X program has its own regulations at 42 CFR part 59, and certain provisions of that rule specifically govern certain types of referrals and their relation to the non-directive pregnancy counseling rider. To that extent, the Title X regulations would apply to how that program handles those referral matters. This final rule does not change how the provisions of the Title X regulation govern matters concerning the non-directive pregnancy counseling rider and referrals in the Title X program, especially since the Title X regulations do not identify part 87 as applicable to Title X grants. *See* 42 CFR 59.10 (identifying the ''other HHS regulations [that] apply to grants under this subpart'').

HHS also disagrees with the commenter's view concerning the non-directive pregnancy counseling rider for Title X. The commenter contends the rider requires Title X grantees to make referrals for all post-conception treatment options. But the rider only requires that if pregnancy counseling is provided, it shall be non-directive. Thus, contrary to the commenter's suggestion, the nondirective pregnancy counseling rider only applies to post-conception counseling; it does not apply to post-conception referrals. It is important to note that in the Title X program, post-conception referrals are referrals out of the Title X program for health care services that are not provided under the Title X program; in contrast, the referrals required by the 2016 rule which are being eliminated by this final rule are referrals from one service provider to another service provider within the same program. Furthermore, as the en banc court of appeals for the Ninth Circuit recently stated in upholding the Title X rule, non-directive only means options must be provided in a neutral manner, not that all conceivable options must be presented. *California* v. *Azar,* 950 F.3d 1067 (9th Cir. 2020). Thus, even if these equal treatment regulations were applicable to the Title X program, there is no tension between the Title X non-directive pregnancy counseling rider and this final rule.

Changes: None.

Affected Regulations: None.

2. Certain Provisions of the ACA

Summary of Comments: A few commenters said that the final rule will clash with several provisions of the Patient Protection and Affordable Care Act (ACA), because it will allow entities to decline to provide information and referrals. Commenters argued that the rule violates section 1554 of the ACA, which prohibits the Secretary of HHS from creating barriers to healthcare, and section 1557, which prohibits discrimination in health programs or activities. Another commenter said that the final rule transforms the Department's role from an agency focused on ensuring nondiscriminatory provision of health care to one that facilitates refusals of care. The commenter said that giving health care providers enhanced powers to refuse patient care in the name of ''conscience'' should be reconciled with the protections for patients under the ACA and other statutes.

Response: HHS disagrees with commenters' characterization of the final rule. The rule merely ensures that HHS's programs are implemented in a manner consistent with Federal law, by ensuring that faith-based organizations may participate in social service programs funded by HHS on an equal basis with secular service providers, consistent with the law. Nothing in the rule addresses the provision of health care per se by health care providers, or provides health care providers with enhanced powers to refuse patient care. In addition, the equal treatment regulations only apply to ''HHS social service programs'' under § 87.2, which the final rule does not modify. Many of the instances of which commenters are concerned may not be encompassed by the final rule.

Section 1554 of the ACA, 42 U.S.C. 18114, provides that, ''[n]otwithstanding any other provision of this Act [the ACA],'' the Secretary of Health and Human Services shall not promulgate any regulation that creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care, impedes timely access to health care services, interferes with communications regarding a full range of treatment options between the patient and the provider, restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions, violates the principles of informed consent and the ethical standards of health care professionals, or limits the availability of health care treatment for the full duration of a patient's medical needs. The clear meaning of

''[n]otwithstanding any other provision of this Act,'' is that—to the extent that section 1554 contains enforceable limitations on the Secretary's regulatory authority [98]—the provision limits the Secretary's regulatory authority under the ACA, not with respect to any other regulatory authorities possessed by the Secretary.[99]

A reconsideration and elimination of certain regulatory provisions, particularly regulations not promulgated under the ACA, neither creates unreasonable regulatory barriers nor impedes timely access to health care. If it were otherwise, section 1554 would essentially serve as a one-way ratchet, preventing HHS from ever reconsidering any regulation that could be characterized as improving access to healthcare in some sense, regardless of the other burdens such regulation may impose on access to health care. HHS's approach in this final rule is consistent with the Ninth Circuit's recent interpretation of section 1554: ''The most natural reading of Section 1554 is that Congress intended to ensure that HHS, in implementing the broad authority provided by the ACA, does not improperly impose regulatory burdens on doctors and patients.'' *California* v. *Azar,* No. 19–15974, 2020 WL 878528, at 18 (9th Cir. Feb. 24, 2020) (en banc). As explained throughout the preamble, the final rule avoids precisely such burdens by removing notice-and-referral requirements that imposed burdens on faith-based organizations without burdening similarly situated secular organizations. In addition, this final rule is not promulgated under any provision of the ACA. Rather, it amends HHS's equal treatment for faith-based organizations regulations (45 CFR part 87) (''equal treatment regulations'') in order to implement Executive Order 13831, on the Establishment of a White House Faith and Opportunity Initiative. 80 FR 47271. Executive Order 13831 requires removal of the alternative provider notice-and-referral requirements, which eliminates the burdens that the regulations promulgated in 2016, pursuant to Executive Order 13559, imposed exclusively on faith-based organizations. The removal of the alternative provider provisions places faith-based organizations on a level playing field with secular organizations, while alleviating the tension with recent Supreme Court precedent regarding nondiscrimination against religious organizations, the Attorney General's Memorandum, and RFRA, 42 U.S.C. 2000bb *et seq.* Additionally, the final rule does not create barriers for individuals to obtain appropriate medical care. Faith-based providers of social services, like other providers of social services, are required to follow the law and the requirements and conditions applicable to the grants and contracts they receive. There is no basis on which to presume that they are less likely than secular social service providers to follow the law. There is, therefore, no need for preventive or prophylactic protections that create administrative burdens on faith-based providers that are not imposed on similarly situated secular providers.

HHS also disagrees with the comment alleging that the elimination of the alternative provider requirements conflict with ACA section 1557, 42 U.S.C. 18116. Section 1557 generally provides that an individual shall not be excluded from participation in, be denied benefits of, or be subjected to discrimination under any health program or activity that receives Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by HHS or any entity established under Title I of the ACA. 42 U.S.C. 18116(a). Section 1557 prohibits discrimination on the basis of certain protected classes in the cited civil rights laws, namely race, color, national origin, sex, age, or disability. Section 1557 applies, to such health programs or activities, the long-standing and familiar Federal civil rights laws: Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975. Section 1557 applies exclusively to health programs or activities receiving Federal financial assistance or to entities created under Title I of the ACA. As noted above, this rule only applies to ''HHS social service programs'' under § 87.2, which the final rule does not modify. Many of the instances of which commenters are concerned under section 1557 of the ACA may not be encompassed by the final rule. The elimination of the alternative provider notice-and-referral requirements merely places faith-based organizations on an even-playing field with secular organizations. Faith-based providers of social services, like other social service providers, must still adhere to the requirements of other applicable laws, which may (or may not) include section 1557.

Changes: None.

Affected Regulations: None.

3. Notice Requirements in Other Department Regulations

Summary of Comments: One commenter said that Federal agencies have routinely included notice requirements for individual program beneficiaries in other nondiscrimination regulations, and in voluntary resolution agreements, including for large entities where the administrative effort involved may be significant. The commenter stated that removing the alternative provider requirements contrasts to the approach taken by HHS in a recent final rule, *Protecting Statutory Conscience Rights in Health Care,* which included a provision that ''OCR will consider an entity's voluntary posting of a notice of nondiscrimination as non-dispositive evidence of compliance.'' *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority,* 84 FR 23170 (May 21, 2019) (*vacated, see, e.g., New York* v. *United States Department of Health and Human Services,* 414 F. Supp. 3d 475 (S.D.N.Y. 2019)).

Response: HHS disagrees that the approach of the proposed rule and this final rule with respect to notice is inconsistent with the approach to notice taken in the recent final rule, *Protecting Statutory Conscience Rights in Health Care,* 84 FR 23170 (May 21, 2019) (2019 Conscience Rule), or in voluntary resolution agreements. The commenter's example of notice requirements in the context of voluntary resolution agreements is not analogous to the alternative provider requirements being eliminated in this final rule. Voluntary resolution agreements are used when there has been a finding of a violation of Federal laws. And the provision in

[98] Section 1554's subsections are open-ended. Nothing in the statute specifies, for example, what constitutes an ''unreasonable barrier[ ],'' ''appropriate medical care[,]'' ''all relevant information[,]'' or ''the ethical standards of health care professionals[.]'' 42 U.S.C. 18114. And there is nothing in the ACA's legislative history that sheds light on the provision. Under these circumstances, it is a substantial question whether section 1554 claims are reviewable under the APA at all. *See Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 420 (1971) (explaining that the APA bars judicial review of agency decision where, among other circumstances, ''statutes are drawn in such broad terms that in a given case there is no law to apply'' (citation omitted)).

[99] *See, e.g., California by & through Becerra* v. *Azar,* 927 F.3d 1068, 1079 (9th Cir.), *reh'g en banc granted sub nom. State by & through Becerra* v. *Azar,* 927 F.3d 1045 (9th Cir. 2019) (''The preamble to § 1554 also suggests that this section was not intended to restrict HHS interpretations of provisions outside the ACA. If Congress intended § 1554 to have sweeping effects on all HHS regulations, even those unrelated to the ACA, it would have stated that § 1554 applies 'notwithstanding any other provision *of law,'* rather than '[n]otwithstanding any other provision *of this Act.*'"); *id.* (''[T]he phrase 'notwithstanding any other provision of law' in 8 U.S.C. 1252(f)(2) meant that the provision 'trumps any contrary provision elsewhere in the law'" (quoting *Andreiu* v. *Ashcroft,* 253 F.3d 477, 482 (9th Cir. 2001)).

the Department's 2019 Conscience Rule (*vacated, see, e.g., New York* v. *United States Department of Health and Human Services,* 414 F.Supp.3d 475 (S.D.N.Y. 2019)), refers to a situation where HHS's Office for Civil Rights (OCR) may be undertaking a compliance review or investigating a covered entity which is in alleged violation of Federal laws. That rule merely states that ''OCR will consider an entity's voluntary posting of a notice of nondiscrimination as non-dispositive evidence of compliance with the applicable substantive provisions of this part, to the extent such notices are provided according to the provisions of this section and are relevant to the particular investigation or compliance review.'' *Id.* at 23270. In that context, the voluntary notice would state that the entity complies with applicable Federal conscience and nondiscrimination laws and that individuals may have the right under Federal law to decline to perform, assist in the performance of, refer for, undergo, or pay for certain health care-related treatments, research, or services that violate the individual's conscience. The 2019 Conscience Rule, which would apply to all entities to which the Federal conscience laws apply, provides, with respect to all such entities, that the voluntary posting of such a nondiscrimination notice establishes non-dispositive evidence of compliance with the 2019 Conscience Rule. In contrast, the current regulation requires a subset of the recipients of HHS-funded social services grants—namely, faith-based organizations that receive funds from the HHS—to provide, to each beneficiary whom they would serve, notice of the beneficiary's right to receive services from a secular service provider. HHS, thus, disagrees with the commenter that this alternative provider notice requirement placed *solely* on faith-based organizations is, in any way, analogous to the voluntary nondiscrimination notices contemplated by the 2019 Conscience Rule.

The alternative provider requirements, moreover, raise serious concerns under the First Amendment and RFRA. As the Supreme Court clarified in *Trinity Lutheran Church of Columbia, Inc.* v. *Comer,* 137 S. Ct. 2012, 2019 (2017) (quoting *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah,* 508 U.S. 520, 533 (1993) (alteration in original)): ''The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.' '' The Court in *Trinity Lutheran* added: ''[T]his Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.' '' *Id.* (quoting *McDaniel* v. *Paty,* 435 U.S. 618, 628 (1978) (plurality opinion)); *see also Mitchell* v. *Helms,* 530 U.S. 793, 827 (2000) (plurality opinion) (''The religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the Government's secular purpose.''). Additionally, the Attorney General's Memorandum noted that ''Government may not target religious individuals or entities for special disabilities based on their religion.'' Principle 6 of the Attorney General's Memorandum, 82 FR 49668 (October 26, 2017). Applying the alternative provider requirements categorically to all faith-based providers, but not to other, secular providers, of federally funded social services, is thus in tension with the nondiscrimination principle articulated in *Trinity Lutheran* and the Attorney General's Memorandum.

In addition, the alternative provider requirements could in certain circumstances run afoul of the protections established by RFRA. Under RFRA, where the Federal Government substantially burdens an entity's exercise of religion, the Federal Government must prove that the burden is in furtherance of a compelling government interest and is the least restrictive means of furthering that interest. 42 U.S.C. 2000bb–1(b). Most faith-based organizations engaged in the provision of social services do so as part of their religious mission—because their religious beliefs compel them to serve their fellow human beings. In such circumstances, the alternative service provider notice requirement may substantially burden the religious exercise of those recipients. *See Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to a Juvenile Justice and Delinquency Prevention Act,* 31 O.L.C. 162, 169–71, 174–83 (June 29, 2007). Requiring faith-based organizations to comply with the alternative provider notice requirement could impose this burden, such as in a case in which a faith-based organization has a religious objection to referring the beneficiary to an alternative provider that provided services in a manner that violates the organization's religious tenets. *See, e.g., Burwell* v. *Hobby Lobby Stores, Inc.,* 573 U.S. 682, 720–26 (2014).

Changes: None.

Affected Regulations: None.

4. Medical Ethics

Summary of Comments: One commenter said that eliminating the alternative provider requirements will place nurses in burdensome ethical dilemmas. The commenter explained that, to the extent that a nurse is employed by a provider whose service offerings may be limited by moral or religious objections, the Code of Ethics for Nurses requires that nurses with conscientious objections to certain medical procedures must communicate their objection as soon as possible, in advance and in time for alternative arrangements to be made for patient care.

Response: HHS disagrees that removing the alternative provider notice-and-referral requirements will place nurses in burdensome ethical dilemmas. First, the final rule only applies to ''HHS social service programs'' under § 87.2. Therefore, many instances commenters are concerned about regarding nurses may not be encompassed by this rule. Second, the final rule does not prohibit organizations or individuals from informing beneficiaries that they can receive services from a secular provider or from voluntarily referring beneficiaries to some other provider. Rather, it merely removes the alternative provider notice-and-referral requirements that were placed solely on faith-based organizations and not on similarly situated secular organizations. Thus, to the extent that an organization or individual believes that its or his/her ethical obligations require the provision of notice to beneficiaries of alternative providers of social services, such organization or individual remains free to provide such notice.

HHS notes, however, that if it were not to remove the current alternative provider notice-and-referral requirements, the exact concern raised by the commenter could occur: Nurses and faith-based providers could foreseeably be placed in burdensome ethical dilemmas under the current notice-and-referral requirements. For example, either a faith-based organization or an individual nurse may hold a religious objection to referring a beneficiary to an alternative provider that provides services in a manner that violates the organization's or nurse's religious tenets. *See, e.g., Burwell* v. *Hobby Lobby Stores, Inc.,* 573 U.S. 682, 720–26 (2014). When a faith-based recipient carries out its social service programs, it may engage in an exercise of religion protected by RFRA, and certain conditions on receiving those grants may substantially burden the

religious exercise of that recipient. *See Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to a Juvenile Justice and Delinquency Prevention Act,* 31 O.L.C. 162, 169–71, 174–83 (June 29, 2007).

Changes: None.

Affected Regulations: None.

5. Discrimination Against Women, Persons With Disabilities, Low-Income Persons, and LGBT Persons

Summary of Comments: Several commenters stated that removing the notice-and-referral requirements will adversely impact women, LGBT, persons with disabilities, or low-income persons. Two commenters stated that women of color in many States disproportionately receive their care at Catholic-affiliated hospitals, which often follow an ethical directive that prohibits the hospital from providing emergency contraception, sterilization, abortion, fertility services, and some treatments for ectopic pregnancies. Accordingly, commenters expressed concern that, if the final rule is implemented, more women, particularly women of color, will be put in situations where they will either lack access to certain reproductive health care services or be required to find another provider willing to provide comprehensive reproductive health services, if such services are available in their communities.

Other commenters said that the final rule would permit discrimination against LGBT parents and children in adoption, foster care, and child welfare services. Commenters stated that the proposed rule would result in more children remaining in foster and congregate care by allowing religious providers to discriminate against LGBT people seeking to adopt. Commenters also said that the final rule would allow faith-based providers to discriminate against LGBT children trying to access services. Other commenters voiced concern that the final rule would cause a public health crisis for LGBT persons who may be left without knowledge of alternative providers to faith-based health care providers in emergency situations. Another commenter stated that the rule would contribute to significant health costs from the medical and mental health impacts of discrimination, citing a study that found that experiencing discrimination in health care, among other sectors, is associated with higher prevalence of suicidal thoughts and attempts among individuals who identify as transgender. Commenters noted that, because no other agency in the Government offers more grants than HHS, HHS's changes to the alternative provider requirement will create the highest incidence of discrimination because of the very scale at which the agency operates.

Numerous commenters also stated that the final rule would allow people in faith-based organizations to use their religion to spread hatred and cause harm to anyone with whom the faith-based provider disagrees. These commenters said that the final rule returns the Department to a time when American citizens can be denied any and all services as long as the refuser says that the denial is due to the provider's religious beliefs. Other commenters said that they support the participation of faith-based organizations in federally funded service programs. These commenters opined that religious providers are the backbone of America, and that no organization should be discriminated against because of its religious or moral beliefs. Commenters stated that, as long as faith-based service providers can meet the necessary eligibility requirements to participate in service programs, commenters saw no downside to allowing such groups to participate, because such participation would create the provision of more services in communities, especially in communities that face greater obstacles in obtaining services. Other commenters stated that faith-based organizations bring large numbers of people who provide services as an outgrowth of their religious beliefs and because of their love for the people in their communities. Some commenters noted that religious persons comprise the most prolific pool of adoptive families in the nation. Commenters also said that they support the final rule because it clarifies that faith-based providers, including hospitals, homeless shelters, and adoption and foster care providers among others, may operate according to their religious beliefs and still participate in Federal service programs.

Response: HHS believes that all people should be treated with dignity and respect, especially in its programs, and that they should be given every protection afforded by the Constitution and the laws passed by Congress. HHS does not condone the unjustified denial of needed medical care or social services to anyone. And it is committed to fully and vigorously enforcing all of the nondiscrimination statutes entrusted to it by Congress. HHS does not agree with commenters who claim that the final rule will create a high incidence of discrimination, raise the costs of health care, cause harm, spread hatred, keep more children in foster and congregate care, or adversely impact women, persons with disabilities, low-income, or self-identifying LGBT persons. HHS is not aware of an instance in which a beneficiary has sought a referral for an alternative provider. Commenters who voiced concern about HHS's removal of the alternative provider requirements generally did not provide evidence, anecdotal or otherwise, that beneficiaries sought referrals required under those provisions. Thus, removing the alternative provider requirements would likely not raise health care costs, jeopardize benefits, or cause a public health crisis for beneficiaries. HHS beneficiaries, even in times of emergencies, are capable of obtaining services, and have obtained such services, without requiring HHS to place requirements on faith-based providers that it did not place on similarly situated secular providers. HHS also notes that this final rule applies to certain social services programs under § 87.2. Therefore, many of the situations that commenters are concerned about regarding nurses may not be encompassed by this rule.

In response to commenters who expressed concerns about the ability of faith-based providers to adequately serve the general public, HHS notes, first, that faith-based organizations have a long history of providing social services, independently and as part of programs funded by HHS.[100] Despite that long history, HHS is not aware of evidence that faith-based organizations would, as a result of their religious beliefs, be unable to provide services to the general public or to specific vulnerable populations. Faith-based providers, like other providers, are required to follow the requirements and conditions of their Federal grants and contracts and may not violate those requirements. HHS finds no basis on which to presume that faith-based providers are less likely than other providers to follow the law. *See Mitchell* v. *Helms,* 530 U.S. 856–57 (2000) (O'Connor, J., concurring in judgment). Thus, religious providers cannot deny ''any and all services as long as the refuser says that the denial is due to the

[100] *See, e.g.,* Lisa McCracken, Faith and the Not-For-Profit Provider, Ziegler Investment Banking, Aug. 25, 2014, *http://image.exct.net/lib/ff021271746401/d/4/zNews_Featured_082514.pdf;* Byron Johnson et al., Assessing the Faith-Based Response to Homelessness in America: Findings from Eleven Cities, Baylor Institute for Studies of Religion (2017), *http://www.baylorisr.org/wp-content/uploads/ISR-Homeless-FINAL-01092017-web.pdf;* Catholic Health Association of the United States, Catholic Health Care in the United States (last updated Jan. 2017), *https://www.chausa.org/about/about/facts-statistics.*

provider's religious belief,'' as some commenters claimed.

Second, HHS recognizes, as noted in Executive Orders 13279 and 13831, the important work that faith-based providers perform for communities in need of services. Executive Order 13279 identifies that faith-based providers participating in social service programs, as defined by the Executive Order, work to reduce poverty, improve opportunities for low-income children, revitalize low-income communities, empower low-income families and individuals to become self-sufficient, and otherwise help people in need. E.O. 13279, 67 FR 77141 (2002). Similarly, as Executive Order 13831 observed, faith-based organizations have a special ability to provide services to individuals, families, and communities through means that are ''different from those of government and with capacity that often exceeds that of government.'' E.O. 13831, 83 FR 20715 (2018). The Executive Order further states that faith-based providers ''lift people up, keep families strong, and solve problems at the local level.'' *Id.* And several commenters opined that faith-based providers and the individuals who work for them are motivated by a desire to serve and help the people in their communities. Commenters also noted that religious beneficiaries comprise the most prolific pool of adoptive families in the nation, which helps remove children from foster and congregate care and place them in permanent homes with forever families.

In addition, HHS does not agree with commenters who predict that the final rule will result in beneficiaries losing access to services, because the participation of faith-based providers will generally increase the amount of services available to all beneficiaries, including religious minorities, women, women of color, low-income, and LGBT persons, and persons with disabilities. Allowing a broader spectrum of providers increases the possibility for all beneficiaries, including vulnerable populations, religious minorities, or persons with disabilities, to be able to locate providers whose goals and values more closely align with their own values. Furthermore, HHS funds several resource centers, hotlines and helplines to provide beneficiaries referrals to a diversity of social service providers which include secular and faith-based organizations.[101]

Commenters who voiced concerns about women, including women of color, accessing reproductive services such as abortion, contraception, sterilization, and certain infertility treatments, should note that, for the last 50 years, Congress has protected providers and other health care entities from being forced by public authorities (or by the recipients of certain HHS funds) to perform certain health care procedures to which they object. First, Congress enacted the Church Amendments in the 1970s to ensure, among other things, that the judicially recognized right to abortions, sterilizations, or related practices would not lead to a requirement that individuals or entities receiving certain HHS health service and research grants must participate in activities to which they have religious or moral objections. 42 U.S.C. 300a–7. Second, Congress passed in 1996 the Coats-Snowe Amendment, which prohibits Federal, State, or local governments from discriminating against any health care entity that refuses to provide, require, or undergo training in performing abortions, referring beneficiaries for abortions or abortion training, or making arrangements for any of those activities. 42 U.S.C. 238n(a)(1)–(2). And third, Congress passed the Weldon Amendment in 2004 and readopted (or incorporated by reference) the amendment in each subsequent appropriations act for the Departments of Labor, Health and Human Services, and Education. *See, e.g.,* Further Consolidated Appropriations Act, 2020, Public Law 116–94, div. A, sec. 507(d), 133 Stat. 2534, 2607 (Dec. 20, 2019). The Weldon Amendment provides that none of the funds made available in the applicable Labor, HHS, and Education appropriations act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions. The alternative provider notice-and-referral requirements did not alter these protections adopted by Congress, and removing such requirements does not change these protections.

Finally, the Government may not compel faith-based providers to change their religious identity or mission as a result of accepting direct Federal financial assistance. Individuals and organizations do not give up religious liberty protections because they provide government-funded social services. The ''government may not exclude religious organizations as such from secular aid programs . . . when the aid is not being used for explicitly religious activities such as worship or proselytization.'' Principle 6 of the Attorney General's Memorandum, 82 FR 49668 (October 26, 2017). Accordingly, religious organizations may retain their autonomy, right of expression, and religious character in the provision of public services. HHS recognizes that for many faith-based organizations, the provision of services to those in need is an exercise of religion, and many faith-based organizations view their explicitly religious activities as integral parts of the programs and services that they provide.

Changes: None.

Affected Regulations: None.

IV. General Regulatory Certifications

A. Regulatory Planning and Review (Executive Order 12866); Improving Regulation and Regulatory Review (Executive Order 13563)

This final rule was drafted in conformity with Executive Order 12866 and Executive Order 13563.

Executive Order 12866 directs agencies, to the extent permitted by law, to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and, in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits and costs are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Under Executive Order 12866, OIRA must determine whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the executive order and subject to review by OMB.

OIRA has determined that this final rule is a significant, but not economically significant, regulatory action subject to review by OMB under section 3(f) of Executive Order 12866. Accordingly, OMB has reviewed this final rule. Pursuant to the Congressional Review Act, 5 U.S.C. 801 *et seq.,* OIRA

[101] *See, e.g.,* 42 U.S.C. 10410 (Family Violence Prevention Services Act national resource centers); Administration for Children and Families, HHS, ACF Hotlines/Helplines, *https://www.acf.hhs.gov/acf-hotlines-helplines* (domestic violence, runaway and homeless youth, and human trafficking hotlines and referral directories).

designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

The Agencies have also reviewed these regulations under Executive Order 13563, which supplements and reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, section 1(b) of Executive Order 13563 requires that an agency engage in a cost-benefit analysis. 76 FR at 3821. Section 1(c) of Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' *Id.* OIRA has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.'' Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies, from Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, OMB M–11–10, *Re: Executive Order 13563,* ''*Improving Regulation and Regulatory Review*'' at 1 (Feb. 2, 2011), *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2011/m11-10.pdf.*

The Agencies are issuing these final rules upon a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, the Agencies selected those approaches that maximize net benefits. Based on the analysis that follows, the Agencies believe that these final rules are consistent with the principles in Executive Order 13563. It is the reasoned determination of the Agencies that these final rules would, to a significant degree, eliminate costs that have been incurred by faith-based organizations as they complied with the requirements of section 2(b) of Executive Order 13559, while not adding any other requirements on those organizations.

The Agencies also have determined that this regulatory action does not unduly interfere with State, local, or tribal governments in the exercise of their governmental functions.

In accordance with Executive Orders 12866 and 13563, the Agencies have assessed the potential costs, cost savings, and benefits, both quantitative and qualitative, of this regulatory action.

1. Costs

The removal of the notice-and-referral requirements could impose some costs on beneficiaries who may now need to investigate alternative providers on their own if they object to the religious character of a potential social service provider. The Agencies invited comments on any information that they could use to quantify this potential cost, but did not receive any comments that specifically addressed the cost of compliance. Although the Agencies cannot quantify this cost with a reasonable degree of confidence, we expect this cost to be de minimis. The number of beneficiaries who will be denied services and therefore would incur costs to identify an alternative provider would likely be very small since this rule makes it clear that such organizations are not permitted to discriminate in the provision of services.

2. Cost Savings

The potential cost savings associated with this regulatory action are those resulting from the removal of the notice requirements and the referral requirement, and those determined to be necessary for administering the Agencies' programs and activities.

DOL previously estimated the cost of imposing the notice requirements at no more than $200 per organization per year (in 2013 dollars). 81 FR at 19395. This cost estimate was based on the expectation that it would take no more than two minutes for a provider to print, duplicate, and distribute an adequate number of disclosure notices for potential beneficiaries and $100 material costs annually. *Id.* The Agencies have adjusted that amount to $220 (in 2020 dollars) using the consumer price index (''CPI'').[102] The Agencies solicited comments on the compliance costs associated with the notice requirements but received no comments.

As shown in Table 1, the Agencies estimated the annual cost savings resulting from the removal of the notice requirements by multiplying the number of faith-based organizations affected by the annual compliance cost of the notice requirements ($220).

TABLE 1—THE ANNUAL COST-SAVINGS OF THE REMOVAL OF THE NOTICE REQUIREMENTS BY AGENCY

Agencies	Number of faith-based organizations (A)	Cost-savings per organization (B)	Annual cost-savings (C = A × B)
DOL	[103] 14	$220	$3,080
HHS	[104] 119	220	26,180
DHS	[105] 30	220	6,600
USDA	[106] 16	220	3,520
DOJ	[107] 67	220	14,740
HUD	[108] 0	220	0
USAID	[109] 0	220	0
VA	[110] 34	220	7,480
ED	[111] 904	220	198,880
Total	.....	.....	260,480

[102] Bureau of Labor Statistics CPI data published on June 10, 2020, *https://www.bls.gov/news.release/cpi.htm.*

[103] Number of faith-based organizations that are DOL grant recipients in FY2019.

[104] Average number of faith-based organizations that are HHS grant recipients in FY2019 and FY2020.

[105] Number of faith-based organizations that are USCIS grant recipients as of June 30, 2020.

[106] Number of faith-based organizations that are USDA grant recipients in FY2019.

[107] Number of faith-based organizations that are DOJ grant recipients in FY2019.

[108] HUD reported no faith-based organizations affected by this final rule.

[109] USAID did not have the notice and referral requirements previously, so this final rule change would not reduce any costs to faith-based organizations that are USAID grant recipients.

[110] VA identified 34 out of 257 Supportive Services for Veteran Families grantees that appear to be faith-based.

[111] A total of 904 institutions of higher education were reported as having a religious affiliation in the Integrated Postsecondary Education Data System in academic years 2018–2019.

In the 2016 final rule, the Agencies were previously unable to quantify the cost of the referral requirement. 81 FR at 19395. However, DOL estimated that each referral request would require no more than two hours of a Training and Development Specialist's time to process. The Agencies invited comment or any data by which they could assess the actual implementation costs of the referral requirements. Although commenters did not provide specific data regarding the burdens of the referral requirement, several commenters did indicate that referral to a new provider might result in some additional burdens for program beneficiaries as they attempted to familiarize themselves with new providers. The Agencies agree that this is a possible burden that program beneficiaries may face but cannot effectively quantify it. The Agencies assume that these burdens would be higher in situations where new providers had dramatically different policies and procedures than previous providers and would be relatively small in situations where old and new providers have highly similar practices. Given that all such providers would be operating Federal programs governed by the same set of regulations and statutes, the Agencies believe the total amount of potential differentiation among providers would likely be relatively limited.

Although the Agencies do not have any way to accurately determine the number of referrals that will occur in any one year, they do not expect this number will be significant or that referral costs will be appreciable for small service providers. Based on the Agencies' records, referral requests are rare, and the Agencies are not aware of any beneficiary who sought a referral under the prior requirement. *See* Part III.C.

Table 2 shows the total annualized cost savings at a 7 percent discounting by Agency for the removal of notification.[112] For example, the annualized cost savings for DOL-regulated entities is $3,080 at a 7 percent discounting. Under Executive Order 13771 when annualized over a perpetual time horizon at a 7 percent discount rate, the cost savings of this rulemaking for DOL is $2,251 (in 2016 dollars).[113]

TABLE 2—THE COST SAVINGS OF THE REMOVAL OF THE NOTICE REQUIREMENTS BY AGENCY

Agency	Annual cost savings of the removal of the notice requirements (C)	Total annualized cost savings at a 7 percent discounting	Perpetual annualized cost savings at a 7 percent discounting (in 2016 dollars)
DOL	$3,080	$3,080	$2,251
HHS	26,180	26,180	19,137
DHS	6,600	6,600	4,824
USDA	3,520	3,520	2,573
DOJ	14,740	14,740	10,775
HUD	0	0	0
USAID	0	0	0
VA	7,480	7,480	5,467
ED	198,880	198,880	145,382
Total	.....	260,480	190,409

3. Benefits

In terms of benefits, the Agencies recognize a non-quantified benefit to religious liberty that comes from removing requirements imposed solely on faith-based organizations, in tension with the principles of free exercise articulated in *Trinity Lutheran.* The Agencies also recognize a non-quantified benefit to grant recipients and beneficiaries alike that comes from increased clarity in the regulatory requirements that apply to faith-based organizations operating social service programs funded by the Federal Government. Beneficiaries will also benefit from the increased capacity of faith-based social service providers to provide services, both because these providers will be able to shift resources—even if only minimal—otherwise spent fulfilling the notice-and-referral requirements to provision of services, and because more faith-based social service providers may participate in Federal programs under these regulations.

B. Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (''RFA''), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, tit. II, 110 Stat. 847, 857, requires Federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on 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 proposed or final rule would have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603–05.

The Agencies believe that the estimated cost savings of $220 per provider per year is far less than one percent of annual revenue of even the smallest faith-based organizations. The Agencies therefore certify that this final rule will not have a significant economic impact on a substantial number of small entities.

[112] Since the annual cost savings by each Agency remain constant over time, the total annual cost savings and the total annualized cost savings at a 3 percent and a 7 percent are the same.

[113] To comply with Executive Order 13771 accounting, the Agencies multiplied the annual cost-savings ($3,080) for DOL by the GDP deflator (0.9582) to convert the cost savings to 2016 dollars ($2,951). Assuming the rule takes effect in 2020, we divided $2,951 by $(1.07)^4$, which equals $2,251. The Agencies used this result to determine the perpetual annualized cost ($2,251) at a 7 percent discount rate in 2016 dollars.

C. Civil Justice Reform (Executive Order 12988)

This final rule has been reviewed in accordance with Executive Order 12988 of February 5, 1996, Civil Justice Reform, 61 FR 4729. The provisions of this rule will not have preemptive effect with respect to any State or local laws, regulations, or policies that conflict with such provisions or which otherwise impede their full implementation. The rule will not have retroactive effect.

D. Consultation and Coordination With Indian Tribal Governments (Executive Order 13175)

In accordance with Executive Order 13175 of November 6, 2000, Consultation and Coordination With Indian Tribal Governments, 65 FR 67249, HUD consulted with representatives of tribal governments concerning the subject of this rule. HUD, through a letter dated July 16, 2019, provided Indian tribes and Alaska Native Villages the opportunity to comment on the substance of the regulatory changes during the development of the proposed rule. HUD received one comment in response to those letters, regarding the ability of faith-based organizations to access funds designated for Indian tribes under the Indian Community Development Block Grant program. Additionally, the February 13, 2020, proposed rule provided Indian tribes with an additional opportunity to comment on the proposed regulatory changes.

The other Agencies have assessed the impact of their provisions in this rule on Indian tribes and determined that those provision do not, to their knowledge, have tribal implications that require tribal consultation under Executive Order 13175.

E. Federalism (Executive Order 13132)

Executive Order 13132 directs that, to the extent practicable and permitted by law, an agency shall not promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on State and local governments, and that is not required by statute, or that preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. Because each change in this rule does not have federalism implications as defined in the Executive Order, does not impose direct compliance costs on State and local governments, and does not preempt State law within the meaning of the Executive Order, the Agencies have concluded that compliance with the requirements of section 6 is not necessary.

F. Reducing Regulation and Controlling Regulatory Costs (Executive Order 13771)

Section 2(a) of Executive Order 13771 requires an agency, unless prohibited by law, to identify at least two existing regulations to be repealed when the agency publicly proposes for notice and comment, or otherwise promulgates, a new regulation. In furtherance of this requirement, section 2(c) of Executive Order 13771 requires that the new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. This rule is considered to be a deregulatory action under that order.

G. Paperwork Reduction Act

This rule does not contain any new or revised ''collection[s] of information'' as defined by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

H. Unfunded Mandates Reform Act

Section 4(1) and (2) of UMRA, 2 U.S.C. 1503(1)–(2), excludes from coverage under that Act any proposed or final Federal regulation that ''enforces constitutional rights'' or ''establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.'' Alternatively, this final rule would not qualify as an ''unfunded'' mandate because the requirements in this final rule apply exclusively in the context of Federal financial assistance, so most, if not all, mandates are funded. The rule in any event will not require expenditures by State, local, or tribal governments of $100 million or more per year. Accordingly, this rulemaking is not subject to the provisions of UMRA.

Final Regulations

List of Subjects

2 CFR Part 3474

Accounting, Administrative practice and procedure, Adult education, Aged, Agriculture, American Samoa, Bilingual education, Blind, Business and industry, Civil rights, Colleges and universities, Communications, Community development, Community facilities, Copyright, Credit, Cultural exchange programs, Educational facilities, Educational research, Education, Education of disadvantaged, Education of individuals with disabilities, Educational study programs, Electric power, Electric power rates, Electric utilities, Elementary and secondary education, Energy conservation, Equal educational opportunity, federally affected areas, Government contracts, Grant programs, Grant programs—agriculture, Grant programs—business and industry, Grant programs—communications, Grant programs—education, Grant programs—energy, Grant programs—health, Grant programs—housing and community development, Grant programs—social programs, Grant administration, Guam, Home improvement, Homeless, Hospitals, Housing, Human research subjects, Indians, Indians—education, Infants and children, Insurance, Intergovernmental relations, International organizations, Inventions and patents, Loan programs, Loan programs—social programs, Loan programs—agriculture, Loan programs—business and industry, Loan programs—communications, Loan programs—energy, Loan programs—health, Loan programs—housing and community development, Manpower training programs, Migrant labor, Mortgage insurance, Nonprofit organizations, Northern Mariana Islands, Pacific Islands Trust Territories, Privacy, Renewable Energy, Reporting and recordkeeping requirements, Rural areas, Scholarships and fellowships, School construction, Schools, Science and technology, Securities, Small businesses, State and local governments, Student aid, Teachers, Telecommunications, Telephone, Urban areas, Veterans, Virgin Islands, Vocational education, Vocational rehabilitation, Waste treatment and disposal, Water pollution control, Water resources, Water supply, Watersheds, Women.

6 CFR Part 19

Civil rights, Government contracts, Grant programs, Nonprofit organizations, Reporting and recordkeeping requirements.

7 CFR Part 16

Administrative practice and procedure, Grant programs.

22 CFR Part 205

Foreign aid, Grant programs, Nonprofit organizations.

24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Crime, Government contracts, Grant programs—housing and community development, Individuals with disabilities, Intergovernmental relations, Loan programs—housing and

community development, Low and moderate income housing, Mortgage insurance, Penalties, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

24 CFR Part 92

Administrative practice and procedure, Aged, Claims, Crime, Government contracts, Grant programs—housing and community development, Individuals with disabilities, Intergovernmental relations, Loan programs—housing and community development, Low and moderate income housing, Mortgage insurance, Penalties, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

24 CFR Part 578

Community facilities, Continuum of Care, Emergency solutions grants, Grant programs—housing and community development, Grant programs—social programs, Homeless, Rural housing, Reporting and recordkeeping requirements, Supportive housing programs—housing and community development, Supportive services.

28 CFR Part 38

Administrative practice and procedure, Grant programs, Reporting and recordkeeping requirements, Nonprofit organizations.

29 CFR Part 2

Administrative practice and procedure, Claims, Courts, Government employees, Religious discrimination.

34 CFR Part 75

Accounting, Copyright, Education, Grant programs—education, Inventions and patents, Private schools, Reporting and recordkeeping requirements.

34 CFR Part 76

Accounting, Administrative practice and procedure, American Samoa, Education, Grant programs—education, Guam, Northern Mariana Islands, Pacific Islands Trust Territory, Prisons, Private schools, Reporting and recordkeeping requirements, Virgin Islands.

38 CFR Part 50

Administrative practice and procedure, Alcohol abuse, Alcoholism, Day care, Dental health, Drug abuse, Government contracts, Grant programs—health, Grant programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Mental health programs, Per-diem program, Reporting and recordkeeping requirements, Travel and transportation expenses, Veterans.

38 CFR Part 61

Administrative practice and procedure, Alcohol abuse, Alcoholism, Day care, Dental health, Drug abuse, Government contracts, Grant programs—health, Grant programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Mental health programs, Reporting and recordkeeping requirements, Travel and transportation expenses, Veterans.

38 CFR Part 62

Administrative practice and procedure, Day care, Disability benefits, Government contracts, Grant programs—health, Grant programs—housing and community development, Grant programs—Veterans, Health care, Homeless, Housing, Indians—lands, Individuals with disabilities, Low and moderate income housing, Manpower training programs, Medicaid, Medicare, Public assistance programs, Public housing, Relocation assistance, Rent subsidies, Reporting and recordkeeping requirements, Rural areas, Social security, Supplemental Security Income (SSI), Travel and transportation expenses, Unemployment compensation.

45 CFR Part 87

Administrative practice and procedure, Grant programs—social programs, Nonprofit organizations, Public assistance programs.

45 CFR Part 1050

Grant programs—social programs.

DEPARTMENT OF EDUCATION

For the reasons discussed in the preamble, the Secretary of Education amends part 3474 of title 2 of the Code of Federal Regulations (CFR) and parts 75 and 76 of title 34 of the CFR, respectively, as follows:

Title II—Grants and Agreements

PART 3474—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS

■ 1. The authority citation for part 3474 is revised to read as follows:

Authority: 20 U.S.C. 1221e–3, 3474; 42 U.S.C. 2000bb *et seq.;* and 2 CFR part 200, unless otherwise noted.

■ 2. Section 3474.15 is revised to read as follows:

§ 3474.15 Contracting with faith-based organizations and nondiscrimination.

(a) This section establishes responsibilities that grantees and subgrantees have in selecting contractors to provide direct Federal services under a program of the Department. Grantees and subgrantees must ensure compliance by their subgrantees with the provisions of this section and any implementing regulations or guidance.

(b)(1) A faith-based organization is eligible to contract with grantees and subgrantees, including States, on the same basis as any other private organization, with respect to contracts for which such organizations are eligible and considering any permissible accommodation.

(2) In selecting providers of goods and services, grantees and subgrantees, including States, must not discriminate for or against a private organization on the basis of the organization's religious character, affiliation, or exercise, as defined in 34 CFR 75.52(c)(3) and 76.52(c)(3), and must ensure that the award of contracts is free from political interference, or even the appearance of such interference, and is done on the basis of merit, not on the basis of religion or religious belief, or lack thereof. Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendices A and B, respectively, to 34 CFR part 75.

(3) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by a grantee or subgrantee in administering Federal financial services from the Department shall require faith-based organizations to provide assurances or notices where they are not required of non-faith-based organizations. Any restrictions on the use of grant funds shall apply equally to faith-based and non-faith-based organizations. All organizations that participate in Department programs or services, including organizations with religious character or affiliation, must carry out eligible activities in accordance with all program requirements, subject to any required or appropriate religious accommodation, and other applicable requirements governing the conduct of Department-funded activities, including those prohibiting the use of direct financial assistance to engage in explicitly religious activities.

(4) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by a grantee or subgrantee shall disqualify faith-based organizations from participating in Department-funded programs or services because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation, or on grounds that discriminate against organizations on the basis of the organizations' religious exercise, as defined in 34 CFR 75.52(c)(3) and 76.52(c)(3).

(c)(1) The provisions of 34 CFR 75.532 and 76.532 that apply to a faith-based organization that is a grantee or subgrantee also apply to a faith-based organization that contracts with a grantee or subgrantee, including a State.

(2) The requirements referenced under paragraph (c)(1) of this section do not apply to a faith-based organization that provides goods or services to a beneficiary under a program supported only by indirect Federal financial assistance, as defined in 34 CFR 75.52(c)(3) and 76.52(c)(3).

(d)(1) A private organization that provides direct Federal services under a program of the Department and engages in explicitly religious activities, such as worship, religious instruction, or proselytization, must offer those activities separately in time or location from any programs or services funded by the Department through a contract with a grantee or subgrantee, including a State. Attendance or participation in any such explicitly religious activities by beneficiaries of the programs and services supported by the contract must be voluntary.

(2) The limitations on explicitly religious activities under paragraph (d)(1) of this section do not apply to a faith-based organization that provides services to a beneficiary under a program supported only by indirect Federal financial assistance, as defined in 34 CFR 75.52(c)(3) and 76.52(c)(3).

(e)(1) A faith-based organization that contracts with a grantee or subgrantee, including a State, will retain its independence, autonomy, right of expression, religious character, and authority over its governance. A faith-based organization that receives Federal financial assistance from the Department does not lose the protections of law.

Note 1 to paragraph (e)(1): Memorandum for All Executive Departments and Agencies, From the Attorney General, ''Federal Law Protections for Religious Liberty'' (Oct. 6, 2017) (describing Federal law protections for religious liberty).

(2) A faith-based organization that contracts with a grantee or subgrantee, including a State, may, among other things—

(i) Retain religious terms in its name;

(ii) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(iii) Use its facilities to provide services without concealing, removing, or altering religious art, icons, scriptures, or other symbols from these facilities;

(iv) Select its board members on the basis of their acceptance of or adherence to the religious tenets of the organization; and

(v) Include religious references in its mission statement and other chartering or governing documents.

(f) A private organization that contracts with a grantee or subgrantee, including a State, may not discriminate against a beneficiary or prospective beneficiary in the provision of program goods or services on the basis of religion or religious belief, a refusal to hold a religious belief, or refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program and may require attendance at all activities that are fundamental to the program.

(g) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1(a), is not forfeited when the organization contracts with a grantee or subgrantee. An organization qualifying for such an exemption may select its employees on the basis of their acceptance of or adherence to the religious tenets of the organization.

(h) No grantee or subgrantee receiving funds under any Department program or service shall construe these provisions in such a way as to advantage or disadvantage faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects.

■ 3. Section 3474.21 is added to read as follows:

§ 3474.21 Severability.

If any provision of this part or its application to any person, act, or practice is held invalid, the remainder of the part or the application of its provisions to any person, act, or practice shall not be affected thereby.

Title 34—Education

PART 75—DIRECT GRANT PROGRAMS

■ 4. The authority citation for part 75 continues to read as follows:

Authority: 20 U.S.C. 1221e–3 and 3474, unless otherwise noted.

■ 5. Section 75.51 is amended by revising paragraphs (b)(3) and (4), adding paragraph (b)(5), and removing the parenthetical authority citation at the end of the section to read as follows:

§ 75.51 How to prove nonprofit status.

* * * * *

(b) * * *

(3) A certified copy of the applicant's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the applicant;

(4) Any item described in paragraphs (b)(1) through (3) of this section if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate; or

(5) For an entity that holds a sincerely held religious belief that it cannot apply for a determination as an entity that is tax-exempt under section 501(c)(3) of the Internal Revenue Code, evidence sufficient to establish that the entity would otherwise qualify as a nonprofit organization under paragraphs (b)(1) through (4) of this section.

■ 6. Section 75.52 is revised to read as follows:

§ 75.52 Eligibility of faith-based organizations for a grant and nondiscrimination against those organizations.

(a)(1) A faith-based organization is eligible to apply for and to receive a grant under a program of the Department on the same basis as any other organization, with respect to programs for which such other organizations are eligible and considering any permissible accommodation. The Department shall provide such religious accommodation as is consistent with Federal law, the Attorney General's Memorandum of October 6, 2017 (Federal Law Protections for Religious Liberty), and the Religion Clauses of the First Amendment to the U.S. Constitution.

(2) In the selection of grantees, the Department may not discriminate for or against a private organization on the basis of the organization's religious character, affiliation, or exercise and must ensure that all decisions about grant awards are free from political interference, or even the appearance of

such interference, and are made on the basis of merit, not on the basis of religion or religious belief, or the lack thereof. Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendices A and B, respectively, to this part.

(3) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department shall require faith-based organizations to provide assurances or notices where they are not required of non-faith-based organizations. Any restrictions on the use of grant funds shall apply equally to faith-based and non-faith-based organizations. All organizations that receive grants under a program of the Department, including organizations with religious character or affiliation, must carry out eligible activities in accordance with all program requirements, subject to any required or appropriate religious accommodation, and other applicable requirements governing the conduct of Department-funded activities, including those prohibiting the use of direct financial assistance to engage in explicitly religious activities.

(4) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department shall disqualify faith-based organizations from applying for or receiving grants under a program of the Department because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation, or on grounds that discriminate against organizations on the basis of the organizations' religious exercise.

(b) The provisions of § 75.532 apply to a faith-based organization that receives a grant under a program of the Department.

(c)(1) A private organization that applies for and receives a grant under a program of the Department and engages in explicitly religious activities, such as worship, religious instruction, or proselytization, must offer those activities separately in time or location from any programs or services funded by a grant from the Department. Attendance or participation in any such explicitly religious activities by beneficiaries of the programs and services funded by the grant must be voluntary.

(2) The limitations on explicitly religious activities under paragraph (c)(1) of this section do not apply to a faith-based organization that provides services to a beneficiary under a program supported only by ''indirect Federal financial assistance.''

(3) For purposes of 2 CFR 3474.15, this section, § 75.714, and appendices A and B to this part, the following definitions apply:

(i) *Direct Federal financial assistance* means financial assistance received by an entity selected by the Government or a pass-through entity (under this part) to carry out a service (*e.g.,* by contract, grant, or cooperative agreement). References to *Federal financial assistance* will be deemed to be references to direct Federal financial assistance, unless the referenced assistance meets the definition of *indirect Federal financial assistance.*

(ii) *Indirect Federal financial assistance* means financial assistance received by a service provider when the service provider is paid for services rendered by means of a voucher, certificate, or other similar means of government-funded payment provided to a beneficiary who is able to make a choice of a service provider. Federal financial assistance provided to an organization is *indirect* under this definition if—

(A) The government program through which the beneficiary receives the voucher, certificate, or other similar means of government-funded payment is neutral toward religion; and

(B) The organization receives the assistance as the result of the genuine, independent choice of the beneficiary.

(iii) *Federal financial assistance* does not include a tax credit, deduction, exemption, guaranty contract, or the use of any assistance by any individual who is the ultimate beneficiary under any such program.

(iv) *Pass-through entity* means an entity, including a nonprofit or nongovernmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, such as a State administering agency, that accepts direct Federal financial assistance as a primary recipient or grantee and distributes that assistance to other organizations that, in turn, provide government-funded social services.

(v) *Religious exercise* has the meaning given to the term in 42 U.S.C. 2000cc–5(7)(A).

(vi) *Discriminate against an organization on the basis of the organization's religious exercise* means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect because of:

(A) Conduct that would not be considered grounds to disfavor a secular organization,

(B) Conduct that must or could be granted an appropriate accommodation in a manner consistent with RFRA (42 U.S.C. 2000bb through 2000bb–4) or the Religion Clauses of the First Amendment to the Constitution, or

(C) The actual or suspected religious motivation of the organization's religious exercise.

Note 1 to paragraph (c)(3): The definitions of *direct Federal financial assistance* and *indirect Federal financial assistance* do not change the extent to which an organization is considered a recipient of Federal financial assistance as those terms are defined under 34 CFR parts 100, 104, 106, and 110.

(d)(1) A faith-based organization that applies for or receives a grant under a program of the Department will retain its independence, autonomy, right of expression, religious character, and authority over its governance. A faith-based organization that receives Federal financial assistance from the Department does not lose the protections of law.

Note 1 to paragraph (d)(1): Memorandum for All Executive Departments and Agencies, From the Attorney General, ''Federal Law Protections for Religious Liberty'' (Oct. 6, 2017) (describing Federal law protections for religious liberty).

(2) A faith-based organization that applies for or receives a grant under a program of the Department may, among other things—

(i) Retain religious terms in its name;

(ii) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(iii) Use its facilities to provide services without concealing, removing, or altering religious art, icons, scriptures, or other symbols from these facilities;

(iv) Select its board members and employees on the basis of their acceptance of or adherence to the religious tenets of the organization; and

(v) Include religious references in its mission statement and other chartering or governing documents.

(e) An organization that receives any Federal financial assistance under a program of the Department shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services or in outreach activities on the basis of religion or religious belief, a refusal to hold a

religious belief, or refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect Federal financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program and may require attendance at all activities that are fundamental to the program.

(f) If a grantee contributes its own funds in excess of those funds required by a matching or grant agreement to supplement federally funded activities, the grantee has the option to segregate those additional funds or commingle them with the funds required by the matching requirements or grant agreement. However, if the additional funds are commingled, this section applies to all of the commingled funds.

(g) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when the organization receives financial assistance from the Department. An organization qualifying for such exemption may select its employees on the basis of their acceptance of or adherence to the religious tenets of the organization.

(h) The Department shall not construe these provisions in such a way as to advantage or disadvantage faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects.

■ 7. Section 75.63 is added to read as follows:

§ 75.63 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

§ 75.712 [Removed and Reserved]

■ 8. Section 75.712 is removed and reserved.

§ 75.713 [Removed and Reserved]

■ 9. Section 75.713 is removed and reserved.

■ 10. Section 75.714 is revised to read as follows:

§ 75.714 Subgrants, contracts, and other agreements with faith-based organizations.

If a grantee under a discretionary grant program of the Department has the authority under the grant to select a private organization to provide services supported by direct Federal financial assistance under the program by subgrant, contract, or other agreement, the grantee must ensure compliance with applicable Federal requirements governing contracts, grants, and other agreements with faith-based organizations, including, as applicable, §§ 75.52 and 75.532, appendices A and B to this part, and 2 CFR 3474.15. If the pass-through entity is a nongovernmental organization, it retains all other rights of a nongovernmental organization under the program's statutory and regulatory provisions.

■ 11. Appendix A to part 75 is revised to read as follows:

Appendix A to Part 75—Notice or Announcement of Award Opportunities

(a) Faith-based organizations may apply for this award on the same basis as any other organization, as set forth at, and subject to the protections and requirements of, this part and 42 U.S.C. 2000bb *et seq.* The Department will not, in the selection of recipients, discriminate against an organization on the basis of the organization's religious character, affiliation, or exercise.

(b) A faith-based organization that participates in this program will retain its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law, including the Free Speech and Free Exercise Clauses of the Constitution, 42 U.S.C. 2000bb *et seq.,* 238n, 18113, 2000e–1(a) and 2000e–2(e), and 12113(d), and the Weldon Amendment, among others. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws.

(c) A faith-based organization may not use direct financial assistance from the Department in contravention of the Establishment Clause or any other applicable requirements. Such an organization also may not, in providing services funded by the Department, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

■ 12. Appendix B to part 75 is added to read as follows:

Appendix B to Part 75—Notice of Award or Contract

(a) A faith-based organization that participates in this program retains its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law, including the Free Speech and Free Exercise Clauses of the Constitution, 42 U.S.C. 2000bb *et seq.,* 238n, 18113, 2000e–1(a) and 2000e–2(e), and 12113(d), and the Weldon Amendment, among others. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws.

(b) A faith-based organization may not use direct financial assistance from the Department in contravention of the Establishment Clause or any other applicable requirements. Such an organization also may not, in providing services funded by the Department, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

PART 76—STATE-ADMINISTERED FORMULA GRANT PROGRAMS

■ 13. The authority citation for part 76 continues to read as follows:

Authority: 20 U.S.C. 1221e–3 and 3474, unless otherwise noted.

■ 14. Section 76.52 is revised to read as follows:

§ 76.52 Eligibility of faith-based organizations for a subgrant and nondiscrimination against those organizations.

(a)(1) A faith-based organization is eligible to apply for and to receive a subgrant under a program of the Department on the same basis as any other private organization, with respect to programs for which such other organizations are eligible and considering any permissible accommodation. A State pass-through entity shall provide such religious accommodation as would be required to a recipient under Federal law, the Attorney General's Memorandum of October 6, 2017 (Federal Law Protections for Religious Liberty), and the Religion Clauses of the First Amendment to the U.S. Constitution.

(2) In the selection of subgrantees and contractors, States may not discriminate for or against a private organization on the basis of the organization's religious character, affiliation, or exercise and must ensure that all decisions about subgrants are free from political interference, or even the appearance of such interference, and are made on the basis of merit, not on the basis of religion or religious belief, or a lack thereof. Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendices A and B, respectively, to 34 CFR part 75.

(3) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by States in administering a program of the Department shall require faith-based organizations to provide assurances or notices where they are not required of non-faith-based organizations. Any restrictions on the

use of subgrant funds shall apply equally to faith-based and non-faith-based organizations. All organizations that receive a subgrant from a State under a State-Administered Formula Grant program of the Department, including organizations with religious character or affiliation, must carry out eligible activities in accordance with all program requirements, subject to any required or appropriate religious accommodation, and other applicable requirements governing the conduct of Department-funded activities, including those prohibiting the use of direct financial assistance in contravention of the Establishment Clause.

(4) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by States shall disqualify faith-based organizations from applying for or receiving subgrants under a State-Administered Formula Grant program of the Department because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation, or on grounds that discriminate against organizations on the basis of the organizations' religious exercise.

(b) The provisions of § 76.532 apply to a faith-based organization that receives a subgrant from a State under a State-Administered Formula Grant program of the Department.

(c)(1) A private organization that applies for and receives a subgrant under a program of the Department and engages in explicitly religious activities, such as worship, religious instruction, or proselytization, must offer those activities separately in time or location from any programs or services funded by a subgrant from a State under a State-Administered Formula Grant program of the Department. Attendance or participation in any such explicitly religious activities by beneficiaries of the programs and services supported by the subgrant must be voluntary.

(2) The limitations on explicitly religious activities under paragraph (c)(1) of this section do not apply to a faith-based organization that provides services to a beneficiary under a program supported only by ''indirect Federal financial assistance.''

(3) For purposes of 2 CFR 3474.15, this section, and § 76.714, the following definitions apply:

(i) *Direct Federal financial assistance* means financial assistance received by an entity selected by the Government or a pass-through entity (under this part) to carry out a service (*e.g.,* by contract, grant, or cooperative agreement). References to ''Federal financial assistance'' will be deemed to be references to direct Federal financial assistance, unless the referenced assistance meets the definition of ''indirect Federal financial assistance.''

(ii) *Indirect Federal financial assistance* means financial assistance received by a service provider when the service provider is paid for services rendered by means of a voucher, certificate, or other means of government-funded payment provided to a beneficiary who is able to make a choice of service provider. Federal financial assistance provided to an organization is *indirect* under this definition if—

(A) The government program through which the beneficiary receives the voucher, certificate, or other similar means of government-funded payment is neutral toward religion; and

(B) The organization receives the assistance as the result of the genuine, independent choice of the beneficiary.

(iii) *Federal financial assistance* does not include a tax credit, deduction, exemption, guaranty contract, or the use of any assistance by any individual who is the ultimate beneficiary under any such program.

(iv) *Pass-through entity* means an entity, including a nonprofit or nongovernmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, such as a State administering agency, that accepts direct Federal financial assistance as a primary recipient or grantee and distributes that assistance to other organizations that, in turn, provide government-funded social services.

(v) *Religious exercise* has the meaning given to the term in 42 U.S.C. 2000cc–5(7)(A).

(vi) *Discriminate against an organization on the basis of the organization's religious exercise* means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect because of:

(A) Conduct that would not be considered grounds to disfavor a secular organization,

(B) Conduct that must or could be granted an appropriate accommodation in a manner consistent with RFRA (42 U.S.C. 2000bb through 2000bb–4) or the Religion Clauses of the First Amendment to the Constitution, or

(C) The actual or suspected religious motivation of the organization's religious exercise.

Note 1 to paragraph (c)(3): The definitions of *direct Federal financial assistance* and *indirect Federal financial assistance* do not change the extent to which an organization is considered a *recipient* of *Federal financial assistance* as those terms are defined under 34 CFR parts 100, 104, 106, and 110.

(d)(1) A faith-based organization that applies for or receives a subgrant from a State under a State-Administered Formula Grant program of the Department will retain its independence, autonomy, right of expression, religious character, and authority over its governance. A faith-based organization that receives Federal financial assistance from the Department does not lose the protection of law.

Note 1 to paragraph (d)(1): Memorandum for All Executive Departments and Agencies, From the Attorney General, ''Federal Law Protections for Religious Liberty'' (Oct. 6, 2017) (describing Federal law protections for religious liberty).

(2) A faith-based organization that applies for or receives a subgrant from a State under a State-Administered Formula Grant program of the Department may, among other things—

(i) Retain religious terms in its name;

(ii) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(iii) Use its facilities to provide services without concealing, removing, or altering religious art, icons, scriptures, or other symbols from these facilities;

(iv) Select its board members and employees on the basis of their acceptance of or adherence to the religious tenets of the organization; and

(v) Include religious references in its mission statement and other chartering or governing documents.

(e) An organization that receives any Federal financial assistance under a program of the Department shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services or in outreach activities on the basis of religion or religious belief, a refusal to hold a religious belief, or refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program and may require attendance at all activities that are fundamental to the program.

(f) If a State or subgrantee contributes its own funds in excess of those funds required by a matching or grant agreement to supplement federally funded activities, the State or subgrantee has the option to segregate those additional funds or commingle them with the funds required by the matching requirements or grant agreement. However, if the additional funds are commingled, this section applies to all of the commingled funds.

(g) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when the organization receives Federal financial assistance from the Department. An organization qualifying for such exemption may select its employees on the basis of their acceptance of or adherence to the religious tenets of the organization.

(h) The Department shall not construe these provisions in such a way as to advantage or disadvantage faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects.

■ 15. Section 76.53 is added to subpart A to read as follows:

§ 76.53 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

§ 76.712 [Removed and Reserved]

■ 16. Section 76.712 is removed and reserved.

§ 76.713 [Removed and Reserved]

■ 17. Section 76.713 is removed and reserved.

■ 18. Section 76.714 is revised to read as follows:

§ 76.714 Subgrants, contracts, and other agreements with faith-based organizations.

If a grantee under a State-Administered Formula Grant program of the Department has the authority under the grant or subgrant to select a private organization to provide services supported by direct Federal financial assistance under the program by subgrant, contract, or other agreement, the grantee must ensure compliance with applicable Federal requirements governing contracts, grants, and other agreements with faith-based organizations, including, as applicable, §§ 76.52 and 76.532 and 2 CFR 3474.15. If the pass-through entity is a nongovernmental organization, it retains all other rights of a nongovernmental organization under the program's statutory and regulatory provisions.

Department of Homeland Security

For the reasons set forth in the preamble, DHS amends part 19 of title 6 of the CFR as follows:

PART 19—NONDISCRIMINATION IN MATTERS PERTAINING TO FAITH–BASED ORGANIZATIONS

■ 19. The authority citation for part 19 is revised to read as follows:

Authority: 5 U.S.C. 301; Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 101 *et seq.*); E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13403, 71 FR 28543, 3 CFR, 2006 Comp., p. 228; E.O. 13498, 74 FR 6533, 3 CFR, 2009 Comp., p. 219; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; and E.O. 13831, 83 FR 20715, 3 CFR, 2018 Comp., p. 806; 42 U.S.C. 2000bb *et seq.*

■ 20. Amend § 19.2 by:
■ a. Revising the definition of ''Direct Federal financial assistance or Federal financial assistance provided directly'';
■ b. In the definition of ''Financial assistance,'' adding a sentence to the end;
■ c. Revising the definition of ''Indirect Federal financial assistance or Federal financial assistance provided indirectly''; and
■ d. Adding a definition for ''Religious exercise'' in alphabetical order.

The revisions and addition read as follows:

§ 19.2 Definitions.

* * * * *

Direct Federal financial assistance or Federal financial assistance provided directly means financial assistance received by an entity selected by the Government or an intermediary (under this part) to carry out a service (*e.g.,* by contract, grant, or cooperative agreement). References to ''Federal financial assistance'' will be deemed to be references to direct Federal financial assistance, unless the referenced assistance meets the definition of ''indirect Federal financial assistance'' or ''Federal financial assistance provided indirectly''.

* * * * *

Financial assistance * * * Financial assistance does not include a tax credit, deduction, exemption, guaranty contract, or the use of any assistance by any individual who is the ultimate beneficiary under any such program.

Indirect Federal financial assistance or Federal financial assistance provided indirectly means financial assistance received by a service provider when the service provider is paid for services rendered by means of a voucher, certificate, or other means of government-funded payment provided to a beneficiary who is able to make a choice of a service provider. Federal financial assistance provided to an organization is considered ''indirect'' when:

(1) The government program through which the beneficiary receives the voucher, certificate, or other similar means of government-funded payment is neutral toward religion; and

(2) The organization receives the assistance as a result of a genuine, independent choice of the beneficiary.

* * * * *

Religious exercise has the meaning given to the term in 42 U.S.C. 2000cc–5(7)(A).

* * * * *

■ 21. Amend § 19.3 by revising paragraphs (a), (b), and (e) and adding paragraph (f) to read as follows:

§ 19.3 Equal ability for faith-based organizations to seek and receive financial assistance through DHS social service programs.

(a) Faith-based organizations are eligible, on the same basis as any other organization and considering any religious accommodations appropriate under the Constitution or other provisions of Federal law, including but not limited to 42 U.S.C. 2000bb *et seq.,* 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e–1(a) and 2000e–2(e), 42 U.S.C. 12113(d), and the Weldon Amendment, to seek and receive direct financial assistance from DHS for social service programs or to participate in social service programs administered or financed by DHS.

(b) Neither DHS, nor a State or local government, nor any other entity that administers any social service program supported by direct financial assistance from DHS, shall discriminate for or against an organization on the basis of the organization's religious motivation, character, affiliation, or exercise. For purposes of this part, to discriminate against an organization on the basis of the organization's religious exercise means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect:

(1) Because of conduct that would not be considered grounds to disfavor a secular organization,

(2) Because of conduct that must or could be granted an appropriate accommodation in a manner consistent with RFRA (42 U.S.C. 2000bb through 2000bb–4) or the Religion Clauses of the First Amendment to the Constitution; or

(3) Because of the actual or suspected religious motivation of the organization's religious exercise.

* * * * *

(e) All organizations that participate in DHS social service programs, including faith-based organizations, must carry out eligible activities in accordance with all program requirements, subject to any reasonable religious accommodation, and other applicable requirements governing the conduct of DHS-funded activities, including those prohibiting the use of direct financial assistance from DHS to engage in explicitly religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by DHS or an intermediary in administering financial assistance from DHS shall disqualify a faith-based organization from participating in DHS's social service programs because such organization is motivated or influenced by religious faith to provide social services or because of its religious character or affiliation, or on grounds that discriminate against an organization on the basis of the organization's religious exercise, as defined in this part.

(f) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation used by DHS or an intermediary in administering financial assistance from DHS shall require faith-based organizations to provide assurances or notices where they are not required of non-faith-based organizations. Any restrictions on the use of grant funds shall apply equally to faith-based and non-faith-based organizations.

■ 22. Amend § 19.4 by revising paragraphs (b) and (c) to read as follows:

§ 19.4 Explicitly religious activities.

* * * * *

(b) Organizations receiving direct financial assistance from DHS for social service programs are free to engage in explicitly religious activities, but such activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from DHS, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance.

(c) All organizations that participate in DHS social service programs, including faith-based organizations, must carry out eligible activities in accordance with all program requirements, subject to any religious accommodations appropriate under the Constitution or other provisions of Federal law, including but not limited to 42 U.S.C. 2000bb *et seq.,* 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e–1(a) and 2000e–2(e), 42 U.S.C. 12113(d), and the Weldon Amendment, and in accordance with all other applicable requirements governing the conduct of DHS-funded activities, including those prohibiting the use of direct financial assistance from DHS to engage in explicitly religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by DHS or a State or local government in administering financial assistance from DHS shall disqualify a faith-based organization from participating in DHS's social service programs because such organization is motivated or influenced by religious faith to provide social services or because of its religious character or affiliation, or on grounds that discriminate against an organization on the basis of the organization's religious exercise, as defined in this part.

* * * * *

§ 19.5 [Amended]

■ 23. Amend § 19.5 in the last sentence by removing ''organization's program'' and adding in its place ''organization's program and may require attendance at all activities that are fundamental to the program''.

■ 24. Revise § 19.6 to read as follows:

§ 19.6 How to prove nonprofit status.

In general, DHS does not require that a recipient, including a faith-based organization, obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code to be eligible for funding under DHS social service programs. Many grant programs, however, do require an organization to be a nonprofit organization in order to be eligible for funding. Funding announcements and other grant application solicitations for social service programs that require organizations to have nonprofit status will specifically so indicate in the eligibility section of the solicitation. In addition, any solicitation for social service programs that requires an organization to maintain tax-exempt status will expressly state the statutory authority for requiring such status. Recipients should consult with the appropriate DHS program office to determine the scope of any applicable requirements. In DHS social service programs in which an applicant for funding must show that it is a nonprofit organization, the applicant may do so by any of the following means:

(a) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(b) A statement from a State or other governmental taxing body or the State secretary of State certifying that:

(1) The organization is a nonprofit organization operating within the State; and

(2) No part of its net earnings may benefit any private shareholder or individual;

(c) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant;

(d) Any item described in paragraphs (a) through (c) of this section if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate; or

(e) For an entity that holds a sincerely held religious belief that it cannot apply for a determination as an entity that is tax-exempt under section 501(c)(3) of the Internal Revenue Code, evidence sufficient to establish that the entity would otherwise qualify as a nonprofit organization under paragraphs (a) through (d) of this section.

§ 19.7 [Removed and Reserved]

■ 25. Remove and reserve § 19.7.

■ 26. Revise § 19.8 to read as follows:

§ 19.8 Independence of faith-based organizations.

(a) A faith-based organization that applies for, or participates in, a social service program supported with Federal financial assistance will retain its autonomy; right of expression; religious character; authority over its governance; and independence from Federal, State, and local governments; and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct Federal financial assistance contrary to § 19.4.

(b) Faith-based organizations may use space in their facilities to provide social services using financial assistance from DHS without removing, concealing, or altering religious articles, texts, art, or symbols.

(c) A faith-based organization using financial assistance from DHS for social

service programs retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on the basis of their acceptance of or adherence to the religious tenets of the organization, and include religious references in its organization's mission statements and other governing documents.

■ 27. Add § 19.11 to read as follows:

§ 19.11 Nondiscrimination among faith-based organizations.

Neither DHS nor any State or local government or other intermediary receiving funds under any DHS social service program shall construe these provisions in such a way as to advantage or disadvantage faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects.

■ 28. Revise appendix A to part 19 to read as follows:

Appendix A to Part 19—Notice or Announcement of Award Opportunities

(a) Faith-based organizations may apply for this award on the same basis as any other organization, as set forth at and subject to the protections and requirements of this part and 42 U.S.C. 2000bb *et seq.* DHS will not, in the selection of recipients, discriminate against an organization on the basis of the organization's religious character, affiliation, or exercise.

(b) A faith-based organization that participates in this program will retain its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law, including the Free Speech and Free Exercise Clauses of the Constitution, 42 U.S.C. 2000bb *et seq.,* 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e–1(a) and 2000e–2(e), 42 U.S.C. 12113(d), and the Weldon Amendment, among others. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws.

(c) A faith-based organization may not use direct financial assistance from DHS to support or engage in any explicitly religious activities except where consistent with the Establishment Clause and any other applicable requirements. Such an organization also may not, in providing services funded by DHS, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

■ 29. Add appendix B to part 19 to read as follows:

Appendix B to Part 19: Notice of Award or Contract

(a) A faith-based organization that participates in this program retains its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law, including the Free Speech and Free Exercise Clauses of the Constitution, 42 U.S.C. 2000bb *et seq.,* 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e–1(a) and 2000e–2(e), 42 U.S.C. 12113(d), and the Weldon Amendment, among others. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws.

(b) A faith-based organization may not use direct financial assistance from DHS to support or engage in any explicitly religious activities except when consistent with the Establishment Clause and any other applicable requirements. Such an organization also may not, in providing services funded by DHS, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

Department of Agriculture

For the reasons set forth in the preamble, USDA amends part 16 of title 7 of the CFR as follows:

PART 16—EQUAL OPPORTUNITY FOR RELIGIOUS ORGANIZATIONS

■ 30. The authority citation for part 16 is revised to read as follows:

Authority: 5 U.S.C. 301; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13280, 67 FR 77145, 3 CFR, 2002 Comp., p. 262; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; E.O. 13831, 83 FR 20715, 3 CFR, 2018 Comp., p. 806; 42 U.S.C. 2000bb *et seq.*

■ 31. Amend § 16.1 by redesignating paragraph (b) as paragraph (c) and adding a new paragraph (b) to read as follows:

§ 16.1 Purpose and applicability.

* * * * *

(b) The requirements established in this part do not prevent a USDA awarding agency or any State or local government or other intermediary from accommodating religion in a manner consistent with Federal law and the Religion Clauses of the First Amendment to the U.S. Constitution.

* * * * *

■ 32. Revise § 16.2 to read as follows:

§ 16.2 Definitions.

As used in this part:

Direct Federal financial assistance, Federal financial assistance provided directly, Direct funding, or *Directly funded* means financial assistance received by an entity selected by the Government or intermediary (under this part) to carry out a service (*e.g.,* by contract, grant, loan agreement, or cooperative agreement). References to *Federal financial assistance* will be deemed to be references to direct Federal financial assistance, unless the referenced assistance meets the definition of *indirect Federal financial assistance* or *Federal financial assistance provided indirectly*. Except as otherwise provided by USDA regulation, the recipients of sub-grants that receive Federal financial assistance through State-administered programs (*e.g.,* flow-through programs such as the National School Lunch Program authorized under the Richard B. Russell National School Lunch Act, 42 U.S.C. 1751 *et seq.*) are not considered recipients of USDA indirect assistance. These recipients of sub-awards are considered recipients of USDA direct financial assistance.

Discriminate against an organization on the basis of the organization's religious exercise means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect:

(1) Because of conduct that would not be considered grounds to disfavor a secular organization;

(2) Because of conduct that must or could be granted an appropriate accommodation in a manner consistent with RFRA (42 U.S.C. 2000bb through 2000bb–4) or the Religion Clauses of the First Amendment to the Constitution; or

(3) Because of the actual or suspected religious motivation of the organization's religious exercise.

Explicitly religious activities include activities that involve overt religious content such as worship, religious instruction, or proselytization. Any such activities must be offered separately, in time or location, from the programs or services funded under the agency's grant or cooperative agreement, and participation must be voluntary for beneficiaries of the agency grant or cooperative agreement-funded programs and services.

Federal financial assistance does not include a guarantee or insurance, regulated programs, licenses, procurement contracts at market value, or programs that provide direct benefits.

Indirect Federal financial assistance or *Federal financial assistance provided indirectly* refers to situations where the choice of the service provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government-funded payment

in accordance with the First Amendment of the U.S. Constitution.

Intermediary means an entity, including a non-governmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government that accepts USDA direct assistance and distributes that assistance to other organizations that, in turn, provide government-funded services. If an intermediary, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government that is administering a program supported by Federal financial assistance, is given the authority under the contract, grant, or agreement to select non-governmental organizations to provide services funded by the Federal Government, the intermediary must ensure compliance by the recipient of a contract, grant, or agreement with this part and any implementing rules or guidance. If the intermediary is a non-governmental organization, it retains all other rights of a non-governmental organization under the program's statutory and regulatory provisions.

Religious exercise has the meaning given to the term in 42 U.S.C. 2000cc–5(7)(A).

■ 33. Revise § 16.3 to read as follows:

§ 16.3 Faith-Based Organizations and Federal Financial Assistance.

(a)(1) A faith-based or religious organization is eligible, on the same basis as any other organization, and considering a religious accommodation, to access and participate in any USDA assistance programs for which it is otherwise eligible. Neither the USDA awarding agency nor any State or local government or other intermediary receiving funds under any USDA awarding agency program or service shall, in the selection of service providers, discriminate against an organization on the basis of the organization's religious character, affiliation, or exercise.

(2) Additionally, decisions about awards of USDA direct assistance or USDA indirect assistance must be free from political interference and must be made on the basis of merit, not on the basis of the religious affiliation of a recipient organization or lack thereof. Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendices A and B to this part.

(b) A faith-based or religious organization that participates in USDA assistance programs will retain its autonomy; right of expression; religious character; authority over its governance; and independence from Federal, State, and local governments, and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use USDA direct assistance to support any ineligible purposes, including explicitly religious activities that involve overt religious content such as worship, religious instruction, or proselytization. A faith-based or religious organization may:

(1) Use its facilities to provide services and programs funded with financial assistance from USDA awarding agency without concealing, altering, or removing religious art, icons, scriptures, or other religious symbols,

(2) Retain religious terms in its organization's name,

(3) Select its board members and otherwise govern itself on a religious basis, and

(4) Include religious references in its mission statements and other governing documents.

(c) In addition, a religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when an organization participates in a USDA assistance program.

(d) A faith-based or religious organization is eligible to access and participate in USDA assistance programs on the same basis as any other organization. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by a USDA awarding agency or a State or local government in administering Federal financial assistance from the USDA awarding agency shall require faith-based or religious organizations to provide assurances or notices where they are not required of non-religious organizations.

(1) Any restrictions on the use of grant funds shall apply equally to religious and non-religious organizations.

(2) All organizations that participate in USDA awarding agency programs or services, including organizations with religious character or affiliations, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of USDA awarding agency-funded activities, including those prohibiting the use of direct financial assistance to engage in explicitly religious activities.

(3) No grant or agreement, document, loan agreement, covenant, memorandum of understanding, policy or regulation that is used by the USDA awarding agency or a State or local government in administering financial assistance from the USDA awarding agency shall disqualify faith-based or religious organizations from participating in the USDA awarding agency's programs or services because such organizations are motivated by or influenced by religious faith, or because of their religious character or affiliation, or on grounds that discriminate against organizations on the basis of the organizations' religious exercise, as defined in this part.

(e) If an intermediary, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government that is administering a program supported by Federal financial assistance, is delegated the authority under the contract, grant, or agreement to select non-governmental organizations to provide services funded by the Federal Government, the intermediary must ensure compliance by the subrecipient with the provisions of this part and any implementing regulations or guidance. If the intermediary is a non-governmental organization, it retains all other rights of a non-governmental organization under the program's statutory and regulatory provisions.

(f)(1) USDA direct financial assistance may be used for the acquisition, construction, or rehabilitation of structures to the extent authorized by the applicable program statutes and regulations. USDA direct assistance may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used by the USDA funding recipients for explicitly religious activities. Where a structure is used for both eligible and ineligible purposes, USDA direct financial assistance may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities in accordance with the cost accounting requirements applicable to USDA funds. Sanctuaries, chapels, or other rooms that an organization receiving direct assistance from USDA uses as its principal place of worship, however, are ineligible for USDA-funded improvements. Disposition of real property after the term of the grant or any change in use of the property during the term of the grant is subject to government-wide regulations governing real property disposition (see 2 CFR part 400).

(2) Any use of USDA direct financial assistance for equipment, supplies,

labor, indirect costs, and the like shall be prorated between the USDA program or activity and any ineligible purposes by the religious organization in accordance with applicable laws, regulations, and guidance.

(3) Nothing in this section shall be construed to prevent the residents of housing who are receiving USDA direct assistance funds from engaging in religious exercise within such housing.

(g) If a recipient contributes its own funds in excess of those funds required by a matching or grant agreement to supplement USDA awarding agency supported activities, the recipient has the option to segregate those additional funds or commingle them with the Federal award funds. If the funds are commingled, the provisions of this section shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds. With respect to the matching funds, the provisions of this section apply irrespective of whether such funds are commingled with Federal funds or segregated.

■ 34. Revise § 16.4 to read as follows:

§ 16.4 Responsibilities of participating organizations.

(a) Any organization that receives direct or indirect Federal financial assistance shall not, with respect to services, or, in the case of direct Federal financial assistance, outreach activities funded by such financial assistance, discriminate against a current or prospective program beneficiary on the basis of religion, religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program and may require attendance at all activities that are fundamental to the program.

(b) Organizations that receive USDA direct assistance under any USDA program may not engage in explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization, as part of the programs or services funded by USDA direct assistance. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services supported with USDA direct assistance, and participation must be voluntary for beneficiaries of the programs or services supported with such USDA direct assistance. The use of indirect Federal financial assistance is not subject to this restriction. Nothing in this part restricts the Department's authority under applicable Federal law to fund activities that can be directly funded by the Government consistent with the Establishment Clause.

(c) Nothing in paragraph (a) or (b) of this section shall be construed to prevent faith-based organizations that receive USDA assistance under the Richard B. Russell National School Lunch Act, 42 U.S.C. 1751 *et seq.,* the Child Nutrition Act of 1966, 42 U.S.C. 1771 *et seq.,* or USDA international school feeding programs from considering religion in their admissions practices or from imposing religious attendance or curricular requirements at their schools.

■ 35. Revise § 16.5 to read as follows:

§ 16.5 Severability.

To the extent that any provision of this regulation is declared invalid by a court of competent jurisdiction, USDA intends for all other provisions that are capable of operating in the absence of the specific provision that has been invalidated to remain in effect.

§ 16.6 [Removed]

■ 36. Remove § 16.6.

■ 37. Revise appendix A to part 16 to read as follows:

Appendix A to Part 16—Notice or Announcement of Award Opportunities

(a) Faith-based organizations may apply for this award on the same basis as any other organization, as set forth at and, subject to the protections and requirements of this part and 42 U.S.C. 2000bb *et seq.,* USDA will not, in the selection of recipients, discriminate against an organization on the basis of the organization's religious character, affiliation, or exercise.

(b) A faith-based organization that participates in this program will retain its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in the U.S. Constitution and Federal law, including 42 U.S.C. 2000bb *et seq.,* 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e–1(a) and 2000e–2(e), 42 U.S.C. 12113(d), and the Weldon Amendment, among others. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws.

(c) A faith-based organization may not use direct financial assistance from USDA to support or engage in any explicitly religious activities except where consistent with the Establishment Clause and any other applicable requirements. Such an organization also may not, in providing services funded by USDA, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

■ 38. Add appendix B to part 16 to read as follows:

Appendix B to Part 16—Notice of Award or Contract

(a) A faith-based organization that participates in this program retains its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in the U.S. Constitution and Federal law, including 42 U.S.C. 2000bb *et seq.,* 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e–1(a) and 2000e–2(e), 42 U.S.C. 12113(d), and the Weldon Amendment, among others. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws.

(b) A faith-based organization may not use direct financial assistance from USDA to support or engage in any explicitly religious activities except when consistent with the Establishment Clause and any other applicable requirements. Such an organization also may not, in providing services funded by USDA, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

Agency for International Development

For the reasons set forth in the preamble, USAID amends part 205 of title 22 of the CFR as follows:

PART 205—PARTICIPATION BY RELIGIOUS ORGANIZATIONS IN USAID PROGRAMS

■ 39. The authority citation for part 205 continues to read as follows:

Authority: 22 U.S.C. 2381(a).

■ 40. In § 205.1, revise paragraphs (a), (c), (f), (g) and add paragraph (l) to read as follows:

§ 205.1 Grants and cooperative agreements.

(a) Faith-based organizations are eligible, on the same basis as any other organization and considering any reasonable accommodation, as is consistent with Federal law, the Attorney General's Memorandum of October 6, 2018 (Federal Law Protections for Religious Liberty), and the Religion Clauses of the First Amendment to the U.S. Constitution, to participate in any USAID program for which they are otherwise eligible. In the selection of service-providers, neither USAID nor entities that make and administer sub-awards of USAID funds shall discriminate for, or against, an organization on the basis of the organization's religious character,

affiliation, or exercise. For purposes of this part, to discriminate against an organization on the basis of the organization's religious exercise means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect:

(1) Because of conduct that would not be considered grounds to disfavor a secular organization;

(2) Because of conduct that must or could be granted an appropriate accommodation in a manner consistent with RFRA (42 U.S.C. 2000bb through 2000bb–4) or the Religion Clauses of the First Amendment to the Constitution; or

(3) Because of the actual or suspected religious motivation of the organization's religious exercise.

(4) Notices or announcements of award opportunities shall include language to indicate that faith-based organizations are eligible on the same basis as any other organization and subject to the protections and requirements of Federal law. As used in this section, the term ''program'' refers to federally funded USAID grants and cooperative agreements, including subgrants and sub-agreements. The term also includes grants awarded under contracts. As used in this section, the term ''grantee'' includes a recipient of a grant or a signatory to a cooperative agreement, as well as sub-recipients of USAID assistance under grants, cooperative agreements, and contracts.

* * * * *

(c) A faith-based organization that applies for, or participates in, USAID-funded programs or services (including through a prime award or sub-award) will retain its autonomy, religious character, and independence, and may continue to carry out its mission consistent with religious freedom protections in Federal law, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from USAID (including through a prime award or sub-award) to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), or in any other manner prohibited by law. Among other things, a faith-based organization that receives financial assistance from USAID may use space in its facilities, without concealing, altering, or removing religious art, icons, scriptures, or other religious symbols. In addition, a faith-based organization that receives financial assistance from USAID retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

* * * * *

(f) No grant document, contract, agreement, covenant, memorandum of understanding, policy, or regulation used by USAID shall require faith-based organizations to provide assurances or notices where the Agency does not require them of non-faith-based organizations. Any restrictions on the use of grant funds shall apply equally to faith-based and non-faith-based organizations. All organizations that participate in USAID's programs (including through a prime award or sub-award), including faith-based ones, must carry out eligible activities in accordance with all program requirements and other applicable requirements that govern the conduct of USAID-funded activities, including those that prohibit the use of direct financial assistance from USAID to engage in explicitly religious activities. No grant document, contract, agreement, covenant, memorandum of understanding, policy, or regulation used by USAID shall disqualify faith-based organizations from participating in USAID's programs because such organizations are motivated or influenced by religious faith to provide social services or other assistance, or because of their religious character or affiliation, or on grounds that discriminate against organizations on the basis of the organizations' religious exercise, as defined in this part.

(g) A religious organization does not forfeit its exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, when the organization receives financial assistance from USAID. An organization that qualifies for such exemption may select its employees on the basis of their acceptance of, and/or adherence to, the religious tenets of the organization.

* * * * *

(l) Nothing in this section shall be construed in such a way as to advantage, or disadvantage, faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects.

Department of Housing and Urban Development

For the reasons set forth in the preamble, HUD amends parts 5, 92, and 578 of title 24 of the CFR as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

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

Authority: 12 U.S.C. 1701x; 42 U.S.C. 1437a, 1437c, 1437f, 1437n, 3535(d); Sec. 327, Pub. L. 109–115, 119 Stat. 2396; Sec. 607, Pub. L. 109–162, 119 Stat. 3051 (42 U.S.C. 14043e *et seq.*); E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; E.O 13831, 83 FR 20715, 3 CFR, 2018 Comp., p. 806; 42 U.S.C. 2000bb *et seq.*

■ 42. Amend § 5.109 by:
■ a. Revising paragraph (a);
■ b. In paragraph (b), revising the definition of ''Indirect Federal financial assistance'' and adding a definition for ''Religious exercise'' in alphabetical order;
■ c. Revising paragraphs (c) and (d);
■ d. Adding a sentence to the end of paragraph (e);
■ e. Removing paragraph (g);
■ f. Redesignating paragraph (h) as paragraph (g) and revising it; and
■ g. Adding a new paragraph (h) and paragraphs (l) and (m).

The revisions and additions read as follows:

§ 5.109 Equal participation of faith-based organizations in HUD programs and activities.

(a) *Purpose.* Consistent with Executive Order 13279, entitled ''Equal Protection of the Laws for Faith-Based and Community Organizations,'' as amended by Executive Order 13559, entitled ''Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations,'' and as amended by Executive Order 13831, entitled ''Establishment of a White House Faith and Opportunity Initiative,'' this section describes requirements for ensuring the equal participation of faith-based organizations in HUD programs and activities. These requirements apply to all HUD programs and activities, including all of HUD's Native American Programs, except as may be otherwise noted in the respective program regulations in title 24 of the Code of Federal Regulations (CFR), or unless inconsistent with certain HUD program authorizing statutes.

(b) * * *

Indirect Federal financial assistance means Federal financial assistance

provided when the choice of the provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of Government-funded payment. Federal financial assistance provided to an organization is considered indirect when the Government program through which the beneficiary receives the voucher, certificate, or other similar means of Government-funded payment is neutral toward religion meaning that it is available to providers without regard to the religious or non-religious nature of the institution and there are no program incentives that deliberately skew for or against religious or secular providers; and the organization receives the assistance as a result of a genuine, independent choice of the beneficiary.

* * * * *

Religious exercise has the meaning given to the term in 42 U.S.C. 2000cc–5(7)(A).

(c) *Equal participation of faith-based organizations in HUD programs and activities.* Faith-based organizations are eligible, on the same basis as any other organization, to participate in any HUD program or activity, considering any permissible accommodations, particularly under the Religious Freedom Restoration Act. Neither the Federal Government, nor a State, tribal or local government, nor any other entity that administers any HUD program or activity, shall discriminate against an organization on the basis of the organization's religious character, affiliation, or lack thereof, or on the basis of the organization's religious exercise. For purposes of this part, to discriminate against an organization on the basis of the organization's religious exercise means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect:

(1) Because of conduct that would not be considered grounds to disfavor a secular organization;

(2) Because of conduct that must or could be granted an appropriate accommodation in a manner consistent with RFRA (42 U.S.C. 2000bb through 2000bb–4) or the Religion Clauses of the First Amendment to the Constitution; or

(3) Because of the actual or suspected religious motivation of the organization's religious exercise.

(4) In addition, decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not based on the organization's religious character, affiliation, or lack thereof, or based on the organization's religious exercise. Notices of funding availability, grant agreements, and cooperative agreements shall include language substantially similar to that in appendix A to this subpart, where faith-based organizations are eligible for such opportunities.

(d) *Independence and identity of faith-based organizations.* (1) A faith-based organization that applies for, or participates in, a HUD program or activity supported with Federal financial assistance retains its autonomy, right of expression, religious character, authority over its governance, and independence, and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs. A faith-based organization that receives Federal financial assistance from HUD does not lose the protections of law.

Note 1 to Paragraph (d)(1): Memorandum for All Executive Departments and Agencies, From the Attorney General, ''Federal Law Protections for Religious Liberty'' (Oct. 6, 2017) (describing Federal law protections for religious liberty).

(2) A faith-based organization that receives direct Federal financial assistance may use space (including a sanctuary, chapel, prayer hall, or other space) in its facilities (including a temple, synagogue, church, mosque, or other place of worship) to carry out activities under a HUD program without concealing, altering, or removing religious art, icons, scriptures, or other religious symbols. In addition, a faith-based organization participating in a HUD program or activity retains its authority over its internal governance, and may retain religious terms in its organization's name, select its board members and employees on the basis of their acceptance of or adherence to the religious tenets of the organization consistent with paragraph (i) of this section), and include religious references in its organization's mission statements and other governing documents.

(e) * * * The use of indirect Federal financial assistance is not subject to this restriction. Nothing in this part restricts HUD's authority under applicable Federal law to fund activities, that can be directly funded by the Government consistent with the Establishment Clause of the U.S. Constitution.

* * * * *

(g) *Nondiscrimination requirements.* Any organization that receives Federal financial assistance under a HUD program or activity shall not, in providing services with such assistance or carrying out activities with such assistance, discriminate against a beneficiary or prospective beneficiary on the basis of religion, religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect Federal financial assistance need not modify its program or activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program and may require attendance at all activities that are fundamental to the program.

(h) *No additional assurances from faith-based organizations.* A faith-based organization is not rendered ineligible by its religious nature to access and participate in HUD programs. Absent regulatory or statutory authority, no notice of funding availability, grant agreement, cooperative agreement, covenant, memorandum of understanding, policy, or regulation that is used by HUD or a recipient or intermediary in administering Federal financial assistance from HUD shall require otherwise eligible faith-based organizations to provide assurances or notices where they are not required of similarly situated secular organizations. All organizations that participate in HUD programs or activities, including organizations with religious character or affiliations, must carry out eligible activities in accordance with all program requirements, subject to any required or appropriate accommodation, particularly under the Religious Freedom Restoration Act, and other applicable requirements governing the conduct of HUD-funded activities, including those prohibiting the use of direct financial assistance to engage in explicitly religious activities. No notice of funding availability, grant agreement, cooperative agreement, covenant, memorandum of understanding, policy, or regulation that is used by HUD or a recipient or intermediary in administering financial assistance from HUD shall disqualify otherwise eligible faith-based organizations from participating in HUD's programs or activities because such organization is motivated or influenced by religious faith to provide such programs and activities, or because of its religious character or affiliation, or on grounds that discriminate against an organization on the basis of the

organization's religious exercise, as defined in this part.

* * * * *

(l) *Tax exempt organizations.* In general, HUD does not require that a recipient, including a faith-based organization, obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code to be eligible for funding under HUD programs. Many grant programs, however, do require an organization to be a nonprofit organization in order to be eligible for funding. Notices of funding availability that require organizations to have nonprofit status will specifically so indicate in the eligibility section of the notice of funding availability. In addition, if any notice of funding availability requires an organization to maintain tax-exempt status, it will expressly state the statutory authority for requiring such status. Applicants should consult with the appropriate HUD program office to determine the scope of any applicable requirements. In HUD programs in which an applicant must show that it is a nonprofit organization but this is not statutorily defined, the applicant may do so by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a State or other governmental taxing body or the State secretary of State certifying that—

(i) The organization is a nonprofit organization operating within the State; and

(ii) No part of its net earnings may benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant;

(4) Any item described in paragraphs (l)(1) through (3) of this section, if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate; or

(5) For an entity that holds a sincerely held religious belief that it cannot apply for a determination as an entity that is tax-exempt under section 501(c)(3) of the Internal Revenue Code, evidence sufficient to establish that the entity would otherwise qualify as a nonprofit organization under paragraphs (l)(1) through (4) of this section.

(m) *Rule of construction.* Neither HUD nor any recipient or other intermediary receiving funds under any HUD program or activity shall construe these provisions in such a way as to advantage or disadvantage faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects.

■ 43. Add appendix A to subpart A of part 5 to read as follows:

Appendix A to Subpart A of Part 5—Notice of Funding Availability

(a) Faith-based organizations may apply for this award on the same basis as any other organization, as set forth at, and subject to the protections and requirements of 42 U.S.C. 2000bb *et seq.,* HUD will not, in the selection of recipients, discriminate against an organization on the basis of the organization's religious character, affiliation, or exercise.

(b) A faith-based organization that participates in this program will retain its independence, and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law, including the Free Speech and Free Exercise Clauses of the Constitution, 42 U.S.C. 2000bb *et seq.,* 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e–1(a) and 2000e–2(e), 42 U.S.C. 12113(d), and the Weldon Amendment, among others. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws, particularly under the Religious Freedom Restoration Act.

(c) A faith-based organization may not use direct financial assistance from HUD to support or engage in any explicitly religious activities except where consistent with the Establishment Clause and any other applicable requirements. Such an organization also may not, in providing services funded by HUD, discriminate against a beneficiary or prospective program beneficiary on the basis of religion, religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM

■ 44. The authority citation for part 92 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 12 U.S.C. 1701x and 4568.

§ 92.508 [Amended]

■ 45. Amend § 92.508 by removing paragraph (a)(2)(xiii).

Department of Justice

■ For the reasons set forth in the preamble, DOJ revises part 38 of title 28 of the CFR to read as follows:

PART 38—PARTNERSHIPS WITH FAITH-BASED AND OTHER NEIGHBORHOOD ORGANIZATIONS

Sec.

38.1 Purpose.
38.2 Applicability and scope.
38.3 Definitions.
38.4 Policy.
38.5 Responsibilities.
38.6 Procedures.
38.7 Assurances.
38.8 Enforcement.

Appendix A to Part 38—Notice or Announcement of Award Opportunities

Appendix B to Part 38—Notice of Award or Contract

Authority: 28 U.S.C. 509; 5 U.S.C. 301; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; 18 U.S.C. 4001, 4042, 5040; 21 U.S.C. 871; 25 U.S.C. 3681; Pub. L. 107–273, 116 Stat. 1758; Pub. L. 109–162, 119 Stat. 2960; 34 U.S.C. 10152, 10154, 10172, 10221, 10382, 10388, 10444, 10446, 10448, 10473, 10614, 10631, 11111, 11182, 20110, 20125; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; E.O. 13831, 83 FR 20715, 3 CFR, 2018 Comp., p. 806; 42 U.S.C. 2000bb *et seq.*

§ 38.1 Purpose.

The purpose of this part is to implement Executive Order 13279, Executive Order 13559, and Executive Order 13831.

§ 38.2 Applicability and scope.

(a) A faith-based organization that applies for, or participates in, a social service program supported with Federal financial assistance may retain its independence and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct Federal financial assistance, whether received through a prime award or sub-award, to support or engage in any explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization.

(b) The use of indirect Federal financial assistance is not subject to this restriction.

(c) Nothing in this part restricts the Department's authority under applicable Federal law to fund activities, such as the provision of chaplaincy services, that can be directly funded by the Government consistent with the Establishment Clause.

(d) To the extent that any provision of this regulation is declared invalid by a court of competent jurisdiction, the Department intends for all other provisions that are capable of operating in the absence of the specific provision that has been invalidated to remain in effect.

§ 38.3 Definitions.

As used in this part:

(a)(1) ''Direct Federal financial assistance'' or ''Federal financial

assistance provided directly'' refers to situations where the Government or an intermediary (under this part) selects the provider and either purchases services from that provider (*e.g.,* via a contract) or awards funds to that provider to carry out a service (*e.g.,* via a grant or cooperative agreement). In general, and except as provided in paragraph (a)(2) of this section, Federal financial assistance shall be treated as direct, unless it meets the definition of ''indirect Federal financial assistance'' or ''Federal financial assistance provided indirectly.''

(2) Recipients of sub-grants that receive Federal financial assistance through State administering agencies or State-administered programs are recipients of ''direct Federal financial assistance'' (or recipients of ''Federal financial assistance provided directly'').

(b) ''Indirect Federal financial assistance'' or ''Federal financial assistance provided indirectly'' refers to situations where the choice of the service provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government-funded payment. Federal financial assistance is considered ''indirect'' when:

(1) The government program through which the beneficiary receives the voucher, certificate, or other similar means of government-funded payment is neutral toward religion and

(2) The service provider receives the assistance as a result of an independent choice of the beneficiary, not a choice of the Government.

(c)(1) ''Intermediary'' or ''pass-through entity'' means an entity, including a nonprofit or nongovernmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, such as a State administering agency, that accepts Federal financial assistance as a primary recipient or grantee and distributes that assistance to other organizations that, in turn, provide government-funded social services.

(2) When an intermediary, such as a State administering agency, distributes Federal financial assistance to other organizations, it replaces the Department as the awarding entity. The intermediary remains accountable for the Federal financial assistance it disburses and, accordingly, must ensure that any providers to which it disburses Federal financial assistance also comply with this part.

(d) ''Department program'' refers to a grant, contract, or cooperative agreement funded by a discretionary, formula, or block grant program administered by or from the Department.

(e) ''Grantee'' includes a recipient of a grant, a signatory to a cooperative agreement, or a contracting party.

(f) The ''Office for Civil Rights'' refers to the Office for Civil Rights in the Department's Office of Justice Programs.

(g) ''Religious exercise'' has the meaning given to the term in 42 U.S.C. 2000cc–5(7)(A).

§ 38.4 Policy.

(a) *Grants (formula and discretionary), contracts, and cooperative agreements.* Faith-based organizations are eligible, on the same basis as any other organization and considering any religious accommodations appropriate under the Constitution or other provisions of Federal law, including but not limited to 42 U.S.C. 2000bb *et seq.,* 42 U.S.C. 38n, 42 U.S.C. 18113, 42 U.S.C. 2000e–1(a) and 2000e–2(e), 42 U.S.C. 12113(d), and the Weldon Amendment, to participate in any Department program for which they are otherwise eligible. Neither the Department nor any State or local government receiving funds under any Department program shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization's religious character or affiliation, or lack thereof, or on the basis of the organization's religious exercise. For purposes of this part, to discriminate against an organization on the basis of the organization's religious exercise means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect:

(1) Because of conduct that would not be considered grounds to disfavor a secular organization;

(2) Because of conduct that must or could be granted an appropriate accommodation in a manner consistent with the Religious Freedom Restoration Act (42 U.S.C. 2000bb *et seq.*) or the Religion Clauses of the First Amendment to the Constitution; or

(3) Because of the actual or suspected religious motivation of the organization's religious exercise.

(b) *Political or religious affiliation.* Decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religion, religious belief, or lack thereof.

§ 38.5 Responsibilities.

(a) Organizations that receive direct Federal financial assistance from the Department may not engage in explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization, as part of the programs or services funded with direct Federal financial assistance from the Department. If an organization conducts such explicitly religious activities, the activities must be offered separately, in time or location, from the programs or services funded with direct Federal financial assistance from the Department, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance.

(b) A faith-based organization that participates in Department-funded programs or services shall retain its autonomy; right of expression; religious character; and independence from Federal, State, and local governments, and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use direct Federal financial assistance from the Department to fund any explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization. Among other things, a faith-based organization that receives Federal financial assistance from the Department may use space in its facilities without concealing, altering, or removing religious art, icons, messages, scriptures, or symbols. In addition, a faith-based organization that receives Federal financial assistance from the Department retains its authority over its internal governance, and it may retain religious terms in its name, select its board members on the basis of their acceptance of or adherence to the religious tenets of the organization, and include religious references in its mission statements and other governing documents.

(c) Any organization that participates in programs funded by Federal financial assistance from the Department shall not, in providing services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect Federal financial assistance need not modify its

program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program and may require attendance at all activities that are fundamental to the program.

(d) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that the Department or a State or local government uses in administering Federal financial assistance from the Department shall require faith-based or religious organizations to provide assurances or notices where they are not required of non-faith-based organizations. Any restrictions on the use of grant funds shall apply equally to faith-based and non-faith-based organizations. All organizations, including religious ones, that participate in Department programs must carry out all eligible activities in accordance with all program requirements, subject to any religious accommodations appropriate under the Constitution or other provisions of Federal law, including but not limited to 42 U.S.C. 2000bb *et seq.,* 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e–1(a) and 2000e–2(e), 42 U.S.C. 12113(d), and the Weldon Amendment, and other applicable requirements governing the conduct of Department-funded activities, including those prohibiting the use of direct Federal financial assistance from the Department to engage in explicitly religious activities. No grant, document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department or a State or local government in administering Federal financial assistance from the Department shall disqualify faith-based or religious organizations from participating in the Department's programs because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation, or on grounds that discriminate against organizations on the basis of the organizations' religious exercise, as defined in this part.

(e) A faith-based organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1(a), is not forfeited when the organization receives direct or indirect Federal financial assistance from the Department. Some Department programs, however, contain independent statutory provisions requiring that all grantees agree not to discriminate in employment on the basis of religion. Accordingly, grantees should consult with the appropriate Department program office to determine the scope of any applicable requirements.

(f) If an intermediary, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government that is administering a program supported by Federal financial assistance, is given the authority under the contract, grant, or agreement to select organizations to provide services funded by the Federal Government, the intermediary must ensure the compliance of the recipient of a contract, grant, or agreement with the provisions of Executive Order 13279, as amended by Executive Order 13559 and further amended by Executive Order 13831, and any implementing rules or guidance. If the intermediary is a nongovernmental organization, it retains all other rights of a nongovernmental organization under the program's statutory and regulatory provisions.

(g) In general, the Department does not require that a grantee, including a faith-based organization, obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code to be eligible for funding under Department programs. Many grant programs, however, do require an organization to be a ''nonprofit organization'' in order to be eligible for funding. Individual solicitations that require organizations to have nonprofit status will specifically so indicate in the eligibility sections of the solicitations. In addition, any solicitation that requires an organization to maintain tax-exempt status shall expressly state the statutory authority for requiring such status. Grantees should consult with the appropriate Department program office to determine the scope of any applicable requirements. In Department programs in which an applicant must show that it is a nonprofit organization, the applicant may do so by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a State taxing body or the State secretary of state certifying that:

(i) The organization is a nonprofit organization operating within the State; and

(ii) No part of its net earnings may lawfully benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant;

(4) Any item described in paragraphs (g)(1) through (3) of this section if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate; or

(5) For an entity that holds a sincerely held religious belief that it cannot apply for a determination as an entity that is tax-exempt under section 501(c)(3) of the Internal Revenue Code, evidence sufficient to establish that the entity would otherwise qualify as a nonprofit organization under paragraphs (g)(1) through (4) of this section.

(h) Grantees should consult with the appropriate Department program office to determine the applicability of this part in foreign countries or sovereign lands.

(i) Neither the Department nor any State or local government or other pass-through entity receiving funds under any Department program or service shall construe these provisions in such a way as to advantage or disadvantage faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects.

§ 38.6 Procedures.

(a) *Effect on State and local funds.* If a State or local government voluntarily contributes its own funds to supplement activities carried out under the applicable programs, the State or local government has the option to separate out the Federal funds or commingle them. If the funds are commingled, the provisions of this section shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds.

(b) *Notices or announcements.* Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendices A and B, respectively, to this part.

§ 38.7 Assurances.

(a) Every application submitted to the Department for direct Federal financial assistance subject to this part must contain, as a condition of its approval and the extension of any such assistance, or be accompanied by, an assurance or statement that the program is or will be conducted in compliance with this part.

(b) Every intermediary must provide for such methods of administration as are required by the Office for Civil Rights to give reasonable assurance that

the intermediary will comply with this part and effectively monitor the actions of its recipients.

§ 38.8 Enforcement.

(a) The Office for Civil Rights is responsible for reviewing the practices of recipients of Federal financial assistance to determine whether they are in compliance with this part.

(b) The Office for Civil Rights is responsible for investigating any allegations of noncompliance with this part.

(c) Recipients of Federal financial assistance determined to be in violation of any provisions of this part are subject to the enforcement procedures and sanctions, up to and including suspension and termination of funds, authorized by applicable laws.

(d) An allegation of any violation or discrimination by an organization, based on this regulation, may be filed with the Office for Civil Rights or the intermediary that awarded the funds to the organization.

Appendix A to Part 38—Notice or Announcement of Award Opportunities

(a) Faith-based organizations may apply for this award on the same basis as any other organization, as set forth at, and subject to the protections and requirements of this part and 42 U.S.C. 2000bb *et seq.* The Department of Justice will not, in the selection of recipients, discriminate against an organization on the basis of the organization's religious character, exercise or affiliation.

(b) A faith-based organization that participates in this program will retain its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law, including the Free Speech and Free Exercise Clauses of the First Amendment, 42 U.S.C. 2000bb *et seq.,* 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e–1(a) and 2000e–2(e), 42 U.S.C. 12113(d), and the Weldon Amendment, among others. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws.

(c) A faith-based organization may not use direct Federal financial assistance from the Department of Justice to support or engage in any explicitly religious activities except where consistent with the Establishment Clause and any other applicable requirements. An organization receiving direct Federal financial assistance also may not, in providing services funded by the Department of Justice, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

Appendix B to Part 38—Notice of Award or Contract

(a) A faith-based organization that participates in this program retains its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law, including the Free Speech and Free Exercise Clauses of the Constitution, 42 U.S.C. 2000bb *et seq.,* 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e–1(a) and 2000e–2(e), 42 U.S.C. 12113(d), and the Weldon Amendment, among others. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws.

(b) A faith-based organization may not use direct Federal financial assistance from the Department of Justice to support or engage in any explicitly religious activities except when consistent with the Establishment Clause of the First Amendment and any other applicable requirements. An organization receiving direct Federal financial assistance also may not, in providing services funded by the Department of Justice, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

DEPARTMENT OF LABOR

For the reasons set forth in the preamble, DOL amends part 2 of title 29 of the Code of Federal Regulations as follows:

PART 2—GENERAL REGULATIONS

■ 46. The authority citation for part 2 is revised to read as follows:

Authority: 5 U.S.C. 301; E.O. 13198, 66 FR 8497, 3 CFR, 2001 Comp., p. 750; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; E.O. 13831, 83 FR 20715, 3 CFR, 2018 Comp., p. 806; 42 U.S.C. 2000bb *et seq.*

Subpart D—Equal Treatment in Department of Labor Programs for Faith-Based and Community Organizations; Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries

■ 47. Amend § 2.31 by revising paragraphs (a) introductory text and (a)(2) and adding paragraph (h) to read as follows:

§ 2.31 Definitions.

* * * * *

(a) The term *Federal financial assistance* means assistance that non-Federal entities (including State and local governments) receive or administer in the form of grants, contracts, loans, loan guarantees, property, cooperative agreements, direct appropriations, or other direct or indirect assistance, but does not include a tax credit, deduction, or exemption, nor the use by a private participant of assistance obtained through direct benefit programs (such as Supplemental Nutrition Assistance Program, social security, pensions). Federal financial assistance may be *direct* or *indirect.*

* * * * *

(2) The term *indirect Federal financial assistance* or *Federal financial assistance provided indirectly* means that the choice of the service provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government-funded payment. Federal financial assistance provided to an organization is considered indirect when:

(i) The Government program through which the beneficiary receives the voucher, certificate, or other similar means of Government-funded payment is neutral toward religion; and

(ii) The organization receives the assistance as a result of a genuine, independent choice of the beneficiary.

* * * * *

(h) The term *religious exercise* has the meaning given to the term in 42 U.S.C. 2000cc–5(7)(A).

■ 48. Revise § 2.32 to read as follows:

§ 2.32 Equal participation of faith-based organizations.

(a) Faith-based organizations must be eligible, on the same basis as any other organization and considering any reasonable accommodation, to seek DOL support or participate in DOL programs for which they are otherwise eligible. DOL and DOL social service intermediary providers, as well as State and local governments administering DOL support, must not discriminate for or against an organization on the basis of the organization's religious character, affiliation, or exercise, although this requirement does not preclude DOL, DOL social service providers, or State or local governments administering DOL support from accommodating religion in a manner consistent with the Religion Clauses of the First Amendment to the Constitution. In addition, because this rule does not affect existing constitutional requirements, DOL, DOL social service providers (insofar as they may otherwise be subject to any constitutional requirements), and State and local governments administering DOL support must continue to comply with otherwise applicable constitutional principles, including, among others, those articulated in the Establishment, Free Speech, and Free Exercise Clauses of the First Amendment to the

Constitution. Notices and announcements of award opportunities and notices of award and contracts shall include language substantially similar to that in appendices A and B, respectively, to this part.

(b) A faith-based organization that is a DOL social service provider retains its autonomy; right of expression; religious character; and independence from Federal, State, and local governments and must be permitted to continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs. Among other things, such a faith-based organization must be permitted to:

(1) Use its facilities to provide DOL-supported social services without concealing, removing, or altering religious art, icons, scriptures, or other religious symbols from those facilities; and

(2) Retain its authority over its internal governance, including retaining religious terms in its name, selecting its board members and employees on the basis of their acceptance of or adherence to the religious requirements or standards of the organization, and including religious references in its mission statements and other governing documents.

(c) A grant document, contract or other agreement, covenant, memorandum of understanding, policy, or regulation that is used by DOL, a State or local government administering DOL support, or a DOL social service intermediary provider must not require faith-based organizations to provide assurances or notices where they are not required of non-faith-based organizations. Any restrictions on the use of financial assistance under a grant shall apply equally to faith-based and non-faith-based organizations. All organizations, including religious ones that are DOL social service providers, must carry out DOL-supported activities, subject to any required or appropriate religious accommodation, in accordance with all program requirements, including those prohibiting the use of direct DOL support for explicitly religious activities (including worship, religious instruction, or proselytization). A grant document, contract or other agreement, covenant, memorandum of understanding, policy, or regulation that is used by DOL, a State or local government, or a DOL social service intermediary provider in administering a DOL social service program must not disqualify organizations from receiving DOL support or participating in DOL programs because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation, or lack thereof, on grounds that discriminate against organizations on the basis of the organizations' religious exercise.

(d) For purposes of this subpart, to discriminate against an organization on the basis of the organization's religious exercise means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect:

(1) Because of conduct that would not be considered grounds to disfavor a secular organization;

(2) Because of conduct that must or could be granted an appropriate accommodation in a manner consistent with the Religious Freedom Restoration Act (RFRA) (42 U.S.C. 2000bb through 2000bb–4) or the Religion Clauses of the First Amendment to the Constitution; or

(3) Because of the actual or suspected religious motivation of the organization's religious exercise.

§ 2.33 [Amended]

■ 49. Amend § 2.33 as follows:

■ a. In the second sentence of paragraph (a), by adding ''and may require attendance at all activities that are fundamental to the program'' after ''organization's program''.

■ b. In paragraph (c), by adding ''and further amended by Executive Order 13831'' after ''13559''.

§§ 2.34 and 2.35 [Removed and Reserved]

■ 50. Remove and reserve §§ 2.34 and 2.35.

■ 51. Revise § 2.37 to read as follows:

§ 2.37 Effect of DOL support on Title VII employment nondiscrimination requirements and on other existing statutes.

A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when the organization receives direct or indirect DOL support. An organization qualifying for such exemption may make its employment decisions on the basis of an applicant's or employee's acceptance of or adherence to the religious requirements or standards of the organization, but not on the basis of any other protected characteristic. Some DOL programs, however, were established through Federal statutes containing independent statutory provisions requiring that recipients refrain from discriminating on the basis of religion. Accordingly, to determine the scope of any applicable requirements, including in light of any additional constitutional or statutory protections for employment decisions that may apply, recipients and potential recipients should consult with the appropriate DOL program official or with the Civil Rights Center, U.S. Department of Labor, 200 Constitution Avenue NW, Room N4123, Washington, DC 20210, (202) 693–6500. Individuals with hearing or speech impairments may access this telephone number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

■ 52. Amend § 2.38 by revising paragraphs (b)(3) and (4) and adding (b)(5) to read as follows:

§ 2.38 Status of nonprofit organizations.

* * * * *

(b) * * *

(3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant;

(4) Any item described in paragraphs (b)(1) through (3) of this section, if that item applies to a State or national parent organization, together with a statement by the State or national parent organization that the applicant is a local nonprofit affiliate of the organization; or

(5) For an entity that holds a sincerely held religious belief that it cannot apply for a determination as an entity that is tax exempt under section 501(c)(3) of the Internal Revenue Code, evidence sufficient to establish that the entity would otherwise qualify as a nonprofit organization under paragraphs (b)(1) through (4) of this section.

§ 2.39 [Amended]

■ 53. Amend § 2.39 by removing ''not on the basis of religion or religious belief or lack thereof'' and adding in its place ''not on the basis of the religious affiliation of a recipient organization or lack thereof''.

■ 54. Add § 2.40 to read as follows:

§ 2.40 Nondiscrimination among faith-based organizations.

Neither DOL nor any State or local government or other entity receiving financial assistance under any DOL program or service shall construe the provisions of this part in such a way as to advantage or disadvantage faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects.

■ 55. Add § 2.41 to read as follows:

§ 2.41 Severability.

Should a court of competent jurisdiction hold any provision(s) of this subpart to be invalid, such action will not affect any other provision of this subpart.

■ 56. Revise appendices A and B to read as follows:

Appendix A to Part 2—Notice or Announcement of Award Opportunities

(a) Faith-based organizations may apply for this award on the same basis as any other organization, as set forth at, and subject to the protections and requirements of subpart D of this part and 42 U.S.C. 2000bb *et seq.* DOL will not, in the selection of recipients, discriminate for or against an organization on the basis of the organization's religious character, exercise or affiliation.

(b) A faith-based organization that participates in this program will retain its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law, including the Free Speech and Free Exercise Clauses of the First Amendment, 42 U.S.C. 2000bb *et seq.,* 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e–1(a) and 2000e–2(e), 42 U.S.C. 12113(d), and the Weldon Amendment, among others. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws.

(c) A faith-based organization may not use direct financial assistance from DOL to engage in any explicitly religious activities except where consistent with the Establishment Clause of the First Amendment to the Constitution and any other applicable requirements. Such an organization also may not, in providing services financially assisted by DOL, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

Appendix B to Part 2—Notice of Award or Contract

(a) A faith-based organization that participates in this program retains its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law, including the Free Speech and Free Exercise Clauses of the First Amendment to the Constitution, 42 U.S.C. 2000bb *et seq.,* 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e–1(a) and 2000e–2(e), 42 U.S.C. 12113(d), and the Weldon Amendment, among others. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws.

(b) A faith-based organization may not use direct financial assistance from DOL to engage in any explicitly religious activities except when consistent with the Establishment Clause of the First Amendment and any other applicable requirements. Such an organization also may not, in providing services financially assisted by DOL, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

DEPARTMENT OF VETERANS AFFAIRS

For the reasons set forth in the preamble, VA amends parts 50, 61, and 62 of title 38 of the CFR as follows:

■ 57. Part 50 is revised to read as follows:

PART 50—EQUAL TREATMENT FOR FAITH BASED ORGANIZATIONS

Sec.

50.1 Definitions.
50.2 Faith-based organizations and Federal financial assistance.
Appendix A to Part 50—Notice or Announcement of Award Opportunities.
Appendix B to Part 50—Notice of Award or Contract.

Authority: 38 U.S.C. 501 and as noted in specific sections.

§ 50.1 Definitions.

(a) *Direct Federal financial assistance, Federal financial assistance provided directly, direct funding,* or *directly funded* means financial assistance received by an entity selected by the Government or pass-through entity (under this part) to carry out a service (*e.g.,* by contract, grant, or cooperative agreement). References to ''Federal financial assistance'' will be deemed to be references to direct Federal financial assistance, unless the referenced assistance meets the definition of ''indirect Federal financial assistance'' or ''Federal financial assistance provided indirectly.''

(b) *Indirect Federal financial assistance* or *Federal financial assistance provided indirectly* means financial assistance received by a service provider when the service provider is paid for services by means of a voucher, certificate, or other means of government-funded payment provided to a beneficiary who is able to make a choice of a service provider. Federal financial assistance provided to an organization is considered ''indirect'' within the meaning of the Establishment Clause of the First Amendment to the U.S. Constitution when—

(1) The government program through which the beneficiary receives the voucher, certificate, or other similar means of government funded payment is neutral toward religion; and

(2) The organization receives the assistance as a result of a genuine, independent choice of the beneficiary.

(c) Federal financial assistance does not include a tax credit, deduction, exemption, guaranty contracts, or the use of any assistance by any individual who is the ultimate beneficiary under any such program.

(d) *Pass-through entity* means an entity, including a nonprofit or nongovernmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, such as a State administering agency, that accepts direct Federal financial assistance as a primary recipient or grantee and distributes that assistance to other organizations that, in turn, provide government-funded social services.

(e) *Programs* or *services* has the same definition as ''social service program'' in Executive Order 13279.

(f) *Recipient* means a non-Federal entity that receives a Federal award directly from a Federal awarding agency to carry out an activity under a Federal program. The term recipient does not include subrecipients, but does include pass-through entities.

(g) *Religious exercise* has the meaning given to the term in 42 U.S.C. 2000cc–5(7)(A).

§ 50.2 Faith-based organizations and Federal financial assistance.

(a) Faith-based organizations are eligible, on the same basis as any other organization and considering any permissible accommodation, to participate in any VA program or service. Neither the VA program nor any State or local government or other pass-through entity receiving funds under any VA program shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization's religious character, affiliation, or exercise. Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendix A and B, respectively, to this part. For purposes of this part, to discriminate against an organization on the basis of the organization's religious exercise means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect:

(1) Because of conduct that would not be considered grounds to disfavor a secular organization;

(2) Because of conduct that must or could be granted an appropriate accommodation in a manner consistent

with RFRA (42 U.S.C. 2000bb through 2000bb–4) or the Religion Clauses of the First Amendment to the Constitution; or

(3) Because of the actual or suspected religious motivation of the organization's religious exercise.

(b) Organizations that receive direct financial assistance from a VA program may not engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) as part of the programs or services funded with direct financial assistance from the VA program, or in any other manner prohibited by law. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the VA program, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance. The use of indirect Federal financial assistance is not subject to this restriction. Nothing in this part restricts VA's authority under applicable Federal law to fund activities, such as the provision of chaplaincy services, that can be directly funded by the Government consistent with the Establishment Clause.

(c) A faith-based organization that participates in programs or services funded by a VA program will retain its autonomy; right of expression; religious character; and independence from Federal, State, and local governments, and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs. A faith-based organization that receives direct Federal financial assistance may use space in its facilities to provide programs or services funded with financial assistance from the VA program without concealing, removing, or altering religious art, icons, scriptures, or other religious symbols. In addition, a faith-based organization that receives Federal financial assistance from a VA program does not lose the protections of law. Such a faith-based organization retains its authority over its internal governance, and it may retain religious terms in its name, select its board members on the basis of their acceptance of or adherence to the religious tenets of the organization, and include religious references in its mission statements and other governing documents.

Note 1 to paragraph (c): Memorandum for All Executive Departments and Agencies, From the Attorney General, ''Federal Law Protections for Religious Liberty'' (Oct. 6, 2017) (describing Federal law protections for religious liberty).

(d) An organization that receives direct or indirect Federal financial assistance shall not, with respect to services, or, in the case of direct Federal financial assistance, outreach activities funded by such financial assistance, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization receiving indirect Federal financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program and may require attendance at all activities that are fundamental to the program.

(e) A faith-based organization is not rendered ineligible by its religious exercise or affiliation to access and participate in Department programs. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by a VA program or a State or local government in administering Federal financial assistance from any VA program shall require faith-based organizations to provide assurances or notices where they are not required of non-faith-based organizations. Any restrictions on the use of grant funds shall apply equally to faith-based and non-faith-based organizations. All organizations that participate in VA programs or services, including organizations with religious character or affiliations, must carry out eligible activities in accordance with all program requirements, subject to any required or appropriate religious accommodation, and other applicable requirements governing the conduct of activities funded by any VA program, including those prohibiting the use of direct financial assistance to engage in explicitly religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by VA or a State or local government in administering financial assistance from VA shall disqualify faith-based organizations from participating in the VA program's programs or services because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation, or on grounds that discriminate against organizations on the basis of the organizations' religious exercise, as defined in this part.

(f) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–1), is not forfeited when the organization receives direct or indirect Federal financial assistance from a VA program. An organization qualifying for such exemption may select its employees on the basis of their acceptance of or adherence to the religious tenets of the organization. Some VA programs, however, contain independent statutory provision affecting a recipient's ability to discriminate in employment. Recipients should consult with the appropriate VA program office if they have questions about the scope of any applicable requirement, including in light of any additional constitutional or statutory protections for employment decisions that may apply.

(g) In general, VA programs do not require that a recipient, including a faith-based organization, obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code to be eligible for funding under VA programs. Some grant programs, however, do require an organization to be a nonprofit organization in order to be eligible for funding. Funding announcements and other grant application solicitations that require organizations to have nonprofit status will specifically so indicate in the eligibility section of the solicitation. In addition, any solicitation that requires an organization to maintain tax-exempt status will expressly state the statutory authority for requiring such status. Recipients should consult with the appropriate VA program office to determine the scope of any applicable requirements. In VA programs in which an applicant must show that it is a nonprofit organization, the applicant may do so by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a State or other governmental taxing body or the State secretary of State certifying that:

(i) The organization is a nonprofit organization operating within the State; and

(ii) No part of its net earnings may benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant;

(4) Any item described in paragraphs (g)(1) through (3) of this section if that item applies to a State or national parent organization, together with a statement

by the state or parent organization that the applicant is a local nonprofit affiliate; or

(5) For an entity that holds a sincerely held religious belief that it cannot apply for a determination as an entity that is tax-exempt under section 501(c)(3) of the Internal Revenue Code, evidence sufficient to establish that the entity would otherwise qualify as a nonprofit organization under paragraphs (g)(2) through (4) of this section.

(h) If a recipient contributes its own funds in excess of those funds required by a matching or grant agreement to supplement VA program-supported activities, the recipient has the option to segregate those additional funds or commingle them with the Federal award funds. If the funds are commingled, the provision of this part shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds. With respect to the matching funds, the provisions of this part apply irrespective of whether such funds are commingled with Federal funds or segregated.

(i) Decisions about awards of Federal financial assistance must be made on the basis of merit, not on the basis of the religious affiliation, or lack thereof, of a recipient organization, and must be free from political interference or even the appearance of such interference.

(j) Neither VA nor any State or local government or other pass-through entity receiving funds under any VA program or service shall construe these provisions in such a way as to advantage or disadvantage faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects.

(k) If a pass-through entity, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government that is administering a program supported by Federal financial assistance, is given the authority under the contract, grant, or agreement to select non-governmental organizations to provide services funded by the Federal Government, the pass-through entity must ensure compliance with the provisions of this part and any implementing regulations or guidance by the sub-recipient. If the pass-through entity is a non-governmental organization, it retains all other rights of a non-governmental organization under the program's statutory and regulatory provisions.

Appendix A to Part 50—Notice or Announcement of Award Opportunities

(a) Faith-based organizations may apply for this award on the same basis as any other organization, as set forth at and, subject to the protections and requirements of this part and 42 U.S.C. 2000bb *et seq.,* the Department will not, in the selection of recipients, discriminate against an organization on the basis of the organization's religious character, affiliation, or exercise.

(b) A faith-based organization that participates in this program will retain its independence from the Government and may continue to carry out its mission consistent with religious and conscience freedom protections in Federal law, including the Free Speech and Free Exercise Clauses of the First Amendment, 42 U.S.C. 2000bb *et seq.,* 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e–1(a) and 2000e–2(e), 42 U.S.C. 12113(d), and the Weldon Amendment, among others. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws.

(c) A faith-based organization may not use direct financial assistance from the Department to support or engage in any explicitly religious activities except where consistent with the Establishment Clause of the First Amendment and any other applicable requirements. Such an organization also may not, in providing services funded by the Department, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

Appendix B to Part 50—Notice of Award or Contract

(a) A faith-based organization that participates in this program retains its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law, including the Free Speech and Free Exercise Clauses of the Constitution, 42 U.S.C. 2000bb *et seq.,* 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e–1(a) and 2000e–2(e), 42 U.S.C. 12113(d), and the Weldon Amendment, among others. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws.

(b) A faith-based organization may not use direct financial assistance from the Department to support or engage in any explicitly religious activities except when consistent with the Establishment Clause and any other applicable requirements. Such an organization also may not, in providing services funded by the Department, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

PART 61—VA HOMELESS PROVIDERS GRANT AND PER DIEM PROGRAM

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

Authority: 38 U.S.C. 501, 2001, 2002, 2011, 2012, 2013, 2061, 2064.

■ 59. Revise § 61.64 to read as follows:

§ 61.64 Faith-based organizations.

(a) Organizations that are faith-based are eligible, on the same basis as any other organization, to participate in VA programs under this part. Decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religion or religious belief or lack thereof.

(b)(1) No organization may use direct financial assistance from VA under this part to pay for any of the following:

(i) Explicitly religious activities such as, religious worship, instruction, or proselytization; or

(ii) Equipment or supplies to be used for any of those activities.

(2) For purposes of this section, ''Indirect financial assistance'' means Federal financial assistance in which a service provider receives program funds through a voucher, certificate, agreement or other form of disbursement, as a result of the genuine, independent choice of a private beneficiary. ''Direct Federal financial assistance'' means Federal financial assistance received by an entity selected by the Government or a pass-through entity as defined in 38 CFR 50.1(d) to provide or carry out a service (*e.g.,* by contract, grant, or cooperative agreement). References to ''financial assistance'' will be deemed to be references to direct Federal financial assistance, unless the referenced assistance meets the definition of ''indirect Federal financial assistance'' in this paragraph (b)(2).

(c) Organizations that engage in explicitly religious activities, such as worship, religious instruction, or proselytization, must offer those services separately in time or location from any programs or services funded with direct financial assistance from VA, and participation in any of the organization's explicitly religious activities must be voluntary for the beneficiaries of a program or service funded by direct financial assistance from VA.

(d) A faith-based organization that participates in VA programs under this part will retain its independence from Federal, State, or local governments and may continue to carry out its mission, including the definition, practice and expression of its religious beliefs, provided that it does not use direct financial assistance from VA under this part to support any explicitly religious activities, such as worship, religious instruction, or proselytization. Among

other things, faith-based organizations may use space in their facilities to provide VA-funded services under this part, without concealing, removing, or altering religious art, icons, scripture, or other religious symbols. In addition, a VA-funded faith-based organization retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members and otherwise govern itself on a religious basis, and include religious reference in its organization's mission statements and other governing documents.

(e) An organization that participates in a VA program under this part shall not, in providing direct program assistance, discriminate against a program beneficiary or prospective program beneficiary regarding housing, supportive services, or technical assistance, on the basis of religion or religious belief.

(f) If a State or local government voluntarily contributes its own funds to supplement federally funded activities, the State or local government has the option to segregate the Federal funds or commingle them. However, if the funds are commingled, this provision applies to all of the commingled funds.

(g) To the extent otherwise permitted by Federal law, the restrictions on explicitly religious activities set forth in this section do not apply where VA funds are provided to faith-based organizations through indirect assistance as a result of a genuine and independent private choice of a beneficiary, provided the faith-based organizations otherwise satisfy the requirements of this part. A faith-based organization may receive such funds as the result of a beneficiary's genuine and independent choice if, for example, a beneficiary redeems a voucher, coupon, or certificate, allowing the beneficiary to direct where funds are to be paid, or a similar funding mechanism provided to that beneficiary and designed to give that beneficiary a choice among providers.

PART 62—SUPPORTIVE SERVICES FOR VETERAN FAMILIES PROGRAM

■ 60. The authority citation for part 62 continues to read as follows:

Authority: 38 U.S.C. 501, 2044, and as noted in specific sections.

■ 61. Revise § 62.62 to read as follows:

§ 62.62 Faith-based organizations

(a) Organizations that are faith-based are eligible, on the same basis as any other organization, to participate in the Supportive Services for Veteran Families Program under this part. Decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religion or religious belief or lack thereof.

(b)(1) No organization may use direct financial assistance from VA under this part to pay for any of the following:

(i) Explicitly religious activities such as, religious worship, instruction, or proselytization; or

(ii) Equipment or supplies to be used for any of those activities.

(2) For purposes of this section, ''Indirect financial assistance'' means Federal financial assistance in which a service provider receives program funds through a voucher, certificate, agreement or other form of disbursement, as a result of the genuine, independent choice of a private beneficiary. ''Direct Federal financial assistance'' means Federal financial assistance received by an entity selected by the Government or a pass-through entity as defined in 38 CFR 50.1(d) to provide or carry out a service (*e.g.,* by contract, grant, or cooperative agreement). References to ''financial assistance'' will be deemed to be references to direct Federal financial assistance, unless the referenced assistance meets the definition of ''indirect Federal financial assistance'' in this paragraph (b)(2).

(c) Organizations that engage in explicitly religious activities, such as worship, religious instruction, or proselytization, must offer those services separately in time or location from any programs or services funded with direct financial assistance from VA under this part, and participation in any of the organization's explicitly religious activities must be voluntary for the beneficiaries of a program or service funded by direct financial assistance from VA under this part.

(d) A faith-based organization that participates in the Supportive Services for Veteran Families Program under this part will retain its independence from Federal, State, or local governments and may continue to carry out its mission, including the definition, practice and expression of its religious beliefs, provided that it does not use direct financial assistance from VA under this part to support any explicitly religious activities, such as worship, religious instruction, or proselytization. Among other things, faith-based organizations may use space in their facilities to provide VA-funded services under this part, without concealing, removing, or altering religious art, icons, scripture, or other religious symbols. In addition, a VA-funded faith-based organization retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members and otherwise govern itself on a religious basis, and include religious reference in its organization's mission statements and other governing documents.

(e) An organization that participates in a VA program under this part shall not, in providing direct program assistance, discriminate against a program beneficiary or prospective program beneficiary regarding housing, supportive services, or technical assistance, on the basis of religion or religious belief.

(f) If a State or local government voluntarily contributes its own funds to supplement federally funded activities, the State or local government has the option to segregate the Federal funds or commingle them. However, if the funds are commingled, this provision applies to all of the commingled funds.

(g) To the extent otherwise permitted by Federal law, the restrictions on explicitly religious activities set forth in this section do not apply where VA funds are provided to faith-based organizations through indirect assistance as a result of a genuine and independent private choice of a beneficiary, provided the faith-based organizations otherwise satisfy the requirements of this part. A faith-based organization may receive such funds as the result of a beneficiary's genuine and independent choice if, for example, a beneficiary redeems a voucher, coupon, or certificate, allowing the beneficiary to direct where funds are to be paid, or a similar funding mechanism provided to that beneficiary and designed to give that beneficiary a choice among providers.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

For the reasons set forth in the preamble, HHS amends parts 87 and 1050 of title 45 of the CFR as follows:

PART 87—EQUAL TREATMENT FOR FAITH-BASED ORGANIZATIONS

■ 62. The authority citation for part 87 is revised to read as follows:

Authority: 5 U.S.C. 301; 42 U.S.C. 2000bb *et seq.*

■ 63. Revise § 87.1 to read as follows:

§ 87.1 Definitions.

The following definitions apply for the purposes of this part.

(a) *Direct Federal financial assistance, Federal financial assistance provided directly,* or *direct funding* means

financial assistance received by an entity selected by the Government or a pass-through entity (as defined in this part) to carry out a service (*e.g.,* by contract, grant, or cooperative agreement). References to Federal financial assistance will be deemed to be references to direct Federal financial assistance, unless the referenced assistance meets the definition of indirect Federal financial assistance or Federal financial assistance provided indirectly.

(b) *Directly funded* means funded by means of direct Federal financial assistance.

(c) *Indirect Federal financial assistance* or *Federal financial assistance provided indirectly* means financial assistance received by a service provider when the service provider is paid for services rendered by means of a voucher, certificate, or other means of government-funded payment provided to a beneficiary who is able to make a choice of a service provider.

(d) Federal financial assistance does not include a tax credit, deduction, exemption, guaranty contract, or the use of any assistance by any individual who is the ultimate beneficiary under any such program.

(e) *Pass-through entity* means an entity, including a nonprofit or nongovernmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, such as a State administering agency, that accepts direct Federal financial assistance as a primary recipient or grantee and distributes that assistance to other organizations that, in turn, provide government funded social services.

(f) *Recipient* means a non-Federal entity that receives a Federal award directly from a Federal awarding agency to carry out an activity under a Federal program. The term recipient does not include subrecipients, but does include pass-through entities.

(g) *Religious exercise* has the meaning given to the term in 42 U.S.C. 2000cc–5(7)(A).

■ 64. Revise § 87.3 to read as follows:

§ 87.3 Faith-based organizations and Federal financial assistance.

(a) Faith-based organizations are eligible, on the same basis as any other organization, and considering any permissible accommodation, to participate in any HHS awarding agency program or service for which they are otherwise eligible. The HHS awarding agency program or service shall provide such accommodation as is consistent with Federal law, the Attorney General's Memorandum of October 6, 2017 (Federal Law Protections for Religious Liberty), and the Religion Clauses of the First Amendment to the U.S. Constitution. Neither the HHS awarding agency nor any State or local government or other pass-through entity receiving funds under any HHS awarding agency program or service shall, in the selection of service providers, discriminate against an organization on the basis of the organization's religious character, affiliation, or exercise. Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendices A and B of this part. For purposes of this part, to discriminate against an organization on the basis of the organization's religious exercise means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect:

(1) Because of conduct that would not be considered grounds to disfavor a secular organization;

(2) Because of conduct that must or could be granted an appropriate accommodation in a manner consistent with the Religious Freedom Restoration Act (42 U.S.C. 2000bb through 2000bb–4) or the Religion Clauses of the First Amendment to the Constitution; or

(3) Because of the actual or suspected religious motivation of the organization's religious exercise.

(b) Organizations that receive direct financial assistance from an HHS awarding agency may not engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) as part of the programs or services funded with direct financial assistance from the HHS awarding agency, or in any other manner prohibited by law. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the HHS awarding agency, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance. The use of indirect Federal financial assistance is not subject to this restriction. Nothing in this part restricts HHS's authority under applicable Federal law to fund activities, such as the provision of chaplaincy services, that can be directly funded by the Government consistent with the Establishment Clause.

(c) A faith-based organization that participates in HHS awarding-agency funded programs or services will retain its autonomy; right of expression; religious character; and independence from Federal, State, and local governments, and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs. A faith-based organization may use space in its facilities to provide programs or services funded with financial assistance from the HHS awarding agency without concealing, removing, or altering religious art, icons, scriptures, or other religious symbols. Such a faith-based organization retains its authority over its internal governance, and it may retain religious terms in its name, select its board members on the basis of their acceptance of or adherence to the religious tenets of the organization, and include religious references in its mission statements and other governing documents. In addition, a faith-based organization that receives financial assistance from the HHS awarding agency does not lose the protections of law.

Note 1 to paragraph (c): Memorandum for All Executive Departments and Agencies, From the Attorney General, ''Federal Law Protections for Religious Liberty'' (Oct. 6, 2017) (describing Federal law protections for religious liberty).

(d) An organization, whether faith-based or not, that receives Federal financial assistance shall not, with respect to services or activities funded by such financial assistance, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, a faith-based organization receiving indirect Federal financial assistance need not modify any religious components or integration with respect to its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program and may require attendance at all activities that are fundamental to the program.

(e) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation used by an HHS awarding agency or a State or local government in administering Federal financial assistance from the HHS awarding agency shall require faith-based organizations to provide assurances or

notices where they are not required of non-faith-based organizations. Any restrictions on the use of grant funds shall apply equally to faith-based and non-faith-based organizations. All organizations, whether faith-based or not, that participate in HHS awarding agency programs or services must carry out eligible activities in accordance with all program requirements (except where modified or exempted by any required or appropriate religious accommodations) including those prohibiting the use of direct Federal financial assistance to engage in explicitly religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation used by an HHS awarding agency or a State or local government in administering Federal financial assistance from the HHS awarding agency shall disqualify faith-based organizations from participating in the HHS awarding agency's programs or services because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation, or on grounds that discriminate against organizations on the basis of the organizations' religious exercise, as defined in this part.

(f) A faith-based organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in the Civil Rights Act of 1964, 42 U.S.C. 2000e–1 and 2000e–2 and the Americans with Disabilities Act, 42 U.S.C. 12113(d)(2), is not forfeited when the faith-based organization receives direct or indirect Federal financial assistance from an HHS awarding agency. An organization qualifying for such exemption may select its employees on the basis of their acceptance of or adherence to the religious tenets of the organization. Recipients should consult with the appropriate HHS awarding agency program office if they have questions about the scope of any applicable requirement, including in light of any additional constitutional or statutory protections or requirements that may apply.

(g) In general, the HHS awarding agency does not require that a recipient, including a faith-based organization, obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code to be eligible for funding under HHS awarding agency programs. Many grant programs, however, do require an organization to be a nonprofit organization in order to be eligible for funding. Funding announcements and other grant application solicitations that require organizations to have nonprofit status will specifically so indicate in the eligibility section of the solicitation. In addition, any solicitation that requires an organization to maintain tax-exempt status will expressly state the statutory authority for requiring such status. Recipients should consult with the appropriate HHS awarding agency program office to determine the scope of any applicable requirements. In HHS awarding agency programs in which an applicant must show that it is a nonprofit organization, the applicant may do so by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a State or other governmental taxing body or the State secretary of State certifying that:

(i) The organization is a nonprofit organization operating within the State; and

(ii) No part of its net earnings may benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant;

(4) Any item described in paragraphs (g)(1) through (3) of this section, if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate; or

(5) For an entity that holds a sincerely held religious belief that it cannot apply for a determination as an entity that is tax-exempt under section 501(c)(3) of the Internal Revenue Code, evidence sufficient to establish that the entity would otherwise qualify as a nonprofit organization under any of paragraphs (g)(1) through (4) of this section.

(h) If a recipient contributes its own funds in excess of those funds required by a matching or grant agreement to supplement HHS awarding agency-supported activities, the recipient has the option to segregate those additional funds or commingle them with the Federal award funds. If the funds are commingled, the provisions of this part shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds. With respect to the matching funds, the provisions of this part apply irrespective of whether such funds are commingled with Federal funds or segregated.

(i) Decisions about awards of direct Federal financial assistance must be made on the basis of merit, not on the basis of the religious affiliation, or lack thereof, of a recipient organization, and must be free from political interference or even the appearance of such interference.

(j) Neither the HHS awarding agency nor any State or local government or other pass-through entity receiving funds under any HHS awarding agency program or service shall construe these provisions in such a way as to advantage or disadvantage faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects.

(k) If a pass-through entity, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government that is administering a program supported by Federal financial assistance, is given the authority under the contract, grant, or agreement to select non-governmental organizations to provide services funded by the Federal Government, the pass-through entity must ensure compliance with the provisions of this part and any implementing regulations or guidance by the sub-recipient. If the pass-through entity is a non-governmental organization, it retains all other rights of a non-governmental organization under the program's statutory and regulatory provisions.

■ 65. Add § 87.4 to read as follows:

§ 87.4 Severability.

Any provision of this part held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this part and shall not affect the remainder thereof or the application of the provision to other persons not similarly situated or to other, dissimilar circumstances.

■ 66. Add appendices A and B to part 87 to read as follows:

Appendix A to Part 87—Notice or Announcement of Award Opportunities

(a) Faith-based organizations may apply for this award on the same basis as any other organization, as set forth at and, subject to the protections and requirements of this part and 42 U.S.C. 2000bb *et seq.,* the Department will not, in the selection of recipients, discriminate against an organization on the basis of the organization's religious character, affiliation, or exercise.

(b) A faith-based organization that participates in this program will retain its independence from the Government and may

continue to carry out its mission consistent with religious freedom, nondiscrimination, and conscience protections in Federal law, including the Free Speech and Free Exercise Clauses of the First Amendment of the U.S. Constitution, the Religious Freedom Restoration Act (42 U.S.C. 2000bb *et seq.*), the Coats-Snowe Amendment (42 U.S.C. 238n), Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e–1(a) and 2000e–2(e)), the Americans with Disabilities Act, 42 U.S.C. 12113(d)(2), section 1553 of the Patient Protection and Affordable Care Act (42 U.S.C. 18113), the Weldon Amendment (*e.g.,* Further Consolidated Appropriations Act, 2020, Public Law 116–94, 133 Stat. 2534, 2607, div. A, sec. 507(d) (Dec. 20, 2019)), or any related or similar Federal laws or regulations. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws.

(c) A faith-based organization may not use direct financial assistance from the Department to engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization). Such an organization also may not, in providing services funded by the Department, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

Appendix B to Part 87—Notice of Award or Contract

(a) A faith-based organization that participates in this program retains its independence from the Government and may continue to carry out its mission consistent with religious freedom, nondiscrimination, and conscience protections in Federal law, including the Free Speech and Free Exercise Clauses of the First Amendment of the U.S. Constitution, the Religious Freedom Restoration Act (42 U.S.C. 2000bb *et seq.*), the Coats-Snowe Amendment (42 U.S.C. 238n), Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e–1(a) and 2000e–2(e)), the Americans with Disabilities Act (42 U.S.C. 12113(d)(2)), section 1553 of the Patient Protection and Affordable Care Act (42 U.S.C. 18113), the Weldon Amendment (*see, e.g.,* Further Consolidated Appropriations Act, 2020, Public Law 116–94, div. A, sec. 507(d), 133 Stat. 2534, 2607 (Dec. 20, 2019)), or any related or similar Federal laws or regulations. Religious accommodations may also be sought under many of these religious freedom, nondiscrimination, and conscience protection laws.

(b) A faith-based organization may not use direct financial assistance from the Department to engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization). Such an organization also may not, in providing services funded by the Department, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

PART 1050—CHARITABLE CHOICE UNDER THE COMMUNITY SERVICES BLOCK GRANT ACT PROGRAMS

■ 67. The authority citation for part 1050 continues to read as follows:

Authority: 42 U.S.C. 9901 *et seq.*

§ 1050.3 [Amended]

■ 68. Amend § 1050.3 in paragraph (h) by removing ''87.3(i) through (l)'' and adding in its place ''87.3(i) and (j)''.

Dated: December 3, 2020.

Betsy DeVos,

Secretary, U.S. Department of Education.

Dated: December 3, 2020.

Chad F. Wolf,

Acting Secretary, U.S. Department of Homeland Security.

Dated: December 3, 2020.

Sonny Perdue,

Secretary, U.S. Department of Agriculture.

Dated: December 4, 2020.

Brian Klotz,

Deputy Director, Center for Faith & Opportunity Initiatives, U.S. Agency for International Development

Benjamin S. Carson, Sr.,

Secretary, U.S. Department of Housing and Urban Development.

Dated: December 4, 2020.

William P. Barr,

Attorney General.

Dated: December 4, 2020.

Eugene Scalia,

Secretary, U.S. Department of Labor.

Dated: December 4, 2020.

Brooks D. Tucker,

Assistant Secretary for Congressional and Legislative Affairs, Performing the Delegable Duties of the Chief of Staff, U.S. Department Veterans Affairs.

Dated: December 4, 2020.

Alex M. Azar II,

Secretary, U.S. Department of Health and Human Services.

[FR Doc. 2020–27084 Filed 12–14–20; 8:45 am]

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Part III

Federal Housing Finance Agency

Department of Housing and Urban Development

Office of Federal Housing Enterprise Oversight

12 CFR Parts 1206, 1225, 1240, et al.
Enterprise Regulatory Capital Framework; Final Rule

FEDERAL HOUSING FINANCE AGENCY

12 CFR Parts 1206, 1225, and 1240

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Federal Housing Enterprise Oversight

12 CFR Part 1750

RIN 2590–AA95

Enterprise Regulatory Capital Framework

AGENCY: Federal Housing Finance Agency; Office of Federal Housing Enterprise Oversight.

ACTION: Final rule.

SUMMARY: The Federal Housing Finance Agency (FHFA or the Agency) is adopting a final rule (final rule) that establishes risk-based and leverage capital requirements for the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac, and with Fannie Mae, each an Enterprise). The final rule also makes conforming amendments to definitions in FHFA's regulations governing assessments and minimum capital and removes the Office of Federal Housing Enterprise Oversight's (OFHEO) regulation on capital for the Enterprises.

DATES: This rule is effective February 16, 2021.

FOR FURTHER INFORMATION CONTACT: Naa Awaa Tagoe, Principal Associate Director, Office of Capital Policy, (202) 649–3140, *NaaAwaa.Tagoe@fhfa.gov;* Andrew Varrieur, Associate Director, Office of Capital Policy, (202) 649–3141, *Andrew.Varrieur@fhfa.gov;* or Mark Laponsky, Deputy General Counsel, Office of General Counsel, (202) 649–3054, *Mark.Laponsky@fhfa.gov.* These are not toll-free numbers. The telephone number for the Telecommunications Device for the Deaf is (800) 877–8339.

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Introduction

On June 30, 2020, FHFA published in the **Federal Register** a notice of proposed rulemaking (proposed rule) seeking comment on a new regulatory capital framework for the Enterprises.[1] The proposed rule was a re-proposal of the regulatory capital framework set forth in the notice of proposed rulemaking published in the **Federal Register** on July 17, 2018 (2018 proposal).[2] While the 2018 proposal remained the foundation of the proposed rule, the proposed rule contemplated enhancements to establish a post-conservatorship regulatory capital framework that would ensure that each Enterprise operates in a safe and sound manner and is positioned to fulfill its statutory mission to provide stability and ongoing assistance to the secondary mortgage market across the economic cycle, in particular during periods of financial stress. FHFA is now adopting in this final rule the proposed regulatory capital framework, with certain changes to the proposed rule described below.

The Proposed Rule

Pursuant to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992[3] (Safety and Soundness Act), as amended by the Housing and Economic Recovery Act of 2008[4] (HERA), the FHFA Director's principal duties include, among other duties, ensuring that each Enterprise operates in a safe and sound manner, that the operations and activities of each Enterprise foster liquid, efficient, competitive, and resilient national housing finance markets, and that each Enterprise carries out its statutory mission only through activities that are authorized under and consistent with the Safety and Soundness Act and its charter.[5] Pursuant to their charters, the statutory purposes of the Enterprises are, among other purposes, to provide stability in, and ongoing assistance to, the secondary market for residential mortgages.[6]

Consistent with these statutory duties and purposes, FHFA re-proposed the regulatory capital framework for the Enterprises for three key reasons. First, FHFA has begun the process to responsibly end the conservatorships of the Enterprises. This policy is a departure from the expectations of interested parties at the time of the 2018 proposal when the prospects for indefinite conservatorships informed comments and perhaps even the decision whether to comment at all.

Second, FHFA proposed to increase the quantity and quality of regulatory capital to ensure that each Enterprise operates in a safe and sound manner

[1] 85 FR 39274.

[2] 83 FR 33312.

[3] Public Law 102–550, 106 Stat. 3941 (1992).

[4] Public Law 110–289, 122 Stat. 2654 (2008).

[5] 12 U.S.C. 4513(a)(1).

[6] 12 U.S.C. 1451 note, 1716.

and is positioned to fulfill its statutory mission to provide stability and ongoing assistance to the secondary mortgage market across the economic cycle, in particular during periods of financial stress. To achieve this objective, each Enterprise must be capitalized to be regarded as a viable going concern by creditors and counterparties both during and after a severe economic downturn. The importance of this going-concern standard was made clear by the Enterprises' funding difficulties and near failure during the 2008 financial crisis. The Enterprises fund themselves with a significant amount of short-term unsecured debt that must be regularly refinanced. Each Enterprise's funding needs are very likely to increase during an economic downturn, all else equal, as the Enterprise funds purchases of non-performing loans (NPLs) out of securitization pools and lenders increase their reliance on the Enterprise's cash window. These ordinary course and procyclical funding needs can be met only if the Enterprise continues to be regarded as a viable going concern by creditors throughout the duration of an economic downturn. Indeed, it was the increase in the Enterprises' borrowing costs and the associated difficulties that the Enterprises faced in refinancing their debt that were among the most immediate grounds for FHFA placing the Enterprises into conservatorship.[7]

The 2008 financial crisis also established that credit, market, and other losses can be incurred quickly during a stress and that an Enterprise's capacity to absorb those losses as incurred while still timely performing its financial obligations defines creditors' and other counterparties' views as to whether the Enterprise remains a viable going concern. During a stress, creditors are unlikely to give much consideration to future revenue prospects in assessing whether an Enterprise can timely perform its financial obligations. Market confidence in the Enterprises waned in mid-2008 when Fannie Mae and Freddie Mac had total capital of, respectively, $55.6 billion and $42.9 billion, notwithstanding their rights to future guarantee fees.

It was in this historical context that HERA amended the Safety and Soundness Act to give FHFA greater authority to establish regulatory capital requirements for the Enterprises. OFHEO had previously been bound by the Safety and Soundness Act's prescriptive restrictions on the stress scenario used to calibrate the risk-based capital requirements. Under HERA's expanded authority, FHFA is required to prescribe by regulation risk-based capital requirements ''to ensure that the enterprises operate in a safe and sound manner, maintaining sufficient capital and reserves to support the risks that arise in the operations and management of the enterprises.'' [8] Importantly, the requirement that each Enterprise ''maintain[] sufficient capital and reserves'' applies before, during, and after a severe economic downturn, codifying in statute a going-concern standard.

For the reasons given in Section IV.B.2 and elsewhere of the proposed rule, FHFA determined that the 2018 proposal's credit risk capital requirements were insufficient to ensure each Enterprise would continue to be regarded as a viable going concern during and after a severe economic downturn. Had the 2018 proposal been in effect at the end of 2007, Fannie Mae's and Freddie Mac's peak cumulative capital exhaustion would have left, respectively, capital equal to only 0.1 percent and 0.5 percent of their total assets and off-balance sheet guarantees. These amounts would not have sustained the market confidence necessary for the Enterprises to continue as going concerns, particularly given the prevailing stress in the financial markets at that time and given the uncertainty as to the potential for other write-downs and the adequacy of the Enterprises' allowances for loan and lease losses (ALLL).[9]

Reinforcing that point, the Enterprises' crisis-era cumulative capital losses, while significant, could have been greater. The Enterprises' losses were likely mitigated by unprecedented federal government support of the housing market and the economy during the crisis, including through the Home Affordable Modification Program, the Troubled Asset Relief Program, the 2009 stimulus package,[10] and the Federal Reserve System's purchases of more than $1.2 trillion of the Enterprises' debt and mortgage-backed securities (MBS) from January 2009 to March 2010. The Enterprises' losses also were likely dampened by the declining interest rate environment of the period, when the interest rates on 30-year fixed-rate mortgage loans declined by approximately 200 basis points through the end of 2011, facilitating refinancings and loss mitigation programs.

In addition to ensuring each Enterprise would continue to be regarded as a viable going concern during and after a repeat of the 2008 financial crisis, FHFA also determined that enhancements to the quantity and quality of regulatory capital at the Enterprises were necessary to mitigate certain risks and limitations associated with the underlying historical data and models used to calibrate the 2018 proposal's credit risk capital requirements. Mitigation of model risk figured prominently in FHFA's design of the proposed rule. As discussed in Section IV.B.2 of the proposed rule, the calibration of the 2018 proposal's credit risk capital requirements attributed a significant portion of the Enterprises' crisis-era losses to the product characteristics of mortgage loans that are no longer eligible for acquisition.[11] The statistical methods used to allocate losses between borrower-related risk attributes and product-related risk

[7] *See Memorandum dated September 6, 2008 re: Proposed Appointment of the Federal Housing Finance Agency as Conservator for the Fannie Mae* at 29 (''The Enterprise's practice of relying upon repo financing of its agency collateral to raise cash in the current credit and liquidity environment is an unsafe or unsound practice that has led to an unsafe or unsound condition, given the unavailability of willing lenders to provide secured financing in significant size to reduce pressure on its discount notes borrowings.''); and *Memorandum dated September 6, 2008 re: Proposed Appointment of the Federal Housing Finance Agency as Conservator for the Freddie Mac* at 28 (''The Enterprise's prolonged reliance almost exclusively on 30-day discount notes is an untenable long-term source of funding and an unsafe or unsound practice that poses abnormal risk to the viability of the Enterprise. Operating without an adequate liquidity funding contingency plan is an unsafe or unsound condition to transact business.''); and Fin. Crisis Inquiry Comm'n, The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States at 316 (2011) (the FCIC Report), available at *https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf;* (''In July and August 2008, Fannie suffered a liquidity squeeze, because it was unable to borrow against its own securities to raise sufficient cash in the repo market.''); *see id.* at 316 (''By June 2008, the spread [between the yield on the GSEs' long-term bonds and rates on Treasuries] had risen 65 percent over the 2007 level; by September 5, just before regulators parachuted in, the spread had nearly doubled from its 2007 level to just under 1 percent, making it more difficult and costly for the GSEs to fund their operations.'').

[8] 12 U.S.C. 4611.

[9] Indeed, in October 2010, FHFA projected $90 billion in additional draws under the Senior Preferred Stock Purchase Agreements through 2013 under the baseline scenario. Only $34 billion in additional draws proved necessary. *See Fed. Hous. Fin. Agency, Projections of the Enterprises' Financial Performance* at 10 (Oct. 2010), available at *https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/2010-10_Projections_508.pdf.*

[10] American Recovery and Reinvestment Act of 2009, Public Law 111–5, 123 Stat. 115 (2009).

[11] These ineligible mortgage loan products included ''Alt-A,'' negative amortization, interest-only, and low or no documentation loans, as well as loans with debt-to-income ratio at origination greater than 50 percent, cash out refinances with total loan-to-value ratios (LTV) greater than 85 percent, and investor loans with LTV greater than or equal to 90 percent.

attributes pose significant model risk.[12] To ensure safety and soundness, the capital requirements should be sized to mitigate the risk of potential underestimation of credit losses that would be incurred in an economic downturn with national housing price declines similar to those observed in the 2008 financial crisis, even absent those ineligible loan types and even assuming a repeat of federal support of the economy and a declining interest rate environment. There also were some material risks to the Enterprises that were not assigned a risk-based capital requirement under either the 2018 proposal or the proposed rule—for example, risks relating to uninsured or underinsured losses from flooding, earthquakes, or other natural disasters or radiological or biological hazards. There also was no risk-based capital requirement for the risks that climate change could pose to property values in some localities.

The third reason FHFA re-proposed the Enterprises' regulatory capital framework was to make changes to mitigate the procyclicality of the aggregate risk-based capital requirements of the 2018 proposal. FHFA agreed with many of the commenters on the 2018 proposal that mitigating the procyclicality of the 2018 proposal's risk-based capital requirements would facilitate capital management and enhance the safety and soundness of the Enterprises. Mitigating that procyclicality was also critical, in FHFA's view, to position each Enterprise to fulfill its statutory mission to provide stability and ongoing assistance to the secondary mortgage market across the economic cycle.

The enhancements contemplated by the proposed rule, while important, preserved the 2018 proposal as the foundation of the Enterprises' regulatory capital framework. FHFA nonetheless determined to solicit comments on the revised framework in its entirety in light of the changed policy environment, the extent and nature of the enhancements, the technical nature of the underlying issues, the diverse range of interested parties, and the critical importance of the Enterprises' regulatory capital framework to the national housing finance markets.

[12] Reliance on static look-up grids and multipliers might also introduce additional model risk as borrower behavior, mortgage products, underwriting and collateral valuation practices, or the national housing markets continue to evolve.

Overview of the Final Rule

Key Modifications to the Proposed Rule

After carefully considering the comments on the proposed rule, and as described in this preamble, FHFA has determined to make a number of changes to the proposed rule to ensure that each Enterprise operates in a safe and sound manner and is positioned to fulfill its statutory mission across the economic cycle, in particular during periods of financial stress. Key modifications to the proposed rule include, among others:

- Changes to the approach to credit risk transfers (CRT) will better tailor the risk-based capital requirements to the risk retained by an Enterprise on its CRT. These enhancements include a change to the overall effectiveness adjustment for a CRT on a pool of mortgage exposures that has a relatively lower aggregate credit risk capital requirement, a change to the method for assigning a risk weight to a retained CRT exposure so as to increase the risk sensitivity of the risk weight, and a modification to the loss-timing adjustment for a CRT on multifamily mortgage exposures to better tailor the adjustment to the contractual term of the CRT and the loan terms of the underlying exposures. These changes will together generally increase the dollar amount of the capital relief for certain CRT structures commonly entered into by the Enterprises.
- The floor on the adjusted risk weight assigned to mortgage exposures will be 20 percent instead of 15 percent. This adjustment may increase to some extent the dollar amount of the capital relief provided by a CRT on a pool of mortgage exposures that, absent the 20 percent risk weight floor, would have had a smaller aggregate net credit risk capital requirement.
- The credit risk capital requirement for a single-family mortgage exposure that is or was in forbearance pursuant to the Coronavirus Aid, Relief, and Economic Security (CARES) Act or a program established by FHFA to provide forbearance for COVID–19-impacted borrowers will be assigned under an approach that is specifically tailored to these exposures. This approach will significantly reduce the credit risk capital requirement for a non-performing loan that is subject to a COVID–19-related forbearance and, following a reinstatement, will then disregard that period of non-performance.
- The framework for determining credit risk capital requirements will permit a modified re-performing loan to transition to a performing loan after a 5-year period of performance, treat a single-family mortgage exposure in a repayment plan (including following a COVID–19-related forbearance) as a non-modified re-performing loan instead of a modified re-performing loan, and apply a more risk-sensitive approach to single-family mortgage exposures with marked-to-market loan-to-value ratios between 30 and 60 percent.
- The combined risk multiplier for a single-family mortgage exposure will be capped at 3.0, as contemplated by the 2018 proposal.
- The countercyclical adjustment to the standardized credit risk capital requirement for a single-family mortgage exposure will be based on the national, not-seasonally adjusted expanded-data FHFA House Price Index® (expanded-data FHFA HPI) instead of the all-transaction FHFA HPI. The long-term HPI trend line will be subject to re-estimation according to a mechanism specified in the final rule. As of June 30, 2020, house prices were moderately greater than the 5 percent collar. As a result, the adjusted marked-to-market loan-to-value ratios of single-family mortgage exposures would be increased by the countercyclical adjustment, increasing the aggregate risk-based capital requirements for these exposures.
- The stress capital buffer will be periodically re-sized to the extent that FHFA's eventual program for supervisory stress tests determines that an Enterprise's peak capital exhaustion under a severely adverse stress would exceed 0.75 percent of adjusted total assets.
- The advanced approaches requirements will have a delayed effective date of the later of January 1, 2025 and any later compliance date provided by a transition order applicable to the Enterprise. During that interim period, an Enterprise's operational risk capital requirement will be 15 basis points of its adjusted total assets.

B. Modifications to the 2018 Proposal

With these modifications to the proposed rule, the final rule adopts most of the proposed rule's contemplated enhancements to the 2018 proposal, including:

- Simplifications and refinements of the grids and risk multipliers for the credit risk capital requirements for single-family mortgage exposures, including removal of the single-family risk multipliers for loan balance and the number of borrowers.
- A stability capital buffer tailored to the risk that an Enterprise's default or

other financial distress could pose to the liquidity, efficiency, competitiveness, and resiliency of national housing finance markets.

- A stress capital buffer that would, among other things, enhance the resiliency of the Enterprises, help ensure that each Enterprise would continue to be regarded as a viable going concern by creditors and other counterparties after a severe economic downturn, and dampen the procyclicality of the regulatory capital framework by encouraging each Enterprise to retain capital during periods of economic expansion while remaining able to provide stability and ongoing assistance to the secondary mortgage market during a period of financial stress by utilizing capital buffers to absorb losses as incurred.
- A countercyclical adjustment for single-family credit risk that would result in greater capital retention when housing markets may be vulnerable to correction, while better enabling the Enterprises to continue to support the secondary mortgage market during a period of financial stress.
- A prudential floor on the credit risk capital requirement assigned to mortgage exposures to mitigate the model and other risks associated with the methodology for calibrating the credit risk capital requirements and also provide further stability in the aggregate risk-based capital requirements through the economic cycle.
- A credit risk capital requirement on senior tranches of CRT held by an Enterprise to capitalize the retained credit risk, an adjustment to the CRT capital treatment to reflect that CRT is not equivalent in loss-absorbing capacity to equity financing, and operational criteria for CRT structures that together would help mitigate certain structuring, recourse, and other risks associated with these securitizations.
- Risk-based capital requirements for a number of exposures not expressly addressed by the 2018 proposal, including credit risk on commitments to acquire mortgage loans, counterparty risk on interest rate and other derivatives, and credit risk on an Enterprise's holdings or guarantees of the other Enterprise's MBS or debt.
- A revised method for determining operational risk capital requirements, as well as a higher floor.
- A requirement that each Enterprise maintain internal models for determining its own risk-based capital requirements that is intended to prompt each Enterprise to develop its own view of credit and other risks and not rely solely on the risk assessments underlying the standardized risk weights assigned under the regulatory capital framework.
- A 2.5 percent leverage ratio requirement and a 1.5 percent leverage buffer that together would serve as a credible backstop to the risk-based capital requirements and mitigate the inherent risks and limitations of any methodology for calibrating granular credit risk capital requirements.

C. Regulatory Capital Requirements

As implemented by this final rule, the regulatory capital framework will require each Enterprise to maintain the following risk-based capital:

- Total capital not less than 8.0 percent of risk-weighted assets, determined as discussed below;
- Adjusted total capital not less than 8.0 percent of risk-weighted assets;
- Tier 1 capital not less than 6.0 percent of risk-weighted assets; and
- Common equity tier 1 (CET1) capital not less than 4.5 percent of risk-weighted assets.

Each Enterprise also will be required to satisfy the following leverage ratios:

- Core capital not less than 2.5 percent of adjusted total assets; and
- Tier 1 capital not less than 2.5 percent of adjusted total assets.

Adjusted total assets will be defined as total assets under generally accepted accounting principles (GAAP), with adjustments to include certain off-balance sheet exposures. Total capital and core capital will have the meaning given in the Safety and Soundness Act. Adjusted total capital, tier 1 capital, and CET1 capital will be defined based on the definitions of total capital, tier 1 capital, and CET1 capital set forth in the regulatory capital framework (the Basel framework) developed by the Basel Committee on Bank Supervision (BCBS) that is the basis for the United States banking regulators' regulatory capital framework (U.S. banking framework). These supplemental regulatory capital definitions will fill certain gaps in the statutory definitions of core capital and total capital by making customary deductions and other adjustments for certain deferred tax assets (DTAs) and other assets that tend to have less loss-absorbing capacity during a financial stress.

To calculate its risk-based capital requirements, an Enterprise will determine its risk-weighted assets under two approaches—a standardized approach and an advanced approach—with the greater of the two used to determine its risk-based capital requirements. Under both approaches, an Enterprise's risk-weighted assets will equal the sum of its credit risk-weighted assets, market risk-weighted assets, and operational risk-weighted assets.

Under the standardized approach, the credit risk-weighted assets for mortgage loans secured by one-to-four residential units (single-family mortgage exposures) and mortgage loans secured by five or more residential units (multifamily mortgage exposures) will be determined using lookup grids and multipliers that assign an exposure-specific risk weight based on the risk characteristics of the mortgage exposure. These lookup grids and multipliers generally are similar to those of the 2018 proposal, with some simplifications and refinements.[13]

Like the 2018 proposal, the base risk weight will be a function of the mortgage exposure's loan-to-value ratio with the property value generally marked to market (MTMLTV). For single-family mortgage exposures, the MTMLTV will be subject to a countercyclical adjustment to the extent that national house prices are 5.0 percent greater than or less than an inflation-adjusted long-term trend. For both single-family and multifamily mortgage exposures, this base risk weight will then be adjusted to reflect additional risk attributes of the mortgage exposure and any loan-level credit enhancement. To ensure an appropriate level of capital, this adjusted risk weight will be subject to a minimum floor of 20 percent.

As of June 30, 2020, under the final rule's standardized approach, the Enterprises' average risk weight for single-family mortgage exposures would have been 37 percent, and the Enterprises' average risk weight for multifamily mortgage exposures would have been 49 percent.[14]

While the standardized approach will utilize FHFA-prescribed lookup grids and risk multipliers, the advanced approach for determining credit risk-weighted assets will rely on each Enterprise's internal models. The advanced approach requirements will require each Enterprise to maintain its own processes for identifying and assessing credit risk, market risk, and operational risk. These requirements are

[13] This base risk weight would be equal to the adjusted total capital requirement for the mortgage exposure expressed in basis points and divided by 800, which is the 8.0 percent adjusted total capital requirement also expressed in basis points. For example, the credit risk capital requirement for a mortgage exposure with a base risk weight of 50 percent would be 400 basis points (800 multiplied by 50 percent).

[14] These average risk weights are determined based on the credit risk capital requirement for single-family and multifamily mortgage exposures after adjustments for mortgage insurance and other loan-level credit enhancement but before any adjustment for CRT.

intended to ensure that each Enterprise continues to enhance its risk management system and also that neither Enterprise relies solely on the standardized approach's lookup grids and multipliers to define credit risk tolerances, measure its credit risk, or allocate capital. In the course of FHFA's supervision of each Enterprise's internal models for credit risk, FHFA also could identify opportunities to update or otherwise enhance the standardized approach's lookup grids and multipliers through a future rulemaking.

Under both the standardized and advanced approaches, an Enterprise will determine the capital treatment for eligible CRT by assigning risk weights to retained CRT exposures. Under the standardized approach, tranche-specific risk weights will be subject to a 10 percent floor. The risk-weighted assets of a retained CRT exposure will be subject to adjustments to reflect loss-sharing effectiveness, loss-timing effectiveness, and the differences between CRT and regulatory capital, ensuring that the capital relief afforded by the CRT appropriately reflects the credit risk retained by the Enterprise.

Each Enterprise also will determine a market risk capital requirement for spread risk. Market risks other than spread risk will not be assigned a market risk capital requirement, but FHFA continues to consider more comprehensive approaches for future rulemakings. Under the standardized approach, an Enterprise will determine its market risk-weighted assets using FHFA-specified formulas for some covered positions and its own models for other covered positions. An Enterprise will separately determine its market risk-weighted assets under an advanced approach that relies only on its own internal models for all covered positions.

The final rule also will require each Enterprise to determine its operational risk capital requirement utilizing the U.S. banking framework's advanced measurement approach, subject to a floor equal to 15 basis points of the Enterprise's adjusted total assets.

Each of these regulatory capital requirements will be enforceable by FHFA under its general authority to order an Enterprise to cease and desist from a violation of law, which would include the final rule and its regulatory capital requirements. Pursuant to that authority, FHFA may require an Enterprise to develop and implement a capital restoration plan or take other appropriate corrective action. FHFA also could elect to enforce the risk-based and leverage ratio requirements pursuant to its authority to require an Enterprise to develop a plan to achieve compliance with prescribed prudential management and operational standards, and FHFA also could enforce the core capital leverage ratio requirement or the risk-based total capital requirement pursuant to its separate authority to require prompt corrective action if an Enterprise fails to maintain certain prescribed regulatory levels.

D. Capital Buffers

To avoid limits on capital distributions and discretionary bonus payments, an Enterprise must maintain CET1 capital that exceeds its risk-based capital requirements by at least the amount of its prescribed capital conservation buffer amount (PCCBA). That PCCBA will consist of three separate component buffers—a stress capital buffer, a countercyclical capital buffer, and a stability capital buffer.

- The stress capital buffer will be at least 0.75 percent of an Enterprise's adjusted total assets. FHFA will periodically re-size the stress capital buffer to the extent that FHFA's eventual program for supervisory stress tests determines that an Enterprise's peak capital exhaustion under a severely adverse stress would exceed 0.75 percent of adjusted total assets.
- The countercyclical capital buffer amount initially will be set at 0 percent of an Enterprise's adjusted total assets. FHFA does not expect to adjust this buffer in the place of, or to supplement, the countercyclical adjustment to the risk-based capital requirements. Instead, as under the Basel and U.S. banking frameworks, FHFA will adjust the countercyclical capital buffer taking into account the macro-financial environment in which the Enterprises operate, such that the buffer would be deployed only when excess aggregate credit growth is judged to be associated with a build-up of system-wide risk. This focus on excess aggregate credit growth means the countercyclical buffer likely will be deployed on an infrequent basis, and generally only when similar buffers are deployed by the U.S. banking regulators.
- An Enterprise's stability capital buffer will be tailored to the risk that an Enterprise's default or other financial distress could pose to the liquidity, efficiency, competitiveness, or resiliency of national housing finance markets. The stability capital buffer will be based on an Enterprise's share of residential mortgage debt outstanding. As of June 30, 2020, Fannie Mae's and Freddie Mac's stability capital buffers would have been, respectively, 1.07 and 0.66 percent of adjusted total assets.

Finally, to avoid limits on capital distributions and discretionary bonus payments, the Enterprise also will be required to maintain tier 1 capital in excess of the amount required under its tier 1 leverage ratio requirement by at least the amount of its prescribed leverage buffer amount (PLBA). The PLBA will equal 1.5 percent of the Enterprise's adjusted total assets, such that the PLBA-adjusted leverage ratio requirement would function as a credible backstop to the PCCBA-adjusted risk-based capital requirements.

E. Transition Period

An Enterprise will not be subject to any requirement under the final rule until the compliance date for the requirement under the final rule. The compliance date for the regulatory capital requirements (distinct from the PCCBA or the PLBA) will be the later of the date of the termination of the conservatorship of the Enterprise (or, if later, the effective date of the final rule, which would be 60 days after publication in the **Federal Register**) and any later compliance date provided in a consent order or other transition order applicable to the Enterprise. In contrast, FHFA contemplates that the compliance dates for the PCCBA and the PLBA will be the date of the termination of the conservatorship of the Enterprise (or, if later, the effective date of the final rule), so as to provide additional authority to FHFA to restrict dividends and other capital distributions during the period in which the Enterprise raises regulatory capital to achieve compliance with the regulatory capital requirements. FHFA expects that this interim period could be governed by a capital restoration plan that would be binding on the Enterprise pursuant to a consent order or other transition order.

The final rule's advanced approaches requirements will be delayed until the later of January 1, 2025 and any later compliance date specific to those requirements provided in a consent order or other transition order applicable to the Enterprise. Regardless of the date of the termination of the conservatorship of an Enterprise, the Enterprise will be required to report its regulatory capital, PCCBA, PLBA, standardized total risk-weighted assets, and adjusted total assets beginning January 1, 2022.

IV. FSOC Review of the Secondary Mortgage Market

On September 25, 2020, the Financial Stability Oversight Council (FSOC) released a statement on its activities-based review of the secondary mortgage

market (FSOC Secondary Market Statement). FSOC found that any distress at the Enterprises that affected their secondary mortgage market activities could pose a risk to financial stability, if risks are not properly mitigated. Much of FSOC's analysis centered on the extent to which the proposed rule would adequately mitigate the potential stability risk of the Enterprises.

The FSOC Secondary Market Statement affirmed the overall quantity and quality of the regulatory capital required by the proposed rule. The FSOC Secondary Market Statement also indicated that greater capital requirements might be appropriate for some exposures. Notably, FSOC's analysis suggested that ''risk-based capital requirements and leverage ratio requirements that are materially less than those contemplated by the proposed rule would likely not adequately mitigate the potential stability risk posed by the Enterprises.'' FSOC also found that ''it is possible that additional capital could be required for the Enterprises to remain viable concerns in the event of a severely adverse stress . . . .''

The FSOC Secondary Market Statement included other findings and recommendations that generally endorsed the objectives, rationales, and approaches of the proposed rule.

• *Going-concern standard.* Consistent with the proposed rule's objectives, FSOC ''encourage[d] FHFA to require the Enterprises to be sufficiently capitalized to remain viable as going concerns during and after a severe economic downturn.'' This recommendation should preclude a ''claims-paying capacity'' or similar framework that seeks only to ensure that an Enterprise has the ability to perform its guarantee and other financial obligations over time, perhaps subject to a stay or other pause in the payment of claims and other financial obligations during a resolution proceeding. Instead, each Enterprise should be capitalized not only to absorb losses as they are incurred in a severely adverse stress, but also so that the Enterprise would have sufficient regulatory capital after that stress to continue to be regarded as a viable going concern by creditors and other counterparties.

• *Enterprise-specific stability buffer.* In a significant departure from the 2018 proposal, the proposed rule contemplated an Enterprise-specific stability capital buffer tailored to the risk that an Enterprise's default or other financial distress could pose to the liquidity, efficiency, competitiveness, or resiliency of national housing finance markets. FSOC affirmed that ''[a] stability capital buffer would mitigate risks to financial stability by reducing the expected impact of an Enterprise's distress on financial markets or other financial market participants and by addressing the potential for decreased market discipline due to an Enterprise's size and importance.'' FSOC also recommended that ''[t]he capital buffers should be tailored to mitigate the potential risks to financial stability.''

• *Quality of capital.* FSOC endorsed the proposed rule's use of the U.S. banking framework's definitions of regulatory capital to prescribe supplemental capital requirements. Specifically, FSOC ''encourage[d] FHFA to ensure high-quality capital by implementing regulatory capital definitions that are similar to those in the U.S. banking framework.'' This recommendation supports FHFA's determination in the proposed rule and in the 2018 proposal, consistent with the U.S. banking framework, not to include a measure of guarantee fees or other future revenues as an element of regulatory capital.

• *U.S. banking framework comparisons.* FSOC found that ''[t]he Enterprises' credit risk requirements . . . likely would be lower than other credit providers across significant portions of the risk spectrum and during much of the credit cycle, which would create an advantage that could maintain significant concentration of risk with the Enterprises.'' This finding is consistent with FHFA's determination in the proposed rule that, as of September 30, 2019, the proposed rule's average credit risk capital requirements for the Enterprises' mortgage exposures generally were roughly half those of similar exposures under the U.S. banking framework. Those lower average credit risk capital requirements were before any adjustment for the capital relief afforded through CRT.

The FSOC Secondary Market Statement also identified potential opportunities to enhance the proposed rule and FHFA's regulatory framework more generally.

• *Buffer calibration.* FSOC ''encourage[d] FHFA to consider the relative merits of alternative approaches for more dynamically calibrating the capital buffers.'' The proposed rule contemplated a stress capital buffer sized as a fixed percent of an Enterprise's adjusted total assets, and FHFA sought comment on whether to adopt an alternative approach under which FHFA would periodically re-size the stress capital buffer, similar to the approach recently adopted by the U.S. banking regulators, to the extent that FHFA's eventual program for supervisory stress tests determines that an Enterprise's peak capital exhaustion under a severely adverse stress would exceed 0.75 percent of adjusted total assets. FHFA has adopted that alternative approach in this final rule.

• *Level playing field.* FSOC ''encourage[d] FHFA and other regulatory agencies to coordinate and take other appropriate action to avoid market distortions that could increase risks to financial stability by generally taking consistent approaches to the capital requirements and other regulation of similar risks across market participants, consistent with the business models and missions of their regulated entities.'' In the final rule, FHFA has adopted a risk weight floor on mortgage exposures that is equal to the smallest risk weight contemplated by the Basel framework for residential real estate exposures.[15]

• *Other regulatory requirements.* FSOC noted that FHFA's ''efforts to strengthen Enterprise liquidity regulation, stress testing, supervision, and resolution planning would help mitigate the potential risk to financial stability.'' FSOC stated that it ''support[ed] FHFA's commitment to developing its broader prudential regulatory framework for the Enterprises and encourage[d] FHFA to continue those efforts.''

FSOC also committed to continue to monitor the secondary mortgage market activities of the Enterprises and FHFA's implementation of the regulatory framework to ensure potential risks to financial stability are adequately addressed. Significantly, if FSOC later determines that such risks to financial stability are not adequately addressed by FHFA's capital and other regulatory requirements or other risk mitigants, FSOC may consider more formal recommendations or other actions, consistent with the interpretive guidance on nonbank financial company determinations issued by FSOC in December 2019.

If the activities-based approach contemplated by that guidance does not adequately address a potential threat to financial stability, FHFA understands that FSOC could consider a nonbank financial company, including an Enterprise, for potential designation for supervision and regulation by the Board of Governors of the Federal Reserve System (Federal Reserve Board).

[15] BCBS, *Basel III: Finalising post-crisis reforms* ¶¶ 59–68 (Dec. 2017).

V. General Comments on the Proposed Rule

FHFA received 128 public comment letters on the proposed rule from the Enterprises, trade associations, consumer advocacy groups, private individuals, and other interested parties.[16] Overall, most commenters supported FHFA's effort to establish a post-conservatorship regulatory capital framework that would ensure that each Enterprise operates in a safe and sound manner and is positioned to fulfill its statutory mission across the economic cycle. However, many commenters also expressed concern about the potential impacts, costs, and burdens of various aspects of the proposed rule.

A. Access and Affordability and Other Aggregate Impacts

Many commenters expressed concern about the potential aggregate impacts of the proposed rule, such as: Higher borrowing costs, including for first-time and low- and moderate-income borrowers and minority and rural communities; implications for the Enterprises' ability to satisfy their affordable housing goals or their duty to serve mandates or perform their countercyclical mission; greater cost of home ownership; an increased racial wealth gap; impacts on the affordability of multifamily housing; different pricing impacts on specific mortgage products; lower Enterprise returns on equity; reduced investor demand for the Enterprises' equity; shifts in market share from the Enterprises to banks, private-label securitization (PLS), or the Federal Housing Administration; limits on the ability of credit unions to serve their customers; incentives for the Enterprises to increase risk taking, retain mortgage credit risk, or engage in risk-based pricing of their guarantee fees; disincentives to engage in CRT; and greater compliance costs.

Some commenters urged that the Enterprises' charter mandate to serve the public interest should inform changes to the proposed rule. Other commenters challenged the perceived complexity of the proposed rule. Still other commenters requested that FHFA perform additional studies on the impact of all or parts of the proposed rule, while certain other commenters sought withdrawal or re-proposal of the proposed rule. Other commenters urged that any future changes to the Enterprises' guarantee fees should wait until there is additional clarity about the future regulatory and market structure.

Some commenters questioned whether the regulatory capital framework might impede an Enterprise's ability to raise capital, while some commenters thought that the Enterprises would still have an attractive return on equity under the proposed rule. A few commenters urged FHFA to consider that each Enterprise's existing books of businesses might have been priced assuming smaller required quantities of regulatory capital, which might be particularly relevant to the extent that recent refinancing volumes extend the expected life of the portfolio.

Many commenters generally supported FHFA's objective to establish a post-conservatorship regulatory capital framework that would ensure that each Enterprise operates in a safe and sound manner and is positioned to fulfill its statutory mission across the economic cycle. Some commenters argued that the interests of low- and moderate-income borrowers would be best served by capitalizing the Enterprises to support the secondary market during a period of financial stress, especially as these borrowers' access to credit tends to be most adversely affected by financial stress. Also, some commenters stated that appropriately capitalizing each Enterprise would mitigate risk to financial stability. A few commenters advocated that FHFA should protect taxpayers against future bailouts by requiring adequate loss-absorbing capacity.

FHFA carefully considered these comments in identifying and assessing potential changes to the proposed rule. As context for that discussion elsewhere in this preamble, FHFA notes that the Safety and Soundness Act requires FHFA to establish by regulation risk-based capital requirements for the Enterprises to ensure that each Enterprise operates in a safe and sound manner, maintaining sufficient capital and reserves to support the risks that arise in the operations and management of the Enterprise.[17] While FHFA has other mission-related mandates, this particular statutory mandate focuses only on safety and soundness.

In addition to ensuring the Enterprises' safety and soundness, the proposed rule did still seek to ensure that each Enterprise will be positioned to fulfill its statutory mission across the economic cycle. This objective led to changes to the 2018 proposal to reduce the regulatory capital framework's procyclicality. The proposed rule also took specific steps to mitigate the potential impacts on higher risk exposures. These steps included setting the PCCBA as a fixed percent of adjusted total assets (not risk-weighted assets), removing the single-family risk multipliers for loan balance and number of borrowers, and reducing the risk-based capital requirements for low down-payment loans with private mortgage insurance. More generally, FHFA continues to believe that appropriately capitalizing each Enterprise is critical to ensuring that the secondary mortgage market supports access to affordable mortgage credit for low- and moderate-income borrowers and minority borrowers during periods of financial stress, when these borrowers are potentially most vulnerable to loss of access to affordable mortgage credit.

In FHFA's view, predictions of a material increase in mortgage credit borrowing costs as a result of the proposed rule are subject to scrutiny and significant uncertainty. Some economic theory and empirical evidence suggest that an increase in an Enterprise's equity financing would lead to some decrease in the Enterprise's cost of equity capital, mooting some, or perhaps much, of any such potential impact of increased regulatory capital requirements.[18] Evidencing that point, the significant increase in the U.S. banking framework's regulatory capital requirements following the 2008 financial crisis generally did not lead to significant increases in borrowing costs, contrary to the predictions of market participants at the time.[19] The Enterprises' cost of capital also might be affected by the pricing and availability of CRT over time. Further complicating the analysis, the Enterprises' pricing decisions will be influenced by a variety of regulatory and market considerations. The Enterprises' housing goals set by FHFA will be a particularly important consideration in each Enterprise's pricing decisions with respect to low- and moderate-income borrowers. As

[16] *See* comments on Enterprise Regulatory Capital Framework, *available* at *https://www.fhfa.gov/SupervisionRegulation/Rules/Pages/Comment-List.aspx?RuleID=674.* The comment period for the proposed rule closed on August 31, 2020.

[17] 12 U.S.C. 4611(a)(1). Safety and soundness is also the standard governing FHFA's authority to set a leverage ratio higher than the minimum prescribed by the statute. 12 U.S.C. 4612(c).

[18] Modigliani, F., and Miller, M.H. (1958), *The Cost of Capital, Corporation Finance and the Theory of Investment,* The American Economic Review, 48:3 (1958); BCBS, *The costs and benefits of bank capital—a review of the literature* (June 2019) at section 2.3; Jihad Dagher et al., *IMF Staff Discussion Note: Benefits and Costs of Bank Capital* (March 2016) at Table 4.A; Federal Reserve Bank of Minneapolis, *The Minneapolis Plan to End Too Big to Fail* (November 2016).

[19] *See, e.g.,* Simon Firestone, Amy Lorenc, and Ben Ranish, *An Empirical Economic Assessment of the Costs and Benefits of Bank Capital in the US* (March 31, 2017).

discussed in Section V.D, an Enterprise's pricing decisions should be increasingly based on its own risk assessment as the Enterprise retains capital. An Enterprise's pricing decisions will also inevitably take into account the pricing and other economic decisions of the other Enterprise, with pricing equilibriums under a duopoly difficult to model and predict. To the extent that the Enterprises compete with other market participants, the cost of mortgage credit will depend on the pricing decisions of those competitors, with those competitors outside the scope of FHFA's regulatory capital framework. Finally, the proposed rule was intended to ensure each Enterprise could support the secondary market during a period of financial stress, and any assessment of the regulatory capital framework's impact on borrowing costs should evaluate borrowing costs over the course of the economic cycle. Commentary on the proposed rule generally did not address these complicating factors and should be considered in the context of similar concerns that post-crisis enhancements to the U.S. banking framework would significantly and adversely affect the cost of and access to credit.

B. Similarities to the U.S. Banking Framework

Some commenters supported the proposed rule's use of the Basel framework's regulatory capital definitions to prescribe supplemental capital requirements. Some commenters also supported the use of risk weights to define each mortgage exposure's risk-based capital requirement, the inclusion of the stress capital buffer, and the incorporation of other concepts from the Basel and U.S. banking frameworks. Some commenters advocated a general alignment of the credit risk capital requirements for similar mortgage exposures across the Enterprises and other market participants, which also was a recommendation in the FSOC Secondary Market Statement.

Other commenters criticized the extent to which the proposed rule incorporated concepts from the Basel and U.S. banking frameworks. Some commenters argued that the proposed rule inappropriately treated the Enterprises as banks and that ''bank-like'' quantities of required capital would be inappropriate for the Enterprises.

As discussed in Sections VIII.A.7 and VIII.B.6 of the proposed rule, as of September 30, 2019, and before adjusting for CRT or the buffers, the average credit risk capital requirements for the Enterprises' mortgage exposures generally were roughly half those of similar exposures under the U.S. banking framework.[20] The Enterprises together would have been required under the proposed rule's risk-based capital requirements to maintain $234 billion in risk-based adjusted total capital as of September 30, 2019 to avoid restrictions on capital distributions and discretionary bonuses. Had they been instead subject to the U.S. banking framework, the Enterprises would have been required to maintain approximately $450 billion, perhaps significantly more, in risk-based total capital (not including market risk and operational risk capital) to avoid similar restrictions.[21] In light of these facts, FHFA reiterates that the proposed rule would not have subjected the Enterprises to the same capital requirements that apply to U.S. banking organizations.

C. Differences Between the Enterprises and Banks

Prompted in some cases perhaps by the comparisons in the proposed rule to the Basel and U.S. banking frameworks, many commenters emphasized the differences in the business models, statutory mandates, and risk profiles of the Enterprises and banking organizations. FHFA agrees with these commenters that there are important differences between the Enterprises and banking organizations. The proposed rule discussed those differences in several places, including Sections IV.B.2, VI.B.3, and XIII of the proposed rule, noting, for example, that while the Enterprises transfer much of the interest rate and funding risk on their mortgage exposures through their sales of guaranteed MBS, banking organizations generally fund themselves through customer deposits and other sources. The different interest rate risk profile of the Enterprises is one reason that the proposed rule's market risk capital requirements constituted a relatively small share of the aggregate risk-based capital requirement.

The differences between the business models, statutory mandates, and risk profiles of the Enterprises and banking organizations, however, should not preclude the proposed rule's comparison of the *credit risk* capital requirement of a large U.S. banking organization for a specific mortgage exposure to the *credit risk* capital requirement of an Enterprise for a similar mortgage exposure.[22] The different interest rate risk profiles do not preclude this comparison because the Basel and U.S. banking frameworks generally do not contemplate an explicit capital requirement for interest rate risk on banking book exposures, instead leaving interest rate risk capital requirements to bank-specific tailoring through the supervisory process.[23] Related to this comparison, the monoline nature of the Enterprises' mortgage-focused businesses suggests that the concentration risk of an Enterprise is generally greater than that of a diversified banking organization with a similar amount of mortgage credit risk. That heightened concentration risk would tend to suggest that greater credit risk capital requirements, relative to banking organizations, could be appropriate for the Enterprises for similar exposures, all else equal.

The differences between the business models, statutory mandates, and risk profiles of the Enterprises and banking

[20] FHFA's mortgage risk-sensitive framework results in a more granular calibration of credit risk capital requirements for mortgage exposures, and some meaningful portion of the gap between the credit risk capital requirements of the Enterprises and large banking organizations under the proposed rule was due to the proposed rule's use of MTMLTV instead of OLTV, as under the U.S. banking framework, to assign credit risk capital requirements. Adjusting for the appreciation in the value of the underlying real property generally led to lower actual credit risk capital requirements at the Enterprises, and some of the gap between the credit risk capital requirements of the Enterprises and large U.S. banking organizations perhaps might be expected to narrow somewhat were real property prices to move toward their long-term trend.

[21] These estimates are complicated and sensitive to important assumptions. There were several key drivers of the gap between the aggregate risk-based capital requirements under the proposed rule and under the U.S. banking framework. The lower underlying credit risk capital requirements contributed significantly to this gap. Different approaches to the capital relief for private mortgage insurance and CRT also contributed to some of the gap. The risk-weighted assets-based buffers of the U.S. banking framework also could increase the gap, depending on the assumptions made as to each Enterprise's buffer requirement. Some of the gap perhaps might be expected to narrow somewhat were real property prices to move toward their long-term trend.

[22] Comparisons of credit risk capital requirements can further safety and soundness by helping to identify and mitigate model and related risks relating to the calibration of the requirements. Comparisons of credit risk capital requirements can also further financial stability by identifying undue differences in regulatory requirements that might distort the market structure, as acknowledged by the FSOC Secondary Market Statement. According to the FSOC Secondary Market Statement, ''[t]he alignment of market participants' credit risk capital requirements across similar credit risk exposures would mitigate risk to financial stability by minimizing market structure distortions.''

[23] *See* BCBS, *Interest Rate Risk in the Banking Book,* ¶ 1 (April 2016), available at *https://www.bis.org/bcbs/publ/d368.pdf;* (''Interest rate risk in the banking book (IRRBB) is part of the Basel capital framework's Pillar 2 (Supervisory Review Process) and subject to the Committee's guidance set out in the 2004 Principles for the management and supervision of interest rate risk (henceforth, the IRR Principles).'').

organizations also should not be understood as inconsistent with capitalizing each Enterprise to remain a viable going concern both during and after a severe economic downturn. As discussed in Section II, each Enterprise has considerable funding risk even if it does not rely on customer deposits, and an Enterprise's ordinary course and procyclical funding needs can be met only if the Enterprise continues to be regarded as a viable going concern by creditors throughout the duration of a financial stress.

D. Mortgage-Risk Sensitive Framework

Many commenters expressed concern that those aspects of the proposed rule that tended to decrease the risk sensitivity of the regulatory capital framework could distort the pricing, risk transfer, or other economic decisions of the Enterprises. FHFA agrees with commenters that there are significant benefits to a mortgage risk-sensitive framework. There are, however, trade-offs associated with risk sensitivity. A more risk-sensitive framework tends to amplify the model and related risks associated with any methodology for calibrating a granular assessment of credit risk, which poses significant risk to safety and soundness. A more risk-sensitive framework can be significantly more procyclical, which was a concern of many commenters on the 2018 proposal. A more risk-sensitive framework also can adversely affect an Enterprise's ability to support access to affordable mortgage credit for higher risk borrowers, perhaps excessively so to the extent that the historical performance of these borrowers, which was used to determine the credit risk capital requirements, might not be predictive of future performance. FHFA believes that it has struck an appropriate balance between these competing policy considerations by preserving risk sensitivity while ensuring that each Enterprise operates in a safe and sound manner and is positioned to fulfill its statutory mission across the economic cycle.

FHFA also believes that those aspects of the final rule that might tend to decrease the regulatory capital framework's risk sensitivity will not unduly distort each Enterprise's pricing, credit, CRT, and other economic decisions. FHFA expects that each Enterprise, like other regulated financial institutions, will base its decisions on its own risk assessments, not solely or even primarily on the regulatory capital requirements. By capitalizing each Enterprise to remain a viable going concern without government support, the final rule will incentivize an Enterprise to continually enhance its own risk assessments so as to effectively manage its now-internalized risk. That incentive will be supplemented by the final rule's advanced approaches requirements, which will require each Enterprise to continually enhance its internal models. FHFA also anticipates that each Enterprise's decisions will be informed by other considerations, in particular the decisions of the other Enterprise and other market participants and also the statutory requirement to satisfy FHFA's housing goals. Evidencing this view that the regulatory capital framework generally will not define pricing decisions, the U.S. banking framework's standardized credit risk capital requirements for residential mortgage exposures have very limited risk sensitivity, and yet the pricing of mortgage credit risk varies widely across U.S. banking organizations and especially across borrowers. Mortgage insurers are subject to aligned Enterprise requirements to maintain minimum levels of financial strength, and yet the pricing of mortgage credit risk varies across mortgage insurers.

More generally, the regulatory capital framework should encourage decisions based on nuanced, dynamic, and diverse understandings of risk. A significant and perhaps underappreciated benefit of capitalizing each Enterprise so that its risks are internalized, rather than borne by taxpayers, is that each Enterprise will face market discipline and strong incentives to base its decisions more on its own understanding of the costs and benefits and less on that of its regulator. This is important because FHFA's risk-based capital requirements should not be regarded as the last or best view on risk. Other modeling approaches might consider the loss experiences of other market participants during the 2008 financial crisis, incorporate data from other economic downturns, both in the United States and abroad, take a different approach to the significant portion of the Enterprises' crisis-era losses that were attributed to product features that are no longer eligible for acquisition (approximately $108 billion), or employ different regularization techniques. The now apparent shortcomings of OFHEO's and the Enterprises' pre-crisis credit models, and other well-known failures of analytical models to accurately predict risk, reinforce the need for a meaningful degree of regulatory caution regarding any modeled estimate of risk. Reform should therefore provide incentives for each Enterprise to develop and act on its own view of risk.

Housing Finance Reform

Commenters raised a variety of issues relating to housing finance reform proposals. Some commenters urged FHFA to wait to finalize a regulatory capital framework for the Enterprises until Congress enacts housing reform legislation clarifying the extent of any federal government support of the Enterprises or their successors. Similarly, some commenters argued that the conservatorships should continue until Congress acts. Some commenters advocated for regulating the Enterprises' pricing or otherwise subjecting the Enterprises to utility-like regulation, while other commenters suggested other administrative or legislative reforms, for example, steps to ensure equitable access to the secondary market by lenders of all sizes and charter types.

Commenters also offered views on issues relating to the Enterprises' conservatorships, including the Enterprises' consent to conservatorship in 2008, subsequent actions by FHFA or the U.S. Department of the Treasury (Treasury), and FHFA's policy to responsibly end the conservatorships. Many commenters urged FHFA to end the conservatorships and recommended certain steps toward that end. Some commenters argued in favor of a resolution of the claims made by the Enterprises' legacy shareholders or that the liquidation preference of Treasury's senior preferred shares should be extinguished. Commenters advocated that FHFA should consider Treasury's commitment under the Senior Preferred Stock Purchase Agreements (PSPA) in designing the regulatory capital framework.

FHFA continues to believe that the regulatory capital framework should not assume extraordinary government support, whether under the PSPAs or otherwise. A central tenet of the reforms following the 2008 financial crisis is that the post-crisis regulatory framework should prevent future taxpayer rescues of financial institutions.[24] Expectations of government support increase risk to the Enterprises' safety and soundness and the stability of the national housing finance markets by undermining market discipline and encouraging excessive

[24] The Dodd-Frank Act is an Act ''[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.''

risk taking.[25] Other regulatory capital frameworks generally would not treat a line of credit or similar arrangement, even one with a governmental actor, as a form of regulatory capital. Moreover, to the extent that there are existing arrangements under which the federal government could be exposed to the losses of a financial institution—for example, the Federal Deposit Insurance Corporation's Deposit Insurance Fund or its Orderly Liquidation Fund—those arrangements have motivated *greater* regulatory capital requirements to mitigate the risk to safety and soundness and to protect taxpayers. More practically, Treasury's commitment under the PSPAs is finite and cannot be replenished, and that commitment could be inadequate to ensure each Enterprise would remain a viable going concern during and after a severe economic downturn, particularly to the extent that an Enterprise's liabilities and other obligations were to grow relative to that fixed commitment.

FHFA continues to support legislation to reform the flaws in the structure of the housing finance system that were at the root of the 2008 financial crisis and that continue to pose risk to taxpayers and financial stability. To that end, FHFA recommended specific legislative reforms in its last Annual Report to Congress. FHFA reiterates its recommendation that Congress authorize FHFA to charter competitors to the Enterprises and remove unnecessary statutory exemptions and other special treatments afforded the Enterprises. Chartering competitors to the Enterprises could reduce the size and importance of any single Enterprise, which could lead to a smaller stability capital buffer and therefore smaller aggregate capital requirements.

Pending legislation, FHFA, as conservator of each Enterprise, is required by statute to act ''for the purpose of reorganizing, rehabilitating, or winding up the affairs of [the Enterprise].''[26] That definite and limited statutory purpose does not authorize an indefinite conservatorship. FHFA is in the process of preparing each Enterprise to responsibly exit conservatorship consistent with its statutory mandate and the FHFA Director's other duties. Finalization of the Enterprises' regulatory capital framework is a key step in that effort.

Finalization of the Enterprise's regulatory capital framework is also required by law. The Safety and Soundness Act not only authorizes, but affirmatively requires, FHFA to prescribe risk-based capital requirements by regulation.[27] FHFA has been subject to this statutory mandate for more than 12 years, and in FHFA's view, this final rule is long overdue.

VI. Definitions of Regulatory Capital

As discussed in Section VII, the proposed rule would have required each Enterprise to maintain specified amounts of core capital and total capital, as defined in the Safety and Soundness Act. The proposed rule would have supplemented the core capital and total capital requirements with risk-based and leverage ratio requirements based on the Basel framework's definitions of total capital, tier 1 capital, and CET1 capital. The supplemental definitions of regulatory capital would have made deductions and other adjustments for certain DTAs, ALLL, goodwill, intangibles, and other assets that might tend to have less loss-absorbing capacity during a financial stress. The tier 1 and CET1 capital requirements also would have ensured that retained earnings and other high-quality capital are the predominant form of regulatory capital.

Some commenters supported the proposed rule's use of the Basel framework's regulatory capital definitions to prescribe supplemental capital requirements, potentially as a means to better align credit risk capital requirements across market participants and also to facilitate comparability across regulatory capital frameworks. Some commenters suggested that CRT should be treated as an element of regulatory capital, while a few commenters argued that tier 1 capital was the best basis for both leverage ratio and risk-based capital requirements. Commenters otherwise generally focused on the proposed rule's treatment of guarantee fees, reserves, and subordinated debt.

A. Guarantee Fees

Consistent with the 2018 proposal, neither the statutory definitions nor the supplemental definitions of regulatory capital in the proposed rule would have included a measure of future guarantee fees or other future revenues. FHFA instead gave consideration to the loss-absorbing capacity of future revenues in calibrating the stress capital buffer.

Many commenters argued that a measure of guarantee fees should be included in one or more of the definitions of regulatory capital. That measure, for example, could be limited to guarantee fees that have been received by an Enterprise but not yet recognized as revenue for accounting purposes. These commenters generally contended that future revenues are available to absorb future losses or pay future claims, as reflected in the estimates of capital exhaustion produced by the Enterprises' annual stress tests. A few commenters noted that the proposed rule could incentivize an Enterprise to create interest-only strips of guarantee fee revenue to recognize assets that could count toward regulatory capital. Commenters also suggested that the proposed rule's approach could have a relatively greater impact on higher risk mortgage exposures.

After considering these comments, FHFA has determined to not include a measure of future revenues in any of the final rule's definitions of regulatory capital. Future revenues instead would continue to be considered in sizing the stress capital buffer, as discussed in Section VIII.A.2. Like the proposed rule, the final rule seeks to ensure that each Enterprise would be capitalized to remain a viable going concern both during and after a severe economic downturn. The 2008 financial crisis established that credit, market, and other losses can be incurred quickly during a stress, and it is an Enterprise's capacity to absorb those losses as incurred while still timely performing its financial obligations that defines creditors' and other counterparties' views as to whether the Enterprise is a viable going concern. During a stress, creditors are unlikely to give much

[25] *See* BCBS, *Global systemically important banks: revised assessment methodology and the higher loss absorbency requirement* ¶ 3 (''[T]he moral hazard costs associated with implicit guarantees derived from the perceived expectation of government support may amplify risk-taking, reduce market discipline and create competitive distortions, and further increase the probability of distress in the future. As a result, the costs associated with moral hazard add to any direct costs of support that may be borne by taxpayers.''); Federal Reserve Board, *Calibrating the GSIB Surcharge* (2015) at 1 (''The experience of the crisis made clear that the failure of a SIFI during a period of stress can do great damage to financial stability, that SIFIs themselves lack sufficient incentives to take precautions against their own failures, that reliance on extraordinary government interventions going forward would invite moral hazard and lead to competitive distortions, and that the pre-crisis regulatory focus on microprudential risks to individual financial firms needed to be broadened to include threats to the overall stability of the financial system.'').

[26] 12 U.S.C. 4617(a)(2).

[27] 12 U.S.C. 4611(a)(1) (''The Director *shall,* by regulation, establish risk-based capital requirements for the enterprises to ensure that the enterprises operate in a safe and sound manner, maintaining sufficient capital and reserves to support the risks that arise in the operations and management of the enterprises.'') (emphasis added). FHFA's predecessor agency, OFHEO, adopted a risk-based capital rule (12 CFR part 1750) that will not have been formally rescinded until the effective date of this final rule. That rule was suspended by FHFA at the inception of the conservatorships in 2008. That rule clearly failed to ensure the safety and soundness of each Enterprise.

consideration to future revenue prospects in assessing whether an Enterprise can timely perform its financial obligations. Market confidence in the Enterprises waned in mid-2008 when Fannie Mae and Freddie Mac had total capital of, respectively, $55.6 billion and $42.9 billion, notwithstanding their right to future guarantee fees. Moreover, as discussed in Section IV, the FSOC Secondary Market Statement endorsed the proposed rule's use of the U.S. banking framework's definitions of regulatory capital to prescribe supplemental capital requirements, and these definitions do not include a measure of future revenues.

B. Reserves

The statutory definition of total capital includes a general allowance for foreclosure losses. As for advanced approaches banking organizations under the U.S. banking framework, the proposed rule would have permitted an Enterprise to include in the supplemental definition of tier 2 capital only the excess of its eligible credit reserves over its total expected credit loss, provided the amount does not exceed 0.6 percent of its credit risk-weighted assets. A few commenters suggested that it might be appropriate to include some portion of ALLL in the supplemental definitions of regulatory capital, particularly if the U.S. banking regulators were in the future to adjust their approach to ALLL after considering the implications of the current expected credit losses methodology (CECL) for estimating allowances for credit losses.

The final rule adopts the proposed rule's approach to ALLL. The limited inclusion of ALLL in tier 2 capital was an outgrowth of FHFA's calibration methodology for mortgage exposures under which the base risk weights and risk multipliers are intended to require credit risk capital sufficient to absorb the lifetime *unexpected* losses incurred on mortgage exposures experiencing a shock to house prices similar to that observed during the 2008 financial crisis. The same is also true for non-mortgage exposures. FHFA will continue to monitor the implications of CECL implementation for this issue and could consider adjustments in the future.

C. Subordinated Debt

The proposed rule would have treated some subordinated debt instruments as tier 2 capital. Some commenters supported the proposed rule's approach. One commenter thought that each Enterprise should be financed primarily through term unsecured debt rather than equity because debt can lock in a structured schedule of funding to meet liquidity needs. Other commenters urged FHFA not to treat subordinated debt instruments as a capital element. In the view of some commenters, the historical record has led to a market expectation that subordinated debt is not actually at risk of absorbing losses. A few commenters expressed concern that, unlike equity instruments, an Enterprise would not be able to suspend debt service on subordinated debt.

FHFA has adopted the proposed rule's approach to subordinated debt in the final rule, and certain subordinated debt instruments will continue to be treated as tier 2 capital. To ensure tier 2 capital actually provides loss-absorbing capacity, an Enterprise would be permitted to include an instrument in its tier 2 capital only if FHFA has determined that the Enterprise has made appropriate provision, including in any resolution plan of the Enterprise, to ensure that the instrument would not pose a material impediment to the ability of an Enterprise to issue common stock instruments following any future appointment of FHFA as conservator or receiver under the Safety and Soundness Act.

VII. Capital Requirements

A. Risk-Based Capital Requirements

The proposed rule would have required each Enterprise to maintain the following risk-based capital:

- Total capital not less than 8.0 percent of risk-weighted assets;
- Adjusted total capital not less than 8.0 percent of risk-weighted assets;
- Tier 1 capital not less than 6.0 percent of risk-weighted assets; and
- CET1 capital not less than 4.5 percent of risk-weighted assets.

As discussed in Section III.B.3 of the proposed rule, a lesson of the 2008 financial crisis is that the Enterprises' safety and soundness depends not only on the quantity but also on the quality of their capital. To that end, FHFA proposed to supplement the risk-based capital requirement based on statutorily defined total capital with additional risk-based capital requirements based on the Basel framework's definitions of total capital, tier 1 capital, and CET1 capital.

FHFA noted in the 2018 proposal and the proposed rule that the Enterprises' DTAs, which are included in total capital and core capital by statute, may provide minimal to no loss-absorbing capability during a period of financial stress as recoverability (via taxable income) may become uncertain. The 2018 proposal addressed this issue by establishing a risk-based capital requirement for DTAs. However, the 2018 proposal did not include adjustments for other capital elements that tend to have less loss-absorbing capacity during a financial stress (*e.g.,* ALLL, goodwill, and intangibles), although FHFA did request comment on how best to compensate for the loss-absorbing deficiencies of ALLL and preferred stock within the framework of the 2018 proposal. The 2018 proposal also requested comment on, but did not adjust for, accumulated other comprehensive income (AOCI), leaving open the possibility that an Enterprise could have positive total capital and core capital despite being insolvent under GAAP. By incorporating deductions and other adjustments, the supplemental risk-based capital requirements for adjusted total capital, tier 1 capital, and CET1 capital would have addressed these safety and soundness issues. The supplemental risk-based capital requirements also would have ensured that retained earnings and other high-quality capital would be the predominant form of regulatory capital.

The shift to a terminology of risk-weighted assets in the proposed rule was a change from the 2018 proposal. The addition of three new risk-based capital requirements raised the need for a straightforward mechanism to specify the aggregate regulatory capital required for each. Also, this approach and its associated terminology are well-understood by those familiar with the U.S. banking framework. Expressing the risk-based capital requirement for an exposure as a risk-weight would facilitate transparency and comparability with the U.S. banking framework and other regulatory capital frameworks. Because these concepts are well-understood, this approach also should facilitate market discipline over each Enterprise's risk-taking by its creditors and other counterparties.

As discussed in Section V.A, many commenters expressed concern about the potential impacts of the proposed rule's regulatory capital requirements on borrowing costs, the Enterprises' ability to satisfy their affordable housing goals or other statutory mandates, the incentives for the Enterprises to increase risk taking or engage in CRT, among other concerns. As discussed in Sections VII.B and VIII.B, many commenters contended that the PLBA-adjusted leverage ratio requirement (*i.e.,* the sum of the leverage ratio requirement and the PLBA) likely would often exceed the PCCBA-adjusted risk-based capital requirements.

Commenters also offered related views on the definitions of regulatory capital and the risk weights and other approaches to assigning risk-based capital requirements for the purpose of determining compliance with these required ratios, as discussed in Sections VI and IX.

Specifically, with respect to the required ratios of risk-based capital, commenters offered views on the relative mix of capital instruments contemplated by the risk-based capital requirements. A few commenters argued that tier 1 capital was the best basis for both leverage ratio and risk-based capital requirements. Some commenters urged FHFA to not treat subordinated debt instruments as a capital element because, in their view, the historical record has led to a market expectation that subordinated debt is not actually at risk of absorbing losses.

After considering these comments, FHFA has determined to adopt each of the required risk-based capital ratios as proposed. FHFA continues to believe it is important to supplement the risk-based capital requirement based on statutorily defined total capital with additional risk-based capital requirements based on the Basel framework's definitions of total capital, tier 1 capital, and CET1 capital. The supplemental risk-based capital requirements will reflect customary deductions and other adjustments for assets that might tend to have less loss-absorbing capacity during a financial stress. The tier 1 and CET1 capital requirements will ensure that retained earnings and other high-quality capital are the predominant form of regulatory capital. The use of the U.S. banking framework's required ratios of risk-based capital will foster comparability and enhance market discipline. As discussed in Section IV, the FSOC Secondary Market Statement endorsed the proposed rule's use of the U.S. banking framework's definitions of regulatory capital to prescribe supplemental capital requirements.

While the final rule adopts required ratios of risk-based capital based on the U.S. banking framework, FHFA reiterates that this approach does not result in each Enterprise having the same risk-based capital requirements as U.S. banking organizations. Under the final rule, the credit risk capital requirement for an exposure is determined by multiplying the risk weight assigned to the exposure by 8 percent. The risk weight of an exposure is the key driver of its credit risk capital requirement, and as of June 30, 2020, the risk weight assigned to single-family mortgage exposures under the final rule would have been roughly three-quarters that of similar exposures under the U.S. banking framework. The Enterprises together would have been required under the final rule's risk-based capital requirements to maintain $283 billion in risk-based adjusted total capital as of June 30, 2020 to avoid restrictions on capital distributions and discretionary bonuses. Had they been instead subject to the U.S. banking framework, the Enterprises would have been required to maintain approximately $450 billion, perhaps significantly more, in risk-based total capital (not including market risk and operational risk capital) to avoid similar restrictions.

B. Leverage Ratio Requirements

1. Adjusted Total Assets

The proposed rule's leverage ratio requirements would have been based on an Enterprise's adjusted total assets. Adjusted total assets would have been defined as total assets under GAAP, with adjustments to include many of the off-balance sheet and other exposures that are included in the supplemental leverage ratio requirements of the U.S. banking framework.

Commenters generally supported basing the supplemental leverage ratio requirement on tier 1 capital. Commenters also generally supported basing the leverage ratio requirements on adjusted total assets, although a few preferred total assets as defined under GAAP. Some commenters suggested the leverage ratio should be adjusted to exclude credit risk that had been transferred to third parties through mortgage insurance or CRT. Another commenter advocated including CRT as an element of capital for purposes of calculating the leverage ratio.

FHFA is adopting the definition of adjusted total assets as proposed.

2. Sizing of the Requirements

The primary purpose of the proposed rule's leverage ratio requirements was to provide a credible, non-risk-based backstop to the risk-based capital requirements to safeguard against model risk and measurement error with a simple, transparent, independent measure of risk. From a safety-and-soundness perspective, each type of requirement offsets potential weaknesses of the other, and well-calibrated risk-based capital requirements working with a credible leverage ratio requirement is more effective than either would be in isolation. The proposed rule's leverage ratio requirements would have had the added benefit of dampening some of the procyclicality inherent in the aggregate risk-based capital requirements.

Under the proposed rule, each Enterprise would have been required to maintain capital sufficient to satisfy two leverage ratio requirements:

- Core capital not less than 2.5 percent of adjusted total assets; and
- Tier 1 capital not less than 2.5 percent of adjusted total assets.

As discussed in Section V.A, many commenters expressed concern about the potential impacts of the proposed rule's regulatory capital requirements on borrowing costs, the Enterprises' ability to satisfy their affordable housing goals or other statutory mandates, the incentives for the Enterprises to increase risk taking or engage in CRT, among other concerns. Commenters also offered related views on the definitions of regulatory capital for the purpose of determining compliance with the leverage ratio requirements, as discussed in Sections VI and IX.

Commenters criticized FHFA's method for sizing the proposed rule's two leverage ratio requirements, with many focusing on FHFA's consideration of the Enterprises' historical loss experience. Some commenters urged FHFA to adopt the 2018 proposal's bifurcated alternative that would have prescribed different leverage ratio requirements for trust and non-trust assets. Other commenters described rationales for lower leverage ratio requirements or for not adopting a leverage ratio requirement at all. Some commenters contended that the model risk, measurement error, and related risks mitigated by the leverage ratio requirements were already mitigated by other aspects of the proposed rule. Other commenters indicated that they did not have sufficient information to assess the relationship between the proposed rule's risk-based capital requirements and the leverage ratio requirements and urged FHFA to make additional information available to the public.

Commenters also offered related views on the proposed rule's PLBA-adjusted leverage ratio requirement, and some of those comments have implications for these leverage ratio requirements. The PLBA-adjusted leverage ratio requirement prescribed the tier 1 capital necessary to avoid restrictions on capital distributions and discretionary bonuses. Many of these commenters contended that the PLBA-adjusted leverage ratio requirement likely would often exceed the PCCBA-adjusted risk-based capital requirements. A binding PLBA-adjusted leverage ratio requirement, in the view of many of these commenters, could

reduce the risk sensitivity of the regulatory capital framework, decrease an Enterprise's incentive to engage in CRT, incentivize an Enterprise to increase risk taking, or reduce an Enterprise's ability to offset lower returns on higher risk exposures with higher returns on lower risk exposures. Some commenters, on the other hand, argued that the PLBA-adjusted leverage ratio requirement was inadequate given the Enterprises' historical loss experience and the risk that each Enterprise poses to financial stability. One commenter thought that the PLBA-adjusted leverage ratio requirement should be the primary measure for setting the Enterprises' regulatory capital requirements because the risk-based capital requirements are complex, less transparent, and perhaps subject to manipulation. Some commenters suggested sizing the PLBA-adjusted leverage ratio requirement based on the pre-CRT risk-based capital requirements. Commenters' views specific to the PLBA are further discussed in Section VIII.B.

FHFA has determined to finalize the leverage ratio requirements as proposed. FHFA continues to believe that the proposed rule's calibration methodology for the leverage ratio requirements was fundamentally sound. First, the leverage ratio requirements are generally aligned with the analogous leverage ratio requirements of U.S. banking organizations, after adjusting for the difference in the average risk weight on their exposures.[28] The monoline nature of the Enterprises' mortgage-focused businesses suggests that the concentration risk of an Enterprise is greater than that of a diversified banking organization with a similar amount of mortgage credit risk, perhaps meriting a leverage ratio requirement greater than 2.5 percent, all else equal. Related to that concentration risk, the leverage ratio requirements are roughly aligned with, if not below, the 4 percent total leverage ratio requirement of the Federal Home Loan Banks, which also have mortgage-focused businesses.[29] Second, the leverage ratio requirements are broadly consistent with the Enterprises' historical loss experiences. The Enterprises' crisis-era cumulative capital losses peaked at the end of 2011 at $265 billion, approximately 4.8 percent of their adjusted total assets as of December 31, 2007.[30] Third, the risks and limitations associated with the underlying historical data and models used to calibrate the credit risk capital requirements reinforce the importance of leverage ratio requirements that safeguard against model risk and measurement error.[31]

The FSOC Secondary Market Statement affirmed the sizing of these leverage ratio requirements. FSOC's analysis suggested that ''leverage ratio requirements that are materially less than those contemplated by the proposed rule would likely not adequately mitigate the potential stability risk posed by the Enterprises.'' FSOC also found that ''it is possible that additional capital could be required for the Enterprises to remain viable concerns in the event of a severely adverse stress . . . .''

FHFA has considered commenters' views that the Enterprises' historical loss experience was an inappropriate consideration in calibrating the proposed rule's leverage ratio requirements because it did not reflect the changes to the Enterprises' acquisition criteria since the 2008 financial crisis. Some commenters suggested that the Enterprises' historical loss experiences should be adjusted to remove the Enterprises' valuation allowances on DTAs, the dividends paid to Treasury, and other deductions from capital that were subsequently reversed.

As discussed in the proposed rule, a portion of the crisis-era losses arose from single-family loans that are no longer eligible for acquisition by the Enterprises. However, the sizing of the leverage ratio requirements must guard against potential future relaxation of underwriting standards and regulatory oversight over those underwriting standards. The sizing of leverage ratio requirements also must take into account the model risk posed by the attribution of such losses to specific product characteristics.

The Enterprises' historical loss experience actually might tend to understate the regulatory capital that would be necessary to remain a viable going concern. The Enterprises' crisis-era losses likely were mitigated to at least some extent by the unprecedented support by the federal government of the housing market and the economy and also by the declining interest rate environment of the period. The calibration of the leverage ratio requirements cannot assume a repeat of those loss mitigants. Also, there are some material risks to the Enterprises that are not assigned a risk-based capital requirement—for example, risks relating to uninsured or underinsured losses from flooding, earthquakes, or other natural disasters or radiological or biological hazards. There also is no risk-

[28] The U.S. banking framework's leverage ratio requirement requires banking organizations to maintain tier 1 capital no less than 4.0 percent of total assets. Insured depository institutions subsidiaries of certain large U.S. bank holding companies also must maintain tier 1 capital no less than 6.0 percent of total assets to be ''well capitalized.'' Using data for the 18 bank holding companies subject to the Federal Reserve Board's supervisory stress testing program in 2018, FHFA determined that the average risk weight on the assets of these banks was 61 percent in the fourth quarter of 2018. Under the U.S. banking framework, the Enterprises' mortgage assets generally would be assigned a 50 percent risk weight under the standardized approach. This suggests that the average risk weight on the assets of the Enterprises would have been approximately 81 percent (50 percent divided by 61 percent) of that of these large bank holding companies. That in turn implies a risk-adjusted analogous leverage ratio requirement for the Enterprises of 3.3 percent (81 percent of the 4.0 percent leverage ratio requirement for U.S. banking organizations).

[29] That 4.0 percent leverage ratio requirement should be considered in the context of the safety and soundness benefits of the statutory requirement that each Federal Home Loan Bank advance be fully secured. Related to that, the safety and soundness benefits of that collateral might be furthered by law, as any security interest granted to a Federal Home Loan Bank by a member (or affiliate of a member) is entitled to special protections under the Federal Home Loan Bank Act.

[30] FHFA's view is that substantially all of each Enterprise's valuation allowances on its DTAs should not be deducted from the estimate of peak capital exhaustion. First, a substantial portion of the Enterprises' DTA valuation allowances were on DTAs first recognized under GAAP during the stress period. As such, these valuation allowances had no net impact on adjusted total capital exhaustion during the stress period because the initial GAAP recognition was offset by the subsequent valuation allowance. Second, had the Enterprises been more appropriately capitalized as of December 31, 2007, much of the DTAs that were already recognized under GAAP at the beginning of the stress period would not have been deducted from adjusted total capital, with the effect that the valuation allowance during the stress period would have contributed to adjusted total capital exhaustion. In other words, there was only a relatively small amount of DTAs that (i) was recognized under GAAP as of the beginning of the stress period, (ii) would have already been deducted from adjusted total capital at the time of the beginning of the stress period, and (iii) were subject to a valuation allowance during the stress period. Despite this, given the complexity of the issue, the considerable attention to the issue by interested parties, and the somewhat different impacts of DTA valuation allowances on different measures of regulatory capital, the proposed rule also noted that the sizing of the regulatory capital requirements was consistent with historical loss experiences even if all of the DTA valuation allowances were deducted from the estimate of peak capital exhaustion.

[31] As discussed in Section IV.B.2 of the proposed rule, a disproportionate share of the Enterprises' crisis-era losses arose from certain single-family mortgage exposures that are no longer eligible for acquisition by the Enterprises. The calibration of the credit risk capital requirements attributed a significant portion of the Enterprises' crisis-era losses (approximately $108 billion) to these products. The statistical methods used to allocate losses between borrower-related risk attributes and product-related risk attributes pose significant model risk. It is possible that the calibration understates the credit losses that would be incurred in an economic downturn with national housing price declines of similar magnitude, even assuming a repeat of crisis-era federal support of the economy and the declining interest rate environment.

based capital requirement for the risks that climate change could pose to property values in some localities.

FHFA also considered commenters' views that the proposed rule's leverage ratio requirements were disproportionate to the capital exhaustion estimated by the Enterprises' annual stress tests. FHFA believes that the Enterprises' stress tests are not an appropriate consideration in calibrating the leverage ratio requirements. The leverage ratio requirements are calibrated to be a credible backstop to the risk-based capital requirements, which are themselves calibrated to absorb the lifetime unexpected losses incurred in a shock similar to that observed during the 2008 financial crisis. The capital exhaustion projected by the Enterprises' past stress tests is different in key respects from the projected lifetime unexpected losses in a severely adverse stress. The Enterprises' stress tests use a nine-quarter loss horizon, whereas much of the projected lifetime unexpected losses would be recognized after the end of that horizon. The Enterprises' stress tests then offset those limited losses with the revenues recognized in the horizon, yielding a projection of capital exhaustion considerably lower than lifetime unexpected losses. Furthermore, the capital exhaustion projected by an Enterprise's stress test results could change significantly across the economic cycle, with projected capital exhaustion following a long period of house price appreciation being considerably less than the projections produced by a stress test at a different point in the economic cycle.

FHFA agrees with commenters that the risk-based capital requirements should, as a general rule, exceed the regulatory capital required under the leverage ratio requirements. At the same time, if the leverage ratio requirements are to be an independently meaningful and credible backstop, there will inevitably be some exceptions in which the leverage ratio requirements exceed the risk-based capital requirements. In FHFA's view, the measurement period of September 30, 2019 was, in fact, consistent with the circumstances under which a credible leverage ratio would be binding, given the exceptional single-family house price appreciation since 2012, the strong credit performance of both single-family and multifamily mortgage exposures, the significant progress by the Enterprises to materially reduce legacy exposure to NPLs and re-performing loans, robust CRT market access enabling substantial risk transfer, and the generally strong condition of key counterparties, such as mortgage insurers.

Some commenters' analysis suggested that the leverage ratio requirements generally would exceed the risk-based capital requirements over most of the economic cycle. That could evidence flaws in FHFA's method for calibrating the leverage ratio requirements, the risk-based capital requirements, or both. After taking into account the views of commenters, and also after considering the FSOC Secondary Market Statement's affirmation of the sizing of the leverage ratio requirements and its suggestion that additional capital could be required, FHFA has adopted adjustments to the risk-based capital requirements that generally should reduce the likelihood that the leverage ratio requirements would exceed the risk-based capital requirements.

C. Enforcement

Under the proposed rule, FHFA stated that it may draw upon several authorities to address potential Enterprise failures to meet the risk-based capital requirements and leverage ratio requirements. An Enterprise failure to meet a capital threshold that is required by regulation may be addressed through enforcement mechanisms for regulatory violations including procedures for cease and desist and consent orders.[32] FHFA may also use the enforcement tools available under its authority to prescribe and enforce prudential management and operations standards (PMOS).[33] The prompt corrective action (PCA) framework set out in the Safety and Soundness Act[34] also provides for enforcement tools when a shortfall occurs in capital requirements that are set forth in the statute, using the statute's prescribed capital concepts.

Commenters generally did not comment on the proposed rule's enforcement framework for the risk-based capital requirements and leverage ratio requirements. After taking into account any implications posed by the changes adopted in the final rule, FHFA is adopting the proposed rule's enforcement framework as proposed.

VIII. Capital Buffers

A. Prescribed Capital Conservation Buffer Amount

Under the proposed rule, to avoid limits on capital distributions and discretionary bonus payments, an Enterprise would have had to maintain regulatory capital that exceeds each of its adjusted total capital, tier 1 capital, and CET1 capital requirements by at least the amount of its PCCBA. The proposed rule's PCCBA would consist of three separate component buffers—a stress capital buffer, a countercyclical capital buffer, and a stability capital buffer.

1. Comments Applicable to Each Component Buffer

Each component buffer of the proposed rule's PCCBA was tailored to achieve its own policy objective and had its own rationale and sizing considerations. Many commenters, however, offered criticisms and other views on the PCCBA as a whole or that could be relevant to one or more of the component buffers. FHFA considered these cross-cutting comments in identifying and assessing potential changes to each of these buffers.

Commenters generally supported the flexibility that the PCCBA afforded the Enterprises in their capital planning and to continue to support the secondary market during a period of financial stress. Many commenters criticized the overall size of the proposed rule's PCCBA, particularly its sizing relative to the risk-based capital requirements. These commenters expressed concern that the PCCBA could adversely affect the availability of mortgage credit or the Enterprises' ability to fulfill their statutory mission. Some commenters recommended eliminating the PCCBA, capping the PCCBA as a share of the underlying risk-based capital requirements, or otherwise reducing the PCCBA. A few commenters thought that the PCCBA added unnecessary complexity. Other commenters offered alternatives to the PCCBA based on the PSPA or reinsurance arrangements. A few commenters thought that the PCCBA should not have to be composed solely of CET1 capital.

Some commenters noted that even with the PCCBA, the Enterprises likely would need support from the federal government to remain viable during a severe economic downturn. Some commenters observed that the PCCBA would mitigate the procyclicality of the aggregate risk-based capital requirements. A few commenters argued that the PCCBA could be replaced with a stress testing program that informs regulatory approvals of capital distributions and bonuses. At least one commenter suggested that FHFA should periodically reassess and solicit public comment on the sizing of the PCCBA or its component buffers.

A recurring comment related to the risk sensitivity of the PCCBA. Each of the PCCBA component buffers would

[32] 12 U.S.C. 4581, 12 CFR part 1209.

[33] 12 U.S.C. 4513b; 12 CFR part 1236.

[34] 12 U.S.C. 4614 *et seq.*

have been determined as a percent of an Enterprise's adjusted total assets. While some commenters supported this approach, many commenters advocated assessing the PCCBA or one or more of its component buffers as a percent of an Enterprise's risk-weighted assets. Related to this concern, the FSOC Secondary Market Statement found that, ''[b]ecause the proposed buffers change based on adjusted total asset size and market share, an Enterprise's capital buffers could decline on a risk-adjusted basis in response to deteriorating Enterprise asset quality or during periods of stress.'' While acknowledging that a more risk-sensitive approach could increase the procyclicality of the aggregate risk-based requirements, FSOC ''encourage[d] FHFA to consider the relative merits of alternative approaches for more dynamically calibrating the capital buffers.''

The final rule adopts the proposed rule's approach to assess each of the PCCBA component buffers as a specified percent of an Enterprise's adjusted total assets. This is a notable departure from the Basel and U.S. banking frameworks, and it is a departure that does reduce the risk-sensitivity of the framework. FHFA continues to believe that the balance of considerations weighs in favor of this approach. In FHFA's view, a fixed-percent PCCBA is important, among other reasons, to reduce the impact that the PCCBA potentially could have on higher risk exposures, avoid amplifying the secondary effects of any model or similar risks inherent to the calibration of granular risk weights for mortgage exposures, and further mitigate the procyclicality of the aggregate risk-based capital requirements. While the Basel and U.S. banking framework assess the analogous buffers against risk-weighted assets, FHFA's underlying credit risk capital requirements for mortgage exposures are considerably more risk sensitive than the analogous requirements of those frameworks. As discussed in Section V.D, that heightened risk sensitivity engenders more procyclicality than the Basel and U.S. banking frameworks, at least with respect to the aggregate risk-based capital required on mortgage exposures, and that procyclicality is in tension with FHFA's objective to ensure the safety and soundness of each Enterprise and that each Enterprise can fulfill its statutory mission to provide stability and ongoing assistance to the secondary mortgage market across the economic cycle. This tension is heightened by the concentration risk associated with the monoline nature of the Enterprises' mortgage-focused businesses. Notwithstanding the final rule's approach, however, FHFA has taken steps to enhance the risk sensitivity of the stress capital buffer.

2. Stress Capital Buffer

Under the proposed rule, an Enterprise's stress capital buffer would have equaled 0.75 percent of the Enterprise's adjusted total assets. The proposed stress capital buffer was similar in amount and rationale to the 0.75 percent going-concern buffer contemplated by the 2018 proposal. For the reasons elaborated in Section III.B.2 of the proposed rule, and as also contemplated by the Basel and U.S. banking frameworks,[35] FHFA continues to believe that each Enterprise should be capitalized to remain a viable going concern both during and after a severe economic downturn. While the regulatory capital requirements are sized to ensure an Enterprise would be regarded as a viable going concern by creditors and other counterparties, the stress capital buffer is sized to ensure that the Enterprise would, in ordinary times, maintain regulatory capital that could be drawn down during a financial stress and still maintain regulatory capital sufficient to satisfy the regulatory capital requirements after that stress.

Some commenters thought that the stress capital buffer was appropriately sized at 0.75 percent of an Enterprise's adjusted total assets. Other commenters argued that the stress capital buffer was excessive or should be eliminated. Some commenters suggested that each Enterprise needs to be capitalized only to absorb losses incurred in a severely adverse stress, not to be regarded as a viable going concern by creditors and other counterparties after that stress. One commenter suggested that FHFA consider calibrating a buffer based on an actuarial model for minimum capital, perhaps after considering the Federal Housing Administration's process for determining the minimum economic net worth and soundness of its Mutual Mortgage Insurance Fund.

Many commenters advocated increasing the risk sensitivity of the stress capital buffer. Some of these commenters suggested that the stress capital buffer should be assessed against risk-weighted assets, not adjusted total assets. A few commenters suggested that it was inappropriate to assess the same stress capital buffer on each Enterprise because each has a different risk profile. Some commenters urged FHFA to adopt the proposed rule's alternative that would rely on FHFA's eventual program for supervisory stress tests, although one commenter thought that should be implemented only after FHFA's supervisory stress testing capabilities have been developed.

After considering these comments, FHFA has determined to adopt the proposed rule's alternative approach under which FHFA would periodically re-size the stress capital buffer to the extent that FHFA's eventual program for supervisory stress tests determines that an Enterprise's peak capital exhaustion under a severely adverse stress would exceed 0.75 percent of adjusted total assets. Pending FHFA's implementation of its supervisory stress testing program, or in any year in which FHFA does not assign a greater stress capital buffer, an Enterprise's stress capital buffer would be 0.75 percent of its adjusted total assets.

FHFA is adopting the alternative approach because a dynamically re-sized stress capital buffer would be more risk-sensitive than a fixed-percent stress capital buffer, potentially varying in amount across the economic cycle and also varying in response to changes in the risk of the Enterprise's mortgage exposures. By leveraging a supervisory stress test, this approach could also incorporate nuanced assumptions, such as with respect to the continued availability and pricing of CRT during a period of financial stress. The final rule's approach is also consistent with the FSOC Secondary Market Statement's recommendation that ''encourage[d] FHFA to consider the relative merits of alternative approaches for more dynamically calibrating the capital buffers.''

3. Countercyclical Capital Buffer

Under the proposed rule, the countercyclical capital buffer for the Enterprises would have initially been set at 0 percent of adjusted total assets. The proposed rule's countercyclical capital buffer was similar in purpose and rationale to the analogous buffer of the U.S. banking framework.

Many commenters argued that FHFA should not adopt a countercyclical capital buffer. One commenter thought

[35] 78 FR at 51105 (''In calibrating the revised risk-based capital framework, the BCBS identified those elements of regulatory capital that would be available to absorb unexpected losses on a going-concern basis. The BCBS agreed that an appropriate regulatory minimum level for the risk-based capital requirements should force banking organizations to hold enough loss-absorbing capital to provide market participants a high level of confidence in their viability. The BCBS also determined that a buffer above the minimum risk-based capital requirements would enhance stability, and that such a buffer should be calibrated to allow banking organizations to absorb a severe level of loss, while still remaining above the regulatory minimum requirements.'').

the value of the countercyclical capital buffer was unclear, as the concept was still theoretical and yet to be modeled and vetted. One commenter argued the countercyclical capital buffer should be more predictable and have a phase-in period and time limitation. Another commenter suggested that FHFA should include a buffer that was triggered when home prices moved a specified amount above the long-term trend. Other commenters suggested that FHFA should clarify the degree of alignment with the U.S. banking framework. Some commenters noted that the U.S. banking regulators have been reluctant to adjust the countercyclical capital buffer. A few commenters advocated adjusting the countercyclical capital buffer based on excessive credit growth in the national housing finance markets. Some commenters were concerned that the method for sizing the countercyclical capital buffer was overly subjective. Several commenters suggested that the countercyclical capital buffer was unnecessary because of stress testing or because the Safety and Soundness Act already authorizes FHFA to temporarily increase regulatory capital requirements.

The final rule adopts the countercyclical capital buffer as proposed. FHFA continues to believe that the countercyclical capital buffer serves an important purpose to the extent that it facilitates FHFA's exercise of its existing authorities to temporarily increase regulatory capital requirements when excess aggregate credit growth poses heightened risk to the safety and soundness of the Enterprises. As discussed in the proposed rule, FHFA does not expect to adjust this buffer as a means to replace or supplement the countercyclical adjustment to the risk-based capital requirements for single-family mortgage exposures. Instead, as under the Basel and U.S. banking frameworks, FHFA would adjust the countercyclical capital buffer taking into account the macro-financial environment in which the Enterprises operate, such that it would be deployed only when excess aggregate credit growth is judged to be associated with a build-up of system-wide risk. This focus on excess aggregate credit growth would have meant that the countercyclical capital buffer likely would be deployed on an infrequent basis and generally only when similar buffers are deployed by the U.S. banking regulators. FHFA also affirms that any adjustment to the countercyclical capital buffer would be made in accordance with applicable law and after appropriate notice to the Enterprises.

4. Stability Capital Buffer

a. Proposed Rule's Approach

As discussed in Section III.B.4 of the proposed rule, the lessons of the 2008 financial crisis have established that the failure of an Enterprise could result in significant harm to the national housing finance markets, as well as the U.S. economy more generally. The Enterprises remain the dominant participants in the housing finance system, owning or guaranteeing 45 percent of residential mortgage debt outstanding as of June 30, 2020. The Enterprises also continue to control critical infrastructure for securitizing and administering $5.8 trillion of single-family and multifamily MBS. Because of the interconnectedness between the Enterprises, distress at one Enterprise could cause distress at the other Enterprise. The Enterprises' imprudent risk-taking and inadequate capitalization led to their near collapse and were among the proximate causes of the 2008 financial crisis. The precipitous financial decline of the Enterprises was also among the most destabilizing events of the 2008 financial crisis, leading to their taxpayer-backed rescue in September 2008. Even today, a perception persists that the Enterprises are ''too big to fail.'' This perception reduces the incentives of creditors and other counterparties to discipline risk-taking by the Enterprises. This perception also produces competitive distortions to the extent that it enables the Enterprises to fund themselves at a lower cost than other market participants.

Pursuant to the Safety and Soundness Act, as amended by HERA, the FHFA Director's principal duties are, among other duties, to ensure that each Enterprise operates in a safe and sound manner and that the operations and activities of each Enterprise foster liquid, efficient, competitive, and resilient national housing finance markets.[36] FHFA proposed to incorporate into each Enterprise's PCCBA an Enterprise-specific stability capital buffer that would be tailored to the risk that the Enterprise's default or other financial distress could have on the liquidity, efficiency, competitiveness, or resiliency of the national housing finance markets (housing finance market stability risk).[37] FHFA cited several reasons for the proposed rule's stability capital buffer.

First, an Enterprise-specific stability capital buffer would foster liquid, efficient, competitive, and resilient national housing finance markets by reducing the expected impact of the Enterprise's failure on the national housing finance markets. Under a regulatory capital framework in which each Enterprise is subject to the same capital requirements and has the same probability of default, a larger Enterprise's default would nonetheless still pose a greater expected impact due to the greater magnitude of the effects of its default on the national housing finance markets. As a result, a probability of default that might be acceptable for a smaller Enterprise might be unacceptably high for a larger Enterprise. By subjecting a larger Enterprise to a larger capital surcharge, an Enterprise-specific stability capital buffer would reduce the probability of a larger Enterprise's default, aligning the expected impact of its default with that of a smaller Enterprise.

Second, an Enterprise-specific stability capital buffer also would foster liquid, efficient, competitive, and resilient national housing finance markets by creating incentives for each Enterprise to reduce its housing finance market stability risk by curbing its market share and growth in ordinary times, with the possibility of an expanded role during a period of financial stress.

Third, an Enterprise-specific stability capital buffer could offset any funding advantage that an Enterprise might have on account of being perceived as ''too big to fail.'' That, in turn, would remove the incentive for counterparties to shift risk to the Enterprise, where that incentive not only increases the housing finance market stability risk posed by the Enterprise but also undermines the competitiveness of the national housing finance markets.

Fourth, a larger capital cushion at an Enterprise could afford the Enterprise and FHFA more time to address emerging weaknesses at the Enterprise that could adversely impact the national housing finance markets. In addition to mitigating national housing finance market risk, the additional time afforded by a larger capital cushion could help FHFA ensure that each Enterprise operates in a safe and sound manner.

Finally, with respect to safety and soundness, any perception that an

[36] 12 U.S.C. 4513(a)(1).

[37] FHFA's proposed stability capital buffer should not be construed to imply or otherwise suggest that a similar capital surcharge would necessarily be appropriate for the Enterprises' counterparties or other market participants in the housing finance system. Some of these market participants do not pose much, if any, risk to the liquidity, efficiency, competitiveness, or resiliency of national housing finance markets.

Enterprise is ''too big to fail'' leads to moral hazard that undermines market discipline by creditors and other counterparties over the risk taking at an Enterprise. By increasing the regulatory capital at an Enterprise, the stability capital buffer would shift more tail risk back to the Enterprise's shareholders, which should have the added benefit of offsetting any ''too big to fail'' funding advantage arising from unpriced tail risk. The resulting enhanced market discipline should enhance safety and soundness by increasing each Enterprise's incentives to effectively manage its risks.

FHFA proposed a stability capital buffer based on a market share approach. Under FHFA's market share approach, an Enterprise's stability capital buffer would have depended on an Enterprise's share of total residential mortgage debt outstanding that exceeds a threshold of 5.0 percent market share. The stability capital buffer, expressed as a percent of adjusted total assets, would have increased by 5 basis points for each percentage point of market share exceeding that threshold. FHFA also solicited comment on an alternative approach that would have the Enterprises compute their stability capital buffer in a manner analogous to the U.S. banking approach for determining the surcharge for global systemically important bank holding companies (GSIB).

b. FSOC Secondary Market Statement

The proposed rule's stability capital buffer was a significant departure from the 2018 proposal. That proposal did not contemplate an Enterprise-specific capital surcharge or other buffer that was tailored to the Enterprise's size or importance, any funding advantage that the Enterprise might have on account of being perceived as ''too big to fail,'' or the risk that the Enterprise's default could pose to the national housing finance markets. The FSOC Secondary Market Statement generally affirmed the merit of this enhancement to the 2018 proposal, and in particular the importance of a separate capital buffer that is expressly intended to mitigate an Enterprise's stability risk.

FSOC found that any distress at the Enterprises that affected their secondary mortgage market activities could pose a risk to financial stability, if risks are not properly mitigated. This important, if perhaps obvious, finding was echoed by the statements made by several of the FSOC principals in connection with FSOC Secondary Market Statement.[38] This finding also confirmed a premise of the proposed rule's stability capital buffer.

FSOC recommended that the regulatory capital requirements should be an important mitigant of the Enterprises' potential stability risk. Specifically, the FSOC Secondary Market Statement stated that ''[a] stability capital buffer would mitigate risks to financial stability by reducing the expected impact of an Enterprise's distress on financial markets or other financial market participants and by addressing the potential for decreased market discipline due to an Enterprise's size and importance.'' Even more importantly, FSOC also recommended that the capital buffers should be intentionally tailored to that potential stability risk, stating ''[t]he capital buffers should be tailored to mitigate the potential risks to financial stability.''

After the FSOC Secondary Market Statement, and given the historical record as to the significant harm an Enterprise's failure could have on the financial system and the economy more generally, it is clear that not only FHFA, but also the other federal regulators, expect that a meaningful stability capital buffer that is specific to each Enterprise's stability risk is a critical feature of the Enterprises' regulatory capital framework.

c. Comments on the Proposed Rule

Many commenters criticized the overall size of each Enterprise's stability capital buffer. Some commenters thought that the stability capital buffer was excessive or even unnecessary given the sizing of the risk-based capital requirements or because of Treasury's commitment under the PSPA. One commenter suggested capping the stability capital buffer at a fixed percent. Other commenters urged eliminating the stability capital buffer because, in their view, it conflicts with the Enterprises' countercyclical mission, while others questioned its applicability because the Enterprises transfer much of the interest rate risk and funding risk on the mortgage exposures that secure their guaranteed MBS. One commenter remarked that the Enterprises' failures in the 2008 financial crisis were due to their underwriting practices, not their market shares.

A few commenters thought that the Enterprises' stability capital buffers were insufficient. Some commenters emphasized the necessity of the stability capital buffer in light of Treasury's rescue of the Enterprises during the 2008 financial crisis. One commenter thought that the stability capital buffer reflects the lessons learned from past crises and the Enterprises' effects on the economy.

Many commenters criticized the proposed rule's market share approach. Some commenters were concerned that the market share approach would be procyclical, increasing an Enterprise's stability capital buffer during a period of financial stress as the Enterprise increased its acquisition share. Some commenters thought that the market share approach might not be well-tailored to an Enterprise's housing finance market stability risk. Many commenters expressed support for either or both of the U.S. banking framework's GSIB surcharge methods, perhaps with adjustments. Other commenters viewed each of the U.S. banking framework's GSIB surcharge methods as inapplicable to the Enterprises due to the different business models.

d. Final Rule's Approach

FHFA is adopting the stability capital buffer as proposed. Consistent with the findings and recommendations of the FSOC Secondary Market Statement, FHFA continues to believe that the stability capital buffer is a critical feature of the Enterprises' regulatory capital framework. An Enterprise-specific stability capital buffer will foster liquid, efficient, competitive, and

[38] *See* Statement of CFTC Chairman Heath P. Tarbert on FSOC's Activities-Based Review of Secondary Mortgage Market Activities, available at: *https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement092520* (''The good news is that for the first time, the FSOC is formally acknowledging that any distress that affects the secondary market activities of the GSEs could pose a risk to the financial stability of the United States if not properly mitigated.''); Statement by FDIC Chairman Jelena McWilliams on FSOC Activities-Based Review of Secondary Mortgage Market Activities, available at: *https://www.fdic.gov/news/speeches/spsep2520.html* (''Prior to the global financial crisis, Fannie Mae and Freddie Mac were two of the largest, most highly leveraged financial companies in the world. Since being placed into conservatorship in September of 2008, their role in the mortgage market has only grown.''); Statement by the Acting Comptroller of the Currency Regarding FSOC's Consideration of Secondary Mortgage Market Activities, available at: *https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020–128.html* (''I support the FSOC's activities-based review of the secondary mortgage market and the thoughtful analysis of the Government Sponsored Enterprises' contribution to financial stability risks as well as of the efforts to address them, ...''); CFPB Director Kraninger's Remarks at the Financial Stability Oversight Council Meeting, available at: *https://www.consumerfinance.gov/about-us/newsroom/director-kraningers-remarks-financial-stability-oversight-council-meeting/* (''As the dominant participants in the secondary mortgage market, [the GSEs] provide the liquidity needed by lenders to provide affordable housing options to consumers. Financial stability and access to credit may be imperiled if the GSEs cannot perform this role effectively. It therefore is critical that we take steps to mitigate that risk.'').

resilient national housing finance markets by reducing the expected impact of the Enterprise's failure on the national housing finance markets. It also will create incentives for each Enterprise to reduce its housing finance market stability risk by curbing its market share and growth in ordinary times, preserving room for a larger role during a period of financial stress. An Enterprise-specific stability capital buffer could offset any funding advantage that an Enterprise might have on account of being perceived as ''too big to fail,'' which would remove the incentive for counterparties to shift risk to the Enterprise and thereby increase the housing finance market stability risk posed by the Enterprise. A larger capital cushion at an Enterprise could afford the Enterprise and FHFA more time to address emerging weaknesses at the Enterprise that could adversely impact the national housing finance markets. By increasing the regulatory capital at an Enterprise, the stability capital buffer also will shift more tail risk back to the Enterprise's shareholders, which should have the added benefit of offsetting any ''too big to fail'' funding advantage arising from unpriced tail risk and thereby enhance market discipline over excessive risk taking.

As urged by many commenters, FHFA carefully considered the proposed rule's alternative that would have had each Enterprise compute its stability capital buffer in a manner analogous to the U.S. banking approach for determining the GSIB surcharge. However, limits on available data preclude, at least at this time, the adjustments that would be necessary to ensure that a modified U.S. banking framework approach yields an Enterprise-specific stability capital buffer that is reasonably tailored to each Enterprise's housing finance market stability risk.

While the U.S. banking framework's GSIB surcharge methods might appear adaptable to financial institutions other than banking organizations, adopting an analogous approach for calibrating the Enterprises' stability capital buffer is not practicable for at least two reasons. First, the U.S. banking framework determines some of the systemic risk indicators using data specific to banking organizations, which presents data limitations that would need to be overcome. For example, each of the U.S. banking framework's systemic indicators is a relative measure determined by dividing the banking organization's applicable measure by the aggregate measure for a set of large banking organizations. The Enterprises' measures are not included in such aggregate measures, and the GSIB surcharge tiers were calibrated based on the bank-only aggregate measure. Therefore, each Enterprise's measure cannot simply be added to that aggregate measure.

Second, FHFA has not identified reliable alternative systemic risk indicators for the Enterprises. For example, the U.S. banking framework's systemic indicators for substitutability relate to measures of payments activity, assets under custody, and underwritten transactions in debt and equity markets. Using the data inputs specified by the U.S. banking framework, the systemic indicator for substitutability would have produced an exceedingly small measure for each Enterprise, perhaps even zero. That measure is clearly inconsistent with any reasonable understanding of the substitutability of the Enterprises, which currently have a near absence of private-sector market participants that could quickly fill the role of the Enterprises in supporting the secondary market.

Without considerable adjustments that are not practicable with existing data, applying the U.S. banking framework's GSIB surcharge methods to the Enterprises would produce results having little, if any, correspondence with a commonsense understanding of each Enterprise's housing finance market stability risk. Consistent with this conclusion, the U.S. banking framework's GSIB framework does not apply to any nonbank financial companies supervised by the Federal Reserve Board, and instead the Federal Reserve Board contemplates a tailored approach to these financial institutions.[39]

With respect to the market share approach, FHFA continues to believe that the sizing of each Enterprise's stability capital buffer is reasonably tailored to the Enterprise's housing finance market stability risk. As of June 30, 2020, Fannie Mae and Freddie Mac would have had stability capital buffers of, respectively, 1.07 and 0.66 percent of adjusted total assets. Under the 33 percent average risk weight on their exposures at that time, Fannie Mae and Freddie Mac's stability capital buffers would have been 3.3 and 2.0 percent of risk-weighted assets, respectively, which would have been a somewhat less than U.S. GSIBs of similar size. Notably, were the average risk weight on the Enterprises' exposures to increase to 35 percent, Fannie Mae's and Freddie Mac's stability capital buffers would be equivalent to 3.1 and 1.9 percent of risk-weighted assets, respectively, considerably below the capital surcharges of U.S. GSIBs of similar size.

FHFA acknowledges that the market share approach could increase the procyclicality of the aggregate risk-based capital requirements. There is inherently some tension between tailoring the stability capital buffer to an Enterprise's housing finance market stability risk, which generally would increase when it expands its role, and mitigating the procyclicality of the regulatory capital framework. To strike an appropriate balance, the final rule adopts the approach of the proposed rule, which provided that an increase in an Enterprise's stability capital buffer would in effect apply two years after an increase in the Enterprise's market share.

B. Prescribed Leverage Buffer Amount

Under the proposed rule, to avoid limits on capital distributions and discretionary bonus payments, an Enterprise would have been required to maintain tier 1 capital in excess of the amount required under the tier 1 leverage ratio requirement by at least the amount of a PLBA equal to 1.5 percent of the Enterprise's adjusted total assets. The primary purpose of the PLBA was to serve as a non-risk-based supplementary measure that provides a credible backstop to the combined PCCBA and risk-based capital requirements. From a safety-and-soundness perspective, each of the risk-based and leverage ratio requirements offsets potential weaknesses of the other. Taken together, well-calibrated risk-based capital requirements working with a credible leverage ratio requirement are more effective than either would be in isolation. FHFA deemed it important that the buffer-adjusted risk-based and leverage ratio requirements are also closely calibrated to each other so that they have an effective complementary relationship.

Many commenters criticized the sizing of the PLBA. Some of these commenters suggested reducing the PLBA to 0.5 percent or 0.75 percent of adjusted total assets. Some commenters argued the PLBA should be removed entirely. A few commenters did support the proposed rule's PLBA of 1.5 percent of adjusted total assets. Other commenters suggested that payout restrictions should be based only on the PCCBA-adjusted risk-based capital requirements.

As discussed in Section VII.B.2, commenters also offered related views on the proposed rule's PLBA-adjusted leverage ratio requirement, and those comments have some implications for the PLBA itself. The PLBA-adjusted

[39] 80 FR 49084.

leverage ratio requirement prescribed the tier 1 capital necessary to avoid restrictions on capital distributions and discretionary bonuses. Many of these commenters contended that the PLBA-adjusted leverage ratio requirement likely would often exceed the PCCBA-adjusted risk-based capital requirements. A binding PLBA-adjusted leverage ratio requirement, in the view of many of these commenters, could reduce the risk sensitivity of the regulatory capital framework, decrease an Enterprise's incentive to engage in CRT, incentivize an Enterprise to increase risk taking, or reduce an Enterprise's ability to offset lower returns on some exposures with higher returns on other exposures. Some commenters, on the other hand, argued that the PLBA-adjusted leverage ratio requirement was inadequate given the Enterprises' historical loss experience and the risk that each Enterprise poses to financial stability. Some commenters suggested sizing the PLBA-adjusted leverage ratio requirement based on the pre-CRT risk-based capital requirements.

After considering these comments, FHFA has determined to adopt the PLBA as proposed. FHFA continues to believe that the proposed rule's calibration methodology for the PLBA was fundamentally sound. The 1.5 percent PLBA is calibrated to ensure that the PCCBA and PLBA have an effective complementary relationship such that each is independently meaningful. The PLBA for Fannie Mae and Freddie Mac would have been, respectively, $53 billion and $38 billion as of September 30, 2019 and would have been $58 billion and $41 billion as of June 30, 2020. For Fannie Mae, the PLBA would have been less than its PCCBA, while for Freddie Mac the reverse would have been true. Moreover, the relative sizing of the PLBA is generally consistent with the relative sizing of similar buffers under the U.S. banking framework. A 1.5 percent PLBA for the Enterprises is 37.5 percent of the 4.0 percent PLBA-adjusted leverage ratio requirement to avoid payout restrictions. The 2.0 percent supplementary leverage ratio requirement of the U.S. banking framework is 40 percent of the 5.0 percent buffer-adjusted leverage ratio requirement to avoid payout restrictions. Finally, FHFA notes that the Federal Home Loan Banks are subject to a 4.0 percent total leverage ratio requirement. While the Federal Home Loan Banks might have greater interest rate risk profiles than the Enterprises, the Federal Home Loan Banks also have the safety and soundness benefits of the statutory requirement that each advance be fully secured, and that security interest has special protection under the Federal Home Loan Bank Act.

FHFA agrees with commenters that the PCCBA-adjusted risk-based capital requirements should, as a general rule, exceed the regulatory capital required under the PLBA-adjusted leverage ratio requirement. Some commenters' analysis suggested that the PLBA-adjusted leverage ratio requirement generally would exceed the PCCBA-adjusted risk-based capital requirements over most of the economic cycle. That could evidence flaws in FHFA's method for calibrating the PLBA-adjusted leverage ratio requirements, the PCCBA-adjusted risk-based capital requirements, or both. After taking into account the views of commenters, and also after considering the FSOC Secondary Market Statement's affirmation of the sizing of the leverage ratio requirements and its suggestion that additional capital could be required, FHFA has adopted adjustments to the risk-based capital requirements that generally should reduce the likelihood that the PLBA-adjusted leverage ratio requirements would exceed the PCCBA-adjusted risk-based capital requirements.

C. Payout Restrictions

Under the proposed rule, an Enterprise would have been subject to limits on its capital distributions and discretionary bonus payments if either its capital conservation buffer was less than its PCCBA or its leverage buffer was less than its PLBA. An Enterprise's maximum payout ratio would have determined the extent to which it is subject to limits on capital distributions and discretionary bonuses. An Enterprise also would not have been permitted to make distributions or discretionary bonus payments during the current calendar quarter if, as of the end of the previous calendar quarter: (i) The eligible retained income of the Enterprise was negative; and (ii) either (A) the capital conservation buffer of the Enterprise was less than its stress capital buffer, or (B) the leverage buffer of the Enterprise was less than its PLBA.

Some commenters supported the payout restrictions as proposed. A few commenters suggested that restrictions on discretionary bonuses would be unfair to employees. Other commenters argued against payout restrictions when an Enterprise is profitable. Some contended that an Enterprise should not be permitted to make any capital distribution at all if it maintained regulatory capital less than its PCCBA-adjusted risk-based capital requirements or its PLBA-adjusted leverage ratio requirements. Other commenters sought clarification as to the circumstances under which an Enterprise would be subject to enforcement action for maintaining regulatory capital less than its PCCBA-adjusted risk-based capital requirements or its PLBA-adjusted leverage ratio requirements. A few commenters suggested changes to the proposed rule's maximum payout ratios.

The final rule adopts the payout restrictions as proposed. FHFA continues to believe that the payout restrictions are appropriately tailored to ensure each Enterprise will maintain safe and sound levels of regulatory capital in the ordinary course while also being able to draw down its regulatory capital during a period of financial stress.

With respect to commenters' suggested clarifications, FHFA continues to expect that each Enterprise generally will seek to avoid any payout restriction by maintaining regulatory capital in excess of its buffer-adjusted risk-based and leverage ratio requirements during ordinary times. FHFA also expects that, consistent with its statutory mission to provide stability and ongoing assistance to the secondary mortgage market across the economic cycle, each Enterprise might draw down its buffers during a period of financial stress. However, it would not be consistent with the safe and sound operation of an Enterprise for the Enterprise to maintain regulatory capital less than its buffer-adjusted requirements in the ordinary course except for some reasonable period after a financial stress, pending the Enterprise's efforts to raise and retain regulatory capital.

Nothing in the final rule limits the authority of FHFA to take action to address unsafe or unsound practices or violations of law, including actions inconsistent with an Enterprise's charter. FHFA could, depending on the facts and circumstances, determine that it is an unsafe or unsound practice, or that it is inconsistent with the Enterprise's statutory mission, for an Enterprise to maintain regulatory capital that is less than its buffer-adjusted requirements during ordinary times. If FHFA were to make that determination, FHFA would have all of its enforcement and other authorities, including its authority to issue a cease-and-desist order, to require the Enterprise to remediate that unsafe or unsound practice—for example, by developing and implementing a plan to raise additional regulatory capital.

IX. Credit Risk Capital: Standardized Approach

A. Single-Family Mortgage Exposures

Much like the proposed rule, the standardized credit risk-weighted assets for each single-family mortgage exposure will be determined under the final rule using grids and risk multipliers that together will assign an exposure-specific risk weight based on the risk characteristics of the single-family mortgage exposure. The base risk weight will be a function of the single-family mortgage exposure's MTMLTV, among other things. The MTMLTV will be subject to a countercyclical adjustment to the extent that national house prices are 5.0 percent greater or less than an inflation-adjusted long-term trend. This base risk weight will then be adjusted based on other risk attributes, including any mortgage insurance or other loan-level credit enhancement and the counterparty strength on that enhancement. Finally, this adjusted risk weight will be subject to a floor.

1. Base Risk Weights

In general, FHFA calibrated the proposed rule's base risk weights and risk multipliers for single-family mortgage exposures to require credit risk capital sufficient to absorb the lifetime unexpected losses incurred on single-family mortgage exposures experiencing a shock to house prices similar to that observed during the 2008 financial crisis. Lifetime unexpected losses are the difference between lifetime credit losses in such conditions (also known as stress losses) and expected losses. The proposed rule would have required an Enterprise to determine a base risk weight for each single-family mortgage exposure using one of four single-family grids (each, a single-family grid) based on performance history:

- *Non-performing loan (NPL):* A single-family mortgage exposure that is 60 days or more past due.
- *Modified re-performing loan (modified RPL):* A single-family mortgage exposure that is not an NPL and has previously been modified or entered a repayment plan.
- *Non-modified re-performing loan (non-modified RPL):* A single-family mortgage exposure that is not an NPL, has not been previously modified or entered a repayment plan, and has been an NPL at any time in the last 48 calendar months.
- *Performing loan:* A single-family mortgage exposure that is not an NPL, a modified RPL, or a non-modified RPL. A non-modified RPL generally would have transitioned to a performing loan after not being an NPL at any time in the prior 48 calendar months.

Many commenters generally supported the proposed rule's base risk weights, which resulted in exposure-specific credit risk capital requirements generally similar to those of the 2018 proposal, subject to some simplifications and refinements. Several commenters suggested that FHFA should establish a process for reviewing the base risk weights every few years that includes soliciting public input from interested parties.

FHFA also received comments on the framework for calibrating the proposed rule's base risk weights. Some commenters advocated greater transparency into, and justification of, the calibration framework, particularly the increase in base risk weights relative to the 2018 proposal.[40] One commenter argued that the house price shock and recovery assumptions underlying the calibration framework were inappropriate given the changes in the national housing finance markets since the 2008 financial crisis, including the enhanced consumer protections and greater capital requirements for mortgage insurers and other market participants. Another commenter recommended a separate capital requirement of 50 basis points of adjusted total assets to mitigate the model risk associated with the calibration framework. Several commenters argued that FHFA should acknowledge that accounting losses comprised a substantial portion of the Enterprises' crisis-era loss experience. Some commenters suggested that the credit risk capital requirements were motivated by an intent to drive changes to the structure of the national housing finance markets. Commenters also suggested that the final rule should permit flexibility to allow the Enterprises to adapt to an evolving market and for their partners to innovate.

Commenters suggested that the base risk weights for high MTMLTV loans were excessive and could adversely impact lending by state housing finance agencies. Some commenters argued that the base risk weight should be assigned based on original loan-to-value (OLTV) instead of MTMLTV for the first few years because, among other things, the change would reduce procyclicality. One commenter recommended splitting each single-family grid's band for single-family mortgage exposures with MTMLTV between 30 percent and 60 percent into three equally sized bands to increase the risk sensitivity of the base risk weights. Some commenters argued that the base risk weights for some higher MTMLTV single-family mortgage exposures were excessive. One commenter suggested using a national house price index instead of state-level house prices to calculate the MTMLTV for a single-family mortgage exposure.

A few commenters advocated the use of a borrower's original credit score instead of the refreshed credit score because the refreshed credit score could materially impact a borrower's access to credit and might increase procyclicality.

Commenters urged changes to the proposed rule's treatment of modified RPLs and non-modified RPLs. Some commenters suggested permitting a modified RPL to transition to a performing loan after several years of performance because these modified RPLs perform much like single-family mortgage exposures that had never been delinquent. One commenter proposed that single-family mortgage exposures subject to repayment plans and other loss mitigation programs that do not modify the required payments should be treated as non-modified RPLs so as to not discourage use of these plans and programs.

Many commenters advocated changes for single-family mortgage exposures in COVID–19-related forbearance. Commenters argued that these exposures (and other single-family mortgage exposures in similar disaster-related forbearance programs) should not be treated as NPLs or modified RPLs for purposes of assigning a basis risk weight and instead generally should be assigned a lower base risk weight. Commenters also suggested that these exposures should be assigned a different performance classification only after the forbearance period ends.

After considering these comments, FHFA has adopted the following changes to the proposed rule's base risk weights.

- The final rule adopts a revised definition of modified RPL that provides that a modified RPL will become a performing loan after 60 calendar months of performance. This treatment is similar to the treatment afforded to non-modified RPLs. In its analysis supporting the proposed rule, FHFA found a material difference in loan performance for modified RPLs that re-performed for four years and performing loans that were never modified. However, FHFA also found this difference began to diminish after five years of re-performance. In light of the commenters' recommendation and upon

[40] FHFA previously published a white paper on its calibration framework available at *https://www.fhfa.gov/PolicyProgramsResearch/Research/Pages/FHFA-Mortgage-Analytics-Platform-Whitepaper-V2.aspx.*

re-examining the available information, the final rule allows for modified RPLs that perform for five years to be reclassified as performing loans.

- Each single-family grid's band for single-family mortgage exposures with an MTMLTV between 30 percent and 60 percent has been divided into three separate, equally-sized bands. This change will moderately enhance the regulatory capital framework's risk sensitivity without materially increasing its complexity.
- A single-family mortgage exposure in a repayment plan will be treated as a non-modified RPL instead of a modified RPL. This change will avoid discouraging the use of these programs, which are important means of mitigating the Enterprises' losses. If after the forbearance the borrower elects a payment deferral instead of a reinstatement or a repayment plan, the single-family mortgage exposure will still be treated as a modified RPL.

The final rule also implements a tailored approach to any single-family mortgage exposure that is in a forbearance pursuant to the CARES Act or a forbearance program for COVID–19-impacted borrowers. During the forbearance (and pending negotiations or other steps reasonably expected to result in a modification), the base risk weight for an NPL will be equal to the product of 0.45 and the base risk weight that would otherwise be assigned to the NPL. After the forbearance, any period of time during which the single-family mortgage exposure was past due will be disregarded for the purpose of assigning a risk weight if the entire amount past due was repaid upon the termination of the forbearance. In effect, a single-family mortgage exposure will, after a reinstatement, return to the classification it had before the COVID–19-related forbearance. As discussed above, because a repayment plan will not be treated as a modification, a single-family mortgage exposure that is subject to a repayment plan after a COVID–19-related forbearance will be treated as a non-modified RPL instead of a modified RPL.

With respect to commenters' concerns about the perceived increase in the base risk weights, FHFA notes that, while the proposed rule's base risk weights generally were greater than the base risk weights implicit in the single-family grids of the 2018 proposal, that change generally would not result in greater aggregate credit risk capital requirements after taking into account offsetting changes to the risk multipliers. The proposed rule eliminated the 2018 proposal's risk multipliers for number of borrowers and loan size, and reallocated the associated unexpected losses across the base risk weights. The practical effect of this change was that the base risk weights in the single-family grids are greater than they otherwise would have been if the two risk multipliers had not been eliminated.

2. Countercyclical Adjustment

Under the proposed rule, the MTMLTV used to assign a base risk weight to a single-family mortgage exposure would have been subject to a countercyclical adjustment that an Enterprise would have been required to make when national house prices increased or decreased by more than 5.0 percent from an estimated inflation-adjusted long-term trend (MTMLTV adjustment). The proposed rule's MTMLTV adjustment would have been based on FHFA's U.S. all-transactions FHFA HPI.

Several commenters generally supported the MTMLTV adjustment as an effective means of mitigating the procyclicality of the aggregate risk-based capital requirements. One commenter suggested that the MTMLTV adjustment was duplicative of the countercyclical capital buffer and therefore unnecessary. A commenter argued that, while the MTMLTV adjustment functioned effectively when applied to historical datasets, it might not function as expected in the future and could, under certain circumstances, reduce the Enterprises' incentives to acquire high OLTV single-family mortgage exposures. Other commenters thought that the procyclicality could be addressed by increasing reliance on OLTV and credit scores at origination instead of MTMLTV and refreshed credit scores. Some commenters thought that CRT could play a role in mitigating procyclicality.

Many commenters recommended changes to the MTMLTV adjustment. Some commenters suggested that the MTMLTV adjustment should be regionalized by using home prices in each state or metropolitan statistical area to avoid distorting regional lending based on national house price trends. Another commenter advocated using a purchase-only HPI instead of the all-transactions FHFA HPI. That commenter also advocated using data from 1975 to 2001 to specify the long-term trend. Commenters also proposed periodically reevaluating the MTMLTV adjustment.

Some commenters focused on the 5.0 percent collar. A few commenters advocated not using a collar and instead applying the MTMLTV adjustment regardless of the extent to which national house prices had departed from the long-term trend. Other commenters suggested a wider collar or an asymmetrical collar that set thresholds at different levels of deviation above and below the long-term trend. One commenter suggested applying the MTMTLTV adjustment to only half the incremental house price appreciation above the collar.

After considering the views of commenters, FHFA has determined to adopt the proposed rule's MTMLTV adjustment with two changes. First, FHFA agrees with commenters that an expanded-data HPI, for example the recently published national, not-seasonally adjusted, expanded-data FHFA House Price Index®, provides a better basis for identifying departures from the inflation-adjusted long-term national house price trends. The expanded-data FHFA HPI excludes the potential valuation biases associated with refinancing transactions, which generally assign a house valuation through an appraisal. The expanded-data FHFA HPI also more accurately reflects market activity by supplementing the Enterprises' acquisitions with data from Federal Housing Administration mortgages and real property records. The additional data provide sufficient sample sizes to ensure robust estimation of the HPI back to 1975.

To estimate the long-term trend using the expanded-data FHFA HPI, FHFA employed the same trough-to-trough methodology used in the proposed rule. The parameters of the long-term trend are estimated using a linear regression on the natural logarithm of real HPI from the trough in the first quarter of 1976 to the trough in the first quarter of 2012, where the quarterly HPI has been deflated by the average quarterly non-seasonally adjusted Consumer Price Index for All Urban Consumers, U.S. City Average, All Items Less Shelter. The long-term trend line for the expanded-data FHFA HPI is somewhat different than the long-term trend line under the proposed rule. Under the final rule's long-term trend line, as of June 30, 2020, house prices were moderately greater than the 5 percent collar. As a result, as of June 30, 2020, each Enterprise would be required to make an increase to the MTMLTVs of single-family mortgage exposures, increasing aggregate risk-based capital for these exposures.

Second, the final rule prescribes a trigger for FHFA to re-estimate the long-term trend line upon a new trough. FHFA will adjust the formula for the long-term HPI trend in accordance with applicable law if two conditions are

satisfied as of the end of a calendar quarter that follows the last adjustment to the long-run HPI trend: (i) The average of the deflated HPI's departures from the long-term HPI trend over four consecutive calendar quarters has been less than -5.0 percent; and (ii) after the end of the calendar quarter in which the first condition is satisfied, the deflated HPI has increased to an extent that it again exceeds the long-term HPI trend. The point in time of the new trough used by FHFA to adjust the formula for the long-term HPI trend will be identified by the calendar quarter with the smallest deflated HPI in the period that includes the calendar quarter in which the first condition is satisfied and ends at the end of the calendar quarter in which the second condition is first satisfied. The proposed rule contemplated changes to the 2018 proposal to mitigate the procyclicality of the aggregate risk-based capital requirements of the 2018 proposal. FHFA agreed with many of the commenters on the 2018 proposal that mitigating the procyclicality of the 2018 proposal's risk-based capital requirements would facilitate capital management and enhance the safety and soundness of the Enterprises by preventing risk-based capital requirements from decreasing to unsafe and unsound levels. Mitigating that procyclicality was also critical, in FHFA's view, to position each Enterprise to fulfill its statutory mission across the economic cycle. FHFA continues to believe that the MTMLTV adjustment is effective in mitigating that procyclicality.

In FHFA's view, the MTMLTV adjustment and the countercyclical capital buffer are not duplicative. Each serves a different purpose. FHFA does not expect to adjust the countercyclical capital buffer as a means to replace or supplement the MTMLTV adjustment. Instead, as under the Basel and U.S. banking frameworks, FHFA would adjust the countercyclical capital buffer taking into account the macro-financial environment in which the Enterprises operate, such that it would be deployed only when excess aggregate credit growth is judged to be associated with a build-up of system-wide risk. This focus on excess aggregate credit growth would mean that the countercyclical capital buffer likely would be deployed on an infrequent basis and generally only when similar buffers are deployed by the U.S. banking regulators. In contrast, the application of the MTMLTV would not depend on a determination by FHFA. Rather the MTMLTV adjustment has an automatic trigger such that an Enterprise would be required to make the adjustment when national house prices increased or decreased by more than 5.0 percent from the long-term trend. The MTMLTV adjustment therefore could apply in circumstances in which house prices deviate significantly from the long-term trend, but there is not simultaneously a build-up of system-wide risk.

FHFA also continues to believe that the 5.0 percent collar strikes an appropriate balance between mitigating procyclicality and preserving the risk sensitivity of the regulatory capital framework. FHFA did consider an asymmetric collar. After considering the relative frequency of significant departures of house prices from the long-term trend, FHFA believes the symmetrical 5.0 percent collar strikes an appropriate balance that avoids distorting the economic signals provided by relatively frequent, but less significant, departures both above and below that trend.

FHFA also considered, but determined not to, regionalize the MTMLTV adjustment by using more granular house price indexes, such as state or MSA house price indexes. Doing so could potentially have enhanced risk sensitivity but would significantly increase the complexity of the regulatory capital framework and the model risk associated with a more granular adjustment.

3. Risk Multipliers

The proposed rule would have required an Enterprise to adjust the base risk weight assigned to a single-family mortgage exposure using a set of risk multipliers to account for additional loan characteristics. The risk multipliers would have refined the base risk weight to account for risk factors beyond the primary risk factors reflected in the single-family grids and for variations in secondary risk factors not captured in the risk profiles of the synthetic loans used to calibrate the single-family grids. The proposed rule's risk multipliers were substantially the same as those of the 2018 proposal, with some simplifications and refinements. The adjusted risk weight for a single-family mortgage exposure would have been the product of the base risk weight, the combined risk multiplier, and any credit enhancement multiplier.

Commenters generally supported the proposed rule's risk multipliers, including the simplifications and refinements made to the 2018 proposal. Several commenters suggested that FHFA should establish a process for reviewing the risk multipliers every few years that includes soliciting public input from interested parties. Some commenters argued that the risk multipliers would result in more capital relief for mortgage insurance than other forms of credit risk transfer.

Several commenters urged FHFA to reinstate the 2018 proposal's cap on the maximum combined risk multiplier for a single-family mortgage exposure. One commenter argued that the base risk weights, when adjusted by risk multipliers, would result in excessive credit risk capital requirements for rate-term refinance loans and purchase-money loans and inadequate credit risk capital requirements for cash-out refinance loans. Other commenters suggested eliminating the risk multiplier for refinance burnout.

Some commenters advocated risk multipliers that would reduce the credit risk capital requirement for a single-family mortgage exposure originated by a state housing finance agency or credit union, where the borrower received down-payment support from a state housing finance agency, or where the borrower received specified homebuyer counseling. One commenter suggested that the risk multipliers should reduce the credit risk capital requirement for a single-family mortgage exposure with a lower balance, for a borrower below a particular area median income threshold, and for a borrower in a locality with lower home ownership rates. A commenter also suggested that the risk multipliers should not increase the credit risk capital requirement for condominium-secured single-family mortgage exposures and should permit lenders to consider credit score alternatives, such as rent or utility payments, for low-income and certain other borrowers. Some commenters encouraged FHFA to align the risk multiplier for high-debt-to-income ratio (DTI) single-family mortgage exposures with the 43 percent DTI threshold of the qualified mortgage rule of the Bureau of Consumer Financial Protection. Other commenters supported more tailored risk multipliers for third-party originations based on an assessment of the originator. Some commenters suggested removing the risk multipliers for the borrower's credit score or that FHFA not use refreshed credit scores for RPLs and NPLs so as to not disincentivize loan modifications or encourage foreclosures.

FHFA is adopting the risk multipliers as proposed with one change. To address commenters' concerns that risk multipliers, while individually reasonable, could compound in certain combinations to assign excessive credit risk capital requirements for single-family mortgage exposures, the final

rule reinstates the 2018 proposal's cap that limits the combined risk multiplier for a single-family mortgage exposure to 3.0. Relatively few single-family mortgage exposures would have a risk multiplier in excess of this cap, such that the cap should not increase the safety and soundness risk to an Enterprise.

FHFA acknowledges commenters' concerns related to certain loan characteristics that the commenters perceived to pose less credit risk, including single-family mortgage exposures originated by state housing finance agencies, credit unions, and certain third-party originators. However, FHFA continues to believe that the base risk weights and risk multipliers for these single-family mortgage exposures are consistent with the best available evidence of the credit risk posed by these exposures.

4. Credit Enhancement Multipliers

Under the proposed rule, to account for the decrease in an Enterprise's exposure to unexpected loss on a single-family mortgage exposure subject to loan-level credit enhancement, an Enterprise would have adjusted the base risk weight using an adjusted credit enhancement multiplier. That adjusted credit enhancement multiplier would have been based on a credit enhancement multiplier (CE multiplier) for the loan-level credit enhancement and then adjusted for the strength of the counterparty providing the loan-level credit enhancement. A smaller CE multiplier (and therefore a smaller adjusted credit enhancement multiplier) would have corresponded to a loan-level credit enhancement that transfers more of the projected unexpected loss to the counterparty and thus requires the Enterprise to maintain less credit risk capital for the single-family mortgage exposure.

Some commenters supported the proposed rule's approach to assigning adjusted CE multipliers to single-family mortgage exposures with loan-level credit enhancement, including the refinements to the counterparty ratings. Many commenters criticized the proposed rule's approach for providing less capital relief for loan-level credit enhancement than the 2018 proposal. Commenters argued that the reduced capital relief would not provide appropriate incentives for loan-level credit enhancement, increasing risk to taxpayers. Commenters suggested that the proposed rule's 35 percent loss-given-default assumption ignored distinctions among counterparty types. Some commenters argued that more capital relief should be provided for deeper loan-level credit enhancement. Commenters suggested using the same CE multiplier for cancelable and non-cancelable mortgage insurance. A few commenters suggested that the CE multiplier on seasoned loans with cancelable mortgage insurance did not provide sufficient capital relief. One commenter argued that the approach to charter-level mortgage insurance would penalize low-income borrowers. Other commenters urged FHFA to provide capital relief only to mortgage insurers in compliance with the Enterprises' Private Mortgage Insurer Eligibility Requirements (PMIERs).

Many commenters advocated that FHFA require each Enterprise to disclose more information with respect to the metrics and processes that would be used by each Enterprise to assign counterparty ratings and mortgage concentration classifications for the purpose of the adjustments to the CE multiplier.

The final rule generally adopts the approach to adjusted CE multipliers as proposed, except that FHFA has refined the counterparty rating definitions to facilitate transparency. FHFA does not expect the definitional changes to result in a change in the rating of any counterparty. With this refinement, FHFA continues to believe that the adjusted CE multipliers provide appropriate capital relief to account for the decrease in an Enterprise's exposure to unexpected loss on a single-family mortgage exposure subject to loan-level credit enhancement, striking an appropriate balance between mitigating the counterparty risk on loan-level enhancement while not adding undue complexity to the regulatory capital framework.

5. Minimum Adjusted Risk Weight

The proposed rule would have established a floor on the adjusted risk weight for a single-family mortgage exposure equal to 15 percent. As discussed in the proposed rule, FHFA determined that a minimum risk weight was necessary to ensure the safety and soundness of each Enterprise and that each Enterprise is positioned to fulfill its statutory mission across the economic cycle.

Some commenters supported the proposed rule's 15 percent floor on the adjusted risk weight for a single-family mortgage exposure, agreeing that the risk-sensitive framework posed meaningful model and related risks and that the proposed rule's credit risk capital requirements were generally too small.

Many other commenters were critical of the floor or its sizing. Commenters thought that the floor reduced the risk sensitivity of the regulatory capital framework and should be removed. Other commenters thought that the floor was too high and should be reduced. Some commenters suggested that the calibration of the floor could merit more of an empirical basis. Some commenters argued that the floor was unnecessary because other aspects of the proposed rule mitigated the model and related risks associated with the calibration framework. Other commenters thought the floor was not well calibrated to mitigate model risk across the spectrum of single-family mortgage exposures. One commenter suggested that the floor inappropriately capitalized political risk, natural disaster risk, interest rate risk, and legal risk, when the credit risk capital requirements should be calibrated based only on credit risk.

Commenters observed that the floor would lead to an increase in the credit risk capital requirement for a substantial portion of the Enterprises' single-family mortgage exposures. Some commenters were concerned that the floor would adversely impact the borrowing costs of lower risk borrowers or could limit an Enterprise's ability to use higher returns on these lower risk borrowers to support lower returns on higher risk borrowers. Some commenters thought that the floor could disincentivize the Enterprises from engaging in CRT. Commenters expressed concern that the floor could cause mortgage intermediation to shift away from the Enterprises to other market participants. Some commenters thought that the floor could reduce the availability of mortgage credit during normal economic conditions but without supporting the availability of mortgage credit during economic downturns. One commenter thought that the floor should be applied to the base risk weight.

FHFA has determined that the final rule will include a floor on the adjusted risk weight for a single-family mortgage exposure. As discussed in the proposed rule, absent the floor, the credit risk capital requirements as of the end of 2007 would not have been sufficient to absorb each Enterprise's crisis-era cumulative capital losses on its single-family book. As also discussed in the proposed rule, FHFA continues to believe that a floor is appropriate to mitigate certain risks and limitations associated with the underlying historical data and models used to calibrate the credit risk capital requirements. These risks and limitations are inherent to any methodology for calibrating granular credit risk capital requirements. In particular:

• A disproportionate share of the Enterprises' crisis-era credit losses arose from certain single-family mortgage exposures that are no longer eligible for acquisition by the Enterprises. The calibration of the credit risk capital requirements attributed a significant portion of the Enterprises' crisis-era losses to these products. The statistical methods used to allocate losses between borrower-related risk attributes and product-related risk attributes pose significant model risk. The sizing of the regulatory capital requirements also must guard against potential future relaxation of underwriting standards and regulatory oversight over those underwriting standards.

• The Enterprises' crisis-era losses likely were mitigated at least to some extent by the unprecedented support by the federal government of the housing market and the economy and also by the declining interest rate environment of the period. There is therefore some risk that the risk-based capital requirements are not specifically calibrated to ensure each Enterprise would be regarded as a viable going concern following a future severe economic downturn that potentially entails more unexpected losses, whether because there is less or no federal support of the economy, because there is less or no reduction in interest rates, or because of other causes.

• There are some potentially material risks to the Enterprises that are not assigned a risk-based capital requirement—for example, risks relating to uninsured or underinsured losses from flooding, earthquakes, or other natural disasters or radiological or biological hazards. There also is no risk-based capital requirement for the risks that climate change could pose to property values in some localities.

Comparisons to the Basel and U.S. banking frameworks' credit risk capital requirements for similar exposures reinforce FHFA's view that a floor is appropriate. Absent a floor, before adjusting for CRT, and before adjusting for the capital buffers under the proposed rule and the Basel and U.S. banking frameworks, the Enterprises' average credit risk capital requirement for single-family mortgage exposures would have been roughly 40 percent that of U.S. banking organizations and roughly 60 percent that of non-U.S. banking organizations.[41]

Several commenters expressed concern about the model and related risks associated with the calibration framework for the risk-based capital requirements for mortgage exposures. Several commenters also argued that credit risk capital requirements generally should be aligned across market participants. The FSOC Secondary Market Statement found that ''[t]he Enterprises' credit risk requirements [under the proposed rule] . . . likely would be lower than other credit providers across significant portions of the risk spectrum and during much of the credit cycle, which would create an advantage that could maintain significant concentration of risk with the Enterprises.'' FSOC ''encourage[d] FHFA and other regulatory agencies to coordinate and take other appropriate action to avoid market distortions that could increase risks to financial stability by generally taking consistent approaches to the capital requirements and other regulation of similar risks across market participants, consistent with the business models and missions of their regulated entities.''

After considering the views of commenters, FHFA has determined to increase the floor to 20 percent. First, the gap between the proposed rule's risk weights for lower risk single-family mortgage exposures and the risk weights for analogous exposures under the Basel and U.S. banking frameworks further evidences that the proposed rule's credit risk capital requirements, even with the proposed rule's floor, might not be adequate to ensure that each Enterprise operates in a safe and sound manner. Mitigation of model risk has figured prominently in FHFA's design of the final rule, including the calibration of the floor. Second, some commenters' analysis suggested that the leverage ratio requirements generally would exceed the risk-based capital requirements over most of the economic cycle. That could further evidence flaws in FHFA's method for calibrating the risk-based capital requirements, particularly given FHFA's confidence in the method for calibrating the leverage ratio requirements as affirmed by the FSOC Secondary Market Statement's affirmation of the sizing of the leverage ratio requirements. Third, FHFA remains concerned that the portfolio-invariant calibration of the credit risk capital requirements for mortgage exposures might not adequately take into account that each Enterprise's mortgage-focused business does not permit a diversified portfolio. Fourth, the gap in credit risk capital requirements relative to the Basel and U.S. banking frameworks also suggests that the Enterprises would continue to have a competitive advantage over some other sources of mortgage credit. That would heighten risk to the competitiveness, efficiency, and resiliency of the national housing finance markets.

As discussed in Section V.B, FHFA continues to believe that the differences between the business models, statutory mandates, and risk profiles of the Enterprises and banking organizations should not preclude comparisons of the *credit risk* capital requirement of a large U.S. banking organization for a specific mortgage exposure to the *credit risk* capital requirement of an Enterprise for a similar mortgage exposure. Comparisons of credit risk capital requirements can further safety and soundness by helping to identify and mitigate model and related risks relating to the calibration of the requirements. Comparisons of credit risk capital requirements can also further financial stability by identifying undue differences in regulatory requirements that might distort the market structure.

The BCBS has finalized a more risk-sensitive set of risk weights for residential real estate exposures, which are to be implemented by January 1, 2022.[42] The Basel framework's standardized risk weights for residential real estate exposures would depend on the LTV of the exposure and would range from 20 percent to 70 percent for an exposure on which repayment is not materially dependent on cash flows generated by the property.[43] The final rule's 20 percent risk weight floor is aligned with the smallest risk weight under the eventual Basel framework.

Notably the Basel framework's 20 percent risk weight applies only to residential real estate exposures with LTVs less than 50 percent. Under the final rule, single-family exposures with LTVs considerably greater than 50 percent could be, and as of June 30, 2020 often would have been, assigned a 20 percent risk weight. Even with this increase in the floor, the Enterprises' average credit risk capital requirements for single-family mortgage exposures likely would be lower than other credit

[41] Absent a floor, as of September 30, 2019, the average pre-CRT net credit risk capital requirement on the Enterprises' single-family mortgage exposures (which reflects the benefit of private mortgage insurance but no adjustments for CRT) would have been 1.7 percent of unpaid principal balance, implying an average risk weight of 21 percent. The U.S. banking framework generally assigns a 50 percent risk weight to these exposures to determine the credit risk capital requirement (equivalent to a 4.0 percent adjusted total capital requirement), while the current Basel framework generally assigns a 35 percent risk weight (equivalent to a 2.8 percent adjusted total capital requirement).

[42] BCBS, *Basel III: Finalising post-crisis reforms* ¶¶ 59–68 (Dec. 2017).

[43] Greater risk weights would apply to residential real estate where repayment is materially dependent on cash flows generated by the property.

providers across significant portions of the risk spectrum and during much of the credit cycle.

B. Multifamily Mortgage Exposures

Much like the proposed rule, the standardized credit risk-weighted assets for each multifamily mortgage exposure will be determined under the final rule using grids and risk multipliers that together assign an exposure-specific risk weight based on the risk characteristics of the multifamily mortgage exposure. The base risk weight will be a function of the multifamily mortgage exposure's MTMLTV and mark-to-market debt service coverage ratio (MTMDSCR). This base risk weight will then be adjusted based on other risk attributes. Finally, this adjusted risk weight will be subject to a floor.

1. Calibration Framework

Many commenters were critical of the framework for calibrating the credit risk capital requirements for multifamily mortgage exposures. Commenters recommended that FHFA provide more transparency into the data and models used to calibrate these requirements. Some commenters indicated that they could not reproduce the proposed rule's credit risk capital requirements using available data. Some commenters thought that, relative to single-family mortgage exposures, FHFA had not devoted sufficient time and attention to the proposed rule's approach to multifamily mortgage exposures, raising the risk of unintended consequences. Several commenters suggested that FHFA should establish a process for reviewing the base risk weights and risk multipliers every few years that includes soliciting public input from interested parties and that considers new performance data.

Commenters argued that the proposed rule's credit risk capital requirements exceeded the Enterprises' historical loss experiences, including during the 2008 financial crisis. Some commenters suggested that the credit risk capital requirements for multifamily mortgage exposures should not be significantly greater those of single-family mortgage exposures, particularly in light of the unique characteristics and risk management practices and the crisis-era performance of each Enterprise's multifamily business relative to its single-family business. One commenter suggested that one Enterprise's multifamily business incurred significant losses in the late 1980s and early 1990s but viewed that loss experience as irrelevant as a result of changes in the market structure. Commenters argued that it would be inappropriate, if a severe economic downturn has recently occurred, to require credit risk capital sufficient to absorb the lifetime unexpected losses of a second severe economic downturn.

One commenter noted that the delinquency rate of one Enterprise's single-family business was greater than that of its multifamily business. Some commenters argued that the multifamily mortgage exposures of the Enterprises historically have performed better than similar exposures of U.S. banking organizations, such that the comparisons to the U.S. banking framework were not meaningful. Commenters provided pre-crisis data on peak credit loss ratios and loss rates across different vintages of multifamily mortgage exposures and also comparisons to single-family mortgage exposure performance. Some commenters urged FHFA to use the same stress scenarios and assumptions to calibrate credit risk capital requirements for both multifamily mortgage exposures and single-family mortgage exposures.

Some commenters thought that the credit risk capital requirements were not sufficiently sensitive to the leverage of the multifamily mortgage exposures. One commenter suggested a cap on the risk weights for multifamily mortgage exposures and that less regulatory capital be required of exposures with less leverage.

Another commenter recommended a separate capital requirement of 50 basis points of adjusted total assets to mitigate the model risk associated with the calibration framework. Several commenters argued that FHFA should acknowledge that accounting losses comprised a substantial portion of the Enterprises' crisis-era loss experience. Some commenters suggested that the credit risk capital requirements were motivated by an intent to drive changes to the structure of the national housing finance markets. Commenters also suggested that the final rule should permit flexibility to allow the Enterprises to adapt to an evolving market and for their partners to innovate.

A commenter expressed the view that the calibration framework did not properly address the differences between each Enterprise's multifamily business model. One potential remedy, according to a commenter, would be to permit an Enterprise to count three years of future servicing revenue, instead of one year, to determine its uncollateralized exposure. Some commenters argued that the credit risk capital requirements were not aligned with the different credit risks across workforce housing, student housing, and luxury housing.

FHFA continues to believe that the calibration framework is appropriate to ensure that each Enterprise operates in a safe and sound manner and is positioned to fulfill its statutory mission across the economic cycle. As discussed in the proposed rule, FHFA generally calibrated the base risk weights and risk multipliers for multifamily mortgage exposures to require credit risk capital sufficient to absorb the lifetime unexpected losses incurred on multifamily mortgage exposures experiencing a shock to property values similar to that observed during the 2008 financial crisis. The multifamily-specific stress scenarios used to generate the base risk weights and risk multipliers involve two parameters: (i) Net operating income (NOI), where NOI represents gross potential income (gross rents) net of vacancy and operating expenses, and (ii) property values. The multifamily-specific stress scenario assumes an NOI decline of 15 percent and a property value decline of 35 percent. This stress scenario is consistent with market conditions observed during the 2008 financial crisis, views from third-party market participants and data vendors, and assumptions behind the Enterprises' stress tests.

FHFA acknowledges commenters' views that this calibration framework results in credit risk capital requirements for multifamily mortgage exposures that might be greater than the Enterprises' loss experience during the 2008 financial crisis. That economic downturn featured a decrease in homeownership rates and an increase in demand for multifamily housing. Future economic downturns might not entail similar market dynamics that would mitigate unexpected losses on multifamily mortgage exposures. FHFA continues to monitor the effects of the COVID–19 stress on the Enterprises' student housing, senior housing, and other multifamily businesses. Moreover, the credit risk capital requirements are calibrated to absorb projected lifetime losses (net of expected losses) in a stress scenario that entails a NOI decline of 15 percent and a property value decline of 35 percent, not to absorb the losses actually experienced during the 2008 financial crisis. Related to this, FHFA believes that the Enterprises' stress tests are not an appropriate consideration in calibrating the credit risk capital requirements for multifamily mortgage exposures. The Enterprises' past stress tests use a nine-quarter loss horizon, whereas much of the projected lifetime unexpected losses would be recognized

after the end of that horizon. The Enterprises' stress tests then offset those limited losses with the revenues recognized in the horizon, yielding a projection of capital exhaustion considerably lower than lifetime unexpected losses.

2. Base Risk Weights

The proposed rule would have required an Enterprise to determine a base risk weight for each multifamily mortgage exposure using a set of two multifamily grids—one for multifamily mortgage exposures with fixed rates (multifamily FRMs), and one for multifamily mortgage exposures with adjustable rates (multifamily ARMs). A multifamily mortgage exposure that has both a fixed-rate period and an adjustable-rate period (hybrid loans) would have been deemed a multifamily FRM during the fixed-rate period and a multifamily ARM during the adjustable-rate period. The proposed rule's multifamily grids were quantitatively identical to the multifamily grids in the 2018 proposal, except the credit risk capital requirements were presented as base risk weights relative to the 8.0 percent adjusted total capital requirement rather than as a percent of unpaid principal balance.

One commenter recommended that FHFA recalibrate the base risk weights for multifamily mortgage exposures to more accurately reflect the Enterprises' historical loss experiences, including during the 2008 financial crisis. Multiple commenters recommended that the base risk weights be more sensitive to MTMLTV, particularly for multifamily mortgage exposures with relatively low MTMLTVs, so as to not incentivize the Enterprises to support higher leverage lending. One commenter suggested FHFA reduce the differences in the base risk weights for multifamily FRMs and multifamily ARMs. Another commenter thought that the base risk weights would discourage the Enterprises from supporting affordable workforce housing because of the greater base risk weights for higher MTMLTV and lower MTMDSCR multifamily mortgage exposures.

The final rule adopts the base risk weights for multifamily mortgage exposures as proposed. As discussed in Section IX.B.1, FHFA continues to believe that the calibration framework for the base risk weights is appropriate to ensure that each Enterprise operates in a safe and sound manner and is positioned to fulfill its statutory mission across the economic cycle.

3. Countercyclical Adjustment

In contrast to the single-family framework, the proposed rule's multifamily framework did not include an adjustment to mitigate the procyclicality of the aggregate risk-based capital requirements, although FHFA believed such an adjustment could be merited. The proposed rule's single-family countercyclical adjustment was based on an estimated long-term trend in an inflation-adjusted all-transactions FHFA HPI. As of the time of the proposed rule, FHFA did not produce a comparable multifamily series, and it was unclear whether there was sufficient data from which to develop a reliable long-term trend in multifamily property values. FHFA solicited comments on options and available data for a countercyclical adjustment to the credit risk capital requirements for multifamily mortgage exposures.

Commenters generally recommended that FHFA adopt a countercyclical adjustment to mitigate the procyclicality of the aggregate risk-based capital requirements for multifamily mortgage exposures. Some commenters suggested a countercyclical adjustment was particularly important for multifamily mortgage exposures because many have balloon-payment features. Commenters suggested that FHFA construct an index based on vacancy rates, effective rents, or other indicia of the fundamental value of multifamily properties. Several commenters urged FHFA use OLTV instead of MTMLTV as an alternative to an index-based countercyclical adjustment.

FHFA is not adopting a countercyclical adjustment in the final rule. After considering the suggestions and views of commenters, FHFA has not identified sufficient public domain data to develop a reliable long-term trend for multifamily property values. Some of the data sets recommended by commenters are not available without cost to the public. FHFA continues to see considerable merit to a countercyclical or similar adjustment. FHFA will continue to monitor the issue and assess available data with which to potentially construct an index.

4. Risk Multipliers

As with single-family mortgage exposures, the proposed rule would have required an Enterprise to adjust the base risk weight for a multifamily mortgage exposure to account for additional loan characteristics using a set of multifamily-specific risk multipliers. The risk multipliers would have refined the base risk weight to account for risk factors beyond the primary risk factors reflected in the multifamily grids and for variations in secondary risk factors not captured in the risk profiles of the synthetic loans used to calibrate the multifamily grids. The risk multipliers were substantially the same as those of the 2018 proposal, with some simplifications and refinements. The adjusted risk weight for a multifamily mortgage exposure would have been the product of the base risk weight and the combined risk multiplier.

Several commenters urged FHFA to reinstate the 2018 proposal's risk multiplier for multifamily mortgage exposures with a government subsidy. One commenter recommended a risk multiplier that would reduce the credit risk capital requirement for targeted affordable housing properties, such as properties with income and rent restrictions pursuant to Low-Income Housing Tax Credit (LIHTC) or similar programs, properties benefitting from project-based rental assistance programs, properties with supplemental tenant services, housing tax credits and tax-exempt bond financing, property tax abatement, energy retrofits, or income diversification. Another commenter suggested a risk multiplier of 0.6 for LIHTC properties.

Commenters recommended that FHFA provide for more similar risk multipliers across loan sizes. Commenters recommended that the risk multiplier for loan size should be a continuous function of loan size to avoid incentivizes to adjust the loan size. One commenter questioned whether the risk multiplier for small loan sizes was consistent with the underlying credit risk.

A commenter recommended that FHFA revisit the risk multiplier for loan term, providing some evidence that credit risk was less for multifamily mortgage exposures with longer terms. A commenter recommended greater risk multipliers for senior housing and student housing, offset by lower risk multipliers for other multifamily properties.

The final rule adopts the risk multipliers as proposed. As discussed in Section IX.B.1, FHFA continues to believe that the calibration framework for the risk multipliers is appropriate to ensure that each Enterprise operates in a safe and sound manner and is positioned to fulfill its statutory mission across the economic cycle. FHFA has analyzed the available performance data for government-subsidized multifamily mortgage exposures. Due to the relatively infrequent instances of loss across multifamily loan programs that include a government subsidy, FHFA

has determined that it was not feasible to accurately calibrate thresholds at which the level of government subsidy impacted the probability of loss occurring or the severity of that loss. FHFA acknowledges commenters' arguments in support of more nuanced or finely calibrated risk multipliers for loan size, loan term, and other risk characteristics, but FHFA believes that any potential benefit is outweighed by the increased complexity.

5. Minimum Adjusted Risk Weight

The 2018 proposal acknowledged that combinations of overlapping characteristics could potentially result in unduly low credit risk capital requirements for certain multifamily mortgage exposures. Under the 2018 proposal, the Enterprises were required to impose a floor of 0.5 on the combined multiplier. FHFA took a somewhat different approach in the proposed rule. As for single-family mortgage exposures, the proposed rule would have established a floor on the adjusted risk weight for a multifamily mortgage exposure equal to 15 percent.

The commenters' views on the proposed rule's 15 percent floor on the adjusted risk weight for a multifamily mortgage exposure were similar to their views on the floor for single-family mortgage exposures, with some commenters addressing the two floors together. Some commenters supported the floor, agreeing that the risk-sensitive framework posed meaningful model and related risks and that the proposed rule's credit risk capital requirements were generally too small.

Many other commenters were critical of the floor or its sizing. Commenters thought that the floor reduced the risk sensitivity of the regulatory capital framework and should be removed. Other commenters thought that the floor was too high and should be reduced. Some commenters suggested that the calibration of the floor could merit more of an empirical basis. Some commenters argued that the floor was unnecessary because other aspects of the proposed rule mitigated the model and related risks associated with the calibration framework. Other commenters thought the floor was not well calibrated to mitigate model risk across the spectrum of multifamily mortgage exposures.

Some commenters thought that the floor could disincentivize the Enterprises from engaging in CRT. Commenters expressed concern that the floor could cause mortgage intermediation to shift away from the Enterprises to other market participants. Some commenters thought the calibration of the floor should not take into account the risk weights under the U.S. banking framework because of the better historical performance of the Enterprises' multifamily mortgage exposures. Commenters also argued that different floors would be appropriate for single-family mortgage exposures and multifamily mortgage exposures. One commenter thought that the floor should be applied to the base risk weight, assuming certain other changes for CRT on multifamily mortgage exposures.

FHFA has determined that the final rule will include a floor on the adjusted risk weight for a multifamily mortgage exposure. As discussed in the proposed rule, FHFA continues to believe that a floor is appropriate to mitigate certain risks and limitations associated with the underlying historical data and models used to calibrate the credit risk capital requirements. These risks include the potential that crisis-era losses were mitigated by the unprecedented federal government support of the economy and the impact of lower interest rates. In addition, these risks include potentially material risks that are not assigned a risk-based requirement, for example those that might arise from natural or other disasters.

FHFA has determined to increase the floor to 20 percent for reasons similar to its determination with respect to the floor on the risk weight assigned to a single-family mortgage exposure. Several commenters expressed concern about the model and related risks associated with the calibration framework for the risk-based capital requirements for mortgage exposures. Several commenters also argued that credit risk capital requirements generally should be aligned across market participants. Some commenters' analysis suggested that the leverage ratio requirements generally would exceed the risk-based capital requirements over most of the economic cycle. That could evidence flaws in FHFA's method for calibrating the risk-based capital requirements, particularly given FHFA's confidence in the method for calibrating the leverage ratio requirements and the FSOC Secondary Market Statement's affirmation of the sizing of the leverage ratio requirements. FHFA also remains concerned that the portfolio-invariant calibration of the credit risk capital requirements for mortgage exposures might not adequately take into account that each Enterprise's mortgage-focused business does not permit a diversified portfolio.

The BCBS has finalized a more risk-sensitive set of risk weights for residential real estate exposures, which are to be implemented by January 1, 2022.[44] The Basel framework's standardized risk weights for residential real estate exposures would depend on the LTV of the exposure and would range from 30 percent to 105 percent for an exposure on which repayment is materially dependent on cash flows generated by the property. Those risk weights would range from 20 percent to 70 percent for an exposure on which repayment is not materially dependent on cash flows generated by the property. The final rule's 20 percent risk weight floor is aligned with the smallest risk weight under the eventual Basel framework.

C. PLS and Other Non-CRT Securitization Exposures

As contemplated by the 2018 proposal, under the proposed rule, an Enterprise would have determined its credit risk capital requirement for PLS and other securitization exposures under a securitization framework that would have been substantially the same as that of the U.S. banking framework. An Enterprise was permitted to elect to determine its credit risk capital requirement for a retained CRT exposure under a somewhat different framework, even if that retained CRT exposure might be similar to an exposure to a traditional or synthetic securitization under the securitization framework.

Under the proposed rule, an Enterprise generally would have assigned a risk weight for a PLS or other securitization exposure using the simplified supervisory formula approach (SSFA). Pursuant to the SSFA, an Enterprise would have determined the risk weight for a securitization exposure using a formula that is based on, among other things, the subordination level of the securitization exposure and the adjusted aggregate credit risk capital requirement of the underlying exposures. A 1,250 percent risk weight would have been assigned to any securitization exposure that absorbs losses up to the adjusted aggregate credit risk capital requirement of the underlying exposures, in effect requiring one dollar of adjusted total capital for each dollar of exposure amount. After that point, the risk weight for a securitization exposure would have been assigned pursuant to an exponential decay function that decreases as the detachment point or attachment point increases, subject to a minimum risk weight of 20 percent.

At the inception of a securitization, the SSFA's exponential decay function

[44] BCBS, *Basel III: Finalising post-crisis reforms* ¶¶ 59–68 (Dec. 2017).

for risk weights, together with the 20 percent risk weight floor, would have required more regulatory capital on a transaction-wide basis than would be required if the underlying exposures had not been securitized. That is, if an Enterprise held every tranche of a securitization, its overall regulatory capital requirement would have been greater than if the Enterprise owned all of the underlying exposures. Consistent with the rationale of U.S. banking regulators, FHFA stated in the proposed rule that it believed this outcome was important to reduce regulatory capital arbitrage through securitizations and to manage the structural and other risks that might be posed by a securitization.[45]

FHFA did not receive comments on the proposed rule's approach to PLS and other non-CRT securitization exposures and is adopting that approach as proposed.

D. Retained CRT Exposures

As discussed below, FHFA received many comments on the proposed rule's approach to CRT. FHFA continues to believe that CRT can play an important role in ensuring that each Enterprise operates in a safe and sound manner and is positioned to fulfill its statutory mission across the economic cycle. FHFA also continues to believe that an Enterprise does retain some credit risk on its CRT and that that risk should be appropriately capitalized. As discussed below, FHFA has adopted changes in the final rule that are intended to better tailor the risk-based capital requirements to the risk retained by an Enterprise on its CRT. For CRT on mortgage exposures having relatively lower credit risk, the final rule reduces the amount of regulatory capital that must be maintained to reflect that the CRT does not have the same loss-absorbing capacity as equity financing. Other changes increase the risk sensitivity of the method for assigning a risk weight to a retained CRT exposure and the method for calculating the loss-timing adjustment on a CRT on multifamily mortgage exposures. Relative to the proposed rule, these changes were intended to increase the capital relief afforded an Enterprise for well-structured CRT on many common mortgage exposures, and generally to provide increased risk sensitivity in the CRT framework, potentially increasing incentives for the Enterprises to engage in CRT.

1. Proposed Rule's Enhancements

FHFA has continued to refine the CRT assessment framework based on its understanding of the safety and soundness risks and limits relating to the effectiveness of CRT in transferring credit risk on the underlying exposures. CRT transfers credit risk only on a specified reference pool, while equity financing is available to ''cross cover'' credit risk on other exposures of the Enterprise. CRT transfers only credit risk, while equity financing also can absorb losses arising from operational and market risks. An Enterprise generally may pause distributions on equity financing during a financial stress but typically must continue debt service or other payments on CRT instruments. Therefore, equity financing provides more robust safety and soundness benefits across exposures and risks than a similar amount of credit exposure transferred through CRT.

One of the lessons of the 2008 financial crisis is that securitization structures, especially complex securitizations, might not perform as expected during a financial stress. In fact, some large banking organizations even elected to reconsolidate some of their securitizations.[46] Similarly, there might be unique legal risks posed by the contractual terms of CRT structures and by the practices associated with contractual enforcement. CRT investors have recently threatened litigation with respect to credit events arising out of COVID–19-related forbearances. There also are structural and other risks that were not reflected in the proposed rule's adjustments for loss-sharing risk and loss-timing risk that could further limit the effectiveness of CRT in transferring credit risk.

FHFA's assessment framework also considers the extent to which an Enterprise's CRT program could limit the Enterprise's ability to fulfill its statutory mission to provide stability and ongoing assistance to the secondary mortgage market across the economic cycle. A financial stress could reduce investor demand for, or increase the cost of, new CRT issuances or undermine the financial strength of some existing CRT counterparties. The procyclicality of some CRT structures could adversely impact an Enterprise's ability to support the secondary mortgage market if the Enterprise lacked sufficient equity financing to support new acquisitions of mortgage exposures. To fulfill its mission, an Enterprise should avoid overreliance on CRT and should maintain at least enough equity capital to support new originations during a period of financial stress, when new CRT issuances might not be available.

FHFA's assessment framework also seeks to prevent each Enterprise's CRT program from undermining the liquidity, efficiency, competitiveness, or resiliency of the national housing finance markets. Some CRT structures might tend to increase the leverage in the housing finance system, especially to the extent some CRT investors themselves rely on short-term debt funding. The disruption in the CRT markets during the recent COVID–19-related financial stress might have been driven in part by leveraged market participants that had invested in CRT rapidly de-levering when confronted by margin calls on short-term financing.

Taking into account these considerations, the proposed rule contemplated enhancements to the 2018

[45] *See Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Capital Adequacy, Transition Provisions, Prompt Corrective Action, Standardized Approach for Risk-weighted Assets, Market Discipline and Disclosure Requirements, Advanced Approaches Risk-Based Capital Rule, and Market Risk Capital Rule,* 78 FR 62018, 62119 (Oct. 11, 2013) (''At the inception of a securitization, the SSFA requires more capital on a transaction-wide basis than would be required if the underlying assets had not been securitized. That is, if the banking organization held every tranche of a securitization, its overall capital requirement would be greater than if the banking organization held the underlying assets in portfolio. The agencies believe this overall outcome is important in reducing the likelihood of regulatory capital arbitrage through securitizations.'').

[46] *See Risk-Based Capital Guidelines; Capital Adequacy Guidelines; Capital Maintenance: Regulatory Capital; Impact of Modifications to Generally Accepted Accounting Principles; Consolidation of Asset-Backed Commercial Paper Programs; and Other Related Issues,* 74 FR 47138, 47142 (Sept. 15, 2009) (''In the case of some structures that banking organizations were not required to consolidate prior to the 2009 GAAP modifications, the recent turmoil in the financial markets has demonstrated the extent to which the credit risk exposure of the sponsoring banking organization to such structures (and their related assets) has in fact been greater than the agencies estimated, and more associated with non-contractual considerations than the agencies had expected. For example, recent performance data on structures involving revolving assets show that banking organizations have often provided non-contractual (implicit) support to prevent senior securities of the structure from being downgraded, thereby mitigating reputational risk and the associated alienation of investors, and preserving access to cost-effective funding.''); *see also* FCIC Report at 246, available at *https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf* (''When the mortgage securities market dried up and money market mutual funds became skittish about broad categories of ABCP, the banks would be required under these liquidity puts to stand behind the paper and bring the assets onto their balance sheets, transferring losses back into the commercial banking system. In some cases, to protect relationships with investors, banks would support programs they had sponsored even when they had made no prior commitment to do so.''); *see also* FCIC Report at 138–139 (''The events of 2007 would reveal the fallacy of those assumptions and catapult the entire $25 billion in commercial paper straight onto the bank's balance sheet, requiring it to come up with $25 billion in cash as well as more capital to satisfy bank regulators.'').

proposal's regulatory capital treatment of CRT to refine FHFA's balancing of the safety and soundness benefits of CRT against the potential safety and soundness, mission, and housing market stability risks that might be posed by CRT. Consistent with the U.S. banking framework, FHFA proposed operational criteria to mitigate the risk that the terms or structure of the CRT would not be effective in transferring credit risk. These operational criteria for CRT were less restrictive than those applicable to traditional or synthetic securitizations under the U.S. banking framework. To partially mitigate the safety and soundness risks posed by this less restrictive approach, FHFA would have required an Enterprise to publicly disclose material risks to the effectiveness of the CRT so as to foster market discipline and FHFA's supervision and regulation.

FHFA also proposed to prescribe the regulatory capital consequences of an Enterprise providing support to a CRT in excess of the Enterprise's pre-determined contractual obligations. As under the U.S. banking framework, if an Enterprise provides implicit support for a CRT, the Enterprise would have been required to include in its risk-weighted assets all of the underlying exposures associated with the CRT as if the exposures were not covered by the CRT.

Generally consistent with the U.S. banking framework, FHFA also proposed a prudential floor of 10 percent on the risk weight assigned to any retained CRT exposure. FHFA also proposed certain refinements to the adjustments to the regulatory capital treatment of CRT for the loss-sharing, loss-timing, and other risks that a CRT might not be fully effective in transferring credit risk to third parties. In particular, FHFA proposed to refine the 2018 proposal's loss-sharing adjustment and loss-timing adjustment, add an overall effectiveness adjustment for the differences between CRT and regulatory capital, and incorporate a loss-timing adjustment for CRT on multifamily mortgage exposures.

2. Risk Weight Floor

Many commenters criticized the proposed rule's 10 percent floor on the risk weight assigned to retained CRT exposures. As discussed below, FHFA continues to believe that an Enterprise retains credit risk to the extent it retains CRT exposures and that such risk should be appropriately capitalized.

Many commenters argued that the 10 percent floor on the risk weight assigned to a retained CRT exposure would unduly decrease the capital relief provided by CRT and reduce the Enterprises' incentives to engage in CRT. Commenters suggested that the floor was duplicative of the proposed rule's overall effectiveness adjustment or unnecessary because of other enhancements contemplated by the proposed rule, including FHFA's ability to approve CRT structures and the stress capital and other buffers. Commenters argued that a credit risk capital requirement for retained CRT exposures was inconsistent with the Enterprises' stress tests. Commenters pointed out the differences between the proposed rule's approach and the 2018 proposal's approach, which in effect assigned a 0 percent risk weight to some retained CRT exposures. Some commenters saw no need for a floor given the perceived remote risk of loss borne by senior CRT tranches.

Commenters argued that FHFA had not provided sufficient analytical support for the floor. Commenters suggested that FHFA should assess the impact of the floor on the Enterprises' risk management practices, their business models, and their CRT programs. Commenters thought that the floor could misalign the Enterprises' incentives, including in some cases by requiring an Enterprise to maintain more regulatory capital for some CRT structures than other structures that transferred less credit risk. One commenter suggested that, as a result of the floor, an Enterprise could achieve more capital relief with a CRT that has a shorter maturity and a detachment point that is less than projected stress loss.

Commenters noted that the floor on the risk weight for retained CRT exposures and the overall effectiveness adjustment would have unique implications for CRT on multifamily mortgage exposures. A commenter recommended that the 15 percent floor on the risk weight for multifamily mortgage exposures should be applied to the base risk weight instead of the adjusted risk weight so as to not distort incentives to enter into CRT.

Some commenters did recommend reducing instead of eliminating the floor. Other commenters suggested calibrating a variable floor based on the seniority of the retained risk weight and aggregate net credit risk capital requirement of the underlying mortgage exposures. One commenter questioned the relevance of the Basel framework's analogous floor, arguing that that floor protected banking organizations from unknown risks while that risk is mitigated for the Enterprises by their underwriting standards and their control over servicing and loss mitigation. Another commenter suggested that the floor could provide a rationale for a smaller PLBA-leverage ratio requirement.

FHFA has determined that the final rule should preserve the proposed rule's 10 percent floor on the risk weight assigned to a retained CRT exposure. The floor avoids treating a retained CRT exposure as if it poses no credit risk. Under the 2018 proposal, a retained CRT exposure with a detachment point less than the net credit risk capital requirement of the underlying mortgage exposures would, in effect, have had a risk weight of 1,250 percent (*i.e.,* the 2018 proposal would have required a dollar of total capital for each dollar of exposure amount), while a retained CRT exposure with an attachment point only marginally greater than that net credit risk capital requirement would have had a risk weight of 0 percent. A retained CRT exposure with an attachment point just beyond that cut-off point likely still would pose some credit risk as a result of the model risks associated with the calibration of the credit risk capital requirement of the underlying exposures and the calibration of the loss-timing adjustment and loss-sharing adjustment. Related to model risk, there is the risk that the structuring of some CRT is driven by regulatory arbitrage, with an Enterprise focused on CRT structures that obtain capital relief that is disproportionate to the modeled credit risk actually transferred. There is also the risk that a CRT will not perform as expected in transferring credit risk to third parties, perhaps because a court will not enforce the contractual terms of the CRT structure as expected. To that point, each Enterprise has significant discretion in performing loss mitigation and other servicing activities, which can sometimes result in significant impact on the timing and amount of losses that are borne by the CRT investors.

Because CRT tranches, even senior CRT tranches, are not risk-free, each Enterprise should maintain regulatory capital to absorb losses on those retained CRT exposures. This approach is generally consistent with that of the Basel and U.S. banking framework, both of which also impose floors on the risk weights for retained securitization exposures.[47] Notably, the U.S. banking

[47] For these and other reasons, the Basel and U.S. banking frameworks impose a prudential floor on the risk weight for any securitization exposure. BCBS, *Revisions to the Securitisation Framework Consultative Document* at 17 (Dec. 2013; final July 2016), available at *https://www.bis.org/publ/bcbs269.pdf* (''The objectives of a risk-weight floor are: [m]itigate concerns related to incorrect model specifications and error from banks' estimates of inputs to capital formulas ([*i.e.*] model risk); and [r]educe the variation in outcomes for similar risks.'').

framework's risk weight floor on securitization exposures is considerably greater at 20 percent.

3. Risk Weight Determination

As discussed above, commenters thought that the 10 percent risk weight floor could misalign the Enterprises' incentives, including in some cases by requiring an Enterprise to maintain more regulatory capital for some CRT structures than other structures that transferred less credit risk. One commenter suggested that, as a result of the floor, an Enterprise could achieve more capital relief with a CRT that has a shorter maturity and a detachment point that is less than projected stress loss.

FHFA acknowledges that the interaction of the floor with the loss-sharing, loss-timing, and overall effectiveness adjustments could, for certain structures, result in an Enterprise's credit risk capital requirement decreasing even as the Enterprise transfers less risk to third parties by lowering the detachment point of the most senior transferred tranche. A reduction in the required regulatory capital arising from less risk transfer would be a misalignment of incentives that could pose safety and soundness risk.

To address these concerns, FHFA has revised the calculation of the risk weight assigned to each CRT tranche. Under the final rule, this approach assigns a 1,250 percent risk weight for a tranche with a detachment point less than the projected stress loss (which is, in effect, the same risk-based capital requirement that would have been assigned to the tranche under the 2018 proposal), a 10 percent risk weight for a tranche with an attachment point greater than the projected stress loss, and a weighted average risk weight for a tranche that straddles the stress loss. That weighted average risk weight would be the average of 1,250 percent weighted by the portion of the tranche exposed to projected stress loss and 10 percent weighted by the portion of the tranche not exposed to projected stress loss. One benefit of this approach is that the required regulatory capital on retained CRT exposures should decrease monotonically with an increase in the detachment point on the transferred CRT tranches, all else equal.

4. Overall Effectiveness Adjustment

The proposed rule's overall effectiveness adjustment would have reduced the risk-weighted assets of transferred CRT tranches by 10 percent, thereby reducing the capital relief afforded by the CRT. This adjustment accounted for the fact that a CRT does not provide the same loss-absorbing capacity as equity financing. Many commenters criticized this overall effectiveness adjustment. Several commenters argued that the overall effectiveness adjustment would disincentivize the Enterprises from engaging in CRT. Commenters also argued that the overall effectiveness adjustment is unnecessary because of other enhancements contemplated by the proposed rule, including the 10 percent risk weight floor on retained CRT exposures, FHFA's ability to approve CRT structures, and the stress capital and other buffers.

Other commenters recommended that FHFA consider alternatives to the overall effectiveness adjustment. Commenters recommended that the overall effectiveness adjustment should not be applied to the Enterprises' fully funded capital markets transactions because those CRT structures do not entail counterparty credit risk. Some commenters supported the overall effective adjustment or even increasing the adjustment, with some conditioning that view on the removal of the 10 percent risk weight floor. One commenter viewed the overall effectiveness adjustment as not unreasonable and recommended that FHFA periodically review its calibration. Some commenters thought that the overall effectiveness adjustment should not be applied to CRT on multifamily exposures in light of the unique structures of those CRT.

After considering commenters' views on the overall effectiveness adjustment and other aspects of the proposed rule's approach to CRT, FHFA has modified the overall effectiveness adjustment so that a CRT on mortgage exposures with less credit risk will be subject to a smaller adjustment, and potentially no adjustment at all. This modification should reduce the extent to which the overall effectiveness adjustment, in combination with the 10 percent risk weight floor, may require more regulatory capital for retained CRT exposures than is necessary to ensure safety and soundness. This modification would reduce the amount of the overall effectiveness adjustment for many of the CRT historically conducted by the Enterprises. This modification also helps ensure that FHFA does not unduly disincentivize CRT on mortgage exposures with risk profiles similar to those of recent acquisitions by the Enterprises.

Under the final rule's overall effectiveness adjustment, the overall effectiveness adjustment would still reduce the risk-weighted assets of transferred CRT tranches by 10 percent (reducing the capital relief afforded by the CRT) if the aggregate net credit risk capital requirement on the underlying mortgage exposures is 4.0 percent or greater (corresponding to a weighted average risk weight of 50 percent). If the aggregate net credit risk capital requirement on the underlying mortgage exposures is less than 4.0 percent, the overall effectiveness adjustment would reduce the risk-weighted assets by a percent amount less than 10 percent, with that percent amount specified by a linear function that decreases the adjustment as the underlying aggregate net credit risk capital requirement decreases. The adjustment would be zero for a CRT on mortgage exposures with an aggregate net credit risk capital requirement less than or equal to 1.6 percent (corresponding to a weighted average risk weight of 20 percent). For example, the final rule's overall effectiveness adjustment amount would be 95 percent on a CRT on mortgage exposures with a weighted average risk weight of 35 percent, as compared to the 90 percent overall effectiveness adjustment under the proposed rule.

5. Loss-Timing Adjustment

The proposed rule would have required an Enterprise to adjust the exposure amount of its retained CRT exposures to account for the mismatch between the contractual coverage of the CRT and the timing of the unexpected losses on the underlying mortgage exposures.

Some commenters generally supported the loss-timing adjustment and its calibration. Some commenters noted that the loss-timing adjustment's impact on the capital relief afforded by CRT was less than that of the overall effectiveness adjustment or the 10 percent risk weight floor. Some commenters urged FHFA to replace the various adjustments with a single measure of the effectiveness of a CRT. Commenters also noted that the various adjustments tended to compound into a substantial discount on the capital relief afforded CRT. As discussed above, some commenters thought that the 10 percent risk weight floor could, in combination with the loss-timing and other adjustments, misalign the Enterprises' incentives, including in some cases by requiring an Enterprise to maintain more regulatory capital for some CRT structures than other structures that transferred less credit risk.

Commenters recommended that the weighted average maturity, instead of the maximum maturity, be used to determine the loss-timing adjustment of a CRT with respect to multifamily

mortgage exposures. These commenters noted that the proposed rule's approach would disproportionately reduce the capital relief on a CRT when there is just one multifamily mortgage exposure with a large mismatch between the contractual term of the CRT and the loan term of the longest maturity multifamily mortgage exposure. That could reduce the incentive to engage in CRT on multifamily mortgage exposures with longer terms, which could adversely impact multifamily mortgage exposures that support affordable housing.

FHFA agrees with commenters that the loss-timing adjustment should be better calibrated to the relationship between the contractual term of the CRT and the maturity profile of the underlying multifamily mortgage exposures. This calibration should consider that many multifamily mortgage exposures have balloon payments that could pose credit losses toward the end of the contractual term of a CRT. Under the proposed rule, the loss-timing adjustment was based on the ratio of the contractual term of the CRT to the term of the multifamily mortgage exposure with the longest maturity to protect against understating the risk retained by the Enterprise. Under the final rule, the loss-timing adjustment will be 100 percent for a multifamily mortgage exposure that has a loan term that is less than or equal to the contractual term of the CRT. For multifamily mortgage exposures with a loan term that is greater than the contractual term of the CRT, the loss-timing adjustment will be the ratio of the remaining contractual term of the CRT to the unpaid principal balance-weighted average loan term of the multifamily mortgage exposures, with that amount divided by two to reflect FHFA's judgment as to the maturity-related risk for these multifamily mortgage exposures with longer terms. The loss-timing adjustment for the CRT would then be an average of those two adjustments, each weighted by the unpaid principal balance of the underlying mortgage exposures used to determine that adjustment. In general, the final rule's approach will result in a greater loss-timing adjustment amount, and greater capital relief, than was contemplated by the proposed rule for a CRT with a contractual term less than 30 years. This approach also should provide an incentive for the Enterprises to lengthen the contractual term of CRTs on multifamily mortgage exposures. The final rule's approach also should generally provide more capital relief than the proposed rule for certain CRT on multifamily mortgage exposures, all else equal.

6. Loss-Sharing Adjustment

The proposed rule would have required an Enterprise to adjust the exposure amount of its retained CRT exposures to account for the counterparty credit risk of the CRT counterparty.

Some commenters generally supported the loss-sharing adjustment and its calibration. Some commenters noted that the loss-sharing adjustment's impact on the capital relief afforded by CRT was less than that of the overall effectiveness adjustment or the 10 percent risk weight floor. Some commenters urged FHFA to replace the various adjustments with a single measure of the effectiveness of a CRT. Commenters also noted that the various adjustments tended to compound into a substantial discount on the capital relief afforded CRT.

One commenter suggested that the proposed rule's loss-sharing adjustment required excessive regulatory capital for counterparty credit risk. Commenters argued that increased transparency as to the criteria and process for assigning counterparty ratings could create incentives for counterparties to take steps to satisfy that criteria and become stronger counterparties. Some commenters thought that FHFA should not assign more capital relief to diversified counterparties, noting that mortgage-focused counterparties have specialized expertise that might offset some of the counterparty strength benefits of diversification. Commenters also urged FHFA to refine the framework so that it takes into account which counterparties are more likely to continue to participate in CRT across the economic cycle, including during a period of financial stress.

Several commenters expressed views on CRT counterparty credit risk management more broadly. Commenters reiterated that there is no counterparty risk on CRT structures that are fully funded at issuance, with the issuance proceeds kept in segregated accounts. Some commenters stated that enhanced collateral requirements were unnecessary. Another commenter noted recent developments in the international regulation of collateralized insurance agreements and conveyed its view that additional collateralization requirements were not necessary. One commenter recommended that FHFA adopt a preference for CRT counterparties such as reinsurers that support mortgage exposures to low-income borrowers at lower interest rates (or pools with greater shares of low-income mortgage loans). A commenter suggested that an Enterprise should be required to publicly disclose implicit support provided to a CRT counterparty and maintain regulatory capital for the underlying mortgage exposures.

Commenters criticized the proposed rule's treatment of Fannie Mae's DUS transactions. Some commenters argued that the capital relief for DUS transactions should be determined under the framework for mortgage insurance and other loan-level credit enhancement. One commenter recommended that the loss-sharing adjustment for DUS transactions should be determined at the level of the servicer, not at the level of the CRT structure, using the aggregates of the credit risk capital requirements, loss-share obligations, collateral, and other inputs relating to the servicer's DUS transactions. One commenter thought that the overall effectiveness adjustment duplicated the loss-sharing adjustment when applied to a DUS transaction. A commenter suggested that three years of future servicing revenue, instead of one year, should be considered in determining the loss-sharing adjustment.

FHFA continues to believe the loss-sharing adjustment is appropriately calibrated and is adopting the loss-sharing adjustment as proposed. FHFA believes that the potential benefits of modifications to the collateral or other requirements would be outweighed by the increased safety and soundness risk. FHFA has determined to retain the proposed rule's calculation of the loss-sharing adjustment at the exposure level, while collateral is calculated at the lender-level. FHFA believes this approach more accurately captures differences in exposure-level loss-sharing structures and risk share percentages that may occur within the portfolio of any given lender.

7. Eligible CRT Structures

The proposed rule would have provided capital relief for any category of credit risk transfers that has been approved by FHFA as effective in transferring the credit risk of one or more mortgage exposures to another party, taking into account any counterparty, recourse, or other risk to the Enterprise and any capital, liquidity, or other requirements applicable to counterparties. That approach gave FHFA considerable discretion to approve new structures, and it did not afford interested parties an opportunity to comment on the specific requirements governing each structure.

To foster transparency and increase the likelihood that FHFA identifies and

mitigates the safety and soundness and other risks posed by CRT structures, the final rule instead identifies and defines five specific CRT structures that are eligible to provide capital relief. FHFA contemplates that capital relief for other CRT structures could be approved in the future. That change, however, would require an amendment to the final rule following notice and an opportunity to comment.

The eligible CRT structures identified in the final rule are the structures currently used by the Enterprises for substantially all of their CRT. These structures are:

- Eligible funded synthetic risk transfers, which include the Enterprises' STACR/CAS deals;
- Eligible reinsurance risk transfers, which include the Enterprises' ACIS/CIRT deals;
- Eligible single-family lender risk shares, which include any partial or full recourse agreement or similar agreement (other than a participation agreement) between an Enterprise and the seller or servicer of a single-family mortgage exposure;
- Eligible multifamily lender risk share, which include credit risk transfers that are on substantially the same terms and conditions as in effect on June 30, 2020 for Fannie Mae's credit risk transfers known as the ''Delegated Underwriting and Servicing program''; and
- Eligible senior-subordinated structures, which include Freddie Mac's K-deals.

Any FHFA-approved CRT entered into before the effective date of the final rule would continue to be eligible to provide capital relief under the final rule regardless of whether it qualifies as one of these five structures.

The final rule's approach to recourse agreements is somewhat different from the proposed rule. Under the proposed rule, recourse agreements would have afforded capital relief under an approach generally similar to that of mortgage insurance, although with a loss-timing adjustment for partial recourse agreements and less prescriptive requirements for the counterparties. The economic substance of a recourse agreement is the same as other credit risk transfers, and in particular these structures generally pose counterparty risk and structuring risk and do not have the same loss-absorbing capacity as equity financing. FHFA has determined that integrating recourse agreements into the CRT framework would result in a more consistent and appropriate capitalization of the retained credit risk borne by the Enterprises under their recourse agreements.

8. Other Comments and Issues

Commenters also offered more general concerns about the proposed rule's approach to CRT. Commenters endorsed CRT as effective in transferring risk to other private-sector market participants, protecting taxpayers, and fostering the stability of the national housing finance markets. Many commenters argued that the proposed rule's approach did not provide appropriate capital relief for CRT, was too punitive, and would disincentivize CRT. Commenters thought that there could be adverse implications on the Enterprises' cost of capital and their guarantee fees if the Enterprises were to reduce their use of CRT.

Some commenters agreed with FHFA's view that equity financing provides more loss-absorbing capacity than CRT. Some commenters agreed that CRT should not be the dominant form of loss-absorbing capacity for an Enterprise. Other commenters disagreed about CRT's loss-absorbing capacity relative to equity financing. One commenter noted that equity financing is exposed to other demands that could reduce its loss-absorbing capacity, including the demands of creditors, while CRT is dedicated to the absorption of credit losses. Some commenters agreed that the loss-timing and loss-sharing adjustments could be appropriate to mitigate the risk that CRT is not as effective as expected in transferring credit risk, but that the proposed rule's other departures from capital neutrality could lead to undesirable and counterintuitive outcomes, including a CRT actually increasing an Enterprise's risk-based capital requirements. Other commenters did not take issue with the departure from capital neutrality so long as the adjustments were not excessive.

Many commenters contended that the PLBA-adjusted leverage ratio requirement likely would often exceed the PCCBA-adjusted risk-based capital requirements, and that a binding PLBA-adjusted leverage ratio requirement could decrease an Enterprise's incentive to engage in CRT.

Commenters observed that, while CRT could tend to increase leverage in the national housing finance markets, the use of leverage in the financial system is not novel, and that market mechanisms and sophisticated market actors can respond to the misuse of leverage. Commenters criticized FHFA's view that a financial stress could reduce investor demand for, or increase the cost of, new CRT issuances or undermine the financial strength of some existing CRT counterparties. Multiple commenters asserted that the CRT markets had generally continued to function during the COVID–19 stress and during several natural disasters in 2017.

Commenters argued that the proposed rule's approach to CRT was inconsistent with Treasury's recommendations in its Housing Reform Plan, which they viewed as supporting the Enterprises' CRT programs and a policy in favor of reducing the Enterprises' footprint by transferring more risk to other private market participants. Some commenters asserted that the proposed rule provided more credit relief for mortgage insurance than CRT. Another commenter urged FHFA to permit the Enterprises to restart their lender risk-sharing CRT on single-family mortgage exposures. Some commenters recommended FHFA identify enhancements to ensure that CRT structures transfer credit risk definitively and without recourse to the Enterprises.

Some commenters asserted that CRT was uneconomic for the Enterprises, provided excessive returns to CRT investors, and left catastrophic risk with the Enterprises. One commenter suggested that the Enterprises should not engage in CRT and instead the Enterprises should be subject to minimum capital requirements.

Commenters suggested that FHFA preserve or expand certain features of the CRT market, such as Real Estate Mortgage Investment Conduit (REMIC) and To Be Announced (TBA) eligibility. Commenters generally supported a tailored approach to CRT and recommended that FHFA not adopt the SSFA.

Several commenters encouraged FHFA to enhance transparency into the Enterprises' CRT programs and FHFA's assessment framework. One commenter suggested that FHFA provide more data and analysis before finalizing an approach to CRT. Another commenter recommended that FHFA develop and disclose a model for assessing CRT structures under different stress scenarios. Commenters also sought information on the future of the Enterprises' CRT programs, including whether the Enterprises would issue PLS or a security guaranteed by the federal government.

Commenters urged FHFA to disclose more information on the criteria and processes for assigning counterparty ratings. Commenters also recommended FHFA require CRT counterparties to provide financial disclosures. One commenter suggested that FHFA disclose a list of counterparties in

significant CRT to foster transparency into the Enterprises' counterparty credit risk.

Several commenters recommended that the proposed rule's approach to CRT should apply only prospectively. One commenter urged FHFA to temporarily extend for 10 years the 2018 proposal's approach to CRT entered into before the publication of the proposed rule. Another commenter expressed the view that current and future CRT structures should be subject to the same requirements and restrictions.

One commenter recommended that the operational criterion restricting clean-up calls should be clarified or removed so as not to limit the practice of including optional redemptions provisions in CRT structures. The commenter argued that other operational criteria, in particular the requirement that a CRT be an ''eligible CRT structure'' approved by FHFA, would ensure appropriate supervision and regulation of an Enterprise's redemptions of CRT.

FHFA believes that the changes to the final rule discussed in this Section IX.D will mitigate some of the commenters' concerns about the impact of the regulatory capital framework on the Enterprises' CRT programs. The final rule also provides that many of the operational criteria will apply only to CRT entered into after the effective date of the final rule. However, even with these changes, the final rule generally will require at inception more credit risk capital on a transaction-wide basis than would be required if the underlying mortgage exposures had not been made subject to a CRT. That is, if an Enterprise held every tranche of a CRT, the Enterprise's credit risk capital requirement on the retained CRT exposures generally would be greater than the credit risk capital requirement of the underlying mortgage exposures.[48] As under the securitization framework, this departure from strict capital neutrality is important to manage the potential safety and soundness risks of CRT. This approach would help mitigate the model risk associated with the calibration of the credit risk capital requirements of the underlying exposures and also the model risk posed by the calibration of the loss-timing adjustment and loss-sharing adjustment.[49] Complex CRT also may pose structural risk and other risks that merit a departure from capital neutrality.[50] This departure from capital neutrality also is important to reducing the likelihood of regulatory capital arbitrage through CRT.[51]

The effects of the final rule on the Enterprises' CRT programs are difficult to predict. As of September 30, 2019, the proposed rule would have afforded the Enterprises' existing CRT roughly half of the capital relief that would have been available under the 2018 proposal. That estimate however does not provide an accurate sense of the final rule's impact on future CRT. Each Enterprise structured its existing CRT structures with attachment and detachment points, collateralization, and other terms based on the conservatorship capital framework, and each Enterprise likely will be able to structure the tranches and other aspects of its future CRT somewhat differently, taking into account the final rule, so as to better optimize capital relief. Also, the 10 percent risk weight floor has a larger impact on CRT on mortgage exposures with lower risk weights, and the Enterprises will be able to achieve more capital relief through CRT to the extent that house prices converge toward their long-term trend or the Enterprises' risk weights on their mortgage exposures included in CRT transactions tend to increase.

The final rule continues to provide each Enterprise a mechanism for flexible and substantial capital relief through CRT, and CRT likely will remain a valuable tool for managing credit risk. As in Section V.D, FHFA expects that each Enterprise will base its decisions on its own risk assessments, not solely or even primarily on the regulatory risk-based capital requirements. The changes made in the final rule generally serve to increase incentives to use CRT relative to the proposed rule. The Enterprises might also have incentives to transfer credit risk beyond projected stress loss to mitigate the risk of an increase in risk-based capital requirements during a period of stress. The 20 percent floor on the risk weight assigned to mortgage exposures might also increase the incentive to enter into CRT on mortgage exposures subject to that floor.

The proposed rule solicited comment on whether FHFA should impose any restrictions on the collateral eligible to secure CRT that pose counterparty credit risk. The proposed rule also solicited comment on whether the adjustments for counterparty credit risk are appropriately calibrated. After considering the views of commenters, FHFA believes that there might be opportunities to enhance the collateral and other requirements and restrictions that mitigate the counterparty credit risk posed by CRT counterparties. Given the complexity of these issues and FHFA's commitment to transparency, FHFA is contemplating future rulemakings to address these issues. Those future rulemakings also could potentially seek to establish exceptions or other approaches to the final rule's requirements and restrictions for certain CRT that satisfy enhanced standards to ensure the effectiveness of the CRT.

E. Other Exposures

While substantially all of an Enterprise's credit risk is posed by its single-family and multifamily mortgage exposures, each Enterprise does have some amount of credit risk arising from a wide variety of other exposures, including non-traditional mortgage exposures and non-mortgage exposures. Calibrating credit risk capital requirements for some of these non-mortgage exposures—for example, an Enterprise's over-the-counter (OTC) and cleared derivatives and repo-style transactions—is complex and

[48] One implication of departing from capital neutrality is that an Enterprise might have some existing CRT structures for which the aggregate credit risk capital requirement of the retained CRT exposures actually would be greater than the aggregate credit risk capital requirement of the underlying exposures. This outcome might be more likely, all else equal, where the underlying exposures have a lower average risk weight, such as, for example, a CRT with respect to seasoned single-family mortgage exposures. Consistent with the U.S. banking framework, an Enterprise may elect to not recognize a CRT for purposes of the credit risk capital requirements and instead hold risk-based capital against the underlying exposures.

[49] BCBS, *Revisions to the Securitisation Framework Consultative Document* at 4 (Dec. 2013; final July 2016), available at *https://www.bis.org/publ/bcbs269.pdf* (''Capital requirements should be calibrated to reasonably conservative standards. This requires the framework to account for the model risk of determining the risks of specific exposures. Models for securitisation tranche performance depend in turn on models for underlying pools. In addition, securitisations have a wide range of structural features that do not exist for banks holding the underlying pool outright and that are impossible to capture in models. This layering of models and simplifying assumptions can exacerbate model risk, justifying a rejection of a strict 'capital neutrality' premise ([*i.e.*] the total capital required after securitisation should not be identical to the total capital before securitisation).'').

[50] BCBS, *Revisions to the Securitisation Framework* at 6 (Dec. 2014; rev. July 2016), available at *https://www.bis.org/bcbs/publ/d374.pdf* (''All other things being equal, a securitisation with lower structural risk needs a lower capital surcharge than a securitisation with higher structural risk; and a securitisation with less risky underlying assets requires a lower capital surcharge than a securitisation with riskier underlying assets.'').

[51] *See* Joint Agency Regulatory Capital Final Rule, 78 FR at 62119 (''At the inception of a securitization, the SSFA requires more capital on a transaction-wide basis than would be required if the underlying assets had not been securitized. That is, if the banking organization held every tranche of a securitization, its overall capital requirement would be greater than if the banking organization held the underlying assets in portfolio. The agencies believe this overall outcome is important in reducing the likelihood of regulatory capital arbitrage through securitizations.'').

technically challenging. As discussed in the proposed rule, FHFA continues to believe it is important to assign a credit risk capital requirement to all material exposures, even those of small amounts relative to an Enterprise's aggregate credit risk exposure.

The proposed rule contemplated incorporating the extensive expertise of the U.S. and international banking regulators in calibrating credit risk capital requirements for these other exposures, with adjustments as appropriate for the Enterprises.[52] The Basel framework has evolved over almost four decades of debate and collaboration among the world's leading financial regulators. That framework also has been enhanced to address the lessons of the 2008 financial crisis. Moreover, developing FHFA's own framework for assigning credit risk capital requirements for these other complex and technically challenging exposures would risk distracting FHFA from its core responsibility and area of relative expertise—fashioning a mortgage risk-sensitive framework for the Enterprises.

Under the proposed rule, an Enterprise generally would have assigned a risk weight or risk weighted asset amount for an exposure other than a mortgage exposure using the same methods for determining credit risk capital requirements under the U.S. banking framework's standardized approach, in particular the Federal Reserve Board's regulatory capital requirements at subpart D of 12 CFR part 217 (Regulation Q). Exposures that would be assigned risk weights under the U.S. banking framework include corporate exposures, exposures to sovereigns, OTC derivatives, cleared transactions, collateralized transactions, and off-balance sheet exposures.

Similarly, some exposures that were assigned credit risk capital requirements under the 2018 proposal would instead have had a credit risk capital requirement assigned under the U.S. banking framework. These would include some DTAs, municipal debt, reverse mortgage loans, reverse MBS, and cash and cash equivalents. For any exposure that was not assigned a specific risk weight under the proposed rule, the default risk weight would have been 100 percent, consistent with the U.S. banking framework.

FHFA received few comments on the proposed rule's credit risk capital requirements for other exposures. The main exception was that commenters criticized the proposed rule's credit risk capital requirement for exposures of an Enterprise to the other Enterprise or another GSE. Commenters argued that the proposed rule would undermine FHFA's single security initiative pursuant to which each Enterprise has begun issuing a single MBS known as the Uniform Mortgage-backed Security (UMBS). To foster fungibility, the UMBS initiative contemplates that each Enterprise may issue a ''Supers'' mortgage-related security, which is a re-securitization of UMBS and certain other TBA-eligible securities, including other Supers.[53] Commenters argued that UMBS fungibility and liquidity could be adversely affected by the proposed rule's assignment of a 20 percent risk weight to an Enterprise's exposure to the other Enterprise arising out of a guarantee of a security backed in whole or in part by securities of the other Enterprise. For example, a credit risk capital requirement for cross-guarantees could lead to a bifurcated treatment of UMBS because each Enterprise could be incentivized to only guarantee Supers only with its own UMBS, leading to different volumes and investor perceptions of UMBS issued by each Enterprise. Some commenters also argued that an Enterprise's exposures to the other Enterprise do not increase aggregate credit risk among the Enterprises and that the proposed rule's credit risk capital requirement in effect double-counted that risk.

FHFA has determined to finalize the proposed rule's approach to other exposures, including an Enterprise's exposures to the other Enterprise. The Enterprises currently are in conservatorship and benefit from Treasury's commitment under the PSPA. However, the Enterprises remain privately-owned corporations, and their obligations do not have the explicit guarantee of the full faith and credit of the United States. The U.S. banking regulators ''have long held the view that obligations of the GSEs should not be accorded the same treatment as obligations that carry the explicit guarantee of the U.S. government.'' [54] FHFA agrees that the MBS and other obligations of an Enterprise should be subject to a credit risk capital requirement greater than that assigned to those obligations that have an explicit guarantee of the full faith and credit of the United States. FHFA also agrees with the FSOC Secondary Market Statement that ''[t]he Enterprises' provision of secondary market liquidity generates significant interconnectedness among the Enterprises . . . . Moreover, given their similar business models, risks at the Enterprises are highly correlated; if one Enterprise experiences financial distress, the other may as well.'' The interconnectedness arising out of UMBS can further important policy objectives, but FHFA still believes the exposures between each Enterprise should be appropriately capitalized to mitigate the risk to safety and soundness that could be posed by distress at the other Enterprise.

This approach does not constitute double-counting of the required capital. An Enterprise issuing and guaranteeing a security backed by the other Enterprise's MBS is not holding capital against the other Enterprise's mortgage exposures, but only against its own exposure to the other Enterprise's guarantee. The investor in the top-level security is receiving double protection against credit risk by means of a guarantee from each Enterprise. It is that double protection that is being capitalized. FHFA believes that this capital treatment of that double guarantee is appropriate and correctly reflects the risk to each Enterprise.

To support investor confidence in that fungibility, FHFA promulgated a final rule governing Enterprise actions that affect UMBS cash flows to investors, issues quarterly prepayment monitoring reports, and has used its powers as the Enterprises' conservator to limit certain pooling practices with respect to the creation of UMBS. In November 2019, FHFA issued a request for input on Enterprise UMBS pooling practices. FHFA remains committed to the success of the UMBS initiative and will continue to enforce that final rule and, if necessary, will take appropriate supervisory and regulatory steps to achieve that objective.

X. Credit Risk Capital: Advanced Approach

The proposed rule would have required an Enterprise to comply with the risk-based capital requirements using the greater of its risk-weighted

[52] For example, consistent with the Enterprises' limited authority to own equity, the final rule adopts a simplified version of the Basel framework's approach to equity exposures. The final rule will establish a default risk weight of 400 percent for equity exposures (consistent with the U.S. banking framework's risk weight for equity exposures to private ventures) and a 100 percent risk weight for certain equity exposures to community development ventures.

[53] If an Enterprise guarantees a security backed in whole or in part by securities of the other Enterprise, the Enterprise is obligated under its guarantee to fund any shortfall in the event that the other Enterprise fails to make a payment due on its securities. The Enterprises have entered into an indemnification agreement relating to commingled securities issued by the Enterprises. The indemnification agreement obligates each Enterprise to reimburse the other for any such shortfall.

[54] 77 FR 52888, 52896 (Aug. 30, 2012).

assets calculated under the standardized approach and the advanced approach. The advanced approach requirements would have required each Enterprise to maintain its own processes for identifying and assessing credit risk, market risk, and operational risk. An Enterprise also would have been subject to requirements and restrictions governing the design, senior management oversight, independent validation, and stress testing of its advanced systems. However, the proposed rule would not have provided more specific and comprehensive prescriptions for an Enterprise's internal models beyond these minimum requirements and FHFA's supervision.

FHFA received relatively few comments on the proposed rule's advanced approaches requirements for determining credit risk-weighted assets. One commenter supported the proposed rule's approach because it would require the Enterprise to improve their internal models. One commenter argued that the proposed rule's requirements were not sufficiently detailed and recommended re-proposing more specific requirements.

Some commenters opposed the advanced approaches requirements. Commenters argued that the standardized approach's lookup grids and multipliers were already risk sensitive. Other commenters suggested that the U.S. banking regulators now disfavor the analogous internal model requirements applicable to large U.S. banking organizations. Some commenters expressed concern about the lack of transparency into the internal models that the Enterprises would use.

FHFA has determined that the final rule's advanced approaches requirements should require each Enterprise to use its internal models to determine its credit risk capital requirements for mortgage and other exposures. As discussed in the proposed rule, these requirements will help ensure that each Enterprise continues to enhance its risk management system and that neither Enterprise simply relies on the standardized approach's lookup grids and multipliers to define credit risk tolerances, measure its credit risk, or allocate economic capital. In the course of FHFA's supervision of each Enterprise's internal models for credit risk, FHFA also could identify opportunities to update or otherwise enhance the standardized approach's lookup grids and multipliers through future rulemakings as market conditions evolve.

The final rule adopts the advanced approaches requirements as proposed. FHFA acknowledges the views of those commenters that argued that the proposed rule's advanced approaches requirements could merit more specificity. FHFA solicited comment on whether to prescribe more specific requirements and restrictions governing the internal models and other procedures used by an Enterprise to determine its advanced credit risk-weighted assets, including whether to require an Enterprise to determine its advanced credit risk-weighted assets under subpart E of Regulation Q. FHFA, however, did not propose specific rule text. FHFA continues to see merit in more specific requirements and restrictions governing an Enterprise's determination of its advanced credit risk-weighted assets, and FHFA continues to contemplate that it might engage in future rulemakings to further enhance this aspect of the regulatory capital framework.

The final rule provides a transition period to permit each Enterprise to develop the governance of the internal models required by the final rule. Specifically, the advanced approaches requirements generally will apply to an Enterprise on the later of January 1, 2025 and any later compliance date specific to those requirements provided in a consent order or other transition order applicable to the Enterprise.

XI. Market Risk Capital

The proposed rule would have required an Enterprise to calculate its market risk-weighted assets for mortgage exposures and other exposures with spread risk. Single-family and multifamily loans and investments in securities held in an Enterprise's portfolio have market risk from changes in value due to movements in interest rates and credit spreads, among other things. As the Enterprises currently hedge interest rate risk at the portfolio level, and under the assumption that the Enterprises' hedging effectively manages that risk, the proposed rule's market risk capital requirements would have been limited only to spread risk.[55] Exposures that were subject to the proposed rule's market risk capital requirement would have included any tangible asset that has more than *de minimis* spread risk, regardless of whether the position is marked-to-market for financial statement reporting purposes and regardless of whether the position is held by the Enterprise for the purpose of short-term resale or with the intent of benefiting from actual or expected short-term price movements, or to lock in arbitrage profits. Covered positions would have included:

- Any NPL, re-performing loan (RPL), reverse mortgage loan, or other mortgage exposure that, in any case, does not secure an MBS guaranteed by the Enterprise;
- Any MBS guaranteed by an Enterprise, MBS guaranteed by Ginnie Mae, reverse mortgage security, PLS, CRT exposure, or other securitization exposure; and
- Any other trading asset or trading liability, whether on- or off-balance sheet.

FHFA received relatively few comments on the proposed rule's market risk capital requirements. With respect to the standardized approach, a commenter indicated no objection to the single point approach or a spread duration approach. Another commenter argued that the market risk capital requirements should only apply to exposures with more than *de minimis* spread risk. Another commenter recommended increasing the market risk capital requirement on multifamily mortgage exposures to at least 100 basis points so that it was consistent with the requirement for multifamily MBS.

With respect to the advanced approaches requirements, commenters suggested that the U.S. banking regulators now disfavor the analogous requirements applicable to the large U.S. banking organizations. Commenters argued that the standardized approach was already risk sensitive. Commenters also suggested that the proposed rule's requirements were not sufficiently detailed and recommended re-proposing more specific requirements and restrictions, while another recommended that FHFA allow a sufficient transition period.

The final rule adopts the market risk capital requirements as proposed. FHFA acknowledges the views of those commenters that thought that the proposed rule's advanced approaches requirements could merit more specificity. FHFA solicited comment on whether to prescribe more specific requirements and restrictions governing the internal models and other procedures used by an Enterprise to determine its advanced market risk-weighted assets, including whether to require an Enterprise to determine its advanced market risk-weighted assets under subpart F of Regulation Q. FHFA, however, did not propose specific rule text. FHFA continues to see merit in more specific requirements and restrictions governing an Enterprise's determination of its advanced market risk-weighted assets, and FHFA

[55] FHFA's supervision of each Enterprise includes examinations of the effectiveness of the Enterprise's hedging of its interest rate risk.

continues to contemplate that it might engage in future rulemakings to further enhance this aspect of the regulatory capital framework.

The final rule provides a transition period to permit each Enterprise to develop the internal models required by the final rule. Specifically, the advanced approaches requirements generally will apply to an Enterprise on the later of January 1, 2025 and any later compliance date specific to those requirements provided in a consent order or other transition order applicable to the Enterprise. During the transition period, each Enterprise's market risk capital requirement will be equal to its measure for spread risk, determined as contemplated by the proposed rule's standardized approach.

XII. Operational Risk Capital

The proposed rule would have established an operational risk capital requirement to be calculated using the advanced measurement approach of the U.S. banking framework but with a floor set at 15 basis points of adjusted total assets. This approach was developed in response to comments on the 2018 proposal. Commenters on the 2018 proposal suggested that the proposed Basel basic indicators approach was insufficient because the Enterprises were too complex to justify such a simple approach and because FHFA's implementation did not allow the requirement to vary appropriately under the basic indicators approach.

Operational risk was defined under the proposed rule as the risk of loss resulting from inadequate or failed internal processes, people, and systems or from external events (including legal risk but excluding strategic and reputational risk). Under the proposed rule, the Enterprise's risk-based capital requirement for operational risk generally would have been its operational risk exposure minus any eligible operational risk offsets. That amount would potentially have been subject to adjustments if the Enterprise qualified to use operational risk mitigants. An Enterprise's operational risk exposure would have been the 99.9th percentile of the distribution of potential aggregate operational losses, as generated by the Enterprise's operational risk quantification system over a one-year horizon (and not incorporating eligible operational risk offsets or qualifying operational risk mitigants).

FHFA received relatively few comments on the proposed rule's operational risk capital requirements. Some commenters were critical of the overall approach and the floor. One commenter recommended reducing the confidence interval. A few commenters raised concerns about the transparency of the Enterprises' internal models. A commenter recommended that FHFA develop a transparent approach using historical data and statistical analysis. Another commenter recommended the U.S. banking framework's standardized measurement approach. One commenter recommended an operational risk capital requirement of 25 basis points.

Other commenters criticized the floor on the operational risk capital requirement. Several commenters urged FHFA to remove or reduce the floor, which could reduce an Enterprise's incentive to enhance its internal models. One commenter argued that FHFA had not justified doubling the floor from the 2018 proposal's requirement.

The final rule adopts the proposed rule's approach to operational risk capital, including the floor of 15 basis points of adjusted total assets. FHFA continues to believe that it is important that operational risk capital does not fall below a meaningful, credible amount. 15 basis points of adjusted total assets also would have represented approximately double what FHFA originally proposed in the 2018 proposal, and approximately double the amount of operational risk capital estimated internally by the Enterprises using the Basel standardized approach. FHFA believes doubling the internally estimated figure is appropriate given the estimates were calculated using historical results while in conservatorship. FHFA estimates that the Enterprises' operational risk capital requirements under the U.S. banking framework's standardized measurement approach would have been somewhat greater than this floor. FHFA also calibrated this floor taking into account the operational risk capital requirements of large U.S. banking organizations. Of the U.S. bank holding companies with at least $500 billion in total assets at the end of 2019, the smallest operational risk capital requirement was 0.69 percent of that U.S. banking organization's total leverage exposure.

FHFA understands that time and resources will be required for each Enterprise to develop the internal models and data to implement the advanced measurement approach. FHFA is also aware that the U.S. banking regulators are considering potentially replacing the advanced measurement approach with the Basel framework's standardized measurement approach. FHFA contemplates a transition period to permit each Enterprise to develop the internal models required by the final rule. Specifically, the internal model requirements of these operational risk capital requirements generally will apply to an Enterprise on the later of January 1, 2025 and any later compliance date specific to those requirements provided in a consent order or other transition order applicable to the Enterprise. During that interim period, each Enterprise's operational risk capital requirement will be 15 basis points of its adjusted total assets.

XIII. Impact of the Enterprise Capital Rule

These impact tables are based on FHFA's estimates based on available data and could differ from an Enterprise's estimates.

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TABLE 1: SUMMARY OF RISK-BASED CAPITAL REQUIREMENTS FOR FANNIE MAE AND FREDDIE MAC COMBINED AS OF JUNE 30, 2020

Enterprises Combined

Risk-based Capital Requirements

$ in billions	Total Capital (Statutory)	CET1	Tier 1	Adjusted Total Capital
Capital Requirement	$174	$98	$131	$174
Prescribed Buffers				
Stress Capital Buffer		50	50	50
Stability Capital Buffer		60	60	60
Countercyclical Capital Buffer Amount		0	0	0
Prescribed Capital Conservation Buffer Amount (PCCBA)	0	109	109	109
Requirement and PCCBA	$174	$207	$240	$283

Leverage Capital Requirements

	Core Capital (Statutory)	Tier 1
Capital Requirement	$166	$166
Prescribed Leverage Buffer Amount (PLBA)	0	100
Requirement and PLBA	$166	$265

TABLE 1A: SUMMARY OF RISK-BASED CAPITAL REQUIREMENTS FOR FANNIE MAE AS OF JUNE 30, 2020

Fannie Mae

Risk-based Capital Requirements

$ in billions	Total Capital (Statutory)	CET1	Tier 1	Adjusted Total Capital
Capital Requirement	$101	$57	$76	$101
Prescribed Buffers				
Stress Capital Buffer		29	29	29
Stability Capital Buffer		42	42	42
Countercyclical Capital Buffer Amount		0	0	0
Prescribed Capital Conservation Buffer Amount (PCCBA)	0	71	71	71
Requirement and PCCBA	$101	$127	$146	$171

Leverage Capital Requirements

	Core Capital (Statutory)	Tier 1
Capital Requirement	$97	$97
Prescribed Leverage Buffer Amount (PLBA)	0	58
Requirement and PLBA	$97	$155

TABLE 1B: SUMMARY OF RISK-BASED CAPITAL REQUIREMENTS FOR FREDDIE MAC AS OF JUNE 30, 2020

Freddie Mac

Risk-based Capital Requirements

$ in billions	Total Capital (Statutory)	CET1	Tier 1	Adjusted Total Capital
Capital Requirement	$73	$41	$55	$73
Prescribed Buffers				
Stress Capital Buffer		21	21	21
Stability Capital Buffer		18	18	18
Countercyclical Capital Buffer Amount		0	0	0
Prescribed Capital Conservation Buffer Amount (PCCBA)	0	39	39	39
Requirement and PCCBA	$73	$80	$94	$112

Leverage Capital Requirements

	Core Capital (Statutory)	Tier 1
Capital Requirement	$69	$69
Prescribed Leverage Buffer Amount (PLBA)	0	41
Requirement and PLBA	$69	$110

TABLE 2: COMPARISON OF FANNIE MAE AND FREDDIE MAC COMBINED RISK-BASED CAPITAL REQUIREMENTS UNDER THE 2020 PROPOSED RULE AND THE FINAL RULE, BY RISK CATEGORY

Enterprises Combined	2020 Re-proposed Rule As of				Final Rule As of		
	9/30/2019		6/30/2020		6/30/2020		
	$ in billions	% of Total	$ in billions	% of Total	$ in billions	% of Total	% of Adjusted Total Assets
Gross Credit Risk	$151.9		$188.6		$214.5		3.23%
Loan-Level Credit Enhancement	(17.0)		(22.3)		(24.8)		(0.37%)
Net Credit Risk	$134.9		$166.3		$189.6		2.86%
CRT Impact, net	(22.1)		(33.9)		(36.6)		(0.55%)
Post-CRT Net Credit Risk	112.8	84%	132.4	86%	153.0	88%	2.31%
Market Risk	13.6	10%	10.6	7%	10.6	6%	0.16%
Operational Risk	8.7	6%	10.0	6%	10.0	6%	0.15%
Deferred Tax Assets	0.0	0%	0.5	0%	0.5	0%	0.01%
Total Capital Requirement	$135.1	100%	$153.4	100%	$174.1	100%	2.62%
Prescribed Buffers							
Stress Capital Buffer	45.5		49.8		49.8		0.75%
Stability Capital Buffer	53.3		59.6		59.6		0.90%
Countercyclical Capital Buffer Amount	0.0		0.0		0.0		0.00%
Prescribed Capital Conservation Buffer Amount (PCCBA)	98.8		109.3		109.3		1.65%
Total Capital Requirement and PCCBA	$233.9		$262.7		$283.4		4.27%
Adjusted Total Assets	$6,072.0		$6,635.2		$6,635.2		
Total Capital Requirement and PCCBA/ Adjusted Total Assets	3.85%		3.96%		4.27%		
Total Risk-Weighted Assets	$1,689		$1,918		$2,176		

TABLE 2A: COMPARISON OF FANNIE MAE RISK-BASED CAPITAL REQUIREMENTS UNDER THE 2020 PROPOSED RULE AND THE FINAL RULE, BY RISK CATEGORY

Fannie Mae	2020 Re-proposed Rule As of				Final Rule As of		
	9/30/2019		6/30/2020		6/30/2020		
	$ in billions	% of Total	$ in billions	% of Total	$ in billions	% of Total	% of Adjusted Total Assets
Gross Credit Risk	$90.8		$108.7		$123.6		3.18%
Loan-Level Credit Enhancement	(10.4)		(13.5)		(14.9)		(0.38%)
Net Credit Risk	80.3		$95.2		$108.7		2.80%
CRT Impact, net	(10.5)		(16.3)		(18.3)		(0.47%)
Post-CRT Net Credit Risk	69.8	86%	78.9	88%	90.4	90%	2.33%
Market Risk	6.2	8%	4.5	5%	4.5	4%	0.12%
Operational Risk	5.1	6%	5.8	7%	5.8	6%	0.15%
Deferred Tax Assets	0.0	0%	0.0	0%	0.0	0%	0.00%
Total Capital Requirement	$81.2	100%	$89.2	100%	$100.7	100%	2.59%
Prescribed Buffers							
Stress Capital Buffer	26.6		29.1		29.1		0.75%
Stability Capital Buffer	37.3		41.5		41.5		1.07%
Countercyclical Capital Buffer Amount	0.0		0.0		0.0		0.00%
Prescribed Capital Conservation Buffer Amount (PCCBA)	63.9		70.6		70.6		1.82%
Total Capital Requirement and PCCBA	$145.1		$159.8		$171.4		4.41%
Adjusted Total Assets	$3,547.4		$3,881.9		$3,881.9		
Total Capital Requirement and PCCBA/ Adjusted Total Assets	4.09%		4.12%		4.41%		
Total Risk-Weighted Assets	$1,015		$1,115		$1,259		

TABLE 2B: COMPARISON OF FREDDIE MAC RISK-BASED CAPITAL REQUIREMENTS UNDER THE 2020 PROPOSED RULE AND THE FINAL RULE, BY RISK CATEGORY

Freddie Mac	2020 Re-proposed Rule As of				Final Rule As of		
	9/30/2019		6/30/2020		6/30/2020		
	$ in billions	% of Total	$ in billions	% of Total	$ in billions	% of Total	% of Adjusted Total Assets
Gross Credit Risk	$61.2		$79.9		$90.9		3.30%
Loan-Level Credit Enhancement	(6.6)		(8.8)		(9.9)		(0.36%)
Net Credit Risk	54.6		$71.0		$80.9		2.94%
CRT Impact, net	(11.6)		(17.6)		(18.3)		(0.67%)
Post-CRT Net Credit Risk	43.0	80%	53.5	83%	62.6	85%	2.27%
Market Risk	7.4	14%	6.2	10%	6.2	8%	0.22%
Operational Risk	3.6	7%	4.1	6%	4.1	6%	0.15%
Deferred Tax Assets	0.0	0%	0.5	1%	0.5	1%	0.02%
Total Capital Requirement	$53.9	100%	$64.2	100%	$73.4	100%	2.66%
Prescribed Buffers							
Stress Capital Buffer	18.9		20.6		20.6		0.75%
Stability Capital Buffer	16.0		18.0		18.0		0.66%
Countercyclical Capital Buffer Amount	0.0		0.0		0.0		0.00%
Prescribed Capital Conservation Buffer Amount (PCCBA)	35.0		38.7		38.7		1.41%
Total Capital Requirement and PCCBA	$88.9		$102.9		$112.0		4.07%
Adjusted Total Assets	$2,524.6		$2,753.3		$2,753.3		
Total Capital Requirement and PCCBA/ Adjusted Total Assets	3.52%		3.74%		4.07%		
Total Risk-Weighted Assets	$674		$803		$917		

TABLE 3: COMPARISON OF FANNIE MAE AND FREDDIE MAC COMBINED RISK-BASED CAPITAL REQUIREMENTS UNDER THE 2020 PROPOSED RULE AND THE FINAL RULE, BY ASSET CATEGORY

Enterprises Combined

	2020 Re-proposed Rule As of				Final Rule As of		
	9/30/2019		6/30/2020		6/30/2020		
	$ in billions	% of Total	$ in billions	% of Total	$ in billions	% of Total	% of Adjusted Total Assets
Single-family	$111.0	82%	$122.5	80%	$142.8	82%	2.15%
Multifamily	17.8	13%	17.8	12%	18.2	10%	0.27%
Other Assets*	6.3	5%	13.1	9%	13.1	8%	0.20%
Total Capital Requirement	$135.1	100%	$153.4	100%	$174.1	100%	2.62%
Prescribed Buffers							
Stress Capital Buffer	45.5		49.8		49.8		0.75%
Stability Capital Buffer	53.3		59.6		59.6		0.90%
Countercyclical Capital Buffer Amount	0.0		0.0		0.0		0.00%
Prescribed Capital Conservation Buffer Amount (PCCBA)	$98.8		$109.3		$109.3		1.65%
Total Capital Requirement and PCCBA	$233.9		$262.7		$283.4		4.27%
Adjusted Total Assets	$6,072.0		$6,635.2		$6,635.2		
Total Capital Requirement and Buffer Target/ Adjusted Total Assets	3.85%		3.96%		4.27%		
Total Risk-Weighted Assets	$1,689		$1,918		$2,176		

*Includes PLS, CMBS, DTA, Other.

TABLE 3A: COMPARISON OF FANNIE MAE RISK-BASED CAPITAL REQUIREMENTS UNDER THE 2020 PROPOSED RULE AND THE FINAL RULE, BY ASSET CATEGORY

Fannie Mae

	2020 Re-proposed Rule As of				Final Rule As of		
	9/30/2019		6/30/2020		6/30/2020		
	$ in billions	% of Total	$ in billions	% of Total	$ in billions	% of Total	% of Adjusted Total Assets
Single-family	$66.5	82%	$71.3	80%	$82.3	82%	2.12%
Multifamily	10.7	13%	11.4	13%	11.9	12%	0.31%
Other Assets*	4.0	5%	6.5	7%	6.5	6%	0.17%
Total Capital Requirement	$81.2	100%	$89.2	100%	$100.7	100%	2.59%
Prescribed Buffers							
Stress Capital Buffer	26.6		29.1		29.1		0.75%
Stability Capital Buffer	37.3		41.5		41.5		1.07%
Countercyclical Capital Buffer Amount	0.0		0.0		0.0		0.00%
Prescribed Capital Conservation Buffer Amount (PCCBA)	$63.9		$70.6		$70.6		1.82%
Total Capital Requirement and PCCBA	$145.1		$159.8		$171.4		4.41%
Adjusted Total Assets	$3,547.4		$3,881.9		$3,881.9		
Total Capital Requirement and Buffer Target/ Adjusted Total Assets	4.09%		4.12%		4.41%		
Total Risk-Weighted Assets	$1,015		$1,115		$1,259		

*Includes PLS, CMBS, DTA, Other.

TABLE 3B: COMPARISON OF FREDDIE MAC RISK-BASED CAPITAL REQUIREMENTS UNDER THE 2020 PROPOSED RULE AND THE FINAL RULE, BY ASSET CATEGORY

Freddie Mac

	2020 Re-proposed Rule As of				Final Rule As of		
	9/30/2019		6/30/2020		6/30/2020		
	$ in billions	% of Total	$ in billions	% of Total	$ in billions	% of Total	Adjusted Total
Single-family	$44.5	83%	$51.3	80%	$60.5	83%	2.20%
Multifamily	7.1	13%	6.4	10%	6.2	8%	0.23%
Other Assets*	2.3	4%	6.6	10%	6.6	9%	0.24%
Total Capital Requirement	$53.9	100%	$64.2	100%	$73.4	100%	2.66%
Prescribed Buffers							
Stress Capital Buffer	18.9		20.6		20.6		0.75%
Stability Capital Buffer	16.0		18.0		18.0		0.66%
Countercyclical Capital Buffer Amount	0.0		0.0		0.0		0.00%
Prescribed Capital Conservation Buffer Amount (PCCBA)	$35.0		$38.7		$38.7		1.41%
Total Capital Requirement and PCCBA	$88.9		$102.9		$112.0		4.07%
Adjusted Total Assets	$2,524.6		$2,753.3		$2,753.3		
Total Capital Requirement and Buffer Target/ Adjusted Total Assets	3.52%		3.74%		4.07%		
Total Risk-Weighted Assets	$674		$803		$917		

*Includes PLS, CMBS, DTA, Other.

TABLE 4: COMPARISON OF SINGLE-FAMILY RISK-BASED CAPITAL REQUIREMENTS UNDER THE 2020 PROPOSED RULE AND THE FINAL RULE, AS OF JUNE 30, 2020

$ in billions	Fannie Mae		Freddie Mac		Enterprises Combined			
	Re-proposed Rule As of 6/30/2020	Final Rule As of 6/30/2020	Re-proposed Rule As of 6/30/2020	Final Rule As of 6/30/2020	Re-proposed Rule As of 6/30/2020	Risk Weight	Final Rule As of 6/30/2020	Risk Weight
Gross Credit Risk	$89.2	$103.8	$63.0	$73.7	$152.1	37%	$177.5	43%
Loan Level Enchancement	(13.5)	(14.9)	(8.8)	(9.9)	(22.2)		(24.8)	
Net Credit Risk	75.7	88.9	54.2	63.9	129.9	31%	152.8	37%
CRT Impact, net	(12.0)	(14.2)	(11.0)	(11.5)	(23.1)		(25.7)	
Post-CRT Net Credit Risk	63.7	74.7	43.1	52.4	106.8	26%	127.1	31%
Market Risk	2.9	2.9	5.0	5.0	7.9		7.9	
Operational Risk	4.6	4.6	3.1	3.1	7.8		7.8	
Total Capital Requirement	$71.3	$82.3	$51.3	$60.5	$122.5		$142.8	
Total UPB	$3,084.7		$2,084.5		$5,169.2			

Includes single-family whole loans, Fannie Mae and Freddie Mac guarantees of single-family securities held by third parties, and investments in single-family securities guaranteed by Fannie Mae, Freddie Mac or Ginnie Mae.

TABLE 5: COMPARISON OF MULTIFAMILY RISK-BASED CAPITAL REQUIREMENTS UNDER THE 2020 PROPOSED RULE AND THE FINAL RULE, AS OF JUNE 30, 2020

$ in billions	Fannie Mae		Freddie Mac		Enterprises Combined			
	Re-proposed Rule As of 6/30/2020	Final Rule As of 6/30/2020	Re-proposed Rule As of 6/30/2020	Final Rule As of 6/30/2020	Re-proposed Rule As of 6/30/2020	Risk Weight	Final Rule As of 6/30/2020	Risk Weight
Net Credit Risk	$14.7	$15.0	$11.9	$12.2	$26.6	48%	$27.1	49%
CRT Impact, net	(4.3)	(4.0)	(6.5)	(6.9)	(10.8)		(10.9)	
Post-CRT Net Credit Risk	10.4	10.9	5.4	5.3	15.8	28%	16.2	29%
Market Risk	0.4	0.4	0.5	0.5	0.9		0.9	
Operational Risk	0.6	0.6	0.5	0.5	1.0		1.0	
Total Capital Requirement	$11.4	$11.9	$6.4	$6.2	$17.8		$18.2	
Total UPB	$379.8		$318.1		$697.9		$697.9	

Includes multifamily whole loans, Fannie Mae and Freddie Mac guarantees of multifamily securities held by third parties, and investments in multifamily securities guaranteed by Fannie Mae, Freddie Mac or Ginnie Mae.

TABLE 6: OTHER ASSETS TOTAL CAPITAL REQUIREMENTS AS OF JUNE 30, 2020

	Fannie Mae			Freddie Mac			Enterprises Combined		
	Capital, $billions	UPB, $billions	Capital, bps	Capital, $billions	UPB, $billions	Capital, bps	Capital, $billions	UPB, $billions	Capital, bps
Other Assets									
Private-label Securities	$0.4	$1.6	2,545	$0.2	$1.4	1,478	$0.6	$2.9	2,054
CMBS	0.0	0.0	0	0.0	0.1	218	0.0	0.1	218
Deferred Tax Assets	0.0	13.1	0	0.5	5.7	815	0.5	18.8	247
Other	6.1	391.4	156	5.9	241.1	246	12.0	632.5	190
Total Capital Requirements	$6.5	$406.1	160	$6.6	$248.3	266	$13.1	$654.4	200

TABLE 7: CALCULATION OF THE STABILITY CAPITAL BUFFER

	In billions of dollars		Data Source*
	Sep 30, 2019	**Jun 30, 2020**	Z.1 - L.217
Total Market			
Single-Family	$11,080.1	$11,303.8	Line 2
Multifamily	$1,560.9	$1,671.8	Line 3
Total	$12,641.0	$12,975.6	
Fannie Mae			
Regular	$3,280.2	$3,417.8	Line 34
Pools	$7.7	$7.5	Line 42
Total	$3,287.9	$3,425.3	
Market Share	26.0%	26.4%	
less 5%	-5.0%	-5.0%	
Share subject to buffer	21.0%	21.4%	
x 5 bps	105.0	107.0	
Adjusted Total Assets	$3,547.4	$3,881.9	
Stability Capital Buffer	$37.3	$41.5	
Freddie Mac			
Regular	$1,969.3	$2,063.4	Line 35
Pools	$268.2	$285.6	Line 41
Total	$2,237.5	$2,349.0	
Market Share	17.7%	18.1%	
less 5%	-5.0%	-5.0%	
Share subject to buffer	12.7%	13.1%	
x 5 bps	63.5	65.5	
x Adjusted Total Assets	$2,524.6	$2,753.3	
Stability Capital Buffer	$16.0	$18.0	

Note: The 9/30/19 column represents figures reported in the re-proposed rule. The Federal Reserve revised the total market numbers, so the updated buffer would be 104.8 bp for Fannie Mae ($37.2 bil) and 63.3 bps for Freddie Mac ($16.0).
Source: Financial Accounts of the United States - Z.1, L.217 Total Mortgages
https://www.federalreserve.gov/releases/z1/20200921/z1.pdf

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XIV. Key Differences From the U.S. Banking Framework

FHFA solicited comment on the appropriateness of key differences between the credit risk capital requirements for mortgage exposures under the proposed rule and the U.S. banking framework. Some commenters argued that the proposed rule inappropriately treated the Enterprises as banks and that ''bank-like'' quantities of required capital would be inappropriate for the Enterprises. Other commenters advocated a general alignment of the credit risk capital requirements for similar mortgage exposures across the Enterprises and other market participants.

As discussed in the proposed rule and in Section V.C, FHFA continues to believe that the differences between the business models, statutory mandates, and risk profiles of the Enterprises and banking organizations should not preclude comparisons of the *credit risk* capital requirement of a large U.S. banking organization for a specific mortgage exposure to the *credit risk* capital requirement of an Enterprise for a similar mortgage exposure. FSOC also viewed this as a valid and meaningful point of comparison. The FSOC Secondary Market Statement found that ''[t]he Enterprises' credit risk requirements . . . likely would be lower than other credit providers across significant portions of the risk spectrum and during much of the credit cycle, which would create an advantage that could maintain significant concentration of risk with the

Enterprises.'' FSOC ''encourage[d] FHFA and other regulatory agencies to coordinate and take other appropriate action to avoid market distortions that could increase risks to financial stability by generally taking consistent approaches to the capital requirements and other regulation of similar risks across market participants, consistent with the business models and missions of their regulated entities.''

Consistent with FSOC's recommendation, and in furtherance of continued transparency and coordination, FHFA has identified several key differences between this final rule and the U.S. banking framework.

• *Risk-based capital requirements.* As of June 30, 2020 and before adjusting for CRT or the buffers under both frameworks, the average credit risk capital requirements under the final rule for the Enterprises' single-family mortgage exposures generally would have been roughly three-quarters those of similar exposures under the U.S. banking framework. The Enterprises together would have been required under the final rule's risk-based capital requirements to maintain $283 billion in risk-based adjusted total capital as of June 30, 2020 to avoid restrictions on capital distributions and discretionary bonuses. Had they been instead subject to the U.S. banking framework, the Enterprises would have been required to maintain approximately $450 billion, perhaps significantly more, in risk-based total capital (not including market risk and operational risk capital) to avoid similar restrictions. In light of these facts, FHFA reiterates that the final rule would not subject the Enterprises to the same capital requirements that apply to U.S. banking organizations.

• *CRT capital relief.* The final rule takes a considerably different approach to assigning risk weights to retained CRT exposures. In particular, the minimum risk weight assigned to retained CRT exposures would be 10 percent under the final rule, while it would have been 20 percent under the U.S. banking framework. The final rule also provides capital relief for a number of CRT structures that would not be eligible for capital relief under the U.S. banking framework.

• *Mortgage insurance.* The final rule provides a more explicit mechanism than the U.S. banking framework for recognizing and assigning capital relief for mortgage insurance.

• *Buffers.* As acknowledged by the FSOC Secondary Market Statement, an increase in the average risk weight on an Enterprise's exposures would cause the dollar amount of the stress capital buffer, capital conservation buffer, and stability capital buffer to become a smaller share of the dollar amount of the U.S. banking framework's analogous buffers were they applied to the Enterprise.[56] At the June 30, 2020 average risk weight of 33 percent, Fannie Mae's PCCBA of 1.82 percent of adjusted total assets would have been equivalent to a buffer that is 5.6 percent of risk-weighted assets. If that average risk weight had instead been 35 percent, that same PCCBA would have been equivalent to a buffer that is 5.2 percent of risk-weighted assets. That growing gap could have implications for a level playing field and the potential for market distortions that pose risk to financial stability.

• *Market risk capital.* The final rule and U.S. banking framework take considerably different approaches to market risk capital requirements. As discussed in Section XI, the final rule generally assigns market risk capital requirements to a broader set of exposures, including ones already subject to credit risk capital requirements, while the U.S. banking framework requires market risk capital not just for spread risk but also a broader range of market risks. The final rule also would be significantly less prescriptive as to requirements and restrictions governing the internal models used to determine the market risk capital requirements. FHFA is considering future rulemakings to prescribe more specific requirements and restrictions.

• *Internal-ratings approach.* Like the U.S. banking framework, each Enterprise would be required to determine its risk-weighted assets under two approaches—a standardized approach and an advanced approach—with the greater of the two risk-weighted assets used to determine its risk-based capital requirements. Unlike the U.S. banking framework, the final rule would be significantly less prescriptive as to requirements and restrictions governing the internal models used to determine the advanced risk-weighted assets. FHFA is considering future rulemakings to prescribe more specific requirements and restrictions.

FHFA believes that each of these differences from the U.S. banking framework is appropriate given the different business models, statutory mandates, and risk profiles of the Enterprises. FHFA acknowledges that these differences could create some risks with respect to a level playing field, the potential for market distortions that pose risk to financial stability or the competitiveness, efficiency, or resiliency of the national housing finance markets, and even the safety and soundness of the Enterprises. FHFA is committed to working with other regulatory agencies to coordinate and take other appropriate action to avoid market distortions that could increase risks to financial stability or the national housing finance markets and, in that spirit, is also committed to reassessing its regulatory capital framework from time to time.

[56] FSOC Secondary Market Statement (''Because the proposed buffers change based on adjusted total asset size and market share, an Enterprise's capital buffers could decline on a risk-adjusted basis in response to deteriorating Enterprise asset quality or during periods of stress.'').

XV. Transition Period

The proposed rule was intended to establish a post-conservatorship regulatory capital framework that would ensure that each Enterprise operates in a safe and sound manner and is positioned to fulfill its statutory mission to provide stability and ongoing assistance to the secondary mortgage market across the economic cycle, in particular during periods of financial stress. Given the Enterprises' current conservatorship status and capitalization, certain sections and subparts of the proposed rule would have been subject to delayed compliance dates as set forth in § 1240.4 of the proposed rule.

The capital requirements and buffers set out in subpart B of the proposed rule would have had a delayed compliance date, unless adjusted by FHFA as described below, of the later of one year from publication of the final rule or the date of the termination of conservatorship. FHFA recognized that the path for transition out of conservatorship and meeting the full capital requirements and buffers was not settled at the time of the proposed rule. Therefore, the proposed rule would have provided FHFA with the discretion to defer compliance with the capital requirements and thereby not subject an Enterprise to statutory prohibitions on capital distributions that would apply if those requirements were not met.

During that deferral period, the PCCBA would have been the CET1 capital that would otherwise be required under the proposed rule's § 1240.10 plus the PCCBA that would otherwise apply under normal conditions under the proposed rule's § 1240.11(a)(5); and the PLBA would have been 4.0 percent of the adjusted total assets of the Enterprise. To benefit from the deferral period, an Enterprise would have been required to comply with any corrective

plan or agreement or order that sets out the actions by which an Enterprise will achieve compliance with specified capital requirements. In addition, the proposed rule would have delayed compliance for reporting under the proposed rule's § 1240.1(f) for one year from the date of publication of the final rule.

Commenters generally were supportive of the proposed rule's compliance period. Commenters were particularly concerned that a short recapitalization period could disrupt the national housing finance markets. Some commenters generally supported a longer compliance period. Some commenters urged FHFA to provide a specific timeline for phase-in of the regulatory capital requirements and PCCBA and PLBA, as the U.S. banking regulators did for similar requirements. Some focused on delaying the effective date for the proposed rule's payout restrictions. A few commenters endorsed the contemplated deferral period so long as an Enterprise complied with any corrective action plan or agreement or order. These commenters noted that an order could position FHFA to maintain heightened supervision of the Enterprise during a recapitalization period while facilitating each Enterprise's ability to conduct significant common equity offerings.

FHFA has revised the contemplated compliance period in several respects, including to provide for an effective date of the final rule that is 60 days after publication in the **Federal Register** and establish different transition periods for the advanced approaches requirements.

Under the final rule, an Enterprise will not be subject to any requirement under the final rule until the compliance date for the requirement under the final rule. The compliance date for the regulatory capital requirements (distinct from the PCCBA or the PLBA) will be the later of the date of the termination of the conservatorship of the Enterprise (or, if later, the effective date of the final rule, which would be 60 days after its publication in the **Federal Register**) and any later compliance date provided in a consent order or other transition order applicable to the Enterprise. In contrast, the final rule provides that the compliance date for the PCCBA and the PLBA will be the date of the termination of the conservatorship of the Enterprise (or, if later, the effective date of the final rule), so as to provide additional authority to FHFA to restrict dividends and other capital distributions during the period in which the Enterprise raises regulatory capital to achieve compliance with the regulatory capital requirements. FHFA expects that this interim period could be governed by a capital restoration plan that would be binding on the Enterprise pursuant to a consent order or other transition order.

The final rule's advanced approaches requirements will be delayed until the later of January 1, 2025 and any later compliance date specific to those requirements provided in a consent order or other transition order applicable to the Enterprise. Regardless of the date of the termination of the conservatorship of an Enterprise, the Enterprise will be required to report its regulatory capital, PCCBA, PLBA, standardized total risk-weighted assets, and adjusted total assets beginning January 1, 2022.

XVI. Temporary Increases of Minimum Capital Requirements

To reinforce its reserved authorities under § 1240.1(d), FHFA proposed to amend its existing rule, 12 CFR part 1225, ''Minimum Capital—Temporary Increase,'' to clarify that the authority implemented in that rule to temporarily increase a regulated entity's required capital minimums applies to risk-based minimum capital levels as well as to minimum leverage ratios. This amendment would have aligned the scope of this regulation, adopted under 12 U.S.C. 4612(d), with the FHFA Director's authority under 12 U.S.C. 4612(e) to establish additional capital and reserve requirements for particular purposes, which authorizes risk-based adjustments to capital requirements for particular products and activities and is not limited to adjustments to the leverage ratio. FHFA also proposed to amend the definition of ''total exposure'' in § 1206.2 to have the same meaning as ''adjusted total assets'' as defined in § 1240.2 of the proposed rule. FHFA also proposed to remove 12 CFR part 1750.

FHFA did not receive any comments on this aspect of the proposed rule, and the final rule adopts these provisions as proposed.

XVII. Administrative Law Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. FHFA need not undertake such an analysis if FHFA has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). FHFA has considered the impact of the final rule under the Regulatory Flexibility Act. The General Counsel of FHFA certifies that the final rule will not have a significant economic impact on a substantial number of small entities because the final rule is applicable only to the Enterprises, which are not small entities for purposes of the Regulatory Flexibility Act.

B. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*) requires that regulations involving the collection of information receive clearance from the Office of Management and Budget (OMB). The final rule contains no such collection of information requiring OMB approval under the PRA. Therefore, no information has been submitted to OMB for review.

C. Congressional Review Act

In accordance with the Congressional Review Act (5 U.S.C. 801 *et seq.*), FHFA has determined that this final rule is a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

Final Rule

List of Subjects

12 CFR Part 1206

Assessments, Federal home loan banks, Government-sponsored enterprises, Reporting and recordkeeping requirements.

12 CFR Part 1225

Federal home loan banks, Federal National Mortgage Association, Federal Home Loan Mortgage Corporation, Capital, Filings, Minimum capital, Procedures, Standards.

12 CFR Part 1240

Capital, Credit, Enterprise, Investments, Reporting and recordkeeping requirements.

12 CFR Part 1750

Banks, banking, Capital classification, Mortgages, Organization and functions (Government agencies), Risk-based capital, Securities.

Authority and Issuance

For the reasons stated in the preamble, under the authority of 12 U.S.C. 4511, 4513, 4513b, 4514, 4515, 4526, 4611, and 4612, FHFA amends chapters XII and XVII, of title 12 of the Code of Federal Regulations as follows:

Chapter XII—Federal Housing Finance Agency

Subchapter A—Organization and Operations

PART 1206—ASSESSMENTS

■ 1. The authority citation for part 1206 continues to read as follows:

Authority: 12 U.S.C. 4516.

■ 2. Amend § 1206.2 by revising the definition of ''Total exposure'' to read as follows:

§ 1206.2 Definitions.

* * * * *

Total exposure has the same meaning given to adjusted total assets in 12 CFR 1240.2.

* * * * *

Subchapter B—Entity Regulations

PART 1225—MINIMUM CAPITAL—TEMPORARY INCREASE

■ 3. The authority citation for part 1225 is amended to read as follows:

Authority: 12 U.S.C. 4513, 4526, and 4612.

■ 4. Amend § 1225.2 by revising the definition of ''Minimum capital level'' to read as follows:

§ 1225.2 Definitions.

* * * * *

Minimum capital level means the lowest amount of capital meeting any regulation or orders issued pursuant to 12 U.S.C. 1426 and 12 U.S.C. 4612, or any similar requirement established by regulation, order or other action.

* * * * *

Subchapter C—Enterprises

■ 5. Add part 1240 to subchapter C to read as follows:

PART 1240—CAPITAL ADEQUACY OF ENTERPRISES

Sec.

Subpart A—General Provisions

1240.1 Purpose, applicability, reservations of authority, reporting, and timing.
1240.2 Definitions.
1240.3 Operational requirements for counterparty credit risk.
1240.4 Transition.

Subpart B—Capital Requirements and Buffers

1240.10 Capital requirements.
1240.11 Capital conservation buffer and leverage buffer.

Subpart C—Definition of Capital

1240.20 Capital components and eligibility criteria for regulatory capital instruments.
1240.21 [Reserved]
1240.22 Regulatory capital adjustments and deductions.

Subpart D—Risk-Weighted Assets—Standardized Approach

1240.30 Applicability.

Risk-Weighted Assets for General Credit Risk

1240.31 Mechanics for calculating risk-weighted assets for general credit risk.
1240.32 General risk weights.
1240.33 Single-family mortgage exposures.
1240.34 Multifamily mortgage exposures.
1240.35 Off-balance sheet exposures.
1240.36 Derivative contracts.
1240.37 Cleared transactions.
1240.38 Guarantees and credit derivatives: substitution treatment.
1240.39 Collateralized transactions.

Risk-Weighted Assets for Unsettled Transactions

1240.40 Unsettled transactions.

Risk-Weighted Assets for CRT and Other Securitization Exposures

1240.41 Operational requirements for CRT and other securitization exposures.
1240.42 Risk-Weighted assets for CRT and other securitization exposures.
1240.43 Simplified supervisory formula approach (SSFA).
1240.44 Credit risk transfer approach (CRTA).
1240.45 Securitization exposures to which the SSFA and the CRTA do not apply.
1240.46 Recognition of credit risk mitigants for securitization exposures.

Risk-Weighted Assets for Equity Exposures

1240.51 Introduction and exposure measurement.
1240.52 Simple risk-weight approach (SRWA).
1240.53–1240.60 [Reserved]

Subpart E—Risk-Weighted Assets—Internal Ratings-Based and Advanced Measurement Approaches

1240.100 Purpose, applicability, and principle of conservatism.
1240.101 Definitions.
1240.121 Minimum requirements.
1240.122 Ongoing qualification.
1240.123 Advanced approaches credit risk-weighted asset calculations.
1240.124–1240.160 [Reserved]
1240.161 Qualification requirements for incorporation of operational risk mitigants.
1240.162 Mechanics of operational risk risk-weighted asset calculation.

Subpart F—Risk-Weighted Assets—Market Risk

1240.201 Purpose, applicability, and reservation of authority.
1240.202 Definitions.
1240.203 Requirements for managing market risk.
1240.204 Measure for spread risk.

Subpart G—Stability Capital Buffer

1240.400 Stability capital buffer.

Authority: 12 U.S.C. 4511, 4513, 4513b, 4514, 4517, 4526, 4611, and 4612.

Subpart A—General Provisions

§ 1240.1 Purpose, applicability, reservations of authority, reporting, and timing.

(a) *Purpose.* This part establishes capital requirements and overall capital adequacy standards for the Enterprises. This part includes methodologies for calculating capital requirements, disclosure requirements related to the capital requirements, and transition provisions for the application of this part.

(b) *Authorities*—(1) *Limitations of authority.* Nothing in this part shall be read to limit the authority of FHFA to take action under other provisions of law, including action to address unsafe or unsound practices or conditions, deficient capital levels, or violations of law or regulation under the Safety and Soundness Act, and including action under sections 1313(a)(2), 1365–1367, 1371–1376 of the Safety and Soundness Act (12 U.S.C. 4513(a)(2), 4615–4617, and 4631–4636).

(2) *Permissible activities.* Nothing in this part may be construed to authorize, permit, or require an Enterprise to engage in any activity not authorized by its authorizing statute or that would otherwise be inconsistent with its authorizing statute or the Safety and Soundness Act.

(c) *Applicability*—(1) *Covered regulated entities.* This part applies on a consolidated basis to each Enterprise.

(2) *Capital requirements and overall capital adequacy standards.* Subject to § 1240.4, each Enterprise must calculate its capital requirements and meet the overall capital adequacy standards in subpart B of this part.

(3) *Regulatory capital.* Subject to § 1240.4, each Enterprise must calculate its regulatory capital in accordance with subpart C of this part.

(4) *Risk-weighted assets.* (i) Subject to § 1240.4, each Enterprise must use the methodologies in subparts D and F of this part to calculate standardized total risk-weighted assets.

(ii) Subject to § 1240.4, each Enterprise must use the methodologies in subparts E and F of this part to calculate advanced approaches total risk-weighted assets.

(d) *Reservation of authority regarding capital.* Subject to applicable provisions of the Safety and Soundness Act—

(1) *Additional capital in the aggregate.* FHFA may require an Enterprise to hold an amount of regulatory capital greater than otherwise required under this part if FHFA determines that the Enterprise's capital requirements under this part are not commensurate with the Enterprise's

credit, market, operational, or other risks.

(2) *Regulatory capital elements.* (i) If FHFA determines that a particular common equity tier 1 capital, additional tier 1 capital, or tier 2 capital element has characteristics or terms that diminish its ability to absorb losses, or otherwise present safety and soundness concerns, FHFA may require the Enterprise to exclude all or a portion of such element from common equity tier 1 capital, additional tier 1 capital, or tier 2 capital, as appropriate.

(ii) Notwithstanding the criteria for regulatory capital instruments set forth in subpart C of this part, FHFA may find that a capital element may be included in an Enterprise's common equity tier 1 capital, additional tier 1 capital, or tier 2 capital on a permanent or temporary basis consistent with the loss absorption capacity of the element and in accordance with § 1240.20(e).

(3) *Risk-weighted asset amounts.* If FHFA determines that the risk-weighted asset amount calculated under this part by the Enterprise for one or more exposures is not commensurate with the risks associated with those exposures, FHFA may require the Enterprise to assign a different risk-weighted asset amount to the exposure(s) or to deduct the amount of the exposure(s) from its regulatory capital.

(4) *Total leverage.* If FHFA determines that the adjusted total asset amount calculated by an Enterprise is inappropriate for the exposure(s) or the circumstances of the Enterprise, FHFA may require the Enterprise to adjust this exposure amount in the numerator and the denominator for purposes of the leverage ratio calculations.

(5) *Consolidation of certain exposures.* FHFA may determine that the risk-based capital treatment for an exposure or the treatment provided to an entity that is not consolidated on the Enterprise's balance sheet is not commensurate with the risk of the exposure and the relationship of the Enterprise to the entity. Upon making this determination, FHFA may require the Enterprise to treat the exposure or entity as if it were consolidated on the balance sheet of the Enterprise for purposes of determining the Enterprise's risk-based capital requirements and calculating the Enterprise's risk-based capital ratios accordingly. FHFA will look to the substance of, and risk associated with, the transaction, as well as other relevant factors FHFA deems appropriate in determining whether to require such treatment.

(6) *Other reservation of authority.* With respect to any deduction or limitation required under this part, FHFA may require a different deduction or limitation, provided that such alternative deduction or limitation is commensurate with the Enterprise's risk and consistent with safety and soundness.

(e) *Corrective action and enforcement.* (1) FHFA may enforce this part pursuant to sections 1371, 1372, and 1376 of the Safety and Soundness Act (12 U.S.C. 4631, 4632, 4636).

(2) FHFA also may enforce the total capital requirement established under § 1240.10(a) and the core capital requirement established under § 1240.10(e) pursuant to section 1364 of the Safety and Soundness Act (12 U.S.C. 4614).

(3) This part is also a prudential standard adopted under section 1313B of the Safety and Soundness Act (12 U.S.C. 4513b), excluding § 1240.11, which is a prudential standard only for purposes of § 1240.4. Section 1313B of the Safety and Soundness Act (12 U.S.C. 4513b) authorizes the Director to require that an Enterprise submit a corrective plan under § 1236.4 specifying the actions the Enterprise will take to correct the deficiency if the Director determines that an Enterprise is not in compliance with this part.

(f) *Reporting procedure and timing*—(1) *Capital Reports*—(i) *In general.* Each Enterprise shall file a capital report with FHFA every calendar quarter providing the information and data required by FHFA. The specifics of required information and data, and the report format, will be separately provided to the Enterprise by FHFA.

(ii) *Required content.* The capital report shall include, as of the end of the last calendar quarter—

(A) The common equity tier 1 capital, core capital, tier 1 capital, total capital, and adjusted total capital of the Enterprise;

(B) The stress capital buffer, the capital conservation buffer amount (if prescribed by FHFA), the stability capital buffer, and the maximum payout ratio of the Enterprise;

(C) The adjusted total assets of the Enterprise; and

(D) The standardized total risk-weighted assets of the Enterprise.

(2) *Timing.* The Enterprise must submit the capital report not later than 60 days after the last day of the calendar quarter or at such other time as the Director requires.

(3) *Approval.* The capital report must be approved by the Chief Risk Officer and the Chief Financial Officer of an Enterprise prior to submission to FHFA.

(4) *Adjustment.* In the event an Enterprise makes an adjustment to its financial statements for a quarter or a date for which information was provided pursuant to this paragraph (f), which would cause an adjustment to a capital report, an Enterprise must file with the Director an amended capital report not later than 15 days after the date of such adjustment.

(5) *Public disclosure.* An Enterprise must disclose in an appropriate publicly available filing or other document each of the information reported under paragraph (f)(1)(ii) of this section.

§ 1240.2 Definitions.

As used in this part:

Acquired CRT exposure means, with respect to an Enterprise:

(1) Any exposure that arises from a credit risk transfer of the Enterprise and has been acquired by the Enterprise since the issuance or entry into the credit risk transfer by the Enterprise; or

(2) Any exposure that arises from a credit risk transfer of the other Enterprise.

Additional tier 1 capital is defined in § 1240.20(c).

Adjusted allowances for credit losses (AACL) means valuation allowances that have been established through a charge against earnings or retained earnings for expected credit losses on financial assets measured at amortized cost and a lessor's net investment in leases that have been established to reduce the amortized cost basis of the assets to amounts expected to be collected as determined in accordance with GAAP. For purposes of this part, adjusted allowances for credit losses include allowances for expected credit losses on off-balance sheet credit exposures not accounted for as insurance as determined in accordance with GAAP. Adjusted allowances for credit losses allowances created that reflect credit losses on purchased credit deteriorated assets and available-for-sale debt securities.

Adjusted total assets means the sum of the items described in paragraphs (1) though (9) of this definition, as adjusted pursuant to paragraph (9) of this definition for a clearing member Enterprise:

(1) The balance sheet carrying value of all of the Enterprise's on-balance sheet assets, plus the value of securities sold under a repurchase transaction or a securities lending transaction that qualifies for sales treatment under GAAP, less amounts deducted from tier 1 capital under § 1240.22(a), (c), and (d), and less the value of securities received in security-for-security repo-style transactions, where the Enterprise acts as a securities lender and includes the securities received in its on-balance

sheet assets but has not sold or re-hypothecated the securities received;

(2) The potential future credit exposure (PFE) for each derivative contract or each single-product netting set of derivative contracts (including a cleared transaction except as provided in paragraph (9) of this definition and, at the discretion of the Enterprise, excluding a forward agreement treated as a derivative contract that is part of a repurchase or reverse repurchase or a securities borrowing or lending transaction that qualifies for sales treatment under GAAP), to which the Enterprise is a counterparty as determined under § 1240.36, but without regard to § 1240.36(c), provided that:

(i) An Enterprise may choose to exclude the PFE of all credit derivatives or other similar instruments through which it provides credit protection when calculating the PFE under § 1240.36, but without regard to § 1240.36(c), provided that it does not adjust the net-to-gross ratio (NGR); and

(ii) An Enterprise that chooses to exclude the PFE of credit derivatives or other similar instruments through which it provides credit protection pursuant to paragraph (2)(i) of this definition must do so consistently over time for the calculation of the PFE for all such instruments;

(3)(i) The amount of cash collateral that is received from a counterparty to a derivative contract and that has offset the mark-to-fair value of the derivative asset, or cash collateral that is posted to a counterparty to a derivative contract and that has reduced the Enterprise's on-balance sheet assets, unless such cash collateral is all or part of variation margin that satisfies the conditions in paragraphs (3)(iv) through (vii) of this definition;

(ii) The variation margin is used to reduce the current credit exposure of the derivative contract, calculated as described in § 1240.36(b), and not the PFE;

(iii) For the purpose of the calculation of the NGR described in § 1240.36(b)(2)(ii)(B), variation margin described in paragraph (3)(ii) of this definition may not reduce the net current credit exposure or the gross current credit exposure;

(iv) For derivative contracts that are not cleared through a QCCP, the cash collateral received by the recipient counterparty is not segregated (by law, regulation, or an agreement with the counterparty);

(v) Variation margin is calculated and transferred on a daily basis based on the mark-to-fair value of the derivative contract;

(vi) The variation margin transferred under the derivative contract or the governing rules of the CCP or QCCP for a cleared transaction is the full amount that is necessary to fully extinguish the net current credit exposure to the counterparty of the derivative contracts, subject to the threshold and minimum transfer amounts applicable to the counterparty under the terms of the derivative contract or the governing rules for a cleared transaction;

(vii) The variation margin is in the form of cash in the same currency as the currency of settlement set forth in the derivative contract, provided that for the purposes of this paragraph (3)(vii), currency of settlement means any currency for settlement specified in the governing qualifying master netting agreement and the credit support annex to the qualifying master netting agreement, or in the governing rules for a cleared transaction; and

(viii) The derivative contract and the variation margin are governed by a qualifying master netting agreement between the legal entities that are the counterparties to the derivative contract or by the governing rules for a cleared transaction, and the qualifying master netting agreement or the governing rules for a cleared transaction must explicitly stipulate that the counterparties agree to settle any payment obligations on a net basis, taking into account any variation margin received or provided under the contract if a credit event involving either counterparty occurs;

(4) The effective notional principal amount (that is, the apparent or stated notional principal amount multiplied by any multiplier in the derivative contract) of a credit derivative, or other similar instrument, through which the Enterprise provides credit protection, provided that:

(i) The Enterprise may reduce the effective notional principal amount of the credit derivative by the amount of any reduction in the mark-to-fair value of the credit derivative if the reduction is recognized in common equity tier 1 capital;

(ii) The Enterprise may reduce the effective notional principal amount of the credit derivative by the effective notional principal amount of a purchased credit derivative or other similar instrument, provided that the remaining maturity of the purchased credit derivative is equal to or greater than the remaining maturity of the credit derivative through which the Enterprise provides credit protection and that:

(A) With respect to a credit derivative that references a single exposure, the reference exposure of the purchased credit derivative is to the same legal entity and ranks *pari passu* with, or is junior to, the reference exposure of the credit derivative through which the Enterprise provides credit protection; or

(B) With respect to a credit derivative that references multiple exposures, the reference exposures of the purchased credit derivative are to the same legal entities and rank *pari passu* with the reference exposures of the credit derivative through which the Enterprise provides credit protection, and the level of seniority of the purchased credit derivative ranks *pari passu* to the level of seniority of the credit derivative through which the Enterprise provides credit protection;

(C) Where an Enterprise has reduced the effective notional amount of a credit derivative through which the Enterprise provides credit protection in accordance with paragraph (4)(i) of this definition, the Enterprise must also reduce the effective notional principal amount of a purchased credit derivative used to offset the credit derivative through which the Enterprise provides credit protection, by the amount of any increase in the mark-to-fair value of the purchased credit derivative that is recognized in common equity tier 1 capital; and

(D) Where the Enterprise purchases credit protection through a total return swap and records the net payments received on a credit derivative through which the Enterprise provides credit protection in net income, but does not record offsetting deterioration in the mark-to-fair value of the credit derivative through which the Enterprise provides credit protection in net income (either through reductions in fair value or by additions to reserves), the Enterprise may not use the purchased credit protection to offset the effective notional principal amount of the related credit derivative through which the Enterprise provides credit protection;

(5) Where an Enterprise acting as a principal has more than one repo-style transaction with the same counterparty and has offset the gross value of receivables due from a counterparty under reverse repurchase transactions by the gross value of payables under repurchase transactions due to the same counterparty, the gross value of receivables associated with the repo-style transactions less any on-balance sheet receivables amount associated with these repo-style transactions included under paragraph (1) of this definition, unless the following criteria are met:

(i) The offsetting transactions have the same explicit final settlement date under their governing agreements;

(ii) The right to offset the amount owed to the counterparty with the amount owed by the counterparty is legally enforceable in the normal course of business and in the event of receivership, insolvency, liquidation, or similar proceeding; and

(iii) Under the governing agreements, the counterparties intend to settle net, settle simultaneously, or settle according to a process that is the functional equivalent of net settlement, (that is, the cash flows of the transactions are equivalent, in effect, to a single net amount on the settlement date), where both transactions are settled through the same settlement system, the settlement arrangements are supported by cash or intraday credit facilities intended to ensure that settlement of both transactions will occur by the end of the business day, and the settlement of the underlying securities does not interfere with the net cash settlement;

(6) The counterparty credit risk of a repo-style transaction, including where the Enterprise acts as an agent for a repo-style transaction and indemnifies the customer with respect to the performance of the customer's counterparty in an amount limited to the difference between the fair value of the security or cash its customer has lent and the fair value of the collateral the borrower has provided, calculated as follows:

(i) If the transaction is not subject to a qualifying master netting agreement, the counterparty credit risk (E*) for transactions with a counterparty must be calculated on a transaction by transaction basis, such that each transaction i is treated as its own netting set, in accordance with the following formula, where Ei is the fair value of the instruments, gold, or cash that the Enterprise has lent, sold subject to repurchase, or provided as collateral to the counterparty, and Ci is the fair value of the instruments, gold, or cash that the Enterprise has borrowed, purchased subject to resale, or received as collateral from the counterparty:

$E_i^* = \max \{0, [E_i — C_i]\}$

(ii) If the transaction is subject to a qualifying master netting agreement, the counterparty credit risk (E*) must be calculated as the greater of zero and the total fair value of the instruments, gold, or cash that the Enterprise has lent, sold subject to repurchase or provided as collateral to a counterparty for all transactions included in the qualifying master netting agreement (ΣE_i), less the total fair value of the instruments, gold, or cash that the Enterprise borrowed, purchased subject to resale or received as collateral from the counterparty for those transactions (ΣC_i), in accordance with the following formula:

$E^* = \max \{0, [\Sigma E_i - \Sigma C_i]\}$

(7) If an Enterprise acting as an agent for a repo-style transaction provides a guarantee to a customer of the security or cash its customer has lent or borrowed with respect to the performance of the customer's counterparty and the guarantee is not limited to the difference between the fair value of the security or cash its customer has lent and the fair value of the collateral the borrower has provided, the amount of the guarantee that is greater than the difference between the fair value of the security or cash its customer has lent and the value of the collateral the borrower has provided;

(8) The credit equivalent amount of all off-balance sheet exposures of the Enterprise, excluding repo-style transactions, repurchase or reverse repurchase or securities borrowing or lending transactions that qualify for sales treatment under GAAP, and derivative transactions, determined using the applicable credit conversion factor under § 1240.35(b), provided, however, that the minimum credit conversion factor that may be assigned to an off-balance sheet exposure under this paragraph is 10 percent; and

(9) For an Enterprise that is a clearing member:

(i) A clearing member Enterprise that guarantees the performance of a clearing member client with respect to a cleared transaction must treat its exposure to the clearing member client as a derivative contract for purposes of determining its adjusted total assets;

(ii) A clearing member Enterprise that guarantees the performance of a CCP with respect to a transaction cleared on behalf of a clearing member client must treat its exposure to the CCP as a derivative contract for purposes of determining its adjusted total assets;

(iii) A clearing member Enterprise that does not guarantee the performance of a CCP with respect to a transaction cleared on behalf of a clearing member client may exclude its exposure to the CCP for purposes of determining its adjusted total assets;

(iv) An Enterprise that is a clearing member may exclude from its adjusted total assets the effective notional principal amount of credit protection sold through a credit derivative contract, or other similar instrument, that it clears on behalf of a clearing member client through a CCP as calculated in accordance with paragraph (4) of this definition; and

(v) Notwithstanding paragraphs (9)(i) through (iii) of this definition, an Enterprise may exclude from its adjusted total assets a clearing member's exposure to a clearing member client for a derivative contract, if the clearing member client and the clearing member are affiliates and consolidated for financial reporting purposes on the Enterprise's balance sheet.

Adjusted total capital means the sum of tier 1 capital and tier 2 capital.

Advanced approaches total risk-weighted assets means:

(1) The sum of:

(i) Credit-risk-weighted assets for general credit risk (including for mortgage exposures), cleared transactions, default fund contributions, unsettled transactions, securitization exposures (including retained CRT exposures), equity exposures, and the fair value adjustment to reflect counterparty credit risk in valuation of OTC derivative contracts, each as calculated under § 1240.123.

(ii) Risk-weighted assets for operational risk, as calculated under § 1240.162(c); and

(iii) Advanced market risk-weighted assets; minus

(2) Excess eligible credit reserves not included in the Enterprise's tier 2 capital.

Advanced market risk-weighted assets means the advanced measure for spread risk calculated under § 1240.204(a) multiplied by 12.5.

Affiliate has the meaning given in section 1303(1) of the Safety and Soundness Act (12 U.S.C. 4502(1)).

Allowances for loan and lease losses (ALLL) means valuation allowances that have been established through a charge against earnings to cover estimated credit losses on loans, lease financing receivables or other extensions of credit as determined in accordance with GAAP. For purposes of this part, *ALLL* includes allowances that have been established through a charge against earnings to cover estimated credit losses associated with off-balance sheet credit exposures as determined in accordance with GAAP.

Bankruptcy remote means, with respect to an entity or asset, that the entity or asset would be excluded from an insolvent entity's estate in receivership, insolvency, liquidation, or similar proceeding.

Carrying value means, with respect to an asset, the value of the asset on the balance sheet of an Enterprise as determined in accordance with GAAP. For all assets other than available-for-sale debt securities or purchased credit deteriorated assets, the carrying value is not reduced by any associated credit

loss allowance that is determined in accordance with GAAP.

Central counterparty (CCP) means a counterparty (for example, a clearing house) that facilitates trades between counterparties in one or more financial markets by either guaranteeing trades or novating contracts.

CFTC means the U.S. Commodity Futures Trading Commission.

Clean-up call means a contractual provision that permits an originating Enterprise or servicer to call securitization exposures before their stated maturity or call date.

Cleared transaction means an exposure associated with an outstanding derivative contract or repo-style transaction that an Enterprise or clearing member has entered into with a central counterparty (that is, a transaction that a central counterparty has accepted).

(1) The following transactions are cleared transactions:

(i) A transaction between a CCP and an Enterprise that is a clearing member of the CCP where the Enterprise enters into the transaction with the CCP for the Enterprise's own account;

(ii) A transaction between a CCP and an Enterprise that is a clearing member of the CCP where the Enterprise is acting as a financial intermediary on behalf of a clearing member client and the transaction offsets another transaction that satisfies the requirements set forth in § 1240.3(a);

(iii) A transaction between a clearing member client Enterprise and a clearing member where the clearing member acts as a financial intermediary on behalf of the clearing member client and enters into an offsetting transaction with a CCP, provided that the requirements set forth in § 1240.3(a) are met; or

(iv) A transaction between a clearing member client Enterprise and a CCP where a clearing member guarantees the performance of the clearing member client Enterprise to the CCP and the transaction meets the requirements of § 1240.3(a)(2) and (3).

(2) The exposure of an Enterprise that is a clearing member to its clearing member client is not a cleared transaction where the Enterprise is either acting as a financial intermediary and enters into an offsetting transaction with a CCP or where the Enterprise provides a guarantee to the CCP on the performance of the client.

Clearing member means a member of, or direct participant in, a CCP that is entitled to enter into transactions with the CCP.

Clearing member client means a party to a cleared transaction associated with a CCP in which a clearing member acts either as a financial intermediary with respect to the party or guarantees the performance of the party to the CCP.

Client-facing derivative transaction means a derivative contract that is not a cleared transaction where the Enterprise is either acting as a financial intermediary and enters into an offsetting transaction with a qualifying central counterparty (QCCP) or where the Enterprise provides a guarantee on the performance of a client on a transaction between the client and a QCCP.

Collateral agreement means a legal contract that specifies the time when, and circumstances under which, a counterparty is required to pledge collateral to an Enterprise for a single financial contract or for all financial contracts in a netting set and confers upon the Enterprise a perfected, first-priority security interest (notwithstanding the prior security interest of any custodial agent), or the legal equivalent thereof, in the collateral posted by the counterparty under the agreement. This security interest must provide the Enterprise with a right to close-out the financial positions and liquidate the collateral upon an event of default of, or failure to perform by, the counterparty under the collateral agreement. A contract would not satisfy this requirement if the Enterprise's exercise of rights under the agreement may be stayed or avoided:

(1) Under applicable law in the relevant jurisdictions, other than

(i) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs, or laws of foreign jurisdictions that are substantially similar to the U.S. laws referenced in this paragraph (1)(i) in order to facilitate the orderly resolution of the defaulting counterparty;

(ii) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (1)(i) of this definition; or

(2) Other than to the extent necessary for the counterparty to comply with applicable law.

Commitment means any legally binding arrangement that obligates an Enterprise to extend credit or to purchase assets.

Common equity tier 1 capital is defined in § 1240.20(b).

Company means a corporation, partnership, limited liability company, depository institution, business trust, special purpose entity, association, or similar organization.

Core capital has the meaning given in section 1303(7) of the Safety and Soundness Act (12 U.S.C. 4502(7)).

Corporate exposure means an exposure to a company that is not:

(1) An exposure to a sovereign, the Bank for International Settlements, the European Central Bank, the European Commission, the International Monetary Fund, the European Stability Mechanism, the European Financial Stability Facility, a multi-lateral development bank (MDB), a depository institution, a foreign bank, a credit union, or a public sector entity (PSE);

(2) An exposure to a GSE;

(3) A mortgage exposure;

(4) A cleared transaction;

(5) A default fund contribution;

(6) A securitization exposure;

(7) An equity exposure;

(8) An unsettled transaction; or

(9) A separate account.

Credit derivative means a financial contract executed under standard industry credit derivative documentation that allows one party (the protection purchaser) to transfer the credit risk of one or more exposures (reference exposure(s)) to another party (the protection provider) for a certain period of time.

Credit-enhancing interest-only strip (CEIO) means an on-balance sheet asset that, in form or in substance:

(1) Represents a contractual right to receive some or all of the interest and no more than a minimal amount of principal due on the underlying exposures of a securitization; and

(2) Exposes the holder of the CEIO to credit risk directly or indirectly associated with the underlying exposures that exceeds a pro rata share of the holder's claim on the underlying exposures, whether through subordination provisions or other credit-enhancement techniques.

Credit risk mitigant means collateral, a credit derivative, or a guarantee.

Credit risk transfer (CRT) means any traditional securitization, synthetic securitization, senior/subordinated structure, credit derivative, guarantee, or other contract, structure, or arrangement (other than primary mortgage insurance) that allows an Enterprise to transfer the credit risk of one or more mortgage exposures (reference exposure(s)) to another party (the protection provider).

Credit union means an insured credit union as defined under the Federal Credit Union Act (12 U.S.C. 1752 *et seq.*).

CRT special purpose entity (CRT SPE) means a corporation, trust, or other entity organized for the specific purpose of bearing credit risk transferred through

a CRT, the activities of which are limited to those appropriate to accomplish this purpose.

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

Current exposure means, with respect to a netting set, the larger of zero or the fair value of a transaction or portfolio of transactions within the netting set that would be lost upon default of the counterparty, assuming no recovery on the value of the transactions.

Current exposure methodology means the method of calculating the exposure amount for over-the-counter derivative contracts in § 1240.36(b).

Custodian means a financial institution that has legal custody of collateral provided to a CCP.

Default fund contribution means the funds contributed or commitments made by a clearing member to a CCP's mutualized loss sharing arrangement.

Depository institution means a depository institution as defined in section 3 of the Federal Deposit Insurance Act.

Derivative contract means a financial contract whose value is derived from the values of one or more underlying assets, reference rates, or indices of asset values or reference rates. Derivative contracts include interest rate derivative contracts, exchange rate derivative contracts, equity derivative contracts, commodity derivative contracts, credit derivative contracts, and any other instrument that poses similar counterparty credit risks. Derivative contracts also include unsettled securities, commodities, and foreign exchange transactions with a contractual settlement or delivery lag that is longer than the lesser of the market standard for the particular instrument or five business days.

Discretionary bonus payment means a payment made to an executive officer of an Enterprise, where:

(1) The Enterprise retains discretion as to whether to make, and the amount of, the payment until the payment is awarded to the executive officer;

(2) The amount paid is determined by the Enterprise without prior promise to, or agreement with, the executive officer; and

(3) The executive officer has no contractual right, whether express or implied, to the bonus payment.

Distribution means:

(1) A reduction of tier 1 capital through the repurchase of a tier 1 capital instrument or by other means, except when an Enterprise, within the same quarter when the repurchase is announced, fully replaces a tier 1 capital instrument it has repurchased by issuing another capital instrument that meets the eligibility criteria for:

(i) A common equity tier 1 capital instrument if the instrument being repurchased was part of the Enterprise's common equity tier 1 capital, or

(ii) A common equity tier 1 or additional tier 1 capital instrument if the instrument being repurchased was part of the Enterprise's tier 1 capital;

(2) A reduction of tier 2 capital through the repurchase, or redemption prior to maturity, of a tier 2 capital instrument or by other means, except when an Enterprise, within the same quarter when the repurchase or redemption is announced, fully replaces a tier 2 capital instrument it has repurchased by issuing another capital instrument that meets the eligibility criteria for a tier 1 or tier 2 capital instrument;

(3) A dividend declaration or payment on any tier 1 capital instrument;

(4) A dividend declaration or interest payment on any tier 2 capital instrument if the Enterprise has full discretion to permanently or temporarily suspend such payments without triggering an event of default; or

(5) Any similar transaction that FHFA determines to be in substance a distribution of capital.

Dodd-Frank Act means the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Pub. L. 111–203, 124 Stat. 1376).

Early amortization provision means a provision in the documentation governing a securitization that, when triggered, causes investors in the securitization exposures to be repaid before the original stated maturity of the securitization exposures, unless the provision:

(1) Is triggered solely by events not directly related to the performance of the underlying exposures or the originating Enterprise (such as material changes in tax laws or regulations); or

(2) Leaves investors fully exposed to future draws by borrowers on the underlying exposures even after the provision is triggered.

Effective notional amount means for an eligible guarantee or eligible credit derivative, the lesser of the contractual notional amount of the credit risk mitigant and the exposure amount of the hedged exposure, multiplied by the percentage coverage of the credit risk mitigant.

Eligible clean-up call means a clean-up call that:

(1) Is exercisable solely at the discretion of the originating Enterprise or servicer;

(2) Is not structured to avoid allocating losses to securitization exposures held by investors or otherwise structured to provide credit enhancement to the securitization; and

(3)(i) For a traditional securitization, is only exercisable when 10 percent or less of the principal amount of the underlying exposures or securitization exposures (determined as of the inception of the securitization) is outstanding; or

(ii) For a synthetic securitization or credit risk transfer, is only exercisable when 10 percent or less of the principal amount of the reference portfolio of underlying exposures (determined as of the inception of the securitization) is outstanding.

Eligible credit derivative means a credit derivative in the form of a credit default swap, nth-to-default swap, total return swap, or any other form of credit derivative approved by FHFA, provided that:

(1) The contract meets the requirements of an eligible guarantee and has been confirmed by the protection purchaser and the protection provider;

(2) Any assignment of the contract has been confirmed by all relevant parties;

(3) If the credit derivative is a credit default swap or nth-to-default swap, the contract includes the following credit events:

(i) Failure to pay any amount due under the terms of the reference exposure, subject to any applicable minimal payment threshold that is consistent with standard market practice and with a grace period that is closely in line with the grace period of the reference exposure; and

(ii) Receivership, insolvency, liquidation, conservatorship or inability of the reference exposure issuer to pay its debts, or its failure or admission in writing of its inability generally to pay its debts as they become due, and similar events;

(4) The terms and conditions dictating the manner in which the contract is to be settled are incorporated into the contract;

(5) If the contract allows for cash settlement, the contract incorporates a robust valuation process to estimate loss reliably and specifies a reasonable period for obtaining post-credit event valuations of the reference exposure;

(6) If the contract requires the protection purchaser to transfer an exposure to the protection provider at settlement, the terms of at least one of the exposures that is permitted to be transferred under the contract provide that any required consent to transfer may not be unreasonably withheld;

(7) If the credit derivative is a credit default swap or nth-to-default swap, the

contract clearly identifies the parties responsible for determining whether a credit event has occurred, specifies that this determination is not the sole responsibility of the protection provider, and gives the protection purchaser the right to notify the protection provider of the occurrence of a credit event; and

(8) If the credit derivative is a total return swap and the Enterprise records net payments received on the swap as net income, the Enterprise records offsetting deterioration in the value of the hedged exposure (either through reductions in fair value or by an addition to reserves).

Eligible credit reserves means all general allowances that have been established through a charge against earnings or retained earnings to cover expected credit losses associated with on- or off-balance sheet wholesale and retail exposures, including AACL associated with such exposures. Eligible credit reserves exclude allowances that reflect credit losses on purchased credit deteriorated assets and available-for-sale debt securities and other specific reserves created against recognized losses.

Eligible funded synthetic risk transfer means a credit risk transfer in which—

(1) A CRT SPE that is bankruptcy remote from the Enterprise and not consolidated with the Enterprise under GAAP is contractually obligated to reimburse the Enterprise for specified losses on a reference pool of mortgage exposures of the Enterprise upon designated credit events and designated modification events;

(2) The credit risk transferred to the CRT SPE is transferred to one or more third parties through two or more classes of securities of different seniority issued by the CRT SPE;

(3) The performance of each class of securities issued by the CRT SPE depends on the performance of the reference pool; and

(4) The proceeds of the securities issued by the CRT SPE—

(i) Are, at the time of entry into the transaction, in the aggregate no less than the maximum obligation of the CRT SPE to the Enterprise; and

(ii) Are invested in financial collateral that secures the payment obligations of the CRT SPE to the Enterprise.

Eligible guarantee means a guarantee that:

(1) Is written;

(2) Is either:

(i) Unconditional, or

(ii) A contingent obligation of the U.S. government or its agencies, the enforceability of which is dependent upon some affirmative action on the part of the beneficiary of the guarantee or a third party (for example, meeting servicing requirements);

(3) Covers all or a pro rata portion of all contractual payments of the obligated party on the reference exposure;

(4) Gives the beneficiary a direct claim against the protection provider;

(5) Is not unilaterally cancelable by the protection provider for reasons other than the breach of the contract by the beneficiary;

(6) Except for a guarantee by a sovereign, is legally enforceable against the protection provider in a jurisdiction where the protection provider has sufficient assets against which a judgment may be attached and enforced;

(7) Requires the protection provider to make payment to the beneficiary on the occurrence of a default (as defined in the guarantee) of the obligated party on the reference exposure in a timely manner without the beneficiary first having to take legal actions to pursue the obligor for payment;

(8) Does not increase the beneficiary's cost of credit protection on the guarantee in response to deterioration in the credit quality of the reference exposure;

(9) Is not provided by an affiliate of the Enterprise; and

(10) Is provided by an eligible guarantor.

Eligible guarantor means:

(1) A sovereign, the Bank for International Settlements, the International Monetary Fund, the European Central Bank, the European Commission, a Federal Home Loan Bank, Federal Agricultural Mortgage Corporation (Farmer Mac), the European Stability Mechanism, the European Financial Stability Facility, a multilateral development bank (MDB), a depository institution, a bank holding company as defined in section 2 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841 *et seq.*), a savings and loan holding company, a credit union, a foreign bank, or a qualifying central counterparty; or

(2) An entity (other than a special purpose entity):

(i) That at the time the guarantee is issued or anytime thereafter, has issued and outstanding an unsecured debt security without credit enhancement that is investment grade;

(ii) Whose creditworthiness is not positively correlated with the credit risk of the exposures for which it has provided guarantees; and

(iii) That is not an insurance company engaged predominately in the business of providing credit protection (such as a monoline bond insurer or re-insurer).

Eligible margin loan means:

(1) An extension of credit where:

(i) The extension of credit is collateralized exclusively by liquid and readily marketable debt or equity securities, or gold;

(ii) The collateral is marked-to-fair value daily, and the transaction is subject to daily margin maintenance requirements; and

(iii) The extension of credit is conducted under an agreement that provides the Enterprise the right to accelerate and terminate the extension of credit and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, insolvency, liquidation, conservatorship, or similar proceeding, of the counterparty, provided that, in any such case:

(A) Any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than:

(*1*) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs,[1] or laws of foreign jurisdictions that are substantially similar to the U.S. laws referenced in this paragraph (1)(iii)(A)(*1*) in order to facilitate the orderly resolution of the defaulting counterparty; or

(*2*) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (1)(iii)(A)(*1*) of this definition; and

(B) The agreement may limit the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with applicable law.

(2) In order to recognize an exposure as an eligible margin loan for purposes of this subpart, an Enterprise must comply with the requirements of § 1240.3(b) with respect to that exposure.

Eligible multifamily lender risk share means a credit risk transfer under which an entity that is approved by an Enterprise to sell multifamily mortgage exposures to an Enterprise retains credit risk of one or more multifamily mortgage exposures on substantially the same terms and conditions as in effect

[1] This requirement is met where all transactions under the agreement are (i) executed under U.S. law and (ii) constitute ''securities contracts'' under section 555 of the Bankruptcy Code (11 U.S.C. 555), qualified financial contracts under section 11(e)(8) of the Federal Deposit Insurance Act, or netting contracts between or among financial institutions.

on June 30, 2020 for Fannie Mae's credit risk transfers known as the ''Delegated Underwriting and Servicing program''.

Eligible reinsurance risk transfer means a credit risk transfer in which the Enterprise transfers the credit risk on one or more mortgage exposures to an insurance company or reinsurer that has been approved by the Enterprise.

Eligible senior-subordinated structure means a traditional securitization in which the underlying exposures are mortgage exposures of the Enterprise and the Enterprise guarantees the timely payment of principal and interest on one or more senior tranches.

Eligible single-family lender risk share means any partial or full recourse agreement or similar agreement (other than a participation agreement) between an Enterprise and the seller or servicer of a single-family mortgage exposure pursuant to which the seller or servicer agrees either to reimburse the Enterprise for losses arising out of the default of the single-family mortgage exposure or to repurchase or replace the single-family mortgage exposure in the event of the default of the single-family mortgage exposure.

Equity exposure means:

(1) A security or instrument (whether voting or non-voting and whether certificated or not certificated) that represents a direct or an indirect ownership interest in, and is a residual claim on, the assets and income of a company, unless:

(i) The issuing company is consolidated with the Enterprise under GAAP;

(ii) The Enterprise is required to deduct the ownership interest from tier 1 or tier 2 capital under this part;

(iii) The ownership interest incorporates a payment or other similar obligation on the part of the issuing company (such as an obligation to make periodic payments); or

(iv) The ownership interest is a securitization exposure;

(2) A security or instrument that is mandatorily convertible into a security or instrument described in paragraph (1) of this definition;

(3) An option or warrant that is exercisable for a security or instrument described in paragraph (1) of this definition; or

(4) Any other security or instrument (other than a securitization exposure) to the extent the return on the security or instrument is based on the performance of a security or instrument described in paragraph (1) of this definition.

ERISA means the Employee Retirement Income and Security Act of 1974 (29 U.S.C. 1001 *et seq.*).

Executive officer means a person who holds the title or, without regard to title, salary, or compensation, performs the function of one or more of the following positions: President, chief executive officer, executive chairman, chief operating officer, chief financial officer, chief investment officer, chief legal officer, chief lending officer, chief risk officer, or head of a major business line, and other staff that the board of directors of the Enterprise deems to have equivalent responsibility.

Exposure amount means:

(1) For the on-balance sheet component of an exposure (including a mortgage exposure); an OTC derivative contract; a repo-style transaction or an eligible margin loan for which the Enterprise determines the exposure amount under § 1240.39; a cleared transaction; a default fund contribution; or a securitization exposure), the Enterprise's carrying value of the exposure.

(2) For the off-balance sheet component of an exposure (other than an OTC derivative contract; a repo-style transaction or an eligible margin loan for which the Enterprise calculates the exposure amount under § 1240.39; a cleared transaction; a default fund contribution; or a securitization exposure), the notional amount of the off-balance sheet component multiplied by the appropriate credit conversion factor (CCF) in § 1240.35.

(3) For an exposure that is an OTC derivative contract, the exposure amount determined under § 1240.36.

(4) For an exposure that is a cleared transaction, the exposure amount determined under § 1240.37.

(5) For an exposure that is an eligible margin loan or repo-style transaction for which the Enterprise calculates the exposure amount as provided in § 1240.39, the exposure amount determined under § 1240.39.

(6) For an exposure that is a securitization exposure, the exposure amount determined under § 1240.42.

Federal Deposit Insurance Act means the Federal Deposit Insurance Act (12 U.S.C. 1813).

Federal Reserve Board means the Board of Governors of the Federal Reserve System.

Financial collateral means collateral:

(1) In the form of:

(i) Cash on deposit with the Enterprise (including cash held for the Enterprise by a third-party custodian or trustee);

(ii) Gold bullion;

(iii) Long-term debt securities that are not resecuritization exposures and that are investment grade;

(iv) Short-term debt instruments that are not resecuritization exposures and that are investment grade;

(v) Equity securities that are publicly traded;

(vi) Convertible bonds that are publicly traded; or

(vii) Money market fund shares and other mutual fund shares if a price for the shares is publicly quoted daily; and

(2) In which the Enterprise has a perfected, first-priority security interest or, outside of the United States, the legal equivalent thereof (with the exception of cash on deposit and notwithstanding the prior security interest of any custodial agent or any priority security interest granted to a CCP in connection with collateral posted to that CCP).

Gain-on-sale means an increase in the equity capital of an Enterprise resulting from a traditional securitization other than an increase in equity capital resulting from:

(1) The Enterprise's receipt of cash in connection with the securitization; or

(2) The reporting of a mortgage servicing asset.

General obligation means a bond or similar obligation that is backed by the full faith and credit of a public sector entity (PSE).

Government-sponsored enterprise (GSE) means an entity established or chartered by the U.S. government to serve public purposes specified by the U.S. Congress but whose debt obligations are not explicitly guaranteed by the full faith and credit of the U.S. government, including an Enterprise.

Guarantee means a financial guarantee, letter of credit, insurance, or other similar financial instrument (other than a credit derivative) that allows one party (beneficiary) to transfer the credit risk of one or more specific exposures (reference exposure) to another party (protection provider).

Investment grade means that the entity to which the Enterprise is exposed through a loan or security, or the reference entity with respect to a credit derivative, has adequate capacity to meet financial commitments for the projected life of the asset or exposure. Such an entity or reference entity has adequate capacity to meet financial commitments if the risk of its default is low and the full and timely repayment of principal and interest is expected.

Minimum transfer amount means the smallest amount of variation margin that may be transferred between counterparties to a netting set pursuant to the variation margin agreement.

Mortgage-backed security (MBS) means a security collateralized by a pool or pools of mortgage exposures,

including any pass-through or collateralized mortgage obligation.

Mortgage exposure means either a single-family mortgage exposure or a multifamily mortgage exposure.

Multifamily mortgage exposure means an exposure that is secured by a first or subsequent lien on a property with five or more residential units.

Mortgage servicing assets (MSAs) means the contractual rights owned by an Enterprise to service for a fee mortgage loans that are owned by others.

Multilateral development bank (MDB) means the International Bank for Reconstruction and Development, the Multilateral Investment Guarantee Agency, the International Finance Corporation, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank, the European Investment Fund, the Nordic Investment Bank, the Caribbean Development Bank, the Islamic Development Bank, the Council of Europe Development Bank, and any other multilateral lending institution or regional development bank in which the U.S. government is a shareholder or contributing member or which FHFA determines poses comparable credit risk.

Netting set means a group of transactions with a single counterparty that are subject to a qualifying master netting agreement or a qualifying cross-product master netting agreement. For derivative contracts, netting set also includes a single derivative contract between an Enterprise and a single counterparty. For purposes of calculating risk-based capital requirements using the internal models methodology in subpart E of this part, this term does not cover a transaction:

(1) That is not subject to such a master netting agreement; or

(2) Where the Enterprise has identified specific wrong-way risk.

Non-guaranteed separate account means a separate account where the insurance company:

(1) Does not contractually guarantee either a minimum return or account value to the contract holder; and

(2) Is not required to hold reserves (in the general account) pursuant to its contractual obligations to a policyholder.

Nth-to-default credit derivative means a credit derivative that provides credit protection only for the nth-defaulting reference exposure in a group of reference exposures.

Original maturity with respect to an off-balance sheet commitment means the length of time between the date a commitment is issued and:

(1) For a commitment that is not subject to extension or renewal, the stated expiration date of the commitment; or

(2) For a commitment that is subject to extension or renewal, the earliest date on which the Enterprise can, at its option, unconditionally cancel the commitment.

Originating Enterprise, with respect to a securitization, means an Enterprise that directly or indirectly originated or securitized the underlying exposures included in the securitization.

Over-the-counter (OTC) derivative contract means a derivative contract that is not a cleared transaction. An OTC derivative includes a transaction:

(1) Between an Enterprise that is a clearing member and a counterparty where the Enterprise is acting as a financial intermediary and enters into a cleared transaction with a CCP that offsets the transaction with the counterparty; or

(2) In which an Enterprise that is a clearing member provides a CCP a guarantee on the performance of the counterparty to the transaction.

Participation agreement is defined in § 1240.33(a).

Protection amount (P) means, with respect to an exposure hedged by an eligible guarantee or eligible credit derivative, the effective notional amount of the guarantee or credit derivative, reduced to reflect any currency mismatch, maturity mismatch, or lack of restructuring coverage (as provided in § 1240.38).

Publicly-traded means traded on:

(1) Any exchange registered with the SEC as a national securities exchange under section 6 of the Securities Exchange Act; or

(2) Any non-U.S.-based securities exchange that:

(i) Is registered with, or approved by, a national securities regulatory authority; and

(ii) Provides a liquid, two-way market for the instrument in question.

Public sector entity (PSE) means a state, local authority, or other governmental subdivision below the sovereign level.

Qualifying central counterparty (QCCP) means a central counterparty that:

(1)(i) Is a designated financial market utility (FMU) under Title VIII of the Dodd-Frank Act;

(ii) If not located in the United States, is regulated and supervised in a manner equivalent to a designated FMU; or

(iii) Meets the following standards:

(A) The central counterparty requires all parties to contracts cleared by the counterparty to be fully collateralized on a daily basis;

(B) The Enterprise demonstrates to the satisfaction of FHFA that the central counterparty:

(*1*) Is in sound financial condition;

(*2*) Is subject to supervision by the Federal Reserve Board, the CFTC, or the Securities Exchange Commission (SEC), or, if the central counterparty is not located in the United States, is subject to effective oversight by a national supervisory authority in its home country; and

(*3*) Meets or exceeds the risk-management standards for central counterparties set forth in regulations established by the Federal Reserve Board, the CFTC, or the SEC under Title VII or Title VIII of the Dodd-Frank Act; or if the central counterparty is not located in the United States, meets or exceeds similar risk-management standards established under the law of its home country that are consistent with international standards for central counterparty risk management as established by the relevant standard setting body of the Bank of International Settlements; and

(2)(i) Provides the Enterprise with the central counterparty's hypothetical capital requirement or the information necessary to calculate such hypothetical capital requirement, and other information the Enterprise is required to obtain under § 1240.37(d)(3);

(ii) Makes available to FHFA and the CCP's regulator the information described in paragraph (2)(i) of this definition; and

(iii) Has not otherwise been determined by FHFA to not be a QCCP due to its financial condition, risk profile, failure to meet supervisory risk management standards, or other weaknesses or supervisory concerns that are inconsistent with the risk weight assigned to qualifying central counterparties under § 1240.37.

(3) A QCCP that fails to meet the requirements of a QCCP in the future may still be treated as a QCCP under the conditions specified in § 1240.3(f).

Qualifying master netting agreement means a written, legally enforceable agreement provided that:

(1) The agreement creates a single legal obligation for all individual transactions covered by the agreement upon an event of default following any stay permitted by paragraph (2) of this definition, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty;

(2) The agreement provides the Enterprise the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty, provided that, in any such case:

(i) Any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than:

(A) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs, or laws of foreign jurisdictions that are substantially similar to the U.S. laws referenced in this paragraph (2)(i)(A) in order to facilitate the orderly resolution of the defaulting counterparty; or

(B) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (2)(i)(A) of this definition; and

(ii) The agreement may limit the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with applicable law.

Repo-style transaction means a repurchase or reverse repurchase transaction, or a securities borrowing or securities lending transaction, including a transaction in which the Enterprise acts as agent for a customer and indemnifies the customer against loss, provided that:

(1) The transaction is based solely on liquid and readily marketable securities, cash, or gold;

(2) The transaction is marked-to-fair value daily and subject to daily margin maintenance requirements;

(3)(i) The transaction is a ''securities contract'' or ''repurchase agreement'' under section 555 or 559, respectively, of the Bankruptcy Code (11 U.S.C. 555 or 559), a qualified financial contract under section 11(e)(8) of the Federal Deposit Insurance Act, or a netting contract between or among financial institutions; or

(ii) If the transaction does not meet the criteria set forth in paragraph (3)(i) of this definition, then either:

(A) The transaction is executed under an agreement that provides the Enterprise the right to accelerate, terminate, and close-out the transaction on a net basis and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, insolvency, liquidation, or similar proceeding, of the counterparty, provided that, in any such case:

(*1*) Any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than:

(*i*) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs, or laws of foreign jurisdictions that are substantially similar to the U.S. laws referenced in this paragraph (3)(ii)(A)(*1*)(*i*) in order to facilitate the orderly resolution of the defaulting counterparty;

(*ii*) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (3)(ii)(A)(*1*)(*i*) of this definition; and

(*2*) The agreement may limit the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with applicable law; or

(B) The transaction is:

(*1*) Either overnight or unconditionally cancelable at any time by the Enterprise; and

(*2*) Executed under an agreement that provides the Enterprise the right to accelerate, terminate, and close-out the transaction on a net basis and to liquidate or set-off collateral promptly upon an event of counterparty default; and

(*3*) In order to recognize an exposure as a repo-style transaction for purposes of this subpart, an Enterprise must comply with the requirements of § 1240.3(e) with respect to that exposure.

Resecuritization means a securitization which has more than one underlying exposure and in which one or more of the underlying exposures is a securitization exposure.

Resecuritization exposure means:

(1) An on- or off-balance sheet exposure to a resecuritization; or

(2) An exposure that directly or indirectly references a resecuritization exposure.

Retained CRT exposure means, with respect to an Enterprise, any exposure that arises from a credit risk transfer of the Enterprise and has been retained by the Enterprise since the issuance or entry into the credit risk transfer by the Enterprise.

Revenue obligation means a bond or similar obligation that is an obligation of a PSE, but which the PSE is committed to repay with revenues from the specific project financed rather than general tax funds.

Securities and Exchange Commission (SEC) means the U.S. Securities and Exchange Commission.

Securities Exchange Act means the Securities Exchange Act of 1934 (15 U.S.C. 78).

Securitization exposure means:

(1) An on-balance sheet or off-balance sheet credit exposure that arises from a traditional securitization or synthetic securitization (including a resecuritization);

(2) An exposure that directly or indirectly references a securitization exposure described in paragraph (1) of this definition;

(3) A retained CRT exposure; or

(4) An acquired CRT exposure.

Securitization special purpose entity (securitization SPE) means a corporation, trust, or other entity organized for the specific purpose of holding underlying exposures of a securitization, the activities of which are limited to those appropriate to accomplish this purpose, and the structure of which is intended to isolate the underlying exposures held by the entity from the credit risk of the seller of the underlying exposures to the entity.

Separate account means a legally segregated pool of assets owned and held by an insurance company and maintained separately from the insurance company's general account assets for the benefit of an individual contract holder. To be a separate account:

(1) The account must be legally recognized as a separate account under applicable law;

(2) The assets in the account must be insulated from general liabilities of the insurance company under applicable law in the event of the insurance company's insolvency;

(3) The insurance company must invest the funds within the account as directed by the contract holder in designated investment alternatives or in accordance with specific investment objectives or policies; and

(4) All investment gains and losses, net of contract fees and assessments, must be passed through to the contract holder, provided that the contract may specify conditions under which there may be a minimum guarantee but must not include contract terms that limit the maximum investment return available to the policyholder.

Servicer cash advance facility means a facility under which the servicer of the underlying exposures of a securitization may advance cash to ensure an

uninterrupted flow of payments to investors in the securitization, including advances made to cover foreclosure costs or other expenses to facilitate the timely collection of the underlying exposures.

Single-family mortgage exposure means an exposure that is secured by a first or subsequent lien on a property with one to four residential units.

Sovereign means a central government (including the U.S. government) or an agency, department, ministry, or central bank of a central government.

Sovereign default means noncompliance by a sovereign with its external debt service obligations or the inability or unwillingness of a sovereign government to service an existing loan according to its original terms, as evidenced by failure to pay principal and interest timely and fully, arrearages, or restructuring.

Sovereign exposure means:

(1) A direct exposure to a sovereign; or

(2) An exposure directly and unconditionally backed by the full faith and credit of a sovereign.

Specific wrong-way risk means wrong-way risk that arises when either:

(1) The counterparty and issuer of the collateral supporting the transaction; or

(2) The counterparty and the reference asset of the transaction, are affiliates or are the same entity.

Standardized market risk-weighted assets means the standardized measure for spread risk calculated under § 1240.204(a) multiplied by 12.5.

Standardized total risk-weighted assets means:

(1) The sum of—

(i) Total risk-weighted assets for general credit risk as calculated under § 1240.31;

(ii) Total risk-weighted assets for cleared transactions and default fund contributions as calculated under § 1240.37;

(iii) Total risk-weighted assets for unsettled transactions as calculated under § 1240.40;

(iv) Total risk-weighted assets for retained CRT exposures, acquired CRT exposures, and other securitization exposures as calculated under § 1240.42;

(v) Total risk-weighted assets for equity exposures as calculated under § 1240.52;

(vi) Risk-weighted assets for operational risk, as calculated under § 1240.162(c) or § 1240.162(d), as applicable; and

(vii) Standardized market risk-weighted assets; minus

(2) Excess eligible credit reserves not included in the Enterprise's tier 2 capital.

Subsidiary means, with respect to a company, a company controlled by that company.

Synthetic securitization means a transaction in which:

(1) All or a portion of the credit risk of one or more underlying exposures is retained or transferred to one or more third parties through the use of one or more credit derivatives or guarantees (other than a guarantee that transfers only the credit risk of an individual mortgage exposure or other retail exposure);

(2) The credit risk associated with the underlying exposures has been separated into at least two tranches reflecting different levels of seniority;

(3) Performance of the securitization exposures depends upon the performance of the underlying exposures; and

(4) All or substantially all of the underlying exposures are financial exposures (such as mortgage exposures, loans, commitments, credit derivatives, guarantees, receivables, asset-backed securities, mortgage-backed securities, other debt securities, or equity securities).

Tier 1 capital means the sum of common equity tier 1 capital and additional tier 1 capital.

Tier 2 capital is defined in § 1240.20(d).

Total capital has the meaning given in section 1303(23) of the Safety and Soundness Act (12 U.S.C. 4502(23)).

Traditional securitization means a transaction in which:

(1) All or a portion of the credit risk of one or more underlying exposures is transferred to one or more third parties other than through the use of credit derivatives or guarantees;

(2) The credit risk associated with the underlying exposures has been separated into at least two tranches reflecting different levels of seniority;

(3) Performance of the securitization exposures depends upon the performance of the underlying exposures;

(4) All or substantially all of the underlying exposures are financial exposures (such as mortgage exposures, loans, commitments, credit derivatives, guarantees, receivables, asset-backed securities, mortgage-backed securities, other debt securities, or equity securities);

(5) The underlying exposures are not owned by an operating company;

(6) The underlying exposures are not owned by a small business investment company defined in section 302 of the Small Business Investment Act;

(7) The underlying exposures are not owned by a firm an investment in which qualifies as a community development investment under section 24 (Eleventh) of the National Bank Act;

(8) FHFA may determine that a transaction in which the underlying exposures are owned by an investment firm that exercises substantially unfettered control over the size and composition of its assets, liabilities, and off-balance sheet exposures is not a traditional securitization based on the transaction's leverage, risk profile, or economic substance;

(9) FHFA may deem a transaction that meets the definition of a traditional securitization, notwithstanding paragraph (5), (6), or (7) of this definition, to be a traditional securitization based on the transaction's leverage, risk profile, or economic substance; and

(10) The transaction is not:

(i) An investment fund;

(ii) A collective investment fund held by a State member bank as fiduciary and, consistent with local law, invested collectively—

(A) In a common trust fund maintained by such bank exclusively for the collective investment and reinvestment of monies contributed thereto by the bank in its capacity as trustee, executor, administrator, guardian, or custodian under the Uniform Gifts to Minors Act; or

(B) In a fund consisting solely of assets of retirement, pension, profit sharing, stock bonus or similar trusts which are exempt from Federal income taxation under the Internal Revenue Code (26 U.S.C.).

(iii) An employee benefit plan (as defined in 29 U.S.C. 1002(3)), a governmental plan (as defined in 29 U.S.C. 1002(32)) that complies with the tax deferral qualification requirements provided in the Internal Revenue Code;

(iv) A synthetic exposure to the capital of a financial institution to the extent deducted from capital under § 1240.22; or

(v) Registered with the SEC under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) or foreign equivalents thereof.

Tranche means all securitization exposures associated with a securitization that have the same seniority level.

Transition order means an order issued by the Director under section 1371 of the Safety and Soundness Act (12 U.S.C. 4631), a plan required by the Director under section 1313B of the Safety and Soundness Act (12 U.S.C. 4513b), or an order, agreement, or similar arrangement of FHFA that, in any case, provides for a compliance date for a requirement of this part that is later

than the compliance date for the requirement specified under § 1240.4.

Unconditionally cancelable means with respect to a commitment, that an Enterprise may, at any time, with or without cause, refuse to extend credit under the commitment (to the extent permitted under applicable law).

Underlying exposures means one or more exposures that have been securitized in a securitization transaction.

Variation margin agreement means an agreement to collect or post variation margin.

Variation margin threshold means the amount of credit exposure of an Enterprise to its counterparty that, if exceeded, would require the counterparty to post variation margin to the Enterprise pursuant to the variation margin agreement.

Wrong-way risk means the risk that arises when an exposure to a particular counterparty is positively correlated with the probability of default of such counterparty itself.

§ 1240.3 Operational requirements for counterparty credit risk.

For purposes of calculating risk-weighted assets under subpart D of this part:

(a) *Cleared transaction.* In order to recognize certain exposures as cleared transactions pursuant to paragraphs (1)(ii), (iii), or (iv) of the definition of ''cleared transaction'' in § 1240.2, the exposures must meet the applicable requirements set forth in this paragraph (a).

(1) The offsetting transaction must be identified by the CCP as a transaction for the clearing member client.

(2) The collateral supporting the transaction must be held in a manner that prevents the Enterprise from facing any loss due to an event of default, including from a liquidation, receivership, insolvency, or similar proceeding of either the clearing member or the clearing member's other clients.

(3) The Enterprise must conduct sufficient legal review to conclude with a well-founded basis (and maintain sufficient written documentation of that legal review) that in the event of a legal challenge (including one resulting from a default or receivership, insolvency, liquidation, or similar proceeding) the relevant court and administrative authorities would find the arrangements of paragraph (a)(2) of this section to be legal, valid, binding and enforceable under the law of the relevant jurisdictions.

(4) The offsetting transaction with a clearing member must be transferable under the transaction documents and applicable laws in the relevant jurisdiction(s) to another clearing member should the clearing member default, become insolvent, or enter receivership, insolvency, liquidation, or similar proceedings.

(b) *Eligible margin loan.* In order to recognize an exposure as an eligible margin loan as defined in § 1240.2, an Enterprise must conduct sufficient legal review to conclude with a well-founded basis (and maintain sufficient written documentation of that legal review) that the agreement underlying the exposure:

(1) Meets the requirements of paragraph (1)(iii) of the definition of ''eligible margin loan'' in § 1240.2, and

(2) Is legal, valid, binding, and enforceable under applicable law in the relevant jurisdictions.

(c) [Reserved]

(d) *Qualifying master netting agreement.* In order to recognize an agreement as a qualifying master netting agreement as defined in § 1240.2, an Enterprise must:

(1) Conduct sufficient legal review to conclude with a well-founded basis (and maintain sufficient written documentation of that legal review) that:

(i) The agreement meets the requirements of paragraph (2) of the definition of ''qualifying master netting agreement'' in § 1240.2; and

(ii) In the event of a legal challenge (including one resulting from default or from receivership, insolvency, liquidation, or similar proceeding) the relevant court and administrative authorities would find the agreement to be legal, valid, binding, and enforceable under the law of the relevant jurisdictions; and

(2) Establish and maintain written procedures to monitor possible changes in relevant law and to ensure that the agreement continues to satisfy the requirements of the definition of ''qualifying master netting agreement'' in § 1240.2.

(e) *Repo-style transaction.* In order to recognize an exposure as a repo-style transaction as defined in § 1240.2, an Enterprise must conduct sufficient legal review to conclude with a well-founded basis (and maintain sufficient written documentation of that legal review) that the agreement underlying the exposure:

(1) Meets the requirements of paragraph (3) of the definition of ''repo-style transaction'' in § 1240.2, and

(2) Is legal, valid, binding, and enforceable under applicable law in the relevant jurisdictions.

(f) *Failure of a QCCP to satisfy the rule's requirements.* If an Enterprise determines that a CCP ceases to be a QCCP due to the failure of the CCP to satisfy one or more of the requirements set forth in paragraphs (2)(i) through (iii) of the definition of a ''QCCP'' in § 1240.2, the Enterprise may continue to treat the CCP as a QCCP for up to three months following the determination. If the CCP fails to remedy the relevant deficiency within three months after the initial determination, or the CCP fails to satisfy the requirements set forth in paragraphs (2)(i) through (iii) of the definition of a ''QCCP'' continuously for a three-month period after remedying the relevant deficiency, an Enterprise may not treat the CCP as a QCCP for the purposes of this part until after the Enterprise has determined that the CCP has satisfied the requirements in paragraphs (2)(i) through (iii) of the definition of a ''QCCP'' for three continuous months.

§ 1240.4 Transition.

(a) *Compliance dates.* An Enterprise will not be subject to any requirement under this part until the compliance date for the requirement under this section.

(b) *Reporting requirements.* The compliance date will be January 1, 2022, for the reporting requirements under any of the following:

(1) Any requirement under § 1240.1(f);

(2) Any requirement under subpart C, D, or G of this part;

(3) Any requirement under § 1240.162(d); and

(4) Any requirement to calculate the standardized measure for spread risk under § 1240.204.

(c) *Advanced approaches requirements.* Any requirement under subpart E or F (other than § 1240.162(d) or any requirement to calculate the standardized measure for spread risk under § 1240.204) will have a compliance date of the later of January 1, 2025 and any later compliance date for that requirement provided in a transition order applicable to the Enterprise.

(d) *Capital requirements and buffers*—(1) *Requirements.* The compliance date of any requirement under § 1240.10 will be the later of:

(i) The date of the termination of the conservatorship of the Enterprise (or, if later, the effective date of this part); and

(ii) Any later compliance date for § 1240.10 provided in a transition order applicable to the Enterprise.

(2) *Buffers.* The compliance date of any requirement under § 1240.11 will be the date of the termination of the conservatorship of the Enterprise (or, if later, the effective date of this part).

(3) *Capital restoration plan.* If a transition order of an Enterprise provides a compliance date for

§ 1240.10, the Director may determine that, for the period between the compliance date for § 1240.11 under paragraph (d)(2) of this section and any later compliance date for § 1240.10 provided in the transition order—

(i) The prescribed capital conservation buffer amount of the Enterprise will be the amount equal to the sum of—

(A) The common equity tier 1 capital that would otherwise be required under § 1240.10(d); and

(B) The prescribed capital conservation buffer amount that would otherwise apply under § 1240.11(a)(5); and

(ii) The prescribed leverage buffer amount of the Enterprise will be equal to 4.0 percent of the adjusted total assets of the Enterprise.

(4) *Prudential standard.* If the Director makes a determination under paragraph (d)(3) of this section, § 1240.11 will be a prudential standard adopted under section 1313B of the Safety and Soundness Act (12 U.S.C. 4513b) until the compliance date of § 1240.10.

Subpart B—Capital Requirements and Buffers

§ 1240.10 Capital requirements.

(a) *Total capital.* An Enterprise must maintain total capital not less than the amount equal to 8.0 percent of the greater of:

(1) Standardized total risk-weighted assets; and

(2) Advanced approaches total risk-weighted assets.

(b) *Adjusted total capital.* An Enterprise must maintain adjusted total capital not less than the amount equal to 8.0 percent of the greater of:

(1) Standardized total risk-weighted assets; and

(2) Advanced approaches total risk-weighted assets.

(c) *Tier 1 capital.* An Enterprise must maintain tier 1 capital not less than the amount equal to 6.0 percent of the greater of:

(1) Standardized total risk-weighted assets; and

(2) Advanced approaches total risk-weighted assets.

(d) *Common equity tier 1 capital.* An Enterprise must maintain common equity tier 1 capital not less than the amount equal to 4.5 percent of the greater of:

(1) Standardized total risk-weighted assets; and

(2) Advanced approaches total risk-weighted assets.

(e) *Core capital.* An Enterprise must maintain core capital not less than the amount equal to 2.5 percent of adjusted total assets.

(f) *Leverage ratio.* An Enterprise must maintain tier 1 capital not less than the amount equal to 2.5 percent of adjusted total assets.

(g) *Capital adequacy.* (1) Notwithstanding the minimum requirements in this part, an Enterprise must maintain capital commensurate with the level and nature of all risks to which the Enterprise is exposed. The supervisory evaluation of an Enterprise's capital adequacy is based on an individual assessment of numerous factors, including the character and condition of the Enterprise's assets and its existing and prospective liabilities and other corporate responsibilities.

(2) An Enterprise must have a process for assessing its overall capital adequacy in relation to its risk profile and a comprehensive strategy for maintaining an appropriate level of capital.

§ 1240.11 Capital conservation buffer and leverage buffer.

(a) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Capital conservation buffer.* An Enterprise's capital conservation buffer is the amount calculated under paragraph (c)(2) of this section.

(2) *Eligible retained income.* The eligible retained income of an Enterprise is the greater of:

(i) The Enterprise's net income, as defined under GAAP, for the four calendar quarters preceding the current calendar quarter, net of any distributions and associated tax effects not already reflected in net income; and

(ii) The average of the Enterprise's net income for the four calendar quarters preceding the current calendar quarter.

(3) *Leverage buffer.* An Enterprise's leverage buffer is the amount calculated under paragraph (d)(2) of this section.

(4) *Maximum payout ratio.* The maximum payout ratio is the percentage of eligible retained income that an Enterprise can pay out in the form of distributions and discretionary bonus payments during the current calendar quarter. The maximum payout ratio is determined under paragraph (b)(2) of this section.

(5) *Prescribed capital conservation buffer amount.* An Enterprise's prescribed capital conservation buffer amount is equal to its stress capital buffer in accordance with paragraph (a)(7) of this section plus its applicable countercyclical capital buffer amount in accordance with paragraph (e) of this section plus its applicable stability capital buffer in accordance with paragraph (f) of this section.

(6) *Prescribed leverage buffer amount.* An Enterprise's prescribed leverage buffer amount is 1.5 percent of the Enterprise's adjusted total assets, as of the last day of the previous calendar quarter.

(7) *Stress capital buffer.* (i) Subject to paragraph (a)(7)(iii) of this section, FHFA will determine the stress capital buffer pursuant to this paragraph (a)(7).

(ii) An Enterprise's stress capital buffer is equal to the Enterprise's adjusted total assets, as of the last day of the previous calendar quarter, multiplied by the greater of:

(A) The following calculation:

(*1*) The ratio of an Enterprise's common equity tier 1 capital to adjusted total assets, as of the final quarter of the previous calendar year, unless otherwise determined by FHFA; minus

(*2*) The lowest projected ratio of the Enterprise's common equity tier 1 capital to adjusted total assets in any quarter of the planning horizon under a supervisory stress test; plus

(*3*) The ratio of:

(*i*) The sum of the Enterprise's planned common stock dividends (expressed as a dollar amount) for each of the quarters of the planning horizon of the supervisory stress test, unless otherwise determined by FHFA; to

(*ii*) The adjusted total assets of the Enterprise in the quarter in which the Enterprise had its lowest projected ratio of common equity tier 1 capital to adjusted total assets in any quarter of the planning horizon under the supervisory stress test; and

(B) 0.75 percent.

(iii) Notwithstanding anything to the contrary in paragraph (a)(7)(ii) of this section, if FHFA does not determine the stress capital buffer for an Enterprise under this paragraph (a)(7), the Enterprise's stress capital buffer is equal to 0.75 percent of the Enterprise's adjusted total assets, as of the last day of the previous calendar quarter.

(b) *Maximum payout amount*—(1) *Limits on distributions and discretionary bonus payments.* An Enterprise shall not make distributions or discretionary bonus payments or create an obligation to make such distributions or payments during the current calendar quarter that, in the aggregate, exceed the amount equal to the Enterprise's eligible retained income for the calendar quarter, multiplied by its maximum payout ratio.

(2) *Maximum payout ratio.* The maximum payout ratio of an Enterprise is the lowest of the payout ratios determined by its capital conservation buffer and its leverage buffer, as set forth on Table 1 to paragraph (b)(5) of this section.

(3) *No maximum payout amount limitation.* An Enterprise is not subject

to a restriction under paragraph (b)(1) of this section if it has:

(i) A capital conservation buffer that is greater than its prescribed capital conservation buffer amount; and

(ii) A leverage buffer that is greater than its prescribed leverage buffer amount.

(4) *Negative eligible retained income.* An Enterprise may not make distributions or discretionary bonus payments during the current calendar quarter if:

(i) The eligible retained income of the Enterprise is negative; and

(ii) Either:

(A) The capital conservation buffer of the Enterprise was less than its stress capital buffer; or

(B) The leverage buffer of the Enterprise was less than its prescribed leverage buffer amount.

(5) *Prior approval.* Notwithstanding the limitations in paragraphs (b)(1) through (3) of this section, FHFA may permit an Enterprise to make a distribution or discretionary bonus payment upon a request of the Enterprise, if FHFA determines that the distribution or discretionary bonus payment would not be contrary to the purposes of this section or to the safety and soundness of the Enterprise. In making such a determination, FHFA will consider the nature and extent of the request and the particular circumstances giving rise to the request.

TABLE 1 TO PARAGRAPH (b)(5): CALCULATION OF MAXIMUM PAYOUT RATIO

Capital buffer[1]	**Maximum payout ratio**
Greater than or equal to the Enterprise's prescribed buffer amount.[2]	No payout ratio limitation applies
Less than the Enterprise's prescribed buffer amount, and greater than or equal to 75 percent of the Enterprise's prescribed buffer amount.	60 percent
Less than 75 percent of the Enterprise's prescribed buffer amount, and greater than or equal to 50 percent of the Enterprise's prescribed buffer amount.	40 percent
Less than 50 percent of the Enterprise's prescribed buffer amount, and greater than or equal to 25 percent of the Enterprise's prescribed buffer amount.	20 percent
Less than 25 percent of the Enterprise's prescribed buffer amount.	0 percent

[1] An Enterprise's "capital buffer" means, as applicable, its capital conservation buffer or its leverage buffer.

[2] An Enterprise's "prescribed buffer amount" means, as applicable, its prescribed capital conservation buffer amount or its prescribed leverage buffer amount.

(c) *Capital conservation buffer*—(1) *Composition of the capital conservation buffer.* The capital conservation buffer is composed solely of common equity tier 1 capital.

(2) *Calculation of capital conservation buffer.* (i) An Enterprise's capital conservation buffer is equal to the lowest of the following, calculated as of the last day of the previous calendar quarter:

(A) The Enterprise's adjusted total capital minus the minimum amount of adjusted total capital under § 1240.10(b);

(B) The Enterprise's tier 1 capital minus the minimum amount of tier 1 capital under § 1240.10(c); or

(C) The Enterprise's common equity tier 1 capital minus the minimum amount of common equity tier 1 capital under § 1240.10(d).

(ii) Notwithstanding paragraphs (c)(2)(i)(A) through (C) of this section, if the Enterprise's adjusted total capital, tier 1 capital, or common equity tier 1 capital is less than or equal to the Enterprise's minimum adjusted total capital, tier 1 capital, or common equity tier 1 capital, respectively, the Enterprise's capital conservation buffer is zero.

(d) *Leverage buffer*—(1) *Composition of the leverage buffer.* The leverage buffer is composed solely of tier 1 capital.

(2) *Calculation of the leverage buffer.* (i) An Enterprise's leverage buffer is equal to the Enterprise's tier 1 capital minus the minimum amount of tier 1 capital under § 1240.10(f), calculated as of the last day of the previous calendar quarter.

(ii) Notwithstanding paragraph (d)(2)(i) of this section, if the Enterprise's tier 1 capital is less than or equal to the minimum amount of tier 1 capital under § 1240.10(d), the Enterprise's leverage buffer is zero.

(e) *Countercyclical capital buffer amount*—(1) *Composition of the countercyclical capital buffer amount.* The countercyclical capital buffer amount is composed solely of common equity tier 1 capital.

(2) *Amount*—(i) *Initial countercyclical capital buffer.* The initial countercyclical capital buffer amount is zero.

(ii) *Adjustment of the countercyclical capital buffer amount.* FHFA will adjust the countercyclical capital buffer amount in accordance with applicable law.

(iii) *Range of countercyclical capital buffer amount.* FHFA will adjust the countercyclical capital buffer amount between zero percent and 0.75 percent of adjusted total assets.

(iv) *Adjustment determination.* FHFA will base its decision to adjust the countercyclical capital buffer amount under this section on a range of macroeconomic, financial, and

supervisory information indicating an increase in systemic risk, including the ratio of credit to gross domestic product, a variety of asset prices, other factors indicative of relative credit and liquidity expansion or contraction, funding spreads, credit condition surveys, indices based on credit default swap spreads, options implied volatility, and measures of systemic risk.

(3) *Effective date of adjusted countercyclical capital buffer amount*—(i) *Increase adjustment.* A determination by FHFA under paragraph (e)(2)(ii) of this section to increase the countercyclical capital buffer amount will be effective 12 months from the date of announcement, unless FHFA establishes an earlier effective date and includes a statement articulating the reasons for the earlier effective date.

(ii) *Decrease adjustment.* A determination by FHFA to decrease the established countercyclical capital buffer amount under paragraph (e)(2)(ii) of this section will be effective on the day following announcement of the final determination or the earliest date permissible under applicable law or regulation, whichever is later.

(iii) *Twelve month sunset.* The countercyclical capital buffer amount will return to zero percent 12 months after the effective date that the adjusted countercyclical capital buffer amount is announced, unless FHFA announces a decision to maintain the adjusted countercyclical capital buffer amount or adjust it again before the expiration of the 12-month period.

(f) *Stability capital buffer.* An Enterprise must use its stability capital buffer calculated in accordance with subpart G of this part for purposes of determining its maximum payout ratio under Table 1 to paragraph (b)(5) of this section.

Subpart C—Definition of Capital

§ 1240.20 Capital components and eligibility criteria for regulatory capital instruments.

(a) *Regulatory capital components.* An Enterprise's regulatory capital components are:

(1) Common equity tier 1 capital;

(2) Additional tier 1 capital;

(3) Tier 2 capital;

(4) Core capital; and

(5) Total capital.

(b) *Common equity tier 1 capital.* Common equity tier 1 capital is the sum of the common equity tier 1 capital elements in this paragraph (b), minus regulatory adjustments and deductions in § 1240.22. The common equity tier 1 capital elements are:

(1) Any common stock instruments (plus any related surplus) issued by the Enterprise, net of treasury stock, that meet all the following criteria:

(i) The instrument is paid-in, issued directly by the Enterprise, and represents the most subordinated claim in a receivership, insolvency, liquidation, or similar proceeding of the Enterprise;

(ii) The holder of the instrument is entitled to a claim on the residual assets of the Enterprise that is proportional with the holder's share of the Enterprise's issued capital after all senior claims have been satisfied in a receivership, insolvency, liquidation, or similar proceeding;

(iii) The instrument has no maturity date, can only be redeemed via discretionary repurchases with the prior approval of FHFA to the extent otherwise required by law or regulation, and does not contain any term or feature that creates an incentive to redeem;

(iv) The Enterprise did not create at issuance of the instrument through any action or communication an expectation that it will buy back, cancel, or redeem the instrument, and the instrument does not include any term or feature that might give rise to such an expectation;

(v) Any cash dividend payments on the instrument are paid out of the Enterprise's net income, retained earnings, or surplus related to common stock, and are not subject to a limit imposed by the contractual terms governing the instrument.

(vi) The Enterprise has full discretion at all times to refrain from paying any dividends and making any other distributions on the instrument without triggering an event of default, a requirement to make a payment-in-kind, or an imposition of any other restrictions on the Enterprise;

(vii) Dividend payments and any other distributions on the instrument may be paid only after all legal and contractual obligations of the Enterprise have been satisfied, including payments due on more senior claims;

(viii) The holders of the instrument bear losses as they occur equally, proportionately, and simultaneously with the holders of all other common stock instruments before any losses are borne by holders of claims on the Enterprise with greater priority in a receivership, insolvency, liquidation, or similar proceeding;

(ix) The paid-in amount is classified as equity under GAAP;

(x) The Enterprise, or an entity that the Enterprise controls, did not purchase or directly or indirectly fund the purchase of the instrument;

(xi) The instrument is not secured, not covered by a guarantee of the Enterprise or of an affiliate of the Enterprise, and is not subject to any other arrangement that legally or economically enhances the seniority of the instrument;

(xii) The instrument has been issued in accordance with applicable laws and regulations; and

(xiii) The instrument is reported on the Enterprise's regulatory financial statements separately from other capital instruments.

(2) Retained earnings.

(3) Accumulated other comprehensive income (AOCI) as reported under GAAP.[1]

(4) Notwithstanding the criteria for common stock instruments referenced above, an Enterprise's common stock issued and held in trust for the benefit of its employees as part of an employee stock ownership plan does not violate any of the criteria in paragraph (b)(1)(iii), (iv), or (xi) of this section, provided that any repurchase of the stock is required solely by virtue of ERISA for an instrument of an Enterprise that is not publicly-traded. In addition, an instrument issued by an Enterprise to its employee stock ownership plan does not violate the criterion in paragraph (b)(1)(x) of this section.

(c) *Additional tier 1 capital.* Additional tier 1 capital is the sum of additional tier 1 capital elements and any related surplus, minus the regulatory adjustments and deductions in § 1240.22. Additional tier 1 capital elements are:

(1) Subject to paragraph (e)(2) of this section, instruments (plus any related surplus) that meet the following criteria:

(i) The instrument is issued and paid-in;

(ii) The instrument is subordinated to general creditors and subordinated debt holders of the Enterprise in a receivership, insolvency, liquidation, or similar proceeding;

(iii) The instrument is not secured, not covered by a guarantee of the Enterprise or of an affiliate of the Enterprise, and not subject to any other arrangement that legally or economically enhances the seniority of the instrument;

(iv) The instrument has no maturity date and does not contain a dividend step-up or any other term or feature that creates an incentive to redeem; and

(v) If callable by its terms, the instrument may be called by the Enterprise only after a minimum of five years following issuance, except that the

[1] *See* § 1240.22 for specific adjustments related to AOCI.

terms of the instrument may allow it to be called earlier than five years upon the occurrence of a regulatory event that precludes the instrument from being included in additional tier 1 capital, a tax event, or if the issuing entity is required to register as an investment company pursuant to the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*). In addition:

(A) The Enterprise must receive prior approval from FHFA to exercise a call option on the instrument.

(B) The Enterprise does not create at issuance of the instrument, through any action or communication, an expectation that the call option will be exercised.

(C) Prior to exercising the call option, or immediately thereafter, the Enterprise must either: Replace the instrument to be called with an equal amount of instruments that meet the criteria under paragraph (b) of this section or this paragraph (c);[2] or demonstrate to the satisfaction of FHFA that following redemption, the Enterprise will continue to hold capital commensurate with its risk.

(vi) Redemption or repurchase of the instrument requires prior approval from FHFA.

(vii) The Enterprise has full discretion at all times to cancel dividends or other distributions on the instrument without triggering an event of default, a requirement to make a payment-in-kind, or an imposition of other restrictions on the Enterprise except in relation to any distributions to holders of common stock or instruments that are *pari passu* with the instrument.

(viii) Any distributions on the instrument are paid out of the Enterprise's net income, retained earnings, or surplus related to other additional tier 1 capital instruments.

(ix) The instrument does not have a credit-sensitive feature, such as a dividend rate that is reset periodically based in whole or in part on the Enterprise's credit quality, but may have a dividend rate that is adjusted periodically independent of the Enterprise's credit quality, in relation to general market interest rates or similar adjustments.

(x) The paid-in amount is classified as equity under GAAP.

(xi) The Enterprise, or an entity that the Enterprise controls, did not purchase or directly or indirectly fund the purchase of the instrument.

(xii) The instrument does not have any features that would limit or discourage additional issuance of capital by the Enterprise, such as provisions that require the Enterprise to compensate holders of the instrument if a new instrument is issued at a lower price during a specified time frame.

(xiii) If the instrument is not issued directly by the Enterprise or by a subsidiary of the Enterprise that is an operating entity, the only asset of the issuing entity is its investment in the capital of the Enterprise, and proceeds must be immediately available without limitation to the Enterprise or to the Enterprise's top-tier holding company in a form which meets or exceeds all of the other criteria for additional tier 1 capital instruments.[3]

(xiv) The governing agreement, offering circular, or prospectus of an instrument issued after February 16, 2021 must disclose that the holders of the instrument may be fully subordinated to interests held by the U.S. government in the event that the Enterprise enters into a receivership, insolvency, liquidation, or similar proceeding.

(2) Notwithstanding the criteria for additional tier 1 capital instruments referenced above, an instrument issued by an Enterprise and held in trust for the benefit of its employees as part of an employee stock ownership plan does not violate any of the criteria in paragraph (c)(1)(iii) of this section, provided that any repurchase is required solely by virtue of ERISA for an instrument of an Enterprise that is not publicly-traded. In addition, an instrument issued by an Enterprise to its employee stock ownership plan does not violate the criteria in paragraphs (c)(1)(v) or (c)(1)(xi) of this section.

(d) *Tier 2 capital.* Tier 2 capital is the sum of tier 2 capital elements and any related surplus, minus the regulatory adjustments and deductions in § 1240.22. Tier 2 capital elements are:

(1) Subject to paragraph (e)(2) of this section, instruments (plus related surplus) that meet the following criteria:

(i) The instrument is issued and paid-in.

(ii) The instrument is subordinated to general creditors of the Enterprise.

(iii) The instrument is not secured, not covered by a guarantee of the Enterprise or of an affiliate of the Enterprise, and not subject to any other arrangement that legally or economically enhances the seniority of the instrument in relation to more senior claims.

(iv) The instrument has a minimum original maturity of at least five years. At the beginning of each of the last five years of the life of the instrument, the amount that is eligible to be included in tier 2 capital is reduced by 20 percent of the original amount of the instrument (net of redemptions) and is excluded from regulatory capital when the remaining maturity is less than one year. In addition, the instrument must not have any terms or features that require, or create significant incentives for, the Enterprise to redeem the instrument prior to maturity.[4]

(v) The instrument, by its terms, may be called by the Enterprise only after a minimum of five years following issuance, except that the terms of the instrument may allow it to be called sooner upon the occurrence of an event that would preclude the instrument from being included in tier 2 capital, a tax event. In addition:

(A) The Enterprise must receive the prior approval of FHFA to exercise a call option on the instrument.

(B) The Enterprise does not create at issuance, through action or communication, an expectation the call option will be exercised.

(C) Prior to exercising the call option, or immediately thereafter, the Enterprise must either: Replace any amount called with an equivalent amount of an instrument that meets the criteria for regulatory capital under this section;[5] or demonstrate to the satisfaction of FHFA that following redemption, the Enterprise would continue to hold an amount of capital that is commensurate with its risk.

(vi) The holder of the instrument must have no contractual right to accelerate payment of principal or interest on the instrument, except in the event of a receivership, insolvency, liquidation, or similar proceeding of the Enterprise.

(vii) The instrument has no credit-sensitive feature, such as a dividend or interest rate that is reset periodically based in whole or in part on the Enterprise's credit standing, but may have a dividend rate that is adjusted periodically independent of the Enterprise's credit standing, in relation to general market interest rates or similar adjustments.

(viii) The Enterprise, or an entity that the Enterprise controls, has not purchased and has not directly or indirectly funded the purchase of the instrument.

[2] Replacement can be concurrent with redemption of existing additional tier 1 capital instruments.

[3] *De minimis* assets related to the operation of the issuing entity can be disregarded for purposes of this criterion.

[4] An instrument that by its terms automatically converts into a tier 1 capital instrument prior to five years after issuance complies with the five-year maturity requirement of this criterion.

[5] An Enterprise may replace tier 2 capital instruments concurrent with the redemption of existing tier 2 capital instruments.

(ix) If the instrument is not issued directly by the Enterprise or by a subsidiary of the Enterprise that is an operating entity, the only asset of the issuing entity is its investment in the capital of the Enterprise, and proceeds must be immediately available without limitation to the Enterprise or the Enterprise's top-tier holding company in a form that meets or exceeds all the other criteria for tier 2 capital instruments under this section.[6]

(x) Redemption of the instrument prior to maturity or repurchase requires the prior approval of FHFA.

(xi) The governing agreement, offering circular, or prospectus of an instrument issued after February 16, 2021 must disclose that the holders of the instrument may be fully subordinated to interests held by the U.S. government in the event that the Enterprise enters into a receivership, insolvency, liquidation, or similar proceeding.

(2) Any eligible credit reserves that exceed expected credit losses to the extent that the excess reserve amount does not exceed 0.6 percent of credit risk-weighted assets.

(e) *FHFA approval of a capital element.* (1) An Enterprise must receive FHFA prior approval to include a capital element (as listed in this section) in its common equity tier 1 capital, additional tier 1 capital, or tier 2 capital unless the element:

(i) Was included in an Enterprise's tier 1 capital or tier 2 capital prior to June 30, 2020 and the underlying instrument may continue to be included under the criteria set forth in this section; or

(ii) Is equivalent, in terms of capital quality and ability to absorb losses with respect to all material terms, to a regulatory capital element FHFA determined may be included in regulatory capital pursuant to paragraph (e)(3) of this section.

(2) An Enterprise may not include an instrument in its additional tier 1 capital or a tier 2 capital unless FHFA has determined that the Enterprise has made appropriate provision, including in any resolution plan of the Enterprise, to ensure that the instrument would not pose a material impediment to the ability of an Enterprise to issue common stock instruments following the appointment of FHFA as conservator or receiver under the Safety and Soundness Act.

(3) After determining that a regulatory capital element may be included in an Enterprise's common equity tier 1 capital, additional tier 1 capital, or tier 2 capital, FHFA will make its decision publicly available, including a brief description of the material terms of the regulatory capital element and the rationale for the determination.

(f) *FHFA prior approval.* An Enterprise may not repurchase or redeem any common equity tier 1 capital, additional tier 1, or tier 2 capital instrument without the prior approval of FHFA to the extent such prior approval is required by paragraph (b), (c), or (d) of this section, as applicable.

§ 1240.21 [Reserved]

§ 1240.22 Regulatory capital adjustments and deductions.

(a) *Regulatory capital deductions from common equity tier 1 capital.* An Enterprise must deduct from the sum of its common equity tier 1 capital elements the items set forth in this paragraph (a):

(1) Goodwill, net of associated deferred tax liabilities (DTLs) in accordance with paragraph (e) of this section;

(2) Intangible assets, other than MSAs, net of associated DTLs in accordance with paragraph (e) of this section;

(3) Deferred tax assets (DTAs) that arise from net operating loss and tax credit carryforwards net of any related valuation allowances and net of DTLs in accordance with paragraph (e) of this section;

(4) Any gain-on-sale in connection with a securitization exposure;

(5) Any defined benefit pension fund net asset, net of any associated DTL in accordance with paragraph (e) of this section, held by the Enterprise. With the prior approval of FHFA, this deduction is not required for any defined benefit pension fund net asset to the extent the Enterprise has unrestricted and unfettered access to the assets in that fund. An Enterprise must risk weight any portion of the defined benefit pension fund asset that is not deducted under this paragraph (a) as if the Enterprise directly holds a proportional ownership share of each exposure in the defined benefit pension fund.

(6) The amount of expected credit loss that exceeds its eligible credit reserves.

(b) *Regulatory adjustments to common equity tier 1 capital.* (1) An Enterprise must adjust the sum of common equity tier 1 capital elements pursuant to the requirements set forth in this paragraph (b). Such adjustments to common equity tier 1 capital must be made net of the associated deferred tax effects.

(i) An Enterprise must deduct any accumulated net gains and add any accumulated net losses on cash flow hedges included in AOCI that relate to the hedging of items that are not recognized at fair value on the balance sheet.

(ii) An Enterprise must deduct any net gain and add any net loss related to changes in the fair value of liabilities that are due to changes in the Enterprise's own credit risk. An Enterprise must deduct the difference between its credit spread premium and the risk-free rate for derivatives that are liabilities as part of this adjustment.

(2) [Reserved]

(c) *Deductions from regulatory capital related to investments in capital instruments.*[1] An Enterprise must deduct an investment in the Enterprise's own capital instruments as follows:

(1) An Enterprise must deduct an investment in the Enterprise's own common stock instruments from its common equity tier 1 capital elements to the extent such instruments are not excluded from regulatory capital under § 1240.20(b)(1);

(2) An Enterprise must deduct an investment in the Enterprise's own additional tier 1 capital instruments from its additional tier 1 capital elements; and

(3) An Enterprise must deduct an investment in the Enterprise's own tier 2 capital instruments from its tier 2 capital elements.

(d) *Items subject to the 10 and 15 percent common equity tier 1 capital deduction thresholds.* (1) An Enterprise must deduct from common equity tier 1 capital elements the amount of each of the items set forth in this paragraph (d) that, individually, exceeds 10 percent of the sum of the Enterprise's common equity tier 1 capital elements, less adjustments to and deductions from common equity tier 1 capital required under paragraphs (a) through (c) of this section (the 10 percent common equity tier 1 capital deduction threshold).

(i) DTAs arising from temporary differences that the Enterprise could not realize through net operating loss carrybacks, net of any related valuation allowances and net of DTLs, in accordance with paragraph (e) of this section. An Enterprise is not required to deduct from the sum of its common equity tier 1 capital elements DTAs (net of any related valuation allowances and net of DTLs, in accordance with paragraph (e) of this section) arising from timing differences that the Enterprise could realize through net

[6] An Enterprise may disregard *de minimis* assets related to the operation of the issuing entity for purposes of this criterion.

[1] The Enterprise must calculate amounts deducted under paragraphs (c) through (f) of this section after it calculates the amount of ALLL or AACL, as applicable, includable in tier 2 capital under § 1240.20(d).

operating loss carrybacks. The Enterprise must risk weight these assets at 100 percent.

(ii) MSAs net of associated DTLs, in accordance with paragraph (e) of this section.

(2) An Enterprise must deduct from common equity tier 1 capital elements the items listed in paragraph (d)(1) of this section that are not deducted as a result of the application of the 10 percent common equity tier 1 capital deduction threshold, and that, in aggregate, exceed 17.65 percent of the sum of the Enterprise's common equity tier 1 capital elements, minus adjustments to and deductions from common equity tier 1 capital required under paragraphs (a) through (c) of this section, minus the items listed in paragraph (d)(1) of this section (the 15 percent common equity tier 1 capital deduction threshold).[2]

(3) For purposes of calculating the amount of DTAs subject to the 10 and 15 percent common equity tier 1 capital deduction thresholds, an Enterprise may exclude DTAs and DTLs relating to adjustments made to common equity tier 1 capital under paragraph (b) of this section. An Enterprise that elects to exclude DTAs relating to adjustments under paragraph (b) of this section also must exclude DTLs and must do so consistently in all future calculations. An Enterprise may change its exclusion preference only after obtaining the prior approval of FHFA.

(e) *Netting of DTLs against assets subject to deduction.* (1) Except as described in paragraph (e)(3) of this section, netting of DTLs against assets that are subject to deduction under this section is permitted, but not required, if the following conditions are met:

(i) The DTL is associated with the asset; and

(ii) The DTL would be extinguished if the associated asset becomes impaired or is derecognized under GAAP.

(2) A DTL may only be netted against a single asset.

(3) For purposes of calculating the amount of DTAs subject to the threshold deduction in paragraph (d) of this section, the amount of DTAs that arise from net operating loss and tax credit carryforwards, net of any related valuation allowances, and of DTAs arising from temporary differences that the Enterprise could not realize through net operating loss carrybacks, net of any related valuation allowances, may be offset by DTLs (that have not been netted against assets subject to deduction pursuant to paragraph (e)(1) of this section) subject to the conditions set forth in this paragraph (e).

(i) Only the DTAs and DTLs that relate to taxes levied by the same taxation authority and that are eligible for offsetting by that authority may be offset for purposes of this deduction.

(ii) The amount of DTLs that the Enterprise nets against DTAs that arise from net operating loss and tax credit carryforwards, net of any related valuation allowances, and against DTAs arising from temporary differences that the Enterprise could not realize through net operating loss carrybacks, net of any related valuation allowances, must be allocated in proportion to the amount of DTAs that arise from net operating loss and tax credit carryforwards (net of any related valuation allowances, but before any offsetting of DTLs) and of DTAs arising from temporary differences that the Enterprise could not realize through net operating loss carrybacks (net of any related valuation allowances, but before any offsetting of DTLs), respectively.

(4) An Enterprise must net DTLs against assets subject to deduction under this section in a consistent manner from reporting period to reporting period. An Enterprise may change its preference regarding the manner in which it nets DTLs against specific assets subject to deduction under this section only after obtaining the prior approval of FHFA.

(f) *Insufficient amounts of a specific regulatory capital component to effect deductions.* Under the corresponding deduction approach, if an Enterprise does not have a sufficient amount of a specific component of capital to effect the required deduction after completing the deductions required under paragraph (d) of this section, the Enterprise must deduct the shortfall from the next higher (that is, more subordinated) component of regulatory capital.

(g) *Treatment of assets that are deducted.* An Enterprise must exclude from standardized total risk-weighted assets and advanced approaches total risk-weighted assets any item deducted from regulatory capital under paragraphs (a), (c), and (d) of this section.

Subpart D—Risk-Weighted Assets—Standardized Approach

§ 1240.30 Applicability.

(a) This subpart sets forth methodologies for determining risk-weighted assets for purposes of the generally applicable risk-based capital requirements for the Enterprises.

(b) This subpart is also applicable to covered positions, as defined in subpart F of this part.

Risk-Weighted Assets for General Credit Risk

§ 1240.31 Mechanics for calculating risk-weighted assets for general credit risk.

(a) *General risk-weighting requirements.* An Enterprise must apply risk weights to its exposures as follows:

(1) An Enterprise must determine the exposure amount of each mortgage exposure, each other on-balance sheet exposure, each OTC derivative contract, and each off-balance sheet commitment, trade and transaction-related contingency, guarantee, repo-style transaction, forward agreement, or other similar transaction that is not:

(i) An unsettled transaction subject to § 1240.40;

(ii) A cleared transaction subject to § 1240.37;

(iii) A default fund contribution subject to § 1240.37;

(iv) A retained CRT exposure, acquired CRT exposure, or other securitization exposure subject to §§ 1240.41 through 1240.46; or

(v) An equity exposure (other than an equity OTC derivative contract) subject to §§ 1240.51 and 1240.52.

(2) An Enterprise must multiply each exposure amount by the risk weight appropriate to the exposure based on the exposure type or counterparty, eligible guarantor, or financial collateral to determine the risk-weighted asset amount for each exposure.

(b) *Total risk-weighted assets for general credit risk.* Total risk-weighted assets for general credit risk equals the sum of the risk-weighted asset amounts calculated under this section.

§ 1240.32 General risk weights.

(a) *Exposures to the U.S. government.* (1) Notwithstanding any other requirement in this subpart, an Enterprise must assign a zero percent risk weight to:

(i) An exposure to the U.S. government, its central bank, or a U.S. government agency; and

(ii) The portion of an exposure that is directly and unconditionally guaranteed by the U.S. government, its central bank, or a U.S. government agency. This includes a deposit or other exposure, or the portion of a deposit or other exposure, that is insured or otherwise unconditionally guaranteed by the FDIC or NCUA.

(2) An Enterprise must assign a 20 percent risk weight to the portion of an exposure that is conditionally guaranteed by the U.S. government, its central bank, or a U.S. government

[2] The amount of the items in paragraph (d) of this section that is not deducted from common equity tier 1 capital pursuant to this section must be included in the risk-weighted assets of the Enterprise and assigned a 250 percent risk weight.

agency. This includes an exposure, or the portion of an exposure, that is conditionally guaranteed by the FDIC or NCUA.

(b) *Certain supranational entities and multilateral development banks (MDBs).* An Enterprise must assign a zero percent risk weight to an exposure to the Bank for International Settlements, the European Central Bank, the European Commission, the International Monetary Fund, the European Stability Mechanism, the European Financial Stability Facility, or an MDB.

(c) *Exposures to GSEs.* (1) An Enterprise must assign a zero percent risk weight to any MBS guaranteed by the Enterprise (other than any retained CRT exposure).

(2) An Enterprise must assign a 20 percent risk weight to an exposure to another GSE, including an MBS guaranteed by the other Enterprise.

(d) *Exposures to depository institutions and credit unions.* (1) An Enterprise must assign a 20 percent risk weight to an exposure to a depository institution or credit union that is organized under the laws of the United States or any state thereof, except as otherwise provided under paragraph (d)(2) of this section.

(2) An Enterprise must assign a 100 percent risk weight to an exposure to a financial institution if the exposure may be included in that financial institution's capital unless the exposure is:

(i) An equity exposure; or

(ii) Deducted from regulatory capital under § 1240.22.

(e) *Exposures to U.S. public sector entities (PSEs).* (1) An Enterprise must assign a 20 percent risk weight to a general obligation exposure to a PSE that is organized under the laws of the United States or any state or political subdivision thereof.

(2) An Enterprise must assign a 50 percent risk weight to a revenue obligation exposure to a PSE that is organized under the laws of the United States or any state or political subdivision thereof.

(f) *Corporate exposures.* (1) An Enterprise must assign a 100 percent risk weight to all its corporate exposures, except as provided in paragraphs (f)(2) and (3) of this section.

(2) An Enterprise must assign a 2 percent risk weight to an exposure to a QCCP arising from the Enterprise posting cash collateral to the QCCP in connection with a cleared transaction that meets the requirements of § 1240.37(b)(3)(i)(A) and a 4 percent risk weight to an exposure to a QCCP arising from the Enterprise posting cash collateral to the QCCP in connection with a cleared transaction that meets the requirements of § 1240.37(b)(3)(i)(B).

(3) An Enterprise must assign a 2 percent risk weight to an exposure to a QCCP arising from the Enterprise posting cash collateral to the QCCP in connection with a cleared transaction that meets the requirements of § 1240.37(c)(3)(i).

(g) *Residential mortgage exposures*—(1) *Single-family mortgage exposures.* An Enterprise must assign a risk weight to a single-family mortgage exposure in accordance with § 1240.33.

(2) *Multifamily mortgage exposures.* An Enterprise must assign a risk weight to a multifamily mortgage exposure in accordance with § 1240.34.

(h) *Past due exposures.* Except for an exposure to a sovereign entity or a mortgage exposure, if an exposure is 90 days or more past due or on nonaccrual:

(1) An Enterprise must assign a 150 percent risk weight to the portion of the exposure that is not guaranteed or that is unsecured;

(2) An Enterprise may assign a risk weight to the guaranteed portion of a past due exposure based on the risk weight that applies under § 1240.38 if the guarantee or credit derivative meets the requirements of that section; and

(3) An Enterprise may assign a risk weight to the collateralized portion of a past due exposure based on the risk weight that applies under § 1240.39 if the collateral meets the requirements of that section.

(i) *Other assets.* (1) An Enterprise must assign a zero percent risk weight to cash owned and held in the offices of an insured depository institution or in transit.

(2) An Enterprise must assign a 20 percent risk weight to cash items in the process of collection.

(3) An Enterprise must assign a 100 percent risk weight to DTAs arising from temporary differences that the Enterprise could realize through net operating loss carrybacks.

(4) An Enterprise must assign a 250 percent risk weight to the portion of each of the following items to the extent it is not deducted from common equity tier 1 capital pursuant to § 1240.22(d):

(i) MSAs; and

(ii) DTAs arising from temporary differences that the Enterprise could not realize through net operating loss carrybacks.

(5) An Enterprise must assign a 100 percent risk weight to all assets not specifically assigned a different risk weight under this subpart and that are not deducted from tier 1 or tier 2 capital pursuant to § 1240.22.

(j) *Insurance assets.* (1) An Enterprise must risk-weight the individual assets held in a separate account that does not qualify as a non-guaranteed separate account as if the individual assets were held directly by the Enterprise.

(2) An Enterprise must assign a zero percent risk weight to an asset that is held in a non-guaranteed separate account.

§ 1240.33 Single-family mortgage exposures.

(a) *Definitions.* Subject to any additional instructions set forth on table 1 to this paragraph (a), for purposes of this section:

Adjusted MTMLTV means, with respect to a single-family mortgage exposure and as of a particular time, the amount equal to:

(i) The MTMLTV of the single-family mortgage exposure (or, if the loan age of the single-family mortgage exposure is less than 6, the OLTV of the single-family mortgage exposure); divided by

(ii) The amount equal to 1 plus the single-family countercyclical adjustment as of that time.

Approved insurer means an insurance company that is currently approved by an Enterprise to guarantee or insure single-family mortgage exposures acquired by the Enterprise.

Cancelable mortgage insurance means a mortgage insurance policy that, pursuant to its terms, may or will be terminated before the maturity date of the insured single-family mortgage exposure, including as required or permitted by the Homeowners Protection Act of 1998 (12 U.S.C. 4901).

Charter-level coverage means mortgage insurance that satisfies the minimum requirements of the authorizing statute of an Enterprise.

Cohort burnout means the number of refinance opportunities since the loan age of the single-family mortgage exposure was 6, categorized into ranges pursuant to the instructions set forth on Table 1 to this paragraph (a).

Coverage percent means the percent of the sum of the unpaid principal balance, any lost interest, and any foreclosure costs that is used to determine the benefit or other coverage under a mortgage insurance policy.

COVID–19-related forbearance means a forbearance granted pursuant to section 4022 of the Coronavirus Aid, Relief, and Economic Security Act or under a program established by FHFA to provide forbearance to borrowers adversely impacted by COVID–19.

Days past due means the number of days a single-family mortgage exposure is past due.

Debt-to-income ratio (DTI) means the ratio of a borrower's total monthly obligations (including housing expense)

divided by the borrower's monthly income, as calculated under the Guide of the Enterprise.

Deflated HPI means, as of a particular time, the amount equal to:

(i) The national, not-seasonally adjusted Expanded-Data FHFA House Price Index® as of the end of the preceding calendar quarter; divided by

(ii) The average of the three monthly observations of the preceding calendar quarter from the non-seasonally adjusted Consumer Price Index for All Urban Consumers, U.S. City Average, All Items Less Shelter.

Guide means, as applicable, the Fannie Mae Single Family Selling Guide, the Fannie Mae Single Family Servicing Guide and the Freddie Mac Single-family Seller/Servicers Guide.

Guide-level coverage means mortgage insurance that satisfies the requirements of the Guide of the Enterprise with respect to mortgage insurance that has a coverage percent that exceeds charter-level coverage.

Interest-only (IO) means a single-family mortgage exposure that requires only payment of interest without any principal amortization during all or part of the loan term.

Loan age means the number of scheduled payment dates since the origination of a single-family mortgage exposure.

Loan-level credit enhancement means:

(i) Mortgage insurance; or

(ii) A participation agreement.

Loan documentation means the completeness of the documentation used to underwrite a single-family mortgage exposure, as determined under the Guide of the Enterprise.

Loan purpose means the purpose of a single-family mortgage exposure at origination.

Long-term HPI trend means, as of a particular time, the amount equal to: 0.66112295.

Where t = the number of quarters from the first quarter of 1975 to and including the end of the preceding calendar quarter and where the first quarter of 1975 is counted as one.[1]

[1] FHFA will adjust the formula for the long-term HPI trend in accordance with applicable law if two conditions are satisfied as of the end of a calendar quarter that follows the last adjustment to the long-term HPI trend: (i) The average of the long-term trend departures over four consecutive calendar quarters has been less than −5.0 percent; and (ii) after the end of the calendar quarter in which the first condition is satisfied, the deflated HPI has increased to an extent that it again exceeds the long-term HPI trend. The point in time of the new trough used by FHFA to adjust the formula for the long-term HPI trend will be identified by the calendar quarter with the smallest deflated HPI in the period that includes the calendar quarter in which the first condition is satisfied and ends at the end of the calendar quarter in which the second condition is first satisfied.

Long-term trend departure means, as of a particular time, the percent amount equal to—

(i) The deflated HPI as of that time divided by the long-term HPI trend as of that time; minus

(ii) 1.0.

MI cancelation feature means an indicator for whether mortgage insurance is cancelable mortgage insurance or non-cancelable mortgage insurance, assigned pursuant to the instructions set forth on Table 1 to this paragraph (a).

Modification means a permanent amendment or other change to the interest rate, maturity date, unpaid principal balance, or other contractual term of a single-family mortgage exposure or a deferral of a required payment until the maturity or earlier payoff of the single-family mortgage exposure. A modification does not include a repayment plan with respect to any amounts that are past due or a COVID–19-related forbearance.

Modified re-performing loan (modified RPL) means a single-family mortgage exposure (other than an NPL) that is or has been subject to a modification, excluding any single-family mortgage exposure that was not 60 or more days past due at any time in a continuous 60-calendar month period that begins at any time after the effective date of the last modification.

Months since last modification means the number of scheduled payment dates since the effective date of the last modification of a single-family mortgage exposure.

Mortgage concentration risk means the extent to which a mortgage insurer or other counterparty is exposed to mortgage credit risk relative to other risks.

MTMLTV means, with respect to a single-family mortgage exposure, the amount equal to:

(i) The unpaid principal balance of the single-family mortgage exposure; divided by

(ii) The amount equal to:

(A) The unpaid principal balance of the single-family mortgage exposure at origination; divided by

(B) The OLTV of the single-family mortgage exposure; multiplied by

(C) The most recently available FHFA Purchase-only State-level House Price Index of the State in which the property securing the single-family mortgage exposure is located; divided by

(D) The FHFA Purchase-only State-level House Price Index, as of date of the origination of the single-family mortgage exposure, in which the property securing the single-family mortgage exposure is located.

Non-cancelable mortgage insurance means a mortgage insurance policy that, pursuant to its terms, may not be terminated before the maturity date of the insured single-family mortgage exposure.

Non-modified re-performing loan (non-modified RPL) means a single-family mortgage exposure (other than a modified RPL or an NPL) that was previously an NPL at any time in the prior 48 calendar months.

Non-performing loan (NPL) means a single-family mortgage exposure that is 60 days or more past due.

Occupancy type means the borrowers' intended use of the property securing a single-family mortgage exposure.

Original credit score means the borrower's credit score as of the origination date of a single-family mortgage exposure.

OLTV means, with respect to a single-family mortgage exposure, the amount equal to:

(i) The unpaid principal balance of the single-family mortgage exposure at *origination;* divided by

(ii) The lesser of:

(A) The appraised value of the property securing the single-family mortgage exposure; and

(B) The sale price of the property securing the single-family mortgage exposure.

Origination channel means the type of institution that originated a single-family mortgage exposure, assigned pursuant to the instructions set forth on table 1 to this paragraph (a).

Participation agreement means, with respect to a single-family mortgage exposure, any agreement between an Enterprise and the seller of the single-family mortgage exposure pursuant to which the seller retains a participation of not less than 10 percent in the single-family mortgage exposure.

Past due means, with respect to a single-family mortgage exposure, that any amount required to be paid by the borrower under the terms of the single-family mortgage exposure has not been paid.

Payment change from modification means the amount, expressed as a percent, equal to:

(i) The amount equal to:

(A) The monthly payment of a single-family mortgage exposure after a modification; divided by

(B) The monthly payment of the single-family mortgage exposure before the modification; minus

(ii) 1.0.

Performing loan means any single-family mortgage exposure that is not an

NPL, a modified RPL, or a non-modified RPL.

Previous maximum days past due means the maximum number of days a modified RPL or non-modified RPL was past due in the prior 36 calendar months.

Product type means an indicator reflecting the contractual terms of a single-family mortgage exposure as of the origination date, assigned pursuant to the instructions set forth on Table 1 to this paragraph (a).

Property type means the physical structure of the property securing a single-family mortgage exposure.

Refinance opportunity means, with respect to a single-family mortgage exposure, any calendar month in which the Primary Mortgage Market Survey (PMMS) rate for the month and year of the origination of the single-family mortgage exposure exceeds the PMMS rate for that calendar month by more than 50 basis points.

Refreshed credit score means the borrower's most recently available credit score.

Single-family countercyclical adjustment means, as of a particular time, zero percent except:

(i) If the long-term trend departure as of that time is greater than 5 percent, the percent amount equal to:

(A) 1.05 multiplied by the long-term HPI trend, as of that time, divided by the deflated HPI, as of that time, minus

(B) 1.0.

(ii) If the long-term trend departure as of that time is less than −5 percent, the percent amount equal to:

(A) 0.95 multiplied by the long-term HPI trend, as of that time, divided by the deflated HPI, as of that time, minus

(B) 1.0.

Streamlined refi means a single-family mortgage exposure that was refinanced through a streamlined refinance program of an Enterprise, including the Home Affordable Refinance Program, Relief Refi, and Refi-Plus.

Subordination means, with respect to a single-family mortgage exposure, the amount equal to the original unpaid principal balance of any second lien single-family mortgage exposure divided by the lesser of the appraised value or sale price of the property that secures the single-family mortgage exposure.

TABLE 1 TO PARAGRAPH (a): PERMISSIBLE VALUES AND ADDITIONAL INSTRUCTIONS

Defined term	Permissible values	Additional instructions
Cohort burnout	"No burnout," if the single-family mortgage exposure has not had a refinance opportunity since the loan age of the single-family mortgage exposure was 6. "Low," if the single-family mortgage exposure has had 12 or fewer refinance opportunities since the loan age of the single-family mortgage exposure was 6. "Medium," if the single-family mortgage exposure has had between 13 and 24 refinance opportunities since the loan age of the single-family mortgage exposure was 6. "High," if the single-family mortgage exposure has had more than 24 refinance opportunities since the loan age of the single-family mortgage exposure was 6.	High if unable to determine.
Coverage percent	0 percent <= coverage percent <= 100 percent	0 percent if outside of permissible range or unable to determine.
Days past due	Non-negative integer	210 if negative or unable to determine.
Debt-to-income (DTI) ratio	0 percent < DTI < 100 percent	42 percent if outside of permissible range or unable to determine.
Interest-only (IO)	Yes, no	Yes if unable to determine.
Loan age	0 <= loan age <= 500	500 if outside of permissible range or unable to determine.
Loan documentation	None, low, full	None if unable to determine.
Loan purpose	Purchase, cashout refinance, rate/term refinance	Cashout refinance if unable to determine.
MTMLTV	0 percent < MTMLTV <= 300 percent	If the property securing the single-family mortgage exposure is located in Puerto Rico or the U.S. Virgin Islands, use the FHFA House Price Index of the United States. If the property securing the single-family mortgage exposure is located in Guam, use the FHFA Purchase-only State-level House Price Index of Hawaii. If the single-family mortgage exposure was originated before 1991, use the Enterprise's proprietary housing price index. Use geometric interpolation to convert quarterly housing price index data to monthly data. 300 percent if outside of permissible range or unable to determine.
Mortgage concentration risk	High, not high	High if unable to determine.
MI cancellation feature	Cancelable mortgage insurance, non-cancelable mortgage insurance.	Cancelable mortgage insurance, if unable to determine.
Occupancy type	Investment, owner-occupied, second home	Investment if unable to determine.
OLTV	0 percent < OLTV <= 300 percent	300 percent if outside of permissible range or unable to determine.
Original credit score	300 <= original credit score <= 850	If there are credit scores from multiple credit repositories for a borrower, use the following logic to determine a single original credit score: • If there are credit scores from two repositories, take the lower credit score.

TABLE 1 TO PARAGRAPH (a): PERMISSIBLE VALUES AND ADDITIONAL INSTRUCTIONS—Continued

Defined term	Permissible values	Additional instructions
		• If there are credit scores from three repositories, use the middle credit score. • If there are credit scores from three repositories and two of the credit scores are identical, use the identical credit score. If there are multiple borrowers, use the following logic to determine a single original credit score: • Using the logic above, determine a single credit score for each borrower. • Select the lowest single credit score across all borrowers. 600 if outside of permissible range or unable to determine.
Origination channel	Retail, third-party origination (TPO)	TPO includes broker and correspondent channels. TPO if unable to determine.
Payment change from modification.	−80 percent < payment change from modification < 50 percent.	If the single-family mortgage exposure initially had an adjustable or step-rate feature, the monthly payment after a permanent modification is calculated using the initial modified rate. 0 percent if unable to determine. −79 percent if less than or equal to −80 percent. 49 percent if greater than or equal to 50 percent.
Previous maximum days past due.	Non-negative integer	181 months if negative or unable to determine.
Product type	"FRM30" means a fixed-rate single-family mortgage exposure with an original amortization term greater than 309 months and less than or equal to 429 months. "FRM20" means a fixed-rate single-family mortgage exposure with an original amortization term greater than 189 months and less than or equal to 309 months. "FRM15" means a fixed-rate single-family mortgage exposure with an original amortization term less than or equal to 189 months. "ARM 1/1" is an adjustable-rate single-family mortgage exposure that has a mortgage rate and required payment that adjust annually.	Product types other than FRM30, FRM20, FRM15 or ARM 1/1 should be assigned to FRM30. Use the post-modification product type for modified mortgage exposures. ARM 1/1 if unable to determine.
Property type	1-unit, 2–4 units, condominium, manufactured home	Use condominium for cooperatives. 2–4 units if unable to determine.
Refreshed credit score	300 <= refreshed credit score <= 850	If there are credit scores from multiple credit repositories for a borrower, use the following logic to determine a single refreshed credit score: • If there are credit scores from two repositories, take the lower credit score. • If there are credit scores from three repositories, use the middle credit score. • If there are credit scores from three repositories and two of the credit scores are identical, use the identical credit score. If there are multiple borrowers, use the following logic to determine a single Original Credit Score: • Using the logic above, determine a single credit score for each borrower. • Select the lowest single credit score across all borrowers. 600 if outside of permissible range or unable to determine.
Streamlined refi	Yes, no	No if unable to determine.
Subordination	0 percent <= Subordination <= 80 percent	80 percent if outside permissible range.

(b) *Risk weight*—(1) *In general.* Subject to paragraph (b)(2) of this section, an Enterprise must assign a risk weight to a single-family mortgage exposure equal to:

(i) The base risk weight for the single-family mortgage exposure as determined under paragraph (c) of this section; multiplied by

(ii) The combined risk multiplier for the single-family mortgage exposure as determined under paragraph (d) of this section; multiplied by

(iii) The adjusted credit enhancement multiplier for the single-family mortgage exposure as determined under paragraph (e) of this section.

(2) *Minimum risk weight.* Notwithstanding the risk weight determined under paragraph (b)(1) of this section, the risk weight assigned to a single-family mortgage exposure may not be less than 20 percent.

(c) *Base risk weight*—(1) *Performing loan.* The base risk weight for a performing loan is set forth on Table 2 to this paragraph (c)(1). For purposes of this paragraph (c)(1), credit score means, with respect to a single-family mortgage exposure:

(i) The original credit score of the single-family mortgage exposure, if the loan age of the single-family mortgage exposure is less than 6; or

(ii) The refreshed credit score of the single-family mortgage exposure.

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TABLE 2 TO PARAGRAPH (c)(1): PERFORMING LOANS

	Adjusted MTMLTV													
Credit Score	<= 30%	> 30%, <= 40%	> 40%, <= 50%	> 50%, <= 60%	> 60%, <= 70%	> 70%, <= 75%	> 75%, <= 80%	> 80%, <= 85%	> 85%, <= 90%	> 90%, <= 95%	> 95%, <= 100%	> 100%, <= 110%	> 110%, <= 120%	> 120%
< 620	2%	10%	18%	34%	49%	72%	105%	129%	159%	188%	218%	247%	275%	317%
>=620, < 640	2%	8%	14%	27%	39%	58%	84%	102%	127%	151%	178%	208%	237%	282%
>=640, < 660	2%	7%	12%	23%	34%	51%	73%	89%	111%	133%	159%	186%	214%	258%
>=660, < 680	2%	6%	10%	20%	29%	44%	63%	78%	98%	119%	141%	168%	194%	236%
>=680, < 700	2%	6%	9%	18%	26%	38%	55%	67%	88%	109%	125%	150%	176%	215%
>=700, < 720	2%	5%	8%	15%	22%	33%	47%	57%	75%	94%	110%	134%	158%	194%
>=720, < 740	2%	4%	6%	13%	19%	28%	41%	50%	66%	84%	96%	118%	140%	172%
>=740, < 760	2%	4%	5%	11%	16%	23%	33%	40%	54%	69%	80%	99%	119%	147%
>=760, < 780	2%	3%	4%	9%	13%	19%	27%	32%	43%	56%	65%	82%	99%	122%
>= 780	2%	3%	3%	7%	10%	14%	21%	25%	33%	43%	50%	63%	77%	96%

(2) *Non-modified RPL.* The base risk weight for a non-modified RPL is set forth on Table 3 to this paragraph (c)(2). For purposes of this paragraph (c)(2), re-performing duration means, with respect to a non-modified RPL, the number of scheduled payment dates since the non-modified RPL was last an NPL.

TABLE 3 TO PARAGRAPH (c)(2): NON-MODIFIED RPLS

	Adjusted MTMLTV													
Non-modified re-performing duration	<= 30%	> 30%, <= 40%	> 40%, <= 50%	> 50%, <= 60%	>60%, <= 70%	> 70%, <= 75%	> 75%, <= 80%	> 80%, <= 85%	> 85%, <= 90%	> 90%, <= 95%	> 95%, <= 100%	> 100%, <= 110%	> 110%, <= 120%	> 120%
<= 3	2%	11%	20%	35%	50%	69%	84%	105%	122%	135%	149%	160%	174%	180%
>3, <= 12	2%	8%	14%	27%	39%	54%	67%	84%	100%	113%	127%	141%	160%	177%
> 12, <= 36	2%	7%	11%	22%	32%	46%	57%	69%	84%	97%	111%	127%	150%	175%
> 36, <= 48	2%	5%	7%	14%	21%	32%	46%	56%	72%	88%	103%	123%	143%	174%

(3) *Modified RPL.* The base risk weight for a modified RPL is set forth on Table 4 to paragraph (c)(3)(ii) of this section. For purposes of this paragraph (c)(3), re-performing duration means, with respect to a modified RPL, the lesser of:

(i) The months since last modification of the modified RPL; and

(ii) The number of scheduled payment dates since the modified RPL was last an NPL.

TABLE 4 TO PARAGRAPH (c)(3)(ii): MODIFIED RPLS

	Adjusted MTMLTV													
Modified re-performing duration	<= 30%	> 30%, <= 40%	> 40%, <= 50%	> 50%, <= 60%	>60%, <= 70%	> 70%, <= 75%	> 75%, <= 80%	> 80%, <= 85%	> 85%, <= 90%	> 90%, <= 95%	> 95%, <= 100%	> 100%, <= 110%	> 110%, <= 120%	> 120%
<= 3	2%	17%	31%	54%	76%	98%	115%	129%	145%	159%	170%	179%	189%	196%
>3, <= 12	2%	14%	25%	44%	62%	81%	95%	109%	124%	139%	152%	164%	178%	195%
> 12, <= 36	2%	11%	19%	35%	50%	66%	79%	92%	107%	123%	136%	152%	169%	194%
> 36	2%	8%	13%	24%	35%	50%	68%	80%	98%	117%	133%	150%	168%	193%

(4) *NPL.* The base risk weight for an NPL is set forth on Table 5 to this paragraph (c)(4).

TABLE 5 TO PARAGRAPH (c)(4): NPLS

	Adjusted MTMLTV									
Days past due	<= 30%	> 30%, <= 40%	> 40%, <= 50%	> 50%, <= 60%	>60%, <= 70%	> 70%, <= 75%	> 75%, <= 80%	> 80%, <= 85%	> 85%, <= 90%	> 90%
60 to 89 days	8%	40%	71%	122%	173%	193%	205%	215%	226%	238%
90 to 209 days	11%	48%	85%	135%	184%	201%	211%	218%	224%	230%
>= 210 days	28%	76%	124%	172%	219%	227%	231%	233%	234%	221%

(d) *Combined risk multiplier*—(1) *In general.* Subject to paragraph (d)(2) of this section, the combined risk multiplier for a single-family mortgage exposure is equal to the product of each of the applicable risk multipliers set forth under the applicable single-family segment on Table 6 to paragraph (d)(2) of this section.

(2) *Maximum combined risk multiplier.* Notwithstanding the combined risk multiplier determined under paragraph (d)(1) of this section, the combined risk multiplier for a single-family mortgage exposure may not exceed 3.0.

TABLE 6 TO PARAGRAPH (d)(2): RISK MULTIPLIERS

Risk factor	Value or range	Single-family segment			
		Performing loan	Non-modified RPL	Modified RPL	NPL
Loan Purpose	Purchase	1.0	1.0	1.0	
	Cashout refinance	1.4	1.4	1.4	
	Rate/term refinance	1.3	1.2	1.3	
Occupancy Type	Owner-occupied or second home	1.0	1.0	1.0	1.0
	Investment	1.2	1.5	1.3	1.2
Property Type	1-unit	1.0	1.0	1.0	1.0
	2–4 unit	1.4	1.4	1.3	1.1
	Condominium	1.1	1.0	1.0	1.0
	Manufactured home	1.3	1.8	1.6	1.2
Origination Channel	Retail	1.0	1.0	1.0	1.0
	TPO	1.1	1.1	1.1	1.0
DTI	DTI <= 25%	0.8	0.9	0.9	
	25% < DTI <= 40%	1.0	1.0	1.0	
	DTI >40%	1.2	1.2	1.1	
Product Type	FRM30	1.0	1.0	1.0	1.0
	ARM1/1	1.7	1.1	1.0	1.1
	FRM15	0.3	0.3	0.5	0.5
	FRM20	0.6	0.6	0.5	0.8
Subordination	No subordination	1.0	1.0	1.0	
	30% < OLTV <= 60% and 0% <subordination <= 5%.	1.1	0.8	1.0	
	30% < OLTV <= 60% and subordination >5%.	1.5	1.1	1.2	
	OLTV >60% and 0% <subordination <= 5%.	1.1	1.2	1.1	
	OLTV >60% and subordination >5%	1.4	1.5	1.3	
Loan Age	Loan age <= 24 months	1.0			

TABLE 6 TO PARAGRAPH (d)(2): RISK MULTIPLIERS—Continued

Risk factor	Value or range	Single-family segment			
		Performing loan	Non-modified RPL	Modified RPL	NPL
	24 months <loan age <= 36 months	0.95			
	36 months <loan Age <= 60 months	0.80			
	Loan age >60 months	0.75			
Cohort Burnout	No burnout	1.0			
	Low	1.2			
	Medium	1.3			
	High	1.4			
Interest-only	No IO	1.0	1.0	1.0	
	Yes IO	1.6	1.4	1.1	
Loan Documentation	Full	1.0	1.0	1.0	
	None or low	1.3	1.3	1.2	
Streamlined Refi	No	1.0	1.0	1.0	
	Yes	1.0	1.2	1.1	
Refreshed Credit Score for Modified RPLs and Non-modified RPLs.	Refreshed credit score <620		1.6	1.4	
	620 <= refreshed credit score <640		1.3	1.2	
	640 <= refreshed credit score <660		1.2	1.1	
	660 <= refreshed credit score <700		1.0	1.0	
	700 <= refreshed credit score <720		0.7	0.8	
	720 <= refreshed credit score <740		0.6	0.7	
	740 <= refreshed credit score <760		0.5	0.6	
	760 <= refreshed credit score <780		0.4	0.5	
	Refreshed credit score >= 780		0.3	0.4	
Payment Change from Modification	Payment change >= 0%			1.1	
	−20% <= payment change <0%			1.0	
	−30% <= payment change < −20%.			0.9	
	Payment change < −30%			0.8	
Previous Maximum Days Past Due	0–59 days		1.0	1.0	
	60–90 days		1.2	1.1	
	91–150 days		1.3	1.1	
	151+ days		1.5	1.1	
Refreshed Credit Score for NPLs	Refreshed credit score <580				1.2
	580 <= refreshed credit score <640				1.1
	640 <= refreshed credit score <700				1.0
	700 <= refreshed credit score <720				0.9
	720 <= refreshed credit score <760				0.8
	760 <= refreshed credit score <780				0.7
	Refreshed credit score >= 780				0.5

(e) *Credit enhancement multiplier*—(1) *Amount*—(i) *In general.* The adjusted credit enhancement multiplier for a single-family mortgage exposure that is subject to loan-level credit enhancement is equal to 1.0 minus the product of:

(A) 1.0 minus the credit enhancement multiplier for the single-family mortgage exposure as determined under paragraph (e)(2) of this section; multiplied by

(B) 1.0 minus the counterparty haircut for the loan-level credit enhancement as determined under paragraph (e)(3) of this section.

(ii) *No loan-level credit enhancement.* The adjusted credit enhancement multiplier for a single-family mortgage exposure that is not subject to loan-level credit enhancement is equal to 1.0.

(2) *Credit enhancement multiplier.* (i) The credit enhancement multiplier for a single-family mortgage exposure that is subject to a participation agreement is 1.0.

(ii) Subject to paragraph (e)(2)(iii) of this section, the credit enhancement multiplier for—

(A) A performing loan, non-modified RPL, or modified RPL that is subject to non-cancelable mortgage insurance is set forth on Table 7 to paragraph (e)(2)(iii)(E) of this section;

(B) A performing loan or non-modified RPL that is subject to cancelable mortgage insurance is set forth on Table 8 to paragraph (e)(2)(iii)(E) of this section;

(C) A modified RPL with a 30-year post-modification amortization that is subject to cancelable mortgage insurance is set forth on Table 9 to paragraph (e)(2)(iii)(E) of this section;

(D) A modified RPL with a 40-year post-modification amortization that is subject to cancelable mortgage insurance is set forth on Table 10 to paragraph (e)(2)(iii)(E) of this section; and

(E) NPL, whether subject to non-cancelable mortgage insurance or cancelable mortgage insurance, is set forth on Table 11 to paragraph (e)(2)(iii)(E) of this section.

(iii) Notwithstanding anything to the contrary in this paragraph (e), for purposes of paragraph (e)(2)(ii) of this section:

(A) The OLTV of a single-family mortgage exposure will be deemed to be 80 percent if the single-family mortgage exposure has an OLTV less than or equal to 80 percent.

(B) If the single-family mortgage exposure has an interest-only feature, any cancelable mortgage insurance will be deemed to be non-cancelable mortgage insurance.

(C) If the coverage percent of the mortgage insurance is greater than charter-level coverage and less than guide-level coverage, the credit enhancement multiplier is the amount equal to a linear interpolation between the credit enhancement multiplier of the single-family mortgage exposure for charter-level coverage and the credit

enhancement multiplier of the single-family mortgage exposure for guide-level coverage.

(D) If the coverage percent of the mortgage insurance is less than charter-level coverage, the credit enhancement multiplier is the amount equal to the midpoint of a linear interpolation between a credit enhancement multiplier of 1.0 and the credit enhancement multiplier of the single-family mortgage exposure for charter-level coverage.

(E) If the coverage percent of the mortgage insurance is greater than guide-level coverage, the credit enhancement multiplier is determined as if the coverage percent were guide-level coverage.

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TABLE 7 TO PARAGRAPH (e)(2)(iii)(E): CREDIT ENHANCEMENT MULTIPLIERS FOR SINGLE-FAMILY MORTGAGE EXPOSURES SUBJECT TO NON-CANCELABLE MORTGAGE INSURANCE (EXCEPT NPLS)

Amortization Term / Coverage Type	Coverage Category	Credit Enhancement Multiplier
15/20-year with Guide-level Coverage	80% < OLTV <= 85% and coverage percent = 6%	0.846
	85% < OLTV <= 90% and coverage percent = 12%	0.701
	90% < OLTV <= 95% and coverage percent = 25%	0.408
	95% < OLTV <= 97% and coverage percent = 35%	0.226
	OLTV > 97% and coverage percent = 35%	0.184
30-year with Guide-level Coverage	80% < OLTV <= 85% and coverage percent = 12%	0.706
	85% < OLTV <= 90% and coverage percent = 25%	0.407
	90% < OLTV <= 95% and coverage percent = 30%	0.312
	95% < OLTV <= 97% and coverage percent = 35%	0.230
	OLTV > 97% and coverage percent = 35%	0.188
15/20-year with Charter-level Coverage	80% < OLTV <= 85% and coverage percent = 6%	0.846
	85% < OLTV <= 90% and coverage percent = 12%	0.701
	90% < OLTV <= 95% and coverage percent = 16%	0.612
	95% < OLTV <= 97% and coverage percent = 18%	0.570
	OLTV > 97% and coverage percent = 20%	0.535
30-year with Charter-level Coverage	80% < OLTV <= 85% and coverage percent = 6%	0.850
	85% < OLTV <= 90% and coverage percent = 12%	0.713
	90% < OLTV <= 95% and coverage percent = 16%	0.627
	95% < OLTV <= 97% and coverage percent = 18%	0.590
	OLTV > 97% and coverage percent = 20%	0.558

TABLE 8 TO PARAGRAPH (e)(2)(iii)(E): CREDIT ENHANCEMENT MULTIPLIERS FOR PERFORMING LOANS AND NON-MODIFIED RPLS SUBJECT TO CANCELABLE MORTGAGE INSURANCE

			Loan Age											
	OLTV	Coverage Percent	<= 5	>5, <= 12	>12, <= 24	>24, <= 36	>36, <= 48	>48, <= 60	> 60, <= 72	> 72, <= 84	> 84, <= 96	>96, <=108	>108, <=120	>120
15/20 Year Amortizing Loan with Guide-level Coverage	>80%, <=85%	6%	0.997	0.998	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	12%	0.963	0.971	0.988	0.999	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>90%, <=95%	25%	0.826	0.853	0.912	0.973	0.996	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>95%, <=97%	35%	0.732	0.765	0.848	0.936	0.986	0.998	1.000	1.000	1.000	1.000	1.000	1.000
	>97%	35%	0.630	0.673	0.762	0.865	0.945	0.980	0.996	1.000	1.000	1.000	1.000	1.000
30 Year Amortizing Loan with Guide-level Coverage	>80%, <=85%	12%	0.867	0.884	0.928	0.962	0.994	0.999	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	25%	0.551	0.584	0.627	0.679	0.785	0.893	0.950	0.986	0.998	1.000	1.000	1.000
	>90%, <=95%	30%	0.412	0.440	0.456	0.484	0.547	0.654	0.743	0.845	0.932	0.969	0.992	1.000
	>95%, <=97%	35%	0.322	0.351	0.369	0.391	0.449	0.535	0.631	0.746	0.873	0.925	0.965	1.000
	>97%	35%	0.272	0.295	0.314	0.353	0.410	0.462	0.515	0.607	0.756	0.826	0.887	1.000
15/20 Year Amortizing Loan with Charter-level Coverage	>80%, <=85%	6%	0.997	0.998	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	12%	0.963	0.971	0.988	0.999	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>90%, <=95%	16%	0.887	0.904	0.943	0.983	0.997	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>95%, <=97%	18%	0.854	0.874	0.918	0.966	0.992	0.999	1.000	1.000	1.000	1.000	1.000	1.000
	>97%	20%	0.788	0.810	0.859	0.922	0.969	0.989	0.998	1.000	1.000	1.000	1.000	1.000
30 Year Amortizing Loan with Charter-level Coverage	>80%, <=85%	6%	0.934	0.943	0.964	0.981	0.997	0.999	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	12%	0.780	0.795	0.819	0.845	0.896	0.948	0.976	0.993	0.999	1.000	1.000	1.000
	>90%, <=95%	16%	0.679	0.690	0.703	0.719	0.755	0.813	0.861	0.916	0.963	0.983	0.995	1.000
	>95%, <=97%	18%	0.642	0.652	0.662	0.676	0.708	0.756	0.806	0.866	0.933	0.960	0.981	1.000
	>97%	20%	0.597	0.607	0.617	0.629	0.658	0.686	0.715	0.765	0.845	0.882	0.914	1.000

TABLE 9 TO PARAGRAPH (e)(2)(iii)(E): CREDIT ENHANCEMENT MULTIPLIERS FOR MODIFIED RPLS WITH 30-YEAR POST-MODIFICATION AMORTIZATION THAT IS SUBJECT TO CANCELABLE MORTGAGE INSURANCE

			Months Since Last Modification											
	OLTV	Coverage Percent	<= 5	>5, <= 12	>12, <= 24	>24, <= 36	>36, <= 48	>48, <= 60	> 60, <= 72	> 72, <= 84	> 84, <= 96	>96, <=108	>108, <=120	>120
15/20 Year Amortizing Loan with Guide-level Coverage	>80%, <=85%	6%	0.997	0.998	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	12%	0.963	0.971	0.988	0.999	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>90%, <=95%	25%	0.826	0.853	0.912	0.973	0.996	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>95%, <=97%	35%	0.732	0.765	0.848	0.936	0.986	0.998	1.000	1.000	1.000	1.000	1.000	1.000
	>97%	35%	0.630	0.673	0.762	0.865	0.945	0.980	0.996	1.000	1.000	1.000	1.000	1.000
30 Year Amortizing Loan with Guide-level Coverage	>80%, <=85%	12%	0.867	0.906	0.978	0.999	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	25%	0.551	0.568	0.653	0.839	0.968	0.992	0.998	1.000	1.000	1.000	1.000	1.000
	>90%, <=95%	30%	0.412	0.426	0.470	0.601	0.794	0.889	0.951	0.981	0.992	1.000	1.000	1.000
	>95%, <=97%	35%	0.322	0.337	0.380	0.492	0.689	0.810	0.899	0.945	0.965	1.000	1.000	1.000
	>97%	35%	0.272	0.284	0.334	0.436	0.561	0.682	0.791	0.857	0.887	1.000	1.000	1.000
15/20 Year Amortizing Loan with Charter-level Coverage	>80%, <=85%	6%	0.997	0.998	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	12%	0.963	0.971	0.988	0.999	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>90%, <=95%	16%	0.887	0.904	0.943	0.983	0.997	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>95%, <=97%	18%	0.854	0.874	0.918	0.966	0.992	0.999	1.000	1.000	1.000	1.000	1.000	1.000
	>97%	20%	0.788	0.810	0.859	0.922	0.969	0.989	0.998	1.000	1.000	1.000	1.000	1.000
30 Year Amortizing Loan with Charter-level Coverage	>80%, <=85%	6%	0.934	0.954	0.989	0.999	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	12%	0.780	0.788	0.832	0.922	0.985	0.996	0.999	1.000	1.000	1.000	1.000	1.000
	>90%, <=95%	16%	0.679	0.685	0.711	0.784	0.889	0.940	0.973	0.989	0.995	1.000	1.000	1.000
	>95%, <=97%	18%	0.642	0.647	0.669	0.732	0.836	0.900	0.947	0.971	0.981	1.000	1.000	1.000
	>97%	20%	0.597	0.602	0.623	0.672	0.740	0.805	0.864	0.898	0.914	1.000	1.000	1.000

TABLE 10 TO PARAGRAPH (e)(2)(iii)(E): CREDIT ENHANCEMENT MULTIPLIERS FOR MODIFIED RPLS WITH 40-YEAR POST-MODIFICATION AMORTIZATION THAT IS SUBJECT TO CANCELABLE MORTGAGE INSURANCE

		Months Since Last Modification												
	OLTV	Coverage Percent	<= 5	>5, <= 12	>12, <= 24	>24, <= 36	>36, <= 48	>48, <= 60	> 60, <= 72	> 72, <= 84	> 84, <= 96	>96, <=108	>108, <=120	>120
15/20 Year Amortizing Loan with Guide-level Coverage	>80%, <=85%	6%	0.997	0.998	0.999	0.999	0.999	0.999	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	12%	0.963	0.971	0.971	0.971	0.980	0.988	0.994	0.999	1.000	1.000	1.000	1.000
	>90%, <=95%	25%	0.826	0.853	0.853	0.853	0.883	0.912	0.943	0.973	0.996	1.000	1.000	1.000
	>95%, <=97%	35%	0.732	0.765	0.765	0.765	0.807	0.848	0.892	0.936	0.986	0.998	1.000	1.000
	>97%	35%	0.630	0.673	0.673	0.673	0.718	0.762	0.814	0.865	0.945	0.980	0.996	1.000
30 Year Amortizing Loan with Guide-level Coverage	>80%, <=85%	12%	0.867	0.884	0.928	0.962	0.994	0.999	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	25%	0.551	0.584	0.627	0.679	0.785	0.893	0.950	0.986	0.998	1.000	1.000	1.000
	>90%, <=95%	30%	0.412	0.440	0.456	0.484	0.547	0.654	0.743	0.845	0.932	0.969	0.992	1.000
	>95%, <=97%	35%	0.322	0.351	0.369	0.391	0.449	0.535	0.631	0.746	0.873	0.925	0.965	1.000
	>97%	35%	0.272	0.295	0.314	0.353	0.410	0.462	0.515	0.607	0.756	0.826	0.887	1.000
15/20 Year Amortizing Loan with Charter-level Coverage	>80%, <=85%	6%	0.997	0.998	0.998	0.999	0.998	0.998	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	12%	0.963	0.971	0.971	0.971	0.980	0.988	0.994	0.999	1.000	1.000	1.000	1.000
	>90%, <=95%	16%	0.887	0.904	0.904	0.904	0.924	0.943	0.963	0.983	0.997	1.000	1.000	1.000
	>95%, <=97%	18%	0.854	0.874	0.874	0.874	0.896	0.918	0.942	0.966	0.992	0.999	1.000	1.000
	>97%	20%	0.788	0.810	0.810	0.810	0.835	0.859	0.891	0.922	0.969	0.989	0.998	1.000
30 Year Amortizing Loan with Charter-level Coverage	>80%, <=85%	6%	0.934	0.943	0.964	0.981	0.997	0.999	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	12%	0.780	0.795	0.819	0.845	0.896	0.948	0.976	0.993	0.999	1.000	1.000	1.000
	>90%, <=95%	16%	0.679	0.690	0.703	0.719	0.755	0.813	0.861	0.916	0.963	0.983	0.995	1.000
	>95%, <=97%	18%	0.642	0.652	0.662	0.676	0.708	0.756	0.806	0.866	0.933	0.960	0.981	1.000
	>97%	20%	0.597	0.607	0.617	0.629	0.658	0.686	0.715	0.765	0.845	0.882	0.914	1.000

TABLE 11 TO PARAGRAPH (e)(2)(iii)(E): CREDIT ENHANCEMENT MULTIPLIERS FOR NPLS SUBJECT TO CANCELABLE MORTGAGE INSURANCE OR NON-CANCELABLE MORTGAGE INSURANCE

Amortization Term / Coverage Type	Coverage Category	Credit Enhancement Multiplier
15/20-year with Guide-level Coverage	80% < OLTV <= 85% and coverage percent = 6%	0.893
	85% < OLTV <= 90% and coverage percent = 12%	0.803
	90% < OLTV <= 95% and coverage percent = 25%	0.597
	95% < OLTV <= 97% and coverage percent = 35%	0.478
	OLTV > 97% and coverage percent = 35%	0.461
30-year with Guide-level Coverage	80% < OLTV <= 85% and coverage percent = 12%	0.813
	85% < OLTV <= 90% and coverage percent = 25%	0.618
	90% < OLTV <= 95% and coverage percent = 30%	0.530
	95% < OLTV <= 97% and coverage percent = 35%	0.490
	OLTV > 97% and coverage percent = 35%	0.505
15/20-year with Charter-level Coverage	80% < OLTV <= 85% and coverage percent = 6%	0.893
	85% < OLTV <= 90% and coverage percent = 12%	0.803
	90% < OLTV <= 95% and coverage percent = 16%	0.775
	95% < OLTV <= 97% and coverage percent = 18%	0.678
	OLTV > 97% and coverage percent = 20%	0.663
30-year with Charter-level Coverage	80% < OLTV <= 85% and coverage percent = 6%	0.902
	85% < OLTV <= 90% and coverage percent = 12%	0.835
	90% < OLTV <= 95% and coverage percent = 16%	0.787
	95% < OLTV <= 97% and coverage percent = 18%	0.765
	OLTV > 97% and coverage percent = 20%	0.760

(3) *Credit enhancement counterparty haircut*—(i) *Counterparty rating*—(A) *In general.* For purposes of this paragraph (e)(3), the counterparty rating for a counterparty is—

(*1*) 1, if the Enterprise has determined that the counterparty has extremely strong capacity to perform its financial obligations in a severely adverse stress;

(*2*) 2, if the Enterprise has determined that the counterparty has very strong capacity to perform its financial obligations in a severely adverse stress;

(*3*) 3, if the Enterprise has determined that the counterparty has strong capacity to perform its financial obligations in a severely adverse stress;

(*4*) 4, if the Enterprise has determined that the counterparty has adequate capacity to perform its financial obligations in a severely adverse stress;

(*5*) 5, if the Enterprise has determined that the counterparty does not have adequate capacity to perform its financial obligations in a severely adverse stress but does have adequate capacity to perform its financial obligations in an adverse stress;

(*6*) 6, if the Enterprise has determined that the counterparty does not have adequate capacity to perform its financial obligations in an adverse stress;

(*7*) 7, if the Enterprise has determined that the counterparty's capacity to perform its financial obligations is questionable under prevailing economic conditions;

(*8*) 8, if the Enterprise has determined that the counterparty is in default on a material contractual obligation (including any obligation with respect to collateral requirements) or is under a resolution proceeding or similar regulatory proceeding.

(B) *Required considerations.* (*1*) In determining the capacity of a counterparty to perform its financial obligations, the Enterprise must consider the likelihood that the counterparty will not perform its material obligations with respect to the posting of collateral and the payment of any amounts payable under its contractual obligations.

(*2*) A counterparty does not have an adequate capacity to perform its financial obligations in a severely adverse stress if there is a material risk that the counterparty would fail to timely perform any financial obligation in a severely adverse stress.

(ii) *Counterparty haircut.* The counterparty haircut is set forth on table 12 to this paragraph (e)(3)(ii). For purposes of this paragraph (e)(3)(ii), RPL means either a modified RPL or a non-modified RPL.

TABLE 12 TO PARAGRAPH (e)(3)(ii): COUNTERPARTY HAIRCUTS

	Mortgage Concentration Risk: Not High			High Mortgage Concentration Risk and Approved Insurer			High Mortgage Concentration Risk and Not an Approved Insurer		
Counterparty Rating	Performing Loans and RPLs		NPLs	Performing Loans and RPLs		NPLs	Performing Loans and RPLs		NPLs
	30 Year Product	20/15 Year Product		30 Year Product	20/15 Year Product		30 Year Product	20/15 Year Product	
1	1.8%	1.3%	0.6%	2.3%	1.6%	0.7%	2.8%	2.0%	0.9%
2	4.5%	3.5%	2.0%	5.9%	4.5%	2.6%	7.3%	5.6%	3.2%
3	5.2%	4.0%	2.4%	6.7%	5.1%	3.1%	8.3%	6.4%	3.9%
4	11.4%	9.5%	6.9%	14.2%	11.8%	8.5%	17.2%	14.3%	10.4%
5	14.8%	12.7%	9.9%	17.8%	15.2%	11.9%	20.9%	18.0%	14.0%
6	21.2%	19.1%	16.4%	24.0%	21.7%	18.6%	26.8%	24.2%	20.8%
7	40.0%	38.2%	35.7%	42.0%	40.1%	37.5%	43.7%	41.7%	39.0%
8	47.6%	46.6%	45.3%	47.6%	46.6%	45.3%	47.6%	46.6%	45.3%

(f) *COVID–19-related forbearances*—(1) *During forbearance.* Notwithstanding anything to the contrary under paragraph (c)(4) of this section, the base risk weight for an NPL is equal to the product of 0.45 and the base risk weight that would otherwise be assigned to the NPL under paragraph (c)(4) of this section if the NPL—

(i) Is subject to a COVID–19-related forbearance; or

(ii) Was subject to a COVID–19-related forbearance at any time in the prior 6 calendar months and is subject to a trial modification plan.

(2) *After forbearance.* Notwithstanding the definition of ''past due'' under paragraph (a) of this section, any period of time in which a single-family mortgage exposure was past due while subject to a COVID–19-related forbearance is to be disregarded for the purpose of assigning a risk weight under this section if the entire amount past due was repaid upon the termination of the COVID–19-related forbearance.

§ 1240.34 Multifamily mortgage exposures.

(a) *Definitions.* Subject to any additional instructions set forth on Table 1 to this paragraph (a), for purposes of this section:

Acquisition debt-service-coverage ratio (acquisition DSCR) means, with respect to a multifamily mortgage exposure, the amount equal to:

(i) The net operating income (NOI) (or, if not available, the net cash flow) of the multifamily property that secures the multifamily mortgage exposure, at the time of the acquisition by the Enterprise (or, if not available, at the time of the underwriting or origination) of the multifamily mortgage exposure; divided by

(ii) The scheduled periodic payment on the multifamily mortgage exposure (or, if interest-only, fully amortizing payment), at the time of the acquisition by the Enterprise (or, if not available, at the time of the origination) of the multifamily mortgage exposure.

Acquisition loan-to-value (acquisition LTV) means, with respect to a multifamily mortgage exposure, the amount, determined as of the time of the acquisition by the Enterprise (or, if not available, at the time of the underwriting or origination) of the multifamily mortgage exposure, equal to:

(i) The unpaid principal balance of the multifamily mortgage exposure; divided by

(ii) The value of the multifamily property securing the multifamily mortgage exposure.

Debt-service-coverage ratio (*DSCR)* means, with respect to a multifamily mortgage exposure:

(i) The acquisition DSCR of the multifamily mortgage exposure if the loan age of the multifamily mortgage exposure is less than 6; or

(ii) The MTMDSCR of the multifamily mortgage exposure.

Interest-only (IO) means a multifamily mortgage exposure that requires only payment of interest without any principal amortization during all or part of the loan term.

Loan age means the number of scheduled payment dates since the origination of the multifamily mortgage exposure.

Loan term means the number of years until final loan payment (which may be a balloon payment) under the terms of a multifamily mortgage exposure.

LTV means, with respect to a multifamily mortgage exposure;

(i) The acquisition LTV of the multifamily mortgage exposure if the loan age of the multifamily mortgage exposure is less than 6, or

(ii) The MTMLTV of the multifamily mortgage exposure.

Mark-to-market debt-service coverage ratio (MTMDSCR) means, with respect to a multifamily mortgage exposure, the amount equal to—

(i) The net operating income (or, if not available, the net cash flow) of the multifamily property that secures the multifamily mortgage exposure, as reported on the most recently available property operating statement; divided by

(ii) The scheduled periodic payment on the multifamily mortgage exposure (or, for interest-only, fully amortizing payment), as reported on the most recently available property operating statement.

Mark-to-market loan-to-value (MTMLTV) means, with respect to a multifamily mortgage exposure, the amount equal to:

(i) The unpaid principal balance of the multifamily mortgage exposure; divided by

(ii) The current value of the property security the multifamily mortgage exposure, estimated using either:

(A) The acquisition property value adjusted using a multifamily property value index; or

(B) The property value estimated based on net operating income and capitalization rate indices.

Multifamily adjustable-rate exposure means a multifamily mortgage exposure that is not, at that time, a multifamily fixed-rate exposure.

Multifamily fixed-rate exposure means a multifamily mortgage exposure that, at that time, has an interest rate that may not then increase or decrease based on a change in a reference index or other methodology, including:

(i) A multifamily mortgage exposure that has an interest rate that is fixed over the life of the loan; and

(ii) A multifamily mortgage exposure that has an interest rate that may increase or decrease in the future, but is fixed at that time.

Net cash flow means, with respect to a multifamily mortgage exposure, the amount equal to:

(i) The net operating income of the multifamily mortgage exposure; minus

(ii) Reserves for capital improvements; minus

(iii) Other expenses not included in net operating income required for the proper operation of the multifamily property securing the multifamily mortgage exposure, including any commissions paid to leasing agents in securing renters and special improvements to the property to accommodate the needs of certain renters.

Net operating income means, with respect to a multifamily mortgage exposure, the amount equal to:

(i) The rental income generated by the multifamily property securing the multifamily mortgage exposure; minus

(ii) The vacancy and property operating expenses of the multifamily property securing the multifamily mortgage exposure.

Original amortization term means the number of years, determined as of the time of the origination of a multifamily mortgage exposure, that it would take a borrower to pay a multifamily mortgage exposure completely if the borrower only makes the scheduled payments, and without making any balloon payment.

Original loan size means the dollar amount of the unpaid principal balance of a multifamily mortgage exposure at origination.

Payment performance means the payment status of history of a multifamily mortgage exposure, assigned pursuant to the instructions set forth on table 1 to this paragraph (a).

Supplemental mortgage exposure means any multifamily fixed-rate exposure or multifamily adjustable-rate exposure that is originated after the origination of a multifamily mortgage exposure that is secured by all or part of the same multifamily property.

Unpaid principal balance (UPB) means the outstanding loan amount of a multifamily mortgage exposure.

TABLE 1 TO PARAGRAPH (a): PERMISSIBLE VALUES AND ADDITIONAL INSTRUCTIONS

Defined Term	Permissible Values	Additional Instructions
Acquisition DSCR	Greater than or equal to 0.	Origination DSCR if negative or unable to determine. If origination DSCR is unavailable, use underwriting DSCR. If underwriting DSCR is unavailable, use 1.00.
Acquisition LTV	Greater than or equal to 0.	Origination LTV if negative or unable to determine. If origination LTV is unavailable, use underwriting LTV. If underwriting LTV is unavailable, use 100 percent.
Interest-only	Yes, no.	Yes if unable to determine.
Loan Term	Non-negative integer in years.	11 years if negative or unable to determine.
MTMDSCR	Greater than or equal to 0.	If the MTMDSCR is unavailable, the last observed DSCR can be marked to market using a property NOI index or an NOI estimate based on rent and expense indices. If the index is not sufficiently granular, either because of its frequency or geography, or with respect to a certain multifamily property type, use a more geographically broad index or a recently estimated mark-to-market value.
MTMLTV	Greater than or equal to 0.	If the MTMLTV is unavailable, mark to market using an index. If the index is not sufficiently granular, either because of its frequency or geography or with respect to a certain multifamily property type, use a more geographically broad index or a recently estimated mark-to-market value.
Net Operating Income (NOI) / Net Cash Flow (NCF)	Greater than or equal to 0.	Infer using origination LTV or origination DSCR if NOI/NCF is unavailable. Alternatively, infer using actual MTMLTV or actual MTMDSCR.
Original Amortization Term	Non-negative integer in years.	31 years if negative or unable to determine.
Original Loan Size	Non-negative dollar value.	$3,000,000 if negative or unable to determine
Payment Performance	Performing, delinquent 60 days or more, re-performing (without modification), modified.	Modified if unable to determine.
Special Product	Not a special product, student housing, rehab/value-add/lease-up, supplemental mortgage exposure.	Rehab/value-add/lease-up if unable to determine.
UPB	UPB > $0	$100,000,000 if negative or unable to determine.

(b) *Risk weight*—(1) *In general.* Subject to paragraphs (b)(2) and (3) of this section, an Enterprise must assign a risk weight to a multifamily mortgage exposure equal to:

(i) The base risk weight for the multifamily mortgage exposure as determined under paragraph (c) of this section; multiplied by

(ii) The combined risk multiplier for the multifamily mortgage exposure as

determined under paragraph (d) of this section.

(2) *Minimum risk weight.* Notwithstanding the risk weight determined under paragraph (b)(1) of this section, the risk weight assigned to a multifamily mortgage exposure may not be less than 20 percent.

(3) *Loan groups.* If a multifamily property that secures a multifamily mortgage exposure also secures one or more supplemental mortgage exposures:

(i) A multifamily mortgage exposure-specific base risk weight must be determined under paragraph (c) of this section using for each of these multifamily mortgage exposures a single DSCR and single LTV, both calculated as if all of the multifamily mortgage exposures secured by the multifamily property were consolidated into a single multifamily mortgage exposure; and

(ii) A multifamily mortgage exposure-specific combined risk multiplier must be determined under paragraph (d) of this section based on the risk characteristics of the multifamily mortgage exposure (except with respect to the loan size multiplier, which would be determined using the aggregate unpaid principal balance of these multifamily mortgage exposures).

(c) *Base risk weight*—(1) *Multifamily fixed-rate exposure.* The base risk weight for a multifamily fixed-rate exposure is set forth on table 2 to this paragraph (c)(1).

TABLE 2 TO PARAGRAPH (c)(1): MULTIFAMILY FIXED-RATE EXPOSURE

		LTV									
		<=35%	> 35%, <=45%	> 45%, <=55%	> 55%, <=65%	> 65%, <=70%	> 70%, <=75%	> 75%, <=80%	> 80%, <=90%	> 90%, <=100%	>100%
DSCR	<1.00	52%	60%	76%	109%	125%	140%	153%	166%	172%	182%
	>= 1.00, <1.15	45%	52%	65%	92%	105%	118%	129%	140%	145%	153%
	>=1.15, < 1.20	40%	46%	58%	81%	93%	103%	112%	122%	127%	134%
	>=1.20, < 1.25	37%	42%	52%	72%	83%	92%	97%	107%	112%	119%
	>=1.25, < 1.30	33%	38%	47%	65%	74%	81%	86%	94%	99%	105%
	>=1.30, < 1.35	31%	35%	43%	59%	66%	71%	76%	84%	88%	93%
	>=1.35, < 1.50	29%	32%	39%	54%	59%	64%	69%	76%	80%	86%
	>=1.50, < 1.65	25%	27%	31%	39%	43%	47%	51%	57%	62%	70%
	>=1.65, < 1.80	22%	23%	26%	31%	34%	37%	41%	47%	53%	61%
	>=1.80, < 1.95	16%	17%	19%	24%	26%	29%	32%	41%	47%	56%
	>=1.95, < 2.10	15%	15%	16%	20%	23%	26%	28%	37%	44%	54%
	>=2.10, < 2.25	13%	14%	15%	19%	21%	24%	25%	36%	42%	53%
	>=2.25	13%	13%	14%	18%	20%	23%	24%	35%	42%	52%

(2) *Multifamily adjustable-rate exposure.* The base risk weight for a multifamily adjustable-rate exposure is set forth on table 3 to this paragraph (c)(2).

TABLE 3 TO PARAGRAPH (c)(2): MULTIFAMILY ADJUSTABLE-RATE EXPOSURE

		LTV									
		<=35%	> 35%, <=45%	> 45%, <=55%	> 55%, <=65%	> 65%, <=70%	> 70%, <=75%	> 75%, <=80%	> 80%, <=90%	> 90%, <=100%	>100%
DSCR	<1.00	81%	86%	93%	133%	153%	172%	189%	211%	229%	255%
	>=1.00, <1.25	71%	75%	80%	113%	129%	145%	158%	178%	193%	215%
	>=1.25, < 1.30	63%	67%	71%	100%	114%	127%	138%	156%	169%	188%
	>=1.30, < 1.36	57%	60%	63%	88%	101%	113%	120%	136%	149%	168%
	>=1.36, < 1.42	51%	54%	57%	79%	90%	99%	106%	120%	131%	148%
	>=1.42, < 1.47	45%	49%	51%	71%	80%	86%	93%	107%	116%	131%
	>=1.47, < 1.53	37%	42%	47%	64%	71%	77%	84%	97%	106%	120%
	>=1.53, < 1.70	30%	33%	37%	47%	51%	56%	63%	72%	83%	98%
	>=1.70, < 1.87	23%	26%	30%	36%	40%	45%	51%	60%	70%	86%
	>=1.87, < 2.03	19%	21%	22%	28%	31%	35%	40%	52%	62%	79%
	>=2.03, < 2.21	17%	18%	19%	24%	26%	31%	34%	47%	58%	75%
	>=2.21, < 2.38	16%	17%	17%	22%	24%	28%	31%	45%	56%	73%
	>=2.38	16%	16%	16%	21%	23%	27%	30%	44%	55%	72%

(d) *Combined risk multiplier.* The combined risk multiplier for a multifamily mortgage exposure is equal to the product of each of the applicable risk multipliers set forth on table 4 to this paragraph (d).

TABLE 4 TO PARAGRAPH (d): MULTIFAMILY RISK MULTIPLIERS

Risk Factor	Value or Range	Risk Multiplier
Payment Performance	Performing	1.00
	Delinquent more than 60 days	1.10
	Re-performing (without modification)	1.10
	Modified	1.20
Interest-only	No	1.00
	Yes (during the interest-only period)	1.10
Loan Term	Loan term <= 1Yr	0.70
	1Yr < loan term <= 2Yr	0.75
	2Yr < loan term <= 3Yr	0.80
	3Yr < loan term <= 4Yr	0.85
	4Yr < loan term <= 5Yr	0.90
	5Yr < loan term <= 7Yr	0.95
	7Yr < loan term <= 10Yr	1.00
	Loan term > 10Yr	1.15
Original Amortization Term	Original amortization term <= 20Yr	0.70
	20Yr < original amortization term <= 25Yr	0.80
	25Yr < original amortization term <= 30Yr	1.00
	Original amortization term > 30Yr	1.10
Original Loan Size (in millions)	Loan size <= $2m	1.45
	$2m < loan size <= $3m	1.35
	$3m < loan size <= $4m	1.25
	$4m < loan size <= $5m	1.15
	$5m < loan size <= $6m	1.08
	$6m < loan size <= $7m	1.02
	$7m < loan size <= $8m	0.96
	$8m < loan size <= $9m	0.92
	$9m < loan size <= $10m	0.88
	$10m < loan size <= $11m	0.86
	$11m < loan size <= $12m	0.84
	$12m < loan size <= $13m	0.82
	$13m < loan size <= $14m	0.81
	$14m < loan size <= $15m	0.81
	$15m < loan size <= $16m	0.80
	$16m < loan size <= $17m	0.80
	$17m < loan size <= $18m	0.80
	$18m < loan size <= $19m	0.80
	$19m < loan size <= $20m	0.80
	$20m < loan size <= $21m	0.80
	$21m < loan size <= $22m	0.80
	$22m < loan size <= $23m	0.79
	$23m < loan size <= $24m	0.78
	$24m < loan size <= $25m	0.76
	Loan size >$25m	0.70
Special Products	Not a special product	1.00
	Student housing	1.15
	Rehab/value-add/lease-up	1.25

§ 1240.35 Off-balance sheet exposures.

(a) *General.* (1) An Enterprise must calculate the exposure amount of an off-balance sheet exposure using the credit conversion factors (CCFs) in paragraph (b) of this section.

(2) Where an Enterprise commits to provide a commitment, the Enterprise may apply the lower of the two applicable CCFs.

(3) Where an Enterprise provides a commitment structured as a syndication or participation, the Enterprise is only required to calculate the exposure amount for its pro rata share of the commitment.

(4) Where an Enterprise provides a commitment or enters into a repurchase agreement and such commitment or repurchase agreement, the exposure amount shall be no greater than the maximum contractual amount of the commitment or repurchase agreement, as applicable.

(b) *Credit conversion factors*—(1) *Zero percent CCF.* An Enterprise must apply a zero percent CCF to the unused portion of a commitment that is unconditionally cancelable by the Enterprise.

(2) *20 percent CCF.* An Enterprise must apply a 20 percent CCF to the amount of commitments with an original maturity of one year or less that are not unconditionally cancelable by the Enterprise.

(3) *50 percent CCF.* An Enterprise must apply a 50 percent CCF to the amount of commitments with an original maturity of more than one year that are not unconditionally cancelable by the Enterprise.

(4) *100 percent CCF.* An Enterprise must apply a 100 percent CCF to the amount of the following off-balance sheet items and other similar transactions:

(i) Guarantees;

(ii) Repurchase agreements (the off-balance sheet component of which equals the sum of the current fair values of all positions the Enterprise has sold subject to repurchase);

(iii) Off-balance sheet securities lending transactions (the off-balance sheet component of which equals the sum of the current fair values of all positions the Enterprise has lent under the transaction);

(iv) Off-balance sheet securities borrowing transactions (the off-balance sheet component of which equals the sum of the current fair values of all non-cash positions the Enterprise has posted as collateral under the transaction); and

(v) Forward agreements.

§ 1240.36 Derivative contracts.

(a) *Exposure amount for derivative contracts.* An Enterprise must use the current exposure methodology (CEM) described in paragraph (b) of this section to calculate the exposure amount for all its OTC derivative contracts.

(b) *Current exposure methodology exposure amount*—(1) *Single OTC derivative contract.* Except as modified by paragraph (c) of this section, the exposure amount for a single OTC derivative contract that is not subject to a qualifying master netting agreement is equal to the sum of the Enterprise's current credit exposure and potential future credit exposure (PFE) on the OTC derivative contract.

(i) *Current credit exposure.* The current credit exposure for a single OTC derivative contract is the greater of the fair value of the OTC derivative contract or zero.

(ii) *PFE.* (A) The PFE for a single OTC derivative contract, including an OTC derivative contract with a negative fair value, is calculated by multiplying the notional principal amount of the OTC derivative contract by the appropriate conversion factor in Table 1 to paragraph (b)(1)(ii)(E) of this section.

(B) For purposes of calculating either the PFE under this paragraph (b)(1)(ii) or the gross PFE under paragraph (b)(2)(ii)(A) of this section for exchange rate contracts and other similar contracts in which the notional principal amount is equivalent to the cash flows, notional principal amount is the net receipts to each party falling due on each value date in each currency.

(C) For an OTC derivative contract that does not fall within one of the specified categories in table 1 to paragraph (b)(1)(ii)(E) of this section, the PFE must be calculated using the appropriate ''other'' conversion factor.

(D) An Enterprise must use an OTC derivative contract's effective notional principal amount (that is, the apparent or stated notional principal amount multiplied by any multiplier in the OTC derivative contract) rather than the apparent or stated notional principal amount in calculating PFE.

(E) The PFE of the protection provider of a credit derivative is capped at the net present value of the amount of unpaid premiums.

TABLE 1 TO PARAGRAPH (b)(1)(ii)(E)—CONVERSION FACTOR MATRIX FOR DERIVATIVE CONTRACTS[1]

Remaining maturity[2]	Interest rate	Foreign exchange rate and gold	Credit (investment grade reference asset)[3]	Credit (non-investment-LI>grade reference asset)	Equity	Precious metals (except gold)	Other
One year or less	0.00	0.01	0.05	0.10	0.06	0.07	0.10
Greater than one year and less than or equal to five years	0.005	0.05	0.05	0.10	0.08	0.07	0.12
Greater than five years	0.015	0.075	0.05	0.10	0.10	0.08	0.15

[1] For a derivative contract with multiple exchanges of principal, the conversion factor is multiplied by the number of remaining payments in the derivative contract.

[2] For an OTC derivative contract that is structured such that on specified dates any outstanding exposure is settled and the terms are reset so that the fair value of the contract is zero, the remaining maturity equals the time until the next reset date. For an interest rate derivative contract with a remaining maturity of greater than one year that meets these criteria, the minimum conversion factor is 0.005.

[3] An Enterprise must use the column labeled "Credit (investment-grade reference asset)" for a credit derivative whose reference asset is an outstanding unsecured long-term debt security without credit enhancement that is investment grade. An Enterprise must use the column labeled "Credit (non-investment-grade reference asset)" for all other credit derivatives.

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(2) *Multiple OTC derivative contracts subject to a qualifying master netting agreement.* Except as modified by paragraph (c) of this section, the exposure amount for multiple OTC derivative contracts subject to a qualifying master netting agreement is equal to the sum of the net current credit exposure and the adjusted sum of the PFE amounts for all OTC derivative contracts subject to the qualifying master netting agreement.

(i) *Net current credit exposure.* The net current credit exposure is the greater of the net sum of all positive and negative fair values of the individual OTC derivative contracts subject to the qualifying master netting agreement or zero.

(ii) *Adjusted sum of the PFE amounts.* The adjusted sum of the PFE amounts, Anet, is calculated as Anet = (0.4 × Agross) + (0.6 × NGR × Agross), where:

(A) Agross = the gross PFE (that is, the sum of the PFE amounts as determined under paragraph (b)(1)(ii) of this section for each individual derivative contract subject to the qualifying master netting agreement); and

(B) Net-to-gross Ratio (NGR) = the ratio of the net current credit exposure to the gross current credit exposure. In calculating the NGR, the gross current credit exposure equals the sum of the positive current credit exposures (as determined under paragraph (b)(1)(i) of this section) of all individual derivative contracts subject to the qualifying master netting agreement.

(c) *Recognition of credit risk mitigation of collateralized OTC derivative contracts.* (1) An Enterprise may recognize the credit risk mitigation benefits of financial collateral that secures an OTC derivative contract or multiple OTC derivative contracts subject to a qualifying master netting agreement (netting set) by using the simple approach in § 1240.39(b).

(2) As an alternative to the simple approach, an Enterprise may recognize the credit risk mitigation benefits of financial collateral that secures such a contract or netting set if the financial collateral is marked-to-fair value on a daily basis and subject to a daily margin maintenance requirement by applying a risk weight to the uncollateralized portion of the exposure, after adjusting the exposure amount calculated under paragraph (b)(1) or (2) of this section using the collateral haircut approach in § 1240.39(c). The Enterprise must substitute the exposure amount calculated under paragraph (b)(1) or (2) of this section for ΣE in the equation in § 1240.39(c)(2).

(d) *Counterparty credit risk for credit derivatives*—(1) *Protection purchasers.* An Enterprise that purchases a credit derivative that is recognized under § 1240.38 as a credit risk mitigant for an exposure is not required to compute a separate counterparty credit risk capital requirement under this subpart provided that the Enterprise does so consistently for all such credit derivatives. The Enterprise must either include all or exclude all such credit derivatives that are subject to a qualifying master netting agreement from any measure used to determine counterparty credit risk exposure to all relevant counterparties for risk-based capital purposes.

(2) *Protection providers.* (i) An Enterprise that is the protection provider under a credit derivative must treat the credit derivative as an exposure to the underlying reference asset. The Enterprise is not required to compute a counterparty credit risk capital requirement for the credit derivative under this subpart, provided that this treatment is applied consistently for all such credit derivatives. The Enterprise must either include all or exclude all such credit derivatives that are subject to a qualifying master netting agreement from any measure used to determine counterparty credit risk exposure.

(ii) The provisions of this paragraph (d)(2) apply to all relevant counterparties for risk-based capital purposes.

(e) [Reserved]

(f) *Clearing member Enterprise's exposure amount.* (1) The exposure amount of a clearing member Enterprise for a client-facing derivative transaction or netting set of client-facing derivative transactions equals the exposure amount calculated according to paragraph (b)(1) or (2) of this section multiplied by the scaling factor the square root of ½ (which equals 0.707107). If the Enterprise determines that a longer period is appropriate, the Enterprise must use a larger scaling factor to adjust for a longer holding period as follows:

$$\text{Scaling factor} = \sqrt{\frac{H}{10}}$$

Where H = the holding period greater than or equal to five days.

(2) Additionally, FHFA may require the Enterprise to set a longer holding period if FHFA determines that a longer period is appropriate due to the nature, structure, or characteristics of the transaction or is commensurate with the risks associated with the transaction.

§ 1240.37 Cleared transactions.

(a) *General requirements*—(1) *Clearing member clients.* An Enterprise that is a clearing member client must use the methodologies described in paragraph (b) of this section to calculate risk-weighted assets for a cleared transaction.

(2) *Clearing members.* An Enterprise that is a clearing member must use the methodologies described in paragraph (c) of this section to calculate its risk-weighted assets for a cleared transaction and paragraph (d) of this section to calculate its risk-weighted assets for its default fund contribution to a CCP.

(b) *Clearing member client Enterprise*—(1) *Risk-weighted assets for cleared transactions.* (i) To determine the risk-weighted asset amount for a cleared transaction, an Enterprise that is a clearing member client must multiply the trade exposure amount for the cleared transaction, calculated in accordance with paragraph (b)(2) of this section, by the risk weight appropriate for the cleared transaction, determined in accordance with paragraph (b)(3) of this section.

(ii) A clearing member client Enterprise's total risk-weighted assets for cleared transactions is the sum of the risk-weighted asset amounts for all its cleared transactions.

(2) *Trade exposure amount.* (i) For a cleared transaction that is either a derivative contract or a netting set of derivative contracts, the trade exposure amount equals:

(A) The exposure amount for the derivative contract or netting set of derivative contracts, calculated using the methodology used to calculate exposure amount for OTC derivative contracts under § 1240.36; plus

(B) The fair value of the collateral posted by the clearing member client Enterprise and held by the CCP, clearing member, or custodian in a manner that is not bankruptcy remote.

(ii) For a cleared transaction that is a repo-style transaction or netting set of repo-style transactions, the trade exposure amount equals:

(A) The exposure amount for the repo-style transaction calculated using the methodologies under § 1240.39(c); plus

(B) The fair value of the collateral posted by the clearing member client Enterprise and held by the CCP, clearing member, or custodian in a manner that is not bankruptcy remote.

(3) *Cleared transaction risk weights.* (i) For a cleared transaction with a QCCP, a clearing member client Enterprise must apply a risk weight of:

(A) 2 percent if the collateral posted by the Enterprise to the QCCP or clearing member is subject to an

arrangement that prevents any losses to the clearing member client Enterprise due to the joint default or a concurrent insolvency, liquidation, or receivership proceeding of the clearing member and any other clearing member clients of the clearing member; and the clearing member client Enterprise has conducted sufficient legal review to conclude with a well-founded basis (and maintains sufficient written documentation of that legal review) that in the event of a legal challenge (including one resulting from an event of default or from liquidation, insolvency, or receivership proceedings) the relevant court and administrative authorities would find the arrangements to be legal, valid, binding and enforceable under the law of the relevant jurisdictions; or

(B) 4 percent if the requirements of § 1240.37(b)(3)(i)(A) are not met.

(ii) For a cleared transaction with a CCP that is not a QCCP, a clearing member client Enterprise must apply the risk weight appropriate for the CCP according to this subpart D.

(4) *Collateral.* (i) Notwithstanding any other requirements in this section, collateral posted by a clearing member client Enterprise that is held by a custodian (in its capacity as custodian) in a manner that is bankruptcy remote from the CCP, clearing member, and other clearing member clients of the clearing member, is not subject to a capital requirement under this section.

(ii) A clearing member client Enterprise must calculate a risk-weighted asset amount for any collateral provided to a CCP, clearing member, or custodian in connection with a cleared transaction in accordance with the requirements under this subpart D.

(c) *Clearing member Enterprises*—(1) *Risk-weighted assets for cleared transactions.* (i) To determine the risk-weighted asset amount for a cleared transaction, a clearing member Enterprise must multiply the trade exposure amount for the cleared transaction, calculated in accordance with paragraph (c)(2) of this section, by the risk weight appropriate for the cleared transaction, determined in accordance with paragraph (c)(3) of this section.

(ii) A clearing member Enterprise's total risk-weighted assets for cleared transactions is the sum of the risk-weighted asset amounts for all of its cleared transactions.

(2) *Trade exposure amount.* A clearing member Enterprise must calculate its trade exposure amount for a cleared transaction as follows:

(i) For a cleared transaction that is either a derivative contract or a netting set of derivative contracts, the trade exposure amount equals:

(A) The exposure amount for the derivative contract, calculated using the methodology to calculate exposure amount for OTC derivative contracts under § 1240.36; plus

(B) The fair value of the collateral posted by the clearing member Enterprise and held by the CCP in a manner that is not bankruptcy remote.

(ii) For a cleared transaction that is a repo-style transaction or netting set of repo-style transactions, trade exposure amount equals:

(A) The exposure amount for repo-style transactions calculated using methodologies under § 1240.39(c); plus

(B) The fair value of the collateral posted by the clearing member Enterprise and held by the CCP in a manner that is not bankruptcy remote.

(3) *Cleared transaction risk weight.* (i) A clearing member Enterprise must apply a risk weight of 2 percent to the trade exposure amount for a cleared transaction with a QCCP.

(ii) For a cleared transaction with a CCP that is not a QCCP, a clearing member Enterprise must apply the risk weight appropriate for the CCP according to this subpart D.

(iii) Notwithstanding paragraphs (c)(3)(i) and (ii) of this section, a clearing member Enterprise may apply a risk weight of zero percent to the trade exposure amount for a cleared transaction with a CCP where the clearing member Enterprise is acting as a financial intermediary on behalf of a clearing member client, the transaction offsets another transaction that satisfies the requirements set forth in § 1240.3(a), and the clearing member Enterprise is not obligated to reimburse the clearing member client in the event of the CCP default.

(4) *Collateral.* (i) Notwithstanding any other requirement in this section, collateral posted by a clearing member Enterprise that is held by a custodian in a manner that is bankruptcy remote from the CCP is not subject to a capital requirement under this section.

(ii) A clearing member Enterprise must calculate a risk-weighted asset amount for any collateral provided to a CCP, clearing member, or a custodian in connection with a cleared transaction in accordance with requirements under this subpart D.

(d) *Default fund contributions*—(1) *General requirement.* A clearing member Enterprise must determine the risk-weighted asset amount for a default fund contribution to a CCP at least quarterly, or more frequently if, in the opinion of the Enterprise or FHFA, there is a material change in the financial condition of the CCP.

(2) *Risk-weighted asset amount for default fund contributions to non-qualifying CCPs.* A clearing member Enterprise's risk-weighted asset amount for default fund contributions to CCPs that are not QCCPs equals the sum of such default fund contributions multiplied by 1,250 percent, or an amount determined by FHFA, based on factors such as size, structure and membership characteristics of the CCP and riskiness of its transactions, in cases where such default fund contributions may be unlimited.

(3) *Risk-weighted asset amount for default fund contributions to QCCPs.* A clearing member Enterprise's risk-weighted asset amount for default fund contributions to QCCPs equals the sum of its capital requirement, K_{CM} for each QCCP, as calculated under the methodology set forth in paragraphs (d)(3)(i) through (iii) of this section (Method 1), multiplied by 1,250 percent or in paragraphs (d)(3)(iv) of this section (Method 2).

(i) *Method 1.* The hypothetical capital requirement of a QCCP (K_{CCP}) equals:

$$K_{CCP} = \sum_{clearing\ member\ i} max\left(EBRM_i - VM_i - IM_i - DF_i; 0\right) \times RW \times 0.08$$

Where:

(A) $EBRM_i$ = the exposure amount for each transaction cleared through the QCCP by clearing member i, calculated in accordance with § 1240.36 for OTC derivative contracts and § 1240.39(c)(2) for repo-style transactions, provided that:

(*1*) For purposes of this section, in calculating the exposure amount the Enterprise may replace the formula provided in § 1240.36(b)(2)(ii) with the following: Anet = (0.15 × Agross) + (0.85 × NGR × Agross); and

(*2*) For option derivative contracts that are cleared transactions, the PFE described in § 1240.36(b)(1)(ii) must be adjusted by multiplying the notional principal amount of

the derivative contract by the appropriate conversion factor in Table 1 to paragraph (b)(1)(ii)(E) of § 1240.36 and the absolute value of the option's delta, that is, the ratio of the change in the value of the derivative contract to the corresponding change in the price of the underlying asset.

(*3*) For repo-style transactions, when applying § 1240.39(c)(2), the Enterprise must use the methodology in § 1240.39(c)(3);

(B) VM_i = any collateral posted by clearing member i to the QCCP that it is entitled to receive from the QCCP, but has not yet received, and any collateral that the QCCP has actually received from clearing member i;

(C) IM_i = the collateral posted as initial margin by clearing member i to the QCCP;

(D) DF_i = the funded portion of clearing member i's default fund contribution that will be applied to reduce the QCCP's loss upon a default by clearing member i;

(E) RW = 20 percent, except when FHFA has determined that a higher risk weight is more appropriate based on the specific characteristics of the QCCP and its clearing members; and

(F) Where a QCCP has provided its K_{CCP}, an Enterprise must rely on such disclosed figure instead of calculating K_{CCP} under this paragraph (d), unless the Enterprise determines that a more conservative figure is appropriate based on the nature, structure, or characteristics of the QCCP.

(ii) For an Enterprise that is a clearing member of a QCCP with a default fund supported by funded commitments, K_{CM} equals:

$$K_{CM_i} = \left(1 + \beta \cdot \frac{N}{N-2}\right) \cdot \frac{DF_i}{DF_{CM}} \cdot K^*_{CM}$$

$$K^*_{CM} = \begin{cases} c_2 \cdot \mu \cdot (K_{CCP} - DF') + c_2 \cdot DF'_{CM} & if \quad DF' < K_{CCP} \quad (i) \\ c_2 \cdot (K_{CCP} - DF_{CCP}) + c_1 \cdot (DF' - K_{CCP}) & if \quad DF_{CCP} < K_{CCP} \leq DF' \quad (ii) \\ c_1 \cdot DF'_{CM} & if \quad K_{CCP} \leq DF_{CCP} \quad (iii) \end{cases}$$

Where

$$\text{(A)} \quad \beta = \frac{A_{Net,1} + A_{Net,2}}{\sum_i A_{Net,i}}$$

Subscripts 1 and 2 denote the clearing members with the two largest A_{Net} values. For purposes of this paragraph (d), for derivatives A_{Net} is defined in § 1240.36(b)(2)(ii) and for repo-style transactions, A_{Net} means the exposure amount as defined in § 1240.39(c)(2) using the methodology in § 1240.39(c)(3);

(B) N = the number of clearing members in the QCCP;

(C) DF_{CCP} = the QCCP's own funds and other financial resources that would be used to cover its losses before clearing members' default fund contributions are used to cover losses;

(D) DF_{CM} = funded default fund contributions from all clearing members and any other clearing member contributed financial resources that are available to absorb mutualized QCCP losses;

(E) $DF = DF_{CCP} + DF_{CM}$ (that is, the total funded default fund contribution);

(F) $\overline{DF}_l$ = average $\overline{DF}_l$ = the average funded default fund contribution from an individual clearing member;

(G) $DF'_{CM} = DF_{CM} - 2 \cdot \overline{DF}_l = \Sigma_i DF_i - 2 \cdot \overline{DF}_l$ (that is, the funded default fund contribution from surviving clearing members assuming that two average clearing members have defaulted and their default fund contributions and initial margins have been used to absorb the resulting losses);

(H) $DF' = DF_{CCP} + DF'_{CM} = DF - 2 \cdot \overline{DF}_l$ (that is, the total funded default fund contributions from the QCCP and the surviving clearing members that are available to mutualize losses, assuming that two average clearing members have defaulted);

$$\text{(I)} \; c_1 = Max\left\{\frac{1.6\%}{(DF'/K_{CCP})^{0.3}}; 0.16\%\right\}$$

(that is, a decreasing capital factor, between 1.6 percent and 0.16 percent, applied to the excess funded default funds provided by clearing members);

(J) c_2 = 100 percent; and

(K) μ = 1.2;

(iii)(A) For an Enterprise that is a clearing member of a QCCP with a default fund supported by unfunded commitments, K_{CM} equals;

$$K_{CM_i} = \frac{DF_i}{DF_{CM}} \cdot K^*_{CM}$$

Where:

(*1*) DF_i = the Enterprise's unfunded commitment to the default fund;

(*2*) DF_{CM} = the total of all clearing members' unfunded commitment to the default fund; and

(*3*) K^*_{CM} as defined in paragraph (d)(3)(ii) of this section.

(B) For an Enterprise that is a clearing member of a QCCP with a default fund supported by unfunded commitments and is unable to calculate K_{CM} using the methodology described in paragraph (d)(3)(iii) of this section, K_{CM} equals:

$$K_{CM_i} = \frac{IM_i}{IM_{CM}} \cdot K^*_{CM}$$

Where:

(*1*) IM_i = the Enterprise's initial margin posted to the QCCP;

(*2*) IM_{CM} = the total of initial margin posted to the QCCP; and

(*3*) K^*_{CM} as defined in paragraph (d)(3)(ii) of this section.

(iii) *Method 2.* A clearing member Enterprise's risk-weighted asset amount for its default fund contribution to a QCCP, RWA_{DF}, equals:

$RWA_{DF} = Min \{12.5 * DF; 0.18 * TE\}$

Where:

(A) TE = the Enterprise's trade exposure amount to the QCCP, calculated according to paragraph (c)(2) of this section;

(B) DF = the funded portion of the Enterprise's default fund contribution to the QCCP.

(*4*) *Total risk-weighted assets for default fund contributions.* Total risk-weighted assets for default fund contributions is the sum of a clearing member Enterprise's risk-weighted assets for all of its default fund contributions to all CCPs of which the Enterprise is a clearing member.

§ 1240.38 Guarantees and credit derivatives: substitution treatment.

(a) *Scope*—(1) *General.* An Enterprise may recognize the credit risk mitigation benefits of an eligible guarantee or eligible credit derivative by substituting the risk weight associated with the protection provider for the risk weight assigned to an exposure, as provided under this section.

(2) *Applicability.* This section applies to exposures for which:

(i) Credit risk is fully covered by an eligible guarantee or eligible credit derivative; or

(ii) Credit risk is covered on a pro rata basis (that is, on a basis in which the Enterprise and the protection provider share losses proportionately) by an eligible guarantee or eligible credit derivative.

(3) *Tranching.* Exposures on which there is a tranching of credit risk (reflecting at least two different levels of seniority) generally are securitization exposures subject to §§ 1240.41 through 1240.46.

(4) *Multiple guarantees or credit derivatives.* If multiple eligible guarantees or eligible credit derivatives cover a single exposure described in this section, an Enterprise may treat the hedged exposure as multiple separate exposures each covered by a single eligible guarantee or eligible credit derivative and may calculate a separate risk-weighted asset amount for each separate exposure as described in paragraph (c) of this section.

(5) *Single guarantees or credit derivatives.* If a single eligible guarantee or eligible credit derivative covers multiple hedged exposures described in paragraph (a)(2) of this section, an Enterprise must treat each hedged exposure as covered by a separate eligible guarantee or eligible credit derivative and must calculate a separate risk-weighted asset amount for each exposure as described in paragraph (c) of this section.

(b) *Rules of recognition.* (1) An Enterprise may only recognize the credit risk mitigation benefits of eligible guarantees and eligible credit derivatives.

(2) An Enterprise may only recognize the credit risk mitigation benefits of an eligible credit derivative to hedge an exposure that is different from the credit derivative's reference exposure used for determining the derivative's cash settlement value, deliverable obligation, or occurrence of a credit event if:

(i) The reference exposure ranks *pari passu* with, or is subordinated to, the hedged exposure; and

(ii) The reference exposure and the hedged exposure are to the same legal entity, and legally enforceable cross-default or cross-acceleration clauses are in place to ensure payments under the credit derivative are triggered when the obligated party of the hedged exposure fails to pay under the terms of the hedged exposure.

(c) *Substitution approach*—(1) *Full coverage.* If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is greater than or equal to the exposure amount of the hedged exposure, an Enterprise may recognize the guarantee or credit derivative in determining the risk-weighted asset amount for the hedged exposure by substituting the risk weight applicable to the guarantor or credit derivative protection provider under this subpart D for the risk weight assigned to the exposure.

(2) *Partial coverage.* If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is less than the exposure amount of the hedged exposure, the Enterprise must treat the hedged exposure as two separate exposures (protected and unprotected) in order to recognize the credit risk mitigation benefit of the guarantee or credit derivative.

(i) The Enterprise may calculate the risk-weighted asset amount for the protected exposure under this subpart D, where the applicable risk weight is the risk weight applicable to the guarantor or credit derivative protection provider.

(ii) The Enterprise must calculate the risk-weighted asset amount for the unprotected exposure under this subpart D, where the applicable risk weight is that of the unprotected portion of the hedged exposure.

(iii) The treatment provided in this section is applicable when the credit risk of an exposure is covered on a partial pro rata basis and may be applicable when an adjustment is made to the effective notional amount of the guarantee or credit derivative under paragraph (d), (e), or (f) of this section.

(d) *Maturity mismatch adjustment.* (1) An Enterprise that recognizes an eligible guarantee or eligible credit derivative in determining the risk-weighted asset amount for a hedged exposure must adjust the effective notional amount of the credit risk mitigant to reflect any maturity mismatch between the hedged exposure and the credit risk mitigant.

(2) A maturity mismatch occurs when the residual maturity of a credit risk mitigant is less than that of the hedged exposure(s).

(3) The residual maturity of a hedged exposure is the longest possible remaining time before the obligated party of the hedged exposure is scheduled to fulfil its obligation on the hedged exposure. If a credit risk mitigant has embedded options that may reduce its term, the Enterprise (protection purchaser) must use the shortest possible residual maturity for the credit risk mitigant. If a call is at the discretion of the protection provider, the residual maturity of the credit risk mitigant is at the first call date. If the call is at the discretion of the Enterprise (protection purchaser), but the terms of the arrangement at origination of the credit risk mitigant contain a positive incentive for the Enterprise to call the transaction before contractual maturity, the remaining time to the first call date is the residual maturity of the credit risk mitigant.

(4) A credit risk mitigant with a maturity mismatch may be recognized only if its original maturity is greater than or equal to one year and its residual maturity is greater than three months.

(5) When a maturity mismatch exists, the Enterprise must apply the following adjustment to reduce the effective notional amount of the credit risk mitigant: $Pm = E \times (t - 0.25)/(T - 0.25)$, where:

(i) Pm = effective notional amount of the credit risk mitigant, adjusted for maturity mismatch;

(ii) E = effective notional amount of the credit risk mitigant;

(iii) t = the lesser of T or the residual maturity of the credit risk mitigant, expressed in years; and

(iv) T = the lesser of five or the residual maturity of the hedged exposure, expressed in years.

(e) *Adjustment for credit derivatives without restructuring as a credit event.* If an Enterprise recognizes an eligible credit derivative that does not include as a credit event a restructuring of the hedged exposure involving forgiveness or postponement of principal, interest, or fees that results in a credit loss event (that is, a charge-off, specific provision, or other similar debit to the profit and loss account), the Enterprise must apply the following adjustment to reduce the effective notional amount of the credit derivative: $Pr = Pm \times 0.60$, where:

(1) Pr = effective notional amount of the credit risk mitigant, adjusted for lack of restructuring event (and maturity mismatch, if applicable); and

(2) Pm = effective notional amount of the credit risk mitigant (adjusted for maturity mismatch, if applicable).

(f) *Currency mismatch adjustment.* (1) If an Enterprise recognizes an eligible guarantee or eligible credit derivative that is denominated in a currency different from that in which the hedged exposure is denominated, the Enterprise must apply the following formula to the effective notional amount of the guarantee or credit derivative: $P_C = Pr \times (1 - H_{FX})$, where:

(i) P_C = effective notional amount of the credit risk mitigant, adjusted for currency mismatch (and maturity mismatch and lack of restructuring event, if applicable);

(ii) Pr = effective notional amount of the credit risk mitigant (adjusted for maturity mismatch and lack of restructuring event, if applicable); and

(iii) H_{FX} = haircut appropriate for the currency mismatch between the credit risk mitigant and the hedged exposure.

(2) An Enterprise must set H_{FX} equal to eight percent unless it qualifies for the use of and uses its own internal estimates of foreign exchange volatility based on a ten-business-day holding period. An Enterprise qualifies for the use of its own internal estimates of foreign exchange volatility if it qualifies for the use of its own-estimates haircuts in § 1240.39(c)(4).

(3) An Enterprise must adjust H_{FX} calculated in paragraph (f)(2) of this section upward if the Enterprise revalues the guarantee or credit derivative less frequently than once every 10 business days using the following square root of time formula:

$$H_{FX} = 8\% \sqrt{\frac{T_M}{10}},$$

where T_M equals the greater of 10 or the number of days between revaluation.

§ 1240.39 Collateralized transactions.

(a) *General.* (1) To recognize the risk-mitigating effects of financial collateral (other than with respect to a retained CRT exposure), an Enterprise may use:

(i) The simple approach in paragraph (b) of this section for any exposure; or

(ii) The collateral haircut approach in paragraph (c) of this section for repo-style transactions, eligible margin loans, collateralized derivative contracts, and single-product netting sets of such transactions.

(2) An Enterprise may use any approach described in this section that is valid for a particular type of exposure or transaction; however, it must use the same approach for similar exposures or transactions.

(b) *The simple approach*—(1) *General requirements.* (i) An Enterprise may recognize the credit risk mitigation benefits of financial collateral that secures any exposure (other than a retained CRT exposure).

(ii) To qualify for the simple approach, the financial collateral must meet the following requirements:

(A) The collateral must be subject to a collateral agreement for at least the life of the exposure;

(B) The collateral must be revalued at least every six months; and

(C) The collateral (other than gold) and the exposure must be denominated in the same currency.

(2) *Risk weight substitution.* (i) An Enterprise may apply a risk weight to the portion of an exposure that is secured by the fair value of financial collateral (that meets the requirements of paragraph (b)(1) of this section) based on the risk weight assigned to the collateral under this subpart D. For repurchase agreements, reverse repurchase agreements, and securities lending and borrowing transactions, the collateral is the instruments, gold, and cash the Enterprise has borrowed, purchased subject to resale, or taken as collateral from the counterparty under the transaction. Except as provided in paragraph (b)(3) of this section, the risk weight assigned to the collateralized portion of the exposure may not be less than 20 percent.

(ii) An Enterprise must apply a risk weight to the unsecured portion of the exposure based on the risk weight applicable to the exposure under this subpart.

(3) *Exceptions to the 20 percent risk-weight floor and other requirements.* Notwithstanding paragraph (b)(2)(i) of this section:

(i) An Enterprise may assign a zero percent risk weight to an exposure to an OTC derivative contract that is marked-to-market on a daily basis and subject to a daily margin maintenance requirement, to the extent the contract is collateralized by cash on deposit.

(ii) An Enterprise may assign a 10 percent risk weight to an exposure to an OTC derivative contract that is marked-to-market daily and subject to a daily margin maintenance requirement, to the extent that the contract is collateralized by an exposure to a sovereign that qualifies for a zero percent risk weight under § 1240.32.

(iii) An Enterprise may assign a zero percent risk weight to the collateralized portion of an exposure where:

(A) The financial collateral is cash on deposit; or

(B) The financial collateral is an exposure to a sovereign that qualifies for a zero percent risk weight under § 1240.32, and the Enterprise has discounted the fair value of the collateral by 20 percent.

(c) *Collateral haircut approach*—(1) *General.* An Enterprise may recognize the credit risk mitigation benefits of financial collateral that secures an eligible margin loan, repo-style transaction, collateralized derivative contract, or single-product netting set of such transactions, by using the collateral haircut approach in this section. An Enterprise may use the standard supervisory haircuts in paragraph (c)(3) of this section or, with prior written notice to FHFA, its own estimates of haircuts according to paragraph (c)(4) of this section.

(2) *Exposure amount equation.* An Enterprise must determine the exposure amount for an eligible margin loan, repo-style transaction, collateralized derivative contract, or a single-product netting set of such transactions by setting the exposure amount equal to $\max\{0, [(\Sigma E - \Sigma C) + \Sigma(Es \times Hs) + \Sigma(Efx \times Hfx)]\}$, where:

(i)(A) For eligible margin loans and repo-style transactions and netting sets thereof, ΣE equals the value of the exposure (the sum of the current fair values of all instruments, gold, and cash the Enterprise has lent, sold subject to repurchase, or posted as collateral to the counterparty under the transaction (or netting set)); and

(B) For collateralized derivative contracts and netting sets thereof, ΣE equals the exposure amount of the OTC derivative contract (or netting set) calculated under § 1240.36(b)(1) or (2).

(ii) ΣC equals the value of the collateral (the sum of the current fair

values of all instruments, gold and cash the Enterprise has borrowed, purchased subject to resale, or taken as collateral from the counterparty under the transaction (or netting set));

(iii) Es equals the absolute value of the net position in a given instrument or in gold (where the net position in the instrument or gold equals the sum of the current fair values of the instrument or gold the Enterprise has lent, sold subject to repurchase, or posted as collateral to the counterparty minus the sum of the current fair values of that same instrument or gold the Enterprise has borrowed, purchased subject to resale, or taken as collateral from the counterparty);

(iv) Hs equals the market price volatility haircut appropriate to the instrument or gold referenced in Es;

(v) Efx equals the absolute value of the net position of instruments and cash in a currency that is different from the settlement currency (where the net position in a given currency equals the sum of the current fair values of any instruments or cash in the currency the Enterprise has lent, sold subject to repurchase, or posted as collateral to the counterparty minus the sum of the current fair values of any instruments or cash in the currency the Enterprise has borrowed, purchased subject to resale, or taken as collateral from the counterparty); and

(vi) Hfx equals the haircut appropriate to the mismatch between the currency referenced in Efx and the settlement currency.

(3) *Standard supervisory haircuts.* (i) An Enterprise must use the haircuts for market price volatility (Hs) provided in table 1 to this paragraph (c)(3)(i), as adjusted in certain circumstances in accordance with the requirements of paragraphs (c)(3)(iii) and (iv) of this section.

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TABLE 1 TO PARAGRAPH (c)(3)(i)—STANDARD SUPERVISORY MARKET PRICE VOLATILITY HAIRCUTS[1]

Residual maturity	Haircut (in percent) assigned based on: Sovereign issuers risk weight under §1240.32 (in percent)[2]			Non-sovereign issuers risk weight under §1240.32 (in percent)			Investment grade securitization exposures (in percent)
	Zero	20 or 50	100	20	50	100	
Less than or equal to 1 year	0.5	1.0	15.0	1.0	2.0	4.0	4.0
Greater than 1 year and less than or equal to 5 years	2.0	3.0	15.0	4.0	6.0	8.0	12.0
Greater than 5 years	4.0	6.0	15.0	8.0	12.0	16.0	24.0
Main index equities (including convertible bonds) and Gold				15.0			
Other publicly traded equities (including convertible bonds)				25.0			
Mutual funds				Highest haircut applicable to any security in which the fund can invest.			
Cash collateral held				Zero.			
Other exposure types				25.0			

[1] The market price volatility haircuts in Table 1 to §1240.39 are based on a 10 business-day holding period.

[2] Includes a foreign PSE that receives a zero percent risk weight.

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(ii) For currency mismatches, an Enterprise must use a haircut for foreign exchange rate volatility (Hfx) of 8.0 percent, as adjusted in certain circumstances under paragraphs (c)(3)(iii) and (iv) of this section.

(iii) For repo-style transactions and client-facing derivative transactions, an Enterprise may multiply the standard supervisory haircuts provided in paragraphs (c)(3)(i) and (ii) of this section by the square root of ½ (which equals 0.707107). For client-facing derivative transactions, if a larger scaling factor is applied under § 1240.36(f), the same factor must be used to adjust the supervisory haircuts.

(iv) If the number of trades in a netting set exceeds 5,000 at any time during a quarter, an Enterprise must

adjust the supervisory haircuts provided in paragraphs (c)(3)(i) and (ii) of this section upward on the basis of a holding period of twenty business days for the following quarter except in the calculation of the exposure amount for purposes of § 1240.37. If a netting set contains one or more trades involving illiquid collateral or an OTC derivative that cannot be easily replaced, an Enterprise must adjust the supervisory haircuts upward on the basis of a holding period of twenty business days. If over the two previous quarters more than two margin disputes on a netting set have occurred that lasted more than the holding period, then the Enterprise must adjust the supervisory haircuts upward for that netting set on the basis of a holding period that is at least two times the minimum holding period for that netting set. An Enterprise must adjust the standard supervisory haircuts upward using the following formula:

$$H_A = H_S\sqrt{\frac{T_M}{T_S}},$$

where

(A) T_M equals a holding period of longer than 10 business days for eligible margin loans and derivative contracts other than client-facing derivative transactions or longer than 5 business days for repo-style transactions and client-facing derivative transactions;

(B) H_S equals the standard supervisory haircut; and

(C) T_S equals 10 business days for eligible margin loans and derivative contracts other than client-facing derivative transactions or 5 business days for repo-style transactions and client-facing derivative transactions.

(v) If the instrument an Enterprise has lent, sold subject to repurchase, or posted as collateral does not meet the definition of ''financial collateral,'' the Enterprise must use a 25.0 percent haircut for market price volatility (Hs).

(4) *Own internal estimates for haircuts.* With the prior written notice to FHFA, an Enterprise may calculate haircuts (Hs and Hfx) using its own internal estimates of the volatilities of market prices and foreign exchange rates:

(i) To use its own internal estimates, an Enterprise must satisfy the following minimum standards:

(A) An Enterprise must use a 99th percentile one-tailed confidence interval.

(B) The minimum holding period for a repo-style transaction and client-facing derivative transaction is five business days and for an eligible margin loan and a derivative contract other than a client-facing derivative transaction is ten business days except for transactions or netting sets for which paragraph (c)(4)(i)(C) of this section applies. When an Enterprise calculates an own-estimates haircut on a T_N-day holding period, which is different from the minimum holding period for the transaction type, the applicable haircut (H_M) is calculated using the following square root of time formula:

$$H_M = H_N\sqrt{\frac{T_M}{T_N}},$$

where

(*1*) T_M equals 5 for repo-style transactions and client-facing derivative transactions and 10 for eligible margin loans and derivative contracts other than client-facing derivative transactions;

(*2*) T_N equals the holding period used by the Enterprise to derive H_N; and

(*3*) H_N equals the haircut based on the holding period T_N.

(C) If the number of trades in a netting set exceeds 5,000 at any time during a quarter, an Enterprise must calculate the haircut using a minimum holding period of twenty business days for the following quarter except in the calculation of the exposure amount for purposes of § 1240.37. If a netting set contains one or more trades involving illiquid collateral or an OTC derivative that cannot be easily replaced, an Enterprise must calculate the haircut using a minimum holding period of twenty business days. If over the two previous quarters more than two margin disputes on a netting set have occurred that lasted more than the holding period, then the Enterprise must calculate the haircut for transactions in that netting set on the basis of a holding period that is at least two times the minimum holding period for that netting set.

(D) An Enterprise is required to calculate its own internal estimates with inputs calibrated to historical data from a continuous 12-month period that reflects a period of significant financial stress appropriate to the security or category of securities.

(E) An Enterprise must have policies and procedures that describe how it determines the period of significant financial stress used to calculate the Enterprise's own internal estimates for haircuts under this section and must be able to provide empirical support for the period used. The Enterprise must provide prior written notice to FHFA if the Enterprise makes any material changes to these policies and procedures.

(F) Nothing in this section prevents FHFA from requiring an Enterprise to use a different period of significant financial stress in the calculation of own internal estimates for haircuts.

(G) An Enterprise must update its data sets and calculate haircuts no less frequently than quarterly and must also reassess data sets and haircuts whenever market prices change materially.

(ii) With respect to debt securities that are investment grade, an Enterprise may calculate haircuts for categories of securities. For a category of securities, the Enterprise must calculate the haircut on the basis of internal volatility estimates for securities in that category that are representative of the securities in that category that the Enterprise has lent, sold subject to repurchase, posted as collateral, borrowed, purchased subject to resale, or taken as collateral. In determining relevant categories, the Enterprise must at a minimum take into account:

(A) The type of issuer of the security;

(B) The credit quality of the security;

(C) The maturity of the security; and

(D) The interest rate sensitivity of the security.

(iii) With respect to debt securities that are not investment grade and equity securities, an Enterprise must calculate a separate haircut for each individual security.

(iv) Where an exposure or collateral (whether in the form of cash or securities) is denominated in a currency that differs from the settlement currency, the Enterprise must calculate a separate currency mismatch haircut for its net position in each mismatched currency based on estimated volatilities of foreign exchange rates between the mismatched currency and the settlement currency.

(v) An Enterprise's own estimates of market price and foreign exchange rate volatilities may not take into account the correlations among securities and foreign exchange rates on either the exposure or collateral side of a transaction (or netting set) or the correlations among securities and foreign exchange rates between the exposure and collateral sides of the transaction (or netting set).

Risk-Weighted Assets for Unsettled Transactions

§ 1240.40 Unsettled transactions.

(a) *Definitions.* For purposes of this section:

(1) Delivery-versus-payment (DvP) transaction means a securities or commodities transaction in which the buyer is obligated to make payment only if the seller has made delivery of the securities or commodities and the seller is obligated to deliver the securities or

commodities only if the buyer has made payment.

(2) Payment-versus-payment (PvP) transaction means a foreign exchange transaction in which each counterparty is obligated to make a final transfer of one or more currencies only if the other counterparty has made a final transfer of one or more currencies.

(3) A transaction has a normal settlement period if the contractual settlement period for the transaction is equal to or less than the market standard for the instrument underlying the transaction and equal to or less than five business days.

(4) Positive current exposure of an Enterprise for a transaction is the difference between the transaction value at the agreed settlement price and the current market price of the transaction, if the difference results in a credit exposure of the Enterprise to the counterparty.

(b) *Scope.* This section applies to all transactions involving securities, foreign exchange instruments, and commodities that have a risk of delayed settlement or delivery. This section does not apply to:

(1) Cleared transactions that are marked-to-market daily and subject to daily receipt and payment of variation margin;

(2) Repo-style transactions, including unsettled repo-style transactions;

(3) One-way cash payments on OTC derivative contracts; or

(4) Transactions with a contractual settlement period that is longer than the normal settlement period (which are treated as OTC derivative contracts as provided in § 1240.36).

(c) *System-wide failures.* In the case of a system-wide failure of a settlement, clearing system or central counterparty, FHFA may waive risk-based capital requirements for unsettled and failed transactions until the situation is rectified.

(d) *Delivery-versus-payment (DvP) and payment-versus-payment (PvP) transactions.* An Enterprise must hold risk-based capital against any DvP or PvP transaction with a normal settlement period if the Enterprise's counterparty has not made delivery or payment within five business days after the settlement date. The Enterprise must determine its risk-weighted asset amount for such a transaction by multiplying the positive current exposure of the transaction for the Enterprise by the appropriate risk weight in table 1 to this paragraph (d).

TABLE 1 TO PARAGRAPH (d)—RISK WEIGHTS FOR UNSETTLED DVP AND PVP TRANSACTIONS

Number of business days after contractual settlement date	Risk weight to be applied to positive current exposure (in percent)
From 5 to 15	100.0
From 16 to 30	625.0
From 31 to 45	937.5
46 or more	1,250.0

(e) *Non-DvP/non-PvP (non-delivery-versus-payment/non-payment-versus-payment) transactions.* (1) An Enterprise must hold risk-based capital against any non-DvP/non-PvP transaction with a normal settlement period if the Enterprise has delivered cash, securities, commodities, or currencies to its counterparty but has not received its corresponding deliverables by the end of the same business day. The Enterprise must continue to hold risk-based capital against the transaction until the Enterprise has received its corresponding deliverables.

(2) From the business day after the Enterprise has made its delivery until five business days after the counterparty delivery is due, the Enterprise must calculate the risk-weighted asset amount for the transaction by treating the current fair value of the deliverables owed to the Enterprise as an exposure to the counterparty and using the applicable counterparty risk weight under this subpart D.

(3) If the Enterprise has not received its deliverables by the fifth business day after counterparty delivery was due, the Enterprise must assign a 1,250 percent risk weight to the current fair value of the deliverables owed to the Enterprise.

(f) *Total risk-weighted assets for unsettled transactions.* Total risk-weighted assets for unsettled transactions is the sum of the risk-weighted asset amounts of all DvP, PvP, and non-DvP/non-PvP transactions.

Risk-Weighted Assets for CRT and Other Securitization Exposures

§ 1240.41 Operational requirements for CRT and other securitization exposures.

(a) *Operational criteria for traditional securitizations.* An Enterprise that transfers exposures it has purchased or otherwise acquired to a securitization SPE or other third party in connection with a traditional securitization may exclude the exposures from the calculation of its risk-weighted assets only if each condition in this section is satisfied. An Enterprise that meets these conditions must hold risk-based capital against any credit risk it retains in connection with the securitization. An Enterprise that fails to meet these conditions must hold risk-based capital against the transferred exposures as if they had not been securitized and must deduct from common equity tier 1 capital any after-tax gain-on-sale resulting from the transaction. The conditions are:

(1) The exposures are not reported on the Enterprise's consolidated balance sheet under GAAP;

(2) The Enterprise has transferred to one or more third parties credit risk associated with the underlying exposures;

(3) Any clean-up calls relating to the securitization are eligible clean-up calls; and

(4) The securitization does not:

(i) Include one or more underlying exposures in which the borrower is permitted to vary the drawn amount within an agreed limit under a line of credit; and

(ii) Contain an early amortization provision.

(b) *Operational criteria for synthetic securitizations.* For synthetic securitizations, an Enterprise may recognize for risk-based capital purposes the use of a credit risk mitigant to hedge underlying exposures only if each condition in this paragraph (b) is satisfied. An Enterprise that meets these conditions must hold risk-based capital against any credit risk of the exposures it retains in connection with the synthetic securitization. An Enterprise that fails to meet these conditions or chooses not to recognize the credit risk mitigant for purposes of this section must instead hold risk-based capital against the underlying exposures as if they had not been synthetically securitized. The conditions are:

(1) The credit risk mitigant is:

(i) Financial collateral;

(ii) A guarantee that meets all criteria as set forth in the definition of ''eligible guarantee'' in § 1240.2, except for the criteria in paragraph (3) of that definition; or

(iii) A credit derivative that meets all criteria as set forth in the definition of ''eligible credit derivative'' in § 1240.2, except for the criteria in paragraph (3) of the definition of ''eligible guarantee'' in § 1240.2.

(2) The Enterprise transfers credit risk associated with the underlying exposures to one or more third parties, and the terms and conditions in the credit risk mitigants employed do not include provisions that:

(i) Allow for the termination of the credit protection due to deterioration in the credit quality of the underlying exposures;

(ii) Require the Enterprise to alter or replace the underlying exposures to improve the credit quality of the underlying exposures;

(iii) Increase the Enterprise's cost of credit protection in response to deterioration in the credit quality of the underlying exposures;

(iv) Increase the yield payable to parties other than the Enterprise in response to a deterioration in the credit quality of the underlying exposures; or

(v) Provide for increases in a retained first loss position or credit enhancement provided by the Enterprise after the inception of the securitization;

(3) The Enterprise obtains a well-reasoned opinion from legal counsel that confirms the enforceability of the credit risk mitigant in all relevant jurisdictions; and

(4) Any clean-up calls relating to the securitization are eligible clean-up calls.

(c) *Operational criteria for credit risk transfers.* For credit risk transfers, an Enterprise may recognize for risk-based capital purposes, the use of a credit risk transfer only if each condition in this paragraph (c) is satisfied (or, for a credit risk transfer entered into before February 16, 2021, only if each condition in paragraphs (c)(2) and (3) of this section is satisfied). An Enterprise that meets these conditions must hold risk-based capital against any credit risk of the exposures it retains in connection with the credit risk transfer. An Enterprise that fails to meet these conditions or chooses not to recognize the credit risk transfer for purposes of this section must instead hold risk-based capital against the underlying exposures as if they had not been subject to the credit risk transfer. The conditions are:

(1) The credit risk transfer is any of the following—

(i) An eligible funded synthetic risk transfer;

(ii) An eligible reinsurance risk transfer;

(iii) An eligible single-family lender risk share;

(iv) An eligible multifamily lender risk share; or

(v) An eligible senior-subordinated structure.

(2) The credit risk transfer has been approved by FHFA as effective in transferring the credit risk of one or more mortgage exposures to another party, taking into account any counterparty, recourse, or other risk to the Enterprise and any capital, liquidity, or other requirements applicable to counterparties;

(3) The Enterprise transfers credit risk associated with the underlying exposures to one or more third parties, and the terms and conditions in the credit risk transfer employed do not include provisions that:

(i) Allow for the termination of the credit risk transfer due to deterioration in the credit quality of the underlying exposures;

(ii) Require the Enterprise to alter or replace the underlying exposures to improve the credit quality of the underlying exposures;

(iii) Increase the Enterprise's cost of credit protection in response to deterioration in the credit quality of the underlying exposures;

(iv) Increase the yield payable to parties other than the Enterprise in response to a deterioration in the credit quality of the underlying exposures; or

(v) Provide for increases in a retained first loss position or credit enhancement provided by the Enterprise after the inception of the credit risk transfer;

(4) The Enterprise obtains a well-reasoned opinion from legal counsel that confirms the enforceability of the credit risk transfer in all relevant jurisdictions;

(5) Any clean-up calls relating to the credit risk transfer are eligible clean-up calls; and

(6) The Enterprise includes in its periodic disclosures under the Federal securities laws, or in other appropriate public disclosures, a reasonably detailed description of—

(i) The material recourse or other risks that might reduce the effectiveness of the credit risk transfer in transferring the credit risk on the underlying exposures to third parties; and

(ii) Each condition under paragraph (a) of this section (governing traditional securitizations) or paragraph (b) of this section (governing synthetic securitizations) that is not satisfied by the credit risk transfer and the reasons that each such condition is not satisfied.

(d) *Due diligence requirements for securitization exposures.* (1) Except for exposures that are deducted from common equity tier 1 capital and exposures subject to § 1240.42(h), if an Enterprise is unable to demonstrate to the satisfaction of FHFA a comprehensive understanding of the features of a securitization exposure that would materially affect the performance of the exposure, the Enterprise must assign the securitization exposure a risk weight of 1,250 percent. The Enterprise's analysis must be commensurate with the complexity of the securitization exposure and the materiality of the exposure in relation to its capital.

(2) An Enterprise must demonstrate its comprehensive understanding of a securitization exposure under paragraph (d)(1) of this section, for each securitization exposure by:

(i) Conducting an analysis of the risk characteristics of a securitization exposure prior to acquiring the exposure, and documenting such analysis within three business days after acquiring the exposure, considering:

(A) Structural features of the securitization that would materially impact the performance of the exposure, for example, the contractual cash flow waterfall, waterfall-related triggers, credit enhancements, liquidity enhancements, fair value triggers, the performance of organizations that service the exposure, and deal-specific definitions of default;

(B) Relevant information regarding the performance of the underlying credit exposure(s), for example, the percentage of loans 30, 60, and 90 days past due; default rates; prepayment rates; loans in foreclosure; property types; occupancy; average credit score or other measures of creditworthiness; average loan-to-value ratio; and industry and geographic diversification data on the underlying exposure(s);

(C) Relevant market data of the securitization, for example, bid-ask spread, most recent sales price and historic price volatility, trading volume, implied market rating, and size, depth and concentration level of the market for the securitization; and

(D) For resecuritization exposures, performance information on the underlying securitization exposures, for example, the issuer name and credit quality, and the characteristics and performance of the exposures underlying the securitization exposures; and

(ii) On an on-going basis (no less frequently than quarterly), evaluating, reviewing, and updating as appropriate the analysis required under paragraph (d)(1) of this section for each securitization exposure.

§ 1240.42 Risk-weighted assets for CRT and other securitization exposures.

(a) *Securitization risk weight approaches.* Except as provided elsewhere in this section or in § 1240.41:

(1) An Enterprise must deduct from common equity tier 1 capital any after-tax gain-on-sale resulting from a securitization and apply a 1,250 percent risk weight to the portion of a CEIO that does not constitute after-tax gain-on-sale.

(2) If a securitization exposure does not require deduction under paragraph (a)(1) of this section, an Enterprise may assign a risk weight to the securitization exposure either using the simplified supervisory formula approach (SSFA) in accordance with § 1240.43(a) through (d) for a securitization exposure that is not a retained CRT exposure or an acquired CRT exposure or using the credit risk transfer approach (CRTA) in accordance with § 1240.44 for a retained CRT exposure, and in either case, subject to the limitation under paragraph (e) of this section.

(3) If a securitization exposure does not require deduction under paragraph (a)(1) of this section and the Enterprise cannot, or chooses not to apply the SSFA or the CRTA to the exposure, the Enterprise must assign a risk weight to the exposure as described in § 1240.45.

(4) If a securitization exposure is a derivative contract (other than protection provided by an Enterprise in the form of a credit derivative) that has a first priority claim on the cash flows from the underlying exposures (notwithstanding amounts due under interest rate or currency derivative contracts, fees due, or other similar payments), an Enterprise may choose to set the risk-weighted asset amount of the exposure equal to the amount of the exposure as determined in paragraph (c) of this section.

(b) *Total risk-weighted assets for securitization exposures.* An Enterprise's total risk-weighted assets for securitization exposures equals the sum of the risk-weighted asset amount for securitization exposures that the Enterprise risk weights under § 1240.41(d), § 1240.42(a)(1), § 1240.43, § 1240.44, or § 1240.45, and paragraphs (e) through (h) of this section, as applicable.

(c) *Exposure amount of a CRT or other securitization exposure*—(1) *On-balance sheet securitization exposures.* Except as provided for retained CRT exposures in § 1240.44(f), the exposure amount of an on-balance sheet securitization exposure (excluding a repo-style transaction, eligible margin loan, OTC derivative contract, or cleared transaction) is equal to the carrying value of the exposure.

(2) *Off-balance sheet securitization exposures.* Except as provided in paragraph (h) of this section or as provided for retained CRT exposures in § 1240.44(f), the exposure amount of an off-balance sheet securitization exposure that is not a repo-style transaction, eligible margin loan, cleared transaction (other than a credit derivative), or an OTC derivative contract (other than a credit derivative) is the notional amount of the exposure.

(3) *Repo-style transactions, eligible margin loans, and derivative contracts.* The exposure amount of a securitization exposure that is a repo-style transaction, eligible margin loan, or derivative contract (other than a credit derivative) is the exposure amount of the transaction as calculated under § 1240.36 or § 1240.39, as applicable.

(d) *Overlapping exposures.* If an Enterprise has multiple securitization exposures that provide duplicative coverage to the underlying exposures of a securitization, the Enterprise is not required to hold duplicative risk-based capital against the overlapping position. Instead, the Enterprise may apply to the overlapping position the applicable risk-based capital treatment that results in the highest risk-based capital requirement.

(e) *Implicit support.* If an Enterprise provides support to a securitization (including a CRT) in excess of the Enterprise's contractual obligation to provide credit support to the securitization (implicit support):

(1) The Enterprise must include in risk-weighted assets all of the underlying exposures associated with the securitization as if the exposures had not been securitized and must deduct from common equity tier 1 capital any after-tax gain-on-sale resulting from the securitization; and

(2) The Enterprise must disclose publicly:

(i) That it has provided implicit support to the securitization; and

(ii) The risk-based capital impact to the Enterprise of providing such implicit support.

(f) *Interest-only mortgage-backed securities.* Regardless of any other provisions in this subpart, the risk weight for a non-credit-enhancing interest-only mortgage-backed security may not be less than 100 percent.

(g) *Nth-to-default credit derivatives*—(1) *Protection provider.* An Enterprise may assign a risk weight using the SSFA in § 1240.43 to an nth-to-default credit derivative in accordance with this paragraph (g). An Enterprise must determine its exposure in the nth-to-default credit derivative as the largest notional amount of all the underlying exposures.

(2) A*ttachment and detachment points.* For purposes of determining the risk weight for an nth-to-default credit derivative using the SSFA, the Enterprise must calculate the attachment point and detachment point of its exposure as follows:

(i) The attachment point (parameter *A*) is the ratio of the sum of the notional amounts of all underlying exposures that are subordinated to the Enterprise's exposure to the total notional amount of all underlying exposures. The ratio is expressed as a decimal value between zero and one. In the case of a first-to-default credit derivative, there are no underlying exposures that are subordinated to the Enterprise's exposure. In the case of a second-or-subsequent-to-default credit derivative, the smallest (n-1) notional amounts of the underlying exposure(s) are subordinated to the Enterprise's exposure.

(ii) The detachment point (parameter *D*) equals the sum of parameter *A* plus the ratio of the notional amount of the Enterprise's exposure in the nth-to-default credit derivative to the total notional amount of all underlying exposures. The ratio is expressed as a decimal value between zero and one.

(3) *Risk weights.* An Enterprise that does not use the SSFA to determine a risk weight for its nth-to-default credit derivative must assign a risk weight of 1,250 percent to the exposure.

(4) *Protection purchaser*—(i) *First-to-default credit derivatives.* An Enterprise that obtains credit protection on a group of underlying exposures through a first-to-default credit derivative that meets the rules of recognition of § 1240.38(b) must determine its risk-based capital requirement for the underlying exposures as if the Enterprise synthetically securitized the underlying exposure with the smallest risk-weighted asset amount and had obtained no credit risk mitigant on the other underlying exposures. An Enterprise must calculate a risk-based capital requirement for counterparty credit risk according to § 1240.36 for a first-to-default credit derivative that does not meet the rules of recognition of § 1240.38(b).

(ii) *Second-or-subsequent-to-default credit derivatives.* (A) An Enterprise that obtains credit protection on a group of underlying exposures through a nth-to-default credit derivative that meets the rules of recognition of § 1240.38(b) (other than a first-to-default credit derivative) may recognize the credit risk mitigation benefits of the derivative only if:

(*1*) The Enterprise also has obtained credit protection on the same underlying exposures in the form of first-through-(n-1)-to-default credit derivatives; or

(*2*) If n-1 of the underlying exposures have already defaulted.

(B) If an Enterprise satisfies the requirements of paragraph (i)(4)(ii)(A) of this section, the Enterprise must determine its risk-based capital requirement for the underlying exposures as if the Enterprise had only synthetically securitized the underlying exposure with the nth smallest risk-weighted asset amount and had obtained no credit risk mitigant on the other underlying exposures.

(C) An Enterprise must calculate a risk-based capital requirement for counterparty credit risk according to § 1240.36 for a nth-to-default credit derivative that does not meet the rules of recognition of § 1240.38(b).

(h) *Guarantees and credit derivatives other than nth-to-default credit derivatives*—(1) *Protection provider.* For a guarantee or credit derivative (other than an nth-to-default credit derivative) provided by an Enterprise that covers the full amount or a pro rata share of a securitization exposure's principal and interest, the Enterprise must risk weight the guarantee or credit derivative as if it holds the portion of the reference exposure covered by the guarantee or credit derivative.

(2) *Protection purchaser.* (i) An Enterprise that purchases a guarantee or OTC credit derivative (other than an nth-to-default credit derivative) that is recognized under § 1240.46 as a credit risk mitigant (including via collateral recognized under § 1240.39) is not required to compute a separate counterparty credit risk capital requirement under § 1240.31, in accordance with § 1240.36(c).

(ii) If an Enterprise cannot, or chooses not to, recognize a purchased credit derivative as a credit risk mitigant under § 1240.46, the Enterprise must determine the exposure amount of the credit derivative under § 1240.36.

(A) If the Enterprise purchases credit protection from a counterparty that is not a securitization SPE, the Enterprise must determine the risk weight for the exposure according to this subpart D.

(B) If the Enterprise purchases the credit protection from a counterparty that is a securitization SPE, the Enterprise must determine the risk weight for the exposure according to § 1240.42, including § 1240.42(a)(4) for a credit derivative that has a first priority claim on the cash flows from the underlying exposures of the securitization SPE (notwithstanding amounts due under interest rate or currency derivative contracts, fees due, or other similar payments).

§ 1240.43 Simplified supervisory formula approach (SSFA).

(a) *General requirements for the SSFA.* To use the SSFA to determine the risk weight for a securitization exposure, an Enterprise must have data that enables it to assign accurately the parameters described in paragraph (b) of this section. Data used to assign the parameters described in paragraph (b) of this section must be the most currently available data; if the contracts governing the underlying exposures of the securitization require payments on a monthly or quarterly basis, the data used to assign the parameters described in paragraph (b) of this section must be no more than 91 calendar days old. An Enterprise that does not have the appropriate data to assign the parameters described in paragraph (b) of this section must assign a risk weight of 1,250 percent to the exposure.

(b) *SSFA parameters.* To calculate the risk weight for a securitization exposure using the SSFA, an Enterprise must have accurate information on the following five inputs to the SSFA calculation:

(1) K_G is the weighted-average (with unpaid principal used as the weight for each exposure) adjusted total capital requirement of the underlying exposures calculated using this subpart. K_G is expressed as a decimal value between zero and one (that is, an average risk weight of 100 percent represents a value of KG equal to 0.08).

(2) Parameter *W* is expressed as a decimal value between zero and one. Parameter *W* is the ratio of the sum of the dollar amounts of any underlying exposures of the securitization that meet any of the criteria as set forth in paragraphs (b)(2)(i) through (vi) of this section to the balance, measured in dollars, of underlying exposures:

(i) Ninety days or more past due;

(ii) Subject to a bankruptcy or insolvency proceeding;

(iii) In the process of foreclosure;

(iv) Held as real estate owned;

(v) Has contractually deferred payments for 90 days or more, other than principal or interest payments deferred on:

(A) Federally-guaranteed student loans, in accordance with the terms of those guarantee programs; or

(B) Consumer loans, including non-federally-guaranteed student loans, provided that such payments are deferred pursuant to provisions included in the contract at the time funds are disbursed that provide for period(s) of deferral that are not initiated based on changes in the creditworthiness of the borrower; or

(vi) Is in default.

(3) Parameter *A* is the attachment point for the exposure, which represents the threshold at which credit losses will first be allocated to the exposure. Except as provided in § 1240.42(g) for nth-to-default credit derivatives, parameter *A* equals the ratio of the current dollar amount of underlying exposures that are subordinated to the exposure of the Enterprise to the current dollar amount of underlying exposures. Any reserve account funded by the accumulated cash flows from the underlying exposures that is subordinated to the Enterprise's securitization exposure may be included in the calculation of parameter *A* to the extent that cash is present in the account. Parameter *A* is expressed as a decimal value between zero and one.

(4) Parameter *D* is the detachment point for the exposure, which represents the threshold at which credit losses of principal allocated to the exposure would result in a total loss of principal. Except as provided in § 1240.42(g) for nth-to-default credit derivatives, parameter *D* equals parameter *A* plus the ratio of the current dollar amount of

the securitization exposures that are *pari passu* with the exposure (that is, have equal seniority with respect to credit risk) to the current dollar amount of the underlying exposures. Parameter *D* is expressed as a decimal value between zero and one.

(5) A supervisory calibration parameter, *p,* is equal to 0.5 for securitization exposures that are not resecuritization exposures and equal to 1.5 for resecuritization exposures (except *p* is equal to 0.5 for resecuritization exposures secured by MBS guaranteed by an Enterprise).

(c) Mechanics of the SSFA. K_G and *W* are used to calculate K_A, the augmented value of K_G, which reflects the observed credit quality of the underlying exposures. K_A is defined in paragraph (d) of this section. The values of parameters *A* and *D,* relative to K_A determine the risk weight assigned to a securitization exposure as described in paragraph (d) of this section. The risk weight assigned to a securitization exposure, or portion of a securitization exposure, as appropriate, is the larger of the risk weight determined in accordance with this paragraph (c) or paragraph (d) of this section and a risk weight of 20 percent.

(1) When the detachment point, parameter *D,* for a securitization exposure is less than or equal to K_A, the exposure must be assigned a risk weight of 1,250 percent.

(2) When the attachment point, parameter *A,* for a securitization exposure is greater than or equal to K_A, the Enterprise must calculate the risk weight in accordance with paragraph (d) of this section.

(3) When *A* is less than K_A and *D* is greater than K_A, the risk weight is a weighted-average of 1,250 percent and 1,250 percent times K_{SSFA} calculated in accordance with paragraph (d) of this section. For the purpose of this weighted-average calculation:

(i) The weight assigned to 1,250 percent equals

$$\frac{K_A - A}{D - A}.$$

(ii) The weight assigned to 1,250 percent times K_{SSFA} equals

$$\frac{D - K_A}{D - A}.$$

(iii) The risk weight will be set equal to:

$$RW = \left[\left(\frac{K_A - A}{D - A}\right) * 1{,}250\ percent\right] + \left[\left(\frac{D - K_A}{D - A}\right) * 1{,}250\ percent * K_{SSFA}\right]$$

(d) *SSFA equation.* (1) The Enterprise must define the following parameters:

$$K_A = (1 - W) * K_G + (0.5 * W)$$

$$a = -\frac{1}{\rho * K_A}$$

$$u = D - K_A$$

$$l = \max(A - K_A, 0)$$

e = 2.71828, the base of the natural logarithms.

(2) Then the Enterprise must calculate K_{SSFA} according to the following equation:

$$K_{SSFA} = \frac{e^{a*u} - e^{a*l}}{a * (u - l)}$$

(3) The risk weight for the exposure (expressed as a percent) is equal to K_{SSFA} * 1,250.

(e) *Limitations.* Notwithstanding any other provision of this section, an Enterprise must assign a risk weight of not less than 20 percent to a securitization exposure.

§ 1240.44 Credit risk transfer approach (CRTA).

(a) *General requirements for the CRTA.* To use the CRTA to determine the risk weighted assets for a retained CRT exposure, an Enterprise must have data that enables it to assign accurately the parameters described in paragraph (b) of this section. Data used to assign the parameters described in paragraph (b) of this section must be the most currently available data; if the contracts governing the underlying exposures of the credit risk transfer require payments on a monthly or quarterly basis, the data used to assign the parameters described in paragraph (b) of this section must be no more than 91 calendar days old. An Enterprise that does not have the appropriate data to assign the parameters described in paragraph (b) of this section must assign a risk weight of 1,250 percent to the retained CRT exposure.

(b) *CRTA parameters.* To calculate the risk weighted assets for a retained CRT exposure, an Enterprise must have accurate information on the following ten inputs to the CRTA calculation.

(1) Parameter *A* is the attachment point for the exposure, which represents the threshold at which credit losses will first be allocated to the exposure. Parameter *A* equals the ratio of the current dollar amount of underlying exposures that are subordinated to the exposure of the Enterprise to the current dollar amount of underlying exposures. Any reserve account funded by the accumulated cash flows from the underlying exposures that is subordinated to the Enterprise's exposure may be included in the calculation of parameter *A* to the extent that cash is present in the account. Parameter *A* is expressed as a value between 0 and 100 percent.

(2) Parameter $AggUPB_{\$}$ is the aggregate unpaid principal balance of the underlying mortgage exposures.

(3) Parameter $CM_{\%}$ is the percentage of a tranche sold in the capital markets. $CM_{\%}$ is expressed as a value between 0 and 100 percent.

(4) Parameter $Collat_{\%RIF}$ is the amount of financial collateral posted by a counterparty under a loss sharing contract expressed as a percentage of the risk in force. For multifamily lender loss sharing transactions where an Enterprise has the contractual right to receive future lender guarantee-fee revenue, the Enterprise may include up to 12 months of estimated lender retained servicing fees in excess of servicing costs on the multifamily mortgage exposures subject to the loss sharing contract. $Collat_{\%RIF}$ is expressed as a value between 0 and 100 percent.

(5) Parameter *D* is the detachment point for the exposure, which represents the threshold at which credit losses of principal allocated to the exposure would result in a total loss of principal. Parameter *D* equals parameter *A* plus the ratio of the current dollar amount of the exposures that are *pari passu* with the exposure (that is, have equal seniority with respect to credit risk) to the current dollar amount of the underlying exposures. Parameter *D* is expressed as a value between 0 and 100 percent.

(6) Parameter $EL_{\$}$ is the remaining lifetime net expected credit risk losses of the underlying mortgage exposures. $EL_{\$}$ must be calculated internally by an Enterprise. If the contractual terms of the CRT do not provide for the transfer of the counterparty credit risk associated with any loan-level credit

enhancement or other loss sharing on the underlying mortgage exposures, then the Enterprise must calculate $EL_{\$}$ assuming no counterparty haircuts. Parameter $EL_{\$}$ is expressed in dollars.

(7) Parameter *HC* is the haircut for the counterparty in contractual loss sharing transactions.

(i) For a CRT with respect to single-family mortgage exposures, the counterparty haircut is set forth in table 12 to paragraph (e)(3)(ii) in § 1240.33, determined as if the counterparty to the CRT were a counterparty to loan-level credit enhancement (as defined in § 1240.33(a)) and considering the counterparty rating and mortgage concentration risk of the counterparty to the CRT and the single-family segment and product of the underlying single-family mortgage exposures.

(ii) For a CRT with respect to multifamily mortgage exposures, the counterparty haircut is set forth in table 1 to this paragraph (b)(7)(ii), with counterparty rating and mortgage concentration risk having the meaning given in § 1240.33(a).

TABLE 1 TO PARAGRAPH (b)(7)(ii): HAIRCUTS FOR MULTIFAMILY LOSS SHARING CRTS

Counterparty Rating	Mortgage Concentration Risk: Not High	Mortgage Concentration Risk: High
1	2.1%	3.4%
2	5.3%	8.5%
3	6.0%	9.6%
4	12.7%	19.2%
5	16.2%	22.9%
6	22.5%	28.5%
7	41.2%	45.1%
8	48.2%	48.2%

(8) Parameter $LS_{\%}$ is the percentage of a tranche that is either insured, reinsured, or afforded coverage through lender reimbursement of credit losses of principal. $LS_{\%}$ is expressed as a value between 0 and 100 percent.

(9) Parameter $LTF_{\%}$ is the loss timing factor which accounts for maturity differences between the CRT and the underlying mortgage exposures. Maturity differences arise when the maturity date of the CRT is before the maturity dates of the underlying mortgage exposures. $LTF_{\%}$ is expressed as a value between 0 and 100 percent.

(i) An Enterprise must have the following information to calculate $LTF_{\%}$ for a CRT with respect to multifamily mortgage exposures:

(A) The remaining months to the contractual maturity of the CRT (CRT_{RMM}).

(B) The UPB-weighted-average remaining months to maturity of the underlying multifamily mortgage exposures that have remaining months to maturity greater than CRT_{RMM} (MME_{RMM}). If the underlying multifamily mortgage exposures all have maturity dates less than or equal to CRT_{RMM}, MME_{RMM} should equal CRT_{RMM}.

(C) The sum of UPB on the underlying multifamily mortgage exposures that have remaining loan terms less than or equal to CRT_{RMM} expressed as a percent of total UPB on the underlying multifamily mortgage exposures (*LTFUPB%*).

(D) An Enterprise must use the following method to calculate LTF% for multifamily CRTs:

$$LTF_{\%} = (LTFUPB_{\%}) * 100\% + 50\% * (1 - LTFUPB_{\%}) \frac{CRT_{RMM}}{MME_{RMM}}$$

(ii) An Enterprise must have the following information to calculate *LTF%* for a newly issued CRT with respect to single-family mortgage exposures:

(A) The original closing date (or effective date) of the CRT and the maturity date on the CRT.

(B) UPB share of single-family mortgage exposures that have original amortization terms of less than or equal to 189 months (*CRTF15%*).

(C) UPB share of single-family mortgage exposures that have original amortization terms greater than 189 months and OLTVs of less than or equal to 80 percent (*CRT80NotF15%*).

(D) The duration of seasoning.

(E) An Enterprise must use the following method to calculate $LTF_{\%}$ for single-family CRTs: Calculate CRT months to maturity (*CRTMthstoMaturity*) using one of the following methods:

(*1*) For single-family CRTs with reimbursement based upon occurrence or resolution of delinquency, *CRTMthstoMaturity* is the difference between the CRT's maturity date and original closing date, except for the following:

(*i*) If the coverage based upon delinquency is between one and three months, add 24 months to the difference between the CRT's maturity date and original closing date; and

(*ii*) If the coverage based upon delinquency is between four and six months, add 18 months to the difference between the CRT's maturity date and original closing date.

(*2*) For all other single-family CRTs, *CRTMthstoMaturity* is the difference between the CRT's maturity date and original closing date.

(*i*) If *CRTMthstoMaturity* is a multiple of 12, then an Enterprise must use the first column of Table 2 to paragraph (b)(9)(ii)(E)(*2*)(*iii*) of this section to identify the row matching *CRTMthstoMaturity* and take a weighted average of the three loss timing factors in columns 2, 3, and 4 as follows:

$LTF_{\%}$ = (*CRTLT*15 * $CRTLT15_{\%}$) + (*CRTLT*80*Not*15 * $CRTLT80NotF15_{\%}$) + (*CRTLTGT*80*Not*15 * (1 − $CRT80NotF15_{\%}$ − $CRTF15_{\%}$))

(*ii*) If *CRTMthstoMaturity* is not a multiple of 12, an Enterprise must use the first column of Table 2 to paragraph (b)(9)(ii)(E)(*2*)(*iii*) of this section to identify the two rows that are closest to *CRTMthstoMaturity* and take a weighted average between the two rows of loss timing factors using linear interpolation, where the weights reflect *CRTMthstoMaturity*.

(*iii*) For seasoned single-family CRTs, the *LTF%* is calculated:

$$LTF_{\%} = \left(\frac{CRTLT_M - CRTLT_s}{100\% - CRTLT_s}\right)$$

where:

$CRTLT_M$ is the loss timing factor calculated under (ii) of this subsection.

$CRTLT_S$ is the loss timing factor calculated under (ii) of this subsection replacing *CRTMthstoMaturity* with the duration of seasoning.

CRTMthstoMaturity is calculated as per (E) of this section.

*CRTLT*15 is the CRT loss timing factor for pool groups backed by single-family mortgage exposures with original amortization terms <= 189 months.

*CRTLT*80*Not*15: is the CRT loss timing factor for pool groups backed by single-family mortgage exposures with original amortization terms > 189 months and OLTVs <=80 percent.

*CRTLTGT*80*Not*15 is the CRT loss timing factor for pool groups backed by single-family mortgage exposures with original amortization terms > 189 months and OLTVs > 80 percent.

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TABLE 2 TO PARAGRAPH (b)(9)(ii)(E)(*2*)(*iii*): SINGLE-FAMILY CRT LOSS TIMING FACTORS

CRTMthstoMaturity (#1)	*CRTLT*15 (#2)	*CRTLT*80*Not*15 (#3)	*CRTLTGT*80*Not*15 (#4)
0	0%	0%	0%
12	1%	0%	0%
24	6%	3%	2%
36	21%	13%	11%
48	44%	31%	26%
60	66%	49%	43%
72	82%	65%	58%
84	90%	74%	68%
96	94%	80%	76%
108	96%	85%	81%
120	98%	88%	86%
132	99%	91%	89%
144	99%	93%	92%
156	100%	94%	94%
168	100%	96%	95%
180	100%	96%	96%
192	100%	97%	97%
204	100%	98%	98%
216	100%	98%	98%
228	100%	98%	98%
240	100%	99%	99%
252	100%	99%	99%
264	100%	99%	99%
276	100%	99%	99%
288	100%	99%	99%
300	100%	100%	100%
312	100%	100%	100%
324	100%	100%	100%
336	100%	100%	100%
348	100%	100%	100%
360	100%	100%	100%

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(10) Parameter $RWA_{\$}$ is the aggregate credit risk-weighted assets associated with the underlying mortgage exposures.

(11) Parameter $CntptyRWA_{\$}$ is the aggregate credit risk-weighted assets due to counterparty haircuts from loan-level credit enhancements. $CntptyRWA_{\$}$ is the difference between:

(i) Parameter $RWA_{\$}$; and

(ii) Aggregate credit risk-weighted assets associated with the underlying mortgage exposures where the counterparty haircuts for loan-level credit enhancements are set to zero.

(c) *Mechanics of the CRTA.* The risk weight assigned to a retained CRT exposure, or portion of a retained CRT exposure, as appropriate, is the larger of *RW*% determined in accordance with paragraph (d) of this section and a risk weight of 10 percent.

(1) When the detachment point, parameter *D,* for a retained CRT exposure is less than or equal to the sum of K_A and *AggEL*%, the exposure must be assigned a risk weight of 1,250 percent.

(2) When the attachment point, parameter *A,* for a retained CRT exposure is greater than or equal to or equal to the sum of K_A and $AggEL_{\%}$, determined in accordance with paragraph (d) of this section, the exposure must be assigned a risk weight of 10 percent.

(3) When parameter *A* is less than or equal to the sum of K_A and $AggEL_{\%}$, and parameter *D* is greater than the sum of K_A and $AggEL_{\%}$, the Enterprise must calculate the risk weight as the sum of:

(i) 1,250 percent multiplied by the ratio of (A) the sum of K_A and $AggEL_{\%}$

minus parameter *A* to (B) the difference between parameter *D* and parameter *A*; and

(ii) 10 percent multiplied by the ratio of (A) parameter *D* minus the sum of K_A and $AggEL_{\%}$ to (B) the difference between parameter *D* and parameter *A*.

(d) *CRTA equations.*

$$RW_{\%,Tranche} = \begin{cases} 1{,}250\% \; if \; K_A + AggEL_{\%} \geq D \\ 10\% \; if \; K_A + AggEL_{\%} \leq A \\ 1250\% * \left(\frac{K_A + AggEL_{\%} - A}{D - A}\right) + 10\% * \left(\frac{D - (K_A + AggEL_{\%})}{D - A}\right) \; if \; A < K_A + AggEL_{\%} < D \end{cases}$$

$$AggEL_{\%} = 100\% * \frac{EL\$}{AggUPB_{\$}}$$

If the contractual terms of the CRT do not provide for the transfer of the counterparty credit risk associated with any loan-level credit enhancement or other loss sharing on the underlying mortgage exposures, then the Enterprise shall calculate K_A as follows:

$$K_A = 100\% * \frac{(RWA_{\$} - CntptyRWA_{\$}) * 8\%}{AggUPB_{\$}}$$

Otherwise the Enterprise shall calculate K_A as follows:

$$K_A = 100\% * \frac{RWA_{\$} * 8\%}{AggUPB_{\$}}$$

(e) *Limitations.* Notwithstanding any other provision of this section, an Enterprise must assign an overall risk weight of not less than 10 percent to a retained CRT exposure.

(f) *Adjusted exposure amount (AEA)*—(1) *In general.* The adjusted exposure amount (AEA) of a retained CRT exposure is equal to:

$$AEA_{\$,Tranche} = EAE_{\%,Tranche} * AggUPB_{\$} * (D - A) \; * \left(1 - \left(\frac{ELS_{\%,Tranche}}{RW_{\%,Tranche} * 8\%}\right)\right)$$

(2) *Inputs*—(i) *Enterprise adjusted exposure.* The adjusted exposure (EAE) of an Enterprise with respect to a retained CRT exposure is as follows:

$EAE_{\%,\text{Tranche}} = 100\% - (CM_{\%,\text{Tranche}} * LTEA_{\%,\text{Tranche,CM}} * OEA_{\%}) - (LS_{\%,\text{Tranche}} * LSEA_{\%,\text{Tranche}} * LTEA_{\%,\text{Tranche,LS}} * OEA_{\%})$,

Where the loss timing effectiveness adjustments (LTEA) for a retained CRT exposure are determined under paragraph (g) of this section, the loss sharing effectiveness adjustment (LSEA) for a retained CRT exposure is determine under paragraph (h) of this section, and the overall effectiveness adjustment (OEA) is determined under paragraph (i) of this section.

(ii) *Expected loss share.* The expected loss share is the share of a tranche that is covered by expected loss (ELS):

$$ELS_{\%,Tranche} = \begin{cases} 100\% \; if \; AggEL_{\%} \geq D \\ 0\% \; if \; AggEL_{\%} \leq A \\ 100\% * \left(\frac{AggEL_{\%} - A}{D - A}\right) \; if \; A < AggEL_{\%} < D. \end{cases}$$

(iii) *Risk weight.* The risk weight of a retained CRT exposure is determined under paragraph (d) of this section.

(g) *Loss timing effectiveness adjustments.* The loss timing effectiveness adjustments (LTEA) for a retained CRT exposure is calculated according to the following calculation:

if $(SLS_{\%,\text{Tranche}} - ELS_{\%,\text{Tranche}}) > 0$ *then* $LTEA_{\%,Tranche,CM}$

$$= \frac{100\% * \max\left(0, \min\left(1, \frac{LTK_{A,CM} + AggEL_{\%} - A}{D - A}\right)\right) - ELS_{\%,Tranche}}{\left(SLS_{\%,Tranche} - ELS_{\%,Tranche}\right)}$$

$LTEA_{\%,Tranche,LS}$

$$= \frac{100\% * \max\left(0, \min\left(1, \frac{LTK_{A,LS} + AggEL_{\%} - A}{D - A}\right)\right) - ELS_{\%,Tranche}}{\left(SLS_{\%,Tranche} - ELS_{\%,Tranche}\right)}$$

Otherwise $LTEA_{\%,Tranche,CM} = 100\%$ *and* $LTEA_{\%,Tranche,LS} = 100\%$

where K_A adjusted for loss timing (LTK_A) is as follows:

$LTK_{A,CM} = \max((K_A + AggEL_{\%}) * LTF_{\%,CM} - AggEL_{\%}, 0\%)$

$LTK_{A,LS} = \max((K_A + AggEL_{\%}) * LTF_{\%,LS} - AggEL_{\%}, 0\%)$

and

$LTF_{\%,CM}$ is $LTF_{\%}$ calculated for the capital markets component of the tranche,

$LTF_{\%,LS}$ is $LTF_{\%}$ calculated for the loss sharing component of the tranche, and the share of the tranche that is covered by expected loss (ELS) and the share of the tranche that is covered by stress loss (SLS) are as follows:

$$ELS_{\%,Tranche} = \begin{cases} 100\% \; if \; AggEL_{\%} \geq D \\ 0\% \; if \; AggEL_{\%} \leq A \\ 100\% * \left(\frac{AggEL_{\%} - A}{D - A}\right) \; if \; A < AggEL_{\%} < D \end{cases}$$

$$SLS_{\%,Tranche} = \begin{cases} 100\% \; if \; K_A + AggEL_{\%} \geq D \\ 0\% \; if \; K_A + AggEL_{\%} \leq A \\ 100\% * \left(\frac{K_A + AggEL_{\%} - A}{D - A}\right) \; if \; A < K_A + AggEL_{\%} < D. \end{cases}$$

(h) *Loss sharing effectiveness adjustment.* The loss sharing effectiveness adjustment (LSEA) for a retained CRT exposure is calculated according to the following calculation:

if $(RW_{\%,Tranche} - ELS_{\%,Tranche} * 1250\%) > 0$ *then*

$$LSEA_{\%,Tranche} = max\left(\left(1 - HC * \frac{\left(UnCollatUL_{\%,Tranche} * 1250\% + SRIF_{\%,Tranche} * 10\%\right)}{\left(RW_{\%,Tranche} - ELS_{\%,Tranche} * 1250\%\right)}\right), 0\%\right)$$

Otherwise

$LSEA_{\%,Tranche} = 100\%$

where

$UnCollatUL_{\%,Tranche} = max(0\%, SLS_{\%,Tranche} - max(Collat_{\%RIF,Tranche}, ELS_{\%,Tranche}))$

$SRIF_{\%,Tranche} = 100\% - max(SLS_{\%,Tranche}, Collat_{\%RIF,Tranche})$

and the share of the tranche that is covered by expected loss (ELS) and the share of the tranche that is covered by stress loss (SLS) are as follows:

$$ELS_{\%,Tranche} = \begin{cases} 100\% \; if \; AggEL_{\%} \geq D \\ 0\% \; if \; AggEL_{\%} \leq A \\ 100\% * \left(\frac{AggEL_{\%} - A}{D - A}\right) \; if \; A < AggEL_{\%} < D \end{cases}$$

$$SLS_{\%,Tranche} = \begin{cases} 100\% \; if \; K_A + AggEL_{\%} \geq D \\ 0\% \; if \; K_A + AggEL_{\%} \leq A \\ 100\% * \left(\frac{K_A + AggEL_{\%} - A}{D - A}\right) \; if \; A < K_A + AggEL_{\%} < D. \end{cases}$$

(i) *Overall effectiveness adjustment.* The overall effectiveness adjustment (OEA) for a retained CRT exposure is calculated according to the following calculation:

$$OEA_{\%} = \begin{cases} 100\% \; if \; K_A \leq 1.6\% \\ 100\% * (1.06667 - 4.16667 * K_A) \; if \; 1.6\% < K_A < 4\% \\ 90\% \; if \; K_A \geq 4\% \end{cases}$$

(j) *RWA supplement for retained loan-level counterparty credit risk.* If the Enterprise elects to use the CRTA for a retained CRT exposure and if the contractual terms of the CRT do not provide for the transfer of the counterparty credit risk associated with any loan-level credit enhancement or other loss sharing on the underlying mortgage exposures, then the Enterprise must add the following risk-weighted assets supplement ($RWASup_{\$}$) to risk weighted assets for the retained CRT exposure.

$RWASup_{\$,Tranche} = CntptyRWA_{\$} * (D - A)$

Otherwise the Enterprise shall add an $RWASup_{\$,Tranche}$ of $0.

(k) *Retained CRT Exposure.* Credit risk-weighted assets for the retained CRT exposure are as follows:

$RWA_{\$,Tranche} = AEA_{\$,Tranche} * RW_{\%,Tranche} + RWASup_{\$,Tranche}$

§ 1240.45 Securitization exposures to which the SSFA and the CRTA do not apply.

An Enterprise must assign a 1,250 percent risk weight to any acquired CRT exposure and all securitization exposures to which the Enterprise does not apply the SSFA under § 1240.43 or the CRTA under § 1240.44.

§ 1240.46 Recognition of credit risk mitigants for securitization exposures.

(a) *General.* (1) An originating Enterprise that has obtained a credit risk mitigant to hedge its exposure to a synthetic or traditional securitization that satisfies the operational criteria provided in § 1240.41 may recognize the credit risk mitigant under § 1240.38 or § 1240.39, but only as provided in this section.

(2) An investing Enterprise that has obtained a credit risk mitigant to hedge a securitization exposure may recognize the credit risk mitigant under § 1240.38 or § 1240.39, but only as provided in this section.

(b) *Mismatches.* An Enterprise must make any applicable adjustment to the protection amount of an eligible guarantee or credit derivative as required in § 1240.38(d) through (f) for any hedged securitization exposure. In the context of a synthetic securitization, when an eligible guarantee or eligible credit derivative covers multiple hedged exposures that have different residual maturities, the Enterprise must use the longest residual maturity of any of the hedged exposures as the residual maturity of all hedged exposures.

Risk-Weighted Assets for Equity Exposures

§ 1240.51 Introduction and exposure measurement.

(a) *General.* (1) To calculate its risk-weighted asset amounts for equity exposures, an Enterprise must use the Simple Risk-Weight Approach (SRWA) provided in § 1240.52.

(2) An Enterprise must treat an investment in a separate account (as defined in § 1240.2) as if it were an equity exposure to an investment fund.

(b) *Adjusted carrying value.* For purposes of §§ 1240.51 and 1240.52, the adjusted carrying value of an equity exposure is:

(1) For the on-balance sheet component of an equity exposure, the Enterprise's carrying value of the exposure;

(2) [Reserved]

(3) For the off-balance sheet component of an equity exposure that is not an equity commitment, the effective notional principal amount of the exposure, the size of which is equivalent to a hypothetical on-balance sheet position in the underlying equity instrument that would evidence the same change in fair value (measured in dollars) given a small change in the price of the underlying equity instrument, minus the adjusted carrying value of the on-balance sheet component of the exposure as calculated in paragraph (b)(1) of this section; and

(4) For a commitment to acquire an equity exposure (an equity commitment), the effective notional principal amount of the exposure is multiplied by the following conversion factors (CFs):

(i) Conditional equity commitments with an original maturity of one year or less receive a CF of 20 percent.

(ii) Conditional equity commitments with an original maturity of over one year receive a CF of 50 percent.

(iii) Unconditional equity commitments receive a CF of 100 percent.

§ 1240.52 Simple risk-weight approach (SRWA).

(a) *General.* Under the SRWA, an Enterprise's total risk-weighted assets for equity exposures equals the sum of the risk-weighted asset amounts for each of the Enterprise's individual equity exposures as determined under this section.

(b) *SRWA computation for individual equity exposures.* An Enterprise must determine the risk-weighted asset amount for an individual equity exposure by multiplying the adjusted carrying value of the equity exposure by the lowest applicable risk weight in this section.

(1) *Community development equity exposures.* A 100 percent risk weight is assigned to an equity exposure that was acquired with the prior written approval of FHFA and is designed primarily to promote community welfare, including the welfare of low- and moderate-income communities or families, such as by providing services or employment, and excluding equity exposures to an unconsolidated small business investment company and equity exposures held through a small business investment company described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 682).

(2) *Other equity exposures.* A 400 percent risk weight is assigned to an equity exposure to an operating company or an investment in a separate account.

§§ 1240.53–1240.60 [Reserved]

Subpart E—Risk-Weighted Assets—Internal Ratings-Based and Advanced Measurement Approaches

§ 1240.100 Purpose, applicability, and principle of conservatism.

(a) *Purpose.* This subpart establishes:

(1) Minimum requirements for using Enterprise-specific internal risk measurement and management processes for calculating risk-based capital requirements; and

(2) Methodologies for the Enterprises to calculate their advanced approaches total risk-weighted assets.

(b) *Applicability.* (1) This subpart applies to each Enterprise.

(2) An Enterprise must also include in its calculation of advanced credit risk-weighted assets under this subpart all covered positions, as defined in subpart F of this part.

(c) *Principle of conservatism.* Notwithstanding the requirements of this subpart, an Enterprise may choose not to apply a provision of this subpart to one or more exposures provided that:

(1) The Enterprise can demonstrate on an ongoing basis to the satisfaction of FHFA that not applying the provision would, in all circumstances, unambiguously generate a risk-based capital requirement for each such exposure greater than that which would otherwise be required under this subpart;

(2) The Enterprise appropriately manages the risk of each such exposure;

(3) The Enterprise notifies FHFA in writing prior to applying this principle to each such exposure; and

(4) The exposures to which the Enterprise applies this principle are not, in the aggregate, material to the Enterprise.

§ 1240.101 Definitions.

(a) Terms that are set forth in § 1240.2 and used in this subpart have the definitions assigned thereto in § 1240.2.

(b) For the purposes of this subpart, the following terms are defined as follows:

Advanced internal ratings-based (IRB) systems means an Enterprise's internal risk rating and segmentation system; risk parameter quantification system; data management and maintenance system; and control, oversight, and validation system for credit risk of exposures.

Advanced systems means an Enterprise's advanced IRB systems, operational risk management processes, operational risk data and assessment systems, operational risk quantification systems, and, to the extent used by the Enterprise, the internal models methodology, advanced CVA approach, double default excessive correlation detection process, and internal models approach (IMA) for equity exposures.

Backtesting means the comparison of an Enterprise's internal estimates with actual outcomes during a sample period not used in model development. In this context, backtesting is one form of out-of-sample testing.

Benchmarking means the comparison of an Enterprise's internal estimates with relevant internal and external data or with estimates based on other estimation techniques.

Business environment and internal control factors means the indicators of an Enterprise's operational risk profile that reflect a current and forward-looking assessment of the Enterprise's underlying business risk factors and internal control environment.

Dependence means a measure of the association among operational losses across and within units of measure.

Economic downturn conditions means, with respect to an exposure held by the Enterprise, those conditions in which the aggregate default rates for that exposure's exposure subcategory (or subdivision of such subcategory selected by the Enterprise) in the exposure's jurisdiction (or subdivision of such jurisdiction selected by the Enterprise) are significantly higher than average.

Eligible operational risk offsets means amounts, not to exceed expected operational loss, that:

(i) Are generated by internal business practices to absorb highly predictable and reasonably stable operational losses, including reserves calculated consistent with GAAP; and

(ii) Are available to cover expected operational losses with a high degree of certainty over a one-year horizon.

Expected operational loss (EOL) means the expected value of the distribution of potential aggregate operational losses, as generated by the Enterprise's operational risk quantification system using a one-year horizon.

External operational loss event data means, with respect to an Enterprise, gross operational loss amounts, dates, recoveries, and relevant causal information for operational loss events occurring at organizations other than the Enterprise.

Internal operational loss event data means, with respect to an Enterprise, gross operational loss amounts, dates, recoveries, and relevant causal information for operational loss events occurring at the Enterprise.

Operational loss means a loss (excluding insurance or tax effects) resulting from an operational loss event. Operational loss includes all expenses associated with an operational loss event except for opportunity costs, forgone revenue, and costs related to risk management and control enhancements implemented to prevent future operational losses.

Operational loss event means an event that results in loss and is associated with any of the following seven operational loss event type categories:

(i) Internal fraud, which means the operational loss event type category that comprises operational losses resulting from an act involving at least one internal party of a type intended to defraud, misappropriate property, or circumvent regulations, the law, or company policy excluding diversity- and discrimination-type events.

(ii) External fraud, which means the operational loss event type category that comprises operational losses resulting from an act by a third party of a type intended to defraud, misappropriate property, or circumvent the law. All third-party-initiated credit losses are to be treated as credit risk losses.

(iii) Employment practices and workplace safety, which means the operational loss event type category that comprises operational losses resulting from an act inconsistent with employment, health, or safety laws or agreements, payment of personal injury claims, or payment arising from diversity- and discrimination-type events.

(iv) Clients, products, and business practices, which means the operational loss event type category that comprises operational losses resulting from the nature or design of a product or from an unintentional or negligent failure to meet a professional obligation to specific clients (including fiduciary and suitability requirements).

(v) Damage to physical assets, which means the operational loss event type category that comprises operational losses resulting from the loss of or damage to physical assets from natural disaster or other events.

(vi) Business disruption and system failures, which means the operational loss event type category that comprises operational losses resulting from disruption of business or system failures.

(vii) Execution, delivery, and process management, which means the operational loss event type category that comprises operational losses resulting from failed transaction processing or process management or losses arising from relations with trade counterparties and vendors.

Operational risk means the risk of loss resulting from inadequate or failed internal processes, people, and systems or from external events (including legal risk but excluding strategic and reputational risk).

Operational risk exposure means the 99.9th percentile of the distribution of potential aggregate operational losses, as generated by the Enterprise's operational risk quantification system over a one-year horizon (and not incorporating eligible operational risk

offsets or qualifying operational risk mitigants).

Risk parameter means a variable used in determining risk-based capital requirements for exposures, such as probability of default, loss given default, exposure at default, or effective maturity.

Scenario analysis means a systematic process of obtaining expert opinions from business managers and risk management experts to derive reasoned assessments of the likelihood and loss impact of plausible high-severity operational losses. Scenario analysis may include the well-reasoned evaluation and use of external operational loss event data, adjusted as appropriate to ensure relevance to an Enterprise's operational risk profile and control structure.

Unexpected operational loss (UOL) means the difference between the Enterprise's operational risk exposure and the Enterprise's expected operational loss.

Unit of measure means the level (for example, organizational unit or operational loss event type) at which the Enterprise's operational risk quantification system generates a separate distribution of potential operational losses.

§ 1240.121 Minimum requirements.

(a) *Process and systems requirements.* (1) An Enterprise must have a rigorous process for assessing its overall capital adequacy in relation to its risk profile and a comprehensive strategy for maintaining an appropriate level of capital.

(2) The systems and processes used by an Enterprise for risk-based capital purposes under this subpart must be consistent with the Enterprise's internal risk management processes and management information reporting systems.

(3) Each Enterprise must have an appropriate infrastructure with risk measurement and management processes that meet the requirements of this section and are appropriate given the Enterprise's size and level of complexity. The Enterprise must ensure that the risk parameters and reference data used to determine its risk-based capital requirements are representative of long run experience with respect to its credit risk and operational risk exposures.

(b) *Risk rating and segmentation systems for exposures.* (1) An Enterprise must have an internal risk rating and segmentation system that accurately, reliably, and meaningfully differentiates among degrees of credit risk for the Enterprise's exposures. When assigning an internal risk rating, an Enterprise may consider a third-party assessment of credit risk, provided that the Enterprise's internal risk rating assignment does not rely solely on the external assessment.

(2) If an Enterprise uses multiple rating or segmentation systems, the Enterprise's rationale for assigning an exposure to a particular system must be documented and applied in a manner that best reflects the obligor or exposure's level of risk. An Enterprise must not inappropriately allocate exposures across systems to minimize regulatory capital requirements.

(3) In assigning ratings to exposures, an Enterprise must use all relevant and material information and ensure that the information is current.

(c) *Quantification of risk parameters for exposures.* (1) The Enterprise must have a comprehensive risk parameter quantification process that produces accurate, timely, and reliable estimates of the risk parameters on a consistent basis for the Enterprise's exposures.

(2) An Enterprise's estimates of risk parameters must incorporate all relevant, material, and available data that is reflective of the Enterprise's actual exposures and of sufficient quality to support the determination of risk-based capital requirements for the exposures. In particular, the population of exposures in the data used for estimation purposes, the underwriting standards in use when the data were generated, and other relevant characteristics, should closely match or be comparable to the Enterprise's exposures and standards. In addition, an Enterprise must:

(i) Demonstrate that its estimates are representative of long run experience, including periods of economic downturn conditions, whether internal or external data are used;

(ii) Take into account any changes in underwriting practice or the process for pursuing recoveries over the observation period;

(iii) Promptly reflect technical advances, new data, and other information as they become available;

(iv) Demonstrate that the data used to estimate risk parameters support the accuracy and robustness of those estimates; and

(v) Demonstrate that its estimation technique performs well in out-of-sample tests whenever possible.

(3) The Enterprise's risk parameter quantification process must produce appropriately conservative risk parameter estimates where the Enterprise has limited relevant data, and any adjustments that are part of the quantification process must not result in a pattern of bias toward lower risk parameter estimates.

(4) The Enterprise's risk parameter estimation process should not rely on the possibility of U.S. government financial assistance.

(5) Default, loss severity, and exposure amount data must include periods of economic downturn conditions, or the Enterprise must adjust its estimates of risk parameters to compensate for the lack of data from periods of economic downturn conditions.

(6) If an Enterprise uses internal data obtained prior to becoming subject to this subpart or external data to arrive at risk parameter estimates, the Enterprise must demonstrate to FHFA that the Enterprise has made appropriate adjustments if necessary to be consistent with the Enterprise's definition of default. Internal data obtained after the Enterprise becomes subject to this subpart must be consistent with the Enterprise's definition of default.

(7) The Enterprise must review and update (as appropriate) its risk parameters and its risk parameter quantification process at least annually.

(8) The Enterprise must, at least annually, conduct a comprehensive review and analysis of reference data to determine relevance of the reference data to the Enterprise's exposures, quality of reference data to support risk parameter estimates, and consistency of reference data to the Enterprise's definition of default.

(d) *Operational risk*—(1) *Operational risk management processes.* An Enterprise must:

(i) Have an operational risk management function that:

(A) Is independent of business line management; and

(B) Is responsible for designing, implementing, and overseeing the Enterprise's operational risk data and assessment systems, operational risk quantification systems, and related processes;

(ii) Have and document a process (which must capture business environment and internal control factors affecting the Enterprise's operational risk profile) to identify, measure, monitor, and control operational risk in the Enterprise's products, activities, processes, and systems; and

(iii) Report operational risk exposures, operational loss events, and other relevant operational risk information to business unit management, senior management, and the board of directors (or a designated committee of the board).

(2) *Operational risk data and assessment systems.* An Enterprise must

have operational risk data and assessment systems that capture operational risks to which the Enterprise is exposed. The Enterprise's operational risk data and assessment systems must:

(i) Be structured in a manner consistent with the Enterprise's current business activities, risk profile, technological processes, and risk management processes; and

(ii) Include credible, transparent, systematic, and verifiable processes that incorporate the following elements on an ongoing basis:

(A) *Internal operational loss event data.* The Enterprise must have a systematic process for capturing and using internal operational loss event data in its operational risk data and assessment systems.

(*1*) The Enterprise's operational risk data and assessment systems must include a historical observation period of at least five years for internal operational loss event data (or such shorter period approved by FHFA to address transitional situations, such as integrating a new business line).

(*2*) The Enterprise must be able to map its internal operational loss event data into the seven operational loss event type categories.

(*3*) The Enterprise may refrain from collecting internal operational loss event data for individual operational losses below established dollar threshold amounts if the Enterprise can demonstrate to the satisfaction of FHFA that the thresholds are reasonable, do not exclude important internal operational loss event data, and permit the Enterprise to capture substantially all the dollar value of the Enterprise's operational losses.

(B) *External operational loss event data.* The Enterprise must have a systematic process for determining its methodologies for incorporating external operational loss event data into its operational risk data and assessment systems.

(C) *Scenario analysis.* The Enterprise must have a systematic process for determining its methodologies for incorporating scenario analysis into its operational risk data and assessment systems.

(D) *Business environment and internal control factors.* The Enterprise must incorporate business environment and internal control factors into its operational risk data and assessment systems. The Enterprise must also periodically compare the results of its prior business environment and internal control factor assessments against its actual operational losses incurred in the intervening period.

(3) *Operational risk quantification systems.* The Enterprise's operational risk quantification systems:

(i) Must generate estimates of the Enterprise's operational risk exposure using its operational risk data and assessment systems;

(ii) Must employ a unit of measure that is appropriate for the Enterprise's range of business activities and the variety of operational loss events to which it is exposed, and that does not combine business activities or operational loss events with demonstrably different risk profiles within the same loss distribution;

(iii) Must include a credible, transparent, systematic, and verifiable approach for weighting each of the four elements, described in paragraph (d)(2)(ii) of this section, that an Enterprise is required to incorporate into its operational risk data and assessment systems;

(iv) May use internal estimates of dependence among operational losses across and within units of measure if the Enterprise can demonstrate to the satisfaction of FHFA that its process for estimating dependence is sound, robust to a variety of scenarios, and implemented with integrity, and allows for uncertainty surrounding the estimates. If the Enterprise has not made such a demonstration, it must sum operational risk exposure estimates across units of measure to calculate its total operational risk exposure; and

(v) Must be reviewed and updated (as appropriate) whenever the Enterprise becomes aware of information that may have a material effect on the Enterprise's estimate of operational risk exposure, but the review and update must occur no less frequently than annually.

(e) *Data management and maintenance.* (1) An Enterprise must have data management and maintenance systems that adequately support all aspects of its advanced systems and the timely and accurate reporting of risk-based capital requirements.

(2) An Enterprise must retain data using an electronic format that allows timely retrieval of data for analysis, validation, reporting, and disclosure purposes.

(3) An Enterprise must retain sufficient data elements related to key risk drivers to permit adequate monitoring, validation, and refinement of its advanced systems.

(f) *Control, oversight, and validation mechanisms.* (1) The Enterprise's senior management must ensure that all components of the Enterprise's advanced systems function effectively and comply with the minimum requirements in this section.

(2) The Enterprise's board of directors (or a designated committee of the board) must at least annually review the effectiveness of, and approve, the Enterprise's advanced systems.

(3) An Enterprise must have an effective system of controls and oversight that:

(i) Ensures ongoing compliance with the minimum requirements in this section;

(ii) Maintains the integrity, reliability, and accuracy of the Enterprise's advanced systems; and

(iii) Includes adequate governance and project management processes.

(4) The Enterprise must validate, on an ongoing basis, its advanced systems. The Enterprise's validation process must be independent of the advanced systems' development, implementation, and operation, or the validation process must be subjected to an independent review of its adequacy and effectiveness. Validation must include:

(i) An evaluation of the conceptual soundness of (including developmental evidence supporting) the advanced systems;

(ii) An ongoing monitoring process that includes verification of processes and benchmarking; and

(iii) An outcomes analysis process that includes backtesting.

(5) The Enterprise must have an internal audit function or equivalent function that is independent of business-line management that at least annually:

(i) Reviews the Enterprise's advanced systems and associated operations, including the operations of its credit function and estimations of risk parameters;

(ii) Assesses the effectiveness of the controls supporting the Enterprise's advanced systems; and

(iii) Documents and reports its findings to the Enterprise's board of directors (or a committee thereof).

(6) The Enterprise must periodically stress test its advanced systems. The stress testing must include a consideration of how economic cycles, especially downturns, affect risk-based capital requirements (including migration across rating grades and segments and the credit risk mitigation benefits of double default treatment).

(g) *Documentation.* The Enterprise must adequately document all material aspects of its advanced systems.

§ 1240.122 Ongoing qualification.

(a) *Changes to advanced systems.* An Enterprise must meet all the minimum requirements in § 1240.121 on an ongoing basis. An Enterprise must notify FHFA when the Enterprise makes

any change to an advanced system that would result in a material change in the Enterprise's advanced approaches total risk-weighted asset amount for an exposure type or when the Enterprise makes any significant change to its modeling assumptions.

(b) *Failure to comply with qualification requirements.* (1) If FHFA determines that an Enterprise fails to comply with the requirements in § 1240.121, FHFA will notify the Enterprise in writing of the Enterprise's failure to comply.

(2) The Enterprise must establish and submit a plan satisfactory to FHFA to return to compliance with the qualification requirements.

(3) In addition, if FHFA determines that the Enterprise's advanced approaches total risk-weighted assets are not commensurate with the Enterprise's credit, market, operational, or other risks, FHFA may require such an Enterprise to calculate its advanced approaches total risk-weighted assets with any modifications provided by FHFA.

§ 1240.123 Advanced approaches credit risk-weighted asset calculations.

(a) An Enterprise must use its advanced systems to determine its credit risk capital requirements for each of the following exposures:

(1) General credit risk (including for mortgage exposures);

(2) Cleared transactions;

(3) Default fund contributions;

(4) Unsettled transactions;

(5) Securitization exposures;

(6) Equity exposures; and

(7) The fair value adjustment to reflect counterparty credit risk in valuation of OTC derivative contracts.

(b) The credit-risk-weighted assets calculated under this subpart E equals the aggregate credit risk capital requirement under paragraph (a) of this section multiplied by 12.5.

§§ 1240.124—1240.160 [Reserved]

§ 1240.161 Qualification requirements for incorporation of operational risk mitigants.

(a) *Qualification to use operational risk mitigants.* An Enterprise may adjust its estimate of operational risk exposure to reflect qualifying operational risk mitigants if:

(1) The Enterprise's operational risk quantification system is able to generate an estimate of the Enterprise's operational risk exposure (which does not incorporate qualifying operational risk mitigants) and an estimate of the Enterprise's operational risk exposure adjusted to incorporate qualifying operational risk mitigants; and

(2) The Enterprise's methodology for incorporating the effects of insurance, if the Enterprise uses insurance as an operational risk mitigant, captures through appropriate discounts to the amount of risk mitigation:

(i) The residual term of the policy, where less than one year;

(ii) The cancelation terms of the policy, where less than one year;

(iii) The policy's timeliness of payment;

(iv) The uncertainty of payment by the provider of the policy; and

(v) Mismatches in coverage between the policy and the hedged operational loss event.

(b) *Qualifying operational risk mitigants.* Qualifying operational risk mitigants are:

(1) Insurance that:

(i) Is provided by an unaffiliated company that the Enterprise deems to have strong capacity to meet its claims payment obligations and the Enterprise assigns the company a probability of default equal to or less than 10 basis points;

(ii) Has an initial term of at least one year and a residual term of more than 90 days;

(iii) Has a minimum notice period for cancellation by the provider of 90 days;

(iv) Has no exclusions or limitations based upon regulatory action or for the receiver or liquidator of a failed depository institution; and

(v) Is explicitly mapped to a potential operational loss event;

(2) In evaluating an operational risk mitigant other than insurance, FHFA will consider whether the operational risk mitigant covers potential operational losses in a manner equivalent to holding total capital.

§ 1240.162 Mechanics of operational risk risk-weighted asset calculation.

(a) If an Enterprise does not qualify to use or does not have qualifying operational risk mitigants, the Enterprise's dollar risk-based capital requirement for operational risk is its operational risk exposure minus eligible operational risk offsets (if any).

(b) If an Enterprise qualifies to use operational risk mitigants and has qualifying operational risk mitigants, the Enterprise's dollar risk-based capital requirement for operational risk is the greater of:

(1) The Enterprise's operational risk exposure adjusted for qualifying operational risk mitigants minus eligible operational risk offsets (if any); or

(2) 0.8 multiplied by the difference between:

(i) The Enterprise's operational risk exposure; and

(ii) Eligible operational risk offsets (if any).

(c) The Enterprise's risk-weighted asset amount for operational risk equals the greater of:

(1) The Enterprise's dollar risk-based capital requirement for operational risk determined under paragraphs (a) or (b) multiplied by 12.5; and

(2) The Enterprise's adjusted total assets multiplied by 0.0015 multiplied by 12.5.

(d) After January 1, 2022, and until the compliance date for this section under § 1240.4, the Enterprise's risk weighted amount for operational risk will equal the Enterprise's adjusted total assets multiplied by 0.0015 multiplied by 12.5.

Subpart F—Risk-weighted Assets—Market Risk

§ 1240.201 Purpose, applicability, and reservation of authority.

(a) *Purpose.* This subpart F establishes risk-based capital requirements for spread risk and provides methods for the Enterprises to calculate their measure for spread risk.

(b) *Applicability.* This subpart applies to each Enterprise.

(c) *Reservation of authority.* Subject to applicable provisions of the Safety and Soundness Act:

(1) FHFA may require an Enterprise to hold an amount of capital greater than otherwise required under this subpart if FHFA determines that the Enterprise's capital requirement for spread risk as calculated under this subpart is not commensurate with the spread risk of the Enterprise's covered positions.

(2) If FHFA determines that the risk-based capital requirement calculated under this subpart by the Enterprise for one or more covered positions or portfolios of covered positions is not commensurate with the risks associated with those positions or portfolios, FHFA may require the Enterprise to assign a different risk-based capital requirement to the positions or portfolios that more accurately reflects the risk of the positions or portfolios.

(3) In addition to calculating risk-based capital requirements for specific positions or portfolios under this subpart, the Enterprise must also calculate risk-based capital requirements for covered positions under subpart D or subpart E of this part, as appropriate.

(4) Nothing in this subpart limits the authority of FHFA under any other provision of law or regulation to take supervisory or enforcement action, including action to address unsafe or unsound practices or conditions,

deficient capital levels, or violations of law.

§ 1240.202 Definitions.

(a) Terms set forth in § 1240.2 and used in this subpart have the definitions assigned in § 1240.2.

(b) For the purposes of this subpart, the following terms are defined as follows:

Backtesting means the comparison of an Enterprise's internal estimates with actual outcomes during a sample period not used in model development. For purposes of this subpart, backtesting is one form of out-of-sample testing.

Covered position means, any asset that has more than *de minimis* spread risk (other than any intangible asset, such as any servicing asset), including:

(i) Any NPL, RPL, reverse mortgage loan, or other mortgage exposure that, in any case, does not secure an MBS guaranteed by the Enterprise;

(ii) Any MBS guaranteed by an Enterprise, MBS guaranteed by Ginnie Mae, reverse mortgage security, PLS, commercial MBS, CRT exposure, or other securitization exposure, regardless of whether the position is held by the Enterprise for the purpose of short-term resale or with the intent of benefiting from actual or expected short-term price movements, or to lock in arbitrage profits; and

(iii) Any other trading asset or trading liability (whether on- or off-balance sheet).[1]

Market risk means the risk of loss on a position that could result from movements in market prices, including spread risk.

Private label security (PLS) means any MBS that is collateralized by a pool or pools of single-family mortgage exposures and that is not guaranteed by an Enterprise or by Ginnie Mae.

Reverse mortgage means a mortgage loan secured by a residential property in which a homeowner relinquishes equity in their home in exchange for regular payments.

Reverse mortgage security means a security collateralized by reverse mortgages.

Spread risk means the risk of loss on a position that could result from a change in the bid or offer price of such position relative to a risk free or funding benchmark, including when due to a change in perceptions of performance or liquidity of the position.

[1] Securities subject to repurchase and lending agreements are included as if they are still owned by the Enterprise.

§ 1240.203 Requirements for managing market risk.

(a) *Management of covered positions*—(1) *Active management.* An Enterprise must have clearly defined policies and procedures for actively managing all covered positions. At a minimum, these policies and procedures must require:

(i) Marking covered positions to market or to model on a daily basis;

(ii) Daily assessment of the Enterprise's ability to hedge position and portfolio risks, and of the extent of market liquidity;

(iii) Establishment and daily monitoring of limits on covered positions by a risk control unit independent of the business unit;

(iv) Routine monitoring by senior management of information described in paragraphs (a)(1)(i) through (iii) of this section;

(v) At least annual reassessment of established limits on positions by senior management; and

(vi) At least annual assessments by qualified personnel of the quality of market inputs to the valuation process, the soundness of key assumptions, the reliability of parameter estimation in pricing models, and the stability and accuracy of model calibration under alternative market scenarios.

(2) *Valuation of covered positions.* The Enterprise must have a process for prudent valuation of its covered positions that includes policies and procedures on the valuation of positions, marking positions to market or to model, independent price verification, and valuation adjustments or reserves. The valuation process must consider, as appropriate, unearned credit spreads, close-out costs, early termination costs, investing and funding costs, liquidity, and model risk.

(b) *Requirements for internal models.* (1) A risk control unit independent of the business unit must approve any internal model to calculate its risk-based capital requirement under this subpart.

(2) An Enterprise must meet all of the requirements of this section on an ongoing basis. The Enterprise must promptly notify FHFA when:

(i) The Enterprise plans to extend the use of a model to an additional business line or product type;

(ii) The Enterprise makes any change to an internal model that would result in a material change in the Enterprise's risk-weighted asset amount for a portfolio of covered positions; or

(iii) The Enterprise makes any material change to its modeling assumptions.

(3) FHFA may determine an appropriate capital requirement for the covered positions to which a model would apply, if FHFA determines that the model no longer complies with this subpart or fails to reflect accurately the risks of the Enterprise's covered positions.

(4) The Enterprise must periodically, but no less frequently than annually, review its internal models in light of developments in financial markets and modeling technologies, and enhance those models as appropriate to ensure that they continue to meet the Enterprise's standards for model approval and employ risk measurement methodologies that are most appropriate for the Enterprise's covered positions.

(5) The Enterprise must incorporate its internal models into its risk management process and integrate the internal models used for calculating its market risk measure into its daily risk management process.

(6) The level of sophistication of an Enterprise's internal models must be commensurate with the complexity and amount of its covered positions. An Enterprise's internal models may use any of the generally accepted approaches, including variance-covariance models, historical simulations, or Monte Carlo simulations, to measure market risk.

(7) The Enterprise's internal models must properly measure all the material risks in the covered positions to which they are applied.

(8) The Enterprise's internal models must conservatively assess the risks arising from less liquid positions and positions with limited price transparency under realistic market scenarios.

(9) The Enterprise must have a rigorous and well-defined process for re-estimating, re-evaluating, and updating its internal models to ensure continued applicability and relevance.

(c) *Control, oversight, and validation mechanisms.* (1) The Enterprise must have a risk control unit that reports directly to senior management and is independent from the business units.

(2) The Enterprise must validate its internal models initially and on an ongoing basis. The Enterprise's validation process must be independent of the internal models' development, implementation, and operation, or the validation process must be subjected to an independent review of its adequacy and effectiveness. Validation must include:

(i) An evaluation of the conceptual soundness of (including developmental evidence supporting) the internal models;

(ii) An ongoing monitoring process that includes verification of processes

and the comparison of the Enterprise's model outputs with relevant internal and external data sources or estimation techniques; and

(iii) An outcomes analysis process that includes backtesting.

(3) The Enterprise must stress test the market risk of its covered positions at a frequency appropriate to each portfolio, and in no case less frequently than quarterly. The stress tests must take into account concentration risk (including concentrations in single issuers, industries, sectors, or markets), illiquidity under stressed market conditions, and risks arising from the Enterprise's trading activities that may not be adequately captured in its internal models.

(4) The Enterprise must have an internal audit function independent of business-line management that at least annually assesses the effectiveness of the controls supporting the Enterprise's market risk measurement systems, including the activities of the business units and independent risk control unit, compliance with policies and procedures, and calculation of the Enterprise's measures for spread risk under this subpart. At least annually, the internal audit function must report its findings to the Enterprise's board of directors (or a committee thereof).

(d) *Internal assessment of capital adequacy.* The Enterprise must have a rigorous process for assessing its overall capital adequacy in relation to its market risk.

(e) *Documentation.* The Enterprise must adequately document all material aspects of its internal models, management and valuation of covered positions, control, oversight, validation and review processes and results, and internal assessment of capital adequacy.

§ 1240.204 Measure for spread risk.

(a) *General requirement*—(1) *In general.* An Enterprise must calculate its standardized measure for spread risk by following the steps described in paragraph (a)(2) of this section. An Enterprise also must calculate an advanced measure for spread risk by following the steps in paragraph (a)(2) of this section.

(2) *Measure for spread risk.* An Enterprise must calculate the standardized measure for spread risk, which equals the sum of the spread risk capital requirements of all covered positions using one or more of its internal models except as contemplated by paragraphs (b) or (c) of this section. An Enterprise also must calculate the advanced measure for spread risk, which equals the sum of the spread risk capital requirements of all covered positions calculated using one or more of its internal models.

(b) *Single point approach*—(1) *General.* For purposes of the standardized measure for spread risk, the spread risk capital requirement for a covered position that is an RPL, an NPL, a reverse mortgage loan, or a reverse mortgage security is the amount equal to:

(i) The market value of the covered position; multiplied by

(ii) The applicable single point shock assumption for the covered position under paragraph (b)(2) of this section.

(2) *Applicable single point shock assumption.* The applicable single point shock assumption is:

(i) 0.0475 for an RPL or an NPL;

(ii) 0.0160 for a reverse mortgage loan; and

(iii) 0.0410 for a reverse mortgage security.

(c) *Spread duration approach*—(1) *General.* For purposes of the standardized measure for spread risk, the spread risk capital requirement for a covered position that is a multifamily mortgage exposure, a PLS, or an MBS guaranteed by an Enterprise or Ginnie Mae and secured by multifamily mortgage exposures is the amount equal to:

(i) The market value of the covered position; multiplied by

(ii) The spread duration of the covered position determined by the Enterprise using one or more of its internal models; multiplied by

(iii) The applicable spread shock assumption under paragraph (c)(2) of this section.

(2) *Applicable spread shock assumption.* The applicable spread shock is:

(i) 0.0015 for a multifamily mortgage exposure;

(ii) 0.0265 for a PLS; and

(iii) 0.0100 for an MBS guaranteed by an Enterprise or by Ginnie Mae and secured by multifamily mortgage exposures (other than IO securities guaranteed by an Enterprise or Ginnie Mae).

Subpart G—Stability Capital Buffer

§ 1240.400 Stability capital buffer.

(a) *Definitions.* For purposes of this subpart:

(1) *Mortgage assets* means, with respect to an Enterprise, the dollar amount equal to the sum of:

(i) The unpaid principal balance of its single-family mortgage exposures, including any single-family loans that secure MBS guaranteed by the Enterprise;

(ii) The unpaid principal balance of its multifamily mortgage exposures, including any multifamily mortgage exposures that secure MBS guaranteed by the Enterprise;

(iii) The carrying value of its MBS guaranteed by an Enterprise, MBS guaranteed by Ginnie Mae, PLS, and other securitization exposures (other than its retained CRT exposures); and

(iv) The exposure amount of any other mortgage assets.

(2) *Residential mortgage debt outstanding* means the dollar amount of mortgage debt outstanding secured by one- to four-family residences or multifamily residences that are located in the United States (and excluding any mortgage debt outstanding secured by commercial or farm properties).

(b) *Amount.* An Enterprise must calculate its stability capital buffer under this section on an annual basis by December 31 of each year. The stability capital buffer of an Enterprise is equal to:

(1) The ratio of:

(i) The mortgage assets of the Enterprise as of December 31 of the previous calendar year; to

(ii) The residential mortgage debt outstanding as of December 31 of the previous calendar year, as published by FHFA;

(2) Minus 0.05;

(3) Multiplied by 5;

(4) Divided by 100; and

(5) Multiplied by the adjusted total assets of the Enterprise, as of December 31 of the previous calendar year.

(c) *Effective date of an adjusted stability capital buffer*—(1) *Increase in stability capital buffer.* An increase in the stability capital buffer of an Enterprise under this section will take effect (*i.e.,* be incorporated into the maximum payout ratio under table 1 to paragraph (b)(5) in § 1240.11) on January 1 of the year that is one full calendar year after the increased stability capital buffer was calculated.

(2) *Decrease in stability capital buffer.* A decrease in the stability capital buffer of an Enterprise will take effect (*i.e.,* be incorporated into the maximum payout ratio under table 1 to paragraph (b)(5) in § 1240.11) on January 1 of the year immediately following the calendar year in which the decreased stability capital buffer was calculated.

(d) *Initial stability capital buffer.* Notwithstanding anything to the contrary in this section, the stability capital buffer of an Enterprise as of January 1, 2021, is equal to—

(1) The ratio of:

(i) The mortgage assets of the Enterprise as of December 31, 2020; to

(ii) The residential mortgage debt outstanding as of December 31, 2020, as published by FHFA;

(2) Minus 0.05;

(3) Multiplied by 5;

(4) Divided by 100; and

(5) Multiplied by the adjusted total assets of the Enterprise as of December 31, 2020.

Chapter XII—Federal Housing Finance Agency

Subchapter C—Safety and Soundness

PART 1750—[REMOVED]

■ 6. Under the authority of 12 U.S.C. 4511 and 12 U.S.C. 4526, part 1750 is removed.

Mark A. Calabria,

Director, Federal Housing Finance Agency.

[FR Doc. 2020–25814 Filed 12–16–20; 8:45 am]

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Part IV

Department of Homeland Security

Department of Justice

Executive Office for Immigration Review

8 CFR Parts 208 and 1208

Asylum Eligibility and Procedural Modifications; Final Rule

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 208

RIN 1615–AC44

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Part 1208

[EOIR Docket No. 19–0111; Dir. Order 06–2021]

RIN 1125–AA91

Asylum Eligibility and Procedural Modifications

AGENCY: Executive Office for Immigration Review, Department of Justice; U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: On July 16, 2019, the Department of Justice and the Department of Homeland Security (''DOJ,'' ''DHS,'' or, collectively, ''the Departments'') published an interim final rule (''IFR'') governing asylum claims in the context of aliens who enter or attempt to enter the United States across the southern land border between the United States and Mexico (''southern land border'') after failing to apply for protection from persecution or torture while in a third country through which they transited en route to the United States. This final rule responds to comments received on the IFR and makes minor changes to regulations implemented or affected by the IFR for clarity and correction of typographical errors.

DATES: This rule is effective on January 19, 2021.

FOR FURTHER INFORMATION CONTACT: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, VA 22041, telephone (703) 305–0289 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Purpose and Summary of the Interim Final Rule

On July 16, 2019, the Departments published an IFR governing asylum claims in the context of aliens who enter or attempt to enter the United States across the southern land border after failing to apply for protection from persecution or torture while in any one of the third countries through which they transited en route to the United States. Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019).

A. Purpose of the Interim Final Rule [1]

The IFR sought to address the large number of meritless asylum claims that aliens are filing with the Departments. *See* 84 FR at 33830–31. Such claims place an extraordinary strain on the Nation's immigration system, undermine many of the humanitarian purposes of asylum, exacerbate the humanitarian crisis of human smuggling, and affect the United States' ongoing diplomatic negotiations with foreign countries.

The IFR sought to mitigate the strain on the country's immigration system by more efficiently identifying aliens who are misusing the asylum system as a tool to enter and remain in the United States as opposed to those legitimately seeking urgent protection from persecution or torture. Aliens who transited through another country where protection was available, and yet did not seek protection, may fall within that category.

The IFR also furthered the humanitarian purposes of asylum by prioritizing individuals who are unable to obtain protection from persecution elsewhere and individuals who are victims of a ''severe form of trafficking in persons'' as defined by 8 CFR 214.11, many of whom do not volitionally transit through a third country to reach the United States. By deterring meritless asylum claims and barring from asylum those individuals whose primary purpose is to make the journey to the United States rather than to seek protection, or those who could have obtained protection in a another country, the Departments sought to ensure that those refugees who have no alternative to U.S.-based asylum relief or have been subjected to an extreme form of human trafficking are able to obtain relief more quickly. 84 FR at 33831.

Additionally, the Departments sought to curtail the humanitarian crisis created by human smugglers bringing men, women, and children across the southern land border. By reducing the incentive for aliens without an urgent or genuine need for asylum to cross the border—in the hope of a lengthy asylum process that will enable them to remain in the United States for years, typically free from detention and with work authorization, despite their statutory ineligibility for relief—the rule aimed to reduce human smuggling and its tragic effects. *Id.*

Finally, the Departments published the IFR to better position the United States in its negotiations with foreign countries on migration issues. The United States is engaged in ongoing diplomatic negotiations with Mexico and various Central American countries regarding migration issues in general, the control of the flow of aliens into the United States (such as through continued implementation of the Migrant Protection Protocols (''MPP'')), and the urgent need to address the humanitarian and security crisis along the southern land border.[2] Those ongoing discussions relate to negotiations with foreign countries with a goal of forging bilateral and multilateral agreements in which other countries will join the United States distributing the mass migration burden among cooperative countries. The purpose of the international agreements is to allocate responsibility between the United States and third countries whereby one country or the other will assume responsibility for adjudicating the claims of aliens who fear removal to their home countries. Addressing the eligibility for asylum of aliens who enter or attempt to enter the United States after failing to seek protection in at least one third country through which they transited en route to the United States will better position the United States in the full range of these negotiations.

B. Legal Authority for the Interim Final Rule

The Departments issued the IFR pursuant to section 208(b)(2)(C) of the Immigration and Nationality Act (''INA'' or ''the Act''), 8 U.S.C. 1158(b)(2)(C), and sections 103(a)(1), (a)(3), and (g) of the Act, 8 U.S.C. 1103(a)(1), (a)(3), and (g). *See* 84 FR at 33831–32.

C. Summary of Regulatory Changes Made by the Interim Final Rule [3]

The IFR revised 8 CFR 208.13 and 208.30 in Chapter I of title 8 of the Code of Federal Regulations (''CFR'') and 1208.13, and 1208.30 in Chapter V of title 8 of the CFR.

The IFR revised 8 CFR 208.13(c) and 8 CFR 1208.13(c) to add a new mandatory bar to eligibility for asylum

[1] The Departments adopt and incorporate herein the background and discussion of the purposes of the rule as published in the preamble to the IFR at 84 FR at 33830–35. Section I of the preamble of this rule also contains a summary of the IFR preamble discussion.

[2] Current Asylum Cooperative Agreements are discussed *infra* at note 13.

[3] The Departments reaffirm the explanation of the regulatory changes as published in the preamble to the IFR. 84 FR at 33835–40. A summary of the discussion in the IFR is further contained in Section I of this preamble.

for an alien who enters or attempts to enter the United States across the southern land border 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. 8 CFR 208.13(c)(4), 1208.13(c)(4). The bar contains exceptions to its applicability for three categories of aliens: (1) Aliens who demonstrate that they applied for protection from persecution or torture in at least one of the countries through which they transited en route to the United States, other than their country of citizenship, nationality, or last lawful habitual residence, and that they received a final judgment denying protection in such country; (2) aliens who demonstrate that they satisfy the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11; and (3) aliens who have transited en route to the United States through only a country or countries that, at the time of transit, were not parties to the 1951 Convention on the Status of Refugees (''Refugee Convention'' or ''1951 Convention''), the 1967 Protocol Relating to the Status of Refugees (''Refugee Protocol'' or ''1967 Protocol''), or the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (''CAT'' or ''Convention Against Torture''). 8 CFR 208.13(c)(4), 1208.13(c)(4) (proposed).

The IFR also added the new limit on asylum eligibility in the process for screening aliens who are subject to expedited removal under section 235(b)(1) of the Act, 8 U.S.C. 1225(b)(1). 8 CFR 208.30(e) (proposed). Pursuant to the IFR, DHS asylum officers were required to determine whether an alien who has expressed a fear of persecution or torture, or who has indicated an intention to apply for asylum, was ineligible for asylum due to a failure to apply for protection in a third country through which he or she transited. *See* 8 CFR 208.30(e)(2) (proposed).

Under that process, if the asylum officer determined that the alien is ineligible for asylum due to the bar at 8 CFR 208.13(c)(4), the asylum officer would nevertheless consider whether the alien had a reasonable fear of persecution or torture for purposes of potential consideration by an immigration judge of withholding of removal and deferral of removal claims under section 241(b)(3) of the Act and 8 CFR 208.16 and 208.17. *See* 8 CFR 208.30(e)(3) (proposed). If the asylum officer had determined that an alien subject to the bar had established a reasonable fear of persecution or torture, DHS would have then referred the alien to an immigration judge for more comprehensive removal proceedings under section 240 of the Act, 8 U.S.C. 1229a. 8 CFR 208.30(e)(5)(i) (proposed). However, if the alien had failed to establish a reasonable fear of persecution or torture, the asylum officer would have provided the alien with a written notice of decision regarding both the application of the bar and the lack of reasonable fear. 8 CFR 208.30(e)(5)(iii) (proposed). The asylum officer's findings then would have been subject to immigration judge review under 8 CFR 208.30(g) and 8 CFR 1208.30(g), applying a reasonable possibility, not significant possibility, standard. *Id.*

Under the IFR's provisions, the immigration judge's review of an asylum officer's application of the third-country-transit bar and accompanying negative ''reasonable fear'' finding, first would have been reviewed de novo in regard to the determination that the alien is ineligible for asylum as stated in 8 CFR 208.13(c)(4). 8 CFR 1003.42(d)(3), 1208.30(g)(2) (proposed). If the immigration judge had agreed with the asylum officer's assessment that the bar at 8 CFR 208.13(c)(4) or 1208.13(c)(4) had applied, the immigration judge then would have proceeded to review the asylum officer's negative reasonable fear finding. 8 CFR 1208.30(g)(2) (proposed). If the immigration judge instead had disagreed with the asylum officer's application of the third-country-transit bar and concluded the alien is not ineligible for asylum, the immigration judge would have vacated the asylum officer's determination. *Id.* DHS then would have commenced removal proceedings against the alien under section 240 of the Act, 8 U.S.C. 1229a, in which the alien could have filed an application for asylum and withholding of removal. *Id.*

D. Procedural Validity of the Interim Final Rule

The U.S. District Court for the District of Columbia vacated the IFR on the ground that, in the court's view, the Departments failed to demonstrate sufficient ''good cause'' or foreign policy reasons for foregoing notice-and-comment rulemaking. *Capital Area Immigrants' Rights Coal.* v. *Trump (''CAIR II''),* --- F. Supp. 3d ---, 2020 WL 3542481 (D.D.C. June 30, 2020). The Supreme Court, however, recently held that an IFR containing all Administrative Procedure Act (''APA'')-required elements of a notice of proposed rulemaking (''NPRM''), as provided in 5 U.S.C. 553(b)–(d), satisfies the APA's procedural requirements. *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania,* 140 S. Ct. 2367, 2384–86 (2020) (''*Little Sisters*''). The Court found that an IFR's publication as an IFR rather than an NPRM did not invalidate the final rule; rather, the Court focused on whether ''fair notice'' was provided to the public. *Id.* at 2385 (quoting *Long Island Care at Home, Ltd.* v. *Coke,* 551 U.S. 158, 174 (2007)).

Here, the IFR contained all APA-required elements of an NPRM: a reference to legal authority, as required by 5 U.S.C. 553(b)(2) (84 FR at 33832–34); a description of the terms and substance of the rule, as required by 5 U.S.C. 553(b)(3) (84 FR at 33835–38); and a request for public comment, as required by 5 U.S.C. 553(c) (84 FR at 33830). In addition, this final rule provides a statement of the rule's purpose and basis, as required by 5 U.S.C. 553(c). Further, this final rule is hereby published 30 days prior to its effective date as required by 5 U.S.C. 553(d) and reiterated by the Court in *Little Sisters. See* 140 S. Ct. at 2386.[4] Accordingly, this rulemaking provides the requisite notice and comment, and this final rule is procedurally sound. The Departments are now issuing this final rule to address the numerous comments received in response to the invitation publicly noticed in the IFR, and to ensure clarity regarding how the IFR interacts with the joint rule signed by the Attorney General and the Acting Secretary of DHS [hereinafter ''Intervening Joint Final Rule''].[5]

II. Revisions to the Interim Final Rule in This Final Rule

Following careful review of the IFR and the public comments received in response, this final rule makes the following changes, pursuant to the Departments' authority under section 208(b)(2)(C) of the Act, 8 U.S.C.

[4] Although the IFR was not published with a 30-day delay in its effective date, and although the IFR has been and will remain in effect until this final rule's effective date, that fact does not change whether this rulemaking complies with 5 U.S.C. 553, as the same was true of the IFR and final rule at issue in *Little Sisters. See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 FR 47792 (Oct. 13, 2017) (publishing the IFR at issue in *Little Sisters* with an effective date of October 6, 2017); Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 FR 57536 (Nov. 15, 2018) (publishing the final rule at issue in *Little Sisters* with an effective date of January 14, 2019).

[5] On December 2, 2020, the Departments signed a joint final rule [hereinafter ''Intervening Joint Final Rule''] that made various amendments to the regulatory text as amended in the IFR previous to this rulemaking. Upon publication of the Intervening Joint Final Rule, certain amendments published in the IFR are no longer necessary.

1158(b)(2)(C), and finalizes this regulatory action. This final rule makes no additional changes to the IFR beyond the changes described below.

A. Amendments to 8 CFR 208.13(c)(4)(i), (iii) and 1208.13(c)(4)(i), (iii)

The IFR provided that an alien who enters, attempts to enter, or arrives in the United States across the southern land border after transiting through at least one country outside of the alien's home country while en route to the United States will not be found ineligible for asylum if (1) the alien demonstrates that he or she applied 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 en route to the United States 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(a), or (3) if the only countries through which the alien transited en route to the United States were, at the time of the transit, not parties to the Refugee Convention or the Refugee Protocol.

The final rule removes the references to torture and to the CAT in subparagraphs (i) and (iii) in deference to the concept that whether an alien has applied for protection from torture and whether a country through which an alien transits en route to the U.S. is a party to the CAT may not have a direct correlation to the immigration benefit of asylum, a grant of which is based on persecution or a well-founded fear of persecution on account of a protected ground.

The final rule also changes the word ''countries'' in 8 CFR 208.13(c)(4)(iii) and 1208.13(c)(4)(iii) to the phrase ''country or countries'' to avoid confusion regarding situations in which an alien transits through only one country. No substantive change from the IFR is intended by this clarification.

B. Amendment to 8 CFR 208.30(e)(5)(iii)

As published in the IFR, 8 CFR 208.30(e)(5)(iii) included a statement that the scope of review for proceedings before an immigration judge that involve an alien who an asylum officer has determined (1) is ineligible for asylum due to the third-country-transit bar at 8 CFR 208.13(c)(4) but (2) has a reasonable fear of persecution or torture is ''limited to a determination of whether the alien is eligible for withholding or deferral of removal.'' *See* 8 CFR 208.30(e)(5)(iii). In addition, the same paragraph stated these aliens would be placed in section 240 removal proceedings ''for 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 Convention Against Torture.'' *See id.* The Intervening Joint Final Rule amended this section, however, and no further clarifying amendments in this section and by this final rule are necessary.

C. Amendments to 8 CFR 208.30(e)(5)(i)

In 8 CFR 208.30(e)(5)(i), the Departments would have revised the introductory language to correct a typographical error in the IFR by removing the reference to ''paragraph (e)(5)(i)'' in 8 CFR 208.30(e)(5)(i) and to reflect the publication of the interim final rule Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 FR 63994 (Nov. 19, 2019) (''ACA IFR''), which provides separate procedures in 8 CFR 208.30(e)(7) for certain aliens subject to bilateral or multilateral agreements pursuant to section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A).[6] The Intervening Joint Final Rule, however, amended this section to make those corrections, and no further clarifying amendments by this final rule are necessary.

D. Amendments to 8 CFR 1003.42

The IFR made edits to 8 CFR 1003.42 to account for the addition of the third-country-transit bar in immigration judge reviews of credible-fear determinations. The Intervening Joint Final Rule amended this section and no further clarifying amendments by this final rule are necessary.

E. Typographical Corrections

The Departments have also made a non-substantive amendment to cross-references in regulations implicated by the IFR to change the reference in 8 CFR 1208.13(c)(4) from 8 CFR 208.15 to 8 CFR 1208.15 because section 1208.13 is in Chapter V of 8 CFR, which governs EOIR, and not Chapter I, which governs DHS.[7]

III. Public Comments on the Interim Final Rule

A. Summary of Public Comments

On July 16, 2019, DHS and DOJ jointly published the IFR in EOIR Docket No. 19–0504. The comment period associated with the IFR closed on August 15, 2019, with 1,847 comments received.[8] Individual or anonymous commenters submitted the vast majority of comments. These commenters were divided between commenters supporting the rule and commenters opposing the rule. Of the 1,847 comments, 50 were submitted by organizations, including non-government organizations, legal advocacy groups, non-profit organizations, and religious organizations. One of these organizations submitted a comment that provided support for the rule, while the other organizations expressed opposition to the rule.

B. Comments Expressing Support

Comment: The Departments received a significant number of comments in support of the IFR. The majority of these commenters voiced general support for the IFR and urged others to support the rule as well. The commenters described a ''flood'' or ''avalanche'' of immigrants at the southern land border and urged support for the IFR as a tool to deal with a ''crisis.'' Commenters described the IFR as helping to close ''loopholes'' in the asylum process. Some commenters urged asylum applicants to apply from their home country.

Response: The Departments note the general support for the rule. The rule is designed neither to require nor allow applicants for asylum under U.S. law to apply in their home countries, but rather to generally require that an alien first apply under a third country's laws outside the alien's country of citizenship, nationality, or last lawful

[6] The ACA IFR modified title 8 of the CFR to provide for the implementation of ''Asylum Cooperative Agreements,'' which are authorized by section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A) and implemented by regulation primarily at 8 CFR 208.30(e)(6)–(7). Commenters alternately used the phrase ''safe third country'' to describe these agreements reached under section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A), likely because the section of the U.S. Code related to such agreements is labelled the ''[s]afe third country'' exception. We have retained the ''safe third country'' phrasing when summarizing those comments.

[7] The Intervening Joint Final Rule amended the cross-reference in the IFR from ''8 CFR 1208.30(g)(2)'' to ''8 CFR 1208.30(g).'' Further, the Intervening Joint Final Rule amended 8 CFR 1208.30(g)(1)(ii) to include specific cross references that were excluded from the IFR. No additional changes are necessary in this rulemaking.

[8] The Departments reviewed all comments that were submitted in response to the rule. However, EOIR did not post 114 of the comments to *regulations.gov* for public inspection. Of these comments, 1 included obscenities, 1 included an image of an unidentified minor child, 2 included potential incitements to violence, 23 were duplicates of another comment submitted by the same commenter, and 87 were non-substantive comments of either ''this is a test'' or ''please write your comment here'' and did not indicate either support for or disagreement with the rule.

habitual residence through which the alien transited en route to the United States.

Comment: Commenters also indicated their support for the Administration's immigration policies more generally. A significant number of commenters demanded that the government build a border wall. Many commenters urged the government to secure or completely close the southern land border in order to prevent drug smuggling and human trafficking, enhance national security, and prevent illegal immigration. Likewise, commenters called for general reform of asylum laws in order to prevent asylum abuse. Some commenters advocated eliminating asylum altogether. Other commenters were concerned about immigrants using public services and urged the government to focus resources on American citizens. Commenters encouraged the enforcement of existing immigration laws and requested pressure on Congress to address broader immigration reform.

Response: The Departments note the support for enforcing the Nation's immigration laws. The Departments, however, did not intend for the rule to address the myriad asylum and immigration issues covered in these comments. For example, this rule does not address building a border wall, the availability of public benefits to aliens, or whether Congress should enact comprehensive immigration reform. This rule is limited to the asylum application process at the southern land border and aims to (1) further the humanitarian purposes of asylum by more expeditiously providing relief to trafficking victims and individuals who are unable to obtain protection from persecution or torture elsewhere, and (2) deter meritless asylum claims.

The Departments also strongly oppose eliminating asylum (which, in any event, would require the enactment of legislation by Congress). As stated in the Refugee Act of 1980, it is ''the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands'' through, among other tools, the asylum process. Pub. L. 96–212, sec. 101(a), Mar. 17, 1980, 94 Stat. 102 (''Refugee Act''). The Departments remain committed to ensuring that those asylees who most urgently need relief from persecution are able to obtain it in a timely manner.

Comment: The Departments also received comments supporting the IFR as a means to help alleviate ''the extraordinary strain placed on the nation's immigration system by the unprecedented surge in meritless asylum claims at the southern land border since 2013'' and ''the consequent caseload backlogs caused by the record numbers of asylum applications being filed.'' One organization also expressed support for the rule as a means to ''curtail the humanitarian crisis created by smugglers trafficking women, children, and entire family units.'' The same organization suggested that the Departments amend the phrase, ''shall be found ineligible for asylum, unless'' in interim final regulations 8 CFR 208.13(c)(4) and 1208.13(c)(4) to read ''shall be presumptively ineligible for asylum in the exercise of discretion, unless.''

Response: The Departments note the support for the IFR. The Departments disagree with the suggested change to the regulatory text. The rule is intended to serve as a bar to asylum eligibility for those aliens described at 8 CFR 208.13(c)(4) and 1208.13(c)(4), not a bar that an immigration judge or asylum officer may waive as a matter of discretion. The use of a bar promotes uniform application and is consistent with existing statutory bars in section 208(b)(2)(A) of the Act, 8 U.S.C. 1158(b)(2)(A), and those instituted by regulation pursuant to 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C).

C. Comments Expressing Opposition

1. General Opposition to the Interim Final Rule and Assertions That the Departments Have Exceeded Their Legal Authority

Comment: The Departments received several comments expressing general opposition to the IFR. Some commenters expressed opposition to the IFR without further explanation. Others asserted that the IFR conflicts with the Act, without citing specific provisions, and others opined that the Departments lack the authority to promulgate the IFR. One commenter stated broad disbelief that anyone could support the IFR.

Response: Because these particular comments failed to articulate specific reasoning underlying expressions of general opposition, DHS and DOJ are unable to provide a more detailed response.

The Departments were well within their legal authority, however, when promulgating the IFR.[9] Congress, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (''IIRIRA''), vested the Departments with broad authority to establish conditions or limitations on asylum. Public Law 104–208, Div. C, Sept. 30, 1996, 110 Stat. 3009, 3009–546. In fact, as the Supreme Court has recognized, ''a major objective of IIRIRA was to protect the Executive's discretion from undue interference.'' *Dep't of Homeland Sec.* v. *Thuraissigiam,* 140 S. Ct. 1959, 1966 (2020) (alteration and quotation marks omitted). Congress created three categories of aliens who are barred from applying for asylum and adopted six other mandatory bars to asylum eligibility. IIRIRA, sec. 604(a), 110 Stat. at 3009–690 to 694 (codified at sections 208(a)(2)(A)–(C), (b)(2)(A)(i)–(vi) of the Act, 8 U.S.C. 1158(a)(2)(A)–(C), and (b)(2)(A)(i)–(vi)). These bars include the asylum cooperative agreement bar to applying for asylum and the firm resettlement bar to asylum eligibility. *Id.* The statutory list is not exhaustive. Instead, Congress, in IIRIRA, further expressly authorized the Attorney General to expound upon two bars to asylum eligibility—the bars for ''particularly serious crimes'' and ''serious nonpolitical offenses.'' INA 208(b)(2)(B)(ii), 8 U.S.C. 1158(b)(2)(B)(ii). Congress also vested the Attorney General with the ability to establish by regulation ''any other conditions or limitations on the consideration of an application for asylum,'' so long as those limitations are ''not inconsistent with this chapter.'' INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C).[10]

As the Tenth Circuit has recognized, ''[t]his delegation of authority means that Congress was prepared to accept administrative dilution of the asylum guarantee in § 1158(a)(1)'' that aliens generally may file asylum applications, given that ''the statute clearly empowers'' the Attorney General and the Secretary to ''adopt[ ] further limitations'' on eligibility to apply for or receive asylum. *R–S–C* v. *Sessions,* 869 F.3d 1176, 1187 & n.9 (10th Cir. 2017). In authorizing ''additional limitations

[9] This section addresses general assertions that the Departments lacked the legal authority to issue the IFR. Section III.C.2 of this preamble addresses comments and responses regarding the IFR's relation to specific provisions of the Act.

[10] The Homeland Security Act of 2002 (''HSA''), Public Law 107–296, Nov. 25, 2002, 116 Stat. 2135, as amended, transferred many immigration-related functions to a newly created DHS headed by the Secretary of Homeland Security (''the Secretary''). The HSA charges the Secretary with ''the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens.'' INA 103(a)(1), 8 U.S.C. 1103(a)(1). Further, the HSA authorizes the Secretary to take all actions ''necessary for carrying out'' the Act. INA 103(a)(3), 8 U.S.C. 1103(a)(3). The HSA nonetheless preserves authority over certain immigration adjudications for EOIR, which is part of DOJ and, thus, subject to the direction and regulation of the Attorney General. *See* INA 103(g), 8 U.S.C. 1103(g); 6 U.S.C. 521. Accordingly, the Secretary along with the Attorney General may establish limitations and conditions on asylum eligibility under section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C).

and conditions'' by regulation, the statute gives the Attorney General and the Secretary broad authority in determining what the ''limitations and conditions'' should be. The Act instructs only that additional limitations on eligibility are to be established ''by regulation,'' and must be ''consistent with'' the rest of section 208 of the Act, 8 U.S.C. 1158. *See* INA 208(b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(2)(C), (d)(5)(B).

The Attorney General has previously invoked section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C), to limit eligibility for asylum based on a ''fundamental change in circumstances'' and on the ability of an applicant to safely relocate internally within a country. *See* Asylum Procedures, 65 FR 76121, 76133–36 (Dec. 6, 2000) (codified at 8 CFR 208.13(b)(1)(i)(A), (B)).[11] The courts in applying these limitations have not questioned the Attorney General's authority to impose them. *See, e.g., Afriyie* v. *Holder,* 613 F.3d 924, 934–36 (9th Cir. 2010) (discussing the allocation of the burden of proof regarding the reasonability of relocation); *Uruci* v. *Holder,* 558 F.3d 14, 19–20 (1st Cir. 2009) (explaining that a Department of State country report may demonstrate a ''fundamental change in circumstances'' sufficient to rebut the presumption of well-founded fear of persecution). The courts have also viewed section 208(b)(2)(C) as conferring broad authority, *see R–S–C,* 869 F.3d at 1187, and have suggested that ineligibility based on fraud would be authorized under it, *Nijjar* v. *Holder,* 689 F.3d 1077, 1082 (9th Cir. 2012) (noting that fraud could be ''one of the 'additional limitations . . . under which an alien shall be ineligible for asylum' that the Attorney General is authorized to establish by regulation'').

Regarding the comment that questions any support for the IFR, a long-held principle of administrative law is that an agency, within its congressionally delegated policymaking responsibilities, may ''properly rely upon the incumbent administration's view of wise policy to inform its judgments.'' *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 865 (1984). Accordingly, an agency may make policy choices that Congress either inadvertently or intentionally left to be resolved by the agency charged with administration of the statute, given the current realities faced by the agency. *See id.* at 865–66. Specifically in the immigration context, Congress has expressly fortified the Executive's broad discretion to make policy decisions on immigration matters without interference. As the Supreme Court recognized, a ''major objective of IIRIRA'' was to protect the Executive's discretion to oversee immigration matters from ''undue interference by the courts; indeed, that can fairly be said to be the theme of the legislation.'' *Thuraissigiam,* 140 S. Ct. at 1965 (alteration and quotation marks omitted).[12] The current situation at the southern land border, specifically the sharp increase of encounters with aliens at the border, subsequent requests for asylum relief, and the large number of meritless, fraudulent, or non-urgent asylum claims that are straining the Nation's immigration system, prompted the Departments to promulgate this rule. *See* 84 FR at 33830–31. As the Supreme Court noted in *Thuraissigiam,* the past decade has seen a 1,883 percent increase in credible-fear claims, with about 50 percent of those applicants found to have a credible fear never applying for asylum. 140 S. Ct. at 1967–68. Moreover, fraudulent asylum claims can be ''difficult to detect,'' given the expedited nature of the screening process and the large caseload. *Id.* The Court noted a study in which 58 percent of randomly selected asylum applications contained indicators of possible fraud, with 12 percent of those cases ultimately determined to be fraudulent. *Id.* at 1967 n.10.

The current statutory framework accordingly leaves the Attorney General (and, after the HSA, the Secretary too) significant discretion to adopt additional bars to asylum eligibility. As further explained above, Congress specifically delegated authority to the Attorney General and the Secretary to ''establish additional limitations and conditions . . . under which an alien shall be ineligible for asylum.'' INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C).

In *Thuraissigiam,* the Supreme Court recognized, in the context of the credible-fear process, that restrictions on Executive discretion to respond to strains on the immigration system and abuses of the system could ''increase the burdens currently overwhelming our immigration system.'' *Thuraissigiam,* 140 S. Ct. at 1966 (quotation marks omitted). While *Thuraissigiam* ruled in the context of judicial review of credible-fear findings, the Supreme Court acknowledged that such burdens would exist ''[e]ven without the added step of judicial review.'' *Id.* The Court recognized that ''[t]he majority of [credible-fear claims] have proved to be meritless.'' *Id.* at 1967. The Court also stated, as noted above, that detection of fraudulent asylum claims is difficult, further noting that while all applications with indicators are not fraudulent, characteristics of such fraud are frequent and require more agency resources. *See id.* at 1967 & n.10. In light of these reasons, a right to judicial review that prolonged what was intended to be an expedited process could pose ''significant consequences for the immigration system.'' *Id.* at 1967. The Court stated that, in fact, the expedited process ''would augment the burdens on that system'' rather than alleviate them, as intended by Congress, because ''[o]nce a fear is asserted, the process would no longer be expedited.'' *Id.*

Similarly, in the asylum context, the significant backlog in asylum cases, the need to prioritize meritorious applications, and the vast numbers of aliens attempting to enter at the southern land border all threaten to overwhelm the immigration system. As the Supreme Court recognized, over ''[t]he past decade'' about 50 percent of aliens who were ''found to have a credible fear . . . did not pursue asylum,'' and, in 2019, ''a grant of asylum followed a finding of credible fear just 15% of the time.'' *Id.* at 1966–67. Because aliens are only required to meet a ''low bar'' for placement in the extensive proceedings associated with asylum claims, *see id.,* it is imperative that the Departments establish clear criteria ensuring that such proceedings are for those who have meritorious claims or urgently require asylum protection in the United States, and such measures are consistent with the Act in order to avoid overwhelming the immigration system.

Through the publication of the IFR, the Departments have properly exercised their congressionally delegated authority. Such policymaking is well within the confines of permissible agency action.

[11] DOJ duplicated 8 CFR 208.13 in its entirety at 8 CFR 1208.13 following the codification of EOIR's regulations in Chapter V of 8 CFR. Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FR 9824 (Feb. 28, 2003).

[12] The Ninth Circuit recently concluded that the Attorney General's discretion to limit eligibility for asylum was narrower than the discretion to grant or deny asylum to aliens who are eligible for such relief. *See E. Bay Sanctuary Covenant* v. *Barr,* 964 F.3d 832, 848 (9th Cir. 2020), *pet. for reh'g en banc pending* (filed Oct. 5, 2020). Specifically, the court determined that the Attorney General's discretion to limit asylum eligibility ''must be consistent with the core principle'' of section 208 of the Act, 8 U.S.C. 1158. *Id.* The Departments agree that their actions limiting eligibility must be ''consistent with'' section 208 of the Act, 8 U.S.C. 1158, and they promulgated the IFR with the understanding that doing so was indeed consistent with that section. *See* 84 FR at 33834. To the extent that the Ninth Circuit disagrees with the Departments' position on this matter, the Departments have provided additional reasoning and evidence in this final rule to address such concerns.

2. Interim Final Rule and the Act

a. Asylum Cooperative Agreements

Comment: Commenters, including a number of organizations and individual commenters, raised concerns that the IFR is inconsistent with the Act's safe-third-country bar to applying for asylum. *See* INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A) (providing that an alien is ineligible to apply for U.S. asylum and may be removed, pursuant to a bilateral or multilateral agreement, to pursue his or her protection claims in a country, other than the country of the alien's nationality or last habitual residence, in which (1) ''the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion,'' and where (2) ''the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection''). Some commenters argued that Congress intended for the safe-third-country bar (or the safe-third-country bar coupled with the firm resettlement bar at section 208(b)(2)(A)(vi) of the Act, 8 U.S.C. 1158(b)(2)(A)(vi)), to be the sole means by which an alien may be denied asylum based on a relationship with a third country. Commenters also stated that the IFR renders the safe-third-country bar superfluous because the rule bars individuals from applying for asylum regardless of whether the country was a signatory to a safe-third-country agreement. Relatedly, commenters were concerned that the IFR is inconsistent with the Act because the IFR does not require the United States to have a bilateral or multilateral agreement with a third country and instead focuses on whether the country is a party to specified international accords. *See* 8 CFR 208.13(c)(4)(iii), 1208.13(c)(4)(iii). Commenters were also concerned that the IFR does not adequately consider or require an individualized determination as to whether a third country is ''safe'' for asylum seekers or has an adequate system for granting protection against persecution and torture. Some commenters stated that the United States must ensure that no person faces persecution in a third country and that people have access to a robust asylum system in a third country when seeking protection.

Response: This rule is consistent with, and complementary to, the Act's provision authorizing Asylum Cooperative Agreements with third countries. *See* INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A) (''the ACA bar''); 84 FR at 33834. The ACA bar operates as a bar to aliens who are covered by such an agreement; such aliens would be barred from applying for asylum in the U.S. pursuant to section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A).[13] Under the Act, the United States has statutory authority to negotiate agreements with third countries. Moreover, nothing in the Act requires that an alien have first traveled through, or sought protection, in that third country for the bar to apply. Rather, the ACA bar authorizes removal of covered aliens to a third country that has agreed to share responsibility with the United States for considering such aliens' claims for asylum or equivalent temporary protection. The authority to remove aliens under an Asylum Cooperative Agreement is limited to only those countries with which the United States has an agreement and that provide ''access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection,'' INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A)—a requirement absent from this third-country-transit rule or the statutory provision pursuant to which it is promulgated. As stated previously, the third country to which an alien may be removed under the ACA bar in section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A) need not be a country through which the alien transited en route to the United States.

In addition, the ACA bar creates a bar to applying for asylum in the United States—unlike this third-country-transit rule, which creates a bar to asylum eligibility for aliens who have applied for such relief in the United States. The ACA bar to applying for protection serves a different purpose from creating a bar to eligibility for protection. The ACA bar involves no determination about the merits of an alien's underlying asylum claim, instead providing a mechanism for an alien's protection claims to be considered fully by a third country that has satisfied the criteria under section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A), and agreed to help share responsibility with the United States to provide relief to aliens needing protection.

Nothing in the Act suggests that Congress intended for the ACA bar at section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A), or the ACA bar coupled with the Act's firm resettlement bar at section 208(b)(2)(A)(vi) of the Act, 8 U.S.C. 1158(b)(2)(A)(vi), to prevent the Departments from establishing limitations on asylum eligibility based on an alien's travel through, or relationship with, a third country. As discussed above in Section III.C.1 of this preamble, Congress provided the Attorney General (and, now, the Secretary) with authority to implement additional conditions and limitations on asylum eligibility at the same time that Congress enacted the ACA bar. INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C). Congress thus authorized the Attorney General and the Secretary to establish conditions and limitations on asylum eligibility in addition to, for example, the ACA bar and firm resettlement bar.

Further, an alien's failure to seek such protection in a third country has long been recognized as a factor that could be considered in terms of whether to deny asylum as a matter of discretion, independent of the ACA or firm resettlement bars. *See Matter of Pula,* 19 I&N Dec. 467, 473–74 (BIA 1987), *superseded in part on other grounds as stated in Andriasian* v. *INS,* 180 F.3d 1033, 1043–44 & n.17 (9th Cir. 1999).

The rule thereby complements, rather than conflicts with, section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A). The ACA bar is designed ''to prevent forum-shopping by asylum seekers, and to promote the orderly handling of asylum claims.'' *See United States* v. *Malenge,* 294 F. App'x 642, 645 (2d Cir. 2008) (discussing the purpose of the agreement between the United States and Canada pursuant to section 208(a)(2)(A) of the Act, 8 U.S.C.

[13] Since the enactment of the statutory provision authorizing such agreements in IIRIRA in 1996, the United States has signed agreements with Honduras, El Salvador, Guatemala, and Canada. *See* Agreement Between the Government of the United States of America and the Government of the Republic of Honduras for Cooperation in the Examination of Protection Claims, 85 FR 25462 (May 1, 2020); DHS, *Joint Statement Between the U.S. Government and the Government of El Salvador* (Sept. 20, 2019), *https://www.dhs.gov/news/2019/09/20/joint-statement-between-us-government-and-government-el-salvador* (last visited Dec. 10, 2020); Agreement Between the Government of the United States of America and the Government of the Republic of Guatemala on Cooperation Regarding the Examination of Protection Claims, 84 FR 64095 (Nov. 20, 2019) (''U.S.-Guatemala ACA''); Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, U.S.-Can., State Dep't No. 05–35, Dec. 5, 2002, 2004 WL 3269854. The Government has previously promulgated regulations implementing the agreement with Canada, *see* 8 CFR 208.30(e)(6), and the Government promulgated an IFR in November 2019 establishing procedures for carrying out the remaining agreements and any future agreements. *See* 84 FR at 63994. Not all of these agreements are currently in force, however, because the agreement with El Salvador has yet to become effective. Also, in the case of Canada, a Canadian court held that the U.S.-Canada agreement violates certain provisions of Canada's Constitution but suspended the declaration of invalidity until January 22, 2021. *Canadian Council for Refugees* v. *Canada (Immigration, Refugees and Citizenship),* 2020 F.C. 770 (Fed. Ct.), *appeal pending* (Fed. Ct. App.). On October 26, 2020, Canada's Federal Court of Appeal granted a stay of the lower court's decision pending a final determination of the Canadian Government's appeal. 2020 FCA 181 (Fed. Ct. App. Oct. 26, 2020).

1158(a)(2)(A)). This rule likewise aims to prevent aliens from ''forum-shopping . . . after transiting through one or more third countries where [an alien] could have sought protection, but did not.'' 84 FR at 33834.

Further, the rule is not inconsistent with the Act merely because it addresses, at a high level of generality, a subject matter similar to the ACA bar (*i.e.,* the availability of asylum for aliens who may be able to obtain protection in a third country). To read the existing exceptions for the availability of asylum as occupying the entire field of permissible exceptions on the same or related topics would render meaningless the Act's express grant of authority to the Attorney General and Secretary to establish additional limitations on asylum eligibility. *See* INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C); *see also TRW Inc.* v. *Andrews,* 534 U.S. 19, 31 (2001) (quoting *Duncan* v. *Walker,* 533 U.S. 167, 174 (1994) (observing that a statute should be construed so that ''no clause, sentence, or word shall be superfluous, void, or insignificant'' (quotation marks omitted)); *Stone* v. *INS,* 514 U.S. 386, 397 (1995) (''When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.''). One district court considering the legality of the IFR has already expressed strong doubts about such an argument because it would place too great a restriction on the Attorney General's and Secretary's authority. *See Capital Area Immigrants' Rights Coal.* v. *Trump (''CAIR I''),* --- F. Supp. 3d ---, 2019 WL 3436501, at *3 (D.D.C. July 24, 2019), ECF No. 28 (explaining in an oral ruling that ''the plaintiffs are reading too strict a limitation on to the Attorney General's authority'' and expressing strong doubts regarding the argument that ''anytime the Attorney General enacts a limitation that covers the same concern as one of those addressed by the statutory bars, it's necessarily inconsistent'' with the Act).[14] The Supreme Court has likewise rejected a similar argument: In *Trump* v. *Hawaii,* the Court determined that the Act's provisions regarding the entry of aliens ''did not implicitly foreclose the Executive from imposing tighter restrictions,'' even in circumstances in which those restrictions concerned a subject ''similar'' to the one that Congress ''already touch[ed] on in the INA.'' 138 S. Ct. 2392, 2411–12 (2018). Thus, by the same reasoning, Congress's statutory command that certain aliens are ineligible to apply for asylum does not deprive the Attorney General and Secretary of authority, by regulation, to deny asylum eligibility for certain other aliens whose circumstances may—in a general sense—be ''similar.''

The Departments emphasize that the rule is consistent with, yet distinct from, the ACA bar. The rule is distinguishable because it provides for a tailored determination of whether an alien passed through a country where he or she could have applied for relief, but did not do so. The rule is consistent with the Act's ACA bar because, among the other reasons detailed above, the rule's denial of asylum where relief could have been pursued in a transit country is entirely consistent with the ACA bar's objective to help ease the strain on the overburdened immigration system. *See* 84 FR at 63996. Thus, far from conflicting with the ACA bar, this rule complements it, reaching additional classes of aliens who have requested asylum, expressed a fear of return, or claimed a fear of persecution or torture when being apprehended or encountered by DHS.

Regarding comments that the IFR does not adequately consider whether a third country is ''safe'' for asylum seekers, the Departments note that 8 CFR 208.13(c)(4)(iii) and 1208.13(c)(4)(iii) apply only if an alien has transited through a third country that is a party to one of the specified international conventions that establish non-refoulement obligations. By becoming a party to those treaties, the third countries in which an alien may be required to apply for protection under this rule are obligated, based on the treaties they have joined, to provide protection from removal of an individual to country where his or her life or freedom would be threatened on account of a protected ground.[15] Aliens who choose not to apply for relief within such a country because—notwithstanding the country's obligations under international conventions—because of their concerns about that country's safety, their fear of persecution or torture in the transit country, the inability of the transit country to offer them protection, or other concerns may be considered for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), or withholding of removal or deferral of removal under the CAT regulations, in the United States.

Comment: Some commenters noted that the United States has entered into only one ''safe third country agreement,'' an agreement with Canada.[16] Commenters further observed that neither Mexico nor Guatemala has entered into safe-third-country agreements with the United States.[17] One commenter emphasized that the legality of the United States' safe-third-country agreement with Guatemala is unclear. Other commenters argued that, under the Act, it is not enough that the United States has entered into a safe-third-country agreement; the third country must offer applicants a full and fair procedure.

Response: As previously noted, this rule is promulgated pursuant to the authority provided under section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C), which authorizes the placement of '' 'additional limitations and conditions . . . under which an alien shall be ineligible for asylum' established by a regulation that is 'consistent with' section 208 of the INA.'' 84 FR at 33832. This rule is not intended to implement an Asylum Cooperative Agreement under section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A). Any discussion of the legality or sufficiency of the Asylum Cooperative Agreement between the United States and Guatemala, or any other country, is beyond the scope of this rulemaking.

b. Firm Resettlement

Comment: Numerous commenters expressed concern that the IFR conflicts

[14] The Departments acknowledge that the district court in the *CAIR* litigation later vacated the IFR in ruling on cross motions for summary judgment. *See* ''*CAIR II,*'' --- F. Supp. 3d ---, 2020 WL 3542481. The court, however, addressed only the plaintiffs' procedural claim under the APA and did not discuss the claim that the IFR is contrary to the INA. *See id.* at *5 (holding that ''Defendants unlawfully promulgated the rule without complying with the APA's notice-and-comment requirements,'' and thus the court ''need not reach Plaintiffs' other claims concerning the validity of the rule''). The Departments also acknowledge that the Ninth Circuit has concluded that the IFR is not consistent with the ACA bar. *See E. Bay Sanctuary Covenant,* 964 F.3d at 846–49. The Ninth Circuit's preliminary injunction remains stayed pending the court's decision on the Government's petition for rehearing en banc and, if that petition is denied, the Government's decision to file a petition for writ of certiorari and, if such writ is filed, the Supreme Court's disposition. *Barr* v. *E. Bay Sanctuary Covenant,* 140 S. Ct. 3 (2019). To the extent that these decisions conflict, the Departments believe that the decision in *CAIR I* is more persuasive.

[15] For example, a third country that is party to the 1951 Convention provides protection to refugees consistent with its non-refoulement obligations under Article 33.1 of the 1951 Convention. *See* 19 U.S.T. 6259, 6276, 189 U.N.T.S. 150, 176 (''No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'').

[16] These comments were submitted before the United States signed the previously mentioned agreements with Honduras and El Salvador.

[17] These comments were submitted before the United States implemented the U.S.-Guatemala ACA. *See* 84 FR 64095.

with the firm resettlement bar to asylum eligibility because the rule precludes eligibility for asylum for aliens who have passed through a third country even if they have not been offered permanent status in that third country. *See* INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi) (providing for the firm resettlement bar, which renders an applicant who ''was firmly resettled in another country prior to arriving in the United States'' ineligible for asylum). Commenters argued that Congress intended that an alien have a more significant relationship with a third country—*i.e.,* be firmly resettled in that country rather than be merely transiting through the country—to be rendered ineligible for asylum.

Some commenters also opposed the IFR because it does not account for whether an alien is eligible for permanent legal status in the third country and because it does not account for the risk of harm that an alien might face in the third country.

Response: The Departments reiterate the explanation in the IFR that it is consistent with the firm resettlement bar under section 208(b)(2)(A)(vi) of the Act, 8 U.S.C. 1158(b)(2)(A)(vi). 84 FR at 33834.[18] The rule is distinct from the firm resettlement bar. While both the rule and the firm resettlement bar seek to reduce forum-shopping by aliens, *compare* 84 FR at 33834, *with* INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi), this transit rule is not linked to, and takes a different approach from, the firm resettlement bar. The rule does not entirely eliminate asylum eligibility based on an alien's stay in another country. Rather, under the rule, aliens remain eligible for asylum so long as they applied for and were denied protection in the relevant third country. *See* 8 CFR 208.13(c)(4)(iii), 1208.13(c)(4)(iii).

The existence of the firm resettlement bar should not be interpreted as an implicit foreclosure of additional limitations on asylum eligibility for aliens who have travelled through other countries. The Supreme Court, as explained above, has already rejected a similar approach to reading the Act. *See Trump,* 138 S. Ct. at 2411–12 (noting that the Act's explicit statutory provisions ''did not implicitly foreclose the Executive from imposing tighter restrictions'' in ''similar'' areas). Further, the firm resettlement bar and this final rule operate in distinctly different manners. The firm resettlement bar merely prohibits the Executive from granting asylum to aliens who have firmly resettled in a third country prior to arriving in the United States. That bar does not require that those aliens who have not firmly resettled should be eligible for or be granted asylum. As a discretionary form of relief, no alien, even if qualified for it, is entitled to it. *Thuraissigiam,* 140 S. Ct. at 1965 n.4 (''A grant of asylum enables an alien to enter the country, but even if an applicant qualifies, an actual grant of asylum is discretionary.''). Thus, any decision on eligibility for such aliens remains committed to the discretion of the Attorney General and the Secretary either through their rulemaking authority, *see* INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C), or through the general requirement that an alien demonstrate that he or she merits a favorable exercise of discretion, *see* INA 208(b)(1), 8 U.S.C. 1158(b)(1). The rule constitutes an exercise of this discretion that supplies a rule of decision for aliens who fall outside the scope of the firm resettlement bar. Put differently, Congress mandated that certain aliens should be excluded from asylum eligibility in order to prevent forum-shopping by asylum seekers. But Congress left to the Attorney General (and, after the HSA, the Secretary) to promulgate additional rules regarding asylum eligibility—such as this final rule—that might also deter forum-shopping. The rule accordingly does not conflict with the firm resettlement bar's prohibition on granting asylum to certain aliens. *See, e.g., Cheney R. Co., Inc.* v. *ICC,* 902 F.2d 66, 69 (D.C. Cir. 1990) (''[T]he contrast between Congress's mandate in one context with its silence in another suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, *i.e.,* to leave the question to agency discretion.'').

Moreover, the rule reasonably complements the firm resettlement bar. That bar, as noted above, categorically denies eligibility to aliens who have ''firmly resettled'' in a different country because those aliens do not need the protections afforded to asylees in this country. The Departments have concluded that aliens who do not even apply for asylum in a third country are similarly unlikely to warrant the protections associated with asylum. The firm resettlement bar and the rule thus complement one another by denying eligibility to those aliens who are least likely to need asylum, and there accordingly is no inconsistency between the two provisions. Both provisions, in other words, advance the overall goal of the asylum statute by focusing relief on applicants who have ''nowhere else to turn.'' *Sall* v. *Gonzales,* 437 F.3d 229, 233 (2d Cir. 2006). Both bars also are reasonably aimed at '' 'encourag[ing]' other nations 'to provide assistance and resettlement.' '' *Pao Yang* v. *INS,* 79 F.3d 932, 939 (9th Cir. 1996) (quoting section 101 of the Refugee Act).

Comment: Some commenters stated that the IFR effectively writes the firm resettlement bar out of the Act because it sets forth a categorical bar to asylum for passing through a third country, thus negating any need to make a determination on whether an alien has firmly resettled. Some commenters stated that the United States must be able to guarantee permanent protection in a third country in order to determine that an alien has firmly resettled there. Commenters also expressed concern that the rule conflicts with the individualized analysis required by the definition of ''firm resettlement'' in the regulations. *See* 8 CFR 208.15, 1208.15.

Response: This rule does not overwrite the firm resettlement bar. The rule addresses a different set of aliens: It applies to those aliens who could have sought protection, but who did not do so, in a third country through which they transited en route to seek asylum at the southern land border of the United States. The firm resettlement bar, in contrast, applies to aliens who have received an offer of permanent status or resettlement in a third country before arriving in the United States. *See* INA 208(a)(2)(A)(vi), 8 U.S.C. 1158(a)(2)(A)(vi); 8 CFR 208.15, 1208.15 (2019) (defining ''firm resettlement'' to include circumstances in which an alien, prior to arriving in the United States, ''entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement'').[19] The

[18] The Departments note that the Ninth Circuit recently held that the IFR was inconsistent with section 208 of the INA, 8 U.S.C. 1158, including the firm resettlement bar in section 208(b)(2)(A)(vi) of the Act, 8 U.S.C. 1158(b)(2)(A)(vi). *E. Bay Sanctuary Covenant,* 964 F.3d at 846–49; *see also Barr,* 140 S. Ct. 3 (staying preliminary injunction regarding the IFR). The Departments, however, have addressed the Ninth Circuit's concerns by further explaining in this final rule how the transit bar is consistent with section 208 of the Act, 8 U.S.C. 1158.

[19] The Departments published an NPRM that, inter alia, proposed amending the definition of firm resettlement, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264 (June 15, 2020), which has recently been finalized, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, signed on December 2, 2020. The new definition refers to receipt or eligibility for permanent legal immigration status or non-permanent but indefinitely renewable legal immigration status, rather than an offer of permanent resident status. *Id.* It also refers to aliens who have spent at least a year in a third country, regardless of whether such status was available. *Id.*

Continued

different focus of these bars consequently means that not all aliens covered by one bar are necessarily covered by the other, contrary to the contention that this rule overrides the statutory firm resettlement bar. For example, the firm resettlement bar retains effect for any alien not covered by the third country transit bar, such as aliens who have sought protection in any third country in transit to the United States but who have been denied such protection, and all persons subject to specific forms of human trafficking. An alien could transit numerous countries en route to the United States, be denied protection in one country, and obtain firm resettlement in another, then only later attempt to obtain relief in the United States. In such cases, it would be firm resettlement, not third country transit, which would bar eligibility for asylum.

Similarly, this rule limits forum-shopping by certain aliens outside the scope of the firm resettlement bar. For example, travelers spending less than a year in a third country en route to the United States without receipt or eligibility for permanent legal immigration status or non-permanent but indefinitely renewable legal immigration status [20] from that third country or another would not fall under the statutory firm resettlement bar, but they would be ineligible for asylum under this rule—unless they had applied for, and been denied asylum eligibility, in any of the third countries through which they transited to reach the U.S. border. This rule thus bars individuals who have not been firmly resettled. Despite the somewhat different classes of aliens encompassed within each bar—one statutory and one a regulatory exercise of statutorily granted authority—both bars are consistent in their purpose. As explained in the IFR, both bars do important work to prevent forum-shopping, helping to ensure that the U.S. asylum process and immigration court system are available to those aliens who are in greatest need of assistance, not aliens who are merely ''seeking to choose among a number of safe countries.'' 84 FR at 33834.

Comment: Commenters stated that the IFR is overbroad because, even where an alien has received an offer to remain in a third country, he or she may not be found to have firmly resettled if the alien can demonstrate that his or her entry into the transit country was a necessary consequence of flight from persecution, that he or she remained only long enough to arrange onward travel and did not establish significant ties, or that his or her conditions of residence were so restricted that he or she was not in fact resettled.

Response: As explained above, the rule is distinct from the firm resettlement bar. The rule is not designed to address aliens who have firmly resettled or developed significant ties elsewhere. Instead, it is designed to identify applicants who are most in need because they have no other country of refuge, and to curtail the ability of aliens to use the asylum process as an end-run around the immigration system. It is reasonable to expect that an alien who is fleeing persecution will seek protection in the first country where it is available, as opposed to waiting until arrival in the United States.[21]

c. Whether or Not at a Port of Entry

Comment: Numerous comments expressed the view that the IFR conflicts with section 208(a)(1) of the Act, 8 U.S.C. 1158(a)(1), which states that ''[a]ny alien who . . . arrives in the United States (whether or not at a designated port of arrival . . .) . . . may apply for asylum.'' Some commenters stated that, because any non-Mexican asylum seekers coming to the southern land border necessarily transited through another country, the rule undermines the ''whether or not at a designated port of arrival'' language of the INA. Commenters also expressed concern that the IFR contravenes the INA's language that ''anyone physically present in the United States'' may apply for asylum.

Response: The rule is consistent with section 208(a)(1) of the Act, 8 U.S.C 1158(a)(1), which provides that aliens present or arriving in the United States, regardless of whether they are at a port of entry, may apply for asylum ''in accordance with this section.'' Section 208(b) of the Act, 8 U.S.C. 1158(b), then establishes conditions for granting asylum and states that the Attorney General (and, now, the Secretary) ''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.''

This rule does not bar any alien who expresses a fear of persecution from applying for asylum, and, in accordance with section 208(a)(1) of the Act, 8 U.S.C. 1158(a)(1), aliens impacted by the IFR may apply for asylum whether or not they are at a port of entry. The rule provides, however, that those who apply for asylum after travelling through a third country without first applying for, and being denied, protection in that third country (except for trafficking victims and aliens whose travel is only through countries that are not party to the relevant treaties) are ineligible to receive asylum. This rule's asylum eligibility bar is based on an alien declining to apply for asylum in one of the first countries in which such relief may have been available, prior to reaching the southern land border—thereby undermining the purported urgency of the alien's need for relief.

For clarity, the Departments note that this rule applies to all aliens who enter, attempt to enter, or arrive in the United States across the southern land border on or after July 16, 2019. These three terms, as explained more fully below, require physical presence in the United States, and, as a result, any aliens who did not physically enter the United States before July 16, 2019, are subject to this rule. This includes, for example, aliens who may have approached the U.S. border but were subject to metering by DHS at a land border port of entry and did not physically cross the border into the United States before July 16, 2019.[22]

That amendment, however, does not alter the point expressed in this final rule that the firm resettlement bar addresses a different set of aliens than those subject to this rule. To the contrary, that amendment—which addresses situations involving renunciation of citizenship and the Migrant Protection Protocols, neither of which are involved in the application of this rule—further crystalizes the distinctiveness of this rule from the firm resettlement bar.

[20] *See* note 20, supra.

[21] The Ninth Circuit cast doubt on the reasonableness of this expectation in light of potentially unsafe conditions in Mexico. *See E. Bay Sanctuary Covenant,* 964 F.3d at 859 (Miller, J., concurring in part) (''The key factual premise of [the Departments'] reasoning is that asylum in Mexico (or Guatemala) is indeed an 'available' opportunity, so that legitimate asylum seekers can reasonably be expected to apply for protection there. But that premise is contradicted by the agencies' own record.''). As explained more fully below, the Departments have considered the Ninth Circuit's opinion, have consulted additional sources of evidence, and have concluded again that Mexico and other countries are indeed capable of safely providing refuge for asylum seekers, thus substantiating the ''key factual premise'' for one of the Departments' rationales in promulgating the rule.

[22] The Departments note that this result is different from the district court's reasoning in granting a preliminary injunction in *Al Otro Lado, Inc.* v. *McAleenan,* 423 F. Supp. 3d 848, 875–76 (S.D. Cal. 2019), which included aliens who approached a U.S. port of entry but were not immediately permitted to cross the border as within the class of aliens who had ''attempted to enter or arrived in'' the United States. *See Al Otro Lado* v. *McAleenan,* 394 F. Supp. 3d 1168, 1199–1205 (S.D. Cal. 2019). The district court's interpretation is contrary to the Departments' intent, as explained below. The Departments also note that, even if aliens subject to metering prior to July 16, 2019, were exempt from this rule, they would nevertheless become subject to the rule upon any

As an initial matter, the terms ''entry'' and ''arrive'' require physical presence in the United States. For example, the term ''entry,'' which has a longstanding definition in immigration law, generally requires physical presence in the United States free from official restraint, after inspection and admission at a port of entry or intentional evasion at or outside of a port of entry. *See Matter of Patel,* 20 I&N Dec. 368, 370 (BIA 1991) (citing, inter alia, *Matter of Pierre,* 14 I&N Dec. 467, 468 (BIA 1973)). Similarly, although the U.S. Code does not define the term ''arrival'' (or ''arrive''), the term is consistently accompanied by the phrase ''in the United States.'' *See, e.g.,* INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B). Specifically, section 208(a) of the Act, 8 U.S.C. 1158(a), states that an alien who ''arrives in'' the United States may seek asylum. The present tense phrase ''arrives in'' thus speaks to actual, ongoing arrival in the United States, not some potential arrival in the future. Similarly, the term ''arriving alien'' is defined by regulation as ''an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means''—all of which require the alien to be physically present in the port of entry. *See* 8 CFR 1.2, 1001.1(q). An alien cannot be an ''applicant for admission'' unless he is ''present in the United States'' or ''arrives in the United States,'' INA 235(a)(1), 8 U.S.C. 1225(a)(1), and he cannot be ''at a port-of-entry'' unless he is in the United States, *see, e.g., United States* v. *Aldana,* 878 F.3d 877, 882 (9th Cir. 2017) (explaining that ports of entry are physical facilities in U.S. territory); *see also* 8 CFR 235.1(a), 1235.1(a) (application to lawfully enter ''shall be made . . . at a U.S. port-of-entry when the port is open for inspection''). Consistent with this reasoning, an immigration officer's duty to refer an alien ''who is arriving in the United States'' for a credible-fear interview does not attach until the ''officer determines that an alien . . . is inadmissible'' on certain grounds, INA 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii); the officer cannot determine that an alien is inadmissible on certain grounds until he inspects the alien, *see* INA 235(a)(3), 8 U.S.C. 1225(a)(3); and the officer's duty to inspect the alien does not attach until the alien ''arrives in'' the United States, INA 235(a)(1), 8 U.S.C. 1225(a)(1). For these reasons, this rule's references to the terms ''arrival'' and ''arrive''—like the references to ''entry''—require physical presence in the United States.[23]

Next, the Departments intended, and continue to intend, for the phrase ''attempt to enter'' to encompass only those who are physically present in the United States. Aliens whom U.S. Customs and Border Protection (''CBP'') encounter at the physical border line of the United States and Mexico, who have not crossed the border line at the time of that encounter, have therefore not attempted to enter. This interpretation, while perhaps counterintuitive in light of a colloquial understanding of the word ''attempt,'' is nonetheless consistent with case law in the immigration context that has equated an ''attempt'' to enter the United States with the actual crossing of the border. *See, e.g., United States* v. *Corrales-Beltran,* 192 F.3d 1311, 1319–20 (9th Cir. 1999) (''The attempt is in itself a substantive offense. It is the act of crossing the boundary line into the United States. It is not an attempt to commit an independently described offense, in the sense in which the word 'attempt' is ordinarily used in criminal law. It is the actual re-entry into the United States.'') (quoting *Mills* v. *United States,* 273 F. 625, 627 (9th Cir. 1921)). This interpretation of the word ''attempt'' in the context of attempting ''to enter'' is also consistent with the above-described meaning of the term ''entry.'' Because ''entry'' requires more than mere physical presence, *see Matter of Patel,* 20 I&N Dec. at 370, an alien can physically cross the border of the United States and still be merely ''attempting'' to enter the United States because, for example, he or she has not yet obtained freedom from official restraint.

For these reasons, the Departments reiterate that ''entry,'' ''attempted entry,'' and ''arrival'' require the alien to be physically present in the United States, whether at a land border port of entry or elsewhere within the United States, and the Departments do not intend for this rule to apply extraterritorially to aliens who are not in the United States in any capacity. Therefore, the rule applies to aliens who, for example, were subject to metering before July 16, 2019, and, as a result, had not entered, attempted to enter, or arrived in the United States by that time.

This rule establishes an additional condition, pursuant to the Attorney General's and the Secretary's authority at section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C), to establish additional limitations and conditions on asylum eligibility[24] for asylum applicants at the southern land border who travel through a third country. Those particular applicants must apply for, and be denied, protection in a third country of transit in order to maintain eligibility for asylum in the United States at the southern land border. Thus, the rule is consistent with the language of the statute. Additionally, as noted in the IFR, the new bar established by the regulation does not modify an alien's eligibility for withholding or deferral of removal proceedings, neither of which is a discretionary form of relief or protection. 84 FR at 33830.

Moreover, ''even if'' an alien satisfies all governing requirements, ''an actual grant of asylum is discretionary.'' *Thuraissigiam,* 140 S. Ct. at 1965 n.4; *see* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A); *INS* v. *Aguirre-Aguirre,* 526 U.S. 415, 420 (1999) (explaining that the ''decision whether asylum should be granted to an eligible alien is committed to the Attorney General's discretion'').

Comment: One commenter expressed concern that the IFR contradicts its own statutory authority because ''arriving at the Southern Border does not constitute an exception [to asylum eligibility] on the statute and, as such, the rule contradicts its own authority.''

Response: The Departments do not believe that the rule contradicts its own statutory authority. As noted in the IFR and explained above in Section III.C.1 of this preamble, the Act authorizes the Attorney General and the Secretary to establish further limitations and conditions on asylum eligibility beyond those expressly stated in the Act itself. INA 208(b)(2)(C), 8 U.S.C. 1158 (b)(2)(C); 84 FR at 33832. Further, the

subsequent entry into the United States. *See Al Otro Lado* v. *Wolf,* 952 F.3d 999, 1017 (9th Cir. 2020) (Bress, J., dissenting) (''Even so, the Third Country Transit Rule plainly applies to the plaintiffs in this case, so that enjoining it as to them was legal error. The Third Country Transit Rule applies to 'any alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019.' 8 CFR 208.13(c)(4). When plaintiffs reach this country, they will be entering or arriving in the United States after that date; the Rule thus plainly covers them.'').

[23] For example, in order to be inspected and processed, an application for admission must be physically present in the United States. *See* INA 235(a)(1), 8 U.S.C. 1225(a)(1) (applying to an alien who arrives ''in'' the United States). Additionally, in order to be processed for expedited removal, an alien must also first be present in the United States. *See* INA 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i) (requiring removal ''from the United States'' of ''an alien . . . who is arriving in the United States'').

[24] The authority to set additional limitations and conditions at section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C), is discussed further in preceding Section III.C.1.

comment mischaracterizes the substance of this rule, which does not bar asylum eligibility on the basis of an alien having arrived at the southern land border. Rather, this rule's asylum eligibility bar is based on an alien declining to apply for asylum in one of the first countries in which such relief may have been available, prior to reaching the southern land border—thereby undermining the purported urgency of the alien's need for relief.

d. Alleged Categorical Ban

Comment: Numerous commenters expressed concern that the IFR would impose a ''sweeping and categorical'' ban on asylum. Commenters also expressed concern that the IFR conflicts with the specific circumstances in the INA under which applicants can be denied asylum because the rule presents a categorical bar to eligibility that does not leave room for individualized determinations.

Response: The Departments would not characterize this rule as a categorical ban on asylum eligibility because the rule does not deny eligibility to every asylum applicant who presents himself or herself at the southern land border. Rather, the rule applies to a subset of aliens—those who pass through a third country or third countries en route to the United States and who do not seek protection in those countries before seeking protection in the United States. Those individuals who apply for such protection and are denied will not be barred from eligibility for asylum as a result of this rule once they reach the United States. Similarly, aliens who are victims of a severe form of trafficking in persons will not be barred from asylum eligibility resulting from their travel through a third country. Therefore, although the rule bars asylum eligibility for a certain subset of aliens reaching the southern land border, the rule does not ban asylum at the border.

Further, as explained above in Section III.C.1, it is well within the Departments' authority to establish new ''limitations and conditions'' on asylum eligibility that are ''consistent with'' the asylum statute. INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C). For example, in 2000, Attorney General Janet Reno, relying on her authority under section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C), limited asylum eligibility based on a well-founded fear of future persecution when there is ''a fundamental change in circumstances'' or the ability of an alien to reasonably relocate within the alien's country of nationality or last habitual residence, even where that alien had established he or she had suffered past persecution. *See* 65 FR at 76127; 8 CFR 208.13(b)(1)(i)–(ii), 1208.13(b)(1)(i)–(ii).

e. Credible Fear

Comment: One commenter expressed concern that the IFR predetermines the outcome of the credible-fear determination process for all affected asylum seekers subject to expedited removal. The commenter stated that the rule would require the asylum officer to apply the higher ''reasonable fear'' standard and that the Act requires that all noncitizens subject to expedited removal who express a fear of return be processed for a credible-fear screening except in circumstances defined in the Act.

Response: The Departments do not believe that the rule is inconsistent with expedited removal. As previously stated by the Departments, this rule does not change the standard as to whether an alien has demonstrated a credible fear of persecution for purposes of asylum (a significant possibility of eligibility for asylum), although the rule expands the scope of the inquiry in the process. 84 FR at 33835–37. Credible-fear screenings for aliens subject to expedited removal are a determination of 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 and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title.'' INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). As discussed above, section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C), authorizes the Departments to establish additional limitations and conditions on asylum eligibility by regulation, and the Departments promulgated the IFR pursuant to this authority. *See* 84 FR at 33833–34. The Act does not limit the credible-fear screening process to consideration of only those bars explicitly stated in the Act to the exclusion of any additional bars that the Departments established under section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C). In fact, it makes little sense to require an asylum officer to determine that an alien otherwise has a significant possibility of eligibility for asylum if the alien is in fact barred from eligibility for asylum in the first place.

3. U.S. Obligations Under International Law

Comment: Numerous commenters raised concerns that the IFR violates the United States' obligations under international law. These comments cited the 1948 Universal Declaration of Human Rights (''UDHR''), the Refugee Convention, the Refugee Protocol, the International Covenant on Civil and Political Rights (''ICCPR''), the CAT, the Convention on the Rights of the Child (''CRC''), and customary international law.

Commenters were concerned that the IFR violates the United States' non-refoulement obligations under international law, which the commenters generally explained as prohibiting the return of asylum seekers to a country where their lives or freedom would be threatened on account of a protected ground. Specifically, commenters were concerned that the IFR would act as a categorical bar to asylum and, therefore, that asylum seekers would only be able to apply for withholding of removal or protection under the CAT regulations—claims that require higher standards of proof. The commenters feared that, as a result, this more searching standard would lead to a higher likelihood of refoulement of persons with otherwise legitimate asylum claims.

Similarly, other commenters stated that requiring asylum seekers to first apply for asylum in Mexico would effectively result in refoulement because Mexico does not have adequate asylum procedures. The commenters asserted that Mexico lacks adequate procedures, claiming, *e.g.,* that the ''asylum system in Mexico is overwhelmed, and applicants face long delays and unfair procedures. In addition, conditions may not be safe for many asylum seekers who are at risk of experiencing violence while living in Mexico and awaiting adjudication of their claims.'' Likewise, the commenters' assertions related to purported dangerous conditions in Mexico result in the commenters' views that returning asylum seekers to Mexico would be considered a violation of the United States' non-refoulement obligations.

Several commenters pointed to statements or guidance issued by the United Nations High Commissioner for Refugees (''UNHCR''). For example, several organizations cited generally UNHCR's statement of belief that ''the rule excessively curtails the right to apply for asylum, jeopardizes the right to protection from refoulement, significantly raises the burden of proof on asylum seekers beyond the international legal standard, sharply curtails basic rights and freedoms of those who manage to meet it, and is not in line with international obligations.'' UNHCR, *UNHCR Deeply Concerned About New U.S. Asylum Restrictions, https://www.unhcr.org/en-us/news/press/2019/7/5d2cdf114/unhcr-deeply-*

concerned-new-asylum-restrictions.html (last visited Dec. 10, 2020).

Others pointed to UNHCR guidance interpreting the Refugee Convention and the Refugee Protocol as providing that asylum seekers are not required to apply for protection in the first country where protection is available. For example, one commenter stated that ''neither the 1951 Convention nor the 1967 Protocol require[s] refugees to apply for protection in the first country available, nor do they require refugees to be returned to a country that was crossed in transit.'' The commenter further averred that ''UNHCR has stated that asylum should not be refused only on the basis that it could have been sought in another country, and it has made clear that an asylum seeker should not be required to seek protection in a country in which he or she has not established any relevant links.''

Another organization was concerned that the IFR prevents asylum seekers from receiving a fair, full, and adequate trial or legal process, as required by the UDHR, the ICCPR, and the CRC.

Response: As explained in the IFR, this rule is consistent with U.S. obligations under the Refugee Protocol, which incorporates Articles 2 through 34 of the Refugee Convention, as well as U.S. obligations under Article 3 of the CAT. These treaties are not directly enforceable in U.S. law, but some of their obligations have been implemented by domestic legislation and implementing regulations. *See INS* v. *Stevic,* 467 U.S. 407, 428 & n.22 (1984); *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.''); Foreign Affairs Reform and Restructuring Act of 1998 (''FARRA''), Public Law 105–277, sec. 2242(b), Oct. 21, 1998, 112 Stat. 2681, 2631–822 (8 U.S.C. 1231 note); 8 CFR 208.16(b)–(c), 208.17, and 208.18; 1208.16(b)–(c), 1208.17 and 1208.18.

The United States has implemented the non-refoulement provisions of Article 33.1 of the Refugee Convention through the withholding of removal provisions at section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), rather than through the asylum provisions at section 208 of the Act, 8 U.S.C. 1158. *See INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 429, 440–41 (1987); *Matter of C–T–L,* 25 I&N Dec. 341, 342–43 (BIA 2010). The Supreme Court has explained that asylum ''does not correspond to Article 33 of the Convention, but instead corresponds to Article 34,'' which provides that contracting States ''shall as far as possible facilitate the assimilation and naturalization of refugees.'' *Cardoza-Fonseca,* 480 U.S. at 441 (quotation marks omitted). Article 34 ''is precatory; it does not require the implementing authority actually to grant asylum to all those who are eligible.'' *Id.* Because the rule does not affect statutory withholding of removal or protection under the CAT regulations, the rule is consistent with U.S. non-refoulement obligations under the 1967 Protocol (incorporating, inter alia, Article 33 of the Refugee Convention) and the CAT. *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. *U.S. Att'y Gen.,* 856 F.3d 249, 257 & n.16 (3d Cir. 2017); *Ramirez-Mejia* v. *Lynch,* 813 F.3d 240, 241 (5th Cir. 2016).

The commenters are correct that neither the Refugee Convention nor the Refugee Protocol requires refugees to apply for protection in the first country available, but that observation is irrelevant to the legality of the rule. As explained above, the United States implements its non-refoulement obligations under the Refugee Protocol and the CAT through statutory withholding of removal and regulatory CAT protection. Because the rule bars asylum eligibility, and does not affect eligibility for statutory withholding of removal or withholding or deferral of removal under the CAT regulations, it does not conflict with U.S. obligations under the Refugee Protocol or the CAT.

Commenters are further incorrect that Mexico does not provide adequate asylum procedures or a sufficiently safe environment for asylum seekers.

First, regarding conditions in Mexico for asylum seekers who wait or pass through there, the anecdotal stories detailing violence in the country are generalized and may not necessarily indicate the presence of the kind of persecution that asylum was designed to address. Relatedly, the U.S. Ambassador to Mexico has explained that reports on localized violence in particular areas of Mexico do not indicate security conditions in the country as a whole. *See* Memorandum for the Attorney General and the Acting Secretary of Homeland Security, from Christopher Landau, United States Ambassador to Mexico, *Re: Mexico Refugee System* 4 (Aug. 31, 2020) (''Landau Memorandum''). Mexico spans nearly 7,600,000 square miles, and the Ambassador explained that discussions about conditions in Mexico oftentimes conflate the perils that refugees might face traversing across dangerous parts of Mexico en route to the United States with the ability to seek protection in a safe place in Mexico.[25] *Id.*

Additionally, 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.,* UNHCR, *Despite Pandemic Restrictions, People Fleeing Violence and Persecution Continue to Seek Asylum in Mexico, https://www.unhcr.org/en-us/news/briefing/2020/4/5ea7dc144/despite-pandemic-restrictions-people-fleeing-violence-persecution-continue.html* (last visited Dec. 10, 2020) (''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 3 months of 2020 compared to the same period in 2019, averaging almost 6,000 per month. *Id.*

These numbers align with historical trends of increasing asylum claims in Mexico annually. Asylum claims filed in Mexico rose by more than 103 percent in 2018 over the previous year. UNHCR, *Fact Sheet: Mexico* 1 (Apr. 2019), *https://reporting.unhcr.org/sites/default/files/UNHCR%20Factsheet%20Mexico%20-%20April%202019.pdf* (last visited Dec. 11, 2020). In 2019 specifically, Mexico reports having received 70,609 refugee applications, which places Mexico eighth in the world for receipt of refugee

[25] The Departments also note various media outlets and writers have opined on living in or retiring to Mexico, which further suggests that the quality of life, including safe living conditions, continues to improve. *See, e.g.,* Kathleen Peddicord, *The Best Places to Retire in Mexico,* U.S. News & World Report (Apr. 30, 2019), *https://money.usnews.com/money/retirement/baby-boomers/articles/the-best-places-to-retire-in-mexico; see also* Liz Flynn, *20 Best Places to Live in Mexico,* Money Inc., *https://moneyinc.com/best-places-to-live-in-mexico/.* In 2019, U.S. citizens traveled to Mexico almost 40 million times. *See* National Travel and Tourism Office, International Trade Administration, U.S. Dep't of Commerce, U.S. Citizen Travel to International Regions (2019). The U.S. Embassy in Mexico City estimates there are more than 1.5 million U.S. citizens living in Mexico. *See* Wendy Fry, *Americans Make Up Mexico's Largest Demographic of Immigrants,* San Diego Union Tribune (June 17, 2019). The Departments suggest that it strains credulity that so many Americans would move to Mexico if it were as unsafe as commenters alleged.

applications. *See* Landau Memorandum at 3. Overall, ''[a]sylum requests have doubled in Mexico each year since 2015.'' Congressional Research Serv., *Mexico's Immigration Control Efforts* 2 (Feb. 19, 2020), *https://fas.org/sgp/crs/row/IF10215.pdf* (last visited Dec. 11, 2020). 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* (last visited Dec. 11, 2020).

Over the past decade, Mexico has substantially reformed its immigration and refugee laws, and in 2020, it more than doubled the budget for the Comisión Mexicana de Ayuda a Refugiados (''COMAR''), the specialized federal agency that handles refugee and asylum issues. *See* Landau Memorandum at 2–3. The Mexican Constitution was amended in 2016 to include the specific right to asylum, *see* Mex. Const. art. 11, paragraph 2 (providing in Spanish that every person has the right to seek and receive asylum and that recognition of refugee status and the granting of political asylum will be carried out in accordance with international treaties). Further, the grounds for seeking and obtaining refugee status under Mexican law are broader than the grounds under United States law. 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 violation of human rights. *Id.* art. 13(II). Prospective refugees may apply at one of seven COMAR offices in the country within 30 days of entry into Mexico, with that time period subject to extension for good cause. *See* Landau Memorandum at 2. Prospective refugees may choose to apply for refugee status in any state, and, as a result, two-thirds of refugee applications are filed in Chiapas, a state that routinely ranks amongst the safest Mexican States. *Id.* at 4. Prospective refugees receive a work permit so that they are legally eligible to work and access public health services while their cases are pending, and Mexican law requires COMAR to process applications within 90 days. *Id.* at 2.

Accordingly, the available data and other evidence simply do not support the conclusion that Mexico cannot be a safe and appropriate destination for individuals to seek asylum when they are fleeing from persecution.

Finally, just as violence may occur in parts of the United States but individuals fleeing persecution may still consider the country relatively ''safe'' when compared to their countries of origin, localized episodes of violence in Mexico may not necessarily mean the country, as a whole, is unsafe for individuals fleeing persecution. In other words, the presence of local or regional crime exists in all countries, even those generally considered ''safe,'' but the presence of local or regional crime does not necessarily render those countries so dangerous that individuals fleeing persecution could not take refuge anywhere in the country.[26]

Further, the United States is not required to grant asylum to all applicants, and, as discussed above, asylum is ultimately discretionary. Thus, regardless of the general safety in Mexico, asylum claims remain subject to discretion. Moreover, over the years, the vast majority of asylum claims have been unsuccessful and unmeritorious under U.S. asylum law. *See* EOIR, *Adjudication Statistics: Asylum Decision Rates* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1248491/download; see also Thuraissigiam,* 140 S. Ct. at 1966–67 (quoting various EOIR statistics demonstrating that ''[t]he majority [of credible fear claims] have proved to be meritless'' and explaining that fraudulent asylum claims are difficult to detect).

A person seeking asylum for a reason supported by law (such as a fear of persecution) does not require a specific destination; he or she requires only a destination that provides refuge. Policy considerations accordingly support promulgation of a bar to asylum to reduce the number of those aliens who wish to use the asylum system to live (and potentially work) in the United States in particular, rather than as a way to avoid persecution in general. The Departments have concluded that the large number of ultimately denied asylum claims, as referenced above, is evidence that many aliens are seeking to use the asylum system for reasons other than seeking refuge from persecution on account of a protected ground. This final rule thus bars those aliens who—by neglecting to seek protection in countries in which they could have done so had they been legitimately fleeing persecution—are likely to be the sorts of aliens attempting to improperly use the system, thereby reducing the incidence of abuse of the asylum system.

Comments concerning statements or guidance from UNHCR are misplaced. First, UNHCR's interpretations of or recommendations regarding the Refugee Convention and Refugee Protocol are ''not binding on the Attorney General, the [Board of Immigration Appeals ('BIA')], or United States courts.'' *Aguirre-Aguirre,* 526 U.S. at 427. ''Indeed, [UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status] 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, quoting *Cardoza-Fonseca,* 480 U.S. 14 439 n. 22.

To the extent such guidance ''may be a useful interpretative aid,'' *id.* at 427, it does not govern how a Contracting State may exercise its prerogative to allow for asylum in its sole discretion.

Second, UNHCR has recognized that refugees may be required to seek protection in other countries. In guidance issued in April 2018, UNHCR affirmed that ''refugees do not have an unfettered right to choose their 'asylum country,' '' and that, even if their ''intentions . . . ought to be taken into account,'' they ''may be returned or transferred to a state where they had found, could have found or, pursuant to a formal agreement, can find

[26] Per the United Nations Office on Drugs and Crime Chart on Victims of Intentional Homicide, the murder rate in Mexico of 29.1/100,000 in 2018 was lower than that in American cities such as St. Louis, Baltimore, Detroit, New Orleans, and Baton Rouge. *See* Fed. Bureau of Investigation, *2018: Crime in the United States* (2018), *https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-8/table-8.xls/view.* More recently, the murder rate in Baltimore, America's deadliest large city, was twice that of Mexico. Sean Kennedy, *'The Wire' is Finished, but Baltimore Still Bleeds,* The Wall St. J., *https://www.wsj.com/articles/the-wire-is-finished-but-baltimore-still-bleeds-11581119104* (last visited Dec. 10, 2020); *see also* Landau Memorandum at 4 (''Security conditions vary widely among (and within) the 32 Mexican States. Many reports of violence that reach the United States are often based on localized violence in particular areas of Mexico, and do not reflect conditions across the country as a whole—that would be like seizing upon crime statistics from particular metropolitan areas in the United States, such as the South Side of Chicago or Baltimore, and extrapolating them to the entire United States.'').

international protection.'' UNHCR, *Legal Considerations Regarding Access to Protection and a Connection Between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries,* at 1 *available at https://www.refworld.org/pdfid/5acb33ad4.pdf* (last visited Dec. 10, 2020). UNHCR explained that ''[t]he 1951 Convention relating to the Status of Refugees and its 1967 Protocol do not prohibit such return or transfer.'' *Id.* Additionally, UNHCR has acknowledged the legitimacy of the ''safe third country concept'' through which nations may deny protection ''in cases where a person could have or can find protection in a third state either in relation to a specific individual case or pursuant to a formal bi- or multilateral agreement between states on the transfer of asylum-seekers.'' *Id.*

Comments arguing that the rule violates ICCPR, the UDHR, and the CRC are also incorrect. First, the ICCPR does not impose a non-refoulement obligation on state parties. The UDHR is a non-binding human rights instrument, not an international agreement, and thus it does not impose legal obligations on the United States. *See Sosa* v. *Alvarez-Machain,* 542 U.S. 692, 728, 734–35 (2004) (''[T]he [UDHR] does not of its own force impose obligations as a matter of international law.''). Similarly, the United States has neither ratified the CRC nor implemented its provisions in domestic law, and accordingly it does not give rise to legal obligations for the United States. *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.''). In addition, this rule does not implicate the two optional protocols of the CRC to which the United States is a party: (1) The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and (2) the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. *See* United Nations, Treaty Collection, *Convention on the Rights of the Child, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en* (last visited Dec. 10, 2020); UNHCR, *Country Profile for United States of America, available at http://indicators.ohchr.org/* (last visited Dec. 10, 2020).

To the extent that some commenters make blanket assertions that the rule violates customary international law or is inconsistent with other non-binding international instruments, the commenters ignore the fact that the rule leaves the requirements for an ultimate grant of statutory withholding of removal or withholding or deferral of removal pursuant to the CAT regulations unchanged, and that aliens who choose not to apply for relief within a country that is a party to the relevant treaties through which they transit en route to the United States may still be considered for such protection.

Comment: Three commenters cited examples of countries that are parties to the 1951 Convention, 1967 Protocol, or the CAT, yet nonetheless persecute individuals, according to allegations by the commenters. For example, one group stated that some countries that are parties to one or more of the relevant treaties punish expressions of atheism by death.

Response: The rule does not require an asylum seeker to apply for protection in every country he or she crosses; it requires the individual to apply in at least one of the countries. Consequently, because the rule applies to aliens crossing the southern land border, 8 CFR 208.13(c)(4) and 1208.13(c)(4), Mexico will necessarily be at least one of the transit countries. In other words, non-Mexican nationals crossing the southern land border must pass through Mexico. As explained in the IFR, Mexico is a party to the Refugee Convention, the Refugee Protocol, and the CAT, and it has an independent asylum system that provides protections to asylum applicants. 84 FR at 33839–40. Further, Mexico has endorsed the 1984 Cartagena Declaration on Refugees and the non-binding 2018 Global Compact on Refugees. *See* Landau Memorandum at 1. Commenters did not generally allege that Mexico persecutes individuals notwithstanding its treaty obligations—and certainly did not allege that Mexico punishes atheists by death. Consequently, commenters' concerns about anecdotes in individual countries that are neither transit countries themselves nor the sole country of transit are inapposite to the focus of the rule. Further, as noted above, aliens who choose not to apply for relief within a country that is a party to the relevant treaties and through which they transit en route to the United States may be considered for withholding of removal or deferral of removal in the United States.

Comment: One group expressed concern that if an individual applies for and is denied asylum in a third country, the person will likely be returned to his or her home country and not be allowed to continue on to the United States. The group further opined that countries may deny valid asylum claims because they do not wish to absorb more migrants.

Response: The Departments appreciate the commenting group's concern that individuals with valid asylum claims should receive protection. The Departments believe the rule will provide such protection. The 1951 Convention and the 1967 Protocol incorporate the principle of non-refoulement—*i.e.,* that countries cannot return individuals to countries where they more likely than not would be persecuted on account of a protected ground (with certain exceptions for individuals who fall within an exclusion or cessation ground). In other words, a third country, which, under the rule must be a party to the Refugee Convention or Refugee Protocol, cannot return an alien to his or her home country if doing so would violate the third country's non-refoulement obligations. The third country, however, may return the alien to his or her home country following a determination that the alien is not eligible for non-refoulement protection in that country.

Finally, aliens who apply for and are denied protection in these countries are not barred from asylum eligibility under this rule.

4. Violates the Refugee Act

Comment: At least one commenter stated that the IFR violates the Refugee Act. The commenter argued that the rule conflicts with the non-refoulement principles of the Refugee Act because it will ''inevitably return refugees to the countries where they will be persecuted.''

Response: The rule does not violate the non-refoulement provisions of the Refugee Act, which were codified at former section 243(h) of the Act, 8 U.S.C. 1253(h) (currently codified at section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3)). Refugee Act, sec. 203(e); *see also Stevic,* 467 U.S. at 421–22. As stated above, the United States has implemented its non-refoulement obligations under the Refugee Protocol and the CAT through the withholding of removal provisions at section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), and the CAT regulations.[27] *See Cardoza-Fonseca,* 480 U.S. at 440–41; FARRA, sec. 2242; 8 CFR 208.16(b)–(c), 208.17,

[27] The Departments further note that the U.S. Mission in Mexico is ''unaware of any pattern or practice of deporting prospective refugees to their countries of origin while their applications remain pending.'' Landau Memorandum at 5. To the contrary, as explained by the U.S. Ambassador to Mexico, ''Mexico introduced 'complementary protection' in 2011 precisely to provide protection from refoulement for individuals who may face danger in their home countries but do not satisfy the legal requirements for refugee status.'' *Id.*

208.18, 1208.16(b)–(c), 1208.17 and 1208.18. The rule does not affect the withholding of removal process or standards. *See* INA 241(b)(3), 8 U.S.C. 1231(b)(3); 8 CFR 208.16–.18, 1208.16–.18. In general, an alien who can demonstrate that he or she would more likely than not face persecution on account of a protected ground or torture would qualify for withholding or deferral of removal. Asylum under the immigration laws, on the other hand, is a discretionary form of relief subject to regulation and limitations by the Attorney General and the Secretary. *See* INA 208(b)(2)(C) and (d)(1), 8 U.S.C. 1158(b)(2)(C) and (d)(1); *Thuraissigiam,* 140 S. Ct. at 1965 n.4; *see also Garcia* v. *Sessions,* 856 F.3d 27, 40 (1st Cir. 2017) (discussing the distinction between asylum and withholding of removal and explaining that ''withholding of removal has long been understood to be a mandatory protection that must be given to certain qualifying aliens, while asylum has never been so understood'').

5. Violates Trafficking Victims Protection Reauthorization Act of 2008

Comment: Some commenters argued that the IFR violates the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (''TVPRA''), Public Law 110–457, Dec. 23, 2008, 122 Stat. 5044. These commenters noted that Congress has provided special protections for unaccompanied alien children (''UAC'') [28] that are designed to humanely treat and protect UAC due to their particular vulnerability to the risk of trafficking or other exploitations. For example, as most relevant to the rule, commenters noted that UAC have a statutory right to present their asylum applications to an asylum officer in a non-adversarial setting in the first instance. *See* TVPRA sec. 235(d)(7)(B) (codified at section 208(b)(3)(C) of the Act, 8 U.S.C. 1158(b)(3)(C)). In addition, the TVPRA exempted UAC from the ACA bar to asylum and the one-year filing deadline for applying for asylum. *See* TVPRA sec. 235(d)(7)(A) (codified at section 208(a)(2)(E) of the Act, 8 U.S.C. 1158(a)(2)(E)). According to commenters, the IFR violates the protections provided by the TVPRA because it deems UAC ineligible for asylum if they transited through a third country and, in effect, removes the procedural protections implemented by the TVPRA. By barring asylum eligibility for UAC who transit through third countries without seeking asylum there, commenters argued, the IFR will effectively require asylum officers to automatically refer UAC to the immigration courts to pursue withholding of removal or protection under the CAT regulations. As a result, the commenters asserted, the IFR in practice would nullify the non-adversarial process that Congress specifically designed for UAC under the TVPRA by placing the UAC in adversarial immigration court proceedings.

Response: This rule does not violate the TVPRA. As the commenters stated, the TVPRA enacted multiple procedures and protections specific to UAC that do not apply to other similarly situated asylum applicants. Congress, however, 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 the Secretary's authority to establish additional limitations on asylum eligibility by regulation, INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C).

DHS and DOJ implement this rule pursuant to the authority at section 208(b)(2)(C) of the Act. It is a valid restriction on asylum eligibility for all asylum applicants, including UAC. And 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 who are apprehended at the southern land border are placed in removal proceedings under section 240 of the Act and raise asylum claims, the immigration judges will 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 barred from eligibility for asylum on the basis of this rule. This rule does not affect any other procedure or protection implemented by the TVPRA.

Further, one district court has already indicated in an oral ruling from the bench that the IFR is likely consistent with the TVPRA. In *CAIR I,* discussed previously in Section III.C.2, the plaintiffs challenged the IFR in part on the grounds that it constituted a violation of the TVPRA's substantive protections for UAC. Complaint at 43–45, *CAIR I,* --- F. Supp. 3d ---, 2019 WL 3436501, ECF No. 1. In denying the plaintiffs' request for a temporary restraining order, the court explained that it had ''strong doubt as to plaintiffs' claims relating to the TVPRA,'' in part because ''the Attorney General has long exercised broad discretion to determine which applicants should be granted asylum.'' *Id.* at *3.[29]

Finally, the Departments note that, for UAC who are barred from asylum eligibility under this rule due to travel through a third country 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, the Departments are cognizant of the ''special circumstances'' often presented by UAC. Nevertheless, the INA does not require special protections for UAC beyond those already contained in the statute, and the INA does not require the provision of additional, extra-statutory protections—and certainly not beyond those which already exist. *See, e.g.,* EOIR, *Operating Policies and Procedures Memorandum 17–03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children* (Dec. 20, 2017), *https://www.justice.gov/eoir/file/oppm17-03/download.* Like all aliens subject to the rule, UAC have the opportunity to apply for protection in one or more countries prior to their arrival in the United States. Further, UAC who are old enough to travel independently across hundreds or thousands of miles to the United States can logically also be expected to seek refuge in one of the countries transited if the UAC are genuinely seeking protection. UAC who are not old enough to travel independently necessarily must travel with adults, and again, there is no reason that adults cannot apply for protection in any country offering refuge if the adults and the UAC are genuinely seeking protection.[30] In short, the

[28] UAC are children who have no lawful immigration status in the United States; who have not attained 18 years of age; and who have no parent or legal guardian in the United States, or no parent or legal guardian in the United States available to provide care and physical custody. 6 U.S.C. 279(g)(2).

[29] As with the claim that the IFR is contrary to the INA, the court in *CAIR II* did not discuss the claim that the IFR is contrary to the TVPRA. *See CAIR II,* --- F. Supp. 3d ---, 2020 WL 3542481, at *1.

[30] The Departments recognize that smugglers may be able to charge higher fees to bring UAC to the United States than to other countries because of the perceived desirability of residing in the United States compared to other countries and, thus, that the rule may also act as a deterrent to child smuggling to the United States. The potential for reduced smuggling of children into the United

Departments have not overlooked the special circumstances of UAC in crafting this rule, but those circumstances are insufficiently compelling to warrant a special exception for UAC from the rule's application.

6. Due Process

Comment: Multiple organizations expressed concerns that the IFR violates the Fifth Amendment Due Process Clause because it allegedly establishes a predetermined outcome of the expedited removal process and presents a categorical bar on asylum for immigrants who enter the United States through the southern land border after transiting through a third country, effectively denying asylum seekers the right to be meaningfully heard on their asylum claims. One commenter further expressed that asylum seekers should have the right to appeal a credible-fear denial to an immigration judge. One commenter stated that it is inappropriate for the Departments to reduce the amount of process provided to asylum applicants in order to decrease the backlog of cases pending before EOIR. One commenter stated that it was unclear how the IFR would lessen the burden on immigration judges to timely and efficiently review claims in compliance with due process requirements because the rule required every affected applicant to file additional evidentiary material.

Response: The rule does not violate the Fifth Amendment Due Process Clause.[31] Like the other limitations on asylum set forth in the INA, the rule does not establish a predetermined outcome for the expedited removal process, and, as stated above, the rule is consistent with those limitations in the rest of section 208 of the Act, 8 U.S.C. 1158. The Departments note that, under the rule, not every immigrant who enters the United States via the southern land border after transiting through a third country is ineligible for asylum in the United States, and the Departments provide a screening process to determine which asylum applicants are, and are not, subject to the regulatory third-country-transit bar. The rule applies to bar asylum eligibility for only those asylum seekers who transited through third countries without seeking protection in at least one of those countries.

As previously stated by the Departments, one purpose of the rule is to ameliorate undue strains on the existing immigration system by deterring meritless or non-urgent asylum claims. *See* 84 FR at 33839; *see also Thuraissigiam,* 140 S. Ct. at 1967. The Departments had established this rule to more effectively separate out non-meritorious or non-urgent claims so that meritorious claims will be adjudicated more quickly and, in the process, the backlog would be reduced.

In addition, the rule provides several procedural protections to ensure that meritorious claims receive a full and fair hearing before an immigration judge and that the bar impacts only aliens properly within the scope of the limitations in 8 CFR 208.13(c)(4), 1208.13(c)(4). Aliens who are subject to the third-country-transit bar, 8 CFR 208.13(c)(4), 1208.13(c)(4), and who clear the reasonable-fear screening standard will be placed in proceedings before an immigration judge, just as aliens who clear the credible-fear standard would be. *See* 84 FR at 33838; *see also* Intervening Joint Final Rule. In those proceedings, the alien will have the opportunity to raise whether the asylum officer incorrectly identified the alien as subject to the bar to asylum. If an immigration judge determines that the asylum officer's determination was incorrect, the alien will be able to apply for asylum, withholding of removal, and protection under the CAT regulations. *See* Intervening Joint Final Rule. Such aliens can appeal the immigration judge's decision in these proceedings to the BIA and then seek review from a Federal court of appeals. *Id.; see also* 8 CFR 1003.1(b)(9); INA 242, 8 U.S.C. 1252. The Departments note that the standard established in the IFR helped ensure—in contrast to commenters' concerns—that the outcome of the process delineated in the rule is not predetermined and that aliens potentially subject to the bar receive the full and fair hearing required by the Due Process Clause. Following public comment periods on the NPRM that introduced this rule and on the Intervening Joint Final Rule, the Departments published the Intervening Joint Final Rule to codify the Departments' view that aliens with negative fear determinations that an Immigration Judge has vacated are better placed in the more limited asylum-and-withholding-only proceedings. *See* 8 CFR 1208.31(g). No additional changes are necessary in this publication.

Comment: Two groups predicted that the IFR will reduce *pro bono* legal representation available to applicants for asylum. The commenters predicted that lawyers will be required to spend additional time on each case because lawyers will need to brief issues related to the rule, file separate applications for spouses and children who will not receive derivative asylum, and take more time to present statutory withholding and CAT claims than they would for asylum claims. The groups argued that these requirements will reduce the number of clients each *pro bono* lawyer will be able to represent.

Response: The Departments respectfully disagree with these predictions. First, the commenters assume that individuals will not apply for asylum in other countries and thus will be barred by the rule from receiving protection. Many individuals may apply for, and may receive, asylum elsewhere, which would reduce the burden on the immigration system and lead to fewer individuals requiring legal representation. Also, to the extent the rule deters frivolous asylum claims, *pro bono* attorneys will be able to devote their time to the fewer, meritorious claims remaining.

7. Specific Populations

a. Adults

Comment: Several commenters raised concerns that the IFR could have a disproportionate impact on certain adults alleged to be particularly vulnerable, such as victims of domestic and gender-based violence; lesbian, gay, bisexual, and transgender (''LGBT'') [32] individuals; children; mothers; and women.

Commenters stated that these individuals may be unable to effectively recount to asylum adjudicators the harms that they have suffered unless they feel safe and secure, which, according to the commenters, would not be possible in Mexico, Guatemala, or

States, however, works in favor of the rule, not against it.

[31] Courts have held that aliens do not have a cognizable substantive due process interest in the receipt of asylum because asylum is a discretionary form of relief. *See, e.g., Yuen Jin* v. *Mukasey,* 538 F.3d 143, 157 (2d Cir. 2008) (holding that ''an alien who has already filed one asylum application, been adjudicated removable and ordered deported, and who has nevertheless remained in the country illegally for several years, does not have a liberty or property interest in a discretionary grant of asylum''); *Ticoalu* v. *Gonzales,* 472 F.3d 8, 11 (1st Cir. 2006) (''Due process rights do not accrue to discretionary forms of relief, . . . and asylum is a discretionary form of relief.''); *Mudric* v. *U.S. Att'y Gen.,* 469 F.3d 94, 99 (3d Cir. 2006) (holding that an eight-year delay in processing the petitioner's asylum application was not a constitutional violation because the petitioner ''had no due process entitlement to the wholly discretionary benefits of which he and his mother were allegedly deprived''); *cf. Munoz* v. *Ashcroft,* 339 F.3d 950, 954 (9th Cir. 2003) (''Since discretionary relief is a privilege created by Congress, denial of such relief cannot violate a substantive interest protected by the Due Process clause.'').

[32] Commenters alternatively used the terms LGBTQ, which refers to lesbian, gay, bisexual, transgender, and queer/questioning; LGBTQI, which further includes intersex; and LGBTQ+. For consistency, this final rule uses the acronym LGBT.

many countries that are parties to the relevant treaties. Commenters further explained that these populations face harm in Mexico, Central America, and other regions of the world, and alleged as a result that the United States cannot expect them to seek relief in third countries where they are equally at risk of harm as in their home countries. In other words, according to these commenters, the rule violates international and Federal law because it creates a bar to asylum without considering whether the country or countries through which an alien has transited would provide an individual with a procedure that provides a level of protection similar to the U.S. system. Commenters noted that other countries may not recognize certain harms as persecution for the purposes of asylum, though the same harms may qualify as persecution under the United States' asylum laws.

Regarding LGBT individuals specifically, commenters highlighted examples of discrimination and violence in Mexico and Central America. Multiple commenters stated that the United States has implicitly recognized the vulnerability of LGBT individuals by, as of July 2019, not returning LGBT individuals to Mexico under the MPP. *See* Anna Giaritelli, *LGBT Asylum-Seekers Exempt from 'Remain in Mexico' Policy and Can Stay in US,* Washington Examiner, *https://www.washingtonexaminer.com/news/lgbt-asylum-seekers-exempt-from-remain-in-mexico-policy-and-can-stay-in-us* (last visited Dec. 10, 2020) (noting that a U.S. official said that the United States was not returning LGBT individuals to Mexico because ''that population would be at greater risk of personal harm if forced to remain in [Mexico]'').

Regarding children, including unaccompanied children specifically,[33] commenters explained that children are frequently targeted by gangs and cartels for recruitment or for sexual violence. Such violence against children, according to commenters, is often underreported or not investigated, and child welfare programs in El Salvador, Guatemala, Honduras, and Mexico are allegedly underfunded and inaccessible.

Response: This rule is a rule of equal application that does not bar any particular classes of asylum applicants from seeking relief due to the nature of the harm the applicant has suffered or the applicant's particular race, religion, nationality, political opinion, or particular social group membership.[34] DHS and DOJ further note that an alien may still seek protection in a third country even if that country has not previously recognized certain harms as persecution, or certain classes of victims as a qualifying particular social group. As noted in the IFR, asylum laws may evolve over time to respond to contemporary circumstances. 84 FR at 33840 (explaining that European states in 1990 adopted the Dublin Regulation, which came into force in 1997, as a response to a mass fleeing of refugees and economic migrants fleeing communism at the end of the Cold War); *see also Matter of A–B–,* 27 I&N Dec. 316, 318–19 (A.G. 2018) (summarizing the development of BIA case law regarding the interpretation of ''particular social group''). And if an alien receives a final judgment denying protection in the third country, then the alien may present proof of such judgment and remain eligible to seek asylum in the United States. *See* 8 CFR 208.13(c)(4)(i), 1208.13(c)(4)(i).

Many of the comments questioning the safety of Mexico, Guatemala, and other countries focused on criminals who target aliens in transit who are perceived to be vulnerable. To the extent individuals are targets of crime by non-governmental actors, the Departments encourage them to seek aid from the government in the country in which the individuals have been targeted, rather than taking a long, perilous journey to the United States that would put them at risk of further victimization. To the extent commenters are concerned about the safety of the third countries that an alien may transit en route to the United States, the Departments note that if an alien believes that he or she would likely be subject to persecution on account of a protected ground or torture in the country that he or she transits en route to the United States, he or she may seek withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), or withholding of removal or deferral of removal under the CAT regulations to avoid the possibility of being returned to that country. *See* 84 FR at 33834. Thus, despite the assertions of commenters, the Departments disagree that the rule leaves such aliens without any possible protection in the United States. Further, as previously noted, statistics detailing violence in Mexico are generalized and may not necessarily indicate the presence of the kind of persecution that asylum was designed to address.[35] Concentrated episodes of violence in Mexico do not mean the country, as a whole, is unsafe for individuals fleeing persecution.[36] Indeed, recognition of a similar concept is already reflected in other areas of the immigration regulations: Asylum applications are to be denied if the applicant could ''avoid future persecution by relocating to another part of the applicant's country,'' and, under the circumstances, it would ''be reasonable to expect the applicant to do so.'' 8 CFR 208.13(b)(1)(i)(B), 1208.13(b)(1)(i)(B).

Mexico is a large nation that is made up of 32 states, which span approximately 760,000 square miles, and it has a population of approximately 130 million people. Landau Memorandum at 4. As recognized by the United States ambassador to Mexico, security conditions may vary widely both across

[33] Comments regarding unaccompanied alien children are discussed further in section III.C.7.b, below.

[34] Nevertheless, the ability to seek the relief of asylum does not necessarily mean that an alien's claim will qualify for asylum, as, for example, not all alleged particular social groups are cognizable. *See, e.g., Matter of L–E–A–,* 27 I&N Dec. 581, 589 (A.G. 2019) (providing that a particular social group must ''share[ ] a common immutable characteristic, [be] defined with particularity, and [be] socially distinct'' (citing *Matter of M–E–V–G–,* 26 I&N Dec. 227, 237–38 (BIA 2014))).

[35] The majority of publicly available data and statistics regarding violent crime in Mexico are generalized and not categorized by motive. A recent case study exploring crime patterns in Mexico City noted ''in this regard, there has been no relevant evidence that provides a good measure of short-term trends for a selected range of crimes experienced by individuals, including those reported to the police.'' C.A. Pina Garcia, *Exploring Crime Patterns in Mexico City,* J. of Big Data 3 (2019), *available at https://journalofbigdata.springeropen.com/track/pdf/10.1186/s40537-019-0228-x* (last visited Dec. 10, 2020). Similarly, the U.S. Department of State's Overseas Security Advisory Council recommends that analysis of crime data from Mexico should ''use any reported national crimes statistics for trend analyses and not as statistical representation.'' U.S. Dep't of State, *Mexico 2020 Crime & Safety Report: Hermosillo,* June 24, 2020, *available at https://www.osac.gov/Content/Report/35043cbd-64a6-4e2e-b650-19027e7900a8* (last visited Dec. 11, 2020). Another recent case study from Mexico noted that ''institutions do not generate sufficient data and statistical information. In many cases, data is not disaggregated by sex or type of crime, and there is no existing information over the number of murders, cause of death or progress in the investigations.'' Católicas por el Derecho a Decidir & Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, *Femicide and Impunity in Mexico: A Context of Structural and Generalized Violence, available at https://www.ecoi.net/en/file/local/1085985/1930_1343058124_cddandcmdpdh-forthesession-mexico-cedaw52.pdf* (last visited Dec. 10, 2020).

[36] Based on these considerations and others, as explained in this final rule, the Departments disagree with the Ninth Circuit's conclusion that the Departments failed to consider evidence demonstrating that Mexico is not a safe option for asylum seekers, thereby ''fail[ing] to consider an important aspect of the problem.'' *E. Bay Sanctuary Covenant,* 964 F.3d at 850–51 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 43 (1983) [hereinafter *Motor Vehicle Mfrs.*]).

and within Mexico. *Id.* Reports of violence often refer to localized violence and ''do not reflect conditions across the county as a whole.'' *Id.* Nearly all applications for protection in Mexico are presented in Chiapas, Mexico City, Veracruz, Tabasco, or Nuevo Leon, which ''generally rank well on security issues based on Mexican government crime statistics,'' and none of which are the subject of a U.S. Department of State ''Level 4'' (Do Not Travel) advisory. *Id.* Furthermore, ''[t]he United States Mission in Mexico is not aware of any pattern of violence targeted at potential refugees awaiting adjudication of their applications.'' *Id.* at 5.

Frequently, discussions about conditions in Mexico conflate the perils that refugees might face traversing dangerous parts of Mexico en route to the United States with the ability to seek protection in a safe place in Mexico. *Id.* For example, Chiapas, Mexico's southernmost state along the border with Guatemala, ''routinely ranks among the safest Mexican States by all metrics.'' [37] *Id.* at 4. Notably, in Mexico, refugees have the right to seek protection in any state in which they are present. *Id.* For all these reasons, the Departments disagree with those commenters asserting that Mexico cannot provide safe refuge for any asylum seekers.

Finally, DHS has no policy of categorically exempting LGBT individuals from the MPP. DHS has set forth categories of aliens who are not amenable to the MPP, and the LGBT community is not one of those categories. *See* CBP, *Guiding Principles for Migrant Protection Protocols,* Jan. 28, 2019, *available at https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf.* The decision to place amenable aliens in the MPP is made by immigration officers in the exercise of their prosecutorial discretion.

Comment: One commenter claimed that the rule will force immigrants ''into the shadows'' and thus discourage them from reporting crimes.

Response: The comment does not explain the basis for its assertion. It seems to assume that individuals who are barred from obtaining asylum will not apply for alternative forms of protection such as withholding or deferral of removal and instead opt to remain illegally in the United States. Further, the Departments note the potential availability of U nonimmigrant status for certain victims of crime. *See* INA 101(a)(15)(U), 214(p), 8 U.S.C. 1101(a)(15)(U), 1184(p). The Departments believe that all victims of crime should come forward, and the Departments support policies to encourage the reporting of crime. The Departments decline, however, to reject sound legal policy in other areas of the law based on conjecture that some may respond by violating the law or declining to report crime.

b. Accompanied and Unaccompanied Alien Children

Comment: Many commenters expressed concern over the effect that the IFR would have on children, both accompanied and unaccompanied. Commenters stated that the IFR is inconsistent with the Act because Congress explicitly exempted UAC from the safe-third-country bar. INA 208(a)(2)(E), 8 U.S.C. 1158(a)(2)(E). Commenters stated that, by exempting unaccompanied children from the safe-third-country provision, Congress indicated its intent not to limit asylum eligibility for UAC in general—in contrast to the present rule. Other commenters stated that, even if the substance of this rule is consistent with the safe-third-country provision, the IFR does not adequately explain why the Departments omitted an exemption for UAC.

Commenters also stated that the IFR will prevent many children from applying for asylum since children have no control over where their families take them or where their families decide to apply for asylum.

Response: The Departments believe that the rule is consistent with the Act with respect to UAC. As explained in the IFR, the Departments recognize that UAC are exempt from two of the three statutory bars to applying for asylum: The ACA bar and the one-year filing deadline. INA 208(a)(2)(E), 8 U.S.C. 1158(a)(2)(E). However, Congress declined to exempt UAC from other limitations on asylum applications and from asylum eligibility bars. For example, Congress did not exempt UAC from the bar on filing successive applications for asylum (INA 208(a)(2)(C), 8 U.S.C. 1158(a)(2)(C)), the various bars to asylum eligibility in section 208(b)(2)(A) of the Act, 8 U.S.C. 1158(b)(2)(A), or the bars, like this one, established pursuant to the Departments' authorities under section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C).

Further, UAC, like others subject to the third-country-transit bar at 8 CFR 208.13(c)(4) and 1208.13(c)(4), still will be considered for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), and for protection under the CAT regulations.

In addition, this rule may encourage families with children and UAC to avoid making a long, arduous, and extremely dangerous journey that brings with it a great risk of harm that could be avoided if they were to more readily avail themselves of legal protection from persecution or torture in a third country closer to the family's or child's country of origin. Further, Chiapas and others may represent safe places to settle in Mexico that would not require any refugees, including children and families, to traverse across dangerous parts of the country. *Cf.* Landau Memorandum at 4–5. The numbers of family units and UAC migrating to the United States have grown. In Fiscal Year 2019, more than 60 percent of persons unlawfully crossing the southern land border were family units or UAC, whereas these classes of individuals made up less than 50 percent of such crossings in Fiscal Year 2018. *Compare* CBP, *Southwest Border Migration FY 2019,* Nov. 14, 2019, *available at https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019, with* CBP, *Southwest Border Migration FY 2018,* Nov. 19, 2018, *available at https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018; see also* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 FR 44392, 44404 (Aug. 23, 2019) (reflecting significant increases in the number of family units apprehended at the southwest border since FY 2013). Also, in Fiscal Year 2019, CBP apprehended 430,546 family units from El Salvador, Guatemala, and Honduras at the southern land border, up from 103,509 such apprehensions in Fiscal Year 2018. *Compare* CBP, *U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019,* Nov. 14, 2019, *available at https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions-fy2019, with* CBP, *U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2018,* Nov. 9, 2018, *available at https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions.* The Departments note that families with children and UAC would be able to seek protection in the countries through which they transit, as the rule would only bar asylum for individuals who

[37] As noted, *supra,* living conditions in Mexico overall are also improving, and the United Nation's *Human Development Report* recently characterized Mexico as a country with ''high human development'' based off of the likelihood of having: a long and healthy life, access to knowledge and a decent standard of living. United Nations, *Human Development Report: Mexico* at 301, 2019, *available at http://hdr.undp.org/sites/default/files/hdr2019.pdf* (last visited Dec. 11, 2020).

pass through countries that are parties to the Refugee Convention or Refugee Protocol. Even if they do not seek such protection, there are still forms of protection available to them in the United States through withholding of removal under the Act and withholding or deferral of removal under the CAT regulations. As stated above, the rule does not deprive them of all possible protections in the United States.

The rule does not violate the TVPRA because asylum officers retain initial jurisdiction over a UAC's asylum application. This rule simply adds an additional bar for asylum officers to apply during their adjudication of a UAC's asylum application.

Finally, as discussed above, the Departments note that UAC who are barred from asylum eligibility under this rule due to travel through a third country 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. The Departments are cognizant of the circumstances often presented by UAC, as observed in section III.C.5, but the INA does not require special protections for UAC beyond those already contained in the statute or the provision of additional, extra-statutory protections. Moreover, the Departments already account for the circumstances of UAC, particularly in immigration proceedings. *See, e.g.,* EOIR, *Operating Policies and Procedures Memorandum 17–03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children,* Dec. 20, 2017, *available at https://www.justice.gov/eoir/file/oppm17-03/download.* Like all aliens subject to the rule, UAC have the opportunity to apply for protection in multiple countries prior to their arrival in the United States. Further, a UAC who is old enough to travel independently across hundreds or thousands of miles to the United States can logically also be expected to seek refuge in one of the countries transited if the UAC is genuinely seeking protection. A UAC who is not old enough to travel independently necessarily must travel with an adult, and again, there is no reason that an adult cannot apply for protection in any country offering refuge if the adult and the UAC are genuinely seeking protection. In short, the Departments have not overlooked the special circumstances of UAC in crafting this rule, but those circumstances are insufficiently compelling to warrant a special exception for UAC from the rule's application.

8. Policy Considerations

a. Nation's Core Values

Comment: Many commenters expressed opposition to the IFR because they claimed that its provisions depart from the core principles of the United States. Commenters remarked that the United States has historically welcomed those fleeing persecution and violence, and they claimed that the provision of protection and the securing of human rights for all people are core principles of the Nation.

Similarly, some commenters stated that extending compassion to those in need is a core American value. Other commenters stated that immigration and diversity are themselves core principles of the United States. Still other commenters discussed American values in the context of providing humanitarian aid and leadership associated with these issues. Commenters also stated that the opportunity to flee one's country and seek safety in another is a fundamental right protected by the United States. Commenters suggested that these core principles are memorialized in Senate reports, the inscription on the Statue of Liberty, the Declaration of Independence, the United States Code, and other various sources.

Other comments were brief but asserted that the policy was ''un-American,'' ''contrary to our nation's core values,'' and ''un-Christian.''

Response: Congress has expressly authorized the Departments to limit asylum eligibility. The United States' non-refoulement obligations are reflected in the withholding provisions of the Act and the CAT regulations. Asylum remains available to aliens who have nowhere else to turn. For all the reasons discussed in the IFR and elsewhere in this final rule, the Departments believe this approach is sound, prudent policy that is warranted by the conditions at the southern land border and is consistent with the asylum statute.

The rule has several objectives. First, it seeks to disincentivize aliens with meritless and non-urgent asylum claims from seeking entry to the United States. *See* 84 FR at 33831. The rule also seeks to reduce misuse of the global system of refugee protection, since aliens who traveled through a country that is obligated to provide non-refoulement protection as a party to the Refugee Convention or Refugee Protocol, but did not seek such protection, may have meritless claims and thus may be misusing the system. *Id.* Meritless or non-urgent claims undermine the humanitarian purposes of asylum, frustrate negotiations with other countries, and encourage heinous practices such as human smuggling and other abuses. *Id.* Accordingly, the rule also seeks to curb the practice of human smuggling and its tragic effects and to bolster negotiations on migration issues between the United States and foreign nations. *Id.* Finally, the rule makes a policy decision to direct relief toward those aliens who were unable to receive protection elsewhere and toward aliens subject to ''severe forms of trafficking in persons,'' defined at 8 CFR 214.11, so that those aliens are able to obtain asylum in the United States more quickly. Consequently, the rule bars asylum eligibility for aliens who might have been able to obtain protection in another country but who chose not to see such protection. *Id.*

DHS and DOJ believe that the rule upholds the ultimate objectives of the commenters in the following ways. First, the rule facilitates effective processing of asylum claims so that aliens with the most urgent claims—those subject to extreme forms of human trafficking and those whose claims were denied in third countries—may be more quickly processed. The rule also decreases the incentive for human smuggling and other dangerous methods used to cross the border by tying the success of an alien's asylum claim more closely to the merits of the underlying claim. Under this rule, only people with a legitimate need for asylum, unable to claim it elsewhere, will have the incentive to enter the United States to raise an asylum claim. Second, the rule encourages aliens fleeing persecution and violence to apply for asylum at the first available opportunity. Truly vulnerable aliens will accordingly be more likely to obtain protection from persecution, in the U.S. or a third country, sooner than in the absence of this final rule.

DHS and DOJ remain vigilant in all efforts to ensure that aliens who face dire circumstances may seek protection. Notwithstanding the assistance that the United States provides to numerous countries across the globe, including Mexico, Guatemala, El Salvador, and Honduras, the U.S. government is committed to making the asylum process for aliens at the southern land border more effective. Currently, the immigration system faces severe strain, and asylum claims often take years to fully process. *See* 84 FR at 33831. This kind of system is ineffective for all parties involved, draining government resources to process and adjudicate these claims and prolonging final resolutions for aliens seeking protection. *Id.* This rule seeks to ameliorate this

strain and inefficiency in order to assist aliens who most need our help.

b. Humanitarian Purposes of Asylum

Comment: Many comments invoked policy considerations, stating that the IFR is inhumane and contradicts the humanitarian purposes of asylum relief. Various commenters emphasized the humanitarian aspects of asylum in the United States—welcoming aliens and providing them with relief, protection, shelter, and other resources—and noted that those aspects of asylum distinguish the United States from other countries. Commenters argued that, without eligibility for asylum and the resources that follow, aliens would face uncertainty, financial burdens, stress, and violence. Leaving aliens to deal with such realities in the wake of the rule is inhumane, commenters claimed.

Commenters also voiced concern that the IFR is inhumane because it allegedly prevents aliens who face violence and persecution from seeking protection, thereby subjecting them to continued violence in their home countries, or, alternatively, to violence in a third country in which they would have to apply for asylum under this rule. Specifically referencing Guatemala, Honduras, and El Salvador, commenters stated that aliens from those countries who are seeking asylum are often fleeing violence, if not death. One commenter stated that demand for drugs from countries like the United States fuels much of the violence in those countries.

Commenters also alleged that the IFR has inhumane effects, including separating families, neglecting children, and subjecting women to abuse. One commenter stated that the IFR would lead to displaced aliens who are in neither their home country nor their preferred country.

Overall, commenters were opposed to the IFR because they claimed it is antithetical to the purpose of asylum itself, as legitimate claims could be procedurally denied based on the fact that the alien had failed to apply for protection in a third country of transit. Some commenters urged humanitarian immigration reform, while most asked the Departments to withdraw the rule altogether.

Response: DHS and DOJ disagree that the rule is antithetical to the humanitarian purposes of asylum. In contrast, this rule seeks to address the humanitarian crisis at the southern border and more effectively address the situation of aliens who urgently need protection, including those who are victims of severe trafficking and refugees who have no other option.

The United States' immigration system has experienced extreme strain over the past decade, and there are questions about the prevalence of fraudulent claims. *See* 84 FR at 33830–31. Despite the tripling of cases referred to DOJ for adjudication, which could take years to resolve, immigration judges grant only a small percentage of asylum requests adjudicated each year. *Id.* Further, the number of new cases has increased an average of 34 percent each year since Fiscal Year 2016, with a higher than 70 percent increase from Fiscal Year 2018 through Fiscal Year 2019. EOIR, *Adjudication Statistics: New Cases and Total Completions,* Oct. 13, 2020, *available at https://www.justice.gov/eoir/page/file/1060841/download.* There is no evidence that the record number of cases referred each year will slow in the future. In addition, the U.S. government continues to encounter massive human smuggling and its tragic effects. 84 FR at 33831.

Through this rule, the Departments seek to provide humanitarian aid effectively for those aliens who need it the most. Thus, with limited exceptions, this rule limits asylum relief to those aliens who have no other option for relief and aliens who experience extreme forms of human trafficking, defined at 8 CFR 214.11. *Id.*

Mexico is a party to, and has ratified the 1951 Refugee Convention, the 1967 Refugee Protocol, and the CAT. *See* Landau Memorandum at 1. Additionally, Mexico is a signatory to, and has incorporated into its law, the 1984 Cartagena Declaration on Refugees. *Id.* Over the past decade, as explained previously, Mexico has substantially reformed its immigration and refugee laws, and in 2020, it more than doubled the budget for COMAR.[38] *Id.* at 2–3. The Mexican Constitution was amended in 2016 to include the specific right to asylum. *Id.* at 2. Further, the grounds for seeking and obtaining refugee status under Mexican law are broader than the grounds under United States law. *Id.* Individuals in Mexico may seek refugee status not only as a result of persecution in their home countries on the basis of race, religion, nationality, gender, membership in a particular social group, or political opinion, but also on the basis of generalized violence or widespread violation of human rights. *See id.; see also* 2011 LRCPPA, arts. 13(I), 13(II). Prospective refugees may apply at any COMAR office in the country within 30 days of entry into Mexico, subject to extension for good cause. Landau Memorandum at 2. Because prospective refugees may choose any state to apply for refugee status, two-thirds of refugee applications are filed in Chiapas, which is one of Mexico's safest states. *Id.* at 4. And if conditions in a particular state happen to change, Mexico allows for the transfer of an asylum application from one state to another. *See id.* at 2. Further, prospective refugees are legally eligible to work and access public health services during the pendency of their cases, with COMAR under a legal obligation to process applications within 90 days. *Id.* The United States Ambassador to Mexico recently disputed allegations that Mexico improperly returns prospective refugees to their countries of origin, stating that he has received ''repeated assurances [from] senior Mexican officials'' that they recognize their obligation to offer protection to refugees. *Id.* at 5. In short, because Mexico is a party to international agreements regarding the treatment of refugees and has recently expanded its capacity to process asylum claims, aliens who truly need urgent protection may apply in Mexico upon arrival in that country, thereby hastening the process to ultimately obtain asylum relief. *See* 84 FR at 33839–40; *see also* UNHCR, *Universal Periodic Review 3rd Cycle, 31st Session: Mexico, National Report* 2, 10–12 (2018), *available at https://www.ohchr.org/EN/HRBodies/UPR/Pages/MXindex.aspx* (last visited Dec. 10, 2020) (describing the protocols and ''protection mechanisms' that Mexico has developed for asylum seekers and others, including measures specifically designed to ensure protection for children, provision of health care, and prevention of violence); *see also* UNHCR, *Fact Sheet: Mexico* (Apr. 2019), *available at https://reporting.unhcr.org/sites/default/files/UNHCR%20Factsheet%20Mexico%20-%20April%202019.pdf*

[38] This budget increase is especially noteworthy in light of concerns raised by immigration-related organizations and others that COMAR lacks sufficient resources. *See, e.g.,* Congressional Research Serv., *Mexico's Immigration Control Efforts* 2, Feb. 19, 2020, *available at https://fas.org/sgp/crs/row/IF10215.pdf* (last visited Dec. 11, 2020) (noting that some experts have asserted that ''COMAR reportedly does not have sufficient budget or staff''); Asylum Access, *Mexican Asylum System for U.S. Immigration Lawyers FAQ,* Nov. 2019, *available at https://asylumaccess.org/wp-content/uploads/2019/11/Mexican-Asylum-FAQ-for-US-Immigration-Lawyers.pdf* (last visited Dec. 11, 2020) (asserting that, although Mexico has seen a ''substantial increase in refugees seeking asylum,'' the Mexican government ''has not provided a commensurate budgetary increase to process the applications''). These reports from 2019 and early 2020 necessarily do not take into account the effects of the recent doubling of COMAR's budget. For this reason and others, the Departments consider the more recent description of the Mexican asylum system from the Ambassador of Mexico to be a more persuasive indication of conditions for those seeking refuge in the country.

(last visited Dec. 11, 2020) (describing how Mexico has been transforming ''its migration policy from a policy guided by security and control, to an approach which places greater emphasis on human rights, protection and regional cooperation''); *id.* (''Mexico has made important commitments to significantly increase its staff and activities to support the work of the Mexican authorities in processing an increased number of asylum claims and ensure protection of its Persons of Concern''). Importantly, aliens who are ineligible for asylum in light of this rule may still apply for withholding of removal under the Act and withholding or deferral of removal under the CAT regulations in the United States. 84 FR at 33839–40. By decreasing the incentive for filing meritless claims and focusing relief on aliens who are unable to obtain protection elsewhere, DHS and DOJ seek to more effectively and more quickly provide humanitarian aid. *Id.* at 33839.

Also through this rule, DHS and DOJ sought to curb the humanitarian crisis of human smuggling. *See id.* at 33830. The likelihood of a lengthy asylum process, throughout which asylum applicants may remain in the United States (typically free from detention and with work authorization) often incentivizes human smugglers and men, women, and children with non-urgent asylum claims to make the dangerous journey across the southern land border. *Id.* at 33831. By directing relief to aliens who legitimately fear persecution and to aliens with the most urgent asylum claims, the rule aims to reduce the incentives for those aliens who lack a legitimate fear of persecution and those aliens with non-urgent claims to engage in dangerous efforts to reach the United State, thereby reducing the humanitarian crisis. *Id.* at 33840.

As previously stated, one overarching purpose of the rule is assisting in the resolution of the humanitarian crisis at the border. *See id.* at 33830; *Thuraissigiam,* 140 S. Ct. at 1967 (noting the drastic increase in credible-fear claims at the border over the past decade, and that, in 2019, only 15 percent of those found to have a credible fear received asylum). Accordingly, DHS and DOJ do not encourage the exacerbation of such circumstances; rather, this rule seeks to aid those populations by encouraging them to apply for asylum in the first safe country they encounter in order to most quickly obtain assistance and protection from those circumstances from which they fled, and by processing claims for those who most desperately need help.

Accordingly, in contrast to the concerns raised in the comments, this rule works to more effectively and quickly provide humanitarian aid to aliens who most need it and reduce the humanitarian crisis of human smuggling.

c. Failure To Address Root Causes of Migration

Comment: Several commenters remarked that the IFR fails to address the root cause of requests for asylum—widespread violence from which aliens must flee. Many of those commenters accordingly opposed the rule and asked that the U.S. government consider addressing the root causes of migration instead. Those commenters stated that the United States, historically a global leader on such issues, is uniquely positioned to address the violence and other extreme circumstances that prompt aliens to migrate. Some commenters concluded that the IFR fails to stop the flow of migrants because the causes remained unaddressed.

Some comments offered suggestions on how the United States could address the violence in Central America and Mexico: Expanding and investing in programming for families, assisting Mexico and other countries in expanding their capacities to process asylum claims, and bolstering protections for those aliens in the United States.

Response: DHS and DOJ acknowledge the violence and crime that many individuals face and appreciate the suggestions from commenters regarding ways in which the United States may assist countries with high levels of violence and aliens fleeing such violence. The United States, through coordination and work among numerous agencies such as DOJ, DHS, the Department of State, and the United States Agency for International Development, provides robust assistance to individuals in need across the globe. *See generally* U.S. Dep't of State, *Foreign Assistance, https://www.foreignassistance.gov.* The Departments' efforts to limit asylum eligibility to aliens in most need of asylum is complementary to these efforts.

Further, the question of improving internal conditions in foreign countries is beyond the scope of this rulemaking. This rule addresses one component of the Nation's immigration system—asylum relief—by reducing the current strain on the system so that meritorious asylum claims may be more effectively processed. *See* 84 FR at 33829–30. The rule does so by discouraging misuse of the asylum system, since aliens who travel through a country where protection was available but declined to seek protection may have meritless claims. *Id.* Such meritless claims undermine the humanitarian purposes of asylum, and encourage heinous practices such as human smuggling. Accordingly, the rule furthers policies likely to reduce the practice of human smuggling and its tragic effects. *Id.* Finally, the rule makes a policy decision to direct relief to aliens who were unable to receive protection elsewhere and aliens subject to ''severe forms of trafficking in persons,'' defined at 8 CFR 214.11, enabling such aliens to more quickly obtain asylum relief in the United States because the number of asylum applicants referred to an immigration judge for consideration of their application is likely to better align with EOIR's adjudicatory capacity.[39] Instituting procedures that better align the availability of asylum with those applicants most in need of protection will help ensure those applicants have access to relief, and the benefits that flow from a grant of asylum,[40] in a timely manner. Consequently, the rule bars aliens from being eligible for asylum who could have obtained protection in another country. *Id.*

Based on these considerations, the Departments believe that the rule does address some causes of migration, such as the incentives for aliens with non-meritorious or non-urgent claims to migrate. *Id.* at 33841, 33831. The rule aims to reduce these causes so that the United States may more effectively process claims for those with a genuine need, and the rule encourages those fleeing persecution to secure protection at the first available opportunity. *See id.* at 33839. Further, the rule continues the

[39] In recent years, the large influx of asylum applications filed with the immigration court system has outpaced EOIR's adjudicatory capacity. For example, in Fiscal Year 2019, EOIR received a record a number of asylum applications (213,798), but issued final decisions in less than half the total number received (91,270). *See* EOIR, *Adjudication Statistics: Total Asylum Applications,* Oct. 13, 2020, *available at https://www.justice.gov/eoir/page/file/1106366/download;* EOIR, *Adjudication Statistics: Asylum Decision Rates,* Oct. 13, 2020, *available at https://www.justice.gov/eoir/page/file/1248491/download.*

[40] Asylum, once granted, creates a path to lawful permanent resident status and U.S. citizenship and affords a variety of other benefits. *See, e.g.,* INA 208(c)(1)(A), (C), 8 U.S.C. 1158(c)(1)(A), (C) (asylees cannot be removed subject to certain exceptions and can travel abroad with prior consent); INA 208(b)(3), 8 U.S.C. 1158(b)(3) (allowing derivative asylum for an asylee's spouse and unmarried children); INA 209(b), 8 U.S.C. 1159(b), 8 CFR 209.2 (allowing the Attorney General or the Secretary to adjust the status of an asylee to that of a lawful permanent resident); 8 U.S.C. 1612(a)(2)(A) (asylees are eligible for certain Federal means-tested benefits on a preferential basis compared to most legal permanent residents); INA 316(a), 8 U.S.C. 1427(a) (describing requirements for the naturalization of lawful permanent residents).

provision of asylum relief for certain aliens who are victims of human trafficking or aliens who were not granted protection after applying for asylum in a third country. *Id.* at 33840. Importantly, the rule also seeks to assist in negotiations with Mexico and other countries in order to adopt a more widespread effort to address issues related to migration, security, and humanitarian aid, including many of the issues identified in these comments. *Id.* In this way, the United States continues to lead international efforts to address these issues.

The government continues to evaluate and assess ways to address these challenges, and this rule is one way through which the U.S. government is addressing the current challenges to the asylum process.

d. Rule Will Encourage Illegal Border Crossings

Comment: Many comments claimed that the IFR encourages border crossing without inspection, including human smuggling and the use of clandestine, dangerous routes. Comments claimed that the IFR effectively eliminated asylum relief at the border, thereby incentivizing border crossing without inspection. Several comments particularly disagreed with the rule's statement that human smuggling created the current humanitarian crisis. The comments asserted, rather, that the practice of human smuggling was a consequence of the crisis, not a cause. The comments expressed that aliens resort to human smuggling in order to flee violence and persecution, which contradicts the rule's assertion that aliens resort to human smuggling because it is widely available. Further, some comments claimed that the rule's additional legal requirements incentivize human smuggling because aliens who are not able to pass the high threshold of ''reasonable fear'' review will risk crossing the border with smugglers rather than be returned to their countries.

Commenters asserted that increased smuggling fees and increased death rates at the border demonstrate that people fleeing violence will risk their lives to reach safety, despite efforts such as the IFR that aim to deter border crossings. As a result, the commenters claimed, the IFR further exposes such aliens to increased danger.

Response: DHS and DOJ disagree that the rule encourages border crossing without inspection through means such as human smuggling and the choice of more clandestine, dangerous routes. The Departments promulgated the rule in part to reduce the incentives to cross without inspection in an effort to reduce such practices.

As explained in the IFR, the U.S. government continues to encounter human smuggling and its tragic effects. *See* 84 FR at 33830–31. Accordingly, this rule seeks to curb the humanitarian crisis of human smuggling. *Id.* at 33830. The likelihood of a lengthy asylum process, throughout which asylum applicants may remain in the United States free from detention and with work authorization, incentivizes aliens with meritless asylum claims to make the dangerous journey across the southern land border, often through the use of human smugglers. *Id.* at 33831. By focusing on the most urgent asylum claims, the rule aims to reduce the incentive for those with non-urgent claims to engage in risky efforts to evade inspection like the use of human smugglers or the use of dangerous routes to travel to the United States—thereby reducing the humanitarian crisis. *Id.* at 33840.

The IFR's statement that it ''seeks to curtail the humanitarian crisis created by human smugglers bringing men, women, and children across the southern land border,'' *id.* at 33840, refers to the particular crisis of human smuggling and the associated consequences. The smuggling industry is largely financially motivated, and courts have recognized that U.S. immigration policy influences smuggling activity. *See id.* at 33841; *see also E. Bay Sanctuary Covenant,* 354 F. Supp. 3d at 1115 (''Reviewing this [news article] with deference to the agencies' views, it at least supports the inference that smugglers might similarly communicate the Rule's potential relevant change in U.S. immigration policy, albeit in non-technical terms.''). Further, the Departments believe that, once migrants learn of these changes to the United States' asylum regulations, the incentive to come to the United States may be reduced, which in turn would decrease the demand for human smuggling. The rule's focus on ensuring that meritorious asylum claims are more efficiently considered within the United States, by incentivizing individuals able to do so to apply for relief in other countries, will reduce the incentive for unlawful smuggling and evasion of the asylum system and, thus, help alleviate this humanitarian crisis. *See* 84 FR at 33831.

The Departments also note that the rule does not eliminate asylum relief at the border, as some commenters have claimed. *See id.* The Departments determined that aliens denied protection in a third country and victims of trafficking in persons, defined at 8 CFR 214.11, have the most urgent asylum claims, and the United States may more effectively process such claims in accordance with the provisions of the rule. *See id.* Far from eliminating asylum relief, the Departments seek to provide protection more effectively to those who most urgently need it.

In contrast to the concerns raised in the comments claiming that the IFR causes or exacerbates these dangerous practices, promulgation of this rule reflects the Departments' commitment to curbing the practices of human smuggling and other dangerous methods for crossing the border without inspection.

Comment: One comment briefly expressed concern that the IFR would create more incentives for human smugglers to ''find ways to get individuals through the border undetected, thereby increasing the number of individuals who have not received a background check.'' The comment did not expressly state the reasoning underlying its concern with individuals who have bypassed background checks.

Response: The Departments response to comments about increased incentives for human smuggling, above, address this comment's concern. The Departments agree on the importance of background checks, as they protect the safety and security of the United States. The Departments disagree with the commenter's prediction, however. The Departments expect that the rule will lead to fewer individuals illegally crossing the border and thus lead to fewer people residing in the U.S. without a background check.

e. Disparate Impact on the Poor and Those Who Cannot Travel by Air or Sea

Comment: Three commenters argued that the IFR discriminates against aliens who do not have the money to travel by air or sea (and thereby avoid crossing the southern land border) or aliens who are forced to flee suddenly and cannot wait for travel documents or a plane or boat reservation. One of the commenters asserted that this demonstrates that the Departments wish to eliminate the availability of asylum.

Response: The Departments recognize that the rule does not impact aliens arriving by sea or air. However, as previously noted, this rule is intended to deal specifically with the crisis at the southern land border. If, as in the past, a crisis arises related to aliens arriving by sea or air, the Departments can reevaluate the scope of the rule's

application.[41] *Cf. City of Las Vegas* v. *Lujan,* 891 F.2d 927, 935 (D.C. Cir. 1989) (permitting agencies to exercise discretion in addressing policy challenges, which could include an incremental ''step'' approach).

The rule does not seek to penalize any asylum seeker based on wealth or exigent circumstances. In the past, U.S. asylum policy has impacted migrants traveling by land, air and sea, affecting individuals using a variety of methods to travel to the United States without regard to resources.[42] As the Departments explained in the IFR, 84 FR at 33829, the rule is aimed at addressing the crisis of aliens crossing the southern land border at historically high rates, which has in turn led to a historic backlog of asylum claims. The rule does not address the northern border because the United States and Canada operate on a shared framework of a cooperative agreement to process asylum claims. *See* 8 CFR 208.30(e)(6). The rule targets those who cross over the southern land border because, with the exception of Mexican nationals, these individuals necessarily transit through a third country en route to the United States.

The Departments believe this approach is reasonable because, as explained previously, Mexico is a party to the relevant treaties and, as explained in the Landau Memorandum, Mexico has taken adequate steps to provide protection to asylum seekers. Thus, aliens passing through Mexico will necessarily have a chance to seek protection. Individuals travelling by air or sea, in contrast, may pass through no other countries at all en route to the United States, and hence might lack such an opportunity. Individuals traveling by air or sea may have boarded a vessel from their home country and arrived directly in the United States without a stopover, and thus without an opportunity to apply for protection, in a third country. Thus, the Departments applied this rule to the southern land border not to discriminate against or harm people who lack the means to arrive by air or sea, but to ensure that the rule applies to those aliens who will in fact have an opportunity to seek protection in a third country.

[41] The United States, for example, has previously taken steps expressly designed to address migration by sea. *See Sale* v. *Haitian Ctrs. Council, Inc.,* 509 U.S. 155, 160–61 (1993) (describing President Reagan's suspension of entry for certain undocumented aliens from the high seas).

[42] *See Haitian Ctrs. Council, Inc.,* 509 U.S. at 161, 163 (describing the effects of President Reagan's suspension).

f. Bad Motives—Racist Intent

Comment: Many comments in opposition to the IFR claimed that it was motivated by racial animus, alleged that it has discriminatory effects, or included a discussion of both. Most comments stated that the rule reflected racist, xenophobic, or prejudiced attitudes, and other comments argued that the IFR impermissibly discriminates on the basis of race.

Commenters alleged, for example, that the IFR demonstrated ''blatant racism,'' ''naked xenophobia,'' and ''thinly veiled white nationalism,'' and accordingly described the rule as ''immoral,'' ''disgusting,'' ''abhorrent,'' and ''sicken[ing].'' Another comment specifically claimed that the IFR's exclusive application to aliens at the southern land border violated equal protection principles under the Fifth Amendment by discriminating based on race, ethnicity, and national origin, rendering the rule unconstitutional. That same comment also claimed that the IFR would more heavily affect certain racial or ethnic groups than others, which courts consider when examining discriminatory purpose. Further, pointing to various statements and policies from the Administration, the comment alleged racial animus and a violation of the Constitution, leading the commenter to request the withdrawal of the IFR.

Other commenters raised concerns with the alleged discriminatory effect of the IFR, explaining that it would have a disproportionately negative impact on people of color, particularly refugees from countries in Central America and Africa, and inherently discriminate against individuals who migrate through the southern land border, thereby effectively denying protection to asylum seekers from El Salvador, Guatemala, and Honduras.

Response: The rule is neither motivated by racial animus nor promulgated with discriminatory intent. As explained in the IFR, 84 FR at 33829, the Departments promulgated the IFR in light of the following considerations. First, in order to reduce the immense strain on the immigration system as a whole, the IFR sought to disincentivize aliens with meritless asylum claims from seeking entry to the United States. *See id.* at 33830. The IFR sought to reduce misuse of the system, since aliens who travel through a country where protection is available, but who did not seek such protection, may have meritless claims and be misusing the system. *Id.* The IFR also sought to curb the practice of human smuggling and its tragic effects and to bolster negotiations on migration issues between the United States and foreign nations. *Id.* Finally, the rule made a policy choice to direct relief to aliens who are unable to receive protection elsewhere and aliens who are subject to ''severe forms of trafficking in persons,'' defined at 8 CFR 214.11, so that those aliens are able to obtain asylum relief in the United States more quickly. Consequently, the rule bars from eligibility for asylum those aliens who could have obtained protection in another country because they passed through countries that are obligated to provide protections to those facing persecution as party to the 1951 Refugee Convention or 1967 Protocol, but did not seek such protection. *Id.*

None of these considerations is racially motivated, nor do these considerations constitute discriminatory purposes. Although the rule may impact, to a greater extent, groups specifically described in the comments, application of the rule relates to the geographic location and particular nature of the humanitarian crisis at the southern land border. As indicated previously, if a crisis arises related to aliens arriving by sea or air, the Departments can reconsider the scope of the rule's application. The Departments do not promulgate the rule with a discriminatory purpose.

9. Statutory Withholding of Removal and Protection Under the CAT Regulations in Lieu of Asylum

Comment: Twenty-one organizations argued that it is not sufficient that individuals affected by the IFR may still apply for statutory withholding of removal or protection under the CAT regulations. These groups raised concerns that applicants will be subject to the higher burden of proof applicable to requests for withholding of removal under the Act and withholding or deferral of removal under the CAT regulations, and they expressed concern that applicants would lose access to benefits available to asylees but not to recipients of statutory withholding or protection under the CAT regulations.

Sixteen organizations noted that, to prevail on a claim for statutory withholding or CAT protection, an applicant must meet a higher burden of proof than that needed to prevail on a claim for asylum—a ''clear probability'' of persecution or torture for withholding and CAT claims versus a ''reasonable possibility'' of persecution for asylum claims. For example, one commenter contended that ''withholding of removal and relief under the Convention [A]gainst Torture, which the rule clarifies will still be available for those subject to this new asylum bar, are not

adequate substitutes for asylum,'' because ''withholding of removal requires asylum-seekers to meet a more stringent standard of proof to establish their eligibility for this relief.'' [43] Another commenter raised concerns that some aliens might be denied protection due to the higher burden of proof, stating that ''[s]ubstituting the different procedural standards of protection from removal or withholding of removal for the existing procedural standards of asylum will not produce equivalent or better results. Instead, this change would result in the exclusion of many victims of serious persecution . . . from having a meaningful opportunity to present their cases and seek safety in the United States.''

Response: To the extent commenters predict that certain individuals will wrongly be denied protection in the United States due to the rule, the Departments disagree. The Departments believe that it is vital that eligible persons be protected from removal to countries where they would likely face persecution on account of a protected ground or torture. The rule is consistent with that goal. Many commenters ignore the possibility that some individuals will obtain protection in countries other than the United States, and they ignore the benefits this result could entail. For example, numerous commenters stated that the long journey to the United States can inflict trauma on individuals who are fleeing persecution or torture. To the extent the rule results in individuals with meritorious claims obtaining protection sooner and with a shorter journey, it should help mitigate such trauma. Finally, it was Congress's deliberate decision to establish a requirement that an alien show that it is more likely than not that his or her ''life or freedom would be threatened'' for statutory withholding of removal, INA 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A), which is a standard designed to meet U.S. obligations under the Refugee Protocol.[44] *See Cardoza-Fonseca,* 480 U.S. at 440–41; *Stevic,* 467 U.S. at 428 (''[I]t seems clear that Congress understood that refugee status alone did not require withholding of deportation, but rather, the alien had to satisfy the ['more likely than not'] standard under § 243(h)[.]''). Commenters should address Congress regarding a change to this statutory standard.

Comment: Numerous commenters noted that an asylee's spouse and unmarried children under the age of 21 receive derivative relief, a benefit missing from statutory withholding and CAT protection. One commenter argued that this distinction ''means the difference between being reunited with one's immediate family and living alone in a foreign country,'' and means that ''new U.S. residents are deprived of a key factor in their eventual social and economic integration into, and independence in, the United States.'' Another commenter raised concerns that this could lead to family separations: ''One of the most damaging consequences of extending only withholding of removal or CAT protection to refugees is the potential for permanent family separation . . . . [A]n immigration judge may grant protection to a refugee parent but order a child deported.''

Response: Those commenters who asserted that the rule will lead to family separations rely on several assumptions. First, they assume that individuals will choose to travel to the United States even when asylum relief may be unavailable if they have not first sought protection in a third country. Commenters offered no support for this assumption and did not consider the potential for individuals to apply for, and potentially receive, relief from a third country through which they transit prior to reaching the United States. In fact, the number of individuals applying for asylum in Mexico and other countries has increased in recent years. *See* 84 FR 33839–40. Second, commenters assumed that a third country will not grant individuals asylum and that applicants will not choose to stay in a third country. If the third country denies asylum, those individuals would not be subject to this rule's bar.

Finally, Congress reached the policy determination in enacting the INA and other immigration statutes over the years to decline to provide derivative relief for family members in the withholding- and deferral-of-removal contexts. Congress could update that policy if desired. Notably, however, the lack of derivative relief for family members outside of the asylum context does not impact the merits of the underlying question whether a particular applicant warrants the discretionary relief of asylum. *See Thuraissigiam,* 140 S. Ct. at 1965 n.4. Indeed, Congress knew that, by giving the Attorney General and the Secretary authority to promulgate additional limitations on eligibility for asylum, certain aliens other than those barred by statute would not be eligible to receive the secondary benefits associated with asylum, such as derivative asylum for family members. *See R–S–C,* 869 F.3d at 1187 (observing that the INA's ''delegation of authority means that Congress was prepared to accept administrative dilution of the asylum guarantee in § 1158(a)(1)''). Congress has nonetheless declined to provide such benefits to aliens eligible only for withholding or deferral of removal, and commenters' concerns are accordingly best addressed to Congress.

Comment: Seven commenters complained that recipients of statutory withholding or CAT protection have no path to lawful permanent resident status or citizenship. Three of these groups also noted that these alternative forms of protection do not guarantee that individuals may remain permanently in the United States. Instead, DHS may remove recipients to another safe country. For example, one commenter complained that this ''[l]imited and uncertain legal status further complicates an already challenging but near-universal early goal of treatment for torture and trauma survivors: restoring a sense of safety.''

Response: Courts have rejected arguments that the Refugee Protocol, as implemented, requires that every qualified refugee receive asylum. For example, the Supreme Court has made clear that Article 34 of the Refugee Convention, which concerns the assimilation and naturalization of refugees, is precatory and not mandatory, and, accordingly, does not mandate that all refugees be granted asylum. *See Cardoza-Fonseca,* 480 U.S. at 441. Section 208 of the INA reflects that Article 34 is precatory and not mandatory, and accordingly does not provide that all refugees shall receive asylum. *See id.; see also R–S–C,* 869 F.3d at 1188; *Mejia* v. *Sessions,* 866 F.3d 573, 588 (4th Cir. 2017); *Cazun,* 856 F.3d at 257 & n.16; *Garcia,* 856 F.3d at 42; *Ramirez-Mejia,* 813 F.3d at 241. As noted above, Congress has also recognized the precatory nature of Article 34 by imposing various statutory exceptions and by authorizing the creation of new bars to asylum eligibility through regulation.

Congress may revisit its decision to decline to provide derivative benefits to family members seeking protection other than asylum. But the consequences of other forms of

[43] Unlike asylum, withholding of removal is a form of protection from removal, not relief.

[44] Article 33.1 of the Refugee Convention states that ''[n]o Contracting State shall expel or return *('refouler')* a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership or a particular social group or political opinion.'' 19 U.S.T. 6259, 6276, 189 U.N.T.S. 150, 176. In 1968, the United States acceded to the Refugee Protocol, which bound parties to comply with the substantive provisions of Articles 2 through 34 of the Convention with respect to refugees. *See Cardoza-Fonseca,* 480 U.S. at 429.

protection such as withholding or deferral of removal does not impact the underlying merits of an applicant's asylum claim.

Comment: Two groups raised concerns that individuals denied asylum will lose access to numerous welfare and public assistance benefits. Groups also stated that recipients of statutory withholding and CAT protection face ''significant barriers to education and work'' compared to asylees and, ''unlike asylum, refugees who secure withholding of removal must apply annually for work authorization.'' Finally, two groups raised concerns that recipients of withholding and CAT protection do not have the same freedom to travel outside of the United States as asylees.

Response: These comments ignore the ample public benefits available to recipients of statutory withholding. Specifically, recipients of statutory withholding are eligible for Supplemental Security Income (''SSI''), the Supplemental Nutrition Assistance Program (''SNAP,'' more commonly known as food stamps), and Medicaid for the first seven years after their applications are granted,[45] and for Temporary Assistance to Needy Families (''TANF'') during the first five years after their applications are granted.[46] Aliens other than asylees are also eligible for other benefits, such as benefits administered by the Office of Refugee Resettlement at the Department of Health and Human Services. *See, e.g.,* Office of Refugee Resettlement, *What We Do* (Dec. 5, 2019), *https://www.acf.hhs.gov/orr/about/what-we-do* (describing how the office provides rehabilitative, social, and legal services to certain aliens ''regardless of immigration status''). Further, the provision of Federal benefits to certain individuals is a policy determination within the purview of Congress, which made the deliberate decision to limit some of these benefits to asylees. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104–193, tit. IV, secs. 401–03, 431, Aug. 22, 1996, 110 Stat. 2105, 2261–67, 2274 (codified at 8 U.S.C. 1611–13, 1641).

Finally, to the extent commenters raised concerns that recipients of statutory withholding and CAT protection must apply annually for work authorization and lack the freedom to travel outside of the United States generally afforded to asylees, neither of these benefits is mandated by U.S. law.

D. Public Comments on Regulatory Requirements

1. Administrative Procedure Act

a. Notice and Comment Requirements

Comment: A significant number of comments stated that the Departments violated the APA because the Departments did not provide the public with notice and an opportunity to comment on the IFR before its implementation and because the rule was not published 30 days before its effective date. *See generally* 5 U.S.C. 553(b)–(d). Commenters asserted that, without notice and comment, they were unable to provide evidence that the rule is unlawful and that it will have numerous harmful effects.

Commenters stated that the Departments' reliance on the good cause exception and foreign affairs exemption to notice-and-comment rulemaking was improper. *See* 84 FR at 33840–42. Discussing the good cause exception, the commenters asserted that the Departments did not provide sufficient evidence that notice-and-comment rulemaking would result in a surge of asylum applicants. Regarding the foreign affairs exemption, the commenters stated that the Departments did not provide evidence that notice and comment rulemaking would negatively affect negotiations with the governments of Mexico, Guatemala, Honduras, or El Salvador. The commenters stated that, in fact, the IFR would have the opposite effect. According to one commenter, ''[s]trong-arming other nations, which are unprepared to deal with massive influxes of asylum seekers and who have institutional challenges of their own, into accepting returned asylum seekers will harm the United States' diplomatic relationships with those countries, and contribute to further destabilization of the region.''

Response: As explained above, the IFR complied with the APA's notice-and-comment requirements, as recently considered by the Supreme Court in *Little Sisters,* 140 S. Ct. 2367. The Court held that an IFR followed by a final rule that satisfies the APA's notice and comment requirements, 5 U.S.C. 553(b)–(d), is procedurally valid. *See id.* The Departments' IFR complied with APA requirements, including providing notice and an opportunity for the public to comment. Subsequently, given this final rule, the rulemaking is procedurally valid, despite the fact that an NPRM was not issued and that reviewing courts have held that the Departments' invocation of the good cause and foreign affairs exceptions to notice and comment was improper.[47] *Compare CAIR I,* 2020 WL 3542481, at *13–19 (holding that the Departments could not rely on the exception and exemption), *with Little Sisters,* 140 S. Ct. at 2386 n.14 (''Because we conclude that the IFRs' request for comment satisfies the APA's rulemaking requirements, we need not reach respondents' additional argument that the Departments lacked good cause to promulgate the 2017 IFRs.'').

b. Arbitrary and Capricious

Comment: Commenters stated that the Departments' determinations underlying the IFR are arbitrary and capricious because the Departments failed to examine relevant data, adequately explain the policy change, or consider the significant impacts of the rule on asylum seekers and the community at large. Commenters argued that the Departments did not provide an adequate explanation for the assertion that an alien's failure to seek protection in a third country relates to the probability that an asylum claim may be meritless. Commenters pointed to Federal appellate cases that held that applicants do not need to apply in the first country where asylum is available and that asylum applicants can have secondary motives for choosing to come to the United States that do not affect their asylum eligibility, such as relatives or friends in the United States who can help them as they pursue their claims. Further, the commenters asserted that the rule does not take into account the many reasons that asylum seekers might not apply for asylum in third countries such as Mexico or Guatemala, which, according to the commenters, feature dangerous conditions and lack asylum

[45] 8 U.S.C. 1612(a)(1), (a)(2)(A)(iii), (a)(3) (SSI and SNAP); 8 U.S.C. 1612(b)(1), (b)(2)(A)(i)(III), (b)(3)(C) (Medicaid).

[46] 8 U.S.C. 1612(b)(1), (b)(2)(A)(ii)(III), (b)(3)(A)–(B) (TANF and Social Security Block Grant); 8 U.S.C. 1622(a), (b)(1)(C); 1621(c) (state public assistance).

[47] The Departments acknowledge that the Supreme Court in *Little Sisters* did suggest that publishing a final rule after an IFR might not satisfy the APA if the IFR ''failed to air the relevant issues with sufficient detail for [the public] to understand the Departments' position.'' 140 S. Ct. at 2384–85. The Departments do not believe that the circumstances of this rule's promulgation indicate such a failed understanding. Many commenters may have disagreed with the Departments' positions regarding the IFR, but the commenters nevertheless understood the substance of the Departments' position. Moreover, the fact that the Departments have now considered over 1,800 comments associated with the IFR—many of them detailed comments from organizations with a significant interest in asylum eligibility—before finalizing the rule suggests that there has been no prejudice in relying on the good cause exception and the foreign affairs exemption to publish the IFR without first providing for a comment period. *See id.* at 2385 (recognizing that the rule of prejudicial error applies to claims under the APA).

infrastructure to process a significant amount of claims.

Commenters also criticized the rule's reliance on *Matter of Pula,* 19 I&N Dec. 467. Commenters noted that although the BIA stated that an alien's transit through third countries may be a negative discretionary factor depending on the factual circumstances, the BIA also has explained that the danger of persecution in the applicant's home country ''should generally outweigh all but the most egregious adverse factors.'' *Matter of Pula,* 19 I&N Dec. at 474.

Likewise, some commenters asserted that the IFR's claim to advance humanitarian objectives is pre-textual because there is no plausible set of circumstances under which a rule prohibiting the vast majority of asylum seekers from obtaining asylum will serve the humanitarian purposes of asylum. In particular, some commenters asserted that, because transiting through a third country does not establish that an asylum claim is meritless, the rule will prohibit otherwise successful asylum claims.

Commenters stated that the IFR did not provide evidence of how it will lower human smuggling and trafficking by reducing incentives, nor how it will affect the dire conditions that currently exist at the border. Further, the commenters stated that the IFR inadequately explained how it will reduce the administrative burden in immigration courts, since, under the rule, the courts will still adjudicate claims for withholding of removal and protection under the CAT regulations, as well as appeals of these asylum denials. In addition, commenters stated that the need to reduce the burden on immigration courts by implementing the IFR is exaggerated because DOJ has added a significant number of immigration judges and the largest increase in pending cases has come from the Attorney General's decision that immigration judges did not have the authority to grant administrative closure. *See Matter of Castro-Tum,* 27 I&N Dec. 271 (A.G. 2018). Commenters also stated that the IFR does not cite any evidence supporting the contention that many asylum seekers are economic migrants seeking to exploit U.S. asylum law.

Next, commenters stated that the Departments provided misleading or inaccurate statistics in the IFR, asserting that denied asylum claims are not necessarily meritless; that the large majority of applicants appear for their hearings, particularly when represented by counsel; and that those affected by the IFR are granted asylum in ratios similar to asylum applicants as a whole. Other commenters stated that the Departments conflated meritless applications with denied applications, for which factors such as access to counsel and the particular immigration judge presiding over the case have major effects on the outcome.

Response: The Departments believe that the determinations underlying the IFR are well-founded. Arbitrary and capricious review is limited and ''highly deferential, presuming the agency action to be valid. . . .'' *Sacora* v. *Thomas,* 628 F.3d 1059, 1068 (9th Cir. 2010), *citing Crickon* v. *Thomas,* 579 F.3d 978, 982 (9th Cir. 2009) (internal quotation marks omitted). 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. The agency need only articulate ''a rational connection between the facts found and the choice made.'' *Motor Vehicle Mfrs.,* 463 U.S. at 43 (1983), *quoting Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 1568, 168 (1962).

Considering the unprecedented increase of asylum applications and the backlog of pending cases, the Departments concluded that the IFR was necessary and well-founded. *See* EOIR, *Adjudication Statistics: Total Asylum Applications* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1106366/download* (demonstrating the increased receipt of asylum applications between Fiscal Years 2008 and 2019); *see also* EOIR, *Adjudication Statistics: Pending Cases* (Oct. 7, 2019), *https://www.justice.gov/eoir/page/file/1060836/download* (demonstrating the increased pending caseload between Fiscal Years 2008 and 2019). Further, the period between the issuance of *Matter of Avetisyan,* 25 I&N Dec. 688 (BIA 2012), which *Matter of Castro-Tum* overturned, and the issuance of *Matter of Castro-Tum* coincided with a 127 percent increase in pending cases, despite relatively low numbers of new case receipts in several of the intervening years. *Compare* EOIR, *Active and Inactive Pending Cases Between February 1, 2012 and May 17, 2018* (Jan. 30, 2019), *https://www.justice.gov/eoir/page/file/1296536/download, with* EOIR, *New Cases and Total Completions* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1139176/download.* In contrast, more recent increases to the pending caseload and the increased burden on the immigration courts have been driven by record numbers of new cases filed; this increase, is driven by continued influxes of illegal immigration, which is one of the primary issues the rule attempts to combat. *See* EOIR, *Pending Cases, New Cases, and Total Completions* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1242166/download.* In short, higher levels of illegal immigration—and not any decision by the Attorney General—have increased the burden on immigration courts, and it is appropriate for the Departments to consider that burden in promulgating this rule.

Although commenters expressed various opinions regarding factors that may reduce or exacerbate the burden on immigration courts, the Departments ultimately believe that this final rule, together with other regulatory and policy efforts, best addresses the dramatic increase in asylum applications and the pending caseload currently experienced by the immigration courts.

The Departments promulgated the IFR based on several considerations, including: (1) The need to reduce the incentive for aliens with meritless or non-urgent asylum claims to seek entry to the United States, thereby relieving stress on immigration enforcement and adjudicatory authorities; (2) the policy decision to direct relief to individuals who are unable to obtain protection from persecution elsewhere and individuals who are victims of a severe form of trafficking in persons, ensuring that these individuals can obtain relief more quickly; (3) the need to curtail human smuggling; (4) a desire to strengthen the United States' negotiating power regarding migration issues in general and regarding related measures employed to control the flow of aliens in the United States; and (5) the urgent need to address the humanitarian and security crisis along the southern land border between the United States and Mexico. 84 FR at 33831, 33840, 33842.

The IFR is reasonably related to each of these considerations and is, therefore, not arbitrary and capricious.[48] As the

[48] The Departments note that the Ninth Circuit determined the rule to be arbitrary and capricious for three reasons. First, the court credited assertions from plaintiffs over contrary assertions from the Departments that aliens in Mexico have no safe options for asylum. *See E. Bay Sanctuary Covenant,* 964 F.3d at 849–50. Second, the court found that the rule assumes, without justification, that aliens who wait to apply for asylum in the United States after traveling through intervening countries where they could have obtained protection are not credible. *Id.* at 852. Third, the court held that the rule failed to exempt UAC, though such exemption is not required by statute. *Id.* at 853–54. The Departments disagree with the Ninth Circuit on all three counts and understand the rule to be consistent with the provisions of section 208 of the Act, 8 U.S.C. 1158. Moreover, the court appears to have misunderstood the rule to some extent, as nothing in the rule relates to the credibility of an alien's claim; instead, the rule takes the logical—and uncontroverted—position that an individual

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IFR explains, aliens with non-meritorious or non-urgent asylum claims will have less incentive to seek entry to the United States. *Id.* at 33840. Thus, there will be less incentive to rely on human smuggling if aliens cannot take advantage of lengthy delays in adjudicating their asylum claims in order to reside and work legally in the United States. *Id.* Fewer incentives to seek entry illegally will relieve stress on the adjudicatory authorities of both DHS and DOJ and on border enforcement. *See* 84 FR at 33831, 33840–41. Likewise, by ensuring that adjudicators are able to focus on the claims of aliens who have not been able to obtain relief in a third country, the rule focuses on the class of aliens who have no other country to turn to, making it easier for those adjudicators to fulfill the humanitarian nature of asylum relief. *Id.; accord Tchitchui* v. *Holder,* 657 F.3d 132, 137 (2d Cir. 2011) (explaining that the ''core regulatory purpose of asylum . . . is not to provide [aliens] with a broader choice of safe homelands, but rather, to protect refugees with nowhere else to turn'' (internal quotation marks omitted)).

Further, by limiting eligibility for asylum to aliens who transit Mexico and Central America without first seeking relief in one of the countries transited, the U.S. government is in a better position to negotiate a formal and lasting resolution to the humanitarian and security crisis along the southern land border with those countries. 84 FR at 33831, 33842. This shifts the responsibility to consider such claims to other countries within the region that are able to provide fair adjudications of requests for asylum. For example, Mexico's status as a party to international agreements regarding refugee claims and its efforts to build its asylum system and robust procedures regarding such relief; and, as discussed above, the statistics regarding the influx of claims in that country, all support the conclusion that asylum in Mexico is a feasible alternative to relief in the United States. *See id.* at 33839; *see also, e.g.,* UNHCR, *Universal Periodic Review 3rd Cycle, 31st Session: Mexico, National Report* 10–12 (2018), *https://www.ohchr.org/EN/HRBodies/UPR/Pages/MXindex.aspx;* Landau Memorandum at 2–5. And, as previously explained, the presence of dangerous conditions in some parts of a country does not necessarily render the entire country unsafe and does not necessarily indicate the presence of the kind of persecution that asylum relief was designed to address. Concentrated episodes of violence do not mean a country, as a whole, is unsafe for individuals fleeing persecution. Regardless of living conditions, the United States is not required to grant asylum to applicants with claims that are not premised on a legitimate fear of persecution.

For example, in a large country like Mexico, which span nearly 760,000 square miles and has a population of approximately 130 million people, security conditions may vary widely both across and within the 32 Mexican states. U.S. Dep't of State, U.S. Embassy and Consulates in Mexico, Memorandum from Christopher Landau, U.S. Ambassador to Mexico, on Mexico's Refugee System (Aug. 31, 2020). Reports of violence often refer to localized violence and ''do not reflect conditions across the county as a whole.'' *Id.* Nearly all applications for protection in Mexico are presented in either Chiapas, Mexico City, Veracruz, Tabasco, or Nuevo Leon, which ''generally rank well on security issues based on Mexican government crime statistics,'' and none of which are the subject of a U.S. Department of State ''Level 4'' (Do Not Travel) advisory. *Id.* Furthermore, ''[t]he United States Mission in Mexico is not aware of any pattern of violence targeted at potential refugees awaiting adjudication of their applications.'' *Id.*

The Ambassador specified that discussions about conditions in Mexico often conflate the perils that refugees might face traversing across dangerous parts of Mexico en route to the United States with the ability to seek protection in a safe place in Mexico. *Id.* For example, Chiapas, Mexico's southernmost state along the border with Guatemala, ''routinely ranks among the safest Mexican States by all metrics.'' *Id.* Notably, in Mexico, refugees have the right to seek protection in any state in which they are present. *Id.*

In response to commenters' concerns related to Federal appellate cases holding that applicants need not apply in the first country where asylum is available and that asylum applicants can have secondary motives for choosing to come to the United States that do not affect their asylum eligibility,[49] the Departments note that those cases reflect the regulatory framework for the ACA and firm resettlement bars (INA 208(a)(2) and (b)(2)(A)(vi), 8 U.S.C. 1158(a)(2) and (b)(2)(A)(vi); 8 CFR 208.15 and 208.30(e)(6)–(7), 1208.15 and 1208.30(e)(6)–(7)) prior to the IFR, which did not include such a requirement. This rule modifies the regulatory framework pursuant to authority granted by Congress, so there is no tension between those cases and this rule, and removes references to

who is in genuine fear for his or her well-being will take refuge at the first available opportunity and that a failure to do so necessarily raises questions about the persuasiveness of the claim. Just as a criminal defendant's subjective belief that an alternative to committing a crime is unavailable or undesirable will not support a necessity defense, *United States* v. *Perdomo-Espana,* 522 F.3d 983, 988 (9th Cir. 2008), an alien's subjective belief that refuge in another country is unavailable or less desirable than settling in the United States does not support the persuasiveness of that alien's asylum claim. Similarly, the Department disagrees with the court's conclusion that Mexico is not a safe country for any alien—as contradicted by the rising number of asylum claims filed in that country in recent years, which would be profoundly and inexplicably irrational behavior if applicants did not perceive it to be a potential safe country—or that pointing to crime in certain parts of Mexico means that the country as a whole is unsafe, any more than local crime rates or individual reports of crime in the United States mean that the entire United States is unsafe. *Cf. Cece* v. *Holder,* 733 F.3d 662, 679 (7th Cir. 2013) (Easterbrook, J. 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?''). Further, the Departments disagree that every regulation restricting asylum eligibility must necessarily exempt UAC solely because they are UAC and even though such exemption is not required or contemplated by statute. Nevertheless, to the extent that the Ninth Circuit disagrees with the Departments' position on this matter, the Departments have provided additional reasoning and evidence in this rulemaking to address such concerns. For example, the Landau Memorandum extensively discusses how conditions in Mexico are adequate to ensure that the country is in fact a safe option for asylum seekers. Further, the fact that Mexico is indeed a safe option helps substantiate the Departments' conclusion that those aliens who nonetheless decline to apply for asylum in Mexico are likely travelling to the U.S. for reasons unrelated to a legitimate fear of persecution. *See E. Bay Sanctuary Covenant,* 964 F.3d at 859 (Miller, J., concurring in part) (observing that the ''key factual premise'' for the Departments' conclusion is that Mexico is safe enough ''that legitimate asylum seekers can reasonably be expected to apply for protection there''). Finally, the Departments have discussed elsewhere in this final rule their consideration of the unique issues or special circumstances raised by UAC. They also note that Mexico has taken steps to ensure safe treatment of migrant children. *See, e.g.,* U.N. Human Rights Council, *Universal Periodic Review 3rd Cycle, 31st Session: Mexico, National Report* 10–11 (2018), *https://www.ohchr.org/EN/HRBodies/UPR/Pages/MXindex.aspx* (last visited Dec. 10, 2020) (describing Mexico's adoption of protocols to care for ''unaccompanied or separated child and adolescent migrants''). The Departments have accordingly concluded that encouraging UAC to apply for asylum in Mexico through the promulgation of this rule will not jeopardize the wellbeing of UAC in a way that would warrant exempting UAC from the rule's scope.

[49] *See, e.g., Tandia* v. *Gonzales,* 437 F.3d 245, 249 (2d Cir. 2006) (''[The applicant's] stay in France would therefore be relevant only to a finding that he had 'firmly resettled' in a third country before arriving in the United States.''); *Mamouzian* v. *Ashcroft,* 390 F.3d 1129, 1138 & n.7 (9th Cir. 2004) (consideration of time in a third country is relevant only in determining whether alien was firmly resettled); *Andriasian,* 180 F.3d at 1047 (similar).

those amendments made in the Intervening Joint Final Rule.

In addition to the policies articulated above, the rule advances several other policy goals consistent with the asylum statute, including focusing relief on applicants who have nowhere else to turn and encouraging other countries to provide protection. The rule relies on the judgment that a ''decision not to apply for protection at the first available opportunity, and instead wait for the more preferred destination of the United States, raises questions about the validity and urgency of the alien's claim and may mean that the claim is less likely to be successful.'' 84 FR at 33839. The Departments believe these determinations are reasonable because immigration law has long supported factoring into the denial of asylum the fact that the applicant could have sought, but failed to seek, protection in a third country while in transit to the United States. *See Matter of Pula,* 19 I&N Dec. at 473–74; *see also Elzour* v. *Ashcroft,* 378 F.3d 1143, 1152 (10th Cir. 2004) (''The firm resettlement bar looks to whether permanent refuge was *offered,* not whether permanent status was ultimately obtained. Refugees may not flee to the United States and receive asylum after having unilaterally rejected safe haven in other nations in which they established significant ties along the way.'') (emphasis in original); *Haloci* v. *Att'y Gen.,* 266 F. App'x 145, 147 (3d Cir. 2008) (''In addition, the IJ found that Haloci's failure to seek asylum in Turkey or Holland, along with his admission that he had never considered any final destination other than the United States, further undercut his alleged fear. The record supports the IJ's findings.''); *Farbakhsh* v. *INS,* 20 F.3d 877, 882 (8th Cir. 1994) (''We also hold that the Board did not abuse its discretion in denying petitioner's application for asylum. Petitioner passed through several countries (Turkey, Italy, Spain, Portugal, Canada) en route to the United States; in Spain and Canada orderly refugee procedures were in fact available to him. He had applied for refugee status in Spain, and Canada had granted him temporary resident status and one year to apply for asylum.''). This rule establishes that an alien who failed to request asylum in a country where it was available is not eligible for asylum in the United States. Further, even though the Board in *Pula* indicated that a range of factors is relevant to evaluating discretionary asylum relief under the general statutory asylum provision, the Act also authorizes the establishment of additional limitations to asylum eligibility by regulation—beyond those embedded in the statute. *See* INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C).[50] This rule uses that authority to establish one of the factors specified as relevant in *Pula* as the foundation of a new asylum bar. This rule's focus on the third-country-transit factor, considered as just one of many factors in *Pula,* is justified, as explained above, by the increased numbers and changed nature of asylum claims in recent years.

Comment: Several commenters asserted that the IFR will not alleviate the strain on the Nation's immigration system. Some commentators argued that immigration judges will have more work as a result of the rule because they will have to inquire whether the applicant satisfied the rule. Others predicted that immigration judges will adjudicate the same number of cases because individuals barred from asylum eligibility will instead apply for statutory withholding or protection under the CAT regulations. One commenter opined that the backlog of immigration cases is caused by the Administration's own policies, such as ''zero tolerance,'' and the solution is to less vigorously enforce immigration laws.

Response: The Departments disagree with these predictions. The commenters assume that individuals will not apply for asylum in other countries. Many individuals may apply for, and may receive, asylum elsewhere, which would reduce the burden on the immigration system. Also, if the rule deters meritless or frivolous applications, it will reduce the burden on the immigration system.

In addition, the interim final rule would reduce the burden on the immigration system even if every alien who would have applied for asylum under the regulations in place prior to the IFR continues to seek statutory withholding of removal or protection under the CAT regulations under the provisions of the IFR. Following publication of the Intervening Joint Final Rule, the claims of those individuals who are subject to the third-country-transit bar would initially be reviewed to determine whether the individuals have a reasonable possibility of persecution or torture, rather than a credible fear. 8 CFR 208.30(e)(5)(iii). Reasonable-fear review is a higher threshold than the ''credible fear'' standard that would have previously applied. *Compare* 8 CFR 208.30(e)(2) (providing that an alien has a credible fear if the alien establishes a ''significant possibility'' of persecution or torture), *with* 8 CFR 208.31(c) (providing that an alien has a reasonable fear if the alien establishes a ''reasonable possibility'' of persecution or torture). As discussed in the Intervening Joint Final Rule, the Departments believe that fewer non-meritorious claims will be referred to an immigration judge for adjudication due to the higher standard applicable in reasonable-fear reviews, increasing efficiencies both for the immigration courts and for aliens who are eligible for protection. Notably, however, this final rule does not include those changes due to the Intervening Joint Final Rule.

The Departments disagree with suggestions to stop or to reduce enforcement of immigration laws as a means of reducing the strain on the Nation's immigration system. The solution is not to ignore the rule of law but to find ways to promote compliance with the law and to increase the efficiency of the Nation's immigration system.

Comment: One group asserted that the rule seeks to deter asylum claims, and that this is not a legally permissible basis for a rule.

Response: The Departments encourage those facing persecution or torture to seek protection. The rule does not seek to deter any such individual from applying for or receiving protection—in fact, it encourages them to seek protection at the first available opportunity. The rule seeks to deter those who would abuse the immigration system by filing meritless, frivolous, or non-urgent asylum claims as a means to obtain immigration benefits to which they would not otherwise be entitled.

Comment: Some commenters challenged the Departments' statistics indicating that many asylum applicants do not appear for their immigration court hearings and that immigration judges deny most asylum claims.

[50] To this end, the Departments published an NPRM that, inter alia, proposed establishing additional factors for consideration when determining whether an alien merits the relief of asylum as a matter of discretion, 85 FR 36264, which has recently been finalized, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, signed on December 2, 2020.

Response: The Departments reiterate the statistics and analysis provided in the IFR. *See id.* Some comments may be based on erroneous readings of the data. For example, one commenter cited the DHS Annual Flow Report on Refugees and Asylees from 2017 as showing that 92 percent of asylum applicants obtain lawful permanent resident status. DHS, *Annual Flow Report: Refugees and Asylees: 2017* (Mar. 2019), *https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2017.pdf.* The report, however, concerns adjustment rates for individuals who are already granted affirmative asylum, not applicants for asylum. *Id.* at 9.

2. Executive Order 13132

Comment: One commenter stated that the IFR will harm the States because: (1) The States' economies are aided by asylees and asylum seekers, (2) harm caused to asylum seekers will result in increased demand on State health programs and resources, (3) organizations in the States will have to divert their resources, and (4) the IFR harms States' interest in family unity. As a result, the commenter stated, DHS and DOJ failed to analyze these impacts or appropriately consult with the States prior to the rule's implementation.

Response: The rule does not have federalism implications because it does not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. DHS and DOJ do not purport to directly regulate who may receive State benefits or how the States or organizations within the States allocate resources for the public. To the extent the commenter alleges that the rule will have a financial impact on the States, such assertion is purely speculative. Finally, any choice by the States to increase public assistance payments to aliens affected by the rule is a policy choice by States, not a result compelled by the rule.

3. Paperwork Reduction Act

Comment: One commenter stated that the IFR will impact the number of respondents who fill out the Form I–589, Application for Asylum and for Withholding of Removal, annually and that, as a result, DHS and DOJ should clarify the status of the I–589 information collection under the Paperwork Reduction Act. The commenter asserted that the rule will likely decrease the number of respondents who submit the I–589, although the commenter also noted that recent increases in the volume of aliens seeking asylum at the border may in fact increase the number of respondents who submit an I–589.

Response: As stated in the IFR, the rule does not propose any new, or revisions to existing, ''collections of information'' as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320. 84 FR at 33843.

Further, the Departments find that it is not possible to estimate the impact of the rule on the volume of respondents who submit a Form I–589 annually. The Form I–589 is used jointly by DHS and DOJ to adjudicate applications for asylum, statutory withholding of removal, and protection under the CAT regulations. While fewer aliens may be eligible for asylum following a credible-fear finding due to the rule, aliens subject to the bar may still apply for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), or withholding or deferral of removal under the CAT regulations, if an asylum officer or immigration judge finds that they have a reasonable fear of persecution or torture. Such aliens would still submit the same Form I–589 that they would have submitted for the purpose of applying for asylum before the enactment of the rule. In addition, as explained in the IFR, the United States has experienced a significant increase in the number of aliens encountered at the southern land border in recent years, which results in a larger total pool of possible asylum applicants. 84 FR at 33838. *Compare* CBP, *Southwest Border Migration FY2019* (Nov. 14, 2019), *https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019* (reporting 851,508 apprehensions at the southern land border for Fiscal Year 2019), *with* CBP, *Southwest Border Migration FY2017* (Dec. 15, 2017), *https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2017* (reporting the following total apprehensions along the southern land border: 479,371 in Fiscal Year 2014; 331,333 in Fiscal Year 2015; 408,870 in Fiscal Year 2016; and 303,916 in Fiscal Year 2017).

The Departments have not proposed any further amendments to the information collection to the IFR as reviewed under Office of Management and Budget (''OMB'') Control Number 1615–0067. *See* OMB, Office of Info. & Regulatory Affairs, *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201905-1615-002.*

IV. Regulatory Review Requirements

A. Administrative Procedure Act

This final rule is being published with a 30-day delay in the effective date as required by the APA. 5 U.S.C. 553(d).

B. Regulatory Flexibility Act

The Departments have reviewed this final rule in accordance with the Regulatory Flexibility Act (''RFA'') (5 U.S.C. 601 *et seq.*) and have determined that this rule will not have a significant economic impact on a substantial number of small entities. The rule will not regulate ''small entities'' as that term is defined in 5 U.S.C. 601(6). Only individuals, rather than entities, are eligible for asylum, and only individuals are eligible for asylum or are otherwise placed in immigration proceedings.

Further, although some organizational commenters (whose organizations might qualify as ''small entities'') asserted that the rule would affect their operations, an RFA analysis is not required when a rule has only incidental effects on small entities, rather than directly regulating those entities. *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.'').[51] Neither the IFR nor this final rule regulates immigration-related organizations in any way; those organizations can continue to accept clients, provide legal advice, and expend their resources however they see fit. The rule neither

[51] *See also Cement Kiln Recycling Coal.* v. *EPA,* 255 F.3d 855, 869 (D.C. Cir. 2001) (''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)); *White Eagle Co-op Ass'n* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009) (''[S]mall 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.'').

compels them nor entitles them to undertake any particular course of conduct. Thus, because this rule does not regulate small entities themselves, the Departments reaffirm their conclusion that no RFA analysis is necessary.

C. Unfunded Mandates Reform Act of 1995

This final rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year, and it will not significantly or uniquely affect small governments. *See* 2 U.S.C. 1532. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Congressional Review Act

This final rule is not a major rule as defined by section 804 of the Congressional Review Act. 5 U.S.C. 804. This rule will not result in ''an annual effect on the economy of $100 million or more''; [52] 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.'' *Id.*

E. Executive Order 12866, Executive Order 13563, and Executive Order 13771 (Regulatory Planning and Review)

This final rule is not subject to Executive Order 12866 because OMB determined that it implicates a foreign affairs function of the United States related to ongoing bilateral and multilateral discussions with the potential to impact a set of specified international relationships and agreements. For similar reasons, this rule is not a ''regulation'' as defined in Executive Order 13771, and the rule is therefore not subject to that order.

F. Executive Order 13132 (Federalism)

This final 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, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

This final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

H. Paperwork Reduction Act

This final rule does not propose new, or revisions to existing, ''collection[s] of information'' as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320.

I. Signature

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, is delegating 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 1208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

Regulatory Amendments

DEPARTMENT OF HOMELAND SECURITY

Accordingly, for the reasons set forth in the preamble, the interim final rule's amendments to 8 CFR 208.13 as published July 16, 2019, at 84 FR 33829 are adopted as final with the following changes:

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 Pub. L. 110–229; 8 CFR part 2.

■ 2. In § 208.13, revise paragraphs (c)(4)(i) and (iii) to read as follows:

§ 208.13 Establishing asylum eligibility.

* * * * *

(c) * * *

(4) * * *

(i) The alien demonstrates that he or she applied for protection from persecution in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the United States and the alien received a final judgment denying the alien protection in such country.

* * * * *

(iii) The only country or countries through which the alien transited en route to the United States were, at the time of the transit, not parties to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees.

* * * * *

DEPARTMENT OF JUSTICE

Accordingly, for the reasons set forth in the preamble, and by the authority vested in the Director, Executive Office for Immigration Review, by the Attorney General Order Number 4910–2020, the interim final rule's amendments to section 1208.13 as published July 16, 2019, at 84 FR 33829 are adopted as final with the following changes:

PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 3. 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 Pub. L. 110–229.

■ 4. In § 1208.13, revise paragraphs (c)(4), (c)(4)(i), and (c)(4)(iii) to read as follows:

§ 1208.13 Establishing asylum eligibility.

* * * * *

(c) * * *

(4) *Additional limitation on eligibility for asylum.* Notwithstanding the provisions of § 1208.15, any alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019, 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, shall be found ineligible for asylum unless

(i) The alien demonstrates that he or she applied for protection from persecution in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the United States and the alien received a final

[52] Unlike the Unfunded Mandates Reform Act of 1995, *see* 2 U.S.C. 1532(a), the Congressional Review Act does not specifically require adjustments for inflation, *see* 5 U.S.C. 804.

judgment denying the alien protection in such country.

* * * * *

(iii) The only country or countries through which the alien transited en route to the United States were, at the time of the transit, not parties to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees.

* * * * *

Approved:

Chad R. Mizelle,

Senior Official Performing the Duties of the General Counsel, U.S. Department of Homeland Security.

Approved:

James R. McHenry III,

Director, Executive Office for Immigration Review, Department of Justice.

[FR Doc. 2020–27856 Filed 12–16–20; 8:45 am]

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