



FEDERAL REGISTER

Vol. 91

Friday,

No. 180

September 18, 2026

Pages 59047–59694

OFFICE OF THE FEDERAL REGISTER



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Contents

Federal Register

Vol. 91, No. 180

Friday, September 18, 2026

Agricultural Marketing Service

RULES

Uniform Pricing Formula Provisions:

Milk in the Northeast and Other Marketing Areas, 59047

NOTICES

Continuance Referendum:

Oranges, Grapefruit, Tangerines, and Pummelos Grown in Florida, 59101

Agriculture Department

See Agricultural Marketing Service

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 59101–59102

Antitrust Division

NOTICES

Proposed Final Judgment and Competitive Impact Statement:

United States of America, et al. v. RealPage, Inc., et al., 59304–59351

Bureau of Safety and Environmental Enforcement

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

Oil and Gas Production Measurement Surface Commingling, and Security, 59156–59160

Centers for Disease Control and Prevention

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 59137–59138

Commerce Department

See International Trade Administration

See National Institute of Standards and Technology

See National Oceanic and Atmospheric Administration

Committee for the Implementation of Textile Agreements

NOTICES

Limitations of Duty-Free Imports of Apparel Articles

Assembled in Beneficiary Sub-Saharan African Countries from Regional and Third-Country Fabric, 59114–59115

Defense Department

PROPOSED RULES

Federal Acquisition Regulation:

Revolutionary Federal Acquisition Regulation Overhaul, 59406–59474, 59476–59531, 59534–59582, 59584–59683

NOTICES

Hearings, Meetings, Proceedings, etc.:

U.S. Strategic Command Strategic Advisory Group, 59117–59118

TRICARE Plan Program Changes for Calendar Year 2027, 59115–59117

Energy Department

See Federal Energy Regulatory Commission

RULES

Energy Conservation Program:

Energy Conservation Standards for Manufactured Housing, 59048

Environmental Protection Agency

NOTICES

Environmental Impact Statements; Availability, etc., 59129–59130

Federal Aviation Administration

RULES

Airspace Designations and Reporting Points:

Alma, MI, 59054–59055

Vicinity of Missoula, MT; Correction, 59055–59056

Airworthiness Directives:

Rolls-Royce Deutschland Ltd. and Co. KG Engines, 59048–59054

Standard Instrument Approach Procedures, and Takeoff

Minimums and Obstacle Departure Procedures;

Miscellaneous Amendments, 59056–59059

NOTICES

Environmental Assessments; Availability, etc.:

Reentry Vehicle Operations in the Marine Environment, 59294–59295

Revision E to FAA Order 8000.95, Regarding Individual Designee Management Policy, 59295–59296

Federal Energy Regulatory Commission

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 59123

Application:

City of Aspen, CO, 59123–59125

Greenwood County, SC, 59128–59129

Southeast Alaska Power Agency, 59126–59127

Southern Star Central Gas Pipeline, Inc., 59127–59128

Combined Filings, 59122, 59125–59126

Licenses; Exemptions, Applications, Amendments, etc.:

Pontook Operating Limited Partnership and New Hampshire Department of Environmental Services, 59118–59119

Southeast Alaska Power Agency, 59119–59120

Scoping Period:

Dauphin Island Gathering Partners; Environmental Issues for the Proposed Dauphin Island Gathering Partners Abandonment Project, 59120–59122

Federal Highway Administration

NOTICES

Final Federal Agency Action:

Proposed Highway in Georgia, 59296–59298

Federal Housing Finance Agency

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 59130–59133

Federal Maritime Commission

NOTICES

Request for Additional Information, 59133

Federal Procurement Policy Office**PROPOSED RULES**

Federal Acquisition Regulation:

Revolutionary Federal Acquisition Regulation Overhaul,
59406–59474, 59476–59531, 59534–59582, 59584–
59683

Federal Reserve System**NOTICES**

Change in Bank Control:

Acquisitions of Shares of a Bank or Bank Holding
Company, 59133–59134

Formations of, Acquisitions by, and Mergers of Bank
Holding Companies, 59134

Federal Trade Commission**NOTICES**

Consent Agreement:

Beretta and Ruger, 59134–59136

Food and Drug Administration**NOTICES**

Biosimilar User Fee Act III Future Needs in the
Development of Interchangeable Products Post-
Workshop; Draft Strategy Document, 59140–59141

Guidance:

Electronic Submission Template for Medical Device
Premarket Approval Applications, 59138–59140

Target Animal Safety Evaluation for Veterinary
Monoclonal Antibody Products, 59141–59143

General Services Administration**PROPOSED RULES**

Federal Acquisition Regulation:

Revolutionary Federal Acquisition Regulation Overhaul,
59406–59474, 59476–59531, 59534–59582, 59584–
59683

Health and Human Services Department*See* Centers for Disease Control and Prevention*See* Food and Drug Administration*See* Health Resources and Services Administration*See* National Institutes of Health**Health Resources and Services Administration****NOTICES**

National Vaccine Injury Compensation Program:

List of Petitions Received, 59144–59146

Supplemental Award:

Infant-Toddler Court Program—National Resource Center,
59143–59144

Supplemental Funding:

Delta Region Community Health Systems Development
Program, 59148

Healthy Start Self-Measured Blood Pressure Monitoring,
59146–59147

National Rural Health Information Clearinghouse
Program, 59147

National Rural Health Policy, Community, and
Collaboration Program, 59148

Rural Residency Planning and Development Technical
Assistance Program, 59143

Historic Preservation, Advisory Council**NOTICES**

Adoption of Categorical Exclusion Pursuant to the National
Environmental Policy Act, 59151–59153

Homeland Security Department*See* Transportation Security Administration*See* U.S. Citizenship and Immigration Services**RULES**

Homeland Security Acquisition Regulation:

Make Personal Protective Equipment in America Act

Restrictions on Foreign Acquisition, 59066–59075

Interior Department*See* Bureau of Safety and Environmental Enforcement*See* National Park Service**International Trade Administration****NOTICES**

Antidumping or Countervailing Duty Investigations, Orders,
or Reviews:

Carbon and Alloy Steel Wire Rod from Algeria, 59107–
59109

Difluoromethane (R-32) from the People's Republic of
China; Rescission, 59110–59111

Polyvinyl Alcohol from Japan and the People's Republic
of China, 59109–59110

Steel Concrete Reinforcing Bar from Bulgaria, Egypt, and
the Socialist Republic of Vietnam, 59104–59106

Steel Concrete Reinforcing Bar from the Socialist
Republic of Vietnam and Egypt, 59102–59104

International Trade Commission**NOTICES**

Investigations; Determinations, Modifications, and Rulings,
etc.:

Certain Electronic Devices with Certain Audio
Technologies, 59161–59162

Certain Gyro-Stabilized Electric Unicycles and
Components Thereof and Products Containing the
Same, 59160

Certain Wireless Communication Devices and
Components Thereof, 59160–59161

Justice Department*See* Antitrust Division**NOTICES**

Agency Information Collection Activities; Proposals,
Submissions, and Approvals:

Lawful Access Data Collection, 59162–59164

Management and Budget Office*See* Federal Procurement Policy Office**National Aeronautics and Space Administration****PROPOSED RULES**

Federal Acquisition Regulation:

Revolutionary Federal Acquisition Regulation Overhaul,
59406–59474, 59476–59531, 59534–59582, 59584–
59683

NOTICES

Hearings, Meetings, Proceedings, etc.:

Aerospace Safety Advisory Panel, 59164

National Institute of Standards and Technology**NOTICES**

Request for Information:

Future Needs for Medical Metrology and Standards for
Medical Imaging, Devices, Diagnostics and Therapy,
59111–59113

National Institutes of Health**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
 Post-Award Reporting Requirements Including Research Performance Progress Report, 59149–59150
 Public Health Service Applications and Pre-Award Reporting Requirements, 59151
 Hearings, Meetings, Proceedings, etc.:
 Center for Scientific Review, 59150
 National Center for Advancing Translational Sciences, 59149
 National Institute of Allergy and Infectious Diseases; Amended, 59149
 National Library of Medicine, 59149

National Oceanic and Atmospheric Administration**PROPOSED RULES**

Coral, Coral Reefs, and Live/Hardbottom Habitats of the South Atlantic and the Shrimp Fishery of the South Atlantic Region:
 Amendments 11/12, 59098–59100

NOTICES

Hearings, Meetings, Proceedings, etc.:
 Mid-Atlantic Fishery Management Council, 59113–59114
 Pacific Fishery Management Council, 59113
 South Atlantic Fishery Management Council, 59113

National Park Service**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
 Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes, 59155–59156
 National Register of Historic Places:
 Pending Nominations and Related Actions, 59154–59155

Personnel Management Office**PROPOSED RULES**

Employment in the Excepted Service, 59076–59098

Presidential Documents**ADMINISTRATIVE ORDERS**

Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2027; Presidential Determination (Presidential Determination No. 2026–23 of September 11, 2026), 59685–59694

Securities and Exchange Commission**NOTICES**

Application:
 OneAscent Capital Opportunities Fund, et al., 59199
 Public Company Accounting Oversight Board:
 Filing of Proposed Rules on Amendments to QC 1000, A Firm's System of Quality Control, and Related Rule and Forms, 59354–59403
 Self-Regulatory Organizations; Proposed Rule Changes:
 Cboe BYX Exchange, Inc., 59164–59173
 Cboe BZX Exchange, Inc., 59236–59245
 Cboe EDGA Exchange, Inc., 59176–59184
 Cboe EDGX Exchange, Inc., 59185–59193, 59253–59256
 Financial Industry Regulatory Authority, Inc., 59259–59278
 MIAx PEARL, LLC, 59245–59247
 MX2 LLC, 59194–59196
 Nasdaq GEMX, LLC, 59234–59236
 Nasdaq MRX, LLC, 59281–59283

New York Stock Exchange LLC, 59247–59253, 59278–59281
 NYSE American LLC, 59217–59234, 59289–59292
 NYSE Arca, Inc., 59199–59216, 59256–59259
 NYSE National, Inc., 59173–59176
 NYSE Texas, Inc., 59196–59199
 The Nasdaq Stock Market LLC, 59283–59289

State Department**RULES**

International Traffic in Arms Regulations:
 Clarifying Policies of Denial, Updating the Major Non-NATO Ally List, and Minor Corrections, 59059–59063
 Modification of U.S. Munitions List Category XX(a), 59063–59065

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
 Request for Exemption from Immigrant Visa Applicant's Affidavit of Support, 59292

Surface Transportation Board**NOTICES**

Exemption:
 Continuance in Control; The Great Walton Railroad Co., Inc., The Athens Line, LLC, 59293–59294
 Operation; Ventura County Railroad Co., Ventura County Railway Co., LLC, 59293
 Quarterly Rail Cost Adjustment Factor, 59293

Transportation Department

See Federal Aviation Administration

See Federal Highway Administration

Transportation Security Administration**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
 Law Enforcement Officer Reimbursement Request, 59153

Treasury Department**NOTICES**

Hearings, Meetings, Proceedings, etc.:
 Commission on Social Impact Partnerships, 59298

U.S. Citizenship and Immigration Services**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
 Application for Provisional Unlawful Presence Waiver; Correction, 59153–59154
 Application for Waiver of Grounds of Inadmissibility; Correction, 59154
 Immigrant Petition by Standalone Investor, Immigrant Petition by Regional Center Investor; Correction, 59154
 Petition for Amerasian, Widow(er), or Special Immigrant; Correction, 59154

United States Sentencing Commission**NOTICES**

Request for Membership Application:
 Victims' Rights Advisory Group, 59300
 Sentencing Guidelines for United States Courts, 59298–59300

Veterans Affairs Department**NOTICES**

Hearings, Meetings, Proceedings, etc.:

Research Advisory Committee on Gulf War Veterans' Illnesses, Subcommittee on Veteran Engagement, 59300–59301

Separate Parts In This Issue**Part II**

Justice Department, Antitrust Division, 59304–59351

Part III

Securities and Exchange Commission, 59354–59403

Part IV

Defense Department, 59406–59474
General Services Administration, 59406–59474
Management and Budget Office, Federal Procurement Policy Office, 59406–59474
National Aeronautics and Space Administration, 59406–59474

Part V

Defense Department, 59476–59531
General Services Administration, 59476–59531
Management and Budget Office, Federal Procurement Policy Office, 59476–59531
National Aeronautics and Space Administration, 59476–59531

Part VI

Defense Department, 59534–59582
General Services Administration, 59534–59582
Management and Budget Office, Federal Procurement Policy Office, 59534–59582
National Aeronautics and Space Administration, 59534–59582

Part VII

Defense Department, 59584–59683
General Services Administration, 59584–59683
Management and Budget Office, Federal Procurement Policy Office, 59584–59683
National Aeronautics and Space Administration, 59584–59683

Part VIII

Presidential Documents, 59685–59694

Reader Aids

Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, and notice of recently enacted public laws.

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CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

3 CFR

Presidential

Determinations:

No. 2026–23 of

September 11,

202659687

5 CFR**Proposed Rules:**

21359076

30259076

31759076

35959076

36259076

43259076

55059076

73159076

92059076

93059076

7 CFR

100059047

10 CFR

46059048

14 CFR

39 (2 documents)59048,

59051

71 (2 documents)59054,

59055

97 (2 documents)59056,

59057

22 CFR

12059059

12159063

12359059

12559059

12659059

48 CFR

302559066

305259066

Proposed Rules:

859406

959584

1259406

1359406

1459534

1559406

1659476

1759476

2759584

2859534

3559476

3659534

3859406

4459406

4759584

5159406

52 (4 documents)59406,

59476, 59534, 59584

50 CFR**Proposed Rules:**

62259098

Rules and Regulations

Federal Register
Vol. 91, No. 180
Friday, September 18, 2026

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 AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1000

[Doc. No. AMS–DA–23–0031]

Milk in the Northeast and Other Marketing Areas; Uniform Pricing Formula Provisions

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule; correcting amendment.

SUMMARY: The Agricultural Marketing Service’s (AMS) Dairy Program published a final rule in the **Federal Register** on January 17, 2025, amending the pricing provisions in the 11 Federal Milk Marketing Orders (FMMOs). This document corrects the Class I differential in Morgan County, Ohio, and removes Shannon County, South Dakota, from the Class I Differential table.

DATES: Effective September 18, 2026.

FOR FURTHER INFORMATION CONTACT: Erin Taylor, USDA/AMS/Dairy Programs, Order Formulation and Enforcement Division, STOP 0231-Room 2530, 1400 Independence Avenue SW, Washington, DC 20250–0231, (202) 720–7311; email: *Erin.Taylor@usda.gov*.

SUPPLEMENTARY INFORMATION: AMS announced changes made to the pricing provisions of the 11 FMMOs through a final rule published on January 17, 2025 (90 FR 6600). AMS now makes the following technical corrections to the differentials table in the final rule: amending the entry for Morgan County, OH, from “3.90” to “3.80” and removing the table entry for Shannon County, SD, in its entirety.

The recommended decision published July 15, 2024 (89 FR 57580), proposed the Class I differential for Morgan County, Ohio, be \$4.00. Commenters to the recommended decision requested this county and four other Ohio counties be amended to \$3.80 rather than \$4.00. USDA agreed in its final decision published December 2, 2024 (89 FR 95466), that the differential for all five counties be set at \$3.80. The four other Ohio counties were changed correctly. USDA inadvertently changed Morgan County, Ohio, to \$3.90 instead of \$3.80 in the final decision and final rule. This final rule corrects that error by amending the value shown on the table for Morgan County to read as “3.80.”

After Class I differentials were implemented during Order Reform on

September 1, 1999 (64 FR 47898), the state of South Dakota renamed Shannon County to Oglala Lakota County. To show there was a change in the differential in the geographic county, USDA left Shannon County in the table and zeroed out the differential. The differential is now listed under Oglala Lakota County. As the previous Shannon County and differential are now listed as Oglala Lakota County, USDA is removing Shannon County from the differential table.

List of Subjects in 7 CFR Part 1000

Milk marketing orders, Reporting and recordkeeping requirements.

Accordingly, 7 CFR part 1000 is amended by making the following correcting amendments:

- PART 1000—GENERAL PROVISIONS OF FEDERAL MILK MARKETING ORDERS**
- 1. The authority citation for part 1000 continues to read as follows:
Authority: 7 U.S.C. 601–674, and 7253.
 - 2. In § 1000.52 amend the table “Class I differential adjusted for location” by revising the entry for Morgan County, OH, and removing the entry for “Shannon County, SD” to read as follows:
§ 1000.52 Adjusted Class I differentials.
* * * * *

County/parish/city	State	FIPS code	Class I differential adjusted for location
* * * * *			
MORGAN	OH	39115	3.80
* * * * *			

Erin Morris,
Administrator, Agricultural Marketing Service.

[FR Doc. 2026–19177 Filed 9–17–26; 8:45 am]

BILLING CODE P

DEPARTMENT OF ENERGY

10 CFR Part 460

[EERE–2009–BT–BC–0021]

RIN 1904–AC11

Energy Conservation Program: Energy Conservation Standards for Manufactured Housing

AGENCY: Office of Critical Minerals and Energy Innovation (formerly Energy Efficiency and Renewable Energy), Department of Energy.

ACTION: Notification of legal effect.

SUMMARY: In this notification, the U.S. Department of Energy (“DOE” or “the Department”) is providing notice that the Department’s Energy Conservation Standards for Manufactured Housing final rule published in the **Federal Register** on May 31, 2022, has no legal effect in light of the enactment of the 21st Century ROAD to Housing Act (“ROAD Act”).

DATES: The information contained in this notification will be applicable on September 18, 2026 and will remain in effect until further notice.

FOR FURTHER INFORMATION CONTACT: Mr. Jeremy Williams, U.S. Department of Energy, Office of Critical Minerals and Energy Innovation, Building Technologies Office, CM–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Email: BuildingEnergyCodes@doe.gov.

Mr. Pete Cochran, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–4798. Email: Peter.Cochran@hq.doe.gov.

SUPPLEMENTARY INFORMATION: On May 31, 2022, DOE published in the **Federal Register** a final rule to establish energy conservation standards for manufactured housing pursuant to the Energy Independence and Security Act of 2007, 87 FR 32728. On July 11, 2026, the 21st Century ROAD to Housing Act (Pub. L. 119–101) (“ROAD Act”) was enacted. Section 301(d)(2)(B) of the ROAD Act specifies that “[n]o energy efficiency standards for manufactured homes developed by any Federal agency shall have legal effect unless and until adopted by the Department of Housing and Urban Development pursuant to the consensus standards and regulatory development process described in . . . 42 U.S.C. 5403(a)(2)).” Section 301(d)(2)(C) of the ROAD Act requires the Department of Housing and Urban Development (“HUD”) to “adopt minimum energy efficiency standards for manufactured homes” within one

year of enactment, and to update those standards every three years.

As of the date of this notification, no minimum energy efficiency standards meeting the requirements under section 301(d) of the ROAD Act have been adopted by HUD. Therefore, it is DOE’s position that the final rule published in the **Federal Register** on May 31, 2022, establishing energy conservation standards for manufactured housing has no legal effect pursuant to section 301(d)(2)(B) of the ROAD Act.

The Department intends to initiate a rulemaking to conform DOE’s regulations for manufactured housing to account for the statutory changes adopted by the ROAD Act, and further notes that DOE will not enforce its energy conservation standards for manufactured housing as they have no legal effect under the ROAD Act.

Signing Authority

This document of the Department of Energy was signed on September 16, 2026, by Audrey Robertson, Assistant Secretary (EERE) for Critical Minerals and Energy Innovation, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on September 16, 2026.

Jennifer Hartzell,

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

[FR Doc. 2026–19154 Filed 9–17–26; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2026–8815; Project Identifier MCAI–2026–00951–E; Amendment 39–23468; AD 2026–18–52]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce Deutschland Ltd. & Co. KG Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Rolls-Royce Deutschland Ltd. & Co. KG (RRD) Model RB211–Trent 875–17, 877–17, 884–17, 884B–17, 892–17, 892B–17, and 895–17 engines. The FAA previously sent this AD as an emergency AD to all known U.S. owners and operators of these engines. This AD was prompted by reports of non-conformances leading to low oil pressure events on low life oil pumps. This AD requires de-pairing of engines on airplanes with two affected engines installed to ensure no more than one affected oil pump is installed on twin-engine airplanes. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective September 21, 2026. Emergency AD 2026–18–52, issued on September 5, 2026, which contains the requirements of this amendment, was effective with actual notice.

The Director of the Federal Register approved the incorporation by reference of a certain publication identified in this AD as of September 21, 2026.

The FAA must receive comments on this AD by November 2, 2026.

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 [regulations.gov](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.

AD Docket: You may examine the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2026–8815; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For European Union Aviation Safety Agency (EASA) material identified in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: ADS@easa.europa.eu. You

may find this material on the EASA website at ad.easa.europa.eu.

- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222-5110. It is also available at regulations.gov under Docket No. FAA-2026-8815.

FOR FURTHER INFORMATION CONTACT:

Alexis Whitaker, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (516) 228-7309; email: alexis.j.whitaker@faa.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments using a method listed under the **ADDRESSES** section. Include “Docket No. FAA-2026-8815; Project Identifier MCAI-2026-00951-E” 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 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 Alexis Whitaker,

Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued Emergency AD 2026-18-52, dated September 5, 2026 (the emergency AD), to address an unsafe condition on all RRD Model RB211-Trent 875-17, 877-17, 884-17, 884B-17, 892-17, 892B-17, and 895-17 engines. The FAA sent the emergency AD to all known U.S. owners and operators of these engines. The emergency AD requires de-pairing of engines on airplanes with two affected engines installed to ensure no more than one affected oil pump is installed on twin-engine airplanes.

The emergency AD was prompted by EASA Emergency AD 2026-0173-E, dated September 4, 2026 (EASA Emergency AD 2026-0173-E) (also referred to as the MCAI), issued by EASA, which is the Technical Agent for the Member States of the European Union, to correct an unsafe condition on all RRD Model RB211-Trent 875-17, 877-17, 884-17, 884B-17, 892-17, 892B-17, and 895-17 engines. The MCAI states that occurrences have been reported of non-conformances leading to low oil pressure events on low life oil pumps. Subsequent investigation identified a potential failure mode affecting the oil pump input coupling shear neck. This condition, if not addressed, could lead to a dual in-flight shutdown on airplanes equipped with two affected engines, resulting in reduced control of the airplane. The FAA is issuing this AD to address the unsafe condition on these products.

You may examine the MCAI in the AD docket at regulations.gov under Docket No. FAA-2026-8815.

Material Incorporated by Reference Under 1 CFR Part 51

The FAA reviewed EASA Emergency AD 2026-0173-E. This material specifies procedures for de-pairing of engines on airplanes with two affected engines installed to ensure no more than one affected oil pump is installed on twin-engine airplanes. 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

These products have been approved by the civil aviation authority (CAA) of another country and are approved for

operation in the United States. Pursuant to the FAA’s bilateral agreement with this State of Design Authority, that authority has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA is issuing this AD after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

AD Requirements

This AD requires accomplishing the actions specified in EASA Emergency AD 2026-0173-E, described previously, except for any differences identified as exceptions in the regulatory text of this AD.

Interim Action

The FAA considers that this AD is an interim action. If final action is later identified, the FAA might consider additional rulemaking.

Explanation of Required Compliance Information

In the FAA’s ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some CAA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, EASA Emergency AD 2026-0173-E is incorporated by reference in this AD. This AD requires compliance with EASA Emergency AD 2026-0173-E in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this AD. Material required by EASA Emergency AD 2026-0173-E for compliance will be available at regulations.gov under Docket No. FAA-2026-8815 after this AD is published.

Justification for Immediate Adoption and Determination of the Effective Date

Section 553(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 required the immediate adoption of Emergency AD 2026-18-52, issued on

September 5, 2026, to all known U.S. owners and operators of these engines. The FAA found that the risk to the flying public justified forgoing notice and comment prior to adoption of this rule because the oil pump can fail prematurely due to cracking of the internal rotor. This condition could lead to a dual in-flight shutdown on airplanes equipped with two affected engines, resulting in reduced control of the airplane. These conditions still exist; therefore, notice and opportunity

for prior public comment are impracticable and contrary to the public interest pursuant to 5 U.S.C. 553(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.

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 the 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 154 engines installed on 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
Records check	1 work-hour × \$85 per hour = \$85	\$0	\$85	\$13,090

The FAA estimates the following costs to do any necessary repair or replacement that would be required

based on the results of the records check. The agency has no way of

determining the number of engines that might need this repair or replacement:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Repair or replace oil pump	Up to 16 work-hours × \$85 per hour = \$1,360	Up to \$237,070	Up to \$238,430.

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:

2026–18–52 Rolls-Royce Deutschland Ltd. & Co. KG: Amendment 39–23468; Docket No. FAA–2026–8815; Project Identifier MCAI–2026–00951–E.

(a) Effective Date

The FAA issued Emergency Airworthiness Directive (AD) 2026–18–52 on September 5, 2026 (also referred to as the emergency AD), directly to affected owners and operators. As a result of such actual notice, the emergency AD was effective for those owners and operators on the date it was received. This AD contains the same requirements as the emergency AD and, for those who did not receive actual notice, is effective on September 21, 2026.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Rolls-Royce Deutschland Ltd. & Co. KG Model RB211-Trent 875–17, 877–17, 884–17, 884B–17, 892–17, 892B–17, and 895–17 engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 7261, Turbine Engine Oil System.

(e) Unsafe Condition

This AD was prompted by reports of non-conformances leading to low oil pressure events on low life oil pumps due to a failure mode affecting the oil pump input coupling shear neck. The FAA is issuing this AD to address a failure mode affecting the oil pump input coupling shear neck. The unsafe condition, if not addressed, could lead to a dual in-flight shutdown on airplanes equipped with two affected engines, resulting in reduced control of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) Emergency AD 2026–0173–E, dated September 4, 2026 (EASA Emergency AD 2026–0173–E).

(h) Exceptions to EASA Emergency AD 2026–0173–E

(1) Where EASA Emergency AD 2026–0173–E refers to its effective date, this AD requires using the effective date of this AD.

(2) This AD does not adopt the “Remarks” section of EASA Emergency AD 2026–0173–E.

(i) Special Flight Permits

Special flight permits, as described in 14 CFR 21.197 and 21.199, are not allowed.

(j) Additional AD Provisions

The following provisions also apply to this AD.

(1) *Alternative Methods of Compliance (AMOCs)*: The Manager, AIR–520, Continued Operational Safety 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 manager of the AIR–520, Continued Operational Safety Branch, send it to the attention of the person identified in paragraph (k) of this AD or email to: 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, AIR–520, Continued Operational Safety Branch, FAA; or EASA; or Rolls-Royce Deutschland Ltd. & Co. KG’s EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(k) Additional Information

For more information about this AD, contact Alexis Whitaker, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (516) 228–7309; email: alexis.j.whitaker@faa.gov.

(l) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) Emergency AD 2026–0173–E, dated September 4, 2026.

(ii) [Reserved]

(3) For EASA material identified in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: ADs@easa.europa.eu. You may find this material on the EASA website at ad.easa.europa.eu.

(4) You may view this material at FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

(5) You may view this material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations or email fr.inspection@nara.gov.

Issued on September 15, 2026.

Brian Knaup,

Acting Deputy Director, Integrated Certificate Management Division, Aircraft Certification Service.

[FR Doc. 2026–19171 Filed 9–16–26; 4:15 pm]

BILLING CODE 4910–13–P

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

[Docket No. FAA–2026–8814; Project Identifier MCAI–2026–00950–E; Amendment 39–23467; AD 2026–18–51]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce Deutschland Ltd. & Co. KG Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Rolls-Royce Deutschland Ltd. & Co. KG (RRD) Model RB211 Trent 768–60, 772–60, and 772B–60 engines. The FAA previously sent this AD as an emergency AD to all known U.S. owners and operators of these engines. This AD was prompted by reports of non-conformances leading to low oil pressure events on low life oil pumps. This AD requires de-pairing of engines on airplanes with two affected engines installed to ensure no more than one affected oil pump is installed on twin-engine airplanes. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective September 21, 2026. Emergency AD 2026–18–51, issued on September 5, 2026, which contains the requirements of this amendment, was effective with actual notice.

The Director of the Federal Register approved the incorporation by reference of a certain publication identified in this AD as of September 21, 2026.

The FAA must receive comments on this AD by November 2, 2026.

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 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.

AD Docket: You may examine the AD docket at regulations.gov under Docket No. FAA–2026–8814; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For European Union Aviation Safety Agency (EASA) material identified in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: ADs@easa.europa.eu. You may find this material on the EASA website at ad.easa.europa.eu.

- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available at regulations.gov under Docket No. FAA–2026–8814.

FOR FURTHER INFORMATION CONTACT:

Alexis Whitaker, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (516) 228–7309; email: alexis.j.whitaker@faa.gov.

SUPPLEMENTARY INFORMATION:**Comments Invited**

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments using a method listed under the **ADDRESSES** section. Include “Docket No. FAA–2026–8814; Project Identifier MCAI–2026–00950–E” 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 [regulations.gov](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 Alexis Whitaker, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued Emergency AD 2026–18–51, dated September 5, 2026 (the emergency AD), to address an unsafe condition on all RRD Model RB211 Trent 768–60, 772–60, and 772B–60 engines. The FAA sent the emergency AD to all known U.S. owners and operators of these engines. The emergency AD requires de-pairing of engines on airplanes with two affected engines installed to ensure no more than one affected oil pump is installed on twin-engine airplanes.

The emergency AD was prompted by EASA Emergency AD 2026–0172–E, dated September 4, 2026 (EASA Emergency AD 2026–0172–E) (also referred to as the MCAI), issued by EASA, which is the Technical Agent for the Member States of the European

Union, to correct an unsafe condition on all RRD Model RB211 Trent 768–60, 772–60, 772B–60, and 772C–60 engines. Model RB211 Trent 772C–60 engines 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 engines in the applicability. The MCAI states that occurrences have been reported of non-conformances leading to low oil pressure events on low life oil pumps. Subsequent investigation identified a potential failure mode affecting the oil pump input coupling shear neck. This condition, if not addressed, could lead to a dual in-flight shutdown on airplanes equipped with two affected engines, resulting in reduced control of the airplane. The FAA is issuing this AD to address the unsafe condition on these products.

You may examine the MCAI in the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2026–8814.

Correction of Typographical Error

This AD corrects an error in the citation of the EASA AD in the emergency AD. Paragraph (g) of the emergency AD incorrectly referenced the wrong EASA AD number in the parenthetical short cite. That EASA AD number has been corrected in this AD to read EASA Emergency AD 2026–0172–E.

Material Incorporated by Reference Under 1 CFR Part 51

The FAA reviewed EASA Emergency AD 2026–0172–E. This material specifies procedures for de-pairing of engines on airplanes with two affected engines installed to ensure no more than one affected oil pump is installed on twin-engine airplanes. 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

These products have been approved by the civil aviation authority (CAA) of another country and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, that authority has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA is issuing this AD after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

AD Requirements

This AD requires accomplishing the actions specified in EASA Emergency AD 2026–0172–E, described previously, except for any differences identified as exceptions in the regulatory text of this AD.

Interim Action

The FAA considers that this AD is an interim action. If final action is later identified, the FAA might consider additional rulemaking.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some CAA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, EASA Emergency AD 2026–0172–E is incorporated by reference in this AD. This AD requires compliance with EASA Emergency AD 2026–0172–E in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this AD. Material required by EASA Emergency AD 2026–0172–E for compliance will be available at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2026–8814 after this AD is published.

Justification for Immediate Adoption and Determination of the Effective Date

Section 553(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 required the immediate adoption of Emergency AD 2026–18–51, issued on September 5, 2026, to all known U.S. owners and operators of these engines. The FAA found that the risk to the flying public justified forgoing notice and comment prior to adoption of this rule because the oil pump can fail prematurely due to cracking of the internal rotor. This condition could lead to a dual in-flight shutdown on airplanes equipped with two affected engines, resulting in reduced control of

the airplane. These conditions still exist; therefore, notice and opportunity for prior public comment are impracticable and contrary to the public interest pursuant to 5 U.S.C. 553(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.

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 the 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 132 engines installed on 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
Records check	1 work-hour × \$85 per hour = \$85	\$0	\$85	\$11,220

The FAA estimates the following costs to do any necessary repair or replacement that would be required

based on the results of the records check. The agency has no way of

determining the number of engines that might need this repair or replacement:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Repair or replace oil pump	Up to 16 work-hours × \$85 per hour = \$1,360	Up to \$237,070	Up to \$238,430.

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:

2026–18–51 Rolls-Royce Deutschland Ltd. & Co. KG: Amendment 39–23467; Docket No. FAA–2026–8814; Project Identifier MCAI–2026–00950–E.

(a) Effective Date

The FAA issued Emergency Airworthiness Directive (AD) 2026–18–51 on September 5, 2026 (also referred to as the emergency AD), directly to affected owners and operators. As a result of such actual notice, the emergency AD was effective for those owners and operators on the date it was received. This

AD contains the same requirements as the emergency AD and, for those who did not receive actual notice, is effective on September 21, 2026.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Rolls-Royce Deutschland Ltd. & Co. KG Model RB211 Trent 768–60, 772–60, and 772B–60 engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 7261, Turbine Engine Oil System.

(e) Unsafe Condition

This AD was prompted by reports of non-conformances leading to low oil pressure events on low life oil pumps due to a failure mode affecting the oil pump input coupling shear neck. The FAA is issuing this AD to address a failure mode affecting the oil pump input coupling shear neck. The unsafe condition, if not addressed, could lead to a dual in-flight shutdown on airplanes equipped with two affected engines, resulting in reduced control of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) Emergency AD 2026–0172–E, dated September 4, 2026 (EASA Emergency AD 2026–0172–E).

(h) Exceptions to EASA Emergency AD 2026–0172–E

(1) Where EASA Emergency AD 2026–0172–E refers to its effective date, this AD requires using the effective date of this AD.

(2) This AD does not adopt the “Remarks” section of EASA Emergency AD 2026–0172–E.

(i) Special Flight Permits

Special flight permits, as described in 14 CFR 21.197 and 21.199, are not allowed.

(j) Additional AD Provisions

The following provisions also apply to this AD.

(1) *Alternative Methods of Compliance (AMOCs)*: The Manager, AIR–520, Continued Operational Safety 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 manager of the AIR–520, Continued Operational Safety Branch, send it to the attention of the person identified in paragraph (k) of this AD or email to: 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, AIR–520, Continued Operational Safety Branch, FAA; or the EASA; or Rolls-Royce Deutschland Ltd. & Co. KG’s EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(k) Additional Information

For more information about this AD, contact Alexis Whitaker, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (516) 228–7309; email: alexis.j.whitaker@faa.gov.

(l) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) Emergency AD 2026–0172–E, dated September 4, 2026.

(ii) [Reserved]

(3) For EASA material identified in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: ADs@easa.europa.eu. You may find this material on the EASA website at ad.easa.europa.eu.

(4) You may view this material at FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

(5) You may view this material at the National Archives and Records

Administration (NARA). For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations or email fr.inspection@nara.gov.

Issued on September 15, 2026.

Brian Knaup,

Acting Deputy Director, Integrated Certificate Management Division, Aircraft Certification Service.

[FR Doc. 2026–19172 Filed 9–16–26; 4:15 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 71**

[Docket No. FAA–2026–7756; Airspace Docket No. 26–AGL–14]

RIN 2120–AA66

Amendment of Class E Airspace; Alma, MI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the Class E airspace at Alma, MI. This action is due to an airspace review conducted due to the decommissioning of the Mount Pleasant very high frequency omnidirectional range (VOR) as part of the VOR Minimum Operational Network (MON) Program. This action brings the airspace into compliance with FAA orders and supports instrument flight rule (IFR) procedures and operations.

DATES: Effective 0901 UTC, December 24, 2026. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: A copy of the notice of proposed rulemaking (NPRM), all comments received, this final rule, and all background material may be viewed online at www.regulations.gov using the FAA Docket number. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from www.federalregister.gov.

FAA Order JO 7400.11M, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at www.faa.gov/air_traffic/publications/. You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence

Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT:

Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:**Authority for This Rulemaking**

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

History

The FAA published an NPRM for Docket No. FAA–2026–7756 in the **Federal Register** (91 FR 42682; July 10, 2026) proposing to amend the Class E airspace at Alma, MI, and published an NPRM Correction (91 FR 46759; July 24, 2026) to correct the title of the NPRM. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. Two (2) comments were received.

The first comment received supported the FAA’s correction of the NPRM. The FAA acknowledges the comment and appreciates the support.

The second comment received stated that due to the error in the title of the initial NPRM published on July 10, 2026, that the FAA did not provide the required 45-days for the public to comment in accordance with the Administrative Procedure Act (APA). However, with the publication of the NPRM correction, the comment period was restarted and extended for the 45-day period following the July 24, 2026, publication of the NPRM correction. As a result, the NPRM comment period was a total of 59 days. The commenter stated, however, that the correction may have failed to trigger certain notification algorithms, depriving certain commenters of the full comment period. However, the APA provides no distinct requirement to extend comment periods

through re-issued NPRMs to ensure triggering notification algorithms. Moreover, the submission of the detailed comment itself demonstrates that the commenter received actual notice, algorithms notwithstanding. Therefore, the FAA declines to adopt the commenter's suggestion or otherwise extend the comment period further. The commenter did not provide any substantive feedback related to the proposal.

Incorporation by Reference

Class E airspace designations are published in paragraph 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11M, dated July 30, 2026, and effective September 15, 2026. These amendments will be published in the next update to FAA Order JO 7400.11. FAA Order JO 7400.11M, which lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points, is publicly available as listed in the **ADDRESSES** section of this document.

The Rule

This action amends 14 CFR part 71 by modifying the Class E airspace extending upward from 700 ft. above the surface at Alma, Michigan due to an airspace review conducted as part of the decommissioning of the Mount Pleasant VOR as part of the VOR MON Program.

For the Gratiot Community Airport, Alma, MI, Class E airspace extending upward from 700 ft. above the surface, this action: (1) increases the radius from 6.5 to 7.4 miles; (2) amends the extension west of the airport to within 2 miles each side of the 270° bearing from the airport extending from the 7.4-mile (previously 6.5-mile) radius to 10.7 (increased from 10.1) miles west of the airport; (3) removes the Mount Pleasant VOR/DME and associated extension from the airspace legal description; and (4) removes the city associated with the airport from the header of the airspace legal description to comply with changes to FAA Order JO 7400.2R, Procedures for Handling Airspace Matters.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a “significant regulatory action” under Executive Order 12866; (2) is not a

“significant rule” under DOT Order 2100.6B, “Policies and Procedures for Rulemakings” (March 10, 2025); and (3) is expected to result in, at most, de minimis costs from compliance with applicable operating requirements or minor flight rerouting for operators choosing to navigate around the controlled airspace. Since these amendments are routine and the expected impact to operators is de minimis, the FAA certifies that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1G, “FAA National Environmental Policy Act Implementing Procedures,” Paragraph B–2.5(a). This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

Lists of Subjects in 14 CFR 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

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

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

■ 1. The authority citation for 14 CFR Part 71 continues to read as follows:

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11M, Airspace Designations and Reporting Points, dated July 30, 2026, and effective September 15, 2026, is amended as follows:

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

* * * * *

AGL MI E5 Alma, MI [Amended]

Gratiot Community Airport, MI
(Lat 43°19'20" N, long 084°41'17" W)

That airspace extending upward from 700 feet above the surface within a 7.4-mile

radius of Gratiot Community Airport; and within 2 miles either side of a 270° bearing from the airport extending from the 7.4-mile radius to 10.7 miles west of the airport.

* * * * *

Issued in Fort Worth, Texas, on September 16, 2026.

Courtney E. Johns,

*Acting Manager, Operations Support Group,
ATO Central Service Center.*

[FR Doc. 2026–19143 Filed 9–17–26; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2025–3288; Airspace
Docket No. 25–ANM–158]

RIN 2120–AA66

Establishment of United States Area Navigation Route T–581 in the Vicinity of Missoula, Montana

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: This action corrects a final rule published by the FAA in the **Federal Register** on August 3, 2026, establishing United States Area Navigation (RNAV) Route T–581 in the vicinity of Missoula, Montana. Specifically, this action corrects the description of the route in the regulatory text of the final rule.

DATES: The effective date of the final rule published in the **Federal Register** on August 3, 2026, remains 0901 UTC, October 29, 2026. The Director of the Federal Register approves this incorporation by reference action under 14 CFR part 71, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order JO 7400.11M, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at www.faa.gov/air-traffic/publications/. You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Steven Roff, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

History

The FAA published a final rule in the **Federal Register** for Docket No. FAA–2025–3288 (91 FR 48756; August 3, 2026), establishing RNAV Route T–581. The legal description in that final rule for T–581 contains two route points that should not be listed in the description

due to them being a turn of less than one degree. This action corrects these errors.

Correction to the Final Rule

Accordingly, pursuant to the authority delegated to me, the final rule for Docket No. FAA–2025–3288, as

published in the **Federal Register** on August 3, 2026 (91 FR 48756; FR Doc. 2026–15675), is corrected as follows:

■ On page 48757, in the third column, under the heading “Paragraph 6011 United States Area Navigation Routes,” revise the table across all three columns to read as follows:

T–581 Missoula, MT (MSO) TO Kalispell, MT (FCA) [NEW]		
Missoula, MT (MSO)	VOR/DME	(Lat. 46°54′28.68″ N, long. 114°05′01.15″ W)
Kalispell, MT (FCA)	VOR/DME	(Lat. 48°12′50.77″ N, long. 114°10′33.21″ W)

Issued in Washington, DC, on September 16, 2026.

Alex W. Nelson,

Manager, Rules and Regulations Group.

[FR Doc. 2026–19173 Filed 9–17–26; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31684; Amdt. No. 4236]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide for the safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective September 18, 2026. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of September 18, 2026.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops–M30, 1200 New Jersey Avenue SE, West Bldg., Ground Floor, Washington, D.C., 20590–0001;

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Information Services, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA).

For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations or email fr.inspection@nara.gov.

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center online at nfdc.faa.gov to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT:

Rune Duke, Manager, Standards Section, Flight Procedures and Airspace Group, Aviation Safety, Federal Aviation Administration. Mailing Address: FAA Mike Monroney Aeronautical Center, Flight Procedures and Airspace Group, 6500 South MacArthur Blvd., STB Annex, Bldg 26, Room 217, Oklahoma City, OK 73099. Telephone (405) 954–1139.

SUPPLEMENTARY INFORMATION: This rule amends 14 CFR part 97 by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (NFDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR 97.20. The large number of SIAPs, their complex nature, and the need for a special format make their verbatim

publication in the **Federal Register** expensive and impractical. Further, pilots do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained on FAA form documents is unnecessary. This amendment provides the affected CFR sections, and specifies the SIAPs and Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPs, Takeoff Minimums and ODPs as identified in the amendatory language for part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP and Takeoff Minimums and ODP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP and Takeoff Minimums and ODP as modified by FDC permanent NOTAMs.

The SIAPs and Takeoff Minimums and ODPs, as modified by FDC permanent NOTAM, and contained in this amendment are based on criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these changes to SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied only to specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of

immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for these SIAP and Takeoff Minimums and ODP amendments require making them effective in less than 30 days.

Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making these SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT regulatory

Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air traffic control, Airports, Incorporation by reference, Navigation (air).

Issued in Washington, DC, September 11, 2026.

Rune Duke,

Manager, Standards Section, Flight Procedures and Airspace Group, Flight Technologies & Procedures Division, Federal Aviation Administration.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, 14 CFR part 97 is amended by amending Standard

Instrument Approach Procedures and Takeoff Minimums and ODPs, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

* * * Effective Upon Publication

AIRAC date	State	City	Airport	FDC No.	FDC date	Procedure name
29-Oct-26 ...	CA	Corona	Corona Muni	6/0152	8/4/26	VOR—A, Amdt 5.
29-Oct-26 ...	NM	Las Vegas	Las Vegas Muni	6/1525	8/4/26	VOR RWY 20, Amdt 6B.
29-Oct-26 ...	NM	Las Vegas	Las Vegas Muni	6/1526	8/4/26	RNAV (GPS) RWY 20, Orig-C.
29-Oct-26 ...	CA	Burbank	Bob Hope	6/2669	7/10/26	VOR RWY 8, Amdt 12A.
29-Oct-26 ...	RI	Newport	Newport State	6/2920	5/27/26	LOC RWY 22, Amdt 7F.
29-Oct-26 ...	RI	Block Island	Block Island State	6/4360	8/13/26	VOR/DME RWY 10, Amdt 5D.
29-Oct-26 ...	LA	Sulphur	Southland fld	6/5624	5/1/26	LOC RWY 15, Amdt 2A.
29-Oct-26 ...	LA	Sulphur	Southland fld	6/5628	5/1/26	RNAV (GPS) RWY 15, Orig-A.
29-Oct-26 ...	IL	Taylorville	Taylorville Muni	6/5630	5/1/26	RNAV (GPS) RWY 36, Orig-B.
29-Oct-26 ...	IL	Taylorville	Taylorville Muni	6/5631	5/1/26	RNAV (GPS) RWY 18, Orig-C.
29-Oct-26 ...	ME	Waterville	Waterville Rgnl	6/5632	5/4/26	RNAV (GPS) RWY 23, Orig-B.
29-Oct-26 ...	PA	Toughkenamon	New Garden	6/6887	8/26/26	RNAV (GPS) RWY 24, Orig.
29-Oct-26 ...	OH	Toledo	Eugene F Kranz Toledo Express.	6/6888	8/25/26	RNAV (GPS) RWY 7, Amdt 1D.
29-Oct-26 ...	OH	Toledo	Eugene F Kranz Toledo Express.	6/6890	8/25/26	RNAV (GPS) RWY 25, Amdt 2D.
29-Oct-26 ...	PA	New Castle	New Castle Muni	6/6893	8/26/26	RNAV (GPS) RWY 23, Amdt 1D.

[FR Doc. 2026–19150 Filed 9–17–26; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31683; Amdt. No. 4235]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes, amends, suspends, or removes Standard

Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures (ODPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective September 18, 2026. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory

provisions. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of September 18, 2026.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops–M30. 1200 New Jersey Avenue SE, West Bldg., Ground Floor, Washington, DC 20590–0001.

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Information Services, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations or email fr.inspection@nara.gov.

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center at nfdc.faa.gov to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT:

Rune Duke, Manager, Standards Section, Flight Procedures and Airspace Group, Aviation Safety, Federal Aviation Administration. Mailing Address: FAA Mike Monroney Aeronautical Center, Flight Procedures and Airspace Group, 6500 South MacArthur Blvd., STB Annex, Bldg 26, Room 217, Oklahoma City, OK 73099. Telephone (405) 954-1139.

SUPPLEMENTARY INFORMATION: This rule amends 14 CFR part 97 by establishing, amending, suspending, or removes SIAPs, Takeoff Minimums and/or ODPs. The complete regulatory description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR 97.20. The applicable FAA Forms are 8260-3, 8260-4, 8260-5, 8260-15A, 8260-15B, when required by an entry on 8260-15A, and 8260-15C.

The large number of SIAPs, Takeoff Minimums and ODPs, their complex nature, and the need for a special format make publication in the **Federal Register** expensive and impractical. Further, pilots do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA form documents is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAPs, Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure, and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPs, Takeoff Minimums and/or ODPs as identified in the amendatory language for part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP, Takeoff Minimums and ODP as amended in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flights safety relating directly to published aeronautical charts.

The circumstances that created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPs and Takeoff Minimums and ODPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making some SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial

number of small entities under the criteria of the Regulatory Flexibility Act.

Lists of Subjects in 14 CFR Part 97

Air traffic control, Airports, Incorporation by reference, Navigation (air).

Issued in Washington, DC, on September 11, 2026.

Rune Duke,

Manager, Standards Section, Flight Procedures and Airspace Group, Flight Technologies & Procedures Division, Federal Aviation Administration.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, 14 CFR part 97 is amended by establishing, amending, suspending, or removing Standard Instrument Approach Procedures and/or Takeoff Minimums and Obstacle Departure Procedures effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

Effective 29 October 2026

St Paul Island, AK, SNP/PASN, LOC BC RWY 18, Amdt 5
St Paul Island, AK, SNP/PASN, RNAV (GPS) RWY 18, Amdt 3
St Paul Island, AK, SNP/PASN, RNAV (GPS) RWY 36, Amdt 2
St Paul Island, AK, SNP/PASN, Takeoff Minimums and Obstacle DP, Amdt 4
El Dorado, AR, ELD, ILS OR LOC RWY 22, Amdt 2F, CANCELED
El Dorado, AR, ELD, RNAV (GPS) RWY 4, Amdt 1
El Dorado, AR, ELD, RNAV (GPS) RWY 13, Orig
El Dorado, AR, ELD, RNAV (GPS) RWY 22, Amdt 1
El Dorado, AR, ELD, RNAV (GPS) RWY 31, Orig
El Dorado, AR, ELD, RNAV (GPS)—A, Orig, CANCELED
El Dorado, AR, ELD, Takeoff Minimums and Obstacle DP, Amdt 3
El Dorado, AR, ELD, VOR/DME RWY 4, Amdt 10D, CANCELED
Jonesboro, AR, JBR, Takeoff Minimums and Obstacle DP, Amdt 4
Melbourne, AR, 42A, Takeoff Minimums and Obstacle DP, Amdt 2
Gunnison, CO, GUC, GUNNISON ONE, Graphic DP
Gunnison, CO, GUC, Takeoff Minimums and Obstacle DP, Amdt 9
Macon, GA, MCN, ILS OR LOC RWY 5, ILS RWY 5 (SA CAT I), ILS RWY 5 (SA CAT II), Amdt 4A

Macon, GA, MCN, RNAV (GPS) RWY 5, Amdt 3B
 Macon, GA, MCN, RNAV (GPS) RWY 14, Amdt 2F
 Macon, GA, MCN, RNAV (GPS) RWY 23, Amdt 2G
 Macon, GA, MCN, RNAV (GPS) RWY 32, Amdt 1F
 Macon, GA, MCN, Takeoff Minimums and Obstacle DP, Amdt 4
 Idaho Falls, ID, IDA, Takeoff Minimums and Obstacle DP, Amdt 6
 Goodland, KS, GLD, ILS OR LOC RWY 30, Amdt 4
 Goodland, KS, GLD, RNAV (GPS) RWY 12, Amdt 2C
 Goodland, KS, GLD, RNAV (GPS) RWY 30, Amdt 2
 Alexandria, LA, ESF, ILS OR LOC RWY 27, Amdt 16C
 Alexandria, LA, ESF, RNAV (GPS) RWY 9, Amdt 2C
 Alexandria, LA, ESF, RNAV (GPS) RWY 27, Amdt 2C
 Willmar, MN, BDH, RNAV (GPS) RWY 31, Amdt 2A
 Osage Beach, MO, K15, Takeoff Minimums and Obstacle DP, Amdt 2
 Star, NC, 43A, Takeoff Minimums and Obstacle DP, Amdt 1
 Sylva, NC, 24A, Takeoff Minimums and Obstacle DP, Amdt 1
 Las Vegas, NV, HND, Takeoff Minimums and Obstacle DP, Amdt 1A
 Mount Joy/Marietta, PA, N71, RNAV (GPS) RWY 28, Amdt 1A
 Walterboro, SC, RBW, ILS Y OR LOC Y RWY 23, Amdt 3A
 Clarksville, TN, CKV, LOC RWY 35, Amdt 7
 Clarksville, TN, CKV, RNAV (GPS) RWY 17, Amdt 1E
 Clarksville, TN, CKV, RNAV (GPS) RWY 35, Amdt 2
 Clarksville, TN, CKV, Takeoff Minimums and Obstacle DP, Amdt 3
 Port Angeles, WA, CLM, RNAV (GPS) RWY 9, Amdt 1C
 Menomonie, WI, LUM, RNAV (GPS) RWY 9, Amdt 2
 Menomonie, WI, LUM, RNAV (GPS) RWY 18, Orig
 Menomonie, WI, LUM, RNAV (GPS) RWY 27, Amdt 2
 Menomonie, WI, LUM, RNAV (GPS) RWY 36, Orig
 Menomonie, WI, LUM, VOR RWY 27, Amdt 2
 Rescinded: On August 19, 2026 (91 FR 53522), the FAA published an Amendment in Docket No. 31679, Amdt No. 4231, to part 97 of the Federal Aviation Regulations under § 97.23. The following entries for Brewton, AL; Montgomery, AL; Crestview, FL; and Atlanta, GA, effective October 29, 2026, are hereby rescinded in their entirety:
 Brewton, AL, 12J, VOR/DME RWY 30, Amdt 8B, CANCELED
 Montgomery, AL, MGM, VOR–A, Amdt 4D, CANCELED
 Crestview, FL, CEW, VOR–A, Amdt 12B, CANCELED
 Atlanta, GA, RYY, VOR/DME RWY 9, Amdt 2C, CANCELED

[FR Doc. 2026–19149 Filed 9–17–26; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF STATE

22 CFR Part 120, 123, 125, and 126

[Public Notice: 13121]

RIN 1400–AG31

International Traffic in Arms Regulations: Clarifying Policies of Denial, Updating the Major Non-NATO Ally List, and Minor Corrections

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: The Department of State is amending the International Traffic in Arms Regulations (ITAR) to clarify certain policy-of-denial provisions, update country policies for Ethiopia and Somalia, add Saudi Arabia and Peru to the list of major non-NATO allies, and make other miscellaneous corrections.

DATES: This rule is effective on September 18, 2026.

FOR FURTHER INFORMATION CONTACT: Mr. Ryan Haddad, Foreign Affairs Officer, Office of Defense Trade Controls Policy, U.S. Department of State, telephone 771–204–7878; email

DDTCCustomerService@state.gov.

ATTN: Regulatory Change, ITAR Section 126.1 Clarification.

SUPPLEMENTARY INFORMATION: It is the policy of the United States to deny licenses or other approvals for exports and imports destined for, or originating in, certain countries. That policy is codified in the ITAR in § 126.1(a), and countries subject to it are identified in paragraph (d). Within that paragraph, the Department distinguishes between countries subject to a comprehensive policy of denial and those subject to qualified policies of denial. Countries subject to a comprehensive policy of denial are identified in § 126.1(d)(1). Meanwhile, qualified policies of denial are described in § 126.1(d)(2). To improve clarity regarding the scope of these prohibitions, and to make additional changes to implement recent policy actions and correct minor typographical errors, the Department is amending parts 120, 123, 125, and 126 of the ITAR. The changes are as follows:

Improving the Organization and Readability of § 126.1

- The text of § 126.1(a) is modified to specify that its prohibitions apply to “exports, reexports, retransfers, and temporary imports of defense articles and defense services destined for, or originating in, certain countries.” This revision more specifically states which controlled events are subject to a policy of denial, and similar changes are made in this rule to other paragraphs for the

same reason. Additionally, a revision is made to further emphasize that the ITAR’s prohibitions on brokering activities involving countries identified in § 126.1 can be found in § 129.7.

- *Identification.* To better introduce the topic of paragraph (c) and to conform with the structure and style of paragraphs in the section, the Department is adding the paragraph heading “*Identification in this section.*” to paragraph (c).

- The general policy descriptions in paragraphs (d)(1) and (2) are revised by clarifying that “exports, reexports, retransfers, and temporary imports” of defense articles and defense services are affected by these prohibitions.

Clarifying Policy of Denial-Related Prohibitions

- *§ 120.15 Exemptions.* The prohibition on exemption usage described in § 120.15(c) is revised to specify that it applies to exports, reexports, retransfers, and temporary imports of defense articles and defense services.

- *§ 123.16 Exemptions of general applicability (defense articles).* The license exemption described in § 123.16 is revised to specify that the exemptions may not be used for defense article and defense service exports, reexports, or retransfers to, or temporary imports from, any proscribed countries, areas, or persons identified in § 126.1 of this subchapter, except as provided in § 126.1.

- *§ 125.4 Exemptions of general applicability (technical data and classified defense articles).*

- In § 125.4(a), the text is revised to specify that the exemptions in the paragraph may not be used for defense article and defense service exports, reexports, retransfers to, or temporary imports from, any proscribed countries, areas, or persons identified in § 126.1 of this subchapter, except as provided in § 126.1. The paragraph is also revised to specify that the exemptions in the paragraph may not be used for transfers “to or for”—rather than just “for”—persons ineligible under § 120.16. This change confirms that such persons may not participate in any ITAR-controlled activities under these exemptions. A minor typographical correction is also made to capitalize the word “Controls.”

- The § 125.4(b)(10) exemption text is revised to replace the term “Disclosures” with the ITAR term “Releases.” A minor typographical correction is also made to hyphenate “full-time.”

Updating § 126.1 Country Policies

- The entry for Ethiopia in paragraph (n) is removed and the paragraph is reserved, implementing a February 5, 2026 policy determination by the Secretary of State terminating the policy of denial for licenses or other approvals for exports of defense articles or defense services destined to or for the armed forces, police, intelligence, or other internal security forces of Ethiopia.

- The entry for Libya in paragraph (k) is revised to make several minor clarifications and typographical corrections:

- Paragraph (3) is revised to use the ITAR phrase “defense services” instead of “technical assistance or training.”

- Paragraph (6) is revised to replace the phrase “arms and related material” with “defense articles” and to replace “provision of assistance or personnel” with “defense services.” It also replaces the phrase “Committee of the Security Council concerning Libya” with the more specific “committee of the United Nations Security Council concerned with Libya,” which is the ITAR’s standard formulation and reflects that the committee is not named with a proper noun.

- Paragraph (8) is revised to add the phrase “provided by the United States Government” after “Defense services,” which was mistakenly omitted in a prior rule. The word “associated” is removed from the phrase “associated temporary exports of defense articles” to clarify that those temporary exports do not need to be specifically associated with the defense services in question to qualify for this exclusion.

- Paragraph (9) is revised to remove the superfluous “s” after “United Nations.”

- The entry for Somalia in paragraph (m) is revised to remove a comma from the existing text clarify the text of the exclusion from the policy of denial. This change affirms that the supply of weapons, ammunition, or military equipment may be authorized through case-by-case licensing review if intended solely for the support of, or use by, European Union training and support activities, Turkey, the United Kingdom, and the United States; it equally applies in the same circumstances for other United Nations Member States that have concluded a Status of Forces Agreement with Somalia, provided those Member States pre-notify the committee of the United Nations Security Council concerned with Somalia. The Department will consider applications for such activities on a case-by-case basis.

- The entry for South Sudan in paragraph (w) is revised to clarify that

the policy of denial generally applies to both exports and imports of defense articles and defense services. A stylistic change is also made in paragraph (2) to use the standardized phrase “committee of the United Nations Security Council concerned with South Sudan.”

Correcting Technical Errors in the § 126.5 Canadian Exemptions

- The Canadian exemption for temporary and permanent export at § 126.5(b) is revised to remove a requirement that contradicts the text of § 123.10. The current § 126.5(b) text states that exporters must obtain a Nontransfer and Use Certificate (Form DSP-83) for all significant military equipment transferred under the § 126.5(b) exemptions. Section 123.10 states that such assurances are not required when using the § 126.5 exemptions. This revision aligns the two paragraphs and clarifies that such certificates are not needed when using the § 126.5(b) Canadian exemption.

- A similar correction is made to § 126.5(d) to specify that the paragraph’s reexport/retransfer exemption requirements do not include the need to obtain Nontransfer and Use Certificates, notwithstanding the cross reference to § 123.9(c) and the requirement to include the information required by that paragraph, which in turn references § 123.1, and the need to include all documentation required of a permanent export license.

Updating the Major Non-NATO Allies List

- In § 120.23, the list of “major non-NATO allies” is revised to add Saudi Arabia (91 FR 3017, January 13, 2026) and Peru (91 FR 3019, January 14, 2026.)

Regulatory Analysis and Notices

Administrative Procedure Act

This rulemaking is exempt from the rulemaking requirements of the Administrative Procedure Act (APA) pursuant to 5 U.S.C. 553(a)(1) as a military or foreign affairs function of the United States. As the provisions of section 553 do not apply to this rulemaking, the Department is publishing this rule with an immediate effective date and without a request for public comment.

Regulatory Flexibility Act

Since this rule is exempt from the notice-and-comment rulemaking provisions of 5 U.S.C. 553, the rule does not require analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This rulemaking does not involve a mandate that will 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 are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

The Office of Information and Regulatory Affairs has found that this rulemaking is not a major rule within the criteria of 5 U.S.C. 804(2). This rule will not increase costs or prices and should have no adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets. The Department does not expect this change to have an annual effect on the economy of \$100 million or more.

Executive Orders 12372 and 13132

This rulemaking does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this rulemaking.

Executive Orders 12866 and 13563

Executive Order 12866, as amended by Executive Order 13563, 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). As a result of this change, certain restrictions on defense trade activities will be clarified. Other changes modestly expand the scope of permissible defense trade activities. Because this rule, on balance, removes regulatory requirements and obligations, the Department believes costs associated with this rule will be minimal. This rule has been designated a “significant regulatory action” by the Office of Information and Regulatory Affairs under Executive Order 12866.

Executive Order 12988

The Department of State has reviewed this rulemaking in light of Executive Order 12988 to eliminate ambiguity,

minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department of State determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, Executive Order 13175 does not apply to this rulemaking.

Executive Order 14192

This rule is exempt from the requirements of Executive Order 14192 because it relates to a foreign affairs or national security function of the United States.

Paperwork Reduction Act

This rulemaking does not impose or revise any information collections subject to 44 U.S.C. Chapter 35.

List of Subjects

22 CFR Part 120

Arms and munitions, Classified information, Exports.

22 CFR Part 123

Arms and munitions, Exports, Reporting and recordkeeping requirements.

22 CFR Part 125

Arms and munitions, Classified information, Exports.

22 CFR Part 126

Arms and munitions, Exports, Reporting and recordkeeping requirements, Technical assistance.

PART 120—PURPOSE AND DEFINITIONS

- 1. The authority citation for part 120 continues to read as follows:

Authority: 22 U.S.C. 2651a, 2752, 2753, 2776, 2778, 2779, 2779a, 2785, 2794, 2797; E.O. 13637, 78 FR 16129, 3 CFR, 2013 Comp., p. 223.

- 2. Amend § 120.15 by revising paragraph (c) to read as follows:

§ 120.15 Exemptions.

* * * * *

(c) Exemptions provided in this subchapter do not apply to defense article and defense service exports, reexports, or retransfers to, or temporary imports originating from, any proscribed countries, areas, or persons identified in § 126.1 of this subchapter, except as provided in § 126.1.

* * * * *

- 3. Amend § 120.23 by revising paragraph (b)(2) to read as follows:

§ 120.23 Organizations and arrangements.

* * * * *

(b) * * *

(2) The following countries have been designated as major non-NATO allies: Argentina, Australia, Bahrain, Brazil, Colombia, Egypt, Israel, Japan, Jordan, Kenya, Kuwait, Morocco, New Zealand, Pakistan, Peru, the Philippines, Qatar, the Republic of Korea, Saudi Arabia, Thailand, and Tunisia. Taiwan shall be treated as though it were designated a major non-NATO ally.

* * * * *

PART 123—LICENSES FOR THE EXPORT AND TEMPORARY IMPORT OF DEFENSE ARTICLES

- 4. The authority citation for part 123 continues to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2753; 22 U.S.C. 2651a; 22 U.S.C. 2776; Pub. L. 105–261, 112 Stat. 1920; Sec. 1205(a), Pub. L. 107–228; Sec. 520, Pub. L. 112–55; Section 1261, Pub. L. 112–239; E.O. 13637, 78 FR 16129.

- 5. Amend § 123.16 by revising paragraph (a) to read as follows:

§ 123.16 Exemptions of general applicability.

(a) The following exemptions apply to exports, reexports, retransfers, or temporary imports of unclassified defense articles for which no approval is needed from the Directorate of Defense Trade Controls. These exemptions do not apply to: Proscribed destinations under § 126.1 of this subchapter; exports for which Congressional notification is required (see § 123.15 and § 124.11 of this subchapter); defense articles designated as Significant Military Equipment (SME) or on the Missile Technology Control Regime (MT) Annex; and may not be used by persons who are generally ineligible as described in § 120.16 of this subchapter. All shipments of defense articles, including but not limited to those to Australia, Canada, and the United Kingdom, require an Electronic Export Information (EEI) filing or notification letter. If the export of a defense article is exempt from licensing, the EEI filing must cite the exemption. Refer to § 123.22 for EEI filing and letter notification requirements.

* * * * *

PART 125—LICENSES FOR THE EXPORT OF TECHNICAL DATA AND CLASSIFIED DEFENSE ARTICLES

- 6. The authority citation for part 125 continues to read as follows:

Authority: Secs. 2 and 38, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778); 22 U.S.C. 2651a; E.O. 13637, 78 FR 16129.

- 7. Amend § 125.4 by revising paragraphs (a) and (b)(10) to read as follows:

§ 125.4 Exemptions of general applicability.

(a) The following exemptions apply to exports of technical data for which approval is not needed from the Directorate of Defense Trade Controls. The exemptions, except for paragraph (b)(13) of this section, do not apply to defense article and defense service exports, reexports, or retransfers to, or temporary imports from, proscribed destinations under § 126.1 of this subchapter or for persons considered generally ineligible under § 120.16 of this subchapter. The exemptions are also not applicable for purposes of establishing offshore procurement arrangements or producing defense articles offshore (see § 124.13), except as authorized under paragraph (c) of this section. Transmission of classified information must comply with the requirements of the Department of Defense National Industrial Security Program Operating Manual (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case the latter guidance must be followed) and the exporter must certify to the transmittal authority that the technical data does not exceed the technical limitation of the authorized export.

(b) * * *

(10) Releases of unclassified technical data in the U.S. by U.S. institutions of higher learning to foreign persons who are their bona fide and full-time regular employees. This exemption is available only if:

* * * * *

PART 126—GENERAL POLICIES AND PROVISIONS

- 8. The authority citation for part 126 continues to read as follows:

Authority: 22 U.S.C. 287c, 2651a, 2752, 2753, 2776, 2778, 2779, 2779a, 2780, 2791, 2797, 10423; sec. 1225, Pub. L. 108–375, 118 Stat. 2091; sec. 7045, Pub. L. 112–74, 125 Stat. 1232; sec. 1250A, Pub. L. 116–92, 133 Stat. 1665; sec. 205, Pub. L. 116–94, 133 Stat. 3052; and E.O. 13637, 78 FR 16129, 3 CFR, 2013 Comp., p. 223.

- 9. Amend § 126.1 by:
- a. Revising paragraph (a);
 - b. In paragraph (c), adding a paragraph heading;
 - c. Revising paragraphs (d), (i) introductory text and (i)(5), (k) introductory text, (k)(3), (6), (8) and (9), (m) introductory text and (m)(2)(iii);

- d. Removing and reserving paragraph (n); and
- e. Revising paragraphs (w) introductory text and (w)(2).

The revisions read as follows:

§ 126.1 Prohibited exports, imports, and sales to or from certain countries.

(a) *General.* It is the policy of the United States to deny licenses and other approvals for exports, reexports, retransfers, and temporary imports of defense articles and defense services destined for, or originating in, certain

countries. (For brokering activities, see § 129.7 of this subchapter, which imposes restrictions similar to those contained in this section.) No transfer of defense articles or defense services may be made pursuant to an exemption provided in this subchapter to or from any proscribed countries, areas, or persons as described in this section, except as follows:

(1) Transfers pursuant to § 123.17, § 125.4(b)(13), § 126.6, or § 126.18(e) of this subchapter;

(c) *Identification in this section.*

(d) *Countries subject to certain prohibitions.* (1) For exports, reexports, retransfers, and temporary imports of defense articles and defense services, the following countries are subject to a policy of denial:

TABLE 1 TO PARAGRAPH (d)(1)

Country
Belarus
Burma
China
Cuba
Iran
North Korea
Syria
Venezuela

(2) For exports, reexports, retransfers, and temporary imports of defense

articles and defense services, a policy of denial applies as specified in the

associated paragraphs in the following table:

TABLE 2 TO PARAGRAPH (d)(2)

Country	Country specific paragraph location
Afghanistan	See also paragraph (g) of this section.
Central African Republic	See also paragraph (u) of this section.
Cyprus	See also paragraph (r) of this section.
Democratic Republic of the Congo	See also paragraph (i) of this section.
Eritrea	See also paragraph (h) of this section.
Haiti	See also paragraph (j) of this section.
Iraq	See also paragraph (f) of this section.
Lebanon	See also paragraph (t) of this section.
Libya	See also paragraph (k) of this section.
Nicaragua	See also paragraph (p) of this section.
Russia	See also paragraph (l) of this section.
Somalia	See also paragraph (m) of this section.
South Sudan	See also paragraph (w) of this section.
Sudan	See also paragraph (v) of this section.
Zimbabwe	See also paragraph (s) of this section.

* * * * *

(i) *Democratic Republic of the Congo.* It is the policy of the United States to deny licenses or other approvals for exports or imports of defense articles and defense services destined for or originating in the Democratic Republic of the Congo, except that a license or other approval may be issued, on a case-by-case basis, for:

* * * * *

(5) Defense articles and defense services as approved by the committee of the United Nations Security Council concerned with the Democratic Republic of the Congo.

* * * * *

(k) *Libya.* It is the policy of the United States to deny licenses or other approvals for exports or imports of defense articles and defense services destined for or originating in Libya, except that a license or other approval may be issued, on a case-by-case basis, for:

* * * * *

(3) The provision of defense services when intended solely for security or disarmament assistance to the Libyan government;

* * * * *

(6) Other sales or supply of defense articles or defense services, as approved in advance by the committee of the

United Nations Security Council concerned with Libya;

* * * * *

(8) Defense services provided by the United States Government to Libyan security forces intended solely to promote the process of reunification of Libyan military and security institutions, as well as temporary exports of defense articles intended solely for use by the non-Libyan providers of those defense services for delivery of those defense services and their protective use, as notified in advance to the committee of the United Nations Security Council concerned with Libya; or

(9) Military aircraft or naval vessels temporarily exported by the United States Government into the territory of Libya solely to deliver items or facilitate activities otherwise exempted or not covered by the United Nations arms embargo on Libya, including humanitarian assistance, as well as defense articles for defensive purposes that remain at all times aboard the vessel or aircraft while temporarily in Libya or on the person of any non-Libyan personnel temporarily disembarked from such vessel or aircraft.

* * * * *

(m) *Somalia*. It is the policy of the United States to deny licenses or other approvals for exports or imports of defense articles and defense services destined for Somalia, except that a license or other approval may be issued, on a case-by-case basis, for:

* * * * *

(2) * * *

(iii) European Union training and support activities, Turkey, the United Kingdom, or the United States, or any other Member State forces with a status of forces agreement or a memorandum of understanding with the Government of the Federal Republic of Somalia, provided that they inform the committee of the United Nations Security Council concerned with Somalia, for information purposes only, about the existence of such agreements;

* * * * *

(w) *South Sudan*. It is the policy of the United States to deny licenses or other approvals for exports or imports of defense articles and defense services destined for South Sudan, except that a license or other approval may be issued, on a case-by-case basis, for:

* * * * *

(2) Non-lethal defense articles intended solely for humanitarian or protective use, and related defense services as notified in advance to the committee of the United Nations Security Council concerned with South Sudan;

* * * * *

■ 10. Amend § 126.5 by revising paragraphs (b) and (d) introductory text to read as follows:

§ 126.5 Canadian exemptions.

* * * * *

(b) *Permanent and temporary export of defense articles*. Except as provided in Supplement No. 1 to part 126 of this subchapter and for exports that transit third countries, Port Directors of U.S. Customs and Border Protection and postmasters shall permit, when for end-use in Canada by Canadian Federal or

Provincial governmental authorities acting in an official capacity or by a Canadian-registered person, or for return to the United States, the permanent and temporary export to Canada without a license of unclassified defense articles and defense services identified on the U.S. Munitions List (22 CFR 121.1). The exceptions are subject to meeting the requirements of this subchapter, to include §§ 120.15(d) and 120.16, parts 122 and 123 (except insofar as exemption from licensing requirements is herein authorized) and § 126.1. For purposes of this section, “Canadian-registered person” is any Canadian national (including Canadian business entities organized under the laws of Canada), dual citizen of Canada and a third country other than a country listed in § 126.1, and permanent resident registered in Canada in accordance with the Canadian Defense Production Act, and such other Canadian Crown Corporations identified by the Department of State in a list of such persons publicly available through the internet website of the Directorate of Defense Trade Controls and by other means.

* * * * *

(d) *Reexports/retransfer*. Reexport/retransfer in Canada to another end-user or end-use or from Canada to another destination, except the United States, must in all instances have the prior approval of the Directorate of Defense Trade Controls. Unless otherwise exempt in this subchapter, the original exporter is responsible, upon request from a Canadian-registered person, for obtaining or providing reexport/retransfer approval. In any instance when the U.S. exporter is no longer available to the Canadian end-user the request for reexport/retransfer may be made directly to the Directorate of Defense Trade Controls. All requests must include the information in § 123.9(c) of this subchapter, except that as provided in § 123.10 of this subchapter a Nontransfer and Use Certificate is not required. Reexport/retransfer approval is acquired by:

* * * * *

Thomas G. DiNanno,

Under Secretary, Arms Control and International Security, Department of State.

[FR Doc. 2026–19161 Filed 9–17–26; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF STATE

22 CFR Part 121

[Public Notice: 13120]

RIN 1400–AG35

International Traffic in Arms Regulations: Modification of U.S. Munitions List Category XX(a)

AGENCY: Department of State.

ACTION: Interim final rule.

SUMMARY: The Department of State (the Department) amends the International Traffic in Arms Regulations (ITAR) to remove from the U.S. Munitions List (USML) certain uncrewed underwater vehicles (UUVs) and make conforming changes to related controls. The Department also requests comments to assist in further refining ITAR controls on UUVs and to identify possible enhancements to the license exemption for certain UUV-related activities.

DATES:

Effective date: This rule is effective October 19, 2026.

Comment due date: Send comments on or before October 19, 2026.

ADDRESSES: Interested parties may submit comments to the Department of State by any of the following methods:

- Visit the *Regulations.gov* website at: <https://www.regulations.gov> and search for the docket number DOS–2026–0958.

- *Email:* DDTCPublicComments@state.gov. Commenting parties must include RIN 1400–AG35 in the subject line of the email message.

See **SUPPLEMENTARY INFORMATION** for other information about electronic filing.

FOR FURTHER INFORMATION CONTACT: Mr. Chris Weil, Office of Defense Trade Controls Policy, Department of State, email DDTCCustomerService@state.gov SUBJECT: U.S. Munitions List Category XX(a)—RIN 1400–AG35.

SUPPLEMENTARY INFORMATION: The Department of State’s Directorate of Defense Trade Controls (DDTC) administers the ITAR (22 CFR parts 120 through 130) to, among other things, regulate the export, reexport, retransfer, and temporary import of defense articles and defense services described on the USML at ITAR § 121.1. Items not subject to the ITAR or to the exclusive licensing jurisdiction of certain other departments or agencies of the U.S. Government are subject to the Export Administration Regulations (EAR) (15 CFR parts 730 through 774), which include the Commerce Control List (CCL) in Supplement No. 1 to part 774. The EAR is administered by the Department of

Commerce, Bureau of Industry and Security (BIS). This rule does not modify the list of defense articles and defense services controlled for purposes of permanent import by the Attorney General, as enumerated on the U.S. Munitions Import List (USML) at 27 CFR 447.21.

Section 38 of the Arms Export Control Act (AECA) (22 U.S.C. 2778) requires periodic review of the USML to determine which articles and services, if any, no longer warrant designation. In maintaining the USML, DDTC identifies articles and services for potential addition to or removal from the USML, or for clarification on how they are described on the USML, through a variety of methods. This can include public feedback and interagency consultations, commodity jurisdiction reviews, advisory opinions, and technology monitoring. The Department maintains the USML such that it comprises those defense articles or defense services that provide a critical military or intelligence advantage. The Department, informed by consultations with its interagency partners, and with the concurrence of the Department of Defense, has determined that those articles and services this rule removes from the USML no longer warrant ITAR control.

USML Category XX(a)(10) describes certain vessels with a gross weight rating exceeding 3,000 pounds that are designed to operate without human interaction for longer than 24 hours or for more than 70 nautical miles. The license exemption at ITAR § 126.9(u) authorizes certain transfers of vessels described in USML Category XX(a)(10).

The Department, with the concurrence of the Department of Defense, now assesses that vessels described in USML Category XX(a)(10) with a gross weight rating up to 8,000 pounds only provide a critical military or intelligence advantage when they are described elsewhere on the USML or when they are specially designed to possess certain navigation capabilities. Based on this assessment, the Department is revising paragraph (a)(10) to continue describing vessels at or under 8,000 pounds only if they are specially designed to have navigation capabilities beyond the ability to (1) follow fixed waypoints and (2) perform collision avoidance maneuvers that adhere to the see-and-avoid principles of navigation regulations. The Department is also revising paragraph (a)(10) to use the term “specially designed,” which is defined in § 120.41, to improve the clarity of the control text. The Department is also adding a new paragraph (a)(11) and moving vessels

with a gross weight rating exceeding 8,000 pounds that are specially designed to operate without human interaction for longer than 24 hours or for more than 70 nautical miles, to paragraph (11) from the current paragraph (10). This rule does not modify the license exemption at § 126.9(u); the provisions in that exemption remain available for vessels described in USML Category XX(a)(10). The Department also makes conforming changes to paragraph (a)(9) in this rule. The Department also notes its intent to review the ITAR controls on autonomous capabilities, including the maritime navigation systems described in USML Category VI.

Request for Comments

Specific Comments Requested

The Department encourages the public to provide comments related to this rule, as well as comments specifically responsive to the questions described in this section. To facilitate timely review and assessment, comments should be provided in a concise sentence or paragraph, followed by supporting explanatory paragraphs and examples, with each distinct comment treated separately as opposed to multiple comments in one paragraph or section. The Department encourages commenters to include supporting facts, research, and evidence in their comments. When doing so, commenters are encouraged to provide citations to any published materials referenced.

1. Are there other navigation capabilities the Department should consider in order to refine the updated navigation system criteria in the new USML Category XX(a)(10)?

2. Section § 126.9 includes a licensing exemption for certain activities using UAVs described in USML Category XX(a)(10).

a. What challenges, if any, have operators of vessels described in the new USML Category XX(a)(10) encountered in using the exemption? How could the Department revise the exemption to mitigate those challenges while continuing to protect U.S. national security interests?

b. Are there additional activities the Department should consider adding to the list of authorized purposes in § 126.9(u)(2)(iii)?

Comment Submission Instructions

Include the Regulatory Information Number (RIN) (1400–AG35) for all submissions related to this rule and follow the submission instructions contained in the **ADDRESSES** section above. Parties who wish to comment

anonymously may do so by submitting their comments via www.regulations.gov, leaving the fields that would identify the commenter blank and including no identifying information in the comment itself. Commenters are cautioned not to include proprietary, export-controlled, personal, or other sensitive information in their comments that they would not want to be made public. If such information would provide useful insight to the comment: (1) assemble that information in a separate document with relevant markings; (2) include “[Proprietary] supplement on file with: [provide POC]” as the first line in the body of the email submission; (3) submit the public portion of the comment via email; and (4) call DDTC at (202) 663–1282 to coordinate submission of the proprietary supplement.

Regulatory Analysis and Notices

Administrative Procedure Act

This rulemaking is exempt from the rulemaking requirements of the Administrative Procedure Act (APA) pursuant to 5 U.S.C. 553(a)(1) as it involves a military or foreign affairs function of the United States. Nevertheless, and without prejudice to this determination, the Department seeks public comments in this rule.

Regulatory Flexibility Act

Since this rule is exempt from the notice-and-comment rulemaking provisions of 5 U.S.C. 553, it does not require analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This rulemaking does not involve a mandate that will 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 are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

The Office of Information and Regulatory Affairs has found that this rule is not a major rule under the criteria of 5 U.S.C. 804(2).

Executive Orders 12372 and 13132

This rulemaking does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372

regarding intergovernmental consultation on Federal programs and activities do not apply to this rulemaking.

Executive Orders 12866 and 13563

Executive Order 12866, as supplemented and affirmed by Executive Order 13563, 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, distributed impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. After review by the Office of Management and Budget (OMB), this rule has been deemed to be a “significant regulatory action” under section 3(f) of Executive Order 12866.

This rule was undertaken pursuant to a statutory directive to periodically review the items on the USML. The Department generally determines which items warrant addition to, or removal from, the USML by assessing whether each provides a critical military or intelligence advantage based on national security and foreign policy considerations. Because the costs and benefits of changing what is controlled focus on the effect or utility of the item or service, rather than its market prevalence or economic value, quantitative analyses cannot be usefully estimated and are not available, particularly since the global prevalence or availability of the item or service are not known. Qualitatively, the rule was assessed for costs and benefits. These revisions are also informed by confidential requests for commodity jurisdiction determinations and advisory opinions, submitted by industry. The Department takes into account common questions and strives to streamline and simplify USML paragraphs based on how it understands industry experience with certain parts of the USML.

This rule removes the designation of certain defense articles by revising USML Category XX(a). Vessels removed from the scope of USML Category XX(a)(10), that are not described elsewhere on the USML, will become subject to the EAR. This action reduces the regulatory requirements associated with the removed vessels. The Department assesses the vessels removed by this rule do not warrant control under the ITAR. The Department assesses the benefits of this

rulemaking outweigh any costs, that modifying the USML in this manner is the most cost-effective method to achieve the Department’s regulatory objectives on this matter, and that doing so will result in a net reduction of the burden on the regulated community.

The alternative to this rule was inaction or delay. The Department could have waited to amend larger parts of the USML at once or continued to gather data to evaluate the controls affected by this rule. These alternatives were rejected. Statutory requirements, including section 38(f) of the Arms Export Control Act (22 U.S.C. 2778(f)), and section 1345 of the National Defense Authorization Act for Fiscal Year 2024, require a periodic review of the USML for edits like those made by this rule. While the Department continuously reviews the entire USML, it aims to implement most revisions through rules that are focused on specific items or subsets of the USML.

Executive Order 14192

This rule is exempt from Executive Order 14192 as it is a regulation issued with respect to a foreign affairs or national security function of the United States.

Executive Order 12988

The Department of State has reviewed this rulemaking in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rulemaking.

Paperwork Reduction Act

This rulemaking does not impose or revise any information collections subject to 44 U.S.C. chapter 35.

List of Subjects in 22 CFR Part 121

Arms and munitions, Classified information, Exports.

For the reasons set forth in the preamble, the Department of State amends 22 CFR part 121, the United States Munitions List, as follows:

PART 121—THE UNITED STATES MUNITIONS LIST

■ 1. The authority citation for part 121 continues to read as follows:

Authority: 22 U.S.C. 2752, 2778, 2797; 22 U.S.C. 2651a; Sec. 1514, Pub. L. 105–261, 112 Stat. 2175; E.O. 13637, 78 FR 16129, 3 CFR, 2013 Comp., p. 223.

■ 2. Amend § 121.1, in Category XX, by revising paragraphs (a)(9) and (10), adding note 1 to paragraph (a)(10)(ii), and adding paragraph (a)(11), to read as follows:

§ 121.1 The United States Munitions List.

* * * * *

Category XX—Submersible Vessels and Related Articles

(a) * * *
* * * * *

(9) Uncrewed, untethered vessels that have an anti-recovery (e.g., scuttle or self-destruct) feature;

(10) Uncrewed, untethered vessels with a gross weight rating exceeding three thousand pounds (3,000 lb) and not exceeding eight thousand pounds (8,000 lb), specially designed to both:

(i) Operate without human interaction for longer than 24 hours or for more than seventy nautical miles (70 nmi); and

(ii) Have capabilities for deviating from, determining, or planning a navigation route, other than: activating and following pre-planned routes using fixed waypoints, station-keeping, or performing collision avoidance maneuvers that adhere to the see-and-avoid principles of navigation regulations; or

Note 1 to paragraph (a)(10)(ii): An example of “see-and-avoid principles of navigation regulations” are those that implement relevant sections of the International Regulations for Preventing Collisions at Sea (COLREGs) such as Rules 5 (look-out), 8 (action to avoid collision), and 13 through 18 (various actions and responsibilities between vessels).

(11) Uncrewed, untethered vessels with a gross weight rating exceeding eight thousand pounds (8,000 lb), specially designed to operate without human interaction for longer than 24 hours or for more than seventy nautical miles (70 nmi).

* * * * *

Thomas G. DiNanno,

Under Secretary for Arms Control and International Security, Department of State.

[FR Doc. 2026–19211 Filed 9–17–26; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF HOMELAND SECURITY

48 CFR Parts 3025 and 3052

[Docket No. DHS–2024–0020]

RIN 1601–AB15

Homeland Security Acquisition Regulation, Make Personal Protective Equipment in America Act Restrictions on Foreign Acquisition (HSAR Case 2024–003)

AGENCY: Office of the Chief Procurement Officer (OCPO), Department of Homeland Security (DHS).

ACTION: Final rule.

SUMMARY: DHS is issuing a final rule to amend the Homeland Security Acquisition Regulation (HSAR) codifying how DHS complies with the requirements of the Make Personal Protective Equipment (PPE) in America Act. These changes are intended to ensure the sustainment and expansion of domestic manufacturing for certain types of PPE critical to the United States' national response to a public health crisis.

DATES: The final rule is effective October 19, 2026.

FOR FURTHER INFORMATION CONTACT: Shaundra Ford, Department of Homeland Security, Office of the Chief Procurement Officer, Acquisition Policy and Legislation, at (202) 282–8000 or email at HSAR@hq.dhs.gov. Include HSAR Case 2024–003 in the subject line.

SUPPLEMENTARY INFORMATION:

Table of Contents for Preamble

- I. Background
- II. Discussion of Public Comments
- III. Final Rule
- IV. Regulatory Analyses
 - A. Executive Orders 12866, 13563, and 14094
 - B. Regulatory Flexibility Act
 - C. Paperwork Reduction Act
 - D. National Environmental Policy Act

I. Background

In a Notice of Proposed Rulemaking (NPRM), published in the **Federal Register** on October 1, 2024, the Department of Homeland Security (DHS) proposed to amend the Homeland Security Acquisition Regulation (HSAR) to codify how DHS complies with the requirements of the Make Personal Protective Equipment (PPE) in America Act.¹

¹ See 89 FR 79851, Homeland Security Acquisition Regulation, Make Personal Protective Equipment in America Act Restrictions on Foreign Acquisition (HSAR Case 2024–003) (Oct. 1, 2024).

As explained in the NPRM, the Infrastructure Investment and Jobs Act was signed into law on November 15, 2021.² Subtitle C of title IX of Division G of the Infrastructure Investment and Jobs Act is the Make PPE in America Act (“MPAA” or “the Act”).³ The Act requires the DHS, Department of Veterans Affairs (VA), and the U.S. Department of Health and Human Services (HHS) to take certain actions to ensure the sustainment and expansion of domestic manufacturing for certain types of PPE critical to the United States' national response to a public health crisis.⁴

The Act defines PPE as surgical masks, respirator masks and powered air purifying respirators and required filters, face shields and protective eyewear, gloves, disposable and reusable surgical and isolation gowns, head and foot coverings, and other gear or clothing used to protect an individual from the transmission of disease.⁵ The Act requires that any contracts for the procurement of PPE entered into by DHS, HHS, or VA be for PPE, including the materials and components thereof, that is domestically grown, reprocessed, reused, or produced.⁶ The Act also requires that these contracts with DHS, HHS, or VA for PPE last at least two years in duration plus all option periods necessary, to incentivize investment in the domestic production of PPE and the materials and components thereof.⁷ The Act allows for alternatives to domestic production under certain conditions (*i.e.*, where PPE assembled outside of the United States (U.S.) contains only materials and components grown, reprocessed, reused or produced in the U.S.).⁸ When using alternatives to domestic production, DHS, HHS, or VA, as applicable, must certify every 120 days that alternatives to domestic production are necessary to procure PPE due to the immediate needs of a public health emergency.⁹ The Act further recognizes certain exceptions to the domestic production of PPE, such as due to nonavailability, or where the PPE cannot be procured at U.S. market prices.¹⁰ Where DHS, HHS, or VA respectively grants an exception, that

² Infrastructure Investment and Jobs Act, Public Law 117–58, 135 Stat. 429 (2021).

³ Make PPE in America Act, Public Law 117–58, div. G, title IX, subtitle C, sections 70951–70953, 135 Stat. 1312–1316. The Make PPE in America Act is codified in 41 U.S.C. 8301 note.

⁴ Public Law 117–58, 135 Stat. 1312.

⁵ Public Law 117–58, 135 Stat. 1313.

⁶ Public Law 117–58, 135 Stat. 1313–14.

⁷ Public Law 117–58, 135 Stat. 1314.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

Secretary would also need to certify that implementing these exceptions are necessary to meet the immediate needs of a public health emergency.¹¹

As discussed in the NPRM, the DHS Chief Procurement Officer can issue HSAR deviations when necessary to allow Components to deviate from the HSAR.¹² On October 17, 2022, DHS issued a deviation regarding how DHS would comply with the Make PPE in America Act requirements (Deviation 23–01).¹³

II. Discussion of Public Comments

Interested parties were given until December 2, 2024, to comment on the NPRM. DHS reviewed the public comments in the development of the final rule. DHS received 23 public comments. A certain number of the comments received were outside the scope of the rule. A discussion of the comments within the scope of the rule is provided, as follows:

1. Definitions

Comment: Several commenters asked DHS to modify its definition of “component,” “domestic personal protective equipment,” “foreign-assembled domestic personal protective equipment,” and “foreign personal protective equipment.” Commenters suggested including the availability exception in the Act for nonavailable articles listed in FAR 25.104(a) to these definitions and, for the “foreign-assembled domestic personal protective equipment,” and “foreign personal protective equipment” definitions, limiting the applicability of FAR 25.104(a) to components used in American manufacturing facilities.

Commenters noted the MPAA includes a nonavailability exception that permits agencies to acquire covered PPE from foreign sources when compliant domestic products are not available in sufficient quantity or quality to meet agency requirements or are included in the nonavailable articles listing in FAR 25.104(a). The commenters further stated that nitrile butadiene rubber (NBR), a key raw material used to manufacture nitrile gloves, is a synthetic latex rubber and therefore falls within definition of “rubber, crude, and latex” which is currently identified as nonavailable in the listing. The commenters assert that

¹¹ *Id.*

¹² See HSAR Deviations, available at: <https://www.dhs.gov/publication/current-hsar-deviations>.

¹³ See HSAR 3001.4 and HSAR Class Deviation 23–01 Implementation of the Make PPE in America Act at <https://www.dhs.gov/sites/default/files/2022-10/HSARClassDeviation23-01ImplementationofMakePPEinAmericaAct-508Final.pdf>.

inclusion of an express reference to FAR 25.104(a) in the “component” definition will limit waivers from the Act’s requirements that allow DHS to acquire foreign-sourced nitrile gloves.

Additionally, the commenters stated that the existing definitions of “foreign-assembled domestic personal protective equipment,” and “foreign personal protective equipment” circumvent the intent of the Act, allowing for the offshore of manufactured items to be identified as domestic and providing foreign manufacturers an advantage over American manufacturers.

Response: DHS declines to adopt the commenters’ suggestions to revise the definitions to incorporate FAR 25.104(a); to otherwise address the domestic nonavailability status of NBR; and to include language limiting the applicability of FAR 25.104(a) to components used in American manufacturing facilities.

First, the nonavailable articles list at FAR 25.104(a) is subject to periodic review and amendment. Incorporating specific references to articles identified as nonavailable under FAR 25.104(a) into the HSAR could create inconsistencies if future revisions are made to the FAR. DHS therefore believes it is more appropriate to rely on the existing statutory and regulatory framework rather than codify specific nonavailability determinations in the HSAR.

Second, DHS disagrees with the commenters’ assertion that the nonavailability exception in section 70953(d) of the MPAA applies only to domestic manufacturing facilities. Section 70953(d)(1) expressly provides that the requirements of sections (b) and (c) do not apply to an item of personal protective equipment, or component or material thereof, that is, or that includes, a material listed in FAR 25.104. Accordingly, the statute expressly contemplates application of the nonavailability exception to covered PPE, components, and materials, including those acquired under the alternative domestic production authority. Limiting the exception as suggested would be inconsistent with the plain language of the Act.

Third, DHS does not believe that revisions to the definitions are necessary to address NBR nonavailability under the Act. Since implementing the MPAA in October 2022, DHS has relied on nonavailability waivers to acquire nitrile gloves for a variety of reasons, including limited domestic manufacturing capacity to meet DHS specifications and quantity requirements; limited availability of domestic nitrile gloves capable of

successfully passing Transportation Security Administration (TSA) testing requirements; and the lack of domestic production of NBR. Prior to January 2026, DHS sourced nitrile gloves from both domestic and foreign manufacturers. However, as domestic manufacturing capacity expanded, DHS transitioned to sourcing all nitrile glove requirements from domestic manufacturers.¹⁴ Although domestic manufacturers continue to rely on foreign-sourced NBR due to the current absence of domestic NBR production, DHS has demonstrated that it can achieve its domestic sourcing objectives without modifying the definitions as suggested.

Moreover, whether NBR may be categorized as “rubber, crude, and latex” under FAR 25.104(a) is not dispositive for the purposes of this rule. Because NBR is not currently produced domestically, agencies acquiring covered PPE that contains NBR have historically relied on the MPAA’s nonavailability exception and associated waiver processes to support the domestic nonavailability status of NBR. DHS therefore does not believe revising the definitions is necessary to address the domestic nonavailability of NBR. Accordingly, DHS declines to incorporate specific references to FAR 25.104(a) or NBR in the regulatory definition of “component.”

2. Expand “Restrictions” Section To Include Additional Language

Comment: Multiple commenters requested that DHS revise HSAR 3025.7102–1, Restrictions, to emphasize that the MPAA prioritizes PPE manufactured in the U.S. by American workers. These commenters also recommended narrowing the application of waivers and exceptions to ensure DHS gives preference to wholly domestic PPE supply chains and manufacturing facilities. The commenters assert that DHS’s proposed implementation of the MPAA relies too heavily on broad waivers and exceptions, which could undermine the Act’s purpose of strengthening domestic PPE manufacturing.

The commenters argued that continued reliance on foreign-manufactured gloves and reseller-based supply chains discourages private investment in U.S. manufacturing capacity, weakens domestic supply chain resilience, and places American jobs at a competitive disadvantage. The

commenters requested that DHS include new paragraphs (c) and (d) to the restrictions listed in 3025.7102–1 as follows: “(c) The intent of the law and priority is given to American Manufacturers of domestic personal protective equipment to include narrow waivers focused on United States based manufacturing facilities and exceptions identified herein to promote national security, support American manufacturing facilities in the United States, and American workers in an effort to reshore and sustain critical American manufacturing capability in the United States. (d) All contract for personal protective equipment, per the purpose of the, as identified in Section 70951 of the Make PPE in America Act which purpose is for the United States to ensure a robust, secure, and wholly domestic PPE supply chain to safeguard public health and national security; to further this effort it provides DHS with flexibility on procurement sources as it does not incorporate any requirement to use a quasi-government mandatory source and thus DHS will use Small Business Sources and encourage our contracting officer to actively seek out and consider small businesses for contracts and American based manufacturing facilities that can manufacture in the United States as priority options.”

Finally, some commenters contended that the Act’s requirements should apply to “quasi-governmental” procurement programs and recommended DHS exhaust domestic manufacturing sources before relying on resellers or nonmanufacturer arrangements.

Response: DHS declines to add the suggested language to the regulatory text in section 3025.7102–1. It is unnecessary to include the purpose and intent of the statute and intent of the law in the regulatory text as the regulations do not change this. Such language may also cause confusion as similar language is not typically included in acquisition regulations.

DHS also disagrees with the commenters’ characterization of DHS’s use of waivers and exceptions under the MPAA. The Act expressly contemplates the use of exceptions and waivers in specified circumstances, including when compliant domestic products, components, or materials are unavailable. Accordingly, DHS’s use of waivers is consistent with the MPAA which provides for exceptions where domestic industrial capacity is not sufficient to meet agency requirements.

DHS further notes that the MPAA establishes domestic sourcing requirements for covered PPE but does

¹⁴ See, e.g., DHS waiver for nitrile butadiene rubber available at <https://www.madeinamerica.gov/waivers/nonavailability/6994cfd16e70851109b4247> (last visited Sep. 8, 2026).

not create separate procurement preferences based on workforce composition, ownership structure, or the nationality of a manufacturer's employees. Therefore, DHS declines to adopt the commenters' proposed references to "American workers" and "American manufacturers" in the regulatory text.

Finally, DHS declines to adopt the commenters' recommendation that contracting officers be required to exhaust domestic manufacturers before considering authorized distributors, resellers, or other permissible acquisition channels. The MPAA establishes sourcing requirements for covered PPE but does not prescribe particular distribution channels or acquisition methodologies. Accordingly, DHS does not believe such a requirement would be appropriate for inclusion in the HSAR. Such inclusion could inadvertently result in noncompliance with statutes governing competition in contracts which do not allow blanket preference of manufacturers over distributors and resellers.

To the extent the commenters' references to "quasi-government" agency program contracts are directed at the AbilityOne Program and Procurement List requirements applicable to nitrile gloves, DHS notes that the AbilityOne Program operates pursuant to the Javits-Wagner-O'Day (JWOD) Act, codified at 41 U.S.C. chapter 85, which establishes a mandatory source program for certain products and services furnished by qualified nonprofit agencies employing people who are blind or have significant disabilities. The Committee for Purchase From People Who Are Blind or Severely Disabled (operating as the AbilityOne Commission) administers the program and maintains the Procurement List, accessible at www.abilityone.gov, identifying mandatory source products and services. Federal agencies are generally required to procure listed items through the designated AbilityOne nonprofit agency (NPA) or its authorized distribution channels in accordance with FAR subpart 8.7 Acquisition from Nonprofit Agencies Employing People Who Are Blind or Severely Disabled of the Federal Acquisition Regulation. Accordingly, DHS is required to buy Procurement List¹⁵ products or services from the organization designated on the Procurement List or from an authorized AbilityOne distributor until: (1) the

government no longer has requirements for that item, or (2) an NPA employing people who are blind or have significant disabilities can no longer furnish that item. This requirement remains unchanged by the MPAA.

It appears some commenters incorrectly believe DHS is using the fact that nitrile gloves are a Procurement List item to circumvent the requirements of the MPAA. Upon implementation of the Act, DHS immediately extended the requirements of the MPAA to nitrile glove purchases from AbilityOne. DHS's reliance on waivers to acquire nitrile gloves had nothing to do with the fact that these items are sourced through AbilityOne. DHS used waivers to acquire nitrile gloves for a variety of reasons, including limited domestic manufacturing capacity to meet DHS specifications and quantity requirements, limited availability of domestic nitrile gloves capable of successfully passing TSA testing requirements, and the lack of domestic production of NBR. Prior to January 2026, DHS sourced nitrile gloves from both domestic and foreign manufacturers. However, as domestic manufacturing capacity expanded, DHS transitioned to sourcing all nitrile glove requirements from domestic manufacturers. The transition to sourcing 100 percent of DHS's nitrile gloves to domestic manufacturers is largely attributable to the partnership between DHS and our AbilityOne NPA. Accordingly, DHS declines to adopt the suggestion as it is not needed to achieve its domestic sourcing objectives.

3. Exceptions Language

Comment: Several commenters asserted that section 70953(d)(1)(A) of the MPAA expressly incorporates the nonavailability determinations contained in FAR 25.104(a) and therefore excludes covered PPE component and materials identified on that list from the Act's domestic sourcing requirements. The commenters argued that DHS should revise HSAR 3025.7102–2 to clarify that materials such as NBR are automatically exempt from the Act when used in PPE manufactured in the United States and that no additional nonavailability determination or waiver should be required.

Response: DHS declines the commenters' request to modify section 3025.7102–2 to include reference to FAR 25.104 or otherwise address the domestic nonavailability status of NBR. The nonavailable articles list at FAR 25.104 is subject to periodic review and amendment. Incorporating specific references to articles identified as

nonavailable under FAR 25.104 into the HSAR could create inconsistencies if future revisions are made to the FAR. DHS therefore believes it is more appropriate to rely on the existing statutory and regulatory framework rather than codify specific nonavailability determinations in the HSAR. DHS also disagrees with the commenters' assertion that the inclusion of a material, component, or supply on the FAR 25.104 nonavailability list automatically eliminates the need for agencies to comply with the Act's exception procedures. While section 70953(d)(1)(A) references articles, materials, and supplies identified in FAR 25.104, DHS does not believe it is necessary or appropriate to incorporate those determinations directly into HSAR. The existing statutory and regulatory framework provides sufficient flexibility to address nonavailable materials and components without creating separate regulatory provisions for specific items in FAR 25.104. Additionally, because NBR is not currently produced domestically, agencies acquiring covered PPE that contains NBR have historically relied on the MPAA's nonavailability exception and associated waiver processes to address the lack of a domestic source. DHS therefore does not believe inclusion of the requested language is necessary to address the current domestic nonavailability of NBR.

4. HSAR 3052.225–7X Make PPE in America

Comment: Multiple commenters requested DHS revise 3025.7102–2(b) to clarify treatment of components and materials identified as nonavailable under FAR 25.104. The commenters' asserted that PPE manufactured in the United States should remain compliant with the MPAA when it contains components or materials listed in FAR 25.104, including NBR. The commenters also proposed revising the paragraph to expressly recognize component-specific waivers and nonavailability determinations when evaluating compliance with the Act's domestic sourcing requirements as follows: "(b) The Contractor shall deliver only domestic personal protective equipment except the domestic manufactured products include component items except under the FAR 25.104 or the agency provides a specific component waiver for domestic manufactured personal protective equipment or to the extent that it specified delivery of foreign-assembled domestic personal protective equipment in the provision of the solicitation entitled "Make PPE in America Certificate."

¹⁵ See 41 U.S.C. chapter 85, FAR subpart 8.7, and the Procurement List at https://www.abilityone.gov/procurement_list/index.html.

Response: Although the commenter cited HSAR 3025.7102–2(b), DHS understands the comment as requesting revisions to the clause at HSAR 3052.225–7X based on the proposed clause language provided. Notwithstanding this, DHS declines to make this change to the clause. The regulatory text at 3025.7102–2 makes clear the applicability of the exception at FAR 25.104. Therefore, including a reference to the nonavailable articles listing in FAR 25.104 in the clause text is unnecessary and redundant.

DHS also declines to incorporate references to specific nonavailable materials, component-specific waivers, or component-level nonavailability determinations into the clause. The purpose of the clause is to implement the contractor's obligation to provide covered PPE that complies with statutory and regulatory requirements applicable to the acquisition. The clause is not intended to restate all exceptions, waiver authorities, and nonavailability determination that may apply under the Act or related regulations. Those matters are addressed elsewhere in the statutory and regulatory framework, including HSAR 3025.7102–2. Accordingly, DHS believes the existing clause adequately implements the Act without the proposed revisions.

5. AbilityOne and Similar Network Providers

Comment: One commenter requested creation of a specific category to clarify the status of PPE repackaging operations under programs like AbilityOne, ensuring transparency and alignment with domestic manufacturing priorities. The commenter asserts this refinement would ensure alignment with industry practices and the intent of the Act.

The commenter also recommended DHS explicitly address AbilityOne exceptions within the order of precedence framework, stating that the Department's current model allows for foreign-produced PPE to receive preference through AbilityOne repackaging operations, undermining the intent of the MPAA. The commenter further stated this is particularly relevant for nitrile gloves, where certain providers import bulk products from Malaysia for domestic repackaging. To prevent this from happening, the commenter stated waiver usage should be narrowly tailored to support U.S. manufacturers utilizing TAA-compliant components rather than allowing broad allowances that benefit foreign producers.

Response: DHS declines the commenter's recommendation to create a specific category for repackaging

operations under programs like AbilityOne. DHS also declines to explicitly identify AbilityOne in the order of preference framework and disagrees that the current model allows for foreign-produced PPE to receive preference through AbilityOne repackaging operations.

The AbilityOne Program operates pursuant to the JWOD Act, codified at 41 U.S.C. chapter 85, which establishes a mandatory source program for certain products and services furnished by qualified nonprofit agencies employing people who are blind or have significant disabilities. The Committee for Purchase From People Who Are Blind or Severely Disabled (operating as the AbilityOne Commission) administers the program and maintains the Procurement List, accessible at www.abilityone.gov, identifying mandatory source products and services. Federal agencies are generally required to procure listed items through the designated AbilityOne NPA or its authorized distribution channels in accordance with FAR subpart 8.7 Acquisition from Nonprofit Agencies Employing People Who Are Blind or Severely Disabled of the Federal Acquisition Regulation.

Nitrile gloves are a Procurement List item for the Department. DHS is required to buy Procurement List products or services from the organization designated on the Procurement List or from an authorized AbilityOne distributor until: (1) the government no longer has requirements for that item, or (2) an NPA employing people who are blind or have significant disabilities can no longer furnish that item. This requirement remains unchanged by the MPAA.

As previously stated, it appears some commenters incorrectly believe DHS is using the fact that nitrile gloves are a Procurement List item to circumvent the requirements of the MPAA. Upon implementation of the Act, DHS immediately extended the requirements of the MPAA to nitrile glove purchases from AbilityOne. DHS's reliance on waivers to acquire nitrile gloves was unrelated to the items being sourced through AbilityOne. DHS used waivers to acquire nitrile gloves for a variety of reasons, including limited domestic manufacturing capacity to meet DHS specifications and quantity requirements, limited availability of domestic nitrile gloves capable of successfully passing TSA testing requirements, and the lack of domestic production of NBR. Prior to January 2026, DHS sourced nitrile gloves from both domestic and foreign manufacturers. However, as domestic manufacturing capacity expanded, DHS

transitioned to sourcing all nitrile glove requirements from domestic manufacturers. The transition to sourcing 100 percent of DHS's nitrile gloves to domestic manufacturers is largely attributable to the partnership between DHS and our AbilityOne NPA. Accordingly, DHS declines to adopt the suggestions as they are not needed to achieve its domestic sourcing objectives.

6. Domestic PPE Categories

Comment: One commenter asked DHS to split “domestic personal protective equipment” into two distinct categories, *i.e.*, “wholly domestic PPE” for items manufactured entirely in the United States and “domestically manufactured PPE” for items like nitrile gloves that currently require some imported raw materials. The commenter requested that the “domestically manufactured PPE” category explicitly recognize FAR 25.104(a) exceptions for materials like NBR, allowing sourcing from Trade Agreements Act (TAA)-compliant countries without penalty while maintaining domestic manufacturing status.

Response: DHS declines to create sub-categories for domestic personal protective equipment. For the purposes of the MPAA, PPE is either domestic, foreign-assembled domestic, or foreign. These definitions were established for consistency with the MPAA which requires purchase of domestic PPE and use of alternative domestic sources when domestic PPE is not available. An additional defined category of PPE is not necessary to implement the availability exception regarding FAR 25.104. Notwithstanding this, the nonavailable articles list at FAR 25.104 is subject to periodic review and amendment.

Incorporating specific references to articles identified as nonavailable under FAR 25.104 into the HSAR could create inconsistencies if future revisions are made to the FAR. DHS therefore believes it is more appropriate to rely on the existing statutory and regulatory framework rather than codify specific nonavailability determinations in the HSAR.

7. Exception Criteria for Nonavailability and Unreasonable Cost

Comment: One commenter requested DHS provide additional guidance regarding the applicability of the nonavailability and unreasonable cost exceptions. Specifically, the commenter recommended: (1) establishing objective quality standards and qualification benchmarks for evaluating nonavailability determinations; (2) adopting defined methodologies and

thresholds for determining when costs are unreasonable, including consideration of total cost of ownership and reliability factors; and (3) clarifying materials and components identified as nonavailable under FAR 25.104, including NBR, are exempt from the Act's domestic sourcing requirements when incorporated into PPE manufactured in the United States.

Response: DHS declines the commenter's recommendation to identify specific quality standards under the exception criteria for nonavailability and unreasonable cost. First, the MPAA provides explicit instruction on the use of the nonavailability exception. Second, DHS does not perform subjective quality assessments and instead relies on established PPE specifications. DHS PPE specifications are based on standards promulgated by either the American National Standards Institute (ANSI), American Society for Testing and Materials (ASTM), or National Institute for Occupational Safety and Health (NIOSH), and regarding nitrile gloves, TSA-specific testing for interference with explosives detection equipment/machines before use. DHS specifications for PPE have been shared with industry multiple times via industry meetings and postings to *SAM.gov*. As such, it is clear DHS does not rely on subjective quality standards.

Regarding identification of a specific methodology for determining whether an item is being provided at an unreasonable cost, DHS declines the commenter's recommendation. DHS intentionally refrained from identifying a specific calculation methodology to allow more flexibility for DHS and to minimize unfavorable impacts to industry. This flexibility is needed due to fluctuating market conditions that could result in the use of unreasonable cost determinations too frequently. Additionally, given DHS acquires these items on a firm fixed price basis, we would not review the individual cost elements associated with the final price of the item. Notwithstanding this, to date DHS has not used the unreasonable cost exception to acquire personal protective equipment covered under this rulemaking.

DHS declines to further identify that the requirements of the MPAA do not apply to PPE, or a component or material thereof, that is or includes a material on the nonavailable articles listing in FAR 25.104(a) or limit the applicability of the exception to U.S.-based manufacturing facilities. The nonavailability exception is already addressed in the regulatory text. Specifically, section 3025.7102-2(b)(1)

states that the purchase restrictions of the MPAA do not apply to PPE, or component thereof, "that is, or that includes, a material listed in FAR 25.104 as one for which a nonavailability determination has been made." Accordingly, DHS concludes the proposed revisions are unnecessary because the existing regulatory text already implements the statutory nonavailability exception and appropriately addresses materials identified in FAR 25.104.

8. Implementation Timeline

Comment: One commenter stated that the proposed implementation timeline appears workable provided DHS maintains clear communication with industry and allows reasonable adjustment periods for manufacturers to scale production. The commenter recommended: (1) a phased approach to domestic content requirements, particularly for items requiring development of domestic raw material sources; (2) ongoing engagement with manufacturers to address implementation challenges and refine guidance as needed; and (3) clear instructions regarding certification and compliance documentation to minimize administrative burdens.

Response: DHS appreciates the commenter's support for the proposed implementation timeline and agrees that continued communication with industry and clear compliance guidance are important to successful implementation of the Act. The MPAA directs agencies to implement the contract requirements beginning 90 days after the enactment of the Act. Accordingly, DHS lacks authority to phase in domestic sourcing requirements beyond the implementation framework established by Congress. As such, a phased approach to domestic content requirements is not possible. However, the Act authorizes the use of exceptions and waivers when covered PPE is unavailable from domestic sources or available only at an unreasonable cost, providing flexibility where domestic industrial capacity cannot meet requirements.

DHS has established forums for ongoing engagement with industry on a variety of procurement topics, including the MPAA. Additionally, DHS waivers under the MPAA are publicly posted at *MadeinAmerica.gov*. DHS intends to continue engaging with industry and other stakeholders regarding implementation of the Act and related acquisition requirements.

The provision at 3052.225-7Y Make PPE in America Certificate clearly

articulates how contractors must certify compliance with MPAA requirements, including requesting identification of the line item for the covered PPE item(s) identifies and the country of assembly. DHS believes the existing certification provision, together with publicly available solicitation and contract documentation, provides sufficient guidance regarding compliance with the Act and does not require further revision as part of this rulemaking.

9. Tiered Sourcing Hierarchy

Comment: One commenter urged DHS to adopt a tiered sourcing hierarchy that prioritizes domestic PPE manufacturing to the greatest extent possible before allowing waivers under the MPAA. Specifically the commenter recommends DHS: (1) give first priority to PPE manufactured in the United States using domestically sourced components; (2) allow U.S.-manufactured PPE using TAA-country components when required components are not available domestically, without requiring a waiver; (3) allow U.S.-manufactured PPE using non-TAA foreign components when domestic or TAA-sourced components are unavailable, without requiring a waiver; (4) permit waivers for foreign-manufactured PPE from TAA countries only after domestic manufacturing options have been exhausted; and (5) permit waivers for non-TAA foreign-manufactured PPE only as a last resort when no domestic or TAA-country sources are available. The commenter argues this approach would better advance the MPAA's objective of strengthening domestic PPE manufacturing by prioritizing U.S.-based production and employment while recognizing the practical reality that certain components, such as NBR, may not be available from domestic sources.

Response: DHS declines to adopt the commenter's proposed restrictions on when a waiver may be used or establish the proposed sourcing hierarchy. The circumstances under which an exception may be used are defined in the MPAA. The Act requires agencies to prioritize the acquisition of covered PPE manufactured in the United States and authorizes the use of exceptions when covered PPE is unavailable or available only at an unreasonable cost. Nothing in the Act directs agencies to create additional tiers of preference among otherwise permissible sources or exhaust particular categories of suppliers before relying on a statutory exception.

DHS has nevertheless taken an additional step beyond the requirements

of the MPAA by requiring procurement of either Buy American statute compliant or TAA-compliant PPE, depending on the dollar value of the procurement, when MPAA compliant PPE is not available. This approach ensures domestically manufactured PPE receives first consideration and that Buy American statute compliant or TAA-compliant PPE is acquired when MPAA compliant PPE cannot be obtained due to nonavailability or unreasonable cost.

DHS also declines to adopt the proposed hierarchy because it does not account for all circumstances in which the Act authorizes use of an exception, including situations involving either nonavailability or unreasonable cost. Further, the proposed hierarchy does not account for agency-specific performance requirements that may affect the availability of compliant PPE, such as the TSA testing requirements applicable to nitrile gloves.

Notwithstanding this, DHS has only used the nonavailability exception when sourcing nitrile gloves and only when necessary to meet mission requirements. To date, DHS has relied on the nonavailability exception to cover a portion of DHS's nitrile glove demand. Prior to January 2026, DHS sourced nitrile gloves from both domestic and foreign manufacturers. However, as domestic manufacturing capacity expanded, DHS transitioned to sourcing all nitrile glove requirements from domestic manufacturers.

Accordingly, DHS declines to adopt the proposed sourcing hierarchy and believes the final rule appropriately implements the statutory framework established by Congress while preserving the flexibility necessary to address nonavailability, unreasonable cost, agency mission requirements, and changing market conditions.

10. Prioritization

Comment: One commenter asked DHS to prioritize American-made products in government procurement decisions and carefully consider prioritizing products fully manufactured in the United States, but that might use certain raw materials unavailable domestically, from Trade Act compliant nations.

Response: DHS already prioritizes wholly domestically manufactured PPE. When these items are not available, either due to nonavailability or unreasonable cost, DHS seeks to acquire either a Buy American statute compliant or TAA-compliant item.

11. Out of Scope

Comment: Some commenters requested that DHS revise the regulatory text to encourage contracting officers to

seek out domestic manufacturers, including small businesses, when acquiring covered PPE.

Response: These suggestions are beyond the scope of this rule. This rule is about implementing the MPAA. The MPAA does not include provisions regarding small business participation and the NPRM did not propose requirements involving small business participation.

III. Final Rule

This final rule amends the HSAR at 48 CFR part 3025, Foreign Acquisition, and at 48 CFR part 3052, Solicitation Provisions and Contract Clauses. The rule adds a new HSAR subpart, an HSAR clause, and an HSAR provision which codifies how DHS complies with the Act. These changes also codify the requirements from Deviation 23–01. Each of these amendments are described in detail in the following paragraphs.

This final rule adds new subpart 3025.71, Make PPE in America Act Restrictions on Foreign Acquisition, to the HSAR, codifying the restrictions in Deviation 23–01 applicable to the acquisition of certain PPE consistent with the Act. These restrictions include minimum time periods for contract duration, content requirements for certain PPE, alternatives to domestic production when conforming PPE is not available, and exceptions when conforming PPE is either nonavailable or cannot be procured at U.S. market prices (or in other words, only available at an unreasonable cost).

This rule also codifies the definitions of terms used in Deviation 23–01.¹⁶ These terms are “component,” “domestic personal protective equipment,” “foreign-assembled domestic personal protective equipment,” “foreign personal protective equipment,” “personal protective equipment,” and “United States.”

Additionally, this rule applies to all types of actions, orders, option exercises, and contracts awarded and administered by DHS. It requires contracting officers to purchase domestic PPE except for when certain exceptions, specified in HSAR 3025.7102–2, apply and also requires that any contract for PPE has a base period of performance of at least two years, plus option periods.

HSAR 3025.7102–2 codifies the conditions under which acquisitions of PPE, or component thereof, are excepted from the requirements of HSAR 3025.7102–1 (*i.e.*, alternatives to domestic production, nonavailability,

and unreasonable cost) consistent with Deviation 23–01.

This final rule further codifies the clauses and provisions that apply when an exception due to nonavailability or unreasonable cost is used, as listed in Deviation 23–01.¹⁷ Additionally, this final rule codifies HSAR 3025.7103, HSAR clause 3052.225–7X, Make PPE in America, and HSAR provision HSAR 3052.225–7Y, Make PPE in America Certificate. The final rule makes a technical edit to consistently use the term “DHS Chief Procurement Officer” where applicable. Otherwise, DHS adopts the NPRM as final, amending 48 CFR part 3025, Foreign Acquisitions, and 48 CFR part 3052, Solicitation Provisions and Contract Clauses.

IV. Regulatory Analyses

A. Executive Orders 12866, 13563, and 14192

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 14192 (Unleashing Prosperity Through Deregulation) directs agencies to significantly reduce the private expenditures required to comply with Federal regulations and provides that “any 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 10 prior regulations.”

The Office of Management and Budget (OMB) has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed this regulatory action. This rule is not an Executive Order 14192 regulatory action because this rule is not significant under Executive Order 12866. *See* OMB Memorandum M–25–20, “Guidance Implementing Section 3 of Executive Order 14192, titled ‘Unleashing Prosperity Through Deregulation’” (Mar. 26, 2025).

Need for the Rule

This final rule codifies the requirements as set forth in the Act and Deviation 23–01. DHS is updating the Homeland Security Acquisition

¹⁶ See 48 CFR 3025.7101.

¹⁷ See 48 CFR 3025.7102–3.

Regulation (HSAR) to align with current DHS practice in Deviation 23–01. This rule provides for consistency between the Act and the HSAR.

Benefits and Costs of the Final Rule

The benefits and costs of a regulation are generally measured against a no-action baseline, which is a reasonable forecast of the way the world would look absent the regulatory action being assessed.¹⁸ As the final rule aligns the regulations with DHS current practice, it does not result in additional costs for the Federal Government. The rule codifies the requirement for contractors to submit a Make PPE in America Certificate, only in the situation when the contractor is proposing foreign-assembled domestic PPE. DHS already included this contractor requirement to certify compliance in Deviation 23–01. Because DHS contractors already comply with Deviation 23–01, they would not incur new costs due to this rule.

However, Deviation 23–01, which is how DHS complies with the requirements of the Act, may cause DHS to incur additional costs in the form of higher prices for domestically produced PPE compared to foreign-produced PPE. Future DHS procurement price differences between domestic and foreign-sourced PPE are difficult to accurately estimate. External factors (outside of the Act's requirement) may influence prices. For example, U.S. Government investments in domestic PPE production could factor into domestic production costs and prices. There is uncertainty on foreign governments investment in foreign PPE production which would impact foreign prices. An analysis of PPE would have to be conducted by type of PPE, such as the domestic and foreign prices of masks, protective eyewear, or gloves. Further, DHS has specific requirements in certain procurements such as gloves (*i.e.*, testing for interference with explosive equipment and protection against Fentanyl exposure) that would need to be considered in any price comparisons.¹⁹ Another factor that would be difficult to address in direct price comparisons is product differences. There are no internationally agreed upon guidelines or standards of what specific products make up PPE

categories, complicating product comparisons.²⁰

Consequently, due to the lack of specific data, complexity of various factors, and uncertainty of external price influences, DHS is not able to estimate the long-run additional DHS cost of an increased shift to domestic PPE procurements due to the requirements of the Act. Importantly, DHS has already complied with the requirements of the Act through Deviation 23–01 and subsequent contract changes.

Congress recognized the need for the United States to have a robust, secure, and wholly domestic PPE supply chain to safeguard public health and national security.²¹ This final rule codifies the statutory requirements that support the sustainment of the U.S. PPE supply chain. This final rule would provide the clarification benefit of consistency and transparency for contractors and DHS contracting officers.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (Mar. 29, 1996), requires Federal agencies engaged in rulemaking to consider the economic impacts of their rules on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people). This final rule will provide clarity and consistency between the HSAR and existing DHS practice as set forth in Deviation 23–01. Contractors currently provide the Make PPE in America Certificate in compliance with Deviation 23–01. The Make PPE in America Certificate is required only if the offeror is proposing foreign-assembled domestic PPE. DHS estimates the contractor burden based on experience from subject matter experts familiar with Deviation 23–01. DHS estimates it will take a contractor 15 minutes to

identify any foreign-assembled domestic PPE items it is offering and complete the Make PPE in America Certificate. DHS assumes an estimated hourly compensation rate of \$57.95 for the time burden.²² The time burden cost per certificate would be \$14.49 (15 minutes × \$57.95).

Based on the estimated cost of \$14.49 per certificate, DHS assumes this cost would not be a significant economic impact on a small entity affected by the final rule. DHS also believes that contractors generally pass along the cost of complying with DHS contracting requirements to DHS. Therefore, DHS certifies under 5 U.S.C. 605(b) that this final rule would not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that DHS consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of 44 U.S.C. 3507(d), obtain approval from the OMB for each collection of information it conducts, sponsors, or requires through regulations. This final rule contains information collection requirements. Accordingly, DHS is updating OMB No. 1600–0005, Solicitation of Proposal Information for Award of Public Contracts.

The collection requirements for this final rule are nominal and based on the new provision, 3052.225–7Y, Make PPE in America Certificate.

Overview of Information Collection

(1) *Type of Information Collection:* Modification to Existing Collection.

(2) *Title of the Form/Collection:* Solicitation of Proposal Information for Award of Public Contracts.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* No form; OCPO.

(4) *Affected public who will be asked or required to respond; as well as a brief abstract:* The affected public is business or other for-profit institutions. DHS needs the information required by provision 3052.225–72 to assess contractor compliance with the Make PPE in America Act. Responses are required for respondents to obtain or retain benefits.

¹⁸ See OMB Circular A–4, p. 15 (September 17, 2003) (accessible at <https://www.whitehouse.gov/wp-content/uploads/2025/08/CircularA-4.pdf>).

¹⁹ DHS, *White Paper: Current State of Personal Protective Equipment Procurement by Make PPE in America Act Covered Agencies*. 3–4 (March 13, 2024).

²⁰ “For example, KN95 respirator masks- China made analogues to domestically regulated N–95 respirators- are generally not authorized as medical PPE in the United States. KN95 are authorized in many countries abroad and received temporary (and limited) Emergency Use Authorization from the [U.S. Food and Drug Administration] FDA.” FDA, *Certain Filtering Facepiece Respirators from China May Not Provide Adequate Respiratory Protection—Letter to Health Care Providers*, October 15, 2020, at <https://www.fda.gov/medical-devices/letters-health-care-providers/certain-filtering-facepiece-respirators-china-may-not-provide-adequate-respiratory-protection-letter>.

²¹ Public Law 117–58, 135 Stat. 1313.

²² The average hourly earnings are based upon the U.S. Department of Labor, Bureau of Labor Statistics’ website (www.bls.gov). The wage rate category selected is for Business and Financial Operations Occupations (13–0000), May 2022. The rate is estimated to be \$57.95 (\$41.39 × 1.4), which includes the wage rate multiplier.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated number of respondents for reporting is 0.08. This number is nominal because a response to this provision is required only if the offeror is proposing foreign-assembled domestic PPE. Such response should be rare, because the offeror of such products is unlikely to receive an award, unless no offers for domestic PPE are received. In Fiscal Year (FY) 2022, DHS awarded 8 contracts for domestic PPE. DHS estimates it will receive ten offers per solicitation. Using the number of contracts awarded in FY 2022, DHS estimates it received 80 offers. DHS estimates 0.2 percent of offers, or 0.16 responses, will include foreign-assembled domestic protective equipment. The average number of responses per respondent is two or 0.08 respondents. DHS estimates it will take each respondent 15 minutes to complete the certificate. These numbers are not unusual given that DHS awarded a mandatory for use, Departmentwide contract for domestic PPE in March of 2022 and the requirements of provision 3052.225–72 Make PPE in America Certificate were satisfied at the contract level. Standalone contracts are awarded only when the domestic PPE needed is not available under the Departmentwide contract.

(6) *An estimate of the total public burden (in hours) associated with the information collection:* The total estimated annual hour burden associated with this collection is 0.033 hours or 2 minutes.

(7) *An estimate of the total public burden (in cost) associated with the information collection:* The estimated total annual cost burden associated with this collection of information is \$2.32.

D. National Environmental Policy Act

DHS and its components analyze regulatory actions to determine whether the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, applies to them and, if so, what degree of analysis is required. DHS Directive 023–01 Rev. 01 “Implementing the National Environmental Policy Act” (Dir. 023–01 Rev. 01) and Instruction Manual 023–01–001–01 Rev. 01 (Instruction Manual)²³ establish the policies and procedures that DHS and its components use to comply with NEPA.

NEPA allows Federal agencies to establish, in their NEPA implementing

procedures, categories of actions (“categorical exclusions”) that experience has shown do not, individually or cumulatively, have a significant effect on the human environment and, therefore, do not require an environmental assessment or environmental impact statement. *See* 42 U.S.C. 4336(a)(2), 4336e(1). The Instruction Manual, Appendix A lists the DHS Categorical Exclusions.²⁴

Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) the entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect.²⁵

The final rule amends the HSAR to better clarify how DHS complies with the Make PPE in America Act, and codifies Deviation 23–01 that is currently in effect. DHS is not aware of any significant impact on the environment, or any change in environmental effect that will result from this final rule.

DHS has reviewed this final rule and finds that no significant impact on the environment, or any change in environmental effect will result from the amendments being promulgated in this final rule. Accordingly, DHS finds that the promulgation of this final rule clearly fits within categorical exclusion A3, established in the DHS’s NEPA implementing procedures as an administrative change with no change in environmental effect, is not part of a larger Federal action, and does not present extraordinary circumstances that create the potential for a significant environmental effect. Therefore, this final rule is categorically excluded from further NEPA review.

List of Subjects in 48 CFR Parts 3025 and 3052

Government procurement.

Accordingly, for the reasons set forth in the preamble, DHS amends 48 CFR parts 3025 and 3052 as follows:

PART 3025—FOREIGN ACQUISITION

■ 1. The authority citation for part 3025 is revised to read as follows:

Authority: 5 U.S.C. 301–302, 41 U.S.C. 1303, 41 U.S.C. 1707, 41 U.S.C. 1702, 41 U.S.C. 8301 note, 48 CFR part 1, subpart 1.3, DHS Delegation No. 00701, Revision No. 03.2, paragraphs (III)(H), and DHS Delegation

No. 00702, Revision No. 01.2, paragraphs (III)(M).

■ 2. Add subpart 3025.71 to read as follows:

Subpart 3025.71—Make PPE in America Act Restrictions on Foreign Acquisition

Sec.

3025.7100 Scope of subpart.

3025.7101 Definitions.

3025.7102 Restrictions on certain personal protective equipment.

3025.7102–1 Restrictions.

3025.7102–2 Exceptions.

3025.7102–3 Specific application of the Buy American statute and Trade Agreements Act.

3025.7103 Solicitation provisions and contract clauses.

3025.7100 Scope of subpart.

This subpart contains restrictions on the acquisition of certain personal protective equipment (PPE) imposed by the Make PPE in America Act (Pub. L. 117–58), and they apply to all types of actions, orders, option exercises, and contracts entered into on or after February 14, 2022.

3025.7101 Definitions.

As used in this subpart—

(a) *Component*, as applied to an item described in 3025.7102–1, means an article, material, or supply incorporated directly into an item of personal protective equipment.

(b) *Domestic personal protective equipment*, as applied to an item described in 3025.7102–1, means personal protective equipment, including the materials and components thereof, that is grown, reprocessed, reused, or produced in the United States.

(c) *Foreign-assembled domestic personal protective equipment*, as applied to an item described in 3025.7102–2, means personal protective equipment that is assembled outside the United States containing only materials and components that are grown, reprocessed, reused, or produced in the United States.

(d) *Foreign personal protective equipment* means personal protective equipment other than domestic personal protective equipment or foreign-assembled domestic personal protective equipment.

(e) *Personal protective equipment*, as applied to an item described in 3025.7102–1, means surgical masks, respirator masks and powered air purifying respirators and required filters, face shields and protective eyewear, gloves, disposable and reusable surgical and isolation gowns, head and foot coverings, and other gear

²³ The Instruction Manual, which contains DHS’s procedures for implementing NEPA, was issued on November 6, 2014, and is available at <https://www.dhs.gov/ocrso/eed/epb/NEPA> (last modified July 29, 2025).

²⁴ *See* Appendix A, Table 1.

²⁵ *Instruction Manual 023–01 at V.B(2)(a)–(c).*

or clothing used to protect an individual from the transmission of disease.

(f) *United States*, as applied to an item described in 3025.7102–1, means the 50 States, the District of Columbia, and the possessions of the United States.

3025.7102 Restrictions on certain personal protective equipment.

3025.7102–1 Restrictions.

The following restrictions implement section 70953 of the Make PPE in America Act, and they apply to all types of actions, orders, option exercises, and contracts.

(a) Except as provided in 3025.7102–2, contracting officers shall purchase domestic personal protective equipment.

(b) Any contract for personal protective equipment shall have a base period of performance of at least 2 years, plus all option periods.

3025.7102–2 Exceptions.

Acquisitions in the following categories are not subject to the restrictions in 3025.7102–1:

(a) Acquisitions of an item of personal protective equipment, or component thereof, otherwise covered by 3025.7102–1 when the DHS Chief Procurement Officer:

(1) Maximizes sources for foreign-assembled domestic personal protective equipment; and

(2) Certifies every 120 days that it is necessary to procure personal protective equipment under alternative procedures to respond to the immediate needs of a public health emergency.

(b) Acquisitions of an item of personal protective equipment, or component thereof, including those described in paragraph (a) of this section—

(1) That is, or that includes, a material listed in FAR 25.104 as one for which a nonavailability determination has been made; or

(2) As to which the DHS Chief Procurement Officer determines that a sufficient quantity of a satisfactory quality that is grown, reprocessed, reused, or produced in the United States cannot be procured as, and when, needed at United States market prices; and

(3) The DHS Chief Procurement Officer certifies every 120 days that it is necessary to procure personal protective equipment to respond to the immediate needs of a public health emergency.

(c) When either of the exceptions in paragraph (a) or (b) of this section are used:

(1) Only the DHS Chief Procurement Officer is authorized to make the certification in paragraphs (a)(2) and (b)(3) of this section or the

nonavailability or unreasonable cost determination in paragraph (b) of this section.

(2) The supporting documentation for the DHS Chief Procurement Officer shall be prepared by the DHS Component(s) and:

(i) For the certification in paragraphs (a)(2) and (b)(3) of this section:

(A) Include a written justification documenting the immediate public health emergency requiring use of alternative procedures; and

(B) Be concurred on by the Head of the Contracting Activity before submission to the DHS Chief Procurement Officer.

(ii) For the nonavailability or unreasonable cost determination in paragraph (b) of this section:

(A) Include a written justification documenting why a nonavailability or unreasonable cost exception is required; and

(B) Be concurred on by the Head of the Contracting Activity before submission to the DHS Chief Procurement Officer.

3025.7102–3 Specific application of the Buy American statute and Trade Agreements Act.

In the event the DHS Chief Procurement Officer determines neither domestic personal protective equipment nor foreign-assembled domestic personal protective equipment is available due to nonavailability or unreasonable cost, contracting officers shall apply one of the following:

(a) The clause at FAR 52.225–1, Buy American—Supplies, and the provision at FAR 52.225–2, Buy American Certificate; or

(b) The clause at FAR 52.225–3, Buy American—Free Trade Agreements—Israeli Trade Act, and the provision at FAR 52.225–4, Buy American—Free Trade Agreements—Israeli Trade Act Certificate; or

(c) The clause at FAR 52.225–5, Trade Agreements, and the provision at FAR 52.225–6, Trade Agreements Certificate, as applicable.

3025.7103 Solicitation provisions and contract clauses.

(a) Insert the clause at 3052.225–71, Make PPE in America, in solicitations and contracts, regardless of dollar value, when procuring any item covered under 3025.7102–1(a).

(b) Insert the provision at 3052.225–72, Make PPE in America Certificate, in solicitations containing the clause at 3052.225–71.

PART 3052—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. The authority citation for part 3052 is revised to read as follows:

Authority: 5 U.S.C. 301–302, 41 U.S.C. 1303, 41 U.S.C. 1707, 41 U.S.C. 1702, 41 U.S.C. 8301 note, 48 CFR part 1, subpart 1.3, DHS Delegation No. 00701, Revision No. 03.2, paragraphs (III)(H), and DHS Delegation No. 00702, Revision No. 01.2, paragraphs (III)(M).

■ 4. Add section 3052.225–71 to read as follows:

3052.225–71 Make PPE in America.

As prescribed in 3025.7103(a), insert the following clause:

Make PPE in America (Oct. 2026)

(a) *Definitions.* As used in this clause—
Component, as applied to an item described in paragraph (b) of this clause, means an article, material, or supply incorporated directly into personal protective equipment.

Domestic personal protective equipment, as applied to an item described in paragraph (b) of this clause, means personal protective equipment, including the materials and components thereof, that is grown, reprocessed, reused, or produced in the United States.

Foreign-assembled domestic personal protective equipment, as applied to an item described in paragraph (b) of this clause, means personal protective equipment that is assembled outside the United States containing only materials and components that are grown, reprocessed, reused, or produced in the United States.

Foreign personal protective equipment means personal protective equipment other than domestic personal protective equipment or foreign-assembled domestic personal protective equipment.

Personal protective equipment, as applied to an item described in paragraph (b) of this clause, means surgical masks, respirator masks and powered air purifying respirators and required filters, face shields and protective eyewear, gloves, disposable and reusable surgical and isolation gowns, head and foot coverings, and other gear or clothing used to protect an individual from the transmission of disease.

United States, as applied to an item described in paragraph (b) of this clause, means the 50 States, the District of Columbia, and the possessions of the United States.

(b) The Contractor shall deliver only domestic personal protective equipment except to the extent that it specified delivery of foreign-assembled domestic personal protective equipment in the provision of the solicitation entitled “Make PPE in America Certificate.”

(c) *Order of Precedence.* In the event the Department of Homeland Security determines neither domestic personal protective equipment nor foreign-assembled domestic personal protective equipment are available due to nonavailability or

unreasonable cost, the Contractor shall comply with the clauses at Federal Acquisition Regulation (FAR) 52.225–1 Buy American—Supplies or 52.225–3 Buy American—Free Trade Agreements—Israeli Trade Act and the provisions at FAR 52.225–2 Buy American Certificate or 52.225–4 Buy American—Free Trade Agreements—Israeli Trade Act Certificate or the clause at FAR 52.225–5 Trade Agreements and the provision at FAR 52.225–6 Trade Agreements Certificate, as applicable.

(End of clause)

■ 5. Add section 3052.225–72 to read as follows:

3052.225–72 Make PPE in America Certificate.

As prescribed in 3052.7103(b), insert the following provision:

Make PPE in America Certificate (Oct. 2026)

(a)(1) The Offeror certifies that each item of personal protective equipment, except

those listed in paragraph (b) of this provision, is domestic personal protective equipment.

(2) The Offeror shall list foreign-assembled domestic personal protective equipment items.

(3) The terms “domestic personal protective equipment,” “foreign-assembled domestic personal protective equipment,” “foreign personal protective equipment,” and “personal protective equipment,” are defined in the clause of this solicitation entitled “Make PPE in America.”

(b) Foreign-assembled Domestic Personal Protective Equipment:

Line item No.	Country of assembly

[List as Necessary]

(c) In the event the Department of Homeland Security determines both domestic personal protective equipment and foreign-assembled domestic personal protective equipment are not available due to nonavailability or unreasonable cost, the Contractor shall comply with the clauses at Federal Acquisition Regulation (FAR) 52.225–1 Buy American—Supplies or

52.225–3 Buy American—Free Trade Agreements—Israeli Trade Act and the provisions at FAR 52.225–2 Buy American Certificate or 52.225–4 Buy American—Free Trade Agreements—Israeli Trade Act Certificate or the clause at FAR 52.225–5 Trade Agreements and the provision at FAR 52.225–6 Trade Agreements Certificate, as applicable. The contracting officer will notify offerors if a nonavailability or unreasonable cost determination is made.

(End of Provision)

Paul Courtney,

Chief Procurement Officer, U.S. Department of Homeland Security.

[FR Doc. 2026–19207 Filed 9–17–26; 8:45 am]

BILLING CODE 9112–FE–P

Proposed Rules

Federal Register

Vol. 91, No. 180

Friday, September 18, 2026

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 213, 302, 317, 359, 362, 432, 550, 731, 920, and 930

[Docket ID: OPM–2026–0166]

RIN 3206–AO92

Employment in the Excepted Service

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) proposes to amend its regulations governing the excepted service, Pathways Programs, and administrative law judge (ALJ) appointments. The proposed rule would conform OPM regulations to current excepted-service schedules, including Schedules E, Policy/Career, and G; modernize part 302 procedures while preserving veterans' preference, compensable-injury restoration rights, and other priority placement rights; authorize and clarify Pathways conversions to Schedule Policy/Career; and make related conforming amendments.

DATES: Comments must be received on or before November 17, 2026.

ADDRESSES: You may submit comments by using the Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.

All submissions must include the agency name and docket number or RIN for this **Federal Register** document. Please arrange and identify your comments about the regulatory text by subpart and section number. If your comments relate to the supplementary information, please refer to the heading and page number in the supplementary section. All comments must be received by the end of the comment period for them to be considered. All comments and other submissions received generally will be posted on the internet at <https://www.regulations.gov> as they

are received, without change, including any personal information provided. However, OPM retains discretion to redact personal or sensitive information, including but not limited to personal or sensitive information pertaining to third parties. As required by 5 U.S.C. 553(b)(4), a summary of this rule may be found in the docket for this rulemaking at <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Ms. Katika Floyd at (202) 606–9531 or by email at employ@opm.gov.

SUPPLEMENTARY INFORMATION:

I. Background

OPM proposes to revise several civil service regulations to conform them to current excepted service schedules, recent Executive orders, and the statutory framework governing excepted service appointment procedures. These amendments are intended to modernize excepted service hiring rules, remove obsolete or unnecessarily complex procedures, preserve statutory veterans' preference and restoration rights, update regulations governing Pathways Programs and ALJ appointments, and simplify the priority reemployment list provisions. This proposal to overhaul excepted service employment is supplemented by another OPM regulation—Shared Certificates and Pooled Hiring Actions—that includes additional enhancements to 5 CFR part 302 (Employment in the Excepted Service) that align with changes being made to the regulations governing recruitment and hiring in the competitive service. 91 FR 58347; Sept. 15, 2026.

A. Excepted Service Appointments and 5 U.S.C. 3320

Section 3320 of title 5, United States Code, provides that the nominating or appointing authority must select for each excepted service vacancy from qualified applicants “in the same manner and under the same conditions” required for the competitive service by the veterans' preference and related provisions referenced in that section, and excludes appointments requiring Senate confirmation or advice and consent. OPM's regulations in part 302 have long implemented this requirement for positions in the excepted service. Current part 302 contains detailed procedures for accepting applications, examining

applicants, maintaining employment lists, applying orders of consideration, and making selections.

OPM now proposes to simplify part 302 while preserving the statutory core of the rule: veterans' preference, job-related qualification requirements, and legally required priority consideration. The proposed rule would remove the legacy structure of priority reemployment lists, reemployment lists, regular employment lists, Orders A, B, and C, professional orders, and unranked orders. In place of that structure, the rule would require agencies to identify and consider qualified and available priority candidates before selecting non-priority candidates, subject to any available and lawful exception. The rule also would retain and clarify restoration and priority-placement protections for employees recovering from compensable injuries under 5 U.S.C. 8151.

B. Recent Executive Orders Affecting Excepted Service Schedules

Several recent Executive orders require conforming amendments to part 213 and related civil service regulations.

First, Executive Order (E.O.) 13843 of July 10, 2018, “Excepting Administrative Law Judges From the Competitive Service,” (83 FR 32755) directed that appointments of ALJs under 5 U.S.C. 3105 be made under Schedule E of the excepted service. The order amended Civil Service Rule VI to create Schedule E and stated that appointment to an ALJ position is not subject to part 302 examination and rating requirements, though agencies must follow the principle of veterans' preference as far as administratively feasible.

Second, E.O. 13957 of October 21, 2020, “Creating Schedule F in the Excepted Service,” (85 FR 67631) created Schedule F in the excepted service for career positions of a confidential, policy-determining, policy-making, or policy-advocating character. E.O. 14171 of January 20, 2025, “Restoring Accountability to Policy-Influencing Positions Within the Federal Workforce,” (90 FR 8625) reinstated and amended E.O. 13957, including by replacing Schedule F terminology with Schedule Policy/Career.

Third, E.O. 14317 of July 17, 2025, “Creating Schedule G in the Excepted

Service,” (90 FR 34753) created Schedule G for noncareer positions of a policy-making or policy-advocating character normally subject to change as a result of a Presidential transition. The order also revised Civil Service Rule VI to identify Schedules A, B, C, D, E, Policy/Career, and G, and distinguished Schedule G from Schedule C and Schedule Policy/Career.

Fourth, E.O. 14410 of June 3, 2026, “Implementing Schedule Policy/Career in the Excepted Service,” (91 FR 34893) further implemented Schedule Policy/Career by placing identified positions in Schedule Policy/Career and amending the Civil Service Rules and prior Executive orders. Among other things, the order:

- Amended Civil Service Rule I to clarify retention of competitive status when an employee’s competitive service position is first listed under Schedule A, B, C, Policy/Career, or G;
- Amended Civil Service Rule III to recognize a basis for appointment without competitive examination for an employee whose initial appointment was to a Pathways Program position in Schedule D and who was later converted to Schedule Policy/Career without a break in service of 1 day;
- Amended Civil Service Rule VI to require at least annual publication of excepted-service schedules;
- Provided for acquisition of competitive status by certain employees serving probationary periods when their positions are first placed in Schedule Policy/Career;
- Amended Civil Service Rule XI to provide that individuals appointed to positions in Schedule C, Schedule E, Schedule Policy/Career, and Schedule G are not subject to trial periods; and
- Amended E.O. 13562 (75 FR 82585, Dec. 30, 2010) to provide that Pathways career appointments may include positions in Schedule Policy/Career, subject to OPM review.

Together, these Executive orders require conforming amendments to several parts of OPM’s regulations to ensure that the Code of Federal Regulations (CFR) accurately reflects the current structure of the excepted service and the legal consequences of appointments under Schedules C, E, Policy/Career, and G.

C. Purpose of This Proposed Rule

The proposed rule has four principal purposes.

First, it would conform part 213 to the current excepted service schedule structure by adding express regulatory text for Schedule E ALJ appointments and Schedule G appointments, and by conforming provisions governing

publication, temporary and time-limited appointments, unique identifiers, and certain Schedule A authorities. It would also make conforming amendments to parts 317, 359, 432, 550, 731, and 920 to account for the creation of Schedule G.

Second, it would modernize part 302 by replacing outdated and difficult-to-administer list and order-of-consideration procedures with a simpler framework centered on veterans’ preference, qualification requirements, job-related evaluation methods, and priority consideration for employees with legally required restoration or reemployment rights.

Third, it would implement conforming changes to Pathways and Schedule Policy/Career regulations so that eligible Pathways Participants may be converted to permanent Schedule Policy/Career appointments where authorized.

Fourth, it would conform ALJ regulations in part 930 to Schedule E by removing obsolete competitive-examination and list-of-eligibles terminology for new ALJ appointments, while preserving applicable statutory protections for ALJs, including 5 U.S.C. 3105 and 7521. It would also update the part 930 regulations relating to reductions in force (RIFs) involving ALJs, conforming those regulations to the status of ALJs appointed after July 10, 2018 as excepted service employees.

OPM previously proposed amendments to its ALJ regulations to implement E.O. 13843 and conform the regulations governing ALJ appointment and employment to the creation of Schedule E. See *Administrative Law Judges*, 85 FR 59207 (Sept. 21, 2020). On April 2, 2026, OPM withdrew that proposed rule, explaining that the comments received in response to the 2020 proposal were more than five years old, that agencies had already implemented E.O. 13843, and that OPM intended to propose Schedule E regulatory changes as part of a broader excepted-service rulemaking under RIN 3206–AO92. See *Administrative Law Judges; Withdrawal*, 91 FR 16584 (Apr. 2, 2026). Consistent with that withdrawal notice, this proposed rule now addresses Schedule E as part of the broader overhaul of OPM’s excepted service regulations.

II. Proposed Changes

A. Part 213—Excepted Service

OPM proposes to revise part 213 to reflect the current schedules in the excepted service: Schedules A, B, C, D, E, Policy/Career, and G.

Proposed amendments to § 213.102 would update the heading and conform the provision governing OPM placement of positions into excepted service schedules.

OPM proposes to revise § 213.103 to eliminate the requirement that OPM publish a monthly **Federal Register** notice identifying each establishment or revocation of an agency-specific Schedule A, B, C, Policy/Career, or G authority. Current § 213.103 requires governmentwide excepted-service authorities to be published as regulations in the **Federal Register** and the CFR, requires monthly notice of agency-specific Schedule A, B, C, and Policy/Career authorities, and requires an annual consolidated listing of all such agency-specific authorities current as of June 30. The proposed rule would retain publication of governmentwide authorities in the **Federal Register** and CFR and would retain an annual consolidated **Federal Register** notice for agency-specific authorities, but would remove the monthly notice requirement.

OPM has tentatively determined that monthly publication is no longer necessary to provide meaningful transparency or oversight, or effective administration of agency-specific excepted-service authorities. Agency-specific authorities do not have general applicability across the Government and historically have not been codified in the CFR. OPM has instead used notices to inform the public of the existence and status of these authorities. The annual consolidated notice is a more complete and useful transparency mechanism because it provides a single authoritative listing of agency-specific authorities, with assigned authority numbers or other unique identifiers, rather than requiring agencies, applicants, employees, and the public to reconstruct the current state of agency-specific authorities from a series of monthly notices. OPM’s annual consolidated notices have historically served this function by identifying the agency-specific authorities current as of a specified date and explaining that governmentwide authorities are codified in the CFR while agency-specific authorities are not.

OPM believes that the annual consolidated **Federal Register** notice satisfies Civil Service Rule VI because Rule VI requires **Federal Register** publication of notice of OPM’s decision granting authority to make excepted-service appointments, but does not prescribe monthly publication. Further, proposed § 213.103(b) would continue to provide public **Federal Register** notice of all current agency-specific authorities in a single consolidated

annual notice, with additional notices available when OPM determines they would promote sound administration or public transparency.

OPM notes that removing the monthly publication requirement does not reduce OPM's substantive oversight of agency-specific authorities. OPM will continue to approve, deny, limit, condition, modify, or revoke agency-specific authorities as appropriate under Civil Service Rule VI, part 213, and applicable Executive orders. Agencies must continue to use the proper authority number or unique identifier when documenting appointments, and OPM will continue to maintain internal records of current agency-specific authorities. In addition, OPM is proposing that it may publish additional notices concerning agency-specific authorities when OPM determines that additional notice would promote sound administration or public transparency.

Proposed § 213.104 would update terminology for temporary, time-limited, intermittent, or seasonal appointments and clarify applicable service limits for appointments in Schedules A, B, C, D, and G. OPM also is not including Schedule E or Schedule Policy/Career in the operative § 213.104 amendments because these appointments are not intended to be temporary, time-limited, intermittent, or seasonal.

OPM also proposes targeted amendments to § 213.3102. Proposed § 213.3102(i)(1) would modernize the Schedule A authority for positions in remote or isolated locations where examination is impracticable. Proposed § 213.3102(u) would update the Schedule A authority for individuals with intellectual disabilities, severe physical disabilities, or psychiatric disabilities, including by revising the structure of the provision and proof-of-disability language.

The proposed rule would amend § 213.3301 to replace the reference to a Schedule C "number" with the phrase "unique identifier." This change is intended to modernize appointment-record terminology while preserving OPM's position-specific authorization process for Schedule C.

The proposed rule would revise § 213.3402(b) to raise the default Recent Graduates appointment ceiling to GS-11 or equivalent, while preserving a GS-12 exception for certain scientific and professional research positions requiring a directly related Ph.D. or equivalent degree. This revision would conform to the changes made in the Pathways Programs final regulation published at 89 FR 25751 (Apr. 12, 2024).

The proposed rule would add a new Schedule E heading and new § 213.3501 for ALJ positions appointed under 5 U.S.C. 3105. Proposed § 213.3501 would provide that new ALJ appointments made on or after July 10, 2018, must be made under Schedule E; would preserve the competitive-service status of incumbents whose status is preserved under § 6.8(d); would exempt Schedule E appointments from part 302 appointment procedures, including examination and rating; would require agencies to follow veterans' preference as far as administratively feasible; would cross-reference the professional license requirement in Civil Service Rule VI and applicable ALJ statutory and regulatory requirements; and would provide that Schedule E ALJs are not subject to a trial period under part 11.

Proposed § 213.3601 would revise the Schedule Policy/Career regulation. Proposed § 213.3601 would revise paragraphs (b) and (c) to clarify the procedures for making appointments under Schedule Policy/Career. The language formerly found in paragraph (d) of this section will be incorporated into paragraph (b). Paragraphs (e) and (f) of this section will be redesignated as paragraphs (d) and (e) of this section.

Proposed § 213.3601 would revise the newly designated paragraph (e) to make clear that Schedule Policy/Career appointments are not subject to a trial period, in alignment with E.O. 14410's revision to Civil Service Rule XI. Revised paragraph (e) also would restate that an individual appointed under § 213.3601(b) in the same manner as an appointment in the competitive service acquires competitive status after completing 2 years of continuing service in the same or similar positions, and would preserve the retention of competitive status under § 1.3(d) and the acquisition of competitive status under § 3.1(a)(5) or § 6.8(e).

Proposed § 213.3601(f) would address positions in statutory personnel systems outside title 5 that may be designated as Schedule Policy/Career. The proposed paragraph would provide that, to the extent permitted by the statute governing the position and any applicable E.O., such a position may be designated as Schedule Policy/Career if the position is of a confidential, policy-determining, policy-making, or policy-advocating character. For positions otherwise covered by chapters 23, 43, or 75 of title 5, designation in Schedule Policy/Career would affect coverage under those chapters to the extent provided by 5 U.S.C. 2302(a)(2)(B)(i), 4301(2)(G), 4303(e)(3), and 7511(b)(2), and applicable implementing regulations. The designation would not

otherwise alter the governing statutory personnel system unless expressly provided by statute, E.O., or regulation.

Finally, the proposed rule would add a new Schedule G heading and new § 213.3701 for noncareer positions of a policy-making or policy-advocating character normally subject to change as a result of a Presidential transition. Section 213.3701 would retain OPM's position-specific authorization process and would require a unique identifier for positions authorized under Schedule G.

B. Part 302—Employment in the Excepted Service

OPM proposes to revise part 302 extensively. Proposed part 302 would replace the current employment-list and order-of-consideration structure with a simpler framework that preserves the substantive requirements of 5 U.S.C. 3320. Section 3320 requires excepted service selections to be made from qualified applicants "in the same manner and under the same conditions" required for the competitive service by 5 U.S.C. 3308 through 3319, but it does not require OPM to retain the specific legacy labels and procedures in current part 302, such as regular employment lists or Orders A, B, and C. Although section 3320 incorporates the competitive-service requirements of 5 U.S.C. 3308 through 3319, current § 302.302(b)(2) also permits category rating consistent with the principles of 5 U.S.C. 3319, and proposed §§ 302.201(b), 302.302(d), and 302.401(c) would continue to permit category rating, applied with the pass-over protections of 5 U.S.C. 3319(c)(6).

Section 3315(a) of title 5, United States Code, provides that a preference eligible who has been separated or furloughed without delinquency or misconduct is entitled, upon request, to have the individual's name placed on appropriate registers and employment lists for every position for which the individual's qualifications have been established, in the order prescribed by 5 U.S.C. 3313. Section 3320 applies that requirement to covered appointments in the excepted service by requiring selection from qualified applicants in the same manner and under the same conditions required by 5 U.S.C. 3308 through 3319.

OPM therefore interprets sections 3315 and 3320 as requiring agencies to preserve the reemployment-priority rights established by those provisions. OPM does not interpret those statutes, however, as requiring agencies to retain the particular list architecture or terminology prescribed by current § 302.303. Current § 302.303

implements the statutory requirements through three separately denominated categories: a priority reemployment list, a discretionary reemployment list, and a regular employment list. Those categories are an administrative means of implementing the statute; the terms themselves do not appear in 5 U.S.C. 3315. Section 3315 also does not prescribe a particular paper or electronic format, database structure, or personnel-management system through which an agency must maintain the required information. Section 1302(c) directs OPM to prescribe regulations administering veterans' preference in the excepted service and therefore permits OPM to modernize the administrative mechanism used to carry out the statutory entitlement, provided that the revised mechanism does not diminish that entitlement.

In subpart A, proposed § 302.101 would restate the coverage of part 302 for purposes of veterans' preference and compensable-injury restoration rights, clarify that Senate-confirmed or advice-and-consent appointments are not covered, and update the list of positions exempt from part 302 appointment procedures. OPM proposes to add law clerk trainee positions filled under 5 CFR 213.3102(e) to the list of positions exempt from the appointment procedures of 5 CFR part 302. Section 213.3102(e) authorizes time-limited appointments of law clerk trainees for law school graduates or persons with equivalent experience pending admission to the bar, while § 213.3102(d) covers attorney positions. Current § 302.101(c) already exempts attorney positions from the appointment procedures of part 302, but it does not expressly identify law clerk trainee positions. Law clerk trainee appointments are closely related to attorney hiring and often serve as a temporary, pre-bar status before an individual may be appointed to an attorney position. OPM therefore proposes to expressly exempt law clerk trainee positions filled under § 213.3102(e) to provide additional flexibility in hiring for these positions and to promote consistency with attorney hiring procedures.

OPM proposes to amend 5 CFR 302.101(c) to add three other categories of positions to the list exempt from the appointment procedures of part 302: positions in remote or isolated locations filled under 5 CFR 213.3102(i)(1), positions in Schedule G, and ALJ positions in Schedule E. These additions would promote clarity and consistency by aligning part 302 with appointing authorities and excepted-service schedules where the application

of ordinary part 302 examining, rating, and selection procedures is impracticable, unnecessary, or inconsistent with the nature of the position. Remote or isolated location appointments are expressly limited to circumstances where examination is impracticable; Schedule G positions are policy-making or policy-advocating positions normally subject to change as a result of a Presidential transition; and Schedule E ALJ appointments are already treated under 5 CFR part 6 as not subject to part 302 appointment procedures. In addition, proposed § 302.101(c)(12) would revise the reemployment exemption in current § 302.101(c)(9) to remove the redundant requirement limiting the exemption, which is already reflected in the introductory text to paragraph (c).

OPM proposes to amend 5 CFR 302.101(c)(6) to make clear the circumstances under which OPM, in consultation with the agency involved, determines the applicability of part 302 procedures on an agency-specific exception to the competitive service. Over the years, this paragraph has had several interpretations. A final rule was published in October 2020, 85 FR 63191, to clarify the intent of the provision. However, agencies continue to seek clarification on the types of positions under paragraph (c)(6) that are exempt from the appointment procedures of part 302. Rather than identify the positions by a specific Schedule, OPM proposes to use its general authority to except positions from the competitive service under Civil Service Rule VI (5 CFR 6.1) to identify the positions for which an exemption may be warranted. This amendment will be reflected in this rule under a newly designated paragraph (c)(8).

The proposed exemptions would not relieve agencies of any obligation under § 302.101(c) to follow the principle of veterans' preference as far as administratively feasible or to honor applicable priority consideration rights.

Proposed § 302.103 would revise the definition of "person entitled to priority consideration," which currently is limited to certain individuals recovering from compensable injury who apply for reappointment within 30 days of the date of cessation of compensation, to cover any individual entitled to priority consideration under 5 U.S.C. 8151, part 353, §§ 302.303 and 302.304, a final order, or other applicable statute, regulation, or binding legal authority. Proposed § 302.104 would clarify when agencies must apply the provisions of part 302 to accord veterans' preference and priority consideration. Proposed § 302.105 would replace the existing

special agency plan provision with a broader alternative-procedures rule, allowing agencies to use written alternative procedures that are applied uniformly, are consistent with merit system principles, and provide preference eligibles and person entitled to priority consideration at least as much advantage as the default procedures in part 302.

Proposed § 302.105(e) would authorize OPM to establish procedures, consistent with 5 U.S.C. 3317(b), 5 U.S.C. 3318, 5 U.S.C. 3319, 5 U.S.C. 3320, and part 302, for rating, ranking, and selection of eligible candidates by participating agencies in OPM-administered cross-government shared hiring actions, including OPM-led pooled hiring actions under § 302.601. OPM increasingly uses shared hiring actions to help agencies fill common mission-critical positions across the Government. The proposed provision would support those actions by permitting OPM to establish documentation and administration procedures suited to multi-agency certificates while preserving veterans' preference, pass-over requirements, and other applicable statutory protections.

Proposed § 302.106 would retain the requirement in current § 302.106 that an excepted service vacancy announcement include a reasonable accommodation statement that complies with part 330, subpart A. Proposed § 302.106 also would clarify that part 302 does not itself require an agency to issue a public vacancy announcement unless public notice is required by statute, regulation, the applicable appointing authority, or agency policy, and would require an announcement for a position covered by part 302 to include, as applicable, instructions for claiming veterans' preference and priority consideration.

In subpart B, proposed § 302.201 would modernize the treatment of veterans' preference under numerical rating, category rating, and alternative procedures. Proposed § 302.202 would revise qualification requirements, including by retaining the statutory limitation on minimum educational requirements for scientific, technical, or professional positions whose duties cannot be performed without prescribed education. Proposed § 302.201 would not retain the separate unranked-referral preference notations in current § 302.201(b) because unranked referral would no longer be a default evaluation method under proposed § 302.302; an agency could adopt a comparable approach only through an alternative procedure under proposed § 302.105 that provides preference eligibles and

persons entitled to priority consideration at least as much advantage as the default procedures of part 302.

In subpart C, proposed §§ 302.301 through 302.304 would replace the various employment lists and order-of-consideration framework with a simplified model. Proposed § 302.303 eliminates the requirement for agencies to establish priority reemployment lists, by geographic area, consisting of priority candidates who had been rated eligible for positions being filled. Instead, priority candidates would apply for consideration for vacancies on a case-by-case basis similar to the requirements for receiving consideration under the career transition programs in part 330 of this chapter. Proposed § 302.303 also includes a requirement that each agency maintain documented priority-consideration procedures and records sufficient to demonstrate compliance with proposed §§ 302.303 and 302.304. Proposed § 302.303 would continue to require agencies to provide priority consideration for specified current or former employees, including preference-eligible employees furloughed or separated from continuing excepted service appointments by RIF or similar workforce reduction action, and current or former employees entitled to priority consideration because of recovery from compensable injury or disability. In addition, the proposal would include any other individual entitled to reemployment priority under statute, regulation, final order, or other binding legal authority.

Under proposed § 302.303(a), an agency would be required to maintain documented procedures sufficient to identify, notify, evaluate, and consider priority candidates for positions covered by part 302. Although an agency would no longer be required to maintain separate records designated as a priority reemployment list, reemployment list, or regular employment list, it would be required to maintain records sufficient to document compliance with §§ 302.303 and 302.304. Under proposed § 302.303(f), each agency's written procedures would be required to address, at a minimum: how individuals, including preference eligibles covered by 5 U.S.C. 3315, may apply for priority consideration for specific vacancies; how individuals may update their availability, location, qualification, grade, pay level, work schedule, and other placement information; how the agency will determine whether an individual is a priority candidate for a specific vacancy; how the agency will evaluate and rank priority candidates and apply

veterans' preference among them; and how the agency will notify priority candidates of the outcome of consideration. An agency could administer these requirements through a standing electronic registry, an automated vacancy-matching system, vacancy-specific rosters, or another documented mechanism, provided that the mechanism satisfies §§ 302.303 and 302.304.

For purposes of 5 U.S.C. 3315, the records an agency maintains under proposed § 302.303(a) and (f)—which must be sufficient to identify each individual entitled to priority consideration and to determine, for each vacancy, whether the individual is qualified, available, and within the scope of consideration—would perform the function of the appropriate registers and employment lists required by section 3315. When 5 U.S.C. 3318(d) applies, the registered preference eligibles whom the agency has determined under proposed §§ 302.303 and 302.304 to be qualified, available, and within the scope of consideration for a particular vacancy would constitute the reemployment list appropriate for the position to be filled. Agencies would remain required to order and consider covered individuals in accordance with 5 U.S.C. 3313 and 3318, as applicable, and the implementing requirements of part 302, including the requirements in proposed § 302.303(f)(5) and (6) that the agency establish how priority candidates will be evaluated and ranked and how veterans' preference will be applied among them, and the requirements in proposed § 302.304(b) governing selection among priority candidates.

The proposed rule would also preserve the operative consequences of placement on the statutory register or employment list. Before making a covered appointment, proposed § 302.304 would require an agency to determine whether a qualified and available priority candidate is within the scope of consideration for the vacancy. If one priority candidate is available, the agency ordinarily would be required to select that candidate before selecting another applicant. If more than one priority candidate is available, the agency would be required to apply the evaluation method established for the vacancy and applicable veterans' preference requirements, and to select from among the priority candidates before considering non-priority candidates. An agency could depart from those requirements only when an exception authorized by statute, regulation, or other applicable law applies and the

agency documents the basis for the exception.

The proposal therefore does not replace the statutory list entitlement with generalized or discretionary consideration. Proposed § 302.303(f) would require each agency to establish its priority-consideration procedures in advance, including the means by which individuals may apply for priority consideration and keep their placement information current; proposed § 302.301(d) would require the agency, when filling a covered position, to provide a means for individuals claiming priority consideration to identify their eligibility and submit the information necessary for the agency to determine whether they are priority candidates; and proposed § 302.304(a) would require the agency to determine whether a priority candidate exists before making any covered appointment and, under proposed § 302.304(f), to document that determination. Maintaining records only after a selection has been made would not satisfy proposed §§ 302.303 and 302.304 or 5 U.S.C. 3315.

OPM recognizes that 5 U.S.C. 3320 does not permit OPM to substitute materially lesser protections for procedures that Congress has made applicable to the excepted service. In *Gingery v. Department of Defense*, 550 F.3d 1347, 1352–54 (Fed. Cir. 2008), the Federal Circuit held that an OPM regulation could not replace the pass-over protections prescribed by 5 U.S.C. 3318 with lesser protections for an excepted-service applicant when the statutory procedures could be applied. The proposed rule follows that principle. It does not rely on a determination that compliance with 5 U.S.C. 3315 is administratively infeasible, and it does not reduce the registration, ordering, referral, selection, or pass-over protections required by 5 U.S.C. 3315, 3318, and 3320. It changes only the administrative form in which agencies maintain and use the information necessary to provide those protections.

The proposed approach is also consistent with the flexibility recognized in current § 302.105, under which an agency may use a system that does not conform to every procedural requirement of part 302 only if eligible applicants entitled to veterans' preference or priority consideration receive at least as much advantage as they would receive under the default procedures. Proposed § 302.105 would retain that limiting principle and would additionally make clear that an alternative procedure may not waive any statutory requirement.

The requirement in current § 302.303 that all other applicants be entered on a regular employment list presents a different issue. Section 3315 establishes a specific entitlement for covered preference eligibles who have been separated or furloughed; it does not independently require an agency to maintain a separately denominated regular employment list containing every other applicant. Agencies would remain required to evaluate, arrange, refer, and select other applicants in accordance with the applicable provisions of 5 U.S.C. 3308 through 3319 and part 302, but they would not be required to preserve the current “regular employment list” as a separate administrative artifact. Proposed § 302.304 would require agencies to consider and select qualified and available priority candidates before non-priority candidates unless a lawful exception applies.

In subpart D, proposed § 302.401 would set out simplified rules for selection and appointment after priority consideration has been satisfied. The proposed rule would replace the existing § 302.401 with a simpler selection rule organized around priority consideration, the evaluation and referral method used for the vacancy, veterans’ preference and pass-over protections, discontinuance of consideration, documentation, and special conditions for OPM-led pooled hiring actions, as set out in proposed § 302.401(a) through (h).

First, proposed § 302.401(a) would require agencies to satisfy the priority-consideration requirements in proposed §§ 302.303 and 302.304 before making any appointment to a position covered by part 302. This makes priority consideration the first step in the selection process.

Second, proposed § 302.401(b) would govern selections when an agency uses numerical rating. Agencies could refer candidates using a method established before applications are solicited and documented in the recruitment file. The referral method could include a cut-off score, a set number of the highest-ranked eligible candidates, a set percentage of the highest-ranked eligible candidates, or another job-related method consistent with § 302.105. Selecting officials could select any referred eligible candidate but could not pass over a higher-standing preference eligible to select a lower-standing nonpreference eligible unless the agency satisfies the pass-over requirements in § 302.401(e).

Third, proposed § 302.401(c) would govern selections when an agency uses category rating. Agencies could select

from the highest quality category. If fewer than three candidates are in the highest category, the agency could merge the highest and second-highest quality categories and select from the merged category. Preference eligibles must be listed ahead of nonpreference eligibles within each category or merged category, and agencies may not select a nonpreference eligible over a preference eligible in the same category unless the pass-over requirements are satisfied.

Fourth, proposed § 302.401(d) would expressly allow agencies to make selections under alternative procedures authorized by § 302.105. Those procedures must provide preference eligibles and persons entitled to priority consideration at least as much advantage in consideration, referral, and selection as they would receive under the default part 302 procedures.

Fifth, proposed § 302.401(e) would consolidate the rule for passing over preference eligibles. Agencies proposing to select a nonpreference eligible over a preference eligible must comply with applicable requirements in 5 U.S.C. 3318(c), 5 U.S.C. 3319(c)(6), and OPM instructions.

Sixth, proposed § 302.401(f) would address discontinuing consideration of an eligible candidate as authorized by 5 U.S.C. 3318(e), § 302.105(e), or other applicable law, in accordance with the procedures set forth in § 332.405, which implements the three-consideration rule of 5 U.S.C. 3318(e).

Seventh, proposed § 302.401(g) would add a documentation requirement. Agencies must document the selection method used, the application of veterans’ preference, the application of priority consideration, any pass-over decision, and the basis for selection. The documentation must be sufficient to permit reconstruction or third-party review.

Eighth, proposed § 302.401(h) would establish special conditions for OPM-led pooled hiring actions, including when OPM may discontinue the consideration of a candidate from a shared certificate after documented bona fide consideration for three separate appointments for the same position. Nothing in those provisions would authorize passing over a preference eligible except as permitted by § 302.401(e) and applicable law. These conditions would apply to OPM-led pooled hiring actions under § 302.601, as added by OPM’s interim rule on shared certificates and OPM-led pooled hiring actions (91 FR 58347), and would supplement, not displace, the three-consideration provisions of §§ 302.502(b), 302.603(d), and 302.604(e).

The proposed rule would also revise § 302.402 to preserve a streamlined reappointment option while making clear that it cannot be used to bypass the new priority-consideration framework. Proposed § 302.402(a) would allow an agency, subject to §§ 302.303 and 302.304, to reappoint a current or former nontemporary executive-branch employee who is a preference eligible to a covered position without applying the examination, rating, ranking, and referral procedures of part 302.

Proposed § 302.402(b) would clarify that this reappointment authority does not permit an agency to bypass a qualified and available person entitled to priority consideration unless a lawful exception under § 302.304 applies. Proposed § 302.402(c) would further clarify that any reappointment must still be consistent with statute, regulation, the applicable appointing authority, and agency reemployment policy.

Proposed §§ 302.201, 302.302, and 302.401 would continue to apply the same statutory veterans’ preference protections through the rating method used for the vacancy: preference points would be added when numerical rating is used; preference eligibles would receive the statutory ordering and placement advantages when category rating is used; and any alternative procedure would have to provide preference eligibles and persons entitled to priority consideration at least as much advantage in evaluation, referral, and selection as the default procedures in part 302. The proposed rule also would preserve applicable pass-over requirements before an agency may select a nonpreference eligible over a preference eligible. Accordingly, OPM views the proposed framework as a modernization of the mechanics for accepting, evaluating, referring, and selecting applicants, not a reduction in the veterans’ preference and related protections required by 5 U.S.C. 3320.

Proposed § 302.701 would update the appeals provision for individuals asserting compensable-injury restoration rights. The proposed amendment would clarify that the relevant restoration or priority-consideration entitlement may arise under 5 U.S.C. 8151, part 353, or part 302, while preserving the existing limitation that an appeal must involve an alleged violation of restoration rights and factual information showing that the individual was denied restoration or priority consideration because another person was employed. Proposed § 302.701 also would clarify that a preference eligible or person entitled to priority consideration may appeal an action taken under part 302 only to the extent an appeal right is provided by

statute, Merit Systems Protection Board (MSPB) regulation, or other applicable law, and that part 302 does not create an appeal right not otherwise provided by law.

OPM's interim rule on shared certificates and OPM-led pooled hiring actions redesignated subpart E of part 302 (Appeals) as subpart G and added new subparts E and F governing shared excepted service certificates and OPM-led pooled hiring actions. The references in this proposed rule reflect that redesignation, and, apart from the conforming cross-reference amendments described below, nothing in this proposed rule would alter the new subparts E and F. This proposal would correct the authority citation for part 302 to include 5 U.S.C. 1104 and the section-specific authority for subparts E and F, which were inadvertently not included in the interim rule.

Consistent with the paragraph designations proposed for §§ 302.302 and 302.401, OPM proposes conforming amendments to the cross-references in subparts E and F. Proposed §§ 302.502(b), 302.603(d), and 302.604(e) would replace the references to § 302.302(b)(1) and § 302.302(b)(2) with references to § 302.302(c) and § 302.302(d), respectively, and proposed §§ 302.603(e) and 302.604(f) would replace the reference to § 302.401(b) with a reference to § 302.401(e). These conforming amendments would align the cross-references with the redesignated paragraphs proposed in this rule and would not alter the three-consideration or pass-over requirements those provisions impose.

OPM is not proposing changes to §§ 302.102, 302.107, 302.108, 302.203, or 302.403. Those provisions address related but distinct requirements that remain necessary under the proposed part 302 framework.

C. Part 317—Employment in the Senior Executive Service

In part 317, OPM proposes to amend provisions governing conversion to the Senior Executive Service (SES), Qualifications Review Board certification, and SES reassignments. The proposed amendments would clarify that Schedule G service would be treated consistently with Schedule C service when identifying noncareer-type or transition-linked service.

Specifically, OPM proposes to amend §§ 317.304 and 317.305 to include Schedule G in the provisions governing conversion of certain appointees to SES appointments; § 317.502 to include Schedule G appointees within the category of “noncareer-type” employees whose conversion to career SES

appointment would not be forwarded to a Qualifications Review Board; and § 317.901 to include Schedule G appointees in the definition of noncareer appointee for purposes of the 120-day restriction on involuntary reassignment of career SES appointees.

D. Part 359—Removal From the Senior Executive Service; Guaranteed Placement in Other Personnel Systems

In part 359, OPM proposes to amend §§ 359.406 and 359.503 to include Schedule G appointees in the definition of noncareer appointee for purposes of restrictions on certain SES removals following the appointment of a new agency head or certain noncareer supervisors. OPM also proposes to amend § 359.701 to clarify that service in a Schedule G position, or in a position meeting the same criteria as a Schedule G position, would not constitute an appointment of equivalent tenure for purposes of guaranteed placement rights following certain removals from the SES.

E. Part 362—Pathways Programs

OPM proposes to revise part 362 to permit eligible Pathways Participants to be converted to permanent positions in Schedule Policy/Career. OPM also proposes to eliminate the definition of “advanced degree” in § 362.102 because the phrase is no longer used in part 362.

Proposed § 362.107 would be revised to describe conversion to the competitive service or Schedule Policy/Career. It would authorize noncompetitive conversion of an eligible Pathways Participant to a term or permanent position in the competitive service, or to a permanent position in Schedule Policy/Career if the position is a career position described in § 213.3601(a) and the conversion is authorized by part 362 and applicable OPM policy or guidance. The proposed section would distinguish direct conversion to a competitive-service position from conversion to Schedule Policy/Career. It would clarify that conversion to Schedule Policy/Career does not itself confer competitive status, career tenure, or a career or career-conditional appointment and that pre-conversion Pathways service does not count toward the 2 years of continuing Schedule Policy/Career service required for acquisition of competitive status under § 213.3601(e).

Proposed § 362.107 also would address career-transition programs, probationary periods, trial periods, and no-entitlement principles. Pathways Participants converted to career or career-conditional appointments under § 315.713 would be subject to applicable

probationary-period requirements under part 11 and would acquire competitive status upon completion of those requirements. Pathways Participants converted to permanent Schedule Policy/Career appointments would not be required to serve a trial period under part 11 and would obtain competitive status after 2 years of continuing service in the Schedule Policy/Career position, but that conversion would not itself confer competitive status. Competitive status could be retained or acquired only as provided in § 213.3601(e), § 362.107(f), § 3.1(a)(5), § 6.8(e), part 315, or another applicable statute, E.O., civil service rule, or OPM regulation.

The proposed rule also would revise Pathways reporting requirements to capture the number of Pathways Participants converted to Schedule Policy/Career and separated and would add § 362.110 to authorize OPM to develop and administer a governmentwide Pathways Leadership Development Program under the Recent Graduates Program authority. That program may include formal training, career development, and rotational assignments across participating agencies, and would be administered consistent with part 362 and applicable OPM implementing instructions.

F. Part 432—Performance Based Reduction in Grade and Removal Actions

OPM proposes to amend § 432.102(f)(11), as redesignated by OPM's final rule on probationary and trial period appeals (91 FR 49072, Aug. 3, 2026), to add employees occupying positions in Schedule G to the categories of employees excluded from coverage under part 432. Part 432 implements the procedures governing performance-based reductions in grade and removals under 5 U.S.C. chapter 43. Section 432.102(f)(11) currently excludes employees occupying positions in Schedule C or Schedule Policy/Career, as authorized under part 213 of this chapter. This amendment would add Schedule G to that same exclusion.

This change is a conforming amendment to reflect the establishment of Schedule G in the excepted service. E.O. 14317 created Schedule G for positions of a policy-making or policy-advocating character that are normally subject to change as a result of a Presidential transition and directed OPM to adopt implementing regulations, with particular attention to amendments to 5 CFR part 213. E.O. 14317 also amended Civil Service Rule VI to provide that, except as required by statute, the Civil Service Rules and

Regulations do not apply to removals from positions listed in Schedule G.

Consistent with that framework, OPM proposes that employees occupying Schedule G positions should be treated in the same manner as employees occupying Schedule C and Schedule Policy/Career positions for purposes of part 432 coverage. The amendment would clarify that the performance-based reduction in grade and removal procedures in part 432 do not apply to employees occupying positions in Schedule G. The amendment would not otherwise alter the coverage of part 432, and employees not expressly excluded under § 432.102(f) would remain covered in accordance with that section.

G. Part 550—Pay Administration (General)

In part 550, OPM is proposing to amend the definition of “nonqualifying appointment” in § 550.703 to include an excepted appointment under Schedule G. This change would align the definition of “nonqualifying appointment” with the existing definition of “qualifying appointment,” which excludes excepted appointments without time limitation under Schedule C or Schedule G.

H. Part 731 (Suitability and Fitness) and Part 920 (Timing of Criminal History Inquiries)

In parts 731 and 920, OPM proposes to amend the definition of “political appointment” to include appointments under Schedule G. These changes would ensure that Schedule G appointees are treated consistently with other political appointees for purposes of suitability and fitness regulations in part 731 and the timing of criminal history inquiries in part 920.

I. Part 930—Administrative Law Judge Program

OPM proposes to amend part 930, subpart B, to conform the Administrative Law Judge Program regulations to Schedule E. Current part 930, subpart B, retains provisions tied to competitive examination, lists of eligibles, and career appointments. The proposed amendments would revise those provisions to recognize that new ALJ appointments are made under Schedule E, remove or reserve the rule on cost of competitive examination, revise appointment provisions, update incumbent and reappointment provisions, revise promotion provisions, and remove references to positions being filled through competitive examination. The proposed amendments would preserve applicable

ALJ statutory protections, including those under 5 U.S.C. 3105 and 7521.

OPM proposes to revise § 930.210 to conform the ALJ RIF regulation to the current status of ALJ positions. Effective July 10, 2018, ALJ positions appointed under 5 U.S.C. 3105 were placed in Schedule E of the excepted service, while incumbents who were in the competitive service on that date retain competitive-service status so long as they remain in their current positions. Current § 930.210 was written against the prior competitive-service ALJ framework and provides ALJs both agency RPL placement assistance and placement on OPM’s ALJ priority referral list. The proposed revision would distinguish between legacy competitive-service ALJs whose status is preserved under § 6.8(d) and ALJs appointed in Schedule E after July 10, 2018.

Under proposed § 930.210(a), ALJs would remain subject to the RIF regulations in part 351, except as modified by § 930.210. Schedule E ALJs would compete as excepted-service employees if otherwise covered by part 351, while ALJs whose competitive-service status is preserved under § 6.8(d) would continue to be treated as competitive-service employees for RIF purposes. This distinction reflects the current legal structure of ALJ appointments and avoids treating post-July 10, 2018 Schedule E ALJs as if they remained in the competitive service.

Proposed § 930.210(b) would also update the rule for determining ALJ retention standing. Because agencies may not rate the job performance of ALJs under § 930.206, agencies may not prepare, assign, or use an ALJ performance rating for RIF purposes. The proposed rule would instead require agencies to determine ALJ performance credit in accordance with the rules in part 351 governing employees who do not have ratings of record. This approach preserves the prohibition on ALJ performance ratings while allowing ALJs to be placed on retention registers under the RIF framework. Section 3502 requires OPM to prescribe RIF regulations that give due effect to tenure, military preference, length of service, and efficiency or performance ratings; the proposed rule applies that framework to ALJs without requiring agencies to create ALJ ratings where another regulation prohibits them.

Proposed § 930.210(c) would clarify assignment rights. Competitive-service employees receive assignment rights under § 351.701, but excepted-service assignment rights are discretionary under § 351.705 and may be provided

only under agency procedures that are consistent with part 351 and uniformly applied in the RIF. Accordingly, proposed § 930.210(c) would provide that Schedule E ALJs do not have mandatory assignment rights under § 351.701. An agency may, in its discretion, provide Schedule E ALJs assignment rights under § 351.705, but if the agency does not do so, it may release a Schedule E ALJ from the competitive level in accordance with the order of release under part 351 without offering assignment to another position. By contrast, an ALJ whose competitive-service status is preserved under § 6.8(d) would remain subject to the competitive-service assignment-right provisions in § 351.701 while that status remains preserved.

Proposed § 930.210(d) would revise ALJ placement-assistance provisions. Under current 5 CFR part 330, the RPL is a required placement program for current and former competitive-service employees who will be or were separated by RIF or who recovered from compensable injury after more than one year. Accordingly, proposed § 930.210(d)(1) would provide that an ALJ in the competitive service whose status is preserved under § 6.8(d) remains eligible for RPL placement assistance under part 330 if reached in a RIF and issued a separation notice.

For Schedule E ALJs, proposed § 930.210(d)(2) would clarify that a Schedule E ALJ who is separated, furloughed, or demoted by RIF does not, solely by virtue of service in a Schedule E ALJ position or appointment under 5 U.S.C. 3105, have a statutory entitlement to priority consideration, priority referral, or reemployment as an ALJ. This treatment aligns Schedule E ALJs with other excepted-service employees separated by RIF. Under current OPM regulations, excepted service employees separated or furloughed from continuing appointments generally do not have a mandatory priority reemployment entitlement. Current § 302.303 requires a priority reemployment list for certain categories, including preference-eligible former employees separated or furloughed from continuing appointments without delinquency or misconduct and certain compensable-injury cases, while agency priority consideration for nonpreference eligibles separated or furloughed from continuing appointments is discretionary.

Thus, the proposed rule would treat Schedule E ALJs like similarly situated excepted-service employees: a Schedule E ALJ would not receive a mandatory priority reemployment list or priority-

referral entitlement merely because the position is an ALJ position, but the individual would retain any priority, restoration, or placement right that arises from another source of law. Proposed § 930.210(d)(3) would expressly preserve rights under 5 U.S.C. 8151, part 353, 5 U.S.C. 3315, 5 U.S.C. 3320, the Uniformed Services Employment and Reemployment Rights Act (USERRA), a final order, or another applicable statute, regulation, or binding legal authority. This savings clause is intended to ensure, for example, that a preference-eligible Schedule E ALJ or an ALJ with compensable-injury restoration rights receives any priority consideration required by the applicable authority.

OPM also proposes to remove the current mandatory ALJ-specific OPM priority referral list as a regulatory entitlement for Schedule E ALJs. OPM has determined that this special list is no longer necessary as a mandatory rule for employees appointed under Schedule E, particularly because Schedule E ALJs are now part of the excepted service and because current law does not provide an ALJ-specific statutory reemployment entitlement after a RIF. Section 7521 provides special good-cause protections for certain actions against ALJs, but expressly excludes RIF actions under 5 U.S.C. 3502 from those procedures. RIF actions involving ALJs are therefore governed by part 351 and § 930.210, not by the good-cause procedures applicable to disciplinary or adverse actions against ALJs. As a conforming change, OPM also proposes to remove § 930.201(e)(9), which describes OPM's authority to maintain and administer the ALJ priority referral program under § 930.210(c) and to redesignate the remaining paragraphs of § 930.201(e) accordingly.

Finally, proposed § 930.210(d)(4) would preserve flexibility for OPM or agencies to establish discretionary placement-assistance procedures for ALJs separated, furloughed, or demoted by RIF. Any such discretionary procedure would have to be in writing and identify its coverage, duration, order of consideration, geographic scope, qualification requirements, and termination conditions. The proposed rule would also clarify that discretionary placement assistance does not create a statutory entitlement to priority consideration, priority referral, or reemployment. This approach preserves agency and OPM flexibility to provide additional assistance where appropriate, while aligning mandatory reemployment-priority rights for Schedule E ALJs with the treatment of

other excepted-service employees under current OPM regulations.

Proposed § 930.211(c)(3) would conform the ALJ adverse-action regulation by clarifying that § 930.211 does not apply to RIF actions taken under 5 U.S.C. 3502, part 351, and § 930.210. This change preserves the distinction between ALJ disciplinary or adverse actions governed by 5 U.S.C. 7521 and RIF actions governed by 5 U.S.C. 3502, part 351, and § 930.210.

III. Requests for Comment

OPM requests comment on all aspects of this proposed rule. OPM is especially interested in comments on the following issues.

A. Governmentwide Schedule A and Schedule B Authorities That May Be Obsolete, Duplicative, or Better Handled Differently

OPM requests comment on whether the following governmentwide Schedule A authorities in § 213.3102 remain necessary; whether any should be removed, reserved, consolidated with another authority, or converted to agency-specific Schedule A authorities; and whether agencies currently rely on these authorities for mission-critical hiring:

§ 213.3102(l)—temporary or intermittent professional, scientific, or technical experts for consultation purposes;

§ 213.3102(n)—local physicians, surgeons, or dentists employed under contract or on a part-time or fee basis;

§ 213.3102(o)—scientific, professional, or analytical positions filled by bona fide faculty members of accredited colleges or universities with special qualifications, with employment limited to 130 working days per year;

§ 213.3102(x)—positions filled by inmates of penal or correctional institutions under work-release programs where a local recruiting shortage exists;

§ 213.3102(aa)—temporary scientific and professional research associate positions at GS-11 and above filled through the National Research Council post-doctoral research associate program; and

§ 213.3102(ff)—not more than 24 positions filled under an agreement between OPM and the Department of Justice (DOJ) by persons in programs administered by the Attorney General under Public Law 91-452 and related statutes.

Current § 213.3102 includes these authorities, including the expert/consultant, local physician/surgeon/dentist, faculty, work-release, National Research Council associate, and DOJ

program authorities. OPM also requests comment on whether any of these authorities overlap with other statutory or regulatory hiring authorities, whether agencies continue to use them, and whether any program-specific authority should be narrowed, modernized, or moved from a governmentwide authority to an agency-specific authority.

OPM also requests comment on whether the governmentwide Schedule B authority in § 213.3202(n) remains necessary. That provision applies to positions filled by preference eligibles or veterans separated under honorable conditions after three or more years of continuous active military service who applied under merit-promotion procedures when applications were accepted from outside the agency's own workforce; the regulation states that no new appointments may be made under this authority after November 30, 1999. OPM requests comment on whether this authority should be removed and reserved, retained only for legacy status purposes, revised, or addressed through another regulatory mechanism.

OPM may, in a final rule, remove, reserve, consolidate, or narrow any of the identified authorities based on comments received, and interested parties should comment now if they rely on any of these authorities and would be affected by such action. Also, OPM requests that agencies identify any current employees, mission-critical hiring pipelines, workforce-planning needs, or legal obligations that would be affected if any of these authorities were removed, reserved, consolidated, narrowed, or converted to agency-specific authority.

B. Additional Schedule A Authorities That May Warrant Exemption From Part 302 Appointment Procedures

Proposed § 302.101(c) would update the list of positions exempt from the appointment procedures of part 302 while preserving the principle of veterans' preference as far as administratively feasible and preserving legally required restoration and priority-consideration rights. OPM requests comment on whether additional governmentwide Schedule A appointing authorities should be exempt from part 302 appointment procedures.

C. Priority Consideration Framework in Part 302/Reliance Interests

OPM requests comment on whether the proposed priority-consideration framework in §§ 302.303 and 302.304 adequately preserves rights of employees who are furloughed, separated by RIF or similar workforce

reduction action, or entitled to restoration or priority consideration because of recovery from compensable injury. OPM also requests comment on whether the proposed framework provides sufficient flexibility for agencies while preserving veterans' preference and legally required restoration and priority-placement rights.

OPM requests comment on whether the proposed rule, if finalized, should apply only to vacancies announced on or after the effective date, and how agencies should treat pending recruitment actions, existing employment lists, certificates, priority reemployment lists, and agency plans established under current part 302.

OPM further requests comment on any reliance interests implicated by the proposed rule and will address them with particularity in any final rule that it issues.

IV. Expected Impact of This Proposed Rule

A. Statement of Need

OPM is issuing this proposed rule to modernize and clarify the regulations governing appointments in the excepted service while preserving the statutory protections required by 5 U.S.C. 3320. Current part 302 relies on legacy employment-list and order-of-consideration procedures that are more complex than necessary to implement the veterans' preference, rating, ranking, referral, and pass-over requirements incorporated by 5 U.S.C. 3320. This proposed rule would replace those procedures with a simpler, more transparent framework that allows agencies to use numerical rating, category rating, or other job-related procedures consistent with 5 U.S.C. 3308 through 3319, while continuing to protect veterans' preference, compensable-injury restoration rights, and other legally required priority-placement rights. The rule is also needed to conform OPM's regulations to current excepted-service schedules and related Executive orders, including provisions governing Schedule E, Schedule G, Schedule Policy/Career, Pathways conversions, career-transition exceptions, merit-promotion rules, and ALJ appointments.

B. Impact

This proposed rule would primarily affect Federal agencies and Federal applicants or employees subject to the covered excepted service appointment authorities. OPM expects the rule to reduce administrative burden by simplifying part 302 appointment

procedures and eliminating legacy employment-list and order-of-consideration structures. Agencies would retain responsibility for applying veterans' preference, establishing job-related qualification requirements, identifying and clearing priority candidates, documenting selection decisions, and complying with restoration rights and other applicable law.

OPM expects the conforming amendments to part 213, part 317, part 359, part 362, part 432, part 550, part 731, part 920, and part 930 to improve regulatory clarity by aligning the CFR with current Executive orders, Pathways conversion policy, Schedule Policy/Career implementation, Schedule G, and Schedule E ALJ appointments. OPM requests comment on the expected implementation costs and benefits of these changes, including any costs associated with revising agency excepted service hiring procedures, updating human resources (HR) systems and personnel-action coding, training HR staff and selecting officials, and documenting priority-consideration and veterans' preference determinations.

C. Regulatory Alternatives

OPM considered retaining the current part 302 framework but rejected that approach because the existing procedures are more complex than necessary to implement the statutory requirements governing veterans' preference and excepted service appointments. OPM also considered preserving the employment-list and order-of-consideration terminology while simplifying specific provisions, but concluded that a more direct priority-consideration model would be clearer for agencies and applicants and would better align part 302 with modern hiring practices.

OPM further considered whether to address Schedule E, Schedule G, Schedule Policy/Career, Pathways conversions, and ALJ conforming amendments in separate rulemakings. OPM proposes to address them together because the provisions interact across parts 213, 302, 317, 359, 362, 432, 550, 731, 920, and 930. Addressing them in a single rulemaking promotes consistency and reduces the risk of conflicting regulatory text.

D. Costs

This proposed rule, once finalized, will affect the operations of approximately 80 Federal agencies—ranging from cabinet-level departments to small independent agencies. OPM will provide guidance on implementing this proposed rule in the form of a fact

sheet or frequently asked questions. OPM estimates that this rulemaking will require individuals employed by these agencies to modify policies and procedures to implement the rulemaking and train HR practitioners and hiring managers on its use. For this cost analysis, OPM assumed an average salary rate of Federal employees performing this work using the rate in 2025 for GS-14, step 5, from the Washington, DC, locality pay table (\$161,486 annual locality rate and \$77.38 hourly locality rate). We assumed that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of \$154.76 per hour. To comply with the regulatory changes in the proposed rule, affected agencies will need to review the rule and update their policies and procedures. We estimate that, in the first year following publication of any final rule, doing so will require an average of 100 hours of work by employees per agency with an average hourly cost of \$154.76. This work would result in estimated costs in that first year of implementation of about \$15,476 per agency, and about \$1,238,080 in total governmentwide. Some agencies may incur additional costs because they have to establish excepted service employment policies where none have existed. We do not believe this rulemaking will substantially increase the ongoing administrative costs to agencies (including the administrative costs of using these new procedures and training new staff) because the rulemaking is streamlining existing procedures and processes.

E. Benefits

OPM expects this proposed rule to improve the clarity, consistency, and administrability of excepted service hiring regulations. The proposal would replace legacy employment-list and order-of-consideration procedures in part 302 with a more direct framework for identifying qualified applicants, applying veterans' preference, clearing priority candidates, documenting selection decisions, and preserving restoration and other legally required placement rights. This simplified structure should reduce agency burden, make excepted-service hiring procedures easier for HR staff and selecting officials to apply, and improve transparency for applicants and employees. The proposed amendments to parts 213, 317, 359, 362, 432, 550, 731, 920, and 930 would also align OPM's regulations with current excepted-service schedules, Pathways

conversion rules, Schedule Policy/ Career implementation, Schedule G, and Schedule E ALJ appointments, reducing ambiguity and the risk of inconsistent agency application. Overall, OPM expects the rule to support faster and more reliable hiring administration while preserving the statutory protections that apply to excepted service appointments.

F. Severability

If any provision of this rule is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, OPM intends that it shall be severable from its respective section(s) and shall not affect the remainder thereof or the application of the provision to other persons not similarly situated or to other dissimilar circumstances, unless such holding is that the provision is invalid and unenforceable in all circumstances, in which event the provision shall be severable from the remainder of this part and shall not affect the remainder thereof. Should provisions related to one of the sections be held to be invalid we believe that the other sections should be severable and would not be impacted.

V. Regulatory Compliance

1. Regulatory Review

OPM has examined the impact of this rule as required by E.O.s 12866 and 13563, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public, health, and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for rules that have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This rulemaking does not reach that threshold but has otherwise been designated as a “significant regulatory action” under section 3(f) of E.O. 12866, as supplemented by E.O. 13563. This rulemaking is not expected to be considered an E.O. 14192 regulatory action because it imposes no more than *de minimis* costs.

2. Regulatory Flexibility Act

The Director of the Office of Personnel Management certifies that this regulation will not have a

significant impact on a substantial number of small entities because it applies only to Federal agencies and employees.

3. Federalism

OPM has examined this proposed rule under E.O. 13132 and has determined that 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.

4. Civil Justice Reform

This rule meets the applicable standard set forth in section 3(a) and (b)(2) of E.O. 12988.

5. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits before issuing any rule that would impose spending costs on State, local, or tribal governments in the aggregate, or on the private sector, in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. That threshold is currently approximately \$193 million. This rulemaking will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, in excess of the threshold. Thus, no written assessment of unfunded mandates is required.

6. Congressional Review Act

OPM will submit the final rule, if issued, to Congress and the Comptroller General under 5 U.S.C. 801. OPM has preliminarily determined that this proposed rule would not be a “major rule” as defined in 5 U.S.C. 804(2).

7. Paperwork Reduction Act (PRA)

This proposed rule does not impose a new collection of information from the public within the meaning of the Paperwork Reduction Act of 1995, as amended (44 U.S.C. 3501 *et seq.*). The proposed rule primarily governs internal Federal agency personnel procedures, documentation, and administration. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number.

List of Subjects

5 CFR Part 213

Government employees, Reporting and recordkeeping requirements.

5 CFR Part 302

Administrative practice and procedure, Authority delegations (Government agencies), Government contracts, Government employees, Investigations.

5 CFR Part 317

Administrative practice and procedure, Government employees.

5 CFR Part 359

Government employees.

5 CFR Part 362

Administrative practice and procedure, Colleges and universities, Government employees.

5 CFR Part 432

Government employees.

5 CFR Part 550

Administrative practice and procedure, Claims, Government employees, Wages.

5 CFR Part 731

Administrative practice and procedure, Authority delegations (Government agencies), Government contracts, Government employees, Investigations.

5 CFR Part 920

Administrative practice and procedure, Government employees.

5 CFR Part 930

Administrative practice and procedure, Computer technology, Government employees, Motor vehicles.

Office of Personnel Management.

Alexys Stanley,

Federal Register Liaison.

Accordingly, for the reasons stated in the preamble, OPM proposes to amend 5 CFR parts 213, 302, 317, 359, 362, 432, 550, 731, 920, and 930 as follows:

PART 213—EXCEPTED SERVICE

■ 1. The authority citation for part 213 is revised to read as follows:

Authority: 5 U.S.C. 3161, 3301, and 3302; 38 U.S.C. 4301 *et seq.*; E.O. 10577, 19 FR 7521, 3 CFR, 1954–1958 Comp., p. 218; E.O. 13843, 83 FR 32755; E.O. 14171, 90 FR 8625; E.O. 14317, 90 FR 34753; E.O. 14410, 91 FR 34893.

Sec. 213.101 also issued under 5 U.S.C. 2103.

Sec. 213.3102 also issued under 5 U.S.C. 3307, 8337(h), and 8456; 38 U.S.C. 4301 *et*

seq.; E.O. 12125, 44 FR 16879, 3 CFR, 1979 Comp., p. 375; E.O. 13124, 64 FR 31103, 3 CFR, 1999 Comp., p. 192; E.O. 13562, 75 FR 82585, 3 CFR, 2010 Comp., p. 291; E.O. 14217, 90 FR 10577; and Presidential Memorandum of May 11, 2010, 75 FR 27157, 3 CFR, 2010 Comp., p. 327.

Sec. 213.3202 also issued under 5 U.S.C. 3304.

Subpart A—General Provisions

■ 2. Amend § 213.102 by revising the section heading and paragraph (b)(3)(i) to read as follows:

§ 213.102 Identification of positions in Schedules A, B, C, D, or G.

* * * * *

(b) * * *

(3) * * *

(i) Upon determining that any position or group of positions, as defined in paragraph (c) of this section, should be excepted indefinitely or temporarily from the competitive service, the Office of Personnel Management will authorize placement of the position or group of positions into Schedule A, B, C, D, or G, as applicable. Unless otherwise specified in a particular appointing authority, an agency may make Schedule A, B, C, D, or G appointments on either a permanent or nonpermanent basis, with any appropriate work schedule (*i.e.*, full-time, part-time, seasonal, on-call, or intermittent).

* * * * *

■ 3. Revise § 213.103 to read as follows:

§ 213.103 Publication of excepted appointing authorities in Schedules A, B, C, D, E, Policy/Career, and G.

(a) Schedule A, B, C, D, E, Policy/Career, and G appointing authorities available for use by all agencies will be published as regulations in the **Federal Register** and the Code of Federal Regulations.

(b) OPM will publish annually, as a notice in the **Federal Register**, a consolidated listing of all agency-specific Schedule A, B, C, Policy/Career, and G authorities current as of June 30 of each year, with assigned authority numbers or other unique identifiers. The annual notice will also identify agency-specific authorities established, modified, or revoked during the preceding reporting period. OPM may publish additional notices concerning agency-specific authorities when OPM determines that additional notice would promote sound administration or public transparency.

■ 4. Amend § 213.104 by revising the section heading and paragraphs (a) introductory text, (a)(1), (a)(2), (b)(1), and (b)(3)(iii) to read as follows:

§ 213.104 Special provisions for temporary, time-limited, intermittent, or seasonal appointments in Schedule A, B, C, D, or G.

(a) When OPM specifies that appointments under a particular Schedule A, B, C, D, or G authority must be temporary, intermittent, or seasonal, or when agencies elect to make temporary, intermittent, or seasonal appointments in Schedule A, B, C, D, or G, those terms have the following meaning:

(1) *Temporary appointments*, unless otherwise specified in a particular Schedule A, B, C, D, or G exception, are made for a specified period not to exceed 1 year and are subject to the time limits in paragraph (b) of this section. Time-limited appointments made for more than 1 year are not considered to be temporary appointments and are not subject to these time limits.

(2) *Intermittent positions* are positions without a regular tour of duty.

* * * * *

(b) * * *

(1) *Service limits*. Agencies may make temporary appointments for a period not to exceed 1 year, unless the applicable Schedule A, B, C, D, or G authority specifies a shorter period. Except as provided in paragraph (b)(3) of this section, agencies may extend temporary appointments for no more than 1 additional year (24 months of total service). Appointment to a successor position (*i.e.*, a position that replaces and absorbs the original position) is considered to be an extension of the original appointment. Appointment to a position involving the same basic duties, in the same major subdivision of the agency, and in the same local commuting area is also considered to be an extension of the original appointment.

* * * * *

(3) * * *

(iii) OPM may approve extension of specific temporary appointments beyond 2 years (24 months total service) for specific positions, projects or other unusual circumstances.

Subpart C—Excepted Schedules

Schedule A

■ 5. Amend § 213.3102 by revising paragraphs (i)(1) and (u) to read as follows:

§ 213.3102 Entire executive civil service.

* * * * *

(i) * * *

(1) Positions in remote/isolated locations where examination is impracticable. A remote/isolated location is outside the local commuting

area of a population center from which an employee can reasonably be expected to travel on short notice under adverse weather or road conditions that are normal for the area. For this purpose, a population center is a town with housing, schools, health care, stores and other businesses in which the government can reasonably expect to attract applicants. An individual appointed under this authority may not be employed in the same agency under a combination of this and any other appointment to positions involving related duties and requiring the same qualifications for more than 1,040 working hours in a service year. Temporary appointments under this authority may be extended in 1-year increments, with no limit on the number of such extensions, as an exception to the service limits in § 213.104.

* * * * *

(u) *Appointment of persons with intellectual disabilities, severe physical disabilities, or psychiatric disabilities*—

(1) *Purpose*. An agency may appoint, on a permanent, time-limited, or temporary basis, a person with an intellectual disability, a severe physical disability, or a psychiatric disability according to the provisions described below.

(2) *Proof of disability*.

(i) An agency must require proof of an applicant's intellectual disability, severe physical disability, or psychiatric disability prior to making an appointment under this section.

(ii) An agency may accept, as proof of disability, appropriate documentation (*e.g.*, records, statements, or other appropriate information) issued by a licensed medical professional (*e.g.*, a physician or other medical professional duly certified by a State, the District of Columbia, or a U.S. territory, to practice medicine); a licensed vocational rehabilitation specialist (State or private); or any Federal agency, State agency, or an agency of the District of Columbia or a U.S. territory that issues or provides disability benefits.

(3) *Permanent or time-limited employment options*. An agency may make permanent or time-limited appointments under this paragraph (u)(3) where an applicant supplies proof of disability as described in paragraph (u)(2) of this section and the agency determines that the individual is likely to succeed in performing the duties of the position for which he or she is applying. In determining whether the individual is likely to succeed in performing the duties of the position, the agency may rely upon the

applicant's employment, educational, or other relevant experience, including but not limited to service under another type of appointment in the competitive or excepted services.

(4) *Temporary employment options.* An agency may make a temporary appointment when:

(i) The agency determines that it is necessary to observe the applicant on the job to determine whether the applicant is able or ready to perform the duties of the position. When an agency uses this option to determine an individual's job readiness, the hiring agency may convert the individual to a permanent appointment in the excepted service whenever the agency determines the individual is able to perform the duties of the position; or

(ii) The work is of a temporary nature.

(5) *Noncompetitive conversion to the competitive service.*

(i) An agency may noncompetitively convert to the competitive service an employee who has completed 2 years of satisfactory service under this authority in accordance with the provisions of Executive Order 12125, as amended by Executive Order 13124, and § 315.709 of this chapter, except as provided in paragraph (u)(5)(ii) of this section.

(ii) Time spent on a temporary appointment specified in paragraph (u)(4)(ii) of this section does not count towards the 2-year requirement.

* * * * *

§ 213.3301 [Amended]

■ 6. Amend § 213.3301 by removing the phrase “number from 213.3302 through 213.3399, or other appropriate number,” in paragraph (a) and adding in its place the phrase “unique identifier”.

■ 7. Amend § 213.3402 by revising paragraph (b) to read as follows:

§ 213.3402 Entire executive civil service; Pathways Programs.

* * * * *

(b) *Recent Graduates Program; Positions in the Recent Graduates Program.*

(1) Except as provided in paragraph (b)(2) of this section, initial appointments of Recent Graduates may be made at any grade level, not to exceed GS-11 (or equivalent level under another pay and classification system, including the Federal Wage System (FWS)), depending on the candidates' qualifications.

(2) Initial appointments may be made to scientific and professional research positions at the GS-12 level for which the classification and qualification criteria for research positions apply, if the candidate possesses a Ph.D. or

equivalent degree directly related to the position the agency is seeking to fill.

(3) Appointments must be made in accordance with the provisions of subpart C of part 362 of this chapter.

■ 8. Add a new undesignated center heading after § 213.3402 to read as follows:

SCHEDULE E

■ 9. Add new § 213.3501 below the undesignated heading SCHEDULE E to read as follows:

§ 213.3501 Positions of administrative law judge appointed under 5 U.S.C. 3105.

(a) An agency may appoint an individual under this section only to an administrative law judge position appointed under 5 U.S.C. 3105. Positions filled under this section are excepted from the competitive service and constitute Schedule E.

(b) A new appointment to an administrative law judge position made on or after July 10, 2018, must be made under Schedule E. This section does not alter the status of an incumbent administrative law judge whose competitive-service status is preserved under § 6.8(d) of this chapter.

(c) An appointment under this section is not subject to the appointment procedures of part 302 of this chapter, including examination and rating procedures. Each agency shall follow the principle of veterans' preference as far as administratively feasible.

(d) Appointments under this section must comply with § 6.3(b) of this chapter. At the time of application and any new appointment, an individual, other than an incumbent administrative law judge, must possess a professional license to practice law and be authorized to practice law under the laws of a State, the District of Columbia, the Commonwealth of Puerto Rico, or a territorial court established under the Constitution of the United States, subject to the license-status provisions in § 6.3(b) of this chapter.

(e) Appointments and personnel actions under this section remain subject to applicable statutory and regulatory requirements governing administrative law judges, including 5 U.S.C. 3105, 5 U.S.C. 7521, and subpart B of part 930 of this chapter.

(f) An individual appointed under this section is not subject to a trial period under part 11 of this chapter.

■ 10. Amend § 213.3601 by:

■ a. Revising paragraphs (b) and (c);

■ b. Removing paragraph (d) and redesignating paragraphs (e) and (f) as paragraphs (d) and (e), respectively; and

■ c. Revising newly redesignated paragraph (e) and adding paragraph (f) to read as follows:

§ 213.3601 Career positions of a confidential, policy-determining, policy-making, or policy-advocating character.

* * * * *

(b)(1) Except as provided in paragraph (c) of this section, agencies must make appointments to positions in Schedule Policy/Career of the excepted service in the same manner as to positions in the competitive service, to include:

(i) Public notification of job opportunities;

(ii) Applicant evaluation based on valid, job-related assessments; and

(iii) Selections of highly qualified individuals based on merit.

(2) In making appointments under paragraph (b)(1) of this section, agencies must follow the principles of veterans' preference as far as administratively feasible based on the rating, ranking, and selection processes used for making appointments. Where numerical ratings are used in the evaluation and referral of candidates, agencies shall follow the regulations related to veterans' preference in part 302 and subpart A of part 337 of this chapter, as applicable. When category rating is used, agencies shall follow the procedures related to veterans' preference in part 302 and subpart C of part 337 of this chapter. Where another process is used in accordance with § 302.105 of this chapter, veteran status must be considered a positive factor.

(c) Agencies must make appointments to positions in Schedule Policy/Career of the excepted service that, but for their placement in Schedule Policy/Career, would be listed in another excepted service schedule pursuant to the rules applicable to such positions in the corresponding schedule, including the application of veterans' preference as far as administratively feasible.

* * * * *

(e) Individuals appointed to positions in Schedule Policy/Career are not subject to trial periods under part 11 of this chapter. An individual appointed under paragraph (b) of this section in the same manner as an appointment in the competitive service acquires competitive status after completing 2 years of continuing service in the same or similar positions. Nothing in this paragraph limits the retention of competitive status under § 1.3(d) of this chapter or the acquisition of competitive status under § 3.1(a)(5) or § 6.8(e) of this chapter.

(f) To the extent permitted by the statute governing the position and any applicable Executive order, a position in a statutory personnel system outside title 5, United States Code, may be designated as Schedule Policy/Career if the position is of a confidential, policy-

determining, policy-making, or policy-advocating character. For a position described in this paragraph that is otherwise covered by chapters 23, 43, or 75 of title 5, designation in Schedule Policy/Career affects coverage under those chapters to the extent provided by 5 U.S.C. 2302(a)(2)(B)(i), 4301(2)(G), 4303(e)(3), and 7511(b)(2), and applicable implementing regulations. Such designation does not otherwise alter the governing statutory personnel system unless expressly provided by statute, Executive order, or regulation.

■ 11. Add a new undesignated center heading after § 213.3601 to read as follows:

SCHEDULE G

■ 12. Add new § 213.3701 below the undesignated heading SCHEDULE G to read as follows:

§ 213.3701 Positions of a policy-making or policy-advocating character normally subject to change as a result of a Presidential transition.

Upon specific authorization by OPM, agencies may make appointments under this section to noncareer positions that are of a policy-making or policy-advocating character and are normally subject to change as a result of a Presidential transition. Positions filled under this authority are excepted from the competitive service and constitute Schedule G. Each position will be assigned a unique identifier to be used by the agency in recording appointments made under that authorization.

PART 302—EMPLOYMENT IN THE EXCEPTED SERVICE

■ 13. The authority citation for part 302 is revised to read as follows:

Authority: 5 U.S.C. 1103, 1104, 1302, 3301, 3302, 3308, 3309, 3313, 3315, 3317, 3318, 3319, 3320, and 8151; E.O. 10577, 19 FR 7521, 3 CFR, 1954–1958 Comp., p. 218; E.O. 14171, 90 FR 8625.

Sec. 302.105 also issued under 5 U.S.C. 1104 and sec. 3(5), Pub. L. 95–454, 92 Stat. 1112.

Sec. 302.107 also issued under 5 U.S.C. 9201–9206 and sec. 1122(b)(1), Pub. L. 116–92, 133 Stat. 1605.

Secs. 302.108 and 302.203 also issued under E.O. 13764, 82 FR 8115, 3 CFR, 2017 Comp., p. 243.

Subparts E and F also issued under 5 U.S.C. 3318(c), 3319(c), and 3320; sec. 2(d), Pub. L. 114–137, 130 Stat. 312 (5 U.S.C. 3318 note).

Sec. 302.701 also issued under 5 U.S.C. chapter 77.

Subpart A—General Provisions

■ 14. Revise § 302.101 to read as follows:

§ 302.101 Positions covered by regulations.

(a) *Positions covered.* With respect to the application of veterans' preference, this part applies to each position in the executive branch of the Federal Government that is not in the competitive service and that is subject to title 5, United States Code, or subject to a statutory requirement to follow the veterans' preference provisions of title 5. With respect to restoration rights due to compensable injury and appeals therefrom, this part applies to positions covered by 5 U.S.C. 8101(1) that are not in the competitive service.

(b) *Positions not covered.* This part does not apply to a position or appointment that is required by the Congress to be confirmed by, or made with the advice and consent of, the Senate.

(c) *Positions exempt from appointment procedures.* An agency is not required to apply the examination, rating, ranking, referral, and selection procedures of this part to the following positions or appointments. Each agency shall, however, follow the principle of veterans' preference as far as administratively feasible and, upon request of a qualified and available preference eligible, shall provide the reasons for the individual's nonselection. Nothing in this paragraph relieves an agency of any restoration, reemployment, or priority consideration obligation required by 5 U.S.C. 8151, part 353 of this chapter, this part, a final order, or other applicable law.

(1) Positions filled by persons appointed without pay or at pay of \$1 a year.

(2) Positions outside the continental United States and outside the State of Hawaii and the Commonwealth of Puerto Rico when filled by persons resident in the locality, and positions in the State of Hawaii and the Commonwealth of Puerto Rico when paid in accordance with prevailing wage rates.

(3) Positions that the exigencies of the national defense program require to be filled immediately before qualified applicants can be identified or considered, provided that appointments under this paragraph are temporary and may not exceed 1 year, with not more than 1 additional year of extension.

(4) Positions filled by appointees serving on an irregular or occasional basis whose hours or days of work are not based on a prearranged schedule and who are paid only for the time actually employed or for services actually performed.

(5) Positions paid on a fee basis.

(6) Attorney positions.

(7) Law clerk trainee positions filled under § 213.3102(e) of this chapter.

(8) Positions OPM excepts from the competitive service under § 6.1 of this chapter when OPM agrees with the agency that the positions should be included hereunder and provides in writing that an agency is not required to fill positions according to the procedures in this part.

(9) Positions included in Schedule C and Schedule G.

(10) Administrative law judge positions in Schedule E.

(11) Confidential, policy-determining, policy-making, or policy-advocating positions filled under Schedule Policy/Career. Appointments under this authority must be made in accordance with the provisions of § 213.3601 of this chapter.

(12) Positions filled by reemployment of an individual in the same agency, at the same or lower grade or pay level, and under the same appointing authority as the position last held.

(13) Positions in remote or isolated locations when filled under § 213.3102(i)(1) of this chapter.

(14) Positions for which a critical hiring need exists when filled under § 213.3102(i)(2) of this chapter.

(15) Positions filled under § 213.3102(u) of this chapter by persons with intellectual disabilities, severe physical disabilities, or psychiatric disabilities.

■ 15. Revise § 302.103 to read as follows:

§ 302.103 Definitions.

For purposes of this part:

Person entitled to priority consideration means an individual who is entitled to priority consideration for appointment under 5 U.S.C. 8151, part 353 of this chapter, §§ 302.303 and 302.304, a final order, or other applicable statute, regulation, or binding legal authority.

■ 16. Revise § 302.104 to read as follows:

§ 302.104 Applicability of regulations to applicants and employees.

Except as otherwise authorized in this chapter, an agency must apply the provisions of this part necessary to accord veterans' preference and priority consideration whenever a qualified preference eligible or a person entitled to priority consideration applies for appointment to a position covered by this part. When no qualified preference eligible or person entitled to priority consideration applies, the agency may use any lawful appointing procedure consistent with the applicable excepted service authority.

■ 17. Revise § 302.105 to read as follows:

§ 302.105 Alternative procedures.

(a) *General.* An agency may use an alternative procedure for accepting, evaluating, referring, or selecting applicants for positions subject to this part if the procedure is in writing, is applied uniformly, is consistent with merit system principles, and provides preference eligibles and persons entitled to priority consideration at least as much advantage in consideration, referral, and selection as they would receive under the procedures otherwise set forth in this part.

(b) *Contents.* An alternative procedure must describe—

- (1) The positions or appointing authorities covered;
- (2) The method for accepting applications or expressions of interest;
- (3) The method for determining qualifications and evaluating applicants;
- (4) The method for applying veterans' preference;

(5) The method for identifying and considering persons entitled to priority consideration;

(6) The documentation the agency will maintain; and

(7) The circumstances under which the agency may use an exception to selection of a person entitled to priority consideration or pass over a preference eligible.

(c) *OPM review.* OPM may require an agency to submit an alternative procedure for review and may require the agency to modify or discontinue any procedure that does not satisfy this section.

(d) *No waiver of law.* An alternative procedure may not waive any statutory requirement, including any requirement concerning veterans' preference, pass-over of preference eligibles, restoration rights, priority consideration, suitability, fitness, or prohibited personnel practices.

(e) *OPM-led pooled hiring actions.* When OPM administers an OPM-led pooled hiring action under subpart F of this part, OPM may establish procedures, consistent with 5 U.S.C. 3317(b), 5 U.S.C. 3318, 5 U.S.C. 3319, 5 U.S.C. 3320, and this part, for the rating, ranking, and selection of eligible candidates by participating agencies.

■ 18. Revise § 302.106 to read as follows:

§ 302.106 Vacancy announcements.

(a) This section does not require an agency to issue a public vacancy announcement unless public notice is required by statute, regulation, the applicable appointing authority, or agency policy.

(b) When an agency announces a vacancy for a position covered by this part, the announcement must also provide, as applicable, instructions for claiming veterans' preference and priority consideration.

(c) When an agency announces a vacancy in the excepted service, the announcement must include a reasonable accommodation statement that complies with part 330, subpart A of this chapter.

Subpart B—Eligibility Standards

■ 19. Revise § 302.201 to read as follows:

§ 302.201 Persons entitled to veterans' preference.

In actions subject to this part, each agency shall grant veterans' preference as follows:

(a) *Numerical rating.* When numerical scores are used in evaluation and referral, the agency shall grant 5 additional points to preference eligibles under 5 U.S.C. 2108(3)(A) and (B), and 10 additional points to preference eligibles under 5 U.S.C. 2108(3)(C) through (G), consistent with 5 U.S.C. 3309.

(b) *Category rating.* When quality categories are used in evaluation and referral, preference eligibles do not receive additional points. The agency must apply veterans' preference consistent with 5 U.S.C. 3319(b) and (c)(6). Within each quality category, preference eligibles must be listed ahead of individuals who are not preference eligibles. For positions other than scientific and professional positions at the GS-9 level or equivalent or higher, qualified preference eligibles with a compensable service-connected disability of 10 percent or more must be listed in the highest quality category.

(c) *Alternative procedures.* When an agency uses an alternative procedure under § 302.105, the agency must provide preference eligibles at least as much advantage in evaluation, referral, and selection as they would receive under the procedures otherwise set forth in this part.

■ 20. Revise § 302.202 to read as follows:

§ 302.202 Qualification requirements.

(a) *General.* Before making an appointment to a position covered by this part, each agency must establish qualification requirements that are job-related and consistent with the duties to be performed. Qualification requirements may include requirements relating to experience, training, competencies, knowledge, skills, abilities, citizenship, minimum age,

physical condition, or other lawful job-related factors.

(b) *Documentation and uniform application.* Each agency must make its qualification requirements a matter of record, include the requirements in any vacancy announcement for the position, apply the requirements uniformly to all applicants, and furnish information concerning the requirements to an applicant upon request.

(c) *Minimum education.* An agency may not include a minimum educational requirement in qualification requirements unless the position is scientific, technical, or professional and the agency determines that the duties of the position cannot be performed by a person who does not have the prescribed minimum education.

(d) *Maximum age.* An agency may not establish a maximum age requirement for a position unless the requirement is authorized by statute or OPM regulation.

(e) *Waiver for preference eligibles.* Qualification requirements must include—

(1) A provision for waiver by the agency of requirements as to age, height, and weight for each preference eligible when the requirements are not essential to performance of the duties of the position; and

(2) A provision for waiver by the agency of physical requirements for each preference eligible when the agency, after giving due consideration to the recommendation of an accredited physician, finds that the applicant is physically able to discharge the duties of the position.

Subpart C—Accepting, Rating, and Arranging Applications

■ 21. Revise § 302.301 to read as follows:

§ 302.301 Receipt of applications.

(a) Each agency shall determine the methods it will use to provide information concerning opportunities to apply for positions covered by this part. The agency shall provide applicants with information on how to apply, a description of the duties of the position, the applicable qualification requirements, and any other job-related information the agency determines is necessary.

(b) Each agency shall establish definite policies and procedures regarding the acceptance of applications for positions covered by this part and shall make those policies and procedures a matter of record.

(c) Each agency shall apply its application policies and procedures

uniformly to all applicants being considered for employment and shall furnish information concerning those policies and procedures to an applicant upon request.

(d) When an agency fills a position covered by this part and priority consideration under § 302.303 may apply, the agency shall provide a means for individuals claiming priority consideration to identify their eligibility and submit the information necessary for the agency to determine whether they are priority candidates for the vacancy.

■ 22. Revise § 302.302 to read as follows:

§ 302.302 Examination and evaluation of applicants.

(a) *General.* An agency may evaluate the qualifications of applicants for positions covered by this part at any time before an appointment is made. The evaluation must be job-related and may be conducted using numerical rating, category rating, or an alternative evaluation method authorized under § 302.105, unless otherwise exempt from the procedures of this part under § 302.101.

(b) *Record of evaluation method.* The agency shall make the evaluation method used to rate and rank applicants a matter of record and shall make information concerning that method available to an applicant upon request.

(c) *Numerical rating.* When an agency uses numerical rating, scores must be assigned on a scale of 100. An applicant must meet the qualification requirements established under § 302.202 and receive an eligible rating of 70 or more to be eligible for appointment. Candidates with eligible ratings must receive additional points for veterans' preference as provided in § 302.201.

(d) *Category rating.* When an agency uses category rating, the agency must establish and define at least two quality categories before accepting applications. The quality categories must reflect the requirements to perform the job successfully and must distinguish differences in the quality of candidates' job-related competencies, knowledge, skills, and abilities. An agency may not establish a "not qualified" category. Only qualified applicants may be placed in a quality category. Veterans' preference must be applied as provided in § 302.201 and 5 U.S.C. 3319.

(e) *Alternative evaluation methods.* When an agency uses an alternative evaluation method authorized under § 302.105, the agency must apply the method in accordance with its written alternative procedure and must ensure

that preference eligibles and persons entitled to priority consideration receive at least as much advantage in referral or selection as they would receive under the procedures otherwise set forth in this part.

(f) *Nonpreference applicants for certain positions.* An agency may not consider or rate an application for the position of elevator operator, messenger, guard, or custodian submitted by a nonpreference eligible as long as at least three qualified preference eligibles are available for the position.

(g) *Evaluating experience.* When experience is a factor in determining eligibility, an agency shall credit a preference eligible —

(1) With time spent in the military service of the United States if the position for which the preference eligible is applying is similar to the position the preference eligible held immediately before entering military service; and

(2) With all valuable experience, including experience gained in religious, civic, welfare, service, and organizational activities, regardless of whether pay was received therefor.

■ 23. Revise § 302.303 to read as follows:

§ 302.303 Priority consideration.

(a) *General.* An agency shall maintain documented procedures sufficient to identify, notify, evaluate, and consider priority candidates for positions covered by this part. In addition, an agency shall maintain sufficient records to document compliance with this section and § 302.304. An agency is not required to maintain separate records designated as a priority reemployment list, reemployment list, or regular employment list.

(b) *Priority candidate.* For purposes of this subpart, a priority candidate is an individual described in paragraph (c) of this section who has applied for priority consideration under the agency's procedures, is within the scope of priority consideration established under this section, is qualified for the vacancy under § 302.202, and is available for appointment.

(c) *Mandatory priority consideration.* Subject to any available and lawful exception, an agency shall provide priority consideration to the following individuals before appointing any other candidate to a position covered by this part:

(1) A current or former employee of the agency who is a preference eligible, who is serving or served under a continuing excepted service appointment, who has been or will be furloughed or separated by reduction in

force or other workforce reduction action not based on delinquency or misconduct, and who applies or registers for reemployment under the agency's procedures;

(2) A current or former employee who is entitled to restoration or priority consideration because of recovery from compensable injury under 5 U.S.C. 8151, part 353 of this chapter, or other applicable law; and

(3) Any other individual to whom the agency is required to provide reemployment priority under statute, regulation, final order, or other binding legal authority.

(d) *Scope of priority consideration.*

(1) Except as otherwise required by statute, regulation, final order, or other binding legal authority, priority consideration under paragraph (c)(1) of this section applies to positions in the agency in the local commuting area from which the individual was or will be furloughed or separated, at the same or lower grade or pay level, with no greater promotion potential, and with a work schedule no broader than the work schedule of the position from which the individual was or will be furloughed or separated.

(2) Priority consideration under paragraph (c)(2) of this section applies in accordance with 5 U.S.C. 8151, part 353 of this chapter, and other applicable law. Nothing in this section limits an employee's right to immediate and unconditional restoration where such restoration is required by law or regulation.

(3) An agency may provide broader priority consideration than the minimum required by this section, including broader geographic consideration, additional grades or pay levels, different work schedules, or longer eligibility periods, if the agency establishes the broader consideration in written policy and applies it uniformly to similarly situated individuals.

(e) *Duration of priority consideration.*

(1) Priority consideration under paragraph (c)(1) of this section expires 2 years after the effective date of the furlough or separation, unless a longer period is required by statute, regulation, final order, or other binding legal authority, or the agency establishes a longer period in written policy.

(2) Priority consideration and restoration rights under paragraph (c)(2) of this section are governed exclusively by 5 U.S.C. 8151, part 353 of this chapter, and other applicable law, and continue for the period, and on the terms, established by that statute and those regulations. Nothing in this section imposes a 2-year or other durational limit on an entitlement

arising under 5 U.S.C. 8151 or part 353 of this chapter, and nothing in this section shall be construed to shorten, condition, or otherwise diminish the restoration or priority-consideration rights provided by that statute and those regulations.

(3) Priority consideration under paragraph (c)(3) of this section continues for the period required by the applicable statute, regulation, final order, or other binding legal authority.

(f) *Agency procedures.* Each agency shall establish written procedures for administering priority consideration under this section. The procedures must address, at a minimum—

(1) How individuals may apply for priority consideration for specific vacancies;

(2) How the agency will determine the qualifications of individuals who may be eligible for priority consideration;

(3) How individuals may update availability, location, qualification, grade, pay level, work schedule, and other placement information;

(4) How the agency will determine whether an individual is a priority candidate for a specific vacancy;

(5) How the agency will evaluate and rank priority candidates, if more than one priority candidate is available for the same vacancy;

(6) How the agency will apply veterans' preference among priority candidates; and

(7) How the agency will notify priority candidates of the outcome of consideration.

■ 24. Revise § 302.304 to read as follows:

§ 302.304 Applying priority consideration and considering other candidates.

(a) *Priority consideration before other candidates.* Before appointing any individual to a position covered by this part, an agency must determine whether there is a priority candidate under § 302.303 for the vacancy. Except as provided in paragraph (d) of this section, an agency may not appoint a non-priority candidate if a priority candidate is qualified, available, within the scope of priority consideration, and eligible for selection for the vacancy.

(b) *Selection among priority candidates.*

(1) If there is one priority candidate for a vacancy, the agency must select that candidate before selecting any other candidate, unless an exception under paragraph (d) of this section applies.

(2) If there is more than one priority candidate for a vacancy, the agency shall evaluate the priority candidates using the method established for the vacancy under § 302.302 or § 302.105

and shall apply veterans' preference under § 302.201. The agency shall select from among the priority candidates before selecting any non-priority candidate, unless an exception under paragraph (d) of this section applies.

(3) An agency may not pass over a preference eligible to select a nonpreference eligible from the same group of priority candidates unless the applicable pass-over requirements of this part, 5 U.S.C. 3318, 5 U.S.C. 3319, or other applicable authority are satisfied.

(c) *Consideration of non-priority candidates.* After an agency has satisfied the priority consideration requirements of this section or has documented that no priority candidate is available and qualified for the vacancy, the agency may consider other qualified applicants using the evaluation method established for the vacancy under § 302.302 or § 302.105. The agency must apply veterans' preference under § 302.201.

(d) *Exceptions.* An agency may appoint an individual other than a priority candidate only when an available and lawful exception applies. Such exceptions include—

(1) A position or appointment exempt from the appointment procedures of this part under § 302.101(c), provided that the exemption does not relieve the agency of any restoration or priority-placement obligation required by 5 U.S.C. 8151, part 353 of this chapter, this part, or other applicable law;

(2) An action required to satisfy an individual's superior statutory or regulatory restoration, reemployment, or placement right, including immediate restoration under part 353 of this chapter, restoration following military service, or compliance with a final order of the Merit Systems Protection Board, a court, or other competent authority;

(3) A determination, documented by the agency, that no priority candidate is qualified, available, or within the scope of priority consideration for the vacancy;

(4) A determination, documented by the agency, that the duties of the position cannot be taken over without undue interruption by any available priority candidate;

(5) A priority candidate's declination of an offer, failure to respond to a written inquiry regarding availability, or failure to appear for a scheduled interview, when the agency's written inquiry or notice advised the candidate of the consequence of nonresponse or nonappearance;

(6) A conversion, extension, reappointment, or other personnel action that is expressly excepted from

priority consideration by statute, regulation, this chapter, OPM-approved plan, or the terms of the applicable appointing authority; or

(7) Any other exception authorized in writing by OPM or otherwise required by law.

(e) *Notice to affected priority candidates.* When an agency uses an exception under paragraph (d) of this section to appoint an individual other than a priority candidate, the agency shall notify each adversely affected priority candidate of the reason for the exception. The agency shall notify the individual of any appeal rights provided by subpart G of this part, part 1201 of this title, part 353 of this chapter, or other applicable law.

(f) *Documentation.* An agency shall maintain documentation showing—

(1) The vacancy or personnel action filled;

(2) Whether priority consideration applied;

(3) The identity of each priority candidate considered;

(4) The agency's qualification and availability determination for each priority candidate;

(5) The evaluation method used;

(6) The application of veterans' preference, if applicable;

(7) The selection or nonselection decision; and

(8) The basis for any exception used under paragraph (d) of this section.

Subpart D—Selection and Appointment; Reappointment; and Qualifications for Promotion

■ 25. Revise § 302.401 to read as follows:

§ 302.401 Selection and appointment.

(a) *Priority consideration first.* Before making an appointment to a position covered by this part, an agency must satisfy the priority consideration requirements in §§ 302.303 and 302.304.

(b) *Numerical rating.* When an agency uses numerical rating, the agency may refer candidates for selection using a method established before applications are solicited and documented in the recruitment file. The method may include a cut-off score, a set number of the highest-ranked eligible candidates, a set percentage of the highest-ranked eligible candidates, or another job-related method consistent with § 302.105. A selecting official may select any referred eligible candidate, except that the selecting official may not pass over a higher-standing preference eligible to select a lower-standing nonpreference eligible unless the agency satisfies paragraph (e) of this section.

(c) *Category rating.* When an agency uses category rating, the agency may select any eligible candidate in the highest quality category. If fewer than three candidates are in the highest quality category, the agency may merge the highest and second-highest quality categories and make selections from the merged category. Preference eligibles must be listed ahead of nonpreference eligibles within each category or merged category. A selecting official may not select a nonpreference eligible over a preference eligible in the same category unless the agency satisfies paragraph (e) of this section.

(d) *Alternative procedures.* When an agency uses an alternative procedure under § 302.105, selection must be made in accordance with that procedure. The procedure must provide preference eligibles and persons entitled to priority consideration at least as much advantage in consideration, referral, and selection as they would receive under the procedures otherwise set forth in this part.

(e) *Passing over a preference eligible.* When an agency proposes to pass over a preference eligible to select a nonpreference eligible, the agency must comply with the applicable requirements of 5 U.S.C. 3318(c), 5 U.S.C. 3319(c)(6), and OPM instructions.

(f) *Discontinuing consideration.* An agency may discontinue consideration of an eligible candidate only as authorized by 5 U.S.C. 3318(e), § 302.105(e), or other applicable law, consistent with the requirements in § 332.405 of this chapter. Nothing in this paragraph authorizes passing over a preference eligible except as permitted by paragraph (e) of this section and applicable law.

(g) *Documentation.* The agency must document the selection method used, the application of veterans' preference, the application of priority consideration, any pass-over decision, and the basis for the selection. The documentation must be sufficient to permit reconstruction or third-party review.

(h) *Special conditions for OPM-led pooled hiring actions.*

(1) When OPM administers an OPM-led pooled hiring action under subpart F of this part, and determines, based on written documentation, that an eligible candidate has received bona fide consideration for three separate appointments from the same shared certificate for the same position, OPM may discontinue further referral of that candidate from that certificate for that position. For purposes of this paragraph, "the same position" means a position in

the same occupational series, at the same grade or equivalent pay level, and involving substantially equivalent duties, qualification requirements, competencies, and, as applicable, duty location or other lawful position requirements. OPM's authority under this paragraph supplements, and does not limit, agency authority under §§ 302.502(b), 302.603(d), and 302.604(e).

(2) Before discontinuing referral under this paragraph, OPM must document the basis for the determination. The documentation must show that the candidate's application material was reviewed and considered, that the candidate received bona fide consideration for three separate appointments, and that discontinuing further referral is supported by a job-related skill, competency, location, availability, or other lawful requirement relevant to the position being filled. OPM must maintain documentation sufficient to reconstruct the action and must provide written notification to a candidate whose referral is discontinued under this paragraph upon request by the candidate.

(3) Nothing in this paragraph authorizes passing over a preference eligible except as permitted by § 302.401(e) and applicable law.

■ 26. Revise § 302.402 to read as follows:

§ 302.402 Reappointment.

(a) Subject to §§ 302.303 and 302.304, an agency may reappoint a current or former nontemporary employee of the executive branch of the Federal Government who is a preference eligible to a position covered by this part without applying the examination, rating, ranking, and referral procedures of this part.

(b) This section does not authorize an agency to bypass a qualified and available person entitled to priority consideration unless a lawful exception under § 302.304 applies.

(c) A reappointment under this section must be otherwise consistent with statute, regulation, the applicable appointing authority, and any agency policy governing reemployment.

Subpart E—Shared Use of Excepted Service Certificates

§ 302.502 [Amended]

■ 27. Amend § 302.502 in paragraph (b) by:

- a. Removing the phrase "§ 302.302(b)(1)" and adding in its place the phrase "§ 302.302(c)"; and
- b. Removing the phrase "§ 302.302(b)(2)" and adding in its place the phrase "§ 302.302(d)".

Subpart F—OPM-Led Pooled Hiring Actions

§ 302.603 [Amended]

■ 28. Amend § 302.603 by:

- a. In paragraph (d), removing the phrase "§ 302.302(b)(1)" and adding in its place the phrase "§ 302.302(c)", and removing the phrase "§ 302.302(b)(2)" and adding in its place the phrase "§ 302.302(d)"; and
- b. In paragraph (e), removing the phrase "§ 302.401(b)" and adding in its place the phrase "§ 302.401(e)".

§ 302.604 [Amended]

■ 29. Amend § 302.604 by:

- a. In paragraph (e), removing the phrase "§ 302.302(b)(1)" and adding in its place the phrase "§ 302.302(c)", and removing the phrase "§ 302.302(b)(2)" and adding in its place the phrase "§ 302.302(d)"; and
- b. In paragraph (f), removing the phrase "§ 302.401(b)" and adding in its place the phrase "§ 302.401(e)".

Subpart G—Appeals

■ 30. Revise § 302.701 to read as follows:

§ 302.701 Entitlement.

(a) *Restoration-rights appeals.* An individual who is covered by 5 U.S.C. 8101(1) and who is entitled to restoration or priority consideration under 5 U.S.C. 8151, part 353 of this chapter, or this part may appeal an alleged violation of restoration rights to the Merit Systems Protection Board under the Board's regulations by presenting factual information that the individual was denied restoration or priority consideration because of the employment of another person.

(b) *Other appeals.* A preference eligible or person entitled to priority consideration may appeal an action taken under this part only to the extent an appeal right is provided by statute, MSPB regulation, or other applicable law. Nothing in this part creates an appeal right not otherwise provided by statute, regulation, or other applicable law.

PART 317—EMPLOYMENT IN THE SENIOR EXECUTIVE SERVICE

■ 31. The authority citation for part 317 is revised to read as follows:

Authority: 5 U.S.C. 3392, 3393, 3395, 3397, 3592, 3593, 3595, 3596, 8414, and 8421; E.O. 14317, 90 FR 34753. Section 317.202 also issued under 5 U.S.C. 9201–9206 and Pub. L. 116–92, sec. 1122(b)(1).

■ 32. Amend § 317.304 by revising paragraphs (a)(2)(i) and (iii) to read as follows:

§ 317.304 Conversion of career and career-type appointees.

- (a) * * *
- (2) * * *

(i) To a Schedule C or Schedule G position established under part 213 of this chapter;

* * * * *

(iii) To a position which meets the same criteria as a Schedule C or Schedule G position or a position authorized to be filled by non-career executive assignment; or

* * * * *

■ 33. Amend § 317.305 by revising paragraph (a)(1) to read as follows:

§ 317.305 Conversion of excepted appointees.

- (a) * * *

(1) In Schedule C or Schedule G of subpart C of part 213 of this chapter;

* * * * *

■ 34. Amend § 317.502 by revising paragraph (e) to read as follows:

§ 317.502 Qualifications Review Board certification.

* * * * *

(e) An action to convert a “noncareer-type” employee to a career SES appointment in the employee’s current position or a successor to that position will not be forwarded to a QRB. A “noncareer-type” employee includes a noncareer SES appointee, a Schedule C appointee, a Schedule G appointee, or equivalent.

* * * * *

■ 35. Amend § 317.901 by revising paragraph (c)(1)(ii) to read as follows:

§ 317.901 Reassignments.

* * * * *

- (c) * * *

- (1) * * *

(ii) Noncareer appointee includes an SES noncareer or limited appointee, an appointee in a position filled under Schedule C or Schedule G, or an appointee in an Executive Schedule or equivalent position that is not required to be filled competitively.

* * * * *

PART 359—REMOVAL FROM THE SENIOR EXECUTIVE SERVICE; GUARANTEED PLACEMENT IN OTHER PERSONNEL SYSTEMS

■ 36. The authority citation for part 359 is revised to read as follows:

Authority: 5 U.S.C. 1302, 3302, and 3596, unless otherwise noted; E.O. 14317, 90 FR 34753.

■ 37. Amend § 359.406 by revising paragraph (b) to read as follows:

§ 359.406 Restrictions.

* * * * *

(b) For purposes of this section, a noncareer appointee includes an SES noncareer or limited appointee, an appointee in a position filled under Schedule C or Schedule G, or an appointee in an Executive Schedule or equivalent position other than a career Executive Schedule or equivalent position.

* * * * *

■ 38. Amend § 359.503 by revising paragraph (b) to read as follows:

§ 359.503 Restrictions.

* * * * *

(b) For purposes of this section, a noncareer appointee includes an SES noncareer or limited appointee, an appointee in a position filled under Schedule C or Schedule G, or an appointee in an Executive Schedule or equivalent position other than a career Executive Schedule or equivalent position.

* * * * *

■ 39. Amend § 359.701 by revising paragraphs (a)(1) and (2) to read as follows:

§ 359.701 Coverage.

* * * * *

- (a) * * *

(1) To a Schedule C or Schedule G position established under part 213 of this chapter;

(2) To a position that meets the same criteria as a Schedule C or Schedule G position; or

* * * * *

PART 362—PATHWAYS PROGRAMS

■ 40. The authority citation for part 362 is revised to read as follows:

Authority: E.O. 13562, 75 FR 82585, 3 CFR, 2010 Comp., p. 291, as amended by E.O. 14217, 90 FR 10577; and E.O. 14410, 91 FR 34893.

Subpart A—General Provisions**§ 362.102 [Amended]**

■ 41. Amend § 362.102 by removing the definition of “Advanced degree.”

■ 42. Amend § 362.104 by revising paragraph (a)(8) to read as follows:

§ 362.104 Agency requirements.

- (a) * * *

(8) Prescribe criteria and procedures on how the agency will determine whether it has the resources available to convert a Pathways Participant to a term or permanent position in the competitive service or, when authorized under § 362.107, to a permanent Schedule Policy/Career position. These procedures must specify the timeline for making the determination, which must include informing the Pathways

Participant no later than 60 calendar days prior to the end of the appointment about whether the agency is able to convert them. If an agency is unable to convert a Pathways Participant, its procedures may include the actions it will take to assist a Participant in pursuing conversion at another agency, when appropriate.

* * * * *

■ 43. Amend § 362.105 by revising paragraph (e)(2) to read as follows:

§ 362.105 Filling positions.

* * * * *

- (e) * * *

(2) A Pathways Participant must be a United States citizen to be eligible for noncompetitive conversion to term or permanent employment in the competitive service or to permanent employment in Schedule Policy/Career.

* * * * *

■ 44. Amend § 362.106 by revising paragraph (h) to read as follows:

§ 362.106 Participant Agreement.

* * * * *

(h) Minimum eligibility requirements for noncompetitive conversion to term or permanent competitive service employment, or to permanent Schedule Policy/Career employment when authorized under § 362.107, according to the requirements of the applicable Pathways Program.

■ 45. Revise § 362.107 to read as follows:

§ 362.107 Conversion to the competitive service or Schedule Policy/Career.

(a) *General conversion authority.* Subject to any limits on conversion imposed by the Director, and in accordance with the provisions of each Pathways Program, an agency may noncompetitively convert an eligible Pathways Participant to:

(1) A term or permanent position in the competitive service; or

(2) A permanent position in Schedule Policy/Career, if the position is a career position described in § 213.3601(a) of this chapter and the conversion is authorized under this part and any applicable OPM policy or guidance. A noncompetitive conversion to a permanent position is subject to review by OPM.

(b) *Competitive service term appointment.* A Pathways Participant who is noncompetitively converted to a competitive service term appointment may be subsequently converted noncompetitively to a permanent competitive service position.

- (c) *Noncompetitive conversion.*

(1) An Intern may be converted to a position within the employing agency or

any other agency within the Federal Government.

(2) A Recent Graduate may be converted to a position within the employing agency or any other agency within the Federal Government. Conversion to a position at a different agency is subject to § 362.305(c).

(d) *Reemployment-priority and career-transition programs.* The provisions of subparts B, F, and G of part 330 of this chapter do not apply to conversions made under this part.

(e) *Career tenure.* Time spent serving as a Pathways Participant counts toward career tenure when the individual is noncompetitively converted to a permanent position in the competitive service upon completion of the Pathways Program, with or without an intervening term appointment, and without a break in service of 1 day, as provided in § 315.201 of this chapter.

(f) *Competitive status, probationary periods, and trial periods.*

(1) A Pathways Participant converted to a career or career-conditional appointment in the competitive service under § 315.713 of this chapter acquires competitive status upon completion of the probationary period requirements in part 11 of this chapter.

(2) A Pathways Participant converted to a Schedule Policy/Career position under paragraph (a)(2) of this section is not required to serve a trial period under part 11 of this chapter and obtains competitive status after 2 years of continuing service in the Schedule Policy/Career position.

(g) *No entitlement.* Service in a Pathways Program confers no right to further employment in either the competitive or excepted service. An agency wishing to convert a Pathways Participant must execute the required actions to do so. Nothing in this section confers a right to conversion to Schedule Policy/Career, conversion to the competitive service, competitive status, career tenure, a career or career-conditional appointment, or future appointment to the competitive service.

■ 46. Amend § 362.109 by revising paragraph (c)(4) and adding paragraph (c)(5) to read as follows:

§ 362.109 Reporting requirements.

* * * * *

(c) * * *

(4) The number of Pathways Participants, per Program, converted to Schedule Policy/Career in the excepted service; and

(5) The number of Pathways Participants, per Program, who were separated.

■ 47. Add § 362.110 to read as follows:

§ 362.110 Governmentwide Pathways Leadership Development Program.

OPM may develop and administer a governmentwide Pathways Leadership Development Program under the Recent Graduates Program authority. The program may include formal training, career development, and rotational assignments across participating agencies. The program must be administered consistent with this part, including the eligibility, appointment, participant agreement, performance, completion, and conversion requirements applicable to Recent Graduates. Responsibilities assigned to participants shall be consistent with the participant's qualifications, skills, competencies, career interests, agency needs, and the broader leadership development purpose of the program. OPM may issue implementing instructions governing the number of participants, participant selection, agency participation, training, rotations, certification of completion, and conversion review. Program Participants may be hired by agencies using the excepted service appointing authority provided by § 213.3402(b) of this chapter.

Subpart B—Internship Program

■ 48. Amend § 362.203 by revising paragraph (g)(4) to read as follows:

§ 362.203 Filling positions.

* * * * *

(g) * * *

(4) Requirements for noncompetitive conversion to a term or permanent position in the competitive service, or to a permanent Schedule Policy/Career position when authorized under § 362.107, are understood by all parties.

* * * * *

■ 49. Amend § 362.204 by revising the section heading and paragraphs (a), (b)(4), and (b)(5) to read as follows:

§ 362.204 Conversion to the competitive service or Schedule Policy/Career.

(a) An agency may noncompetitively convert an Intern who is a U.S. citizen to a term or permanent appointment in the competitive service or to a permanent appointment in Schedule Policy/Career under § 362.107.

(b) * * *

(4) Met the qualification standards for the position to which the Intern will be converted; and

(5) Met agency-specific requirements as specified in the agency's Participant Agreement with the Intern.

* * * * *

Subpart C—Recent Graduates Program

■ 50. Amend § 362.303 by revising paragraphs (b)(3)(i) through (iii) to read as follows:

§ 362.303 Filling positions.

* * * * *

(b) * * *

(3) * * *

(i) An agency may make an initial appointment of a Recent Graduate to any position filled under the authority in this section for which the Recent Graduate qualifies, up to the GS-11 level (or equivalent under another pay and classification system, such as the Federal Wage System), except as provided in paragraph (b)(3)(ii) of this section.

(ii) Initial appointments may be made to scientific and professional research positions at the GS-12 level for which the classification and qualification criteria for research positions apply, if the candidate possesses a Ph.D. or equivalent degree directly related to the position the agency is seeking to fill.

(iii) Positions must have progressively more responsible duties that provide career advancement opportunities (*i.e.*, positions must provide for career ladder advancement).

* * * * *

■ 51. Amend § 362.304 by revising paragraphs (d) and (e) to read as follows:

§ 362.304 Movement between agencies.

* * * * *

(d) Time served under the previous agency's Recent Graduates Program is credited toward the Program requirements for noncompetitive conversion eligibility to the competitive service or, when authorized under § 362.107, to Schedule Policy/Career. Because there is no break in service, the Recent Graduate does not begin a new period in the Program upon moving to the new agency.

(e) The new employing agency's plan must identify requirements for Program completion and eligibility for noncompetitive conversion to the competitive service or, when authorized under § 362.107, to Schedule Policy/Career.

■ 52. Revise § 362.305 to read as follows:

§ 362.305 Conversion to the competitive service or Schedule Policy/Career.

(a) An agency may noncompetitively convert a Recent Graduate who is a U.S. citizen to a competitive service term or permanent position or to a permanent Schedule Policy/Career position under § 362.107 when the Recent Graduate has:

(1) Successfully completed at least 1 year of continuous service in addition to all the requirements of the Recent Graduates Program;

(2) Demonstrated successful job performance consistent with the applicable performance appraisal program established under the agency's approved performance appraisal system that results in a rating of record (or summary rating) of at least fully successful or equivalent and a recommendation for conversion by the first-level supervisor (or in the case of a participant in an OPM-administered governmentwide Pathways Leadership Development Program under § 362.110, has been certified as successfully completing the Program by both OPM and the employing agency's Executive Resources Board); and

(3) Met the OPM Qualification Standard for the position to which the Recent Graduate will be converted.

(b) An agency must make the noncompetitive conversion effective on the date the service requirement is met, or at the end of an agency-approved extension, if applicable.

(c) A Recent Graduate may be converted to a permanent or term position in the competitive service, or to a permanent Schedule Policy/Career position when authorized under § 362.107, at a different agency when the following conditions are met:

(1) The employing (or losing) agency is unable to convert the Recent Graduate to a term or permanent position in the competitive service or a permanent position in the excepted service under Schedule Policy/Career in the current organizational unit of the employing agency or another component within the same Department or agency. The reasons for conversion at another agency may include unforeseen budgetary constraints; reorganizations; abolishment of positions; completion of cohort-based Pathways programs; or other appropriate reasons. Such a conversion to another agency may not be due to issues related to misconduct, poor performance, or suitability;

(2) Conversion must occur on or before the end of the prescribed Program period, plus any agency-approved extension; and

(3) The position at the new agency must have a full performance level that is equivalent to or lower than the position to which the Recent Graduate would have been converted at the prior agency.

PART 432—PERFORMANCE BASED REDUCTION IN GRADE AND REMOVAL ACTIONS

■ 53. The authority citation for part 432 is revised to read as follows:

Authority: 5 U.S.C. 4303, 4305; E.O. 14284, 90 FR 17729; E.O. 14317, 90 FR 34753.

■ 54. Amend § 432.102 by revising paragraph (f)(11) to read as follows:

§ 432.102 Coverage.

* * * * *

(f) * * *

(11) An employee occupying a position in Schedule C, Schedule G, or Schedule Policy/Career as authorized under part 213 of this chapter;

* * * * *

PART 550—PAY ADMINISTRATION (GENERAL)

Subpart G—Severance Pay

■ 55. The authority citation for subpart G of part 550 is revised to read as follows:

Authority: 5 U.S.C. 5595; E.O. 11257, 30 FR 14353, 3 CFR, 1964–1965 Comp., p. 357; E.O. 14317, 90 FR 34753; E.O. 14410, 91 FR 34893.

■ 56. Amend the definition of “Nonqualifying appointment” in § 550.703 by revising paragraph (e) to read as follows:

§ 550.703 Definitions.

* * * * *

Nonqualifying appointment * * *

(e) An excepted appointment under Schedule C or Schedule G; a noncareer appointment in the Senior Executive Service, as defined in 5 U.S.C. 3132(a); or an equivalent appointment made for similar purposes; and

* * * * *

PART 731—SUITABILITY AND FITNESS

■ 57. The authority citation for part 731 is revised to read as follows:

Authority: 5 U.S.C. 1103, 1302, 2301, 2302, 3301, 7301. E.O. 10577, 19 FR 7521, 3 CFR, 1954–1958 Comp., p. 218, as amended. E.O. 13467, 73 FR 38103, 3 CFR, 2009 Comp., p. 198, as amended. E.O. 13488, 74 FR 4111, 3 CFR, 2010 Comp., p. 189, as amended. E.O. 13764, 82 FR 8115, 3 CFR, 2017 Comp., p. 243. E.O. 14210, 90 FR 9669. Presidential Memorandum of January 31, 2014, 3 CFR, 2014 Comp., p. 340. Presidential Memorandum of March 20, 2025, 90 FR 13683. E.O. 14317, 90 FR 34753. 5 CFR parts 1, 2, 5, and 6.

■ 58. Amend § 731.101 by revising the definition of “Political appointment” in paragraph (a) to read as follows:

§ 731.101 Purpose.

(a) * * *

Political appointment means an appointment by Presidential nomination for confirmation by the Senate, an appointment by the President without Senate confirmation (except those appointed under 5 CFR 213.3102(c)); an appointment to a position compensated under the Executive Schedule (5 U.S.C. 5312 through 5316); an appointment of a White House Fellow to be assigned as an assistant to a top-level Federal officer (5 CFR 213.3102(z)); a Schedule C appointment (5 CFR 213.3301 and 213.3302); a Schedule G appointment (5 CFR 213.3701); a noncareer, limited term, or limited emergency Senior Executive Service appointment (5 CFR part 317, subpart F); an appointee to serve in a political capacity under agency-specific authority; and a provisional political appointment.

* * * * *

PART 920—TIMING OF CRIMINAL HISTORY INQUIRIES

■ 59. The authority citation for part 920 is revised to read as follows:

Authority: 5 U.S.C. 1103(a)(5)(A), 9201–9206; Pub. L. 116–92, sec. 1122(b)(1) (5 U.S.C. 9201 note); E.O. 14317, 90 FR 34753.

■ 60. Amend § 920.101 by revising the definition of “Political appointment” to read as follows:

§ 920.101 Definitions.

* * * * *

Political appointment means an appointment by the President without Senate confirmation (except those appointed under 5 CFR 213.3102(c)); an appointment to a position compensated under the Executive Schedule (5 U.S.C. 5312 through 5316); an appointment of a White House Fellow to be assigned as an assistant to a top-level Federal officer (5 CFR 213.3102(z)); a Schedule C appointment (5 CFR 213.3301, 213.3302); a Schedule G appointment (5 CFR 213.3701); a noncareer, limited term, or limited emergency Senior Executive Service appointment (5 CFR part 317, subpart F); an appointee to serve in a political capacity under agency-specific authority; and a provisional political appointment.

* * * * *

PART 930—PROGRAMS FOR SPECIFIC POSITIONS AND EXAMINATIONS (MISCELLANEOUS)

Subpart B—Administrative Law Judge Program

■ 61. The authority citation for subpart B is revised to read as follows:

Authority: 5 U.S.C. 1104(a), 1302(a), 1305, 3105, 3301, 3304, 3323(b), 3344, 4301(2)(D), 5372, and 7521; E.O. 10577, 19 FR 7521, 3 CFR, 1954–1958 Comp., p. 218; E.O. 13843, 83 FR 32755, 3 CFR, 2018 Comp., p. 844; E.O. 14410, 91 FR 34893.

■ 62. Amend § 930.201 by revising paragraphs (b), (d), and (e)(1), removing paragraph (e)(9), and redesignating paragraphs (e)(10) and (e)(11) as paragraphs (e)(9) and (e)(10), respectively. The revisions read as follows:

§ 930.201 Coverage.

* * * * *

(b) Administrative law judge positions appointed under 5 U.S.C. 3105 are in Schedule E of the excepted service, except that an administrative law judge whose competitive-service status is preserved under § 6.8(d) of this chapter remains in the competitive service for as long as that status is preserved under that section. Except as otherwise stated in this subpart or other applicable law or regulation, the rules and regulations applicable to administrative law judge positions apply without regard to whether the position is in Schedule E or whether the incumbent retains preserved competitive-service status.

* * * * *

(d) OPM may prescribe qualification, assessment, documentation, or other requirements for appointment to administrative law judge positions as necessary to administer this subpart, § 213.3501 of this chapter, and applicable statutes and Executive orders. OPM is not required to administer a competitive examination or to prescribe a competitive examination methodology for appointments to administrative law judge positions made under Schedule E.

(e) * * *

(1) Establish qualification standards, assessment requirements, documentation requirements, and other appointment-related requirements for administrative law judge positions under 5 U.S.C. 3105, § 213.3501 of this chapter, and this subpart B, including any requirements necessary to determine whether an individual meets the minimum appointment requirements for an administrative law judge position;

* * * * *

■ 63. Remove and reserve § 930.203.

§ 930.203 [Reserved]

■ 64. Amend § 930.204 by revising paragraphs (a), (c), (e), and (g) to read as follows:

§ 930.204 Appointments and conditions of employment.

(a) *Appointment.* An agency may appoint an individual to an administrative law judge position only under Schedule E in accordance with § 213.3501 of this chapter, this subpart, and any applicable OPM policy or guidance. An appointment under this paragraph is subject to investigation, and an administrative law judge is subject to the suitability requirements in part 731 of this chapter, as applicable. An individual appointed to an administrative law judge position under Schedule E is not subject to a trial period under part 11 of this chapter.

* * * * *

(c) *Appointment of incumbents of newly classified administrative law judge positions.* An agency may appoint an incumbent employee to an administrative law judge position under Schedule E if the employee is serving in the position when it is classified as an administrative law judge position on the basis of legislation, Executive order, or a decision of a court and if—

(1) The employee is serving under a permanent appointment in the competitive service or excepted service;

(2) The employee is serving in the position on the day the legislation, Executive order, or decision of the court on which the classification of the position is based becomes effective;

(3) OPM receives a recommendation for the employee's appointment from the agency concerned; and

(4) OPM determines the employee meets the qualification requirements and minimum appointment requirements for an administrative law judge position, including the professional license requirement in paragraph (b) of this section and § 6.3(b) of this chapter.

* * * * *

(e) *Promotion.*

(1) Part 335 of this chapter does not apply to the promotion of administrative law judges appointed under Schedule E. Promotion of an administrative law judge appointed under Schedule E is governed by this subpart, § 213.3501 of this chapter, and applicable OPM policy or guidance.

(2) To reclassify an administrative law judge position at a higher level, the agency must submit a request to OPM. When OPM approves the higher-level classification, OPM will direct the promotion of the administrative law judge occupying the position prior to the reclassification.

(3) For an administrative law judge whose competitive-service status is preserved under § 6.8(d) of this chapter,

promotion remains subject to this subpart and applicable OPM direction. Part 335 of this chapter applies only to the extent OPM determines it remains applicable to the preserved competitive-service status and is not inconsistent with this subpart, § 213.3501 of this chapter, or applicable Executive orders.

* * * * *

(g) *Reinstatement or reappointment.* Subject to OPM approval, an agency may reinstate or reappoint a former administrative law judge who served under 5 U.S.C. 3105 if the individual meets the qualification requirements and minimum appointment requirements for an administrative law judge position, including the professional license requirement in paragraph (b) of this section and § 6.3(b) of this chapter. A reinstatement or reappointment under this paragraph must be made under Schedule E unless the individual is otherwise entitled by law or regulation to preserved competitive-service status.

* * * * *

■ 65. Amend § 930.205 by revising paragraph (b) to read as follows:

§ 930.205 Administrative law judge pay system.

* * * * *

(b) Pay level AL–3 is the basic pay level for administrative law judge positions, except for positions placed at pay levels AL–2 or AL–1 with OPM approval under paragraph (c) of this section.

* * * * *

■ 66. Revise § 930.210 to read as follows:

§ 930.210 Reduction in force.

(a) *Application of reduction in force regulations.*

(1) Except as modified by this section, the reduction in force regulations in part 351 of this chapter apply to administrative law judges.

(2) An administrative law judge appointed under Schedule E on or after July 10, 2018, is in the excepted service and, if otherwise covered by part 351 of this chapter, is a competing employee in the excepted service tenure group.

(3) An administrative law judge whose competitive-service status is preserved under § 6.8(d) of this chapter remains in the competitive service for reduction in force purposes for as long as that status is preserved under § 6.8(d).

(b) *Determination of retention standing.*

(1) An agency must determine the retention standing of administrative law judges in accordance with part 351 of this chapter, as modified by this section.

(2) Administrative law judges in the competitive service under § 6.8(d) of this chapter must be listed on a competitive-service retention register. Administrative law judges in Schedule E must be listed on an excepted-service retention register.

(3) Because an agency may not rate the job performance of an administrative law judge under § 930.206, an agency may not assign, prepare, or use an administrative law judge performance rating for reduction in force purposes. The agency must determine the administrative law judge's performance credit in accordance with the rules in part 351 of this chapter governing employees who do not have ratings of record.

(c) Assignment rights.

(1) An agency may, in its discretion, provide assignment rights to administrative law judges in Schedule E in accordance with § 351.705 of this chapter, under written agency procedures that are uniformly and consistently applied in the reduction in force.

(2) If an agency adopts assignment rights for Schedule E administrative law judges under § 351.705 of this chapter, any assignment right must be limited to positions under the same appointing authority and must otherwise comply with part 351 of this chapter and this subpart.

(3) If an agency does not adopt assignment rights for Schedule E administrative law judges under § 351.705 of this chapter, the agency may release a Schedule E administrative law judge from the competitive level in accordance with the order of release under part 351 of this chapter without offering assignment to another position.

(4) An administrative law judge whose competitive-service status is preserved under § 6.8(d) of this chapter is subject to the competitive-service assignment right provisions in § 351.701 of this chapter while that competitive-service status remains preserved. Nothing in this section requires an agency to assign a competitive-service administrative law judge to a Schedule E position or to preserve competitive-service status in a position where such status is not preserved under § 6.8(d) of this chapter.

(d) Placement assistance.

(1) An administrative law judge in the competitive service who is reached in an agency's reduction in force and receives a notification of separation is eligible for placement assistance under the agency's reemployment priority list established and maintained in accordance with subpart B of part 330 of this chapter.

(2) A Schedule E administrative law judge who is separated, furloughed, or demoted by reduction in force does not, solely by virtue of service in a Schedule E administrative law judge position or appointment under 5 U.S.C. 3105, have a statutory entitlement to priority consideration, priority referral, or reemployment as an administrative law judge.

(3) Nothing in this section limits any restoration, reemployment, placement, or priority-consideration right that an individual may have under 5 U.S.C. 8151, part 353 of this chapter, 5 U.S.C. 3315, 5 U.S.C. 3320, the Uniformed Services Employment and Reemployment Rights Act, a final order, or another applicable statute, regulation, or binding legal authority.

(4) OPM or an agency may establish discretionary placement-assistance procedures for administrative law judges separated, furloughed, or demoted by reduction in force. Any discretionary placement-assistance procedure must be in writing and must state its coverage, duration, order of consideration, geographic scope, qualification requirements, and any conditions for termination of eligibility. A discretionary placement-assistance procedure does not create a statutory entitlement to priority consideration, priority referral, or reemployment.

■ 67. Amend § 930.211 by revising paragraph (c) introductory text and paragraph (c)(3) to read as follows:

§ 930.211 Actions against administrative law judges.

* * * * *

(c) Exceptions from procedures. This section does not apply—

* * * * *

(3) To reduction in force actions taken under 5 U.S.C. 3502, part 351 of this chapter, and § 930.210; or

* * * * *

[FR Doc. 2026–19222 Filed 9–17–26; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

RIN 0648–BN92

Coral, Coral Reefs, and Live/ Hardbottom Habitats of the South Atlantic and the Shrimp Fishery of the South Atlantic Region; Amendments 11/12

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Announcement of availability of fishery management plan amendments; request for comments.

SUMMARY: The South Atlantic Fishery Management Council (Council) has submitted Amendment 11 to the Fishery Management Plan for Coral, Coral Reefs, and Live/Hardbottom Habitats of the South Atlantic (Coral FMP) and Amendment 12 to the Fishery Management Plan for the Shrimp Fishery of the South Atlantic Region (Shrimp FMP; jointly Amendments 11/12) for review, approval, and implementation by NMFS. If approved, Amendments 11/12 would establish a shrimp fishery access area (SFAA) along the eastern boundary of the northern extension of the Oculina Bank Habitat Area of Particular Concern (OHAPC) where trawling for rock shrimp is currently prohibited. The purpose of Amendments 11/12 is to reinstate access to historic rock shrimp fishing grounds, achieve optimum yield (OY) in the rock shrimp fishery, while minimizing impacts to deep-water corals in the OHAPC.

DATES: Written comments on Amendments 11/12 must be received on or before November 17, 2026.

ADDRESSES: A plain language summary of Amendments 11/12 is available at <https://www.regulations.gov/docket/NOAA-NMFS-2026-1750>. You may submit comments on this document, identified by NOAA–NMFS–2026–1750, by either of the following methods:

- **Electronic Submission:** Submit comments electronically via the Federal e-Rulemaking Portal. Visit <https://www.regulations.gov> and type NOAA–NMFS–2026–1750 in the Search box. Click on the “Comment” icon, complete the required fields, and enter or attach your comments.

- **Mail:** Send written comments to Rick DeVactor, NMFS Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period may not be considered by NMFS. All comments received are part of the public record and will generally be posted for public viewing on <https://www.regulations.gov> without change. All personal identifying information (e.g., name, address) confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments; enter “N/

A" in the required fields if you wish to remain anonymous.

An electronic copy of Amendments 11/12 is available from <https://www.regulations.gov> or from the Southeast Regional Office website at: <https://www.fisheries.noaa.gov/action/coral-amendment-11-shrimp-amendment-12-establish-shrimp-fishery-access-area>. Amendments 11/12 include an environmental assessment, a Regulatory Flexibility Act analysis, regulatory impact review, and fishery impact statement.

FOR FURTHER INFORMATION CONTACT:

Karla Gore, NMFS Southeast Regional Office, 727-824-5305, or Karla.Gore@noaa.gov.

SUPPLEMENTARY INFORMATION: NMFS manages the coral and shrimp fisheries in Federal waters of the U.S. South Atlantic. The shrimp fishery in the South Atlantic region is managed under the Shrimp FMP. Coral, coral reefs, and live/hardbottom habitats of the South Atlantic region are managed under the Coral FMP. These FMPs were prepared by NMFS and the Council, and are implemented by NMFS through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The Magnuson-Stevens Act requires each regional fishery management council to submit any FMP or FMP amendment to the Secretary for review and approval, partial approval, or disapproval. The Magnuson-Stevens Act also requires that NMFS, upon receiving an FMP or FMP amendment, publish an announcement in the **Federal Register** notifying the public that the FMP or amendment is available for review and comment.

Background

In 1984, NMFS published the final rule to implement the designation of a 92-square-nautical-mile (NM²) portion of the Oculina Bank as the OHAPC (49 FR 29607, July 23, 1984) to protect a unique coral reef ecosystem of *Oculina varicosa* (ivory tree coral) found off the east coast of Florida (49 FR 29607, July 23, 1984). A habitat area of particular concern (HAPC) is a subset of Essential Fish Habitat (EFH) that is prioritized for conservation and management because it is ecologically important, particularly susceptible to human-induced environmental degradation, or rare. The OHAPC meets these HAPC criteria due to its high biodiversity by supporting over 70 species of fish and hundreds of species of invertebrates as well as the presence of slow-growing coral pinnacles. As part of the OHAPC

designation there is a prohibition on the use of bottom trawls, bottom longlines, dredges, traps, and pots within the OHAPC to mitigate the risk of damage by fishing gear to *Oculina* coral. Additionally, anchoring by all fishing vessels is prohibited within the area to prevent physical impact to the coral structures.

In 2000, the size of the OHAPC was expanded through Amendment 4 to the Coral FMP (65 FR 37292, June 14, 2000). In 2014, the OHAPC boundary was extended northward through Amendment 8 to the Coral FMP (Coral Amendment 8; 80 FR 42423, July 17, 2015). The proposed SFAA in Amendments 11/12 is located within the OHAPC area that was implemented through Coral Amendment 8.

Amendment 5 to the Shrimp FMP first required the use of vessel monitoring system (VMS) by vessels allowed to fish for rock shrimp in the commercial rock shrimp limited-access permit program (68 FR 2188, January 16, 2003). In addition, Amendment 8 to the Coral FMP allowed fishermen to transit the OHAPC, with an increased VMS ping rate of 1 ping per five minutes during the transit time (80 FR 42423, July 17, 2015). Current regulations require the use of a NMFS-approved VMS for an owner or operator with a commercial vessel permit for South Atlantic rock shrimp in South Atlantic Federal waters.

During the development of Amendment 8, some participants within the rock shrimp industry noted to the Council that a narrow portion of the expanded OHAPC along the eastern boundary was a historically important rock shrimp fishing ground. Although the use of this area by the rock shrimp fleet is variable and depends on environmental conditions, industry representatives maintained that access to this narrow strip is critical for the economic viability of the fleet during periods when rock shrimp follow the Gulf Stream to the offshore side of the reef. Rock shrimp fishermen requested adjustment of the proposed OHAPC boundary expansion in Amendment 8 and provided coordinates for their important fishing grounds in the area proposed for the expansion of the OHAPC. Because this request from industry happened late in the development of Coral Amendment 8, the Council determined that it did not have sufficient time to evaluate the request, given concerns that included verification of the provided coordinates, as well as data on effort and yield of historic rock shrimp fishing in the proposed area. Therefore, it was decided not to change the proposed expansion of

the OHAPC boundary contained in Coral Amendment 8, but instead to consider the fishermen's request of a possible OHAPC boundary adjustment through a new amendment to the Coral FMP.

In June 2020, the Council recommended the development of Amendment 10 to the Coral FMP (Coral Amendment 10) to consider options to create a SFAA in the OHAPC that would allow rock shrimp access to a historical fishing area. That action aligned with the Presidential Executive Order (E.O.) on Seafood Competitiveness and Economic Growth to "reduce burdens on domestic fishing and to increase production within sustainable fisheries" for commercial fishermen who have lost access to areas that had been traditionally fished (E.O. 13921; 85 FR 28471, May 12, 2020). As discussed in Coral Amendment 10, the rock shrimp portion of the shrimp fishery has been consistently operating well below OY and maximum sustainable yield levels. The purpose of Coral Amendment 10 was to increase the economic and social benefits to rock shrimp fishermen by allowing access to historic rock shrimp fishing grounds.

The Council recommended approval of Coral Amendment 10 at its September 2021 meeting and submitted it to NMFS for Secretarial review in December 2021. On July 28, 2022, NMFS, on behalf of the Secretary of Commerce, disapproved Coral Amendment 10. Specifically, NMFS determined that Coral Amendment 10 and supporting analyses did not adequately demonstrate how the proposed action was consistent with section 303(a)(7) of the Magnuson-Stevens Act, which requires FMPs to minimize to the extent practicable, the adverse effects of fishing on EFH, and the goals and objectives of the Coral FMP, specifically in regard to protection of EFH. Additionally, NMFS determined that Coral Amendment 10 did not demonstrate consistency with section 301(a)(9) of the Magnuson-Stevens Act, which requires fishery conservation and management measures to minimize bycatch to the extent practicable and, to the extent bycatch cannot be avoided, minimize the mortality of such bycatch. The Magnuson-Stevens Act allows a Council to submit a revised amendment that addresses any identified deficiencies.

The Council developed Amendments 11/12 to address the deficiencies identified in Coral Amendment 10. Amendments 11/12 incorporate updated scientific data and analysis as well as amending the Shrimp FMP to address the need to achieve OY in the rock shrimp fishery.

While Coral Amendment 10 originally proposed changes only to the Coral FMP, Amendments 11/12 amend the Shrimp FMP as well to properly manage the rock shrimp fishery's access to the proposed SFAA and to ensure that fishery specific objectives, such as optimizing yield and protecting the interests of traditional users in the rock shrimp fishery. Furthermore, amending both the Coral and the Shrimp FMPs ensures that the action to create an SFAA remains consistent with the objectives of the Coral FMP to optimize the benefits generated from coral resources while conserving the coral and minimizing adverse human impacts on sensitive habitat.

The Council's Deep-water Shrimp Advisory Panel (AP) supported the creation of an SFAA noting that shrimpers are experienced professionals who use high-resolution navigation and VMS to avoid sensitive habitat. The Deep-water Shrimp AP also noted that the area of the proposed SFAA has a history of trawling for rock shrimp and that the industry relies on a healthy reef ecosystem to support the shrimp population. However, the Coral AP and the Habitat and Ecosystem AP both expressed concern with the proposed SFAA and noted the risk of indirect damage of rock shrimp trawling within the OHAPC from sedimentation plumes, stating that fine particles stirred up by trawling can travel considerable distances and potentially smother coral polyps or larvae.

During the development of Amendments 11/12, these conflicting AP viewpoints on Amendment 10 were considered by the Council because the coordinates for the SFAA proposed by Amendment 10 and Amendments 11/12 are identical. The Council ultimately recommended the implementation of the SFAA, which is supported by new survey data and ongoing VMS monitoring, finding that it provides the best balance between historical rock shrimp fishing access and habitat protection. The boundary of the proposed SFAA also includes a buffer between it and known *Oculina* coral pinnacles to aid in decreasing potential sedimentation impacts from bottom trawling. Amendments 11/12 address the deficiencies of Coral Amendment 10 through inclusion of recent scientific surveys in the OHAPC and analysis on EFH, bycatch and habitat impacts as well as how the proposed action meet the objectives of the FMPs. Two new surveys are incorporated into the record in Amendments 11/12. In 2022, a NMFS Southeast Fisheries Science Center visual survey using a towed camera system covered approximately 35

kilometers over an area that included the proposed SFAA and found no evidence of live, dead, or rubble *Oculina* coral within the proposed SFAA. Additionally, in April 2025, the NOAA Ship Nancy Foster completed a high-resolution acoustic mapping expedition that included the area of the proposed SFAA. This mapping data confirms that the proposed SFAA consists of low-relief sandy and muddy bottoms, lacking the high-relief mounds required to support *Oculina* colonies.

As part of Amendments 11/12, a bycatch practicability analysis (BPA) was developed to identify bycatch and habitat impacts that were not described in Coral Amendment 10. The BPA reviews rock shrimp fishery observer data from 2018 through 2022 and documents that bycatch in the rock shrimp fishery is primarily composed of non-managed invertebrates. The occurrence of South Atlantic snapper-grouper species managed by the Council and NMFS is negligible in any bycatch from the rock shrimp fishery. The BPA also addresses the risk of sedimentation on deep-water coral pinnacles. Based on the location of the proposed SFAA which is approximately 360 to 1,580 meters away from known coral pinnacles and the oceanographic currents in the area, this buffer is expected to minimize the risk of sedimentation plumes impacts to habitat to the extent practicable. The BPA also concludes the use of specialized gear (Turtle Excluder Devices and Bycatch Reduction Devices), which combined with the sandy and muddy-bottom location of the SFAA, effectively minimizes bycatch mortality.

Action Contained in Amendments 11/12

Amendments 11/12 would establish an approximately 14.10 NM² SFAA along the eastern boundary of the northern extension of the OHAPC, in an area where fishing for rock shrimp is currently prohibited. Within the proposed SFAA, a shrimp vessel with a valid Federal limited access commercial vessel permit for rock shrimp would be allowed to bottom trawl for rock shrimp. All other existing restrictions in the OHAPC, including the prohibitions on anchoring and the use of bottom longline, dredge, pot, or trap gear, would continue to apply in the proposed SFAA (50 CFR 622.224(b)(1)(i)). Current regulations which require the use of a NMFS-approved VMS on a vessel for an owner or operator with a limited access endorsement for South Atlantic rock shrimp or a commercial vessel permit for rock shrimp in the South Atlantic

Federal waters would remain unchanged in the OHAPC and the proposed SFAA. Vessels are required to maintain a VMS transmission rate of 1 position per 5 minutes when transiting through both area or fishing in the SFAA (50 CFR 622.205 and 50 CFR 622.224(b)(1)(i)(C)). The current transmission rate is considered effective in monitoring fishing activity within and near the OHAPC. Amendments 11/12 would also not change the current transit provisions for rock shrimp vessels within the OHAPC. Under these provisions, transit means a direct and non-stop continuous course through the area, maintaining a minimum speed of 5 knots as determined by an operating VMS and a VMS minimum ping rate of one ping per 5 minutes; fishing gear appropriately stowed means that doors and nets are out of the water (50 CFR 622.224(b)(1)(i)(C)).

Proposed Rule for Amendments 11/12

A proposed rule to implement Amendments 11/12 has been drafted. In accordance with the Magnuson-Stevens Act, NMFS is evaluating the proposed rule to determine whether it is consistent with the FMPs, the Magnuson-Stevens Act, and other applicable law. If that determination is affirmative, NMFS will publish the proposed rule in the **Federal Register** for public review and comment.

Consideration of Public Comments

The Council submitted Amendments 11/12 for review, approval, and implementation by the Secretary. Comments on Amendments 11/12 must be received no later than November 17, 2026. Comments received during the respective comment periods, whether specifically directed to Amendments 11/12 or the proposed rule, will be considered by NMFS in the decision to approve, partially approve, or disapprove, Amendments 11/12. Comments received after the comment periods will not be considered by NMFS in this decision. All comments received by NMFS on Amendments 11/12 or the proposed rule during their respective comment periods will be addressed in the final rule.

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

Dated: September 15, 2026.

Shannon Bettridge,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2026–19182 Filed 9–17–26; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 91, No. 180

Friday, September 18, 2026

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

Agricultural Marketing Service

[Doc. No. AMS–SC–26–1255]

Oranges, Grapefruit, Tangerines, and Pummelos Grown in Florida; Continuance Referendum

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Referendum order.

SUMMARY: This document directs that a referendum be conducted among eligible Florida citrus producers to determine whether they favor continuance of the marketing order regulating the handling of oranges, grapefruit, tangerines, and pummelos produced in Florida.

DATES: The referendum will be conducted from October 19 through November 9, 2026. Only current Florida citrus producers within the production area that produced oranges, grapefruit, tangerines, or pummelos for the fresh market during the period of August 1, 2025, through July 31, 2026, are eligible to vote in this referendum. Ballots delivered to AMS via U.S. mail or electronic ballot must show proof of delivery by no later than 11:59 p.m. Eastern Time on November 9, 2026, to be included in the vote tabulation.

ADDRESSES: Copies of the marketing order may be obtained from the office of the referendum agents at Southeast Region Branch, Market Development Division, Specialty Crops Program, AMS, USDA, 1124 1st Street South, Winter Haven, FL 33880; telephone: (863) 324–3375; or from the Docket Clerk, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; telephone (202) 720–8085; or on the internet: <https://www.ecfr.gov/current/title-7/subtitle-B/chapter-IX/part-905>.

FOR FURTHER INFORMATION CONTACT:

Jennie M. Varela, Marketing Specialist, or Christian D. Nissen, Branch Chief, Southeast Region Branch, Market Development Division, Specialty Crops Program, AMS, USDA, 1124 1st Street South, Winter Haven, FL 33880; telephone: (863) 324–3375; or email: Jennie.Varela@usda.gov or Christian.Nissen@usda.gov.

SUPPLEMENTARY INFORMATION: Pursuant to Marketing Order No. 905, as amended (7 CFR part 905; the Order), and the applicable provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674) (the Act), it is hereby directed that a referendum be conducted to ascertain whether continuance of the Order is favored by fresh citrus producers. The referendum will be conducted from October 19 through November 9, 2026, among Florida fresh citrus producers in the Order's production area. Only current Florida citrus producers engaged in the production of oranges, grapefruit, tangerines, or pummelos for the fresh market during the period of August 1, 2025, through July 31, 2026, may participate in the continuance referendum.

USDA has determined that continuance referenda are an effective means for determining whether producers favor the continuation of marketing order programs. In accordance with § 905.83(c), USDA must conduct a referendum every six years. USDA would consider termination of the Order if less than two-thirds of the producers voting in the referendum, and less than two-thirds of the citrus volume represented in the referendum, vote in favor of continuance. In evaluating the merits of continuance versus termination, USDA will not exclusively consider the results of the continuance referendum. USDA will also consider all other relevant information concerning the operation of the Order and relative benefits and costs to producers, handlers, and consumers to determine whether continued operation of the Order would tend to effectuate the declared policy of the Act.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the ballot materials used in the referendum have been approved by the Office of Management and Budget (OMB) and have been assigned OMB No. 0581–0189, Fruit Crops. It has been

estimated it will take an average of 20 minutes for each of the approximately 200 citrus producers to cast a ballot. Participation is voluntary. Ballots delivered to AMS via U.S. mail or electronic ballot must show proof of delivery by no later than 11:59 p.m. Eastern Time on November 9, 2026, to be included in the vote tabulation.

Delaney Fuhrmeister, Rebecca Geller, Steven Kauffman, Christian Nissen, and Jennie Varela of the Southeast Region Branch, Market Development Division, Specialty Crops Program, AMS, USDA, are hereby designated as the referendum agents of the Secretary of Agriculture to conduct this referendum. The procedure applicable to the referendum shall be the "Procedure for the Conduct of Referenda in Connection with Marketing Orders for Fruits, Vegetables, and Nuts Pursuant to the Agricultural Marketing Agreement Act of 1937, as Amended" (7 CFR part 900.400 *et seq.*).

Ballots and voting instructions will be sent by U.S. mail or through electronic mail to all Florida citrus producers of record and may also be obtained from the referendum agents or their appointees.

(Authority: 7 U.S.C. 601–674.)

Erin Morris

Administrator, Agricultural Marketing Service.

[FR Doc. 2026–19174 Filed 9–17–26; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

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 October 19, 2026 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.

Animal Plant and Health Inspection Service

Title: Emergency Management Response System (EMRS).

OMB Control Number: 0579–0071.

Summary of Collection: The Animal Health Protection Act (AHPA) of 2002 is the primary Federal law governing the protection of animal health. The law gives the Secretary of Agriculture broad authority to detect, control, or eradicate pests or diseases of livestock or poultry. The Secretary may also prohibit or restrict import or export of any animal or related material if necessary to prevent the spread of any livestock or poultry pest or disease. Through the Foreign Animal Disease Surveillance Program, the Animal and Plant Health Inspection Service (APHIS) Veterinary Services compiles essential epidemiological and diagnostic data that are used to define foreign animal diseases (FAD) and their risk factors. The data is compiled through the Veterinary Services Emergency Management Response System, a web-based database for reporting investigations of suspected FAD occurrences.

Need and Use of the Information: APHIS collects information such as the purpose of the diagnostician’s visit to the site, the name and address of the owner/manager and the site, the type of operation being investigated, the number of and type of animals on the premises, vaccination information on the animals in the herd or flock, biosecurity practices at the site, whether

any animals have been moved to or from the premises and when this movement occurred, number of sick or dead animals, the results of physical examinations of the affected animals, the results of postmortem examinations, and the number and kinds of samples taken, and the name of the suspected disease.

APHIS uses the collected information to effectively prevent FAD occurrences and protect the health of the United States. Without the information, APHIS has no way to detect and monitor FAD outbreaks in the United States.

Description of Respondents: Businesses; and State, Local or Tribal Governments.

Number of Respondents: 158.

Frequency of Responses: Reporting, on occasion.

Total Burden Hours: 24,703.

Rachelle Ragland-Greene,
Departmental Information Collection
Clearance Officer.

[FR Doc. 2026–19163 Filed 9–17–26; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–552–854, C–729–806]

Steel Concrete Reinforcing Bar From the Socialist Republic of Vietnam and Egypt: Countervailing Duty Orders

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: Based on affirmative final determinations by the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC), Commerce is issuing countervailing duty (CVD) orders on steel concrete reinforcing bar (rebar) from the Socialist Republic of Vietnam (Vietnam) and Egypt.

DATES: Applicable September 18, 2026

FOR FURTHER INFORMATION CONTACT: Erin Howard (Vietnam), at (202) 482–3453 and Lingjun Wang (Egypt) at (202) 482–2316, AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

In accordance with sections 705(d) and 777(i) of the Tariff Act of 1930 as amended (the Act) on July 30, 2026, Commerce published in the **Federal Register** its affirmative final

determinations in the countervailing duty investigations of rebar from Vietnam and Egypt.¹ On September 11, 2026, the ITC notified Commerce of its final affirmative determinations pursuant to sections 705(b)(1)(A)(i) and 705(d) of the Act, that an industry in the United States is materially injured by reason of subsidized imports of rebar from Vietnam and Egypt.²

Scope of the Orders

The product covered by these orders is rebar from Vietnam and Egypt. For a complete description of the scope of these orders, *see* the appendix to this notice.

Countervailing Duty Orders

Based on the above-referenced affirmative final determinations by the ITC that an industry in the United States is materially injured by reason of subsidized imports of rebar from Vietnam and Egypt, in accordance with sections 705(c)(2) and 706(a) of the Act, Commerce is issuing these CVD orders. Because the ITC determined that imports of rebar from Vietnam and Egypt are materially injuring a U.S. industry, unliquidated entries of such merchandise entered, or withdrawn from warehouse, for consumption, are subject to the assessment of countervailing duties.

Therefore, in accordance with section 706(a)(1) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to assess, upon further instruction by Commerce, countervailing duties on unliquidated entries of rebar from Vietnam and Egypt. With the exception of entries occurring after the expiration of the provisional measures period and before the publication of the ITC’s final affirmative injury determinations, as further described below, countervailing duties will be assessed on unliquidated entries of rebar from Vietnam and Egypt entered, or withdrawn from warehouse, for consumption on or after January 13, 2026, the date of publication of the *Preliminary Determinations* in the **Federal Register**.³

¹ *See Steel Concrete Reinforcing Bar from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination*, 91 FR 48074 (July 30, 2026), and *Steel Concrete Reinforcing Bar from Egypt: Final Affirmative Countervailing Duty Determination*, 91 FR 48068 (July 30, 2026).

² *See* ITC’s Letter, “Notification of the ITC Final Determinations,” dated September 11, 2026.

³ *See Steel Concrete Reinforcing Bar from the Socialist Republic of Vietnam: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 91 FR 1265 (January 13, 2026); and *Steel Concrete Reinforcing Bar from Egypt: Preliminary Affirmative Countervailing Duty Determination, and Alignment*

Suspension of Liquidation and Cash Deposits

In accordance with section 706 of the Act, Commerce will instruct CBP to reinstitute the suspension of liquidation of rebar from Vietnam and Egypt, effective on the date of publication of the ITC's notice of final affirmative injury determination in the **Federal Register**, and to assess, upon further

instruction by Commerce, pursuant to section 706(a)(1) of the Act, countervailing duties on each entry of subject merchandise in an amount based on the net countervailable subsidy rates below. On or after the date of publication of the ITC's final injury determinations in the **Federal Register**, CBP must require, at the same time as importers would normally deposit estimated duties on this merchandise, a

cash deposit equal to the rates noted below. These instructions suspending liquidation will remain in effect until further notice.

Estimated Countervailable Subsidy Rates

The estimated countervailable subsidy rates are as follows; all-others rate applies to all producers or exporters not specifically listed below.

VIETNAM

Company	Subsidy rate (percent <i>ad valorem</i>)
Hoa Phat Group Joint Stock Company ⁴	6.80
All Others	6.80

EGYPT

Company	Subsidy rate (percent <i>ad valorem</i>)
Al-Ezz Dekheila Steel Alexandria Company (SAE); Ezz Steel Company S.A.E.; Ezz Rolling Mills Company (SAE); Al-Ezz Flat Steel Company (SAE); Contra Steel Co.; and Al-Ezz Group Holding Company for Industry & Investment (collectively, Ezz Group)	23.27
All Others	23.27

Provisional Measures

Section 703(d) of the Act states that the suspension of liquidation pursuant to an affirmative preliminary determination may not remain in effect for more than four months. In the underlying investigations, Commerce published the *Preliminary Determinations* on January 13, 2026.⁵ Therefore, entries of certain rebar from Vietnam and Egypt made on or after May 12, 2026, and prior to the date of publication of the ITC's final determinations in the **Federal Register**, are not subject to the assessment of countervailing duties due to Commerce's discontinuation of the suspension of liquidation.

In accordance with section 703(d) of the Act, Commerce instructed CBP to discontinue the suspension of liquidation of entries concerning these investigations effective May 13, 2026 (the date on which the provisional CVD measures expired), and intend to instruct CBP to liquidate, without regard

to countervailing duties, unliquidated entries concerning these investigations, or withdrawn from warehouse, for consumption on or after May 13, 2026, through the day preceding the date of publication of the ITC's affirmative final injury determinations in the **Federal Register**. Suspension of liquidation and the collection of cash deposits will resume on the date of publication of the ITC's affirmative final injury determinations in the **Federal Register**.

Establishment of the Annual Inquiry Service Lists

On September 20, 2021, Commerce published the *Final Rule* in the **Federal Register**.⁶ On September 27, 2021, Commerce also published the *Procedural Guidance* in the **Federal Register**.⁷ The *Final Rule* and *Procedural Guidance* provide that Commerce will maintain an annual inquiry service list for each order or suspended investigation, and any interested party submitting a scope

ruling application or request for circumvention inquiry shall serve a copy of the application or request on the persons on the annual inquiry service list for that order, as well as any companion order covering the same merchandise from the same country of origin.⁸

In accordance with the *Procedural Guidance*,⁹ for orders published in the **Federal Register** after November 4, 2021, Commerce will create an annual inquiry service list segment in Commerce's online e-filing and document management system, Antidumping and Countervailing Duty Electronic Service System (ACCESS), available at <https://access.trade.gov>, within five business days of publication of the notice of the order. Each annual inquiry service list will be saved in ACCESS, under each case number, and under a specific segment type called "AISL-Annual Inquiry Service List."¹⁰

Interested parties who wish to be added to the annual inquiry service list

⁴ of Final Determination with Final Antidumping Duty Determination, 91 FR 1263 (January 13, 2026), (collectively, *Preliminary Determinations*).

⁵ Commerce continues to find the following companies to be cross-owned with Hoa Phat Group Joint Stock Company: Hoa Phat Dung Quat Steel Joint Stock Company, Hoa Phat Hai Duong Steel Joint Stock Company, Hoa Phat Hung Yen Steel Limited Liability Company, Hoa Phat Energy Joint Stock Company, An Thong Mineral Investment Joint Stock Company, Hoa Phat Iron and Steel Joint Stock Company, Hoa Phat Metal Producing Company Limited, Hoa Phat Prestressed Concrete

One Member Limited Liability Company, and Hoa Phat Steel Products Joint Stock Company.

⁶ See *Preliminary Determinations*.

⁷ See *Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws*, 86 FR 52300 (September 20, 2021) (*Final Rule*).

⁸ See *Scope Ruling Application; Annual Inquiry Service List; and Informational Sessions*, 86 FR 53205 (September 27, 2021) (*Procedural Guidance*).

⁹ *Id.*

¹⁰ *Id.* at 53206.

¹⁰ This segment will be combined with the ACCESS Segment Specific Information (SSI) field which will display the month in which the notice of the order or suspended investigation was published in the **Federal Register**, also known as the anniversary month. For example, for an order under case number A-000-000 that was published in the **Federal Register** in January, the relevant segment and SSI combination will appear in ACCESS as "AISL-January Anniversary." Note that there will be only one annual inquiry service list segment per case number, and the anniversary month will be pre-populated in ACCESS.

for an order must submit an entry of appearance to the annual inquiry service list segment for the order in ACCESS within 30 days after the date of publication of the order. For ease of administration, Commerce requests that law firms with more than one attorney representing interested parties in an order designate a lead attorney to be included on the annual inquiry service list. Commerce will finalize the annual inquiry service list within five business days thereafter. As mentioned in the *Procedural Guidance*, the new annual inquiry service list will be in place until the following year, when the *Opportunity Notice* for the anniversary month of the order is published.

Commerce may update an annual inquiry service list at any time as needed based on interested parties' amendments to their entries of appearance to remove or otherwise modify their list of members and representatives, or to update contact information. Any changes or announcements pertaining to these procedures will be posted to the ACCESS website.

Special Instructions for Petitioners and Foreign Governments

In the *Final Rule*, Commerce stated that, "after an initial request and placement on the annual inquiry service list, both petitioners and foreign governments will automatically be placed on the annual inquiry service list in the years that follow."¹¹ Accordingly, as stated above, the petitioners and the Governments of Vietnam and Egypt should submit their initial entries of appearance after publication of this notice in order to appear in the first annual inquiry service list for those orders for which they qualify as an interested party. Pursuant to 19 CFR 351.225(n)(3), the petitioners and the Governments of Vietnam and Egypt will not need to resubmit their entries of appearance each year to continue to be included on the annual inquiry service list. However, the petitioners and the Governments of Vietnam and Egypt are responsible for making amendments to their entries of appearance during the annual update to the annual inquiry service list in accordance with the procedures described above.

Notification to Interested Parties

This notice constitutes the CVD orders with respect to rebar from Vietnam and Egypt. Pursuant to section 706(a) of the Act. Interested parties can find a list of CVD orders currently in

effect at <https://www.trade.gov/data-visualization/adcvd-proceedings>.

These CVD orders are published in accordance with section 706(a) of the Act and 19 CFR 351.211(b).

Dated: September 14, 2026.

Christopher Abbott,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix

Scope of the Orders

The merchandise subject to these orders is steel concrete reinforcing bar imported in either straight length or coil form (rebar) regardless of metallurgy, length, diameter, or grade or lack thereof.

The subject merchandise includes rebar that has been further processed in the subject countries or a third country, including but not limited to cutting, grinding, galvanizing, painting, coating, or any other processing that would not otherwise remove the merchandise from the scope of these orders if performed in the country of manufacture of the rebar.

Specifically excluded are plain rounds (*i.e.*, nondeformed or smooth rebar).

The subject merchandise is classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) primarily under item numbers 7213.10.0000, 7214.20.0000, and 7228.30.8010. The subject merchandise may also enter under other HTSUS numbers including 7221.00.0017, 7221.00.0018, 7221.00.0030, 7221.00.0045, 7222.11.0001, 7222.11.0057, 7222.11.0059, 7222.30.0001, 7227.20.0080, 7227.90.6030, 7227.90.6035, 7227.90.6040, 7228.20.1000, and 7228.60.6000. HTSUS numbers are provided for convenience and customs purposes; however, the written description of the scope remains dispositive.

[FR Doc. 2026–19103 Filed 9–17–26; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–487–002, A–729–805, A–552–853]

Steel Concrete Reinforcing Bar From Bulgaria, Egypt, and the Socialist Republic of Vietnam: Antidumping Duty Orders

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: Based on affirmative final determinations by the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC), Commerce is issuing the antidumping duty (AD) orders on steel concrete reinforcing bar (rebar) from Bulgaria, Egypt, and the Socialist Republic of Vietnam (Vietnam).

DATES: Applicable September 18, 2026.

FOR FURTHER INFORMATION CONTACT:

Hermes Pinilla (Bulgaria) at (202) 482–3477; Kate Fracke (Vietnam) at (202) 482–3299; or Anne Entz (Egypt) at (202) 482–3845, AD/CVD Operations, Offices I, III, and IX, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On July 30, 2026, Commerce published its affirmative final determinations in the less-than-fair-value investigations of rebar from Bulgaria, Egypt, and Vietnam, in accordance with sections 735(d) and 777(i) of the Tariff Act of 1930, as amended (the Act).¹ On September 11, 2026, pursuant to section 735(d) of the Act, the ITC notified Commerce of its final affirmative determinations that an industry in the United States is materially injured within the meaning of section 735(b)(1)(A)(i) of the Act by reason of dumped imports of rebar from Bulgaria, Egypt, and Vietnam.²

Scope of the Orders

The products covered by these orders are rebar from Bulgaria, Egypt, and Vietnam. For a complete description of the scope of the orders, *see* the appendix to this notice.

AD Orders

Based on the above-referenced affirmative final determinations by the ITC, in accordance with sections 735(c)(2) and 736 of the Act, Commerce is issuing these AD orders. Because the ITC determined that an industry in the United States is materially injured by reason of imports of rebar from Bulgaria, Egypt, and Vietnam, unliquidated entries of such merchandise from the countries, entered or withdrawn from warehouse for consumption, are subject to the assessment of antidumping duties.

Therefore, in accordance with section 736(a)(1) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to assess, upon further instruction by Commerce, antidumping

¹ *See Steel Concrete Reinforcing Bar from Bulgaria: Final Affirmative Determination of Sales at Less Than Fair Value*, 91 FR 48084 (July 30, 2026); *see also Steel Concrete Reinforcing Bar From Egypt: Final Affirmative Determination of Sales at Less Than Fair Value*, 91 FR 48066 (July 30, 2026); and *Steel Concrete Reinforcing Bar From the Socialist Republic of Vietnam: Final Affirmative Determination of Sales at Less Than Fair Value*, 91 FR 48063 (July 30, 2026).

² *See* ITC's Letter, "Notification of ITC Final Determination," dated September 11, 2026.

¹¹ *See Final Rule*, 86 FR at 52335.

duties equal to the amount by which the normal value of the merchandise exceeds the export price (or constructed export price) of the merchandise on all relevant entries of rebar from Bulgaria, Egypt, and Vietnam. Antidumping duties will be assessed on unliquidated entries of rebar from Bulgaria, Egypt, and Vietnam entered, or withdrawn from warehouse, for consumption on or after March 13, 2026, the date of publication of the *Preliminary Determinations*,³ but will not include entries occurring after the expiration of the provisional measures period and before publication of the ITC's final injury determination under section 735(b) of the Act, as further described in

the "Provisional Measures" section of this notice below.

Continuation of Suspension of Liquidation and Cash Deposits

Except as noted in the "Provisional Measures" section of this notice, in accordance with sections 735(c)(1)(B) and 736 of the Act, Commerce intends to instruct CBP to continue to the suspend liquidation on all relevant entries of rebar from Bulgaria, Egypt, and Vietnam. These instructions suspending liquidation will remain in effect until further notice.

Commerce also intends to instruct CBP to require cash deposits equal to the estimated weighted-average dumping margins indicated in the tables

below, adjusted by the relevant export subsidy offsets for Vietnam.⁴ Effective on the date of publication in the **Federal Register** of the notice of the ITC's final affirmative injury determination, CBP will require, at the same time as importers would normally deposit estimated customs duties on subject merchandise, a cash deposit equal to the rates listed in the tables below. The all-others rates apply to all producers or exporters not specifically listed, as appropriate.

Estimated Weighted-Average Dumping Margins

The estimated weighted-average dumping margins are as follows:

BULGARIA

Exporter/producer	Weighted-average dumping margin (percent)
Promet Steel JSC	53.27
All Others	53.27

EGYPT

Exporter/producer	Weighted-average dumping margin (percent)
Al-Ezz Dekheila Steel Alexandria Company S.A.E.; Ezz Steel Company S.A.E.; Ezz Rolling Mills Company S.A.E.; and Al-Ezz Flat Steel Company S.A.E	34.20
El Marakby Steel	* 52.73
Suez Steel Company	* 52.73
All Others	34.20

* Rate based on facts available with adverse inferences.

VIETNAM

Producer	Exporter	Weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets (percent))
Hoa Phat Dung Quat Steel Joint Stock Company; Hoa Phat Hai Duong Steel Joint Stock Company; Hoa Phat Hung Yen Steel Limited Liability Company; and Hoa Phat Prestressed Concrete Company Limited.	Hoa Phat Dung Quat Steel Joint Stock Company; Hoa Phat Hai Duong Steel Joint Stock Company.	128.53	123.49
Vietnam-Wide Entity .....	.....	* 136.57	131.53

* Rate based on facts available with adverse inferences.

Provisional Measures

Section 733(d) of the Act states that suspension of liquidation pursuant to an affirmative preliminary determination may not remain in effect for more than

four months, except where exporters representing a significant proportion of exports of the subject merchandise request that Commerce extend the four-month period to no more than six

months. At the request of exporters that account for a significant proportion of rebar from Bulgaria, Egypt, and Vietnam, Commerce extended the four-

³ See *Steel Concrete Reinforcing Bar from Bulgaria: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 91 FR 12351 (March 13, 2026); see also *Steel Concrete Reinforcing Bar from Egypt: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final*

Determination, and Extension of Provisional Measures, 91 FR 12347 (March 13, 2026); and *Steel Concrete Reinforcing Bar from the Socialist Republic of Vietnam: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination and Extension of Provisional Measures*, 91 FR 12359

(March 13, 2026) (collectively, *Preliminary Determinations*).

⁴ We note that we are not making an export subsidy offset for either Bulgaria or Egypt because: (1) there is no companion CVD investigation on rebar from Bulgaria; and (2) we found no countervailable export subsidies in the companion CVD investigation of rebar from Egypt.

month period to six months in each of these investigations.⁵

The extended provisional measures period began on the date of the publication of the *Preliminary Determinations*, i.e., March 13, 2026, and ended on September 8, 2026. As a result, entries of rebar from Bulgaria, Egypt, and Vietnam made on or after September 9, 2026, and before the date of publication of the ITC's final injury determination in the **Federal Register** are not subject to the assessment of antidumping duties. Therefore, in accordance with section 736(a)(1) of the Act and its practice, Commerce will instruct CBP to terminate the suspension of liquidation and to liquidate, without regard to antidumping duties, unliquidated entries of rebar from Bulgaria, Egypt, and Vietnam entered, or withdrawn from warehouse, for consumption on or after September 9, 2026, the first day provisional measures were no longer in effect, until and through the day preceding the date of publication of the ITC's final injury determination in the **Federal Register**. Suspension of liquidation and the collection of cash deposits will resume on the date of publication of the ITC's final determination in the **Federal Register**.

Establishment of the Annual Inquiry Service Lists

On September 20, 2021, Commerce published the *Final Rule* in the **Federal Register**.⁶ On September 27, 2021, Commerce also published the *Procedural Guidance* in the **Federal Register**.⁷ The *Final Rule* and *Procedural Guidance* provide that Commerce will maintain an annual inquiry service list for each order or suspended investigation, and any interested party submitting a scope ruling application or request for circumvention inquiry shall serve a copy of the application or request on the persons on the annual inquiry service list for that order, as well as any companion order covering the same merchandise from the same country of origin.

In accordance with the *Procedural Guidance*, for orders published in the **Federal Register** after November 21, 2021, Commerce will create an annual inquiry service list segment in Commerce's online e-filing and

document management system, Antidumping and Countervailing Duty Electronic Service System (ACCESS), available at <https://access.trade.gov>, within five business days of publication of the notice of the order. Each annual inquiry service list will be saved in ACCESS, under each case number, and under a specific segment type called "AISL-Annual Inquiry Service List."⁸

Interested parties who wish to be added to the annual inquiry service list for an order must submit an entry of appearance to the annual inquiry service list segment for the order in ACCESS within 30 days after the date of publication of the order. For ease of administration, Commerce requests that law firms with more than one attorney representing interested parties in an order designate a lead attorney to be included on the annual inquiry service list. Commerce will finalize the annual inquiry service list within five business days thereafter. As mentioned in the *Procedural Guidance*,⁹ the new annual inquiry service list will be in place until the following year, when the *Opportunity Notice* for the anniversary month of the order is published.

Commerce may update an annual inquiry service list at any time as needed based on interested parties' amendments to their entries of appearance to remove or otherwise modify their list of members and representatives, or to update contact information. Any changes or announcements pertaining to these procedures will be posted to the ACCESS website at <https://access.trade.gov>.

Special Instructions for the Petitioner and Foreign Governments

In the *Final Rule*, Commerce stated that, "after an initial request and placement on the annual inquiry service list, both petitioners and foreign governments will automatically be placed on the annual inquiry service list in the years that follow."¹⁰ Accordingly, as stated above, the petitioner and foreign governments should submit their initial entries of

appearance after publication of this notice in order to appear in the first annual inquiry service lists for these orders. Pursuant to 19 CFR 351.225(n)(3), the petitioner and foreign governments will not need to resubmit their entries of appearance each year to continue to be included on the annual inquiry service list. However, the petitioner and foreign governments are responsible for making amendments to their entries of appearance during the annual update to the annual inquiry service list in accordance with the procedures described above.

Notification to Interested Parties

This notice constitutes the AD orders with respect to rebar from Bulgaria, Egypt, and Vietnam, pursuant to section 736(a) of the Act. Interested parties can find a list of AD and countervailing duty orders currently in effect at <https://www.trade.gov/data-visualization/adcvd-proceedings>.

These AD orders are published in accordance with section 736(a) of the Act and 19 CFR 351.211(b).

Dated: September 14, 2026.

Christopher Abbott,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix

Scope of the Orders

The merchandise subject to these orders is steel concrete reinforcing bar imported in either straight length or coil form (rebar) regardless of metallurgy, length, diameter, or grade or lack thereof.

The subject merchandise includes rebar that has been further processed in the subject country or a third country, including but not limited to cutting, grinding, galvanizing, painting, coating, or any other processing that would not otherwise remove the merchandise from the scope of these orders if performed in the country of manufacture of the rebar.

Specifically excluded are plain rounds (i.e., nondeformed or smooth rebar).

The subject merchandise is classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) primarily under item numbers 7213.10.0000, 7214.20.0000, and 7228.30.8010. The subject merchandise may also enter under other HTSUS numbers including 7221.00.0017, 7221.00.0018, 7221.00.0030, 7221.00.0045, 7222.11.0001, 7222.11.0057, 7222.11.0059, 7222.30.0001, 7227.20.0080, 7227.90.6030, 7227.90.6035, 7227.90.6040, 7228.20.1000, and 7228.60.6000. HTSUS numbers are provided for convenience and customs purposes; however, the written description of the scope remains dispositive.

[FR Doc. 2026-19102 Filed 9-17-26; 8:45 am]

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⁵ See *Preliminary Determinations*.

⁶ See *Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws*, 86 FR 52300 (September 20, 2021) (*Final Rule*).

⁷ See *Scope Ruling Application; Annual Inquiry Service List; and Informational Sessions*, 86 FR 53205 (September 27, 2021) (*Procedural Guidance*).

⁸ This segment will be combined with the ACCESS Segment Specific Information (SSI) field which will display the month in which the notice of the order or suspended investigation was published in the **Federal Register**, also known as the anniversary month. For example, for an order under case number A-000-000 that was published in the **Federal Register** in January, the relevant segment and SSI combination will appear in ACCESS as "AISL-January Anniversary." Note that there will be only one annual inquiry service list segment per case number, and the anniversary month will be pre-populated in ACCESS.

⁹ See *Procedural Guidance*, 86 FR at 53206.

¹⁰ See *Final Rule*, 86 FR at 52335.

DEPARTMENT OF COMMERCE**International Trade Administration**

[C-721-003]

Carbon and Alloy Steel Wire Rod From Algeria: Final Affirmative Countervailing Duty Determination and Countervailing Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that countervailable subsidies are being provided to producers and exporters of carbon and alloy steel wire rod (wire rod) from Algeria. The period of investigation (POI) is January 1, 2025, through December 31, 2025. In addition, Commerce is issuing the countervailing duty (CVD) order on wire rod from Algeria.

DATES: Applicable September 18, 2026.

FOR FURTHER INFORMATION CONTACT: Jonathan Schueler or Joshua Nixon, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-9175 and (202) 482-8361, respectively.

SUPPLEMENTARY INFORMATION:**Background**

On July 8, 2026, Commerce published in the **Federal Register** the *Preliminary Determination* in this investigation and invited interested parties to comment.¹ Because no comments were submitted by interested parties, we have adopted our *Preliminary Determination* for purposes of this final determination. Accordingly, no decision memorandum accompanies this **Federal Register** notice.

Scope of the Order

The product covered by this investigation is wire rod from Algeria. For a complete description of the scope of this order, *see* the appendix to this notice.

Scope Comments

No interested party commented on the scope of the investigation as it appeared in the *Preliminary Determination*.² Therefore, we made no changes to the scope of the investigation from that

published in the *Preliminary Determination*.

Methodology

Commerce conducted this investigation in accordance with section 701 of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found to be countervailable, Commerce determines that there is a subsidy, *i.e.*, a financial contribution by an “authority” that gives rise to a benefit to the recipient, and that the subsidy is specific.³ In making this final determination, Commerce relied on facts available, including with an adverse inference, pursuant to sections 776(a) and (b) of the Act.⁴

Verification

Because the sole respondent, SPA Algerian Qatar Steel, did not participate in this investigation and because the Government of Algeria did not provide information Commerce requested, Commerce did not conduct a verification in this investigation.⁵

All-Others Rate

Sections 703(d) and 705(c)(5)(A) of the Act provide that Commerce shall determine an estimated all-others rate for companies not individually examined. Pursuant to section 705(c)(5)(A)(ii) of the Act, if the individual estimated countervailable subsidy rates established for all exporters and producers individually examined are zero, *de minimis*, or determined based entirely on section 776 of the Act, Commerce may use any reasonable method to establish the estimated subsidy rate for all other producers or exporters. In this investigation, Commerce has determined the estimated subsidy rate for the individually examined respondent under section 776 of the Act. This is the only rate available in this proceeding for deriving the all-others rate. Consequently, pursuant to sections 703(d) and 705(c)(5)(A)(ii) of the Act, Commerce established the all-others rate by applying the countervailable subsidy rate assigned to the non-responsive company listed below. For a full description of the methodology underlying Commerce’s

analysis, *see* the *Preliminary Determination*.⁶

Final Determination and Estimated Countervailable Subsidy Rates

Commerce determines that the following estimated countervailable subsidy rates exist:

Company	Subsidy rate (percent <i>ad valorem</i>)
SPA Algerian Qatar Steel	* 73.33
All Others	73.33

*Rate is based on facts available with adverse inferences.

Disclosure

Normally, Commerce discloses to interested parties the calculations performed in a final determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of the final determination in the **Federal Register**, in accordance with 19 CFR 351.224(b). However, because the program rates assigned in the *Preliminary Determination* are unchanged, there are no new calculations to disclose.

Countervailing Duty Order

No material injury determination is necessary in this countervailing duty investigation, pursuant to section 701(c)(1) of the Act, because the United States Trade Representative has determined that Algeria is not a “Subsidies Agreement country” within the meaning of section 701(b) of the Act.⁷ Therefore, in accordance with section 705(c)(2) of the Act, Commerce is issuing this CVD order.

Continuation of Suspension of Liquidation and Cash Deposits

In accordance with section 706 of the Act, Commerce intends to instruct CBP to continue the suspension of liquidation of wire rod from Algeria, as described in Appendix I to this notice, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**, and to assess, upon further instruction by Commerce, pursuant to section 706(a)(1) of the Act, countervailing duties on each entry of subject merchandise in an amount based on the net countervailable subsidy rates above. These instructions suspending liquidation will remain in effect until further notice. Commerce also intends, pursuant to section 706(a)(1) of the Act,

¹ *See Carbon and Alloy Steel Wire Rod from Algeria: Preliminary Affirmative Countervailing Duty Determination*, 91 FR 42178 (July 8, 2026) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

² *See Preliminary Determination*, 91 FR at 42178.

³ *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

⁴ *See Preliminary Determination* PDM at the section “Use of Facts Otherwise Available and Application of Adverse Inferences.”

⁵ *See Preliminary Determination*, 91 FR at 42178.

⁶ *Id.*, 91 FR at 42178–42179.

⁷ *See Status of Algeria Under the Tariff of 1930, as Amended*, 90 FR 34334 (July 21, 2025).

to instruct CBP to require cash deposits equal to the amounts as indicated above. Accordingly, effective on the date of publication of this notice in the **Federal Register**, CBP will require, at the same time as importers would normally deposit estimated customs duties on the subject merchandise, a cash deposit for each entry of subject merchandise equal to the subsidy rates listed above. The all-others rate applies to all producers or exporters not specifically listed, as appropriate.

ITC Notification

As noted above, no material injury determination is necessary in this countervailing duty investigation, pursuant to section 701(c)(1) of the Act, because the United States Trade Representative has determined that Algeria is not a “Subsidies Agreement country” within the meaning of section 701(b) of the Act.⁸ Should it later be determined that the ITC requires information related to this determination, we will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information either publicly or under administrative protective order, without the written consent of the Assistant Secretary for Enforcement and Compliance.

Administrative Protective Order

This notice will serve as the only reminder to parties subject to the APO of their responsibility concerning the destruction of proprietary information disclosed under APO, in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Establishment of the Annual Inquiry Service Lists

On September 20, 2021, Commerce published the *Final Rule* in the **Federal Register**.⁹ On September 27, 2021, Commerce also published the *Procedural Guidance* in the **Federal Register**.¹⁰ The *Final Rule* and *Procedural Guidance* provide that Commerce will maintain an annual

inquiry service list for each order or suspended investigation, and any interested party submitting a scope ruling application or request for circumvention inquiry shall serve a copy of the application or request on the persons on the annual inquiry service list for that order, as well as any companion order covering the same merchandise from the same country of origin.

In accordance with the *Procedural Guidance*, for orders published in the **Federal Register** after November 4, 2021, Commerce will create an annual inquiry service list segment in Commerce’s online e-filing and document management system, Antidumping and Countervailing Duty Electronic Service System (ACCESS), available at <https://access.trade.gov>, within five business days of publication of the notice of the order. Each annual inquiry service list will be saved in ACCESS, under each case number, and under a specific segment type called “AISL-Annual Inquiry Service List.”¹¹

Interested parties who wish to be added to the annual inquiry service list for an order must submit an entry of appearance to the annual inquiry service list segment for the order in ACCESS within 30 days after the date of publication of the order. For ease of administration, Commerce requests that law firms with more than one attorney representing interested parties in an order designate a lead attorney to be included on the annual inquiry service list. Commerce will finalize the annual inquiry service list within five business days thereafter. As mentioned in the *Procedural Guidance*,¹² the new annual inquiry service list will be in place until the following year, when the *Opportunity Notice* for the anniversary month of the order is published.

Commerce may update an annual inquiry service list at any time as needed based on interested parties’ amendments to their entries of appearance to remove or otherwise modify their list of members and representatives, or to update contact information. Any changes or announcements pertaining to these

procedures will be posted to the ACCESS website at <https://access.trade.gov>.

Special Instructions for the Petitioner and Foreign Governments

In the *Final Rule*, Commerce stated that, “after an initial request and placement on the annual inquiry service list, both petitioners and foreign governments will automatically be placed on the annual inquiry service list in the years that follow.”¹³ Accordingly, as stated above, the petitioner and foreign governments should submit their initial entries of appearance after publication of this notice in order to appear in the first annual inquiry service lists for this order. Pursuant to 19 CFR 351.225(n)(3), the petitioner and foreign governments will not need to resubmit their entries of appearance each year to continue to be included on the annual inquiry service list. However, the petitioner and foreign governments are responsible for making amendments to their entries of appearance during the annual update to the annual inquiry service list in accordance with the procedures described above.

Notification to Interested Parties

This determination is issued and published pursuant to sections 705(d) and 777(i) of the Act, and 19 CFR 351.210(c).

In addition, this notice constitutes the CVD order with respect to wire rod from Algeria, pursuant to section 706(a) of the Act. Interested parties can find a list of antidumping duty and CVD orders currently in effect at <https://www.trade.gov/data-visualization/adcvd-orders-and-suspension-agreements>.

This CVD order is issued and published in accordance with section 706(a) of the Act and 19 CFR 351.211(b).

Dated: September 14, 2026.

Christopher Abbott,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix

Scope of the Order

The merchandise subject to this order covers certain hot-rolled products of carbon steel and alloy steel, in coils, of approximately circular cross section, less than 19.00 mm in actual solid cross-sectional diameter. Specifically excluded are steel products possessing the above-noted physical characteristics and meeting the Harmonized Tariff Schedule of the United States (HTSUS)

⁸ *Id.*

⁹ See *Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws*, 86 FR 52300 (September 20, 2021) (*Final Rule*).

¹⁰ See *Scope Ruling Application; Annual Inquiry Service List; and Informational Sessions*, 86 FR 53205 (September 27, 2021) (*Procedural Guidance*).

¹¹ This segment will be combined with the ACCESS Segment Specific Information (SSI) field which will display the month in which the notice of the order or suspended investigation was published in the **Federal Register**, also known as the anniversary month. For example, for an order under case number A-000-000 that was published in the **Federal Register** in January, the relevant segment and SSI combination will appear in ACCESS as “AISL-January Anniversary.” Note that there will be only one annual inquiry service list segment per case number, and the anniversary month will be pre-populated in ACCESS.

¹² See *Procedural Guidance*, 86 FR at 53206.

¹³ See *Final Rule*, 86 FR at 52335.

definitions for (a) stainless steel; (b) tool steel; (c) high nickel steel; (d) ball bearing steel; or (e) concrete reinforcing bars and rods. Also excluded are free cutting steel (also known as free machining steel) products (*i.e.*, products that contain by weight one or more of the following elements: 0.1 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.04 percent of phosphorus, more than 0.05 percent of selenium, or more than 0.01 percent of tellurium). All products meeting the physical description of subject merchandise that are not specifically excluded are included in this scope.

The products subject to this order are currently classifiable under subheadings 7213.91.3011, 7213.91.3015, 7213.91.3020, 7213.91.3093, 7213.91.4500, 7213.91.6000, 7213.99.0030, 7227.20.0030, 7227.20.0080, 7227.90.6010, 7227.90.6020, 7227.90.6030, and 7227.90.6035 of the HTSUS. Products entered under subheadings 7213.90.0090 and 7227.90.6090 of HTSUS also may be included in this scope if they meet the physical description of subject merchandise above. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

[FR Doc. 2026–19107 Filed 9–17–26; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–861, A–570–879]

Polyvinyl Alcohol From Japan and the People's Republic of China: Continuation of Antidumping Duty Orders

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determinations by the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC) that revocation of the antidumping duty (AD) orders on polyvinyl alcohol from Japan and the People's Republic of China (China) would likely lead to the continuation or recurrence of dumping and material injury to an industry in the United States, Commerce is publishing a notice of continuation of these AD orders.

DATES: Applicable September 11, 2026.

FOR FURTHER INFORMATION CONTACT: Nathan Araya, 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) 482–3401.

SUPPLEMENTARY INFORMATION:

Background

On July 2 and October 1, 2003, Commerce published in the **Federal Register** the AD orders on polyvinyl alcohol from Japan and China, respectively.¹ On March 2, 2026, the ITC instituted,² and Commerce initiated,³ the fourth sunset reviews of the *Orders*, pursuant to section 751(c) and 752(a) of the Tariff Act of 1930, as amended (the Act). As a result of its reviews, Commerce determined that revocation of the *Orders* would likely lead to the continuation or recurrence of dumping, and therefore, notified the ITC of the magnitude of the margins of dumping likely to prevail should the *Orders* be revoked.⁴

On September 11, 2026, the ITC published its determination, pursuant to sections 751(c) and 752(a) of the Act, that revocation of the *Orders* would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.⁵

Scope of the Orders

The merchandise covered by these *Orders* is PVA. This product consists of all PVA hydrolyzed in excess of 80 percent, whether or not mixed or diluted with commercial levels of defoamer or boric acid, except as noted below.

The following products are specifically excluded from the scope of these *Orders*:

- (1) PVA in fiber form.
- (2) PVA with hydrolysis less than 83 mole percent and certified not for use in the production of textiles.
- (3) PVA with hydrolysis greater than 85 percent and viscosity greater than or equal to 90 cps.
- (4) PVA with a hydrolysis greater than 85 percent, viscosity greater than or equal to 80 cps but less than 90 cps, certified for use in an ink jet application.
- (5) PVA for use in the manufacture of an excipient or as an excipient in the

¹ See *Antidumping Duty Order: Polyvinyl Alcohol from Japan*, 68 FR 39518 (July 2, 2003); see also *Antidumping Duty Order: Polyvinyl Alcohol from the People's Republic of China*, 68 FR 56620 (October 1, 2003) (collectively, the *Orders*).

² See *Polyvinyl Alcohol from China and Japan; Institution of Five-Year Reviews*, 91 FR 10155 (March 2, 2026).

³ See *Initiation of Five-Year (Sunset) Reviews*, 91 FR 10053 (March 2, 2026).

⁴ See *Polyvinyl Alcohol from the People's Republic of China and Japan: Final Results of the Expedited Fourth Sunset Review of the Antidumping Duty Orders*, 91 FR 39592 (June 30, 2026), and accompanying Issues and Decision Memorandum.

⁵ See *Polyvinyl Alcohol from China and Japan*, 91 FR 57920 (September 11, 2026) (*ITC Final Determination*).

manufacture of film coating systems which are components of a drug or dietary supplement and accompanied by an end-use certification.

(6) PVA covalently bonded with cationic monomer uniformly present on all polymer chains in a concentration equal to or greater than one mole percent.

(7) PVA covalently bonded with carboxylic acid uniformly present on all polymer chains in a concentration equal to or greater than two mole percent, certified for use in a paper application.

(8) PVA covalently bonded with thiol uniformly present on all polymer chains, certified for use in emulsion polymerization of non-vinyl acetic material.

(9) PVA covalently bonded with paraffin uniformly present on all polymer chains in a concentration equal to or greater than one mole percent.

(10) PVA covalently bonded with silan uniformly present on all polymer chains certified for use in paper coating applications.

(11) PVA covalently bonded with sulfonic acid uniformly present on all polymer chains in a concentration level equal to or greater than one mole percent.

(12) PVA covalently bonded with acetoacetylate uniformly present on all polymer chains in a concentration level equal to or greater than one mole percent.

(13) PVA covalently bonded with polyethylene oxide uniformly present on all polymer chains in a concentration level equal to or greater than one mole percent.

(14) PVA covalently bonded with quaternary amine uniformly present on all polymer chains in a concentration level equal to or greater than one mole percent.

(15) PVA covalently bonded with diacetoneacrylamide uniformly present on all polymer chains in a concentration level greater than three mole percent, certified for use in a paper application.

The merchandise subject to these *Orders* is currently classifiable under subheading 3905.30.00 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of this proceeding is dispositive.

Continuation of the Orders

As a result of the determinations by Commerce and the ITC that revocation of the *Orders* would likely lead to continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section

751(d)(2) of the Act, Commerce hereby orders the continuation of the *Orders*. U.S. Customs and Border Protection will continue to collect AD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of the continuation of the *Orders* will be September 11, 2026.⁶ Pursuant to section 751(c)(2) of the Act and 19 CFR 351.218(c)(2), Commerce intends to initiate the next five-year reviews of the *Orders* not later than 30 days prior to fifth anniversary of the date of the last determination by the ITC.

Administrative Protective Order (APO)

This notice also serves as a final reminder to parties subject to an APO of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

These five-year (sunset) reviews and this notice are in accordance with sections 751(c) and 751(d)(2) of the Act and published in accordance with section 777(i) of the Act, and 19 CFR 351.218(f)(4).

Dated: September 15, 2026.

Scot Fullerton,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2026–19110 Filed 9–17–26; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–121]

Difluoromethane (R–32) From the People's Republic of China: Rescission of Antidumping Duty Administrative Review; 2025–2026

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) is rescinding the administrative review of the antidumping duty (AD) order on difluoromethane (R–32) from the

People's Republic of China (China) covering the period of review (POR) is March 1, 2025, through February 28, 2026, because, as explained below, there are no reviewable suspended entries for the companies subject to this review.

DATES: Applicable September 18, 2026.

FOR FURTHER INFORMATION CONTACT: Ajay Menon, AD/CVD Operations, Office IX, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0208.

SUPPLEMENTARY INFORMATION:

Background

On May 4, 2026, in accordance with section 751(a) of the Tariff Act of 1930, as amended, (the Act) and 19 CFR 351.221(c)(1)(i), based on a timely request for review from Arkema, Inc. (the petitioner),¹ Commerce published the initiation notice in the **Federal Register**.² On May 7, 2026, we notified interested parties that information from U.S. Customs and Border Protection (CBP) indicated that there were no entries of the subject merchandise during the POR.³ On May 21, 2026, the petitioner submitted comments regarding Commerce's May 7, 2026, memorandum and respondent selection.⁴ Further, on July 27, 2026, we notified interested parties of our intent to rescind this administrative review due to a lack of suspended entries.⁵ We also received comments from the petitioner regarding our intent to rescind.⁶

Rescission of Review

Pursuant to 19 CFR 351.213(d)(3), it is Commerce's practice to rescind an administrative review of an AD order where it concludes that there were no entries of subject merchandise during the POR for which liquidation is suspended.⁷ Normally, upon

completion of an administrative review, the suspended entries are liquidated at the AD rates calculated for the review period.⁸ Therefore, for an administrative review to be conducted, there must be a reviewable, suspended entry that Commerce can instruct CBP to liquidate at the calculated AD rates for the review period.⁹

As noted above, Commerce notified all interested parties of its intent to rescind the review because there were no reviewable, suspended entries of subject merchandise during the POR and invited interested parties to comment.¹⁰ We received comments from the petitioner, arguing that Commerce should not rescind its review of Sam Gas (Thailand) Co., Ltd. (Sam Gas) because, according to the petitioner, information suggests that Sam Gas made imports of subject merchandise that were transshipped¹¹ through Thailand during the POR.¹² However, as noted above, CBP data shows there were no suspended entries of R–32 from China during the POR. Therefore, consistent with our practice,¹³ in the absence of any suspended entries of subject merchandise during the POR, we are rescinding this administrative review, in accordance with 19 CFR 351.213(d)(3).

Cash Deposit Requirements

As Commerce has proceeded to a final rescission of this administrative review, no cash deposit rates will change. Accordingly, the current cash deposit requirements shall remain in effect until further notice.

Assessment Rates

Commerce will instruct CBP to assess antidumping duties on all appropriate entries. Antidumping duties shall be assessed at rates equal to the cash deposit rate of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19

¹ See Petitioner's Letter, "Request for Administrative Review," dated March 31, 2026.

² See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 91 FR 23941 (May 4, 2026).

³ See Memorandum, "Customs Entry Data from U.S. Customs and Border Protection," dated May 7, 2026.

⁴ See Petitioner's Letter "Respondent Selection Comments," dated May 21, 2026 (Respondent Selection Comments).

⁵ See Memorandum "Notice of Intent to Rescind Review," dated July 27, 2026 (Intent to Rescind Memorandum).

⁶ See Petitioner's Letter, "Comments in Response to Notice of Intent to Rescind Review," dated August 3, 2026 (Intent to Rescind Comments).

⁷ See, e.g., *Welded Line Pipe from the Republic of Turkey: Rescission of the Antidumping Duty Administrative Review; 2019–2020*, 87 FR 27988 (May 10, 2022); see also, e.g., *Certain Softwood Lumber Products from Canada: Final Results and*

Final Rescission, in Part, of the Countervailing Duty Administrative Review, 2020, 87 FR 48455 (August 9, 2022); and *Certain Non-Refillable Steel Cylinders from the People's Republic of China: Rescission of Countervailing Duty Administrative Review; 2020–2021*, 87 FR 64008 (October 21, 2022).

⁸ See 19 CFR 351.212(b)(2).

⁹ See 19 CFR 351.212(d)(3).

¹⁰ See Intent to Rescind Memorandum.

¹¹ Commerce referred the petitioner's letter regarding transshipment to CBP. See Commerce's Letter, "Difluoromethane (R–32) from the People's Republic of China," dated September 10, 2026.

¹² See Intent to Rescind Comments; see also Respondent Selection Comments at 2.

¹³ See *Ad Hoc Shrimp Trade Action Committee v. United States*, 88 F.Supp.2d 1345, 1357 (March 20, 2012) ("... Commerce's decision to rely exclusively on Type 03 CBP Data rather than on other possible data sets is reasonable . . .").

⁶ See ITC Final Determination.

CFR 351.212(c)(1)(i). Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of this rescission notice in the **Federal Register**.

Notification Regarding Administrative Protective Order (APO)

This notice serves as a final reminder to parties subject to an APO of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of the APO materials or conversion to judicial protective order is hereby requested. Failure to comply with regulations and terms of an APO is a violation, which is subject to sanction.

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: September 15, 2026.

Scot Fullerton,

*Acting Deputy Assistant Secretary for
Antidumping and Countervailing Duty
Operations.*

[FR Doc. 2026–19109 Filed 9–17–26; 8:45 am]

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DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket Number: 260909–0004]

Request for Information (RFI) on Future Needs for Medical Metrology and Standards for Medical Imaging, Devices, Diagnostics and Therapy

AGENCY: Physical Measurement Laboratory (PML), National Institute of Standards and Technology (NIST), U.S. Department of Commerce.

ACTION: Notice of public meeting; request for information (RFI).

SUMMARY: The National Institute of Standards and Technology (NIST) and the National Institute of Biomedical Imaging and Bioengineering (NIBIB), a part of the National Institutes of Health (NIH), are requesting input from stakeholders in order to gain a better understanding of the future needs for medical metrology and standards around medical imaging, devices, and diagnostics. This request for information is coordinated with a NIST/NIBIB Symposium on Medical Metrology and

Standards for American Healthcare and Commerce Medical Imaging, Devices, Diagnostics at the joint NIST/University of Maryland Institute (UMI) for Bioscience and Biotechnology Research (IBBR). The input received will inform a joint NIST and NIBIB medical metrology and standards roadmap, a document that will identify future needs for medical metrology and standards, identify major stakeholders, and provide guidance for future government programs.

DATES:

Symposium

The *NIST/NIBIB Symposium on Medical Metrology and Standards for American Healthcare and Commerce Medical Imaging, Devices, Diagnostics, and Therapy* will be held on Thursday, September 24, 2026, from 8:45 a.m. to 5:30 p.m. Requests to participate must be submitted via the symposium website at <https://www.nist.gov/news-events/events/2026/09/nistnibib-symposium-medical-metrology-and-standards-american-healthcare> no later than 5:00 p.m. Eastern Time on Friday, September 11, 2026 for in-person attendance, and 5:00 p.m. Eastern Time on Tuesday, September 22, 2026 for virtual attendance. To request to participate, go to the symposium website, click on “Register Here” button, and follow the instructions listed.

Comments in Response to Request for Information

Comments in response to this notice must be received on or before November 30, 2026, at 11:59 p.m. Eastern Time. Written comments in response to this notice should be submitted in accordance with the instructions in the **ADDRESSES** and **SUPPLEMENTARY INFORMATION** sections below. Submissions received after this date may not be considered.

ADDRESSES:

Symposium

Details about attending the NIST–NIBIB Symposium on Medical Metrology and Standards on September 24, 2026, can be found on the Symposium website at <https://www.nist.gov/news-events/events/2026/09/nistnibib-symposium-medical-metrology-and-standards-american-healthcare>. To register, go to the event website, click on “Register Here” button, and follow the instructions listed. Registrants will need to provide their full name, affiliation, email address, and whether they are attending virtually or in person. They will need to

indicate if they are an invited speaker, want to present a poster (and give a title of presentation), or need a display table. Optional emergency information and special needs can be specified.

Comments in Response To Request for Information

Comments can be submitted at www.regulations.gov following the instructions below:

Interested parties can submit electronic public comments via the Federal e-Rulemaking Portal.

1. Go to www.regulations.gov and enter NIST–2026–0133 in the search field;

2. Click the “Comment Now!” icon, complete the required fields, including the relevant docket number and title in the subject field; and

3. Enter or attach your comments.

Additional information on the use of regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket is available at www.regulations.gov/faq. If you require an accommodation or cannot otherwise submit your comments via regulations.gov, please contact NIST using the information in the **FOR FURTHER INFORMATION CONTACT** section below.

NIST will not accept comments for this notice by postal mail, email, or fax. To ensure that NIST does not receive duplicate copies, please submit your comments only once. Comments containing references, studies, research, and other empirical data that are not widely published should include copies of the reference materials.

NIST will also not accept comments accompanied by a request that part or all the material be treated confidentially because of its business proprietary nature or for any other reason. Therefore, do not submit confidential business information or otherwise sensitive, protected, or personal information, such as account numbers, Social Security numbers, or names of other individuals.

All submissions, including comments, attachments and other supporting materials, will become part of the public record and subject to public disclosure. All relevant comments received by the deadline will be posted at: <https://www.regulations.gov> under docket number NIST–2026–0133 without change or redaction.

FOR FURTHER INFORMATION CONTACT:

Stephen Russek, Project Leader:
Magnetic Imaging, 325 Broadway,
Boulder, CO; email: stephen.russek@nist.gov; phone: 303–497–5097. Direct

media inquiries to NIST's Office of Public Affairs at (301) 975-2762.

Users of telecommunication devices for the deaf, or a text telephone may call the Federal Relay Service toll free at 1-800-877-8339. NIST will make the RFI available in alternate formats, such as Braille or large print, upon request by persons with disabilities.

SUPPLEMENTARY INFORMATION:

Background

Healthcare accounts for 18% of the GDP in the US and is projected to increase to 20.6% by 2034.¹ It is one of the most socially and commercially important sectors in our economy. Critical components of the healthcare infrastructure are the underlying measurements that are required for accurate screening and diagnostic evaluations and subsequent therapeutic planning and application. Metrology refers to the science of establishing precise reproducible measurements with well-defined uncertainties. A variety of measurement standards exist to ensure measurements are accurate, precise, comparable across all involved sites, and durable over time. Most of the standards are consensus standards established by a large body of stakeholders including professional societies and standards organizations. Government agencies, such as NIST, assist where primary traceability and validation are required.

To help ensure that future medical measurements and standards are developed appropriately and efficiently, a NIST/NIBIB Symposium on Medical Metrology and Standards for American Healthcare and Commerce Medical Imaging, Devices, Diagnostics will be held on September 24, 2026 at the joint NIST/UMD Institute for Bioscience and Biotechnology Research (IBBR), 9600 Gudelsky Dr, Rockville, MD 20850.

NIST, along with other government agencies, have hosted workshops in the past on different aspects of medical metrology resulting in highly cited documents.² With the advent of rapidly

advancing medical technology and artificial intelligence (AI), the future requirements for medical metrology and standards may change considerably. Agility and evolving standards may be required to address a rapidly changing US healthcare system. Better medical metrology and standards are expected to be an important component of the healthcare infrastructure allowing for improved and cost-effective healthcare.

Symposium

The NIST/NIBIB Symposium on Medical Metrology and Standards for American Healthcare and Commerce Medical Imaging, Devices, Diagnostics will be held as indicated in the **DATES** and **ADDRESSES** section. Requests to participate must be received via the symposium website at <https://www.nist.gov/news-events/events/2026/09/nistnibib-symposium-medical-metrology-and-standards-american-healthcare> no later than 5:00 p.m. Eastern Time on Friday, September 11, 2026 for in person attendance, and 5:00 p.m. Eastern Time on Tuesday, September 22, 2026 for virtual attendance. The symposium will be recorded and transcribed for internal NIST use only.

The NIST/NIBIB symposium is meant to be a general meeting with a wide selection of stakeholders. There will be invited speakers who have a very broad range of expertise and will include representatives from clinical sites, government, industry, professional societies, and academia. The goal of the speakers is to highlight the role of medical metrology and standards in their work, discuss future directions and challenges, and potentially show how their work overlaps with the broader medical metrology and standards framework needed for the US healthcare system. At the end of each session, there will be panel discussions where the speakers can address questions and discuss common themes. Between sessions, there will be a break and poster presentations from researchers, standards organizations, and companies providing medical metrology and standards.

The final agenda will be posted on the Symposium website <https://www.nist.gov/news-events/events/2026/09/nistnibib-symposium-medical-metrology-and-standards-american-healthcare> in a downloadable pdf file, along with directions to the IBBR site and suggested local accommodations. Information regarding the virtual

attendance link and parking vouchers will be sent to registrants after registration is completed.

All visitors attending the Symposium on the joint NIST/University of Maryland Institute (UMD) for Bioscience and Biotechnology Research (IBBR) site are required to pre-register to be admitted. Presentation of ID, driver's license or passport will be required to pick up badge and enter. Limited space is available on a first-come, first-served basis for anyone who wishes to attend in person. For detailed information please visit: <https://www.ibbr.umd.edu/events/visiting-ibbr>.

NIST provides reasonable accommodation to individuals with disabilities where appropriate. If you are a person who requires a reasonable accommodation, please make requests in advance for sign language interpretation, assistive listening devices, or other reasonable accommodation to Sabina Mohan, Conference Program Specialist, sabina.mohan@nist.gov, no later than 5:00 p.m. Eastern Time on September 11, 2026, so appropriate arrangements can be made. Determinations for reasonable accommodation will be made on a case-by-case basis.

Request for Information

In this notice, NIST and NIBIB seek information from organizations, companies, and individuals who are impacted by medical metrology and standards in the areas of Medical Imaging, Devices, Diagnostics and Therapy as well as any other interested stakeholders.

Respondents need not address all topic areas described in this notice, though all responses should specify which statements are being responded to. All relevant responses that comply with the requirements listed in the **DATES** and **ADDRESSES** sections of this RFI will be considered.

NIST and NIBIB seek information on the following topic areas, including but not limited to:

- Areas where there is a need for improved medical measurements relating to medical imaging, devices, diagnostics and therapy and how we can provide the needed standards and validation of these measurements.
- Identification of future medical standards efforts for new measurement areas that may not be currently addressed.

- Suggested changes to the medical metrology and standards process to allow improved and cost-effective healthcare in a time of rapidly changing technology and incorporation of AI.

¹ NHE Fact Sheet | CMS, n.d. <<https://www.cms.gov/data-research/statistics-trends-and-reports/national-health-expenditure-data/nhe-fact-sheet>> [accessed 16 August 2026].

² Laurence P. Clarke, Ram D. Sriram, and Linda Beth Schilling, 'Imaging as a Biomarker: Standards for Change Measurements in Therapy Workshop Summary', *Academic Radiology*, 15.4 (2008), pp. 501-30, doi:10.1016/j.acra.2007.10.021; Megan H. Cleveland and others, 'Report of the 2019 NIST-FDA Workshop on Standards for next Generation Sequencing Detection of Viral Adventitious Agents in Biologics and Biomanufacturing', *Biologicals: Journal of the International Association of Biological Standardization*, 64 (2020), pp. 76-82, doi:10.1016/j.biologics.2020.02.003; J. C. Chiao and others, 'Metrology and Standards Needs for Some Categories of Medical Devices', *Journal of*

Research of the National Institute of Standards and Technology, 113.2 (2008), p. 121, doi:10.6028/jres.113.009.

- Examples of how medical metrology and standards have improved diagnostics, therapeutic outcomes, and cost efficiency. Examples where they are detrimental.

Authority: 15 U.S.C. 272(b) and 272(c).

Alicia Chambers,

NIST Executive Secretariat.

[FR Doc. 2026–19147 Filed 9–17–26; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XG062]

South Atlantic Fishery Management Council—Public Meeting

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

ACTION: Meeting of the South Atlantic Fishery Management Council's Snapper Grouper Advisory Panel.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold a meeting of the Snapper Grouper Advisory Panel (AP) October 6–8, 2026.

DATES: The Snapper Grouper AP will meet from 1 p.m. on October 6, 2026, until 12 p.m. on October 8, 2026.

ADDRESSES:

Meeting address: The meeting will be held at the Drury Plaza Hotel North Charleston, 2934 West Montague, North Charleston, SC 29418; phone (843) 938–1503. *Council address:* South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N Charleston, SC 29405. The meeting will also be available via webinar. See **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT:

Michael Schmidtke, Fishery Scientist, SAFMC; phone (843) 302–8433 or toll free (866) SAFMC–10; FAX (843) 769–4520; email: mike.schmidtke@safmc.net.

SUPPLEMENTARY INFORMATION: Meeting information, including the agenda, overview, briefing book materials, and an online public comment form will be posted on the Council's website at: <https://safmc.net/advisory-panel-meetings/> 2 weeks prior to the meeting. The meeting is open to the public and available via webinar as it occurs. The webinar registration link will be available from the Council's website. Public comment will also be taken during the meeting.

The agenda for the Snapper Grouper AP meeting includes discussions of

developing amendments to the Fishery Management Plan (FMP) for the Snapper Grouper Fishery of the South Atlantic Region: Amendment 60 (commercial permit and trip efficiency), Amendment 44 (yellowtail snapper and mutton snapper), and Regulatory Amendment 38 (headboat vessel limits). The AP will provide input and recommendations on these amendments for the Council's consideration.

The AP will also develop a fishery performance report and evaluate the stock risk rating for red grouper. The AP will also receive updates on other ongoing Council projects and initiatives and address other items as needed.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the Council office (see **ADDRESSES**) 5 days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: September 16, 2026.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2026–19185 Filed 9–17–26; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XG025]

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Ad Hoc Marine Planning Committee (MPC) will hold an online public meeting.

DATES: The online meeting will be held Friday, October 2, 2026, from 9 a.m. to 5 p.m. Pacific Time, or until business for the day has been completed.

ADDRESSES: This meeting will be held online. Specific meeting information, including a proposed agenda and directions on how to attend the meeting and system requirements, will be provided in the meeting announcement on the Pacific Council's website (see <https://www.pcouncil.org>).

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, Oregon 97220–1384.

FOR FURTHER INFORMATION CONTACT: For general inquiries: Kerry Griffin, Staff Officer, Pacific Council, (503) 820–2409.

For technical assistance in accessing the meeting: Mr. Hayden York, hayden.york@pcouncil.org, 503–820–2424.

SUPPLEMENTARY INFORMATION: The purpose of this online meeting is for the MPC to consider current marine planning issues, including oil and gas leasing, NOAA Aquaculture Opportunity Areas, deep-sea mineral mining, and other ocean development or planning activities that may impact commercial or recreational fishing and West Coast fishing dependent communities. The MPC will provide a report in the Advanced Briefing Book for the Pacific Council's November 2026 meeting.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Hayden York (see **FOR FURTHER INFORMATION CONTACT**) at least 10 days prior to the meeting date.

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

Dated: September 16, 2026.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2026–19187 Filed 9–17–26; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XF808]

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council (Council) will hold public meetings.

DATES: The meetings will be held Tuesday, October 6, 2026, through Thursday, October 8, 2026. For agenda details, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES:

Meeting address: This will be an in-person meeting with a virtual option. Council members, other meeting participants, and members of the public will have the option to participate in person at The Sanderling (1461 Duck Road, Duck, NC 27949) or virtually via Webex webinar. Webinar connection instructions and briefing materials will be available at: <https://www.mafmc.org/briefing/october-2026>.

Council address: Mid-Atlantic Fishery Management Council, 800 N State St., Suite 201, Dover, DE 19901; telephone: (302) 674-2331; <https://www.mafmc.org>. The Council's website, <https://www.mafmc.org>, also has details on the meeting location, proposed agenda, webinar listen-in access, and briefing materials.

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D. Executive Director, Mid-Atlantic Fishery Management Council; telephone: (302) 526-5255.

SUPPLEMENTARY INFORMATION: The following items are on the agenda, although agenda items may be addressed out of order (changes will be noted on the Council's website when possible).

Tuesday, October 6, 2026

Executive Committee (Closed Session)

—Review 2026 Ricks E Savage Award nominations

Executive Committee (Open Session)

—Review draft deliverables for the 2027 Implementation Plan

LUNCH

Evaluation of Vessel Baseline Restrictions

—Review and consider initiating management action

Scup Gear Restricted Areas (GRAs) Project

—Review scup GRAs, previous analysis, and summary of IRA project results
—Consider potential management action

Wednesday, October 7, 2026

2027 Illex Specifications

—Review recommendations from the Scientific and Statistical Committee (SSC), Monitoring Committee, Advisory Panel, and staff
—Review previously adopted 2027 specifications, including commercial measures, and revise as necessary

Northwest Atlantic Fisheries Organization (NAFO) Illex Quota Issues

—Review staff and SSC input
—Decide on next steps

2027 Atlantic Mackerel Specifications

—Review recommendations from the SSC, Monitoring Committee, Advisory Panel, and staff
—Review previously adopted 2027 specifications, including commercial and recreational measures, and revise as necessary

LUNCH

Longfin Squid Research Track Assessment

—Overview of recently completed Research Track stock assessment results

2027 Spiny Dogfish Specifications

—Review recommendations from the SSC, Monitoring Committee, Advisory Panel, and staff
—Review previously adopted 2027 specifications, including commercial measures, and revise as necessary

Joint MAFMC and SAFMC Blueline Tilefish Subcommittee Update

—Review recommendations from the Subcommittee and consider next steps

Habitat Activities Update—Greater Atlantic Regional Fisheries Office (GARFO) Habitat and Ecosystem Services Division

—Presentation on draft design of regional fisheries compensatory fund administration and public comment opportunities

Regional Offshore Wind Fisheries Compensatory Mitigation Fund Update—Deirdre Boelke, Fisheries Insight Network

—Presentation on draft design of regional fisheries compensatory fund administration and public comment opportunities

Atlantic Large Whale Take Reduction Plan (ALWTRP) Scoping Presentation—Corie Grewal, NOAA Fisheries

—Review information on the scoping process for potential future ALWTRP modifications

Thursday, October 8, 2026

Business Session

Committee Reports (SSC); Executive Director's Report; Organization Reports; and Liaison Reports

Other Business and General Public Comment

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during these meetings. Actions will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c).

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to Shelley Spedden, (302) 526-5251, at least 5 days prior to the meeting date.

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

Dated: September 16, 2026.

Key Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2026-19183 Filed 9-17-26; 8:45 am]

BILLING CODE 3510-22-P

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Limitations of Duty-Free Imports of Apparel Articles Assembled in Beneficiary Sub-Saharan African Countries From Regional and Third-Country Fabric

AGENCY: Committee for the Implementation of Textile Agreements (CITA)

ACTION: Publishing the New Quantitative Limit on Duty-Free Benefits for Certain Apparel Assembled in Sub-Saharan Africa

DATES: The new limitations became effective October 1, 2026.

FOR FURTHER INFORMATION CONTACT: Thomas Newberg, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-7578.

SUPPLEMENTARY INFORMATION:

Authority: Title I, Section 112(b)(3) of the Trade and Development Act of 2000

(TDA 2000), Public Law (Pub. L.) 106–200, as amended by Division B, Title XXI, section 3108 of the Trade Act of 2002, Public Law 107–210; Section 7(b)(2) of the AGOA Acceleration Act of 2004, Public Law 108–274; Division D, Title VI, section 6002 of the Tax Relief and Health Care Act of 2006 (TRHCA 2006), Public Law 109–432, and section 1 of The African Growth and Opportunity Amendments (Pub. L. 112–163), August 10, 2012; Presidential Proclamation 7350 of October 2, 2000 (65 FR 59321); Presidential Proclamation 7626 of November 13, 2002 (67 FR 69459); Title I, Section 103(b)(2) and (3) of the Trade Preferences Extension Act of 2015, Public Law 114–27, June 29, 2015; Division I, Section 5019 of the Consolidated Appropriations Act, 2026 (Pub. L. 119–75); and Division B, Section 2008 of the Continuing Appropriations and Extensions Act, 2027 (Pub. L. 119–103).

Title I of TDA 2000 provides for duty-free treatment for certain textile and apparel articles imported from designated beneficiary sub-Saharan African countries. Section 112(b)(3) of TDA 2000 provides duty-free treatment for apparel articles wholly assembled in one or more beneficiary sub-Saharan African countries from fabric wholly formed in one or more beneficiary sub-Saharan African countries from yarn originating in the United States or one or more beneficiary sub-Saharan African countries or former beneficiary sub-Saharan African countries, subject to quantitative limitations. This preferential treatment is also available for apparel articles assembled in one or more lesser-developed beneficiary sub-Saharan African countries, regardless of the country of origin of the fabric used to make such articles, subject to quantitative limitation. Public Law 119–103 extended preferential treatment under these programs through December 31, 2028.

The AGOA Acceleration Act of 2004 provides that the quantitative limitation will be an amount not to exceed seven percent of the aggregate square meter equivalents of all apparel articles imported into the United States in the preceding 12-month period for which data are available. *See* Section 112(b)(3)(A)(ii)(I) of TDA 2000, as amended by Section 2008(b)(2) of the Continuing Appropriations and Extensions Act, 2027. Of this overall amount, apparel imported during the same period under the special rule for lesser-developed countries is limited to an amount not to exceed 3.5 percent of all apparel articles imported into the United States in the preceding 12-month

period for which data are available. *See* Section 112(b)(3)(B)(ii)(II) of TDA 2000, as amended by Section 2008(b)(3) of the Continuing Appropriations and Extensions Act, 2027. Presidential Proclamation 7350 of October 2, 2000 directed CITA to publish the aggregate quantity of imports allowed during each 12-month period in the **Federal Register**.

For the period beginning on October 1, 2026, and extending through September 30, 2027, the aggregate quantity of imports eligible for preferential treatment under these provisions is 1,690,799,016 square meters equivalent. Of this amount, 845,399,508 square meters equivalent is available to apparel articles imported under the special rule for lesser-developed countries. Apparel articles entered in excess of these quantities will be subject to otherwise applicable tariffs.

These quantities are calculated using the aggregate square meter equivalents of all apparel articles imported into the United States, derived from the set of Harmonized System lines listed in the Annex to the World Trade Organization Agreement on Textiles and Clothing (ATC), and the conversion factors for units of measure into square meter equivalents used by the United States in implementing the ATC.

Joshua Kroon,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 2026–19191 Filed 9–17–26; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF DEFENSE

Office of the Secretary

TRICARE: Notice of TRICARE Plan Program Changes for Calendar Year (CY) 2027

AGENCY: Office of the Secretary of Defense, Department of Defense (DoD).

ACTION: ACTION: Notice; TRICARE Plan Program changes for CY 2027.

SUMMARY: This notice provides information regarding TRICARE Plan Program Changes for CY 2027.

DATES: TRICARE Health Plan information in this notice is valid for services during CY 2027 (January 1–December 31, 2027).

ADDRESSES: Defense Health Agency, TRICARE Health Plan Division, 7700 Arlington Boulevard, Suite 5101, Falls Church, Virginia 22042–5101.

FOR FURTHER INFORMATION CONTACT: Ms. Debra Fisher, 703–275–6224,

dha.ncr.healthcare-ops.mbx.thp-policy-and-programs-branch@health.mil.

SUPPLEMENTARY INFORMATION: A final rule published in the **Federal Register** (FR) on February 15, 2019 (84 FR 4326–4333) established the requirement for the Director, Defense Health Agency (DHA), to provide notice of TRICARE program changes to Military Health System (MHS) beneficiaries each CY in connection with the annual open season enrollment period. The following changes or improvements to the TRICARE program benefits apply for CY 2027.

Open Season Announcement

Open Season is an annual period when beneficiaries may enroll in a health plan or make changes to their health care, dental, and/or vision coverage for the next CY.

During the TRICARE Open Season running from November 9 through December 8, 2026, qualified MHS beneficiaries may enroll in or change their TRICARE Prime or TRICARE Select plan.

During the Federal Employee Dental and Vision Insurance Program (FEDVIP) Open Season running from November 9 through December 7, 2026, qualified MHS beneficiaries, including TRICARE For Life beneficiaries, may enroll in or make changes to their dental and/or vision plans. FEDVIP is operated by the U.S. Office of Personnel Management.

Any changes MHS beneficiaries make during Open Season will take effect on January 1, 2027. If a beneficiary remains eligible and does not make any changes during Open Season, then his/her coverage will remain the same for 2027. TRICARE enrollees can ensure they receive important health plan information by promptly entering any change in mailing address, email address, and other information in the Defense Enrollment Eligibility Reporting System (DEERS) and verifying their preference for receipt of information digitally or by paper mailings with their respective regional contractors. TRICARE enrollees can avoid any health care coverage gaps by ensuring changes in their payment information are also updated with their regional contractors. *See* <https://tricare.mil/Plans/Eligibility/DEERS> as a guide for when to update information in DEERS throughout the year.

Annual Announcements

The following TRICARE program features are subject to a year-to-year determination and are announced each year prior to the annual TRICARE Open Season:

Urgent Care Visits: The number of urgent care visits remains unlimited without referrals for TRICARE Prime enrollees for Plan CY 2027. Beneficiaries may receive urgent care from TRICARE-authorized urgent care centers (UCCs) and convenience clinics (CCs), either network or non-network, without a referral. They may also receive urgent care from any TRICARE network provider (*i.e.*, family medicine; internal medicine-general practice; pediatricians). In situations when a TRICARE Prime enrollee seeks care from a non-network TRICARE authorized provider (outside of a TRICARE-authorized UCC or CC), the usual TRICARE Prime Point of Service deductible and cost-shares will apply. Private sector care for active duty Service members is subject to different rules. Covered beneficiaries in the U.S. who want assistance with decisions on whether to seek urgent care, except those enrolled in the Uniformed Services Family Health Plan (USFHP) or in a plan under the Competitive Plans Demonstration (CPD), may call the MHS Nurse Advice Line (NAL) at 1-800-874-2273 for health care guidance from a specially trained registered nurse. The NAL is available 24/7 to eligible TRICARE beneficiaries. USFHP and CPD enrollees should contact their contractor's designated nurse advice line. Beneficiaries residing overseas can call the NAL for health care advice when traveling in the U.S. but must coordinate care with their Overseas Regional Call Center. For additional information, call the servicing TRICARE contractor or visit <https://www.tricare.mil/ContactUs> and click on "MHS Nurse Advice Line."

Prime Service Area (PSA) Changes: PSAs are geographic areas around military medical treatment facilities and Base Realignment and Closure sites where TRICARE Prime is available. PSAs support the medical readiness of active-duty members of the Uniformed Services by adding to the capability and capacity of military hospitals and clinics. There are no changes to the existing PSAs for CY 2027.

What's New

The following changes or improvements to TRICARE program benefits apply to CY 2027 (although some changes were implemented in 2026):

Prescription Copay Waiver for Certain Dependents Enrolled in TRICARE Prime Remote: Active-duty family members enrolled in TRICARE Prime Remote in the United States and who live more than 50 miles or a one-hour drive from a military medical treatment facility

pharmacy will no longer pay copayments for covered prescription medications filled at retail network pharmacies, effective February 28, 2026. Eligible families will see the copayment waiver applied automatically at the pharmacy.

Demonstrations

Competitive Plans Demonstration: Again for 2027, TRICARE-eligible active duty family members, retirees, and retiree family members who reside within certain ZIP Codes in metro Atlanta, Georgia, and metro Tampa, Florida, have additional options for their TRICARE coverage. Eligible individuals in these areas may opt to voluntarily enroll in a Competitive Plans Demonstration health plan, also known as TRICARE Prime Demo, regardless of whether they are currently enrolled in TRICARE Prime or TRICARE Select. See <https://tricare.mil/Plans/HealthPlans/TRICARE-Prime-Demo> for more information. Details are available in an April 28, 2025, **Federal Register** notice at <https://www.federalregister.gov/documents/2025/04/28/2025-07258/tricare-tricare-competitive-plans-demonstration-cpd>.

Childbirth and Breastfeeding Support Demonstration (CBSD): The CBSD was extended for five years and will now end on December 31, 2031. Until the CBSD ends, beneficiaries may access the services of certified labor doulas, certified lactation consultants, and certified lactation counselors. The CBSD is available to beneficiaries in the United States and overseas. Details are available at <https://tricare.mil/cbsd>.

Pre-Hospital Blood Transfusions (PHBT) Demonstration: Beginning January 1, 2027, a five-year nationwide demonstration will be used to evaluate an alternative payment method for PHBT. This demonstration will evaluate whether providing a supplementary reimbursement for PHBT will improve beneficiary access to this life-saving care, enhance clinical outcomes for patients in hemorrhagic shock, and prove to be administratively feasible. Details are available in a July 6, 2026, **Federal Register** notice at: <https://www.federalregister.gov/documents/2026/07/06/2026-13515/tricare-demonstration-project-for-tricare-ambulance-add-on-reimbursement-for-pre-hospital-blood>.

Benefit Improvements

Ambulatory Blood Pressure Monitoring: TRICARE expanded coverage for ambulatory blood pressure monitoring to include diagnosis of masked hypertension in children and adults; diagnosis of abnormal nocturnal

blood pressure in children; and management of certain conditions as recommended by the American Academy of Pediatrics or American Heart Association.

Optune™ Tumor Treating Fields (TTF) Device: Optune TTF device for treatment of adult beneficiaries, 22 years of age or older, with newly diagnosed glioblastoma multiforme, following surgery and radiation is covered.

Ablative Fractional Laser (e.g., Carbon Dioxide and Erbium Yag): Ablative fractional laser for the treatment of symptomatic scars resulting from burns and other trauma is covered. Care must be preauthorized, including subsequent sessions following the first treatment to ensure ongoing therapy is medically necessary and appropriate for the treatment of symptomatic scars. This treatment was previously provided under Provisional Coverage and was converted to a permanent benefit effective February 24, 2026.

Autologous Hematopoietic Stem Cell Transplantation: Benefits may be cost-shared for a single event of myeloablative or non-myeloablative therapy with autologous hematopoietic stem cell transplant for the treatment of multiple sclerosis when criteria are met.

Stereotactic Laser Amygdalohippocampectomy (SLAH): SLAH including magnetic resonance imaging guided laser interstitial thermal therapy may be covered for the treatment of mesial temporal lobe epilepsy when performed in accordance with American Society for Stereotactic and Functional Neurosurgery recommendations.

Liver Transplant for Metastatic Colorectal Cancer: Liver transplantation for colorectal cancer with liver metastasis is covered for beneficiaries who meet specified inclusion requirements and do not meet exclusion criteria, with prior authorization and tumor board approval.

Peripheral Nerve Stimulation: Peripheral nerve stimulation, a non-opioid, and minimally invasive pain treatment, for the treatment of chronic pain, including chronic post-operative pain, chronic post-amputation pain, chronic phantom limb pain, and chronic migraine and headache conditions, is covered. Additionally, peripheral nerve stimulation for the treatment of acute post-operative and acute post-amputation pain for up to 60 days following surgery using temporary peripheral nerve stimulations, such as SPRINT®, is covered.

New Provisional Coverage

Vertebral Body Tethering: Vertebral body tethering, a minimally invasive

alternative to spinal fusion therapy, is covered under the Provisional Coverage Program for certain adolescents with adolescent idiopathic scoliosis.

Benefit Changes

Transcutaneous Electrical Nerve Stimulation (TENS): Effective July 1, 2026, TENS devices and supplies are excluded for all conditions except acute post-operative pain.

Appendix A

Certain TRICARE enrollee out-of-pocket costs (enrollment fees, premiums, catastrophic caps, deductibles, and copayments) are

adjusted annually by Federal law and regulations based on the annual Cost of Living Adjustment (COLA) applied to Uniformed Service member retired pay. A difference in copayments remains between those who entered Uniformed Service before January 1, 2018 (Group A), and those who entered on or after that date (Group B).

The retiree COLA is typically announced after the Federal fiscal year begins in October. Beneficiary out-of-pocket expenses impacted by the 2026 COLA will be posted to the *tricare.mil/changes* web page before the start of TRICARE Open Season, November 10, 2026.

Premium Based Plans

The CY 2027 monthly premiums for TRICARE Reserve Select, TRICARE Retired Reserve, and TRICARE Young Adult and the quarterly premiums for the Continued Health Care Benefit Program will be posted to the *tricare.mil/changes* web page once announced.

Pharmacy Out-of-Pocket Expenses for CY 2027

TRICARE Pharmacy copayments are unchanged for January 1, 2027:

PHARMACY COPAYMENTS FOR CALENDAR YEAR 2027 *

Year	Retail network generic formulary 30-day supply	Retail network brand-name formulary 30-day supply	Retail network non-formulary 30-day supply	Mail order generic formulary 90-day supply	Mail order brand-name formulary 90-day supply	Mail order non-formulary 90-day supply
2027	\$16	\$48	**\$85	\$14	\$44	\$85

* Active duty Service members (ADSMs) and Active duty family members enrolled in TRICARE Prime Remote enjoy a \$0 copay for covered drugs at any pharmacy.

** For all beneficiaries except ADSMs, select brand-name maintenance medications (taken for long-term conditions) may only be filled twice at retail and then must be filled through home delivery or military pharmacy.

Dated: September 15, 2026.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2026–19115 Filed 9–17–26; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE

Office of the Secretary

U.S. Strategic Command Strategic Advisory Group; Notice of Federal Advisory Committee Closed Meeting; Republication

AGENCY: Office of the Chairman of the Joint Chiefs of Staff, Department of Defense (DoD).

ACTION: Notice of Federal Advisory Committee closed meeting; republication.

SUMMARY: The DoD (referred to herein as “Department of War” or “DoW”) is publishing this notice to announce that the following Federal Advisory Committee meeting of the U.S. Strategic Command Strategic Advisory Group will take place.

DATES:

Day 1—Closed to the public Monday, September 21, 2026.

Day 2—Closed to the public Tuesday, September 22, 2026.

ADDRESSES: 900 SAC Boulevard, Offutt AFB, Nebraska 68113.

FOR FURTHER INFORMATION CONTACT: Mr. Derrick J. Besse, Designated Federal Officer (DFO), (402) 912–0322 (Voice), *derrick.j.besse.civ@mail.mil* (Email). Mailing address is 900 SAC Boulevard, Suite N3.170, Offutt AFB, Nebraska 68113.

SUPPLEMENTARY INFORMATION: This notice originally published in the **Federal Register** on September 16, 2026 (91 FR 58663). The necessary waiver language was missing from the **SUPPLEMENTARY INFORMATION** section. The notice is being reprinted in its entirety to include the waiver language.

Due to circumstances beyond the control of the DFO, the U.S. Strategic Command Strategic Advisory Group was unable to provide public notification required by 41 CFR 102–3.150(a) concerning its September 21–22, 2026 meeting. Accordingly, the Advisory Committee Management Officer for the Department of War, pursuant to 41 CFR 102–3.150(b), waives the 7-calendar day notification requirement.

This meeting is being held under the provisions of chapter 10 of the United States Code (U.S.C.) (commonly known as the Federal Advisory Committee Act or FACA), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.140.

Purpose of the Meeting: The purpose of the meeting is to provide advice and recommendations on scientific, technical, intelligence, nuclear, and

policy-related issues to the Commander, U.S. Strategic Command.

Agenda: Topics include: Annual Stockpile Assessment, Strategic Landscape and Threats, Strategy and Policy Development, Readiness and Current Operations, Sustainment/Modernization and Transition Risk, Risk and Hard Problems, Developing Technologies Impact on the Strategic Environment.

Meeting Accessibility: Pursuant to 5 U.S.C. 552b, and 41 CFR 102–3.155, the DoW has determined that the meeting shall be closed to the public. Per delegated authority by the Chairman, Joint Chiefs of Staff, Admiral Richard A. Correll, Commander, U.S. Strategic Command, in consultation with his legal advisor, has determined in writing that the public interest requires that all sessions of this meeting be closed to the public because they will be concerned with matters listed in 5 U.S.C. 552b(c)(1).

Written Statements: Pursuant to 41 CFR 102–3.140(c), the public or interested organizations may submit written statements to the membership of the Strategic Advisory Group at any time or in response to the stated agenda of a planned meeting. Written statements should be submitted to the Strategic Advisory Group’s DFO; the DFO’s contact information can be obtained from the GSA’s FACA Database—<http://www.facadatabase.gov/>. Written

statements that do not pertain to a scheduled meeting of the Strategic Advisory Group may be submitted at any time. However, if individual comments pertain to a specific topic being discussed at a planned meeting, then these statements must be submitted no later than five business days prior to the meeting in question. The DFO will review all submitted written statements and provide copies to all the committee members.

Dated: September 16, 2026.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison
Officer, Department of Defense.

[FR Doc. 2026-19167 Filed 9-17-26; 8:45 am]

BILLING CODE 6001-FR-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2861-056]

Pontook Operating Limited Partnership & New Hampshire Department of Environmental Services; Notice of Intent To File License Application, Filing of Pre-Application Document (Pad), Commencement of Pre-Filing Process, and Scoping; Request for Comments on the Pad and Scoping Document, and Identification of Issues and Associated Study Requests

a. *Type of Filing:* Notice of Intent to File License Application for a New License and Commencing Pre-filing Process.

b. *Project No.:* 2861-056.

c. *Date Filed:* July 17, 2026.

d. *Submitted By:* Pontook Operating Limited Partnership (Pontook Partnership).

e. *Name of Project:* Pontook Hydroelectric Project.

f. *Location:* The project is located on the Androscoggin River, in the Town of Dummer, Coos County, New Hampshire.

g. *Filed Pursuant to:* 18 CFR part 5 of the Commission's Regulations.

h. *Potential Applicant Contact:* Sean McDermott, Licensing Manager, Pontook Limited Operating Partnership, 472 Main St., Berlin, NH 03570.

i. *FERC Contact:* Tamika Ali-Yerima at (202) 502-6391; or email tamika.ali-yerima@ferc.gov.

j. *Cooperating agencies:* Federal, state, local, and Tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests

described in item (o) below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. See 94 FERC ¶ 61,076 (2001).

k. *With this notice, we are initiating informal consultation with:* (a) the U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR, Part 402 and (b) the State Historic Preservation Officer, as required by section 106, National Historic Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating Pontook Partnership as the Commission's non-federal representative for carrying out informal consultation, pursuant to section 7 of the Endangered Species Act and section 106 of the National Historic Preservation Act.

m. Pontook Partnership filed with the Commission a Pre-Application Document (PAD; including a proposed process plan and schedule), pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD is available for review on the Commission's website (<http://www.ferc.gov>), using the "eLibrary" link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at fercolinesupport@ferc.gov, (866) 208-3676 (toll free), or (202) 502-8659 (TTY). A copy is also available via the contact in item (h) above.

Register online at <http://www.ferc.gov/docs-filing/esubscription.asp> to be notified via email of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

o. With this notice, we are soliciting comments on the PAD and Commission's staff Scoping Document 1 (SD1), as well as study requests. All comments on the PAD and SD1, and study requests, should be sent to the address above in item (h). In addition, all comments on the PAD and SD1, study requests, requests for cooperating agency status, and all communications to and from Commission staff related to the merits of the potential application must be filed with the Commission.

The Commission strongly encourages electronic filing. Please file all documents using the Commission's eFiling system at <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can

submit brief comments up to 10,000 characters, without prior registration, using the eComment system at <https://ferconline.ferc.gov/FERCONline.aspx>. For assistance, please contact FERC Online Support at FERCONlineSupport@ferc.gov. In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Debbie-Anne A. Reese, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Debbie-Anne A. Reese, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, M.D. 20852. The first page of any filing must clearly identify the project name and docket number: Pontook Hydroelectric Project (P-2861-056).

All filings with the Commission must bear the appropriate heading: "Comments on Pre-Application Document," "Study Requests," "Comments on Scoping Document 1," "Request for Cooperating Agency Status," or "Communications to and from Commission Staff." Any individual or entity interested in submitting study requests, commenting on the PAD or SD1, and any agency requesting cooperating status must do so on or before 5:00 p.m. Eastern Time on November 16, 2026.

p. *Scoping Process*

In accordance with the National Environmental Policy Act (NEPA), Commission staff will prepare either an environmental assessment (EA) or an environmental impact statement (EIS) (collectively referred to as the "NEPA document"). The primary goal of the scoping process is to identify the specific environmental issues and concerns that should be considered in the NEPA document. The Commission's scoping process will help determine the required level of analysis and satisfy NEPA scoping requirements, irrespective of whether the Commission prepares an EA or EIS.

Scoping Sessions

Commission staff will hold two scoping sessions in the vicinity of the project. We invite all interested agencies, Indian Tribes, non-governmental organizations (NGOs), and individuals to attend one or both of the meetings and assist staff in defining and clarifying the issues to be addressed. The dates, times, and locations of the scoping sessions will be provided in a future notice.

Scoping Document 1 (SD1), which outlines the subject areas to be

addressed in the NEPA document, was mailed to the individuals and entities on the Commission's mailing list and Pontook Partnership's PAD distribution list. Scoping session participants should come prepared to describe their issues and/or concerns. Please review the PAD and SD1 in preparation for the scoping sessions. Copies of SD1 will be available at the scoping meetings, or may be viewed on the web at <http://www.ferc.gov>, using the "eLibrary" link. Directions on how to obtain a copy of the PAD and SD1 are included above in item (n).

Based on all oral and written comments, a Scoping Document 2 (SD2) may be issued. SD2 may include a revised process plan and schedule, as well as a list of issues, identified through the scoping process.

Meeting Procedures

The scoping sessions will begin promptly at their respective start times listed above. There will not be a formal presentation by Commission staff when the session opens, and you may arrive any time after the scheduled start time. Individual oral comments will be taken on a one-on-one basis with a court reporter. This format is designed to receive the maximum number of oral comments in a convenient way during the timeframe allotted. If you wish to speak, Commission staff will hand out numbers in the order of your arrival. If a significant number of people are interested in providing oral comments in the one-on-one setting, a time limit may be implemented for each commentor. If all individuals who wish to provide comments have had an opportunity to do so, staff may conclude the session half an hour earlier than the scheduled time.

Your oral comments will be recorded by the court reporter and become part of the public record for this proceeding. Transcripts will be publicly available on FERC's eLibrary system [see item (n) above for instructions on using eLibrary].

Although there will not be a formal presentation, Commission staff will be available throughout the scoping session to answer your questions about the environmental review process. Representatives from Pontook Partnership will also be present to answer project-specific questions.

Proper conduct will help the sessions maintain a respectful atmosphere for attendees to provide comments effectively. Loudspeakers, lighting, oversized visual aids, other visual or audible disturbances, and disruptive video and photographic equipment are not permitted. Recorded interviews are

also not permitted within the session space. FERC reserves the right to end the session if disruptions interfere with the opportunity for individuals to provide oral comments or if there is a safety or security risk. Please see Appendix C of the SD1 for additional information on the session format and conduct.

It is important to note that the Commission provides equal consideration to all comments received, whether filed in written form or provided orally at a scoping session.

q. *Environmental Site Review:* The applicant and Commission staff will conduct an environmental site review of the project. The date, time, and location of the environmental site review will be provided in a future notice.

r. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, contact the Office of Public Participation at (202) 502-6595 or OPP@ferc.gov.

(Authority: 18 CFR 2.1)

Dated: September 15, 2026.

Debbie-Anne A. Reese,
Secretary.

[FR Doc. 2026-19198 Filed 9-17-26; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2911-046]

Southeast Alaska Power Agency; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Amendment of license to modify project boundary and delete transmission line from license.

b. *Project No.:* 2911-046.

c. *Date Filed:* May 26, 2026, as supplemented August 13, 2026.

d. *Applicant:* Southeast Alaska Power Agency.

e. *Name of Project:* Swan Lake Project.

f. *Location:* The project is located on Falls Creek in Ketchikan Gateway Borough, Alaska.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Mr. Robert Siedman, CEO, Southeast Alaska Power Agency, 55 Don Finney Lane, Ketchikan, AK 99901, (907) 228-2281, rsiedman@seapahydro.org.

i. *FERC Contact:* Mr. Steven Sachs, (202) 502-8666, Steven.Sachs@ferc.gov.

j. *Deadline for filing comments, motions to intervene, and protests:* October 15, 2026, 5:00 p.m. Eastern Time.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/docs-filing/ecomment.asp>. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov, (866) 208-3676 (toll free), or (202) 502-8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Debbie-Anne A. Reese, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Debbie-Anne A. Reese, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

The first page of any filing should include the docket number P-2911-046. Comments emailed to Commission staff are not part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears 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. *Description of Request:* The applicant proposes to amend the project to delete the 30.5-mile-long Swan to Bailey transmission line from the project license. The applicant states that with the construction of the connected Swan-Tyee Intertie, the Swan to Bailey line is no longer a primary transmission line for the Swan Lake Hydroelectric Project and is not part of the licensed project. The applicant does not propose any changes to the line beyond administratively removing it from the license, and would continue to operate and maintain the line as it has done in the past. Jurisdiction over the transmission line right-of-way would convert to the current landowners.

l. *Locations of the application:* This filing may be viewed on the

Commission's website at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. 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, call 1-866-208-3676 or email FERCOnlineSupport@ferc.gov, for TTY, call (202) 502-8659.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene*: Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Documents*: Any filing must: (1) bear in all capital letters the title "COMMENTS", "PROTEST", or "MOTION TO INTERVENE" as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

p. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, contact the Office of Public Participation at (202) 502-6595 or OPP@ferc.gov.

(Authority: 18 CFR 2.1)

Dated: September 15, 2026.

Debbie-Anne A. Reese,
Secretary.

[FR Doc. 2026-19197 Filed 9-17-26; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP26-560-000]

Dauphin Island Gathering Partners; Notice of Scoping Period Requesting Comments on Environmental Issues for the Proposed Dauphin Island Gathering Partners Abandonment Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental document that will discuss the environmental impacts of the Dauphin Island Gathering Partners Abandonment Project involving construction and operation of facilities by Dauphin Island Gathering Partners (DIGP) in Mobile County, Alabama, Alabama state waters, and Mobile and Main Pass Blocks of federal offshore waters. The Commission will use this environmental document in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies regarding the project. As part of the National Environmental Policy Act (NEPA) review process, the Commission takes into account concerns the public may have about proposals and the environmental impacts that could result from its action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. This gathering of public input is referred to as "scoping." The main goal of the scoping process is to focus the analysis in the environmental document on the important environmental issues. Additional information about the Commission's NEPA process is described below in the *NEPA Process and Environmental Document* section of this notice.

By this notice, the Commission requests public comments on the scope of issues to address in the environmental document. To ensure that your comments are timely and properly recorded, please submit your comments so that the Commission receives them in Washington, DC on or before 5:00 p.m. Eastern Time on October 15, 2026. Comments may be submitted in written form. Further details on how to submit comments are provided in the *Public Participation* section of this notice.

Your comments should focus on the potential environmental effects,

reasonable alternatives, and measures to avoid or lessen environmental impacts. Your input will help the Commission staff determine what issues they need to evaluate in the environmental document. Commission staff will consider all written comments during the preparation of the environmental document.

If you submitted comments on this project to the Commission before the opening of this docket on July 31, 2026, you will need to file those comments in Docket No. CP26-560-000 to ensure they are considered as part of this proceeding.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives should notify their constituents of this proposed project and encourage them to comment on their areas of concern.

DIGP provided landowners with a fact sheet prepared by the FERC entitled "An Interstate Natural Gas Facility On My Land? What Do I Need To Know?" which addresses typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. This fact sheet along with other landowner topics of interest are available for viewing on the FERC website (www.ferc.gov) under the Natural Gas, Landowner Topics link.

Public Participation

There are three methods you can use to submit your comments to the Commission. Please carefully follow these instructions so that your comments are properly recorded. The Commission encourages electronic filing of comments and has staff available to assist you at (866) 208-3676 or FERCOnlineSupport@ferc.gov.

(1) You can file your comments electronically using the eComment feature, which is located on the Commission's website (www.ferc.gov) under the link to FERC Online. Using eComment is an easy method for submitting brief, text-only comments on a project;

(2) You can file your comments electronically by using the eFiling feature, which is located on the Commission's website (www.ferc.gov) under the link to FERC Online. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on "eRegister." You will be asked to select the type of filing you are making; a comment on a particular project is considered a "Comment on a Filing"; or

(3) You can file a paper copy of your comments by mailing them to the Commission. Be sure to reference the project docket number (CP26–560–000) on your letter. Submissions sent via the U.S. Postal Service must be addressed to: Debbie-Anne A. Reese, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Debbie-Anne A. Reese, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

Additionally, the Commission offers a free service called eSubscription which makes it easy to stay informed of all issuances and submittals regarding the dockets/projects to which you subscribe. These instant email notifications are the fastest way to receive notification and provide a link to the document files which can reduce the amount of time you spend researching proceedings. Go to <https://www.ferc.gov/ferc-online/overview> to register for eSubscription.

For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, contact the Office of Public Participation at (202) 502–6595 or OPP@ferc.gov.

Summary of the Proposed Project

DIGP proposes to abandon about 119.3 miles of existing natural gas pipelines and related appurtenances in Mobile County, Alabama, Alabama state waters, and Mobile and Main Pass Blocks of federal offshore waters, known as the Dauphin Island Gathering Partners Abandonment Project. DIGP proposes to abandon its system given that is no longer economically feasible due to the depletion of attached reserves and the lack of new lease activity in the vicinity. DIGP also states that abandonment is needed to eliminate environmental and safety risks due to aging energy infrastructure and harsh offshore environment conditions.

The Dauphin Island Gathering Partners Abandonment Project would consist of the following facilities:

- abandonment in place and by removal 3.88 and 0.04 miles, respectively, of onshore 20-inch-diameter pipeline on Line 70 in Mobile County, Alabama;
- abandonment in place and by removal 3.43 and 0.05, respectively, of onshore 24-inch-diameter pipeline on Line 71 in Mobile County, Alabama;
- abandonment in place 8.65 and 8.62 miles of existing line 70 and Line 71, respectively, in Alabama state waters;

- abandonment in place 47.25 miles of offshore 24-inch-diameter pipeline on the Line 11355 in Alabama state waters and federal offshore waters, including disconnecting from the base of the riser at MP–225 Platform;

- abandonment by removal 17.75 miles of Line 11355 within the Significant Sediment Resource Area in federal offshore waters;

- abandonment in place 29.66 miles of offshore 20-inch-diameter pipeline on Line 10824, including a disconnection from the subsea spool tie-in location at the MP–164 subsea valve tie-in and a disconnection from the riser base subsea spool at the MP–225 Platform in federal offshore waters; and

- abandonment of risers by removal at the AST–73 Platform, including abandonment by removal 0.04 mile of piping associated with the tin-in to the riser and subsea spool sections of the AST–73 Platform in Alabama state waters.

The general location of the project facilities is shown in appendix 1.¹

Land Requirements for Construction

Abandonment of the proposed facilities would affect 31.4 acres of land onshore and 650.8 acres of land offshore, including 1.4 acres of state waters and 649.5 acres of federal waters. Onshore abandonment activities would be associated with portions of Line 70 and Line 71 pipelines, the Coden Valve Yard, the Mobile Bay Gas Processing Plant, and a third-party facility directly south of and adjacent to the Coden Valve Yard. Offshore abandonment activities would be associated with portions of Line 70 and Line 71, Line 11355, and Line 10824.

NEPA Process and the Environmental Document

Any environmental document issued by the Commission will discuss impacts that could occur as a result of the construction and operation of the proposed project under the relevant general resource areas:

- geology and soils;
- water resources and wetlands;
- vegetation and wildlife;
- threatened and endangered species;
- cultural resources;
- land use;
- air quality and noise; and
- reliability and safety.

¹ The appendices referenced in this notice will not appear in the **Federal Register**. Copies of the appendices were sent to all those receiving this notice in the mail and are available at www.ferc.gov using the link called “eLibrary.” For instructions on connecting to eLibrary, refer to the last page of this notice. For assistance, contact FERC at FERCOnlineSupport@ferc.gov or call toll free, (886) 208–3676 or TTY (202) 502–8659.

Commission staff will also evaluate reasonable alternatives to the proposed project or portions of the project and make recommendations on how to lessen or avoid impacts on the various resource areas. Your comments will help Commission staff identify and focus on the issues that might have an effect on the human environment and potentially eliminate others from further study and discussion in the environmental document.

Following this scoping period, Commission staff will determine whether to prepare an Environmental Assessment (EA) or an Environmental Impact Statement (EIS). The EA or the EIS will present Commission staff's independent analysis of the issues. If Commission staff prepares an EA, a *Notice of Schedule for the Preparation of an Environmental Assessment* will be issued. The EA may be issued for an allotted public comment period. The Commission would consider timely comments on the EA before making its decision regarding the proposed project. If Commission staff prepares an EIS, a *Notice of Intent to Prepare an EIS/ Notice of Schedule* will be issued, which will open up an additional comment period. Staff will then prepare a draft EIS which will be issued for public comment. Commission staff will consider all timely comments received during the comment period on the draft EIS and revise the document, as necessary, before issuing a final EIS. Any EA or draft and final EIS will be available in electronic format in the public record through eLibrary² and the Commission's natural gas environmental documents web page (<https://www.ferc.gov/industries-data/natural-gas/environment/environmental-documents>). If eSubscribed, you will receive instant email notification when the environmental document is issued.

With this notice, the Commission is asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues of this project to formally cooperate in the preparation of the environmental document.³ Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the *Public Participation* section of this notice.

² For instructions on connecting to eLibrary, refer to the last page of this notice.

³ Cooperating agency responsibilities are addressed in Section 107(a)(3) of NEPA (42 U.S.C. 4336(a)(3)).

Consultation Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, the Commission is using this notice to initiate consultation with the applicable State Historic Preservation Office(s), and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.⁴ The environmental document for this project will document findings on the impacts on historic properties and summarize the status of consultations under section 106.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; Native American Tribes; environmental and public interest groups; other interested parties; and local libraries and media outlets. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project and includes a mailing address with their comments. Commission staff will update the environmental mailing list as the analysis proceeds to ensure that Commission notices related to this environmental review are sent to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

If you need to make changes to your name/address, or if you would like to remove your name from the mailing list, please complete one of the following steps:

(1) Send an email to GasProjectAddressChange@ferc.gov stating your request. You must include the docket number CP26-560-000 in your request. If you are requesting a change to your address, please be sure to include your name and the correct address. If you are requesting to delete your address from the mailing list, please include your name and address

⁴ The Advisory Council on Historic Preservation's regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

as it appeared on this notice. This email address is unable to accept comments.

OR

(2) Return the attached "Mailing List Update Form" (appendix 2).

Additional Information

Additional information about the project is available from the FERC website at www.ferc.gov using the eLibrary link. Click on the eLibrary link, click on "General Search" and enter the docket number in the "Docket Number" field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at FercOnlineSupport@ferc.gov or (866) 208-3676, or for TTY, contact (202) 502-8659. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

Public sessions or site visits will be posted on the Commission's calendar located at <https://www.ferc.gov/news-events/events> along with other related information.

(Authority: 18 CFR 2.1)

Dated: September 15, 2026.

Debbie-Anne A. Reese,

Secretary.

[FR Doc. 2026-19202 Filed 9-17-26; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP26-1253-000.

Applicants: Gulf South Pipeline Company, LLC.

Description: Compliance filing: Compliance Tariff Filing to Docket No. CP25-547-000, et al. to be effective 10/1/2026.

Filed Date: 9/14/26.

Accession Number: 20260914-5249.

Comment Date: 5 p.m. 9/28/26.

Docket Numbers: RP26-1255-000.

Applicants: Texas Gas Transmission, LLC.

Description: Compliance filing: Compliance Tariff Filing to Docket No. CP25-549-000, et al. to be effective 10/1/2026.

Filed Date: 9/14/26.

Accession Number: 20260914-5262.

Comment Date: 5 p.m. 9/28/26.

Docket Numbers: RP26-1256-000.

Applicants: Just Energy Solutions Inc., IGS Energy.

Description: Joint Petition for Limited Waiver of Capacity Release Regulations, et al. of IGS Energy, et al.

Filed Date: 9/14/26.

Accession Number: 20260914-5279.

Comment Date: 5 p.m. 9/28/26.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) 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.

Filings in Existing Proceedings

Docket Numbers: RP25-858-006.

Applicants: ANR Pipeline Company.

Description: Compliance filing: Compliance to Stipulation and Agreement of Settlement—RP25-858 to be effective 11/1/2025.

Filed Date: 9/15/26.

Accession Number: 20260915-5091.

Comment Date: 5 p.m. 9/28/26.

Docket Numbers: RP26-1109-001.

Applicants: Vector Pipeline L.P.

Description: Compliance filing: Amendment/Substitute Record to be effective 1/1/2027.

Filed Date: 9/14/26.

Accession Number: 20260914-5159.

Comment Date: 5 p.m. 9/28/26.

Any person desiring to protest in any of the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number.

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.

For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, contact the Office of Public Participation at (202) 502-6595 or OPP@ferc.gov.

Dated: September 15, 2026.

Carlos D. Clay,

Deputy Secretary.

[FR Doc. 2026-19179 Filed 9-17-26; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. IC26–36–000]

Commission Information Collection Activities (Ferc–521); Comment Request; Extension**AGENCY:** Federal Energy Regulatory Commission.**ACTION:** Notice of information collection and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995 (PRA), the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on FERC–521: Payments for Benefits from Headwater Improvements (OMB Control No 1902–0087) which will be submitted to the Office of Management and Budget (OMB) for a review of the information collection requirements. There are no proposed changes to the reporting requirements. No comments were received in the 60-day comment period.

DATES: Comments on the collection of information are due October 19, 2026.

ADDRESSES: Send written comments on FERC–521 to OMB through https://www.reginfo.gov/public/do/PRA/icrPublicCommentRequest?ref_nbr=202607-1902-007. You can also visit <https://www.reginfo.gov/public/do/>

PRAMain and use the drop-down under “Currently under Review” to select the “Federal Energy Regulatory Commission” where you can see the open opportunities to provide comments. Comments should be sent within 30 days of publication of this notice.

Please submit a copy of your comments to the Commission via email to DataClearance@FERC.gov. You must specify the docket No. (IC26–36–000) and the FERC Information Collection number (FERC–521) in your email. If you are unable to file electronically, comments may be filed by USPS mail or by hand (including courier) delivery:

- *Mail via U.S. Postal Service Only:* Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

- *All other delivery methods:* Federal Energy Regulatory Commission, Secretary of the Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

Docket: To view comments and issuances in this docket, please visit <https://elibrary.ferc.gov/eLibrary/search>.

FOR FURTHER INFORMATION CONTACT:

Kayla Williams, (202) 502–6468.
DataClearance@FERC.gov

SUPPLEMENTARY INFORMATION:

Title: FERC–521, Payments for Benefits from Headwater Improvements
OMB Control No.: 1902–0087

Type of Request: Three-year extension of the FERC–521 information collection

requirements with no changes to the reporting requirements.

Abstract: The purpose of FERC–521 is to implement information collections pursuant to Section 10(f) of the Federal Power Act (FPA). Section 10(f) of the FPA requires hydropower licensees to reimburse upstream headwater project owners for an equitable portion of the benefits it receives as a result of construction work related to headwater improvements. These benefits, referred to as headwater benefits, are the additional energy production possible at a downstream hydropower project resulting from the regulation of river flows by an upstream storage reservoir. The Commission requires federal agencies and owners of non-federal hydropower projects to file data for determining headwater benefits as outlined in 18 Code of Federal Regulations (CFR) Part 11.

Type of Respondents: There are two types of entities that respond, Federal and Non-Federal storage and hydropower project owners. The Federal entities that typically respond include the U.S. Army Corps of Engineers and the U.S. Department of Interior Bureau of Reclamation. The Non-Federal entities may consist of any Municipal or Non-Municipal hydropower project owner.

Estimate of Annual Burden¹ and cost:² The Commission estimates the total Public Reporting Burden for this information collection as:

	Number of respondents	Annual number of responses per respondent	Total number of responses	Average burden & cost per response	Total annual burden hours & total annual cost	Cost per respondent (\$)
	(1)	(2)	(1) * (2) = (3)	(4)	(3) * (4) = (5)	(5) ÷ (1)
Federal and Non-Federal project owners.	3	1	3	40 hrs.; \$4,080	120 hrs.; \$12,240	\$4,080

Comments: Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency’s estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) 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.

Dated: September 15, 2026.

Debbie-Anne A. Reese,

Secretary.

[FR Doc. 2026–19200 Filed 9–17–26; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Project No. 10441–020]

City of Aspen, Colorado; Notice of Application Accepted for Filing and Soliciting Motions To Intervene and Protests

Take notice that the following hydroelectric application has been filed

¹ Burden is defined as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further

explanation of what is included in the information collection burden, refer to 5 Code of Federal Regulations 1320.3.

² FERC estimates that industry hourly costs are similar to the Commission FY 2026 average salary plus benefits of \$213,003 per year (or \$102/hour).

with the Commission and is available for public inspection.

a. *Type of Application*: Subsequent Minor License.

b. *Project No.*: 10441–020.

c. *Date filed*: April 8, 2025.

d. *Applicant*: City of Aspen, Colorado.

e. *Name of Project*: Maroon Creek Hydroelectric Project.

f. *Location*: The existing project is located on Maroon Creek near the city of Aspen in Pitkin County, Colorado. The project occupies 0.575 acres of land managed by the U.S. Forest Service in the White River National Forest.

g. *Filed Pursuant to*: Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact*: Mr. Phil Overeynder, Utility Director, 427 Rio Grande Place, Aspen, CO 81611 (970) 920–5000, phil.overeynder@aspen.gov.

i. *FERC Contact*: Jane Dalglish, Coordinator, West Branch, Division of Hydropower Licensing; (503) 552–2718; jane.dalglish@ferc.gov.

j. *Deadline for filing motions to intervene and protests*: By 5:00 p.m. Eastern Time on November 16, 2026.

The Commission strongly encourages electronic filing. Please file motions to intervene and protests and requests for cooperating agency status using the Commission's eFiling system at <https://ferconline.ferc.gov/FEROnline.aspx>. Commenters can submit brief comments up to 10,000 characters, without prior registration, using the eComment system at <https://ferconline.ferc.gov/QuickComment.aspx>. For assistance, please contact FERC Online Support at, (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy via U.S. Postal Service to: Debbie-Anne A. Reese, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Debbie Anne A. Reese, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. All filings must clearly identify the project name and docket number on the first page: Maroon Creek Hydroelectric Project P–10441–020.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted but is not ready for environmental analysis at this time.

l. *Project Description*: The existing project works consist of (a) a 10-foot-high, 40-foot-long reinforced concrete dam with a crest elevation of 8,245.75 feet (the Maroon Creek diversion dam); (b) a small impoundment; (c) an intake structure at the dam; (d) a 39-inch-diameter, 5,563-foot-long buried reinforced concrete penstock; (e) a 27-inch-diameter, 1,317-foot-long buried reinforced concrete penstock together with a 110-foot section of steel penstock at the plant site; (f) a powerhouse with a 450 kW turbine-generator unit; (g) a 200-foot-long trapezoidal open channel tailrace, returning the water to Maroon Creek; (h) 0.48 kV generator leads to a three-phase, 0.48/24.9 kV step-up transformer; (i) an approximately 400-foot-long, 24.9 kV overhead power line tap connection to the Aspen Highlands circuit operated by Holy Cross Energy; and (j) appurtenant facilities.

The application describes the addition of up to 50 kW of generating capacity through two new small turbines, with two new attached generators placed at the existing diversion dam. These new units would generate power from the bypass flows released from the diversion dam without changing the time or the amount of those releases. Flows utilized by new generation equipment would be returned to the same location on the stream immediately below the dam and headgate.

m. A copy of the application can be viewed on the Commission's website at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket

number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at FEROnlineSupport@ferc.gov or call toll-free, (866) 208–3676 or (202) 502–8659 (TTY).

You may also register online at <https://ferconline.ferc.gov/FEROnline.aspx> to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, contact the Office of Public Participation at (202) 502–6595 or OPP@ferc.gov.

o. Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

All filings must (1) bear in all capital letters the title "PROTEST" or "MOTION TO INTERVENE"; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application.

p. *Procedural schedule*: The application will be processed according to the following schedule. Revisions to the schedule will be made as appropriate

Milestone	Date
Issue Scoping Notice	October 2026.
Scoping Comments Due	November 2026.
Issue Notice of Ready for Environmental Analysis	January 2027.

(Authority: 18 CFR 2.1.)

Dated: September 15, 2026.

Carlos D. Clay,

Deputy Secretary.

[FR Doc. 2026–19180 Filed 9–17–26; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following Electric Corporate filings:

Docket Numbers: EC26–172–000.

Applicants: Fern Solar LLC, Strauss Wind, LLC.

Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of Fern Solar LLC, et al.

Filed Date: 9/14/26.

Accession Number: 20260914–5280.

Comment Date: 5 p.m. ET 10/5/26.

Docket Numbers: EC26–173–000.

Applicants: Aquamarine Westside, LLC, Aquamarine Lessee, LLC, Castanea Project, LLC, Westlands Cherry, LLC, Westlands Grape, LLC, Westlands VI Project, LLC, Westlands Solar Blue (OZ) Owner, LLC, Westlands Transmission Project Owner, LLC.

Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of Aquamarine Westside, LLC, et al.

Filed Date: 9/14/26.

Accession Number: 20260914–5282.

Comment Date: 5 p.m. ET 10/5/26.

Take notice that the Commission received the following Electric Rate filings:

Docket Numbers: ER10–2918–030; ER19–1411–007.

Applicants: GenOn Bowline, LLC, Carr Street Generating Station, L.P.

Description: Notice of Non-Material Change in Status of Carr Street Generating Station, L.P., et al.

Filed Date: 9/11/26.

Accession Number: 20260911–5331.

Comment Date: 5 p.m. ET 10/2/26.

Docket Numbers: ER23–222–001.

Applicants: EnerSmart Mesa Heights BESS LLC.

Description: Notice of Change in Status of EnerSmart Mesa Heights BESS LLC.

Filed Date: 9/11/26.

Accession Number: 20260911–5332.

Comment Date: 5 p.m. ET 10/2/26.

Docket Numbers: ER26–2936–002.

Applicants: Southwest Power Pool, Inc.

Description: Tariff Amendment: 1889R16 Evergy Kansas Central, Inc. NITSA NOA to be effective 9/1/2026.

Filed Date: 9/15/26.

Accession Number: 20260915–5068.

Comment Date: 5 p.m. ET 10/6/26.

Docket Numbers: ER26–2937–002.

Applicants: Southwest Power Pool, Inc.

Description: Tariff Amendment: 1891R16 Evergy Kansas Central, Inc. NITSA NOA to be effective 9/1/2026.

Filed Date: 9/15/26.

Accession Number: 20260915–5077.

Comment Date: 5 p.m. ET 10/6/26.

Docket Numbers: ER26–2940–002.

Applicants: Southwest Power Pool, Inc.

Description: Tariff Amendment: 1893R17 Evergy Kansas Central, Inc. NITSA NOA to be effective 9/1/2026.

Filed Date: 9/15/26.

Accession Number: 20260915–5082.

Comment Date: 5 p.m. ET 10/6/26.

Docket Numbers: ER26–2946–002.

Applicants: Public Service Company of New Mexico.

Description: Tariff Amendment: Response to Deficiency Letter and Request for Shortened Comment Period to be effective 8/24/2026.

Filed Date: 9/14/26.

Accession Number: 20260914–5257.

Comment Date: 5 p.m. ET 9/24/26.

Docket Numbers: ER26–3092–001.

Applicants: Oregon Trail Solar, LLC.

Description: Tariff Amendment: Response to Deficiency Letter to be effective 9/1/2026.

Filed Date: 9/15/26.

Accession Number: 20260915–5096.

Comment Date: 5 p.m. ET 10/6/26.

Docket Numbers: ER26–3417–001.

Applicants: Midcontinent Independent System Operator, Inc.

Description: Tariff Amendment: 2026–09–15_SA 4820 MEC-Beeline Solar Energy Sub FCA (GEN–2018–043) to be effective 7/29/2026.

Filed Date: 9/15/26.

Accession Number: 20260915–5100.

Comment Date: 5 p.m. ET 10/6/26.

Docket Numbers: ER26–3541–000.

Applicants: Overnight Solar LLC.

Description: Supplement to 08/17/2026, Overnight Solar LLC tariff filing.

Filed Date: 9/11/26.

Accession Number: 20260911–5326.

Comment Date: 5 p.m. ET 10/2/26.

Docket Numbers: ER26–3765–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Amendment to GIA, Service Agreement No. 7916; Project Identifier No. AG1–553 to be effective 11/15/2026.

Filed Date: 9/15/26.

Accession Number: 20260915–5053.

Comment Date: 5 p.m. ET 10/6/26.

Docket Numbers: ER26–3766–000.

Applicants: Blue Branch Solar, LLC.

Description: § 205(d) Rate Filing: Blue Branch Solar, LLC MBR Tariff to be effective 11/11/2026.

Filed Date: 9/15/26.

Accession Number: 20260915–5060.

Comment Date: 5 p.m. ET 10/6/26.

Docket Numbers: ER26–3767–000.

Applicants: Blue Jay Road Solar, LLC.

Description: § 205(d) Rate Filing: Blue Jay Road Solar, LLC MBR Tariff to be effective 11/11/2026.

Filed Date: 9/15/26.

Accession Number: 20260915–5061.

Comment Date: 5 p.m. ET 10/6/26.

Docket Numbers: ER26–3768–000.

Applicants: Lapis Solar, LLC.

Description: § 205(d) Rate Filing: Lapis Solar, LLC MBR Tariff to be effective 11/11/2026.

Filed Date: 9/15/26.

Accession Number: 20260915–5064.

Comment Date: 5 p.m. ET 10/6/26.

Docket Numbers: ER26–3769–000.

Applicants: Romero Energy Center, LLC.

Description: § 205(d) Rate Filing: Notice of Succession and Revision to Market-Based Rate Tariff—Romero EC, LLC to be effective 4/30/2026.

Filed Date: 9/15/26.

Accession Number: 20260915–5080.

Comment Date: 5 p.m. ET 10/6/26.

Docket Numbers: ER26–3770–000.

Applicants: Romero Energy Center II, LLC.

Description: § 205(d) Rate Filing: Notice of Succession and Revision to Market-Based Rate Tariff—Romero EC II to be effective 4/30/2026.

Filed Date: 9/15/26.

Accession Number: 20260915–5081.

Comment Date: 5 p.m. ET 10/6/26.

Docket Numbers: ER26–3771–000.

Applicants: Northern States Power Company, a Minnesota corporation.

Description: § 205(d) Rate Filing: 2026–09–15 MPPA-Chaska West Creek-220MW–797–0.0.0 to be effective 9/16/2026.

Filed Date: 9/15/26.

Accession Number: 20260915–5114.

Comment Date: 5 p.m. ET 10/6/26.

Docket Numbers: ER26–3772–000.

Applicants: Alabama Power Company, Georgia Power Company, Mississippi Power Company.

Description: § 205(d) Rate Filing: Alabama Power Company submits tariff filing per 35.13(a)(2)(iii) Plumleaf Solar Project (Plumleaf Energy Reserve) LGIA Filing to be effective 9/4/2026.

Filed Date: 9/15/26.

Accession Number: 20260915–5116.

Comment Date: 5 p.m. ET 10/6/26.

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, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) 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.

For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, contact the Office of Public Participation at (202) 502-6595 or OPP@ferc.gov.

Dated: September 15, 2026.

Carlos D. Clay,

Deputy Secretary.

[FR Doc. 2026-19176 Filed 9-17-26; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 3015-023]

Southeast Alaska Power Agency; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Amendment of license to modify project boundary and delete transmission line from license.

b. *Project No.:* 3015-023.

c. *Date Filed:* June 29, 2026.

d. *Applicant:* Southeast Alaska Power Agency.

e. *Name of Project:* Tyee Lake Project.

f. *Location:* The project is located on Tyee Creek in Wrangell Borough, Alaska.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Mr. Robert Siedman, CEO, Southeast Alaska Power

Agency, 55 Don Finney Lane, Ketchikan, AK 99901, (907) 228-2281, rsiedman@seapahydro.org.

i. *FERC Contact:* Mr. Steven Sachs, (202) 502-8666, Steven.Sachs@ferc.gov.

j. *Deadline for filing comments, motions to intervene, and protests:* October 15, 2026, 5:00 p.m. Eastern Time.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/docs-filing/ecomment.asp>. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov, (866) 208-3676 (toll free), or (202) 502-8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Debbie-Anne A. Reese, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Debbie-Anne A. Reese, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include the docket number P-3015-023. Comments emailed to Commission staff are not part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears 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. *Description of Request:* The applicant proposes to amend the project to delete the 79.5-mile-long Tyee-Petersburg transmission line from the project license. The applicant states that with the construction of the connected Swan-Tyee Intertie, the Tyee-Petersburg line is no longer a primary transmission line for the Tyee Lake Hydroelectric Project and is not part of the licensed project. The applicant does not propose any changes to the line beyond administratively removing it from the license, and would continue to operate and maintain the line as it has done in the past. Jurisdiction over the

transmission line right-of-way would convert to the current landowners.

l. *Locations of the application:* This filing may be viewed on the Commission's website at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. 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, call 1-866-208-3676 or email FERCOnlineSupport@ferc.gov, for TTY, call (202) 502-8659.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Documents:* Any filing must: (1) bear in all capital letters the title "COMMENTS", "PROTEST", or "MOTION TO INTERVENE" as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

p. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, contact the Office of Public Participation at (202) 502-6595 or OPP@ferc.gov.

(Authority: 18 CFR 2.1)

Dated: September 15, 2026.

Debbie-Anne A. Reese,
Secretary.

[FR Doc. 2026–19196 Filed 9–17–26; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP26–572–000]

Southern Star Central Gas Pipeline, Inc.; Notice of Application and Establishing Intervention Deadline

Take notice that on August 31, 2026, Southern Star Central Gas Pipeline, Inc. (Southern Star), 4700 State Route 56, Owensboro, Kentucky 42301, filed an application under section 7(c) of the Natural Gas Act (NGA) and Part 157 of the Commission's regulations requesting authorization for its Everyg McNew Power Plant Delivery Project (Project). Southern Star proposes to (1) construct approximately 1.6 miles of 30-inch-diameter pipeline, (2) construct the new Hutchinson Compressor Station (CS) comprised of three new compressor units totaling 5,700 horsepower, and (3) construct one new meter station, all located in Reno County, Kansas. The project also includes ancillary modifications to Southern Star's existing Hesston CS in Harvey County, Kansas and Stafford CS in Stafford County, Kansas. The Project is designed to provide approximately 123,000 dekatherms per day of firm natural gas transportation to the Everyg McNew Power Plant in Reno County, Kansas. Southern Star estimates the total cost of the Project to be \$75.5 million, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>). From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

User assistance is available for eLibrary and the Commission's website during normal business hours from

FERC Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at public.reference.room@ferc.gov.

Any questions regarding the proposed project should be directed to Will Wathen, Director, Rates & Regulatory, Southern Star Central Gas Pipeline, Inc., 4700 State Route 56, Owensboro, Kentucky 42301, by phone at (270) 925–1969, or by email at will.wathen@southernstar.com.

Pursuant to section 157.9 of the Commission's Rules of Practice and Procedure,¹ within 90 days of this Notice the Commission staff will either: complete its environmental review and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or environmental assessment (EA) for this proposal. The filing of an EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Public Participation

There are three ways to become involved in the Commission's review of this project: you can file comments on the project, you can protest the filing, and you can file a motion to intervene in the proceeding. There is no fee or cost for filing comments or intervening. The deadline for filing a motion to intervene is 5:00 p.m. Eastern Time on October 6, 2026. How to file protests, motions to intervene, and comments is explained below.

For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, contact the Office of Public Participation (OPP) at (202) 502–6595 or OPP@ferc.gov.

Comments

Any person wishing to comment on the project may do so. Comments may include statements of support or objections, to the project as a whole or

specific aspects of the project. The more specific your comments, the more useful they will be.

Protests

Pursuant to sections 157.10(a)(4)² and 385.211³ of the Commission's regulations under the NGA, any person⁴ may file a protest to the application. Protests must comply with the requirements specified in section 385.2001⁵ of the Commission's regulations. A protest may also serve as a motion to intervene so long as the protestor states it also seeks to be an intervenor.

To ensure that your comments or protests are timely and properly recorded, please submit your comments on or before 5:00 p.m. Eastern Time on October 6, 2026.

There are three methods you can use to submit your comments or protests to the Commission. In all instances, please reference the Project docket number CP26–572–000 in your submission.

(1) You may file your comments electronically by using the eComment feature, which is located on the Commission's website at www.ferc.gov under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You may file your comments or protests electronically by using the eFiling feature, which is located on the Commission's website (www.ferc.gov) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on "eRegister." You will be asked to select the type of filing you are making; first select "General" and then select "Comment on a Filing"; or

(3) You can file a paper copy of your comments or protests by mailing them to the following address below. Your written comments must reference the Project docket number (CP26–572–000).

To file via USPS: Debbie-Anne A. Reese, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

To file via any other courier: Debbie-Anne A. Reese, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

² 18 CFR 157.10(a)(4).

³ 18 CFR 385.211.

⁴ Persons include individuals, organizations, businesses, municipalities, and other entities. 18 CFR 385.102(d).

⁵ 18 CFR 385.2001.

¹ 18 CFR 157.9.

The Commission encourages electronic filing of comments (options 1 and 2 above) and has eFiling staff available to assist you at (202) 502–8258 or FercOnlineSupport@ferc.gov.

Persons who comment on the environmental review of this project will be placed on the Commission's environmental mailing list, and will receive notification when the environmental documents (EA or EIS) are issued for this project and will be notified of meetings associated with the Commission's environmental review process.

The Commission considers all comments received about the project in determining the appropriate action to be taken. However, the filing of a comment alone will not serve to make the filer a party to the proceeding. To become a party, you must intervene in the proceeding. For instructions on how to intervene, see below.

Interventions

Any person, which includes individuals, organizations, businesses, municipalities, and other entities,⁶ has the option to file a motion to intervene in this proceeding. Only intervenors have the right to request rehearing of Commission orders issued in this proceeding and to subsequently challenge the Commission's orders in the U.S. Circuit Courts of Appeal.

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure⁷ and the regulations under the NGA⁸ by the intervention deadline for the project, which is 5:00 p.m. Eastern Time on October 6, 2026. As described further in Rule 214, your motion to intervene must state, to the extent known, your position regarding the proceeding, as well as your interest in the proceeding. For an individual, this could include your status as a landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene. For more information about motions to intervene, refer to the FERC website at <https://www.ferc.gov/resources/guides/how-to/intervene.asp>.

There are two ways to submit your motion to intervene. In both instances, please reference the Project docket number CP26–572–000 in your submission.

(1) You may file your motion to intervene by using the Commission's

eFiling feature, which is located on the Commission's website (www.ferc.gov) under the link to Documents and Filings. New eFiling users must first create an account by clicking on "eRegister." You will be asked to select the type of filing you are making; first select "General" and then select "Intervention." The eFiling feature includes a document-less intervention option; for more information, visit <https://www.ferc.gov/docs-filing/efiling/document-less-intervention.pdf>; or

(2) You can file a paper copy of your motion to intervene, along with three copies, by mailing the documents to the address below. Your motion to intervene must reference the Project docket number CP26–572–000.

To file via USPS: Debbie-Anne A. Reese, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

To file via any other courier: Debbie-Anne A. Reese, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

The Commission encourages electronic filing of motions to intervene (option 1 above) and has eFiling staff available to assist you at (202) 502–8258 or FercOnlineSupport@ferc.gov.

Protests and motions to intervene must be served on the applicant either by mail at: Will Wathen, Director, Rates & Regulatory, Southern Star Central Gas Pipeline, Inc., 4700 State Route 56, Owensboro, Kentucky 42301, or by email (with a link to the document) at will.wathen@southernstar.com. Any subsequent submissions by an intervenor must be served on the applicant and all other parties to the proceeding. Contact information for parties can be downloaded from the service list at the eService link on FERC Online. Service can be via email with a link to the document.

All timely, unopposed⁹ motions to intervene are automatically granted by operation of Rule 214(c)(1).¹⁰ Motions to intervene that are filed after the intervention deadline are untimely, and may be denied. Any late-filed motion to intervene must show good cause for being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations.¹¹ A person obtaining party status will be placed on the service list maintained by

the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Tracking the Proceeding

Throughout the proceeding, additional information about the project will be available from OPP at (202) 502–6595 or on the FERC website at www.ferc.gov using the "eLibrary" link as described above. 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. For more information and to register, go to www.ferc.gov/docs-filing/esubscription.asp.

Intervention Deadline: 5:00 p.m. Eastern Time on October 6, 2026.

(Authority: 18 CFR 2.1)

Dated: September 15, 2026.

Debbie-Anne A. Reese,
Secretary.

[FR Doc. 2026–19201 Filed 9–17–26; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1267–136]

Greenwood County, South Carolina; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Amendment of license to modify emergency spillway, add flood protection berm, and raise bulkheads.

b. *Project No.:* 1267–136.

c. *Date Filed:* August 11, 2026.

d. *Applicant:* Greenwood County, South Carolina.

e. *Name of Project:* Buzzards Roost Project.

f. *Location:* The project is located on the Saluda River in Greenwood, Laurens, and Newberry counties, South Carolina.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

⁶ 18 CFR 385.102(d).

⁷ 18 CFR 385.214.

⁸ 18 CFR 157.10.

⁹ The applicant has 15 days from the submittal of a motion to intervene to file a written objection to the intervention.

¹⁰ 18 CFR 385.214(c)(1).

¹¹ 18 CFR 385.214(b)(3) and (d).

h. *Applicant Contact*: Mr. Toby Chappell, County Manager, Park Plaza, Suite 102, 600 Monument Street, Box P-103, Greenwood, SC 29646, (864) 942-8507, tchappell@greenwoodsc.gov.

i. *FERC Contact*: Mr. Steven Sachs, (202) 502-8666, Steven.Sachs@ferc.gov.

j. *Cooperating agencies*: With this notice, the Commission is inviting federal, state, local, and Tribal agencies with jurisdiction and/or special expertise with respect to environmental issues affected by the proposal, that wish to cooperate in the preparation of any environmental document, if applicable, to follow the instructions for filing such requests described in item k. below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of any environmental document cannot also intervene. See 94 FERC ¶ 61,076 (2001).

k. *Deadline for filing comments, motions to intervene, and protests*: October 15, 2026, 5:00 p.m. Eastern Time.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/docs-filing/ecomment.asp>. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov, (866) 208-3676 (toll free), or (202) 502-8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Debbie-Anne A. Reese, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Debbie-Anne A. Reese, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include the docket number P-1267-136. Comments emailed to Commission staff are not part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears 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.

l. *Description of Request*: The applicant requests an amendment of license to improve the project's ability to safely pass large floods. The applicant intends to construct a new concrete emergency spillway downstream of the existing earthen emergency spillway, reconstruct the existing earthen emergency spillway to ensure controlled releases at prescribed flood elevations, excavate the emergency spillway channel to expand flow capacity, construct a new berm in a topographic saddle 500 to 1,000 feet east of the emergency spillway to retain the reservoir during a flood, and raise concrete bulkhead walls at the powerhouse and service spillway to prevent overtopping. Construction is expected to last approximately 12 months, beginning in April 2027. The applicant is proposing no changes to normal operation or generation facilities.

m. *Locations of the application*: This filing may be viewed on the Commission's website at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. 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, call 1-866-208-3676 or email FERCOnlineSupport@ferc.gov, for TTY, call (202) 502-8659.

n. *Individuals desiring to be included on the Commission's mailing list* should so indicate by writing to the Secretary of the Commission.

o. *Comments, Protests, or Motions to Intervene*: Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, 385.214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

p. *Filing and Service of Documents*: Any filing must: (1) bear in all capital letters the title "COMMENTS", "PROTEST", or "MOTION TO INTERVENE" as applicable; (2) set forth in the heading the name of the applicant and the project number of the

application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

q. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, contact the Office of Public Participation at (202) 502-6595 or OPP@ferc.gov.

(Authority: 18 CFR 2.1)

Dated: September 15, 2026.

Debbie-Anne A. Reese,
Secretary.

[FR Doc. 2026-19199 Filed 9-17-26; 8:45 am]

BILLING CODE 6717-01-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL OPRM-FAD-240]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information 202-993-3272 or <https://www.epa.gov/nepa>. Weekly receipt of Environmental Impact Statements (EIS)
Filed September 4, 2026 10 a.m. EST
Through September 14, 2026 10 a.m. EST
Pursuant to CEQ Guidance on 42 U.S.C. 4332.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: <https://cdxapps.epa.gov/cdx-enepa-II/public/action/eis/search>.

EIS No. 20260122, Final, EPA, CA, ADOPTION—FEIS for Dam Retrofit and Surrender of the Anderson Dam Hydroelectric Project Exemption, Review Period Ends: 10/09/2026, Contact: Alaina McCurdy 202-564-6996.

The Environmental Protection Agency (EPA) has adopted the Federal Energy Regulatory Commission's Final EIS No. 20260009 filed 02/06/2026 with the Environmental Protection Agency. The

EPA was not a cooperating agency on this project. Therefore, republication of the document is necessary.

EIS No. 20260123, Draft, FTA, WA, Everett Link Extension Project, Comment Period Ends: 11/02/2026, Contact: Todd Tillinger 206-220-7538.

EIS No. 20260124, Final, NRCS, CA, Watershed Plan & EIS for McGriff Lakes Sutter Basin Watershed Flood Control & Flood Safety Project, Review Period Ends: 11/02/2026, Contact: Richard Rivas 530-792-5510.

EIS No. 20260125, Draft, NRCS, UT, Cove—East Fork of the Virgin River Watershed Plan, Comment Period Ends: 11/02/2026, Contact: Ammon Bowsell 435-459-1621.

Dated: September 15, 2026.

Nancy Abrams,

Deputy Director, Federal Activities Division.

[FR Doc. 2026-19164 Filed 9-17-26; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL HOUSING FINANCE AGENCY

[No. 2026-N-12]

Proposed Collection; Comment Request

AGENCY: Federal Housing Finance Agency.

ACTION: Federal Home Loan Bank Capital Stock—60-Day notice of submission of information collection for approval from Office of Management and Budget.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), the Federal Housing Finance Agency (FHFA) is seeking public comment concerning an information collection known as “Federal Home Loan Bank Capital Stock,” which has been assigned control number 2590-0002 by the Office of Management and Budget (OMB). FHFA intends to submit the information collection to OMB for review and approval of a three-year extension of the control number, which is due to expire on November 30, 2026.

DATES: Interested persons may submit comments on or before November 17, 2026.

ADDRESSES: Submit comments to FHFA, identified by “Proposed Collection; Comment Request: ‘Federal Home Loan Bank Capital Stock, (No. 2026-N-12)’ ” by any of the following methods:

- **Agency Website:** <https://www.fhfa.gov/regulation/federal-register?comments=open>.

- **Email:** RegComments@fhfa.gov. Include “Proposed Collection; Comment Request: ‘Federal Home Loan Bank Capital Stock, (No. 2026-N-12)’ in the subject line of the message.

- **Mail/Hand Delivery:** Federal Housing Finance Agency, Fourth Floor, 400 Seventh Street SW, Washington, DC 20219, ATTENTION: Proposed Collection; Comment Request: “Federal Home Loan Bank Capital Stock, (No. 2026-N-12).” Please note that all mail sent to FHFA via U.S. Mail is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks. For any time-sensitive correspondence, please plan accordingly.

FHFA invites comments on all aspects of the proposed rule and will take all comments into consideration before issuing a final rule. Comments, including any personally identifiable information such as name and contact information, will be posted to the electronic rulemaking docket on the FHFA public website at <https://www.fhfa.gov>, except as described below. Commenters should submit only information that the commenter wishes to make available publicly. FHFA will not redact personally identifiable information once it is submitted. Commenters who do not wish to be identified by their comments may submit their comments anonymously. FHFA may post only a single representative example of identical or substantially identical comments, and in such cases will generally identify the number of identical or substantially identical comments represented by the posted example. FHFA may, in its discretion, redact or refrain from posting all or any portion of any comment that contains content that is obscene, vulgar, profane, or threatens harm. All comments, including those that are redacted or not posted, will be retained in their original form in FHFA’s internal rulemaking file and will be considered as required by all applicable laws. Commenters who would like FHFA to consider any portion of their comment exempt from disclosure on the basis that it contains trade secrets, or financial, confidential or proprietary data or information, should follow the procedures in section IV.D. of FHFA’s *Policy on Communications with Outside Parties in Connection with FHFA Rulemakings*, see <https://www.fhfa.gov/document/policy-on-communications-with-outside-parties-in-connection-with-fhfa-rulemakings>. FHFA cannot guarantee that such data or information will remain confidential if disclosure is sought pursuant to an applicable statute or regulation. See 12 CFR 1202.8, 12

CFR 1214.2, and FHFA’s FOIA *Reference Guide* at <https://www.fhfa.gov/about/foia-reference-guide> for additional information.

FOR FURTHER INFORMATION CONTACT: Eric Raudenbush, Associate General Counsel, Eric.Raudenbush@fhfa.gov, (202) 649-3084 or Angela Supervielle, Assistant Counsel, Angela.Supervielle@fhfa.gov, (202) 649-3973 (these are not toll-free numbers). For TTY/TRS users with hearing and speech disabilities, dial 711 and ask to be connected to any of the contact numbers above.

SUPPLEMENTARY INFORMATION:

A. Paperwork Reduction Act

Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from 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) to include agency requests or requirements that ten or more persons submit information to a third party.

Section 3506(c)(2)(A) of title 44 and 5 CFR 1320.8(d) requires Federal agencies to provide a 60-day notice¹ in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection of information to OMB for approval. FHFA’s collection of information set forth in this document is titled “Federal Home Loan Bank Capital Stock” (assigned control number 2590-0002 by OMB). To comply with the PRA requirement, FHFA is publishing notice of a proposed three-year extension of this collection of information and renewal of the control number, which is due to expire on November 30, 2026.

B. Background

The Federal Home Loan Bank System consists of eleven regional Federal Home Loan Banks (Banks) and the Office of Finance (a joint office of the Banks that issues and services the Banks’ debt securities). The Banks are wholesale financial institutions, organized under the authority of the Federal Home Loan Bank Act (Bank Act) to serve the public interest by enhancing the availability of residential housing finance and community lending credit through their member institutions and, to a limited extent, through certain eligible nonmembers. Each Bank is structured as a regional cooperative that is owned and controlled by member

¹ Following the close of this notice’s 60-day comment period, FHFA will publish a second notice with a 30-day comment period as required by 44 U.S.C. 3507(b) and 5 CFR 1320.10(a).

institutions located within its district, which are also its primary customers. An institution that is eligible for membership in a particular Bank must purchase and hold a prescribed minimum amount of the Bank's capital stock in order to become and remain a member of that Bank. With limited exceptions, only an institution that is a member of a Bank may obtain access to low cost secured loans, known as advances, or other products provided by that Bank.

Section 6 of the Bank Act establishes capital requirements for the Banks and requires FHFA to issue regulations prescribing uniform capital standards applicable to all of the Banks.² Section 6 also establishes parameters relating to the Banks' capital structures and requires that each Bank adopt a "capital structure plan" (capital plan) to establish, within those statutory parameters, its own capital structure and to establish requirements for, and govern transactions in, the Bank's capital stock.³ FHFA's regulations on Bank Capital Requirements, Capital Stock, and Capital Plans are located at 12 CFR part 1277.

C. Need For and Use of the Information Collection

Both the Bank Act and FHFA's regulations state that a Bank's capital plan must require its members to maintain a minimum investment in the Bank's capital stock, but both permit each Bank to determine for itself what that minimum investment is and how each member's required minimum investment is to be calculated.⁴ Although each Bank's capital plan establishes a slightly different method for calculating the required minimum stock investment for its members, each Bank's method is tied to some degree to both the level of assets held by the member institution (typically referred to as a "membership stock purchase requirement") and the amount of advances or other business engaged in between the member and the Bank (typically referred to as an "activity-based stock purchase requirement").

A Bank must collect information from its members to determine the minimum capital stock investment each member is required to maintain at any point in time. Although the information needed to calculate a member's required minimum investment and the precise method through which it is collected differ somewhat from Bank to Bank, the

Banks typically collect two types of information. First, in order to calculate and monitor compliance with its membership stock purchase requirement, a Bank typically requires each member to provide and/or confirm an annual report on the amount and types of assets held by that institution. Second, each time a Bank engages in a business transaction with a member, the Bank typically confirms with the member the amount of additional Bank capital stock, if any, the member must acquire in order to satisfy the Bank's activity-based stock purchase requirement and the method through which the member will acquire that stock.

D. Burden Estimate

FHFA has analyzed the time burden imposed on respondents by the two collections under this control number and estimates that the average total annual hour burden imposed on all respondents over the next three years will be 19,898 hours. This estimate is derived from the following calculations:

1. Membership Stock Purchase Requirement Submissions

FHFA estimates that the average annual number of current and former members and applicants for membership required to report information needed to calculate a membership stock purchase requirement will be 6,425, and that each institution will submit one report per year, resulting in an estimated total of 6,425 submissions annually. The estimate for the average time required to prepare, review, and submit each report is 0.7 hours. Accordingly, the estimate for the annual hour burden associated with membership stock purchase requirement submissions is (6,425 reports $\times$ 0.7 hours per report) = 4,498 hours.

2. Activity-Based Stock Purchase Requirement Submissions

FHFA estimates that the average number of daily transactions between Banks and members that will require the exchange of information to confirm the member's activity-based stock purchase requirement will be 295, and that there will be an average of 261 working days per year, resulting in an estimated 76,995 submissions annually. The estimate for the average preparation time per submission is 0.1 hours. Accordingly, the estimate for the annual hour burden associated with activity-based stock purchase requirement submissions is (76,995 submissions $\times$ 0.2 hours per submission) = 15,400 hours.

E. Comment Request

FHFA requests written comments on the following: (1) Whether the collection of information is necessary for the proper performance of FHFA functions, including whether the information has practical utility; (2) the accuracy of FHFA's estimates of the burdens of the collection of information; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Shawn Bucholtz,

Chief Data Officer, Federal Housing Finance Agency.

[FR Doc. 2026-19169 Filed 9-17-26; 8:45 am]

BILLING CODE 8070-01-P

FEDERAL HOUSING FINANCE AGENCY

[No. 2026-N-11]

Proposed Collection; Comment Request

AGENCY: Federal Housing Finance Agency.

ACTION: 60-Day notice of submission of information collection for approval from Office of Management and Budget.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), the Federal Housing Finance Agency (FHFA) is seeking public comments concerning an information collection known as "Members of the Banks," which has been assigned control number 2590-0003 by the Office of Management and Budget (OMB). FHFA intends to submit the information collection to OMB for review and approval of a three-year extension of the control number, which is due to expire on November 30, 2026.

DATES: Interested persons may submit comments on or before November 17, 2026.

ADDRESSES: Submit comments to FHFA, identified by "Proposed Collection; Comment Request: 'Members of the Banks, (No. 2026-N-11)'" by any of the following methods:

- *Agency Website:* <https://www.fhfa.gov/regulation/federal-register?comments=open>.

- *Email:* RegComments@fhfa.gov. Include "Proposed Collection; Comment Request: 'Members of the Banks, (No. 2026-N-11)'" in the subject line of the message.

² See 12 U.S.C. 1426(a).

³ See 12 U.S.C. 1426(b), (c).

⁴ See 12 U.S.C. 1426(c)(1); 12 CFR 1277.22, 1277.28(a).

• *Mail/Hand Delivery:* Federal Housing Finance Agency, Fourth Floor, 400 Seventh Street SW, Washington, DC 20219, ATTENTION: Proposed Collection; Comment Request: “Members of the Banks, (No. 2026–N–11).” Please note that all mail sent to FHFA via U.S. Mail is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks. For any time-sensitive correspondence, please plan accordingly.

FHFA invites comments on all aspects of the proposed rule and will take all comments into consideration before issuing a final rule. Comments, including any personally identifiable information such as name and contact information, will be posted to the electronic rulemaking docket on the FHFA public website at <https://www.fhfa.gov>, except as described below. Commenters should submit only information that the commenter wishes to make available publicly. FHFA will not redact personally identifiable information once it is submitted. Commenters who do not wish to be identified by their comments may submit their comments anonymously. FHFA may post only a single representative example of identical or substantially identical comments, and in such cases will generally identify the number of identical or substantially identical comments represented by the posted example. FHFA may, in its discretion, redact or refrain from posting all or any portion of any comment that contains content that is obscene, vulgar, profane, or threatens harm. All comments, including those that are redacted or not posted, will be retained in their original form in FHFA’s internal rulemaking file and will be considered as required by all applicable laws. Commenters who would like FHFA to consider any portion of their comment exempt from disclosure on the basis that it contains trade secrets, or financial, confidential or proprietary data or information, should follow the procedures in section IV.D. of FHFA’s *Policy on Communications with Outside Parties in Connection with FHFA Rulemakings*, see <https://www.fhfa.gov/document/policy-on-communications-with-outside-parties-in-connection-with-fhfa-rulemakings>. FHFA cannot guarantee that such data or information will remain confidential if disclosure is sought pursuant to an applicable statute or regulation. See 12 CFR 1202.8, 12 CFR 1214.2, and FHFA’s *FOIA Reference Guide* at <https://www.fhfa.gov/about/foia-reference-guide> for additional information.

FOR FURTHER INFORMATION CONTACT: Eric Raudenbush, Associate General Counsel, Eric.Raudenbush@fhfa.gov, (202) 649–3084 or Angela Supervielle, Assistant Counsel, Angela.Supervielle@fhfa.gov, (202) 649–3973 (these are not toll-free numbers). For TTY/TRS users with hearing and speech disabilities, dial 711 and ask to be connected to any of the contact numbers above.

SUPPLEMENTARY INFORMATION:

A. Paperwork Reduction Act

Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from 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) to include agency requests or requirements that ten or more persons submit information to a third party.

Section 3506(c)(2)(A) of title 44 and 5 CFR 1320.8(d) requires Federal agencies to provide a 60-day notice¹ in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection of information to OMB for approval. FHFA’s collection of information set forth in this document is titled “Members of the Banks” (assigned control number 2590–0003 by OMB). To comply with the PRA requirement, FHFA is publishing notice of a proposed three-year extension of this collection of information and renewal of the control number, which is due to expire on November 30, 2026.

B. Background

The Federal Home Loan Bank System consists of eleven regional Federal Home Loan Banks (Banks) and the Office of Finance (a joint office of the Banks that issues and services the Banks’ debt securities). The Banks are wholesale financial institutions, organized under the authority of the Federal Home Loan Bank Act (Bank Act) to serve the public interest by enhancing the availability of residential housing finance and community lending credit through their member institutions and, to a limited extent, through certain eligible nonmembers. Each Bank is structured as a regional cooperative that is owned and controlled by member institutions located within its district, which are also its primary customers. The Banks carry out their public policy functions primarily by providing low-

cost loans, known as advances, to their members. With limited exceptions, an institution may obtain advances and access other products and services provided by a Bank only if it is a member of that Bank.

The Bank Act limits membership in any Bank to specific types of financial institutions located within the Bank’s district that meet specific eligibility requirements. Section 4 of the Bank Act specifies the types of institutions that may be eligible for membership and establishes eligibility requirements that each type of applicant must meet in order to become a Bank member.² That provision also specifies that (with limited exceptions) an eligible institution may become a member only of the Bank of the district in which the institution’s “principal place of business” is located.³ With respect to the termination of Bank membership, section 6(d) of the Bank Act sets forth requirements pursuant to which an institution may voluntarily withdraw from membership or a Bank may terminate an institution’s membership for cause.⁴

C. Need For and Use of the Information Collection

FHFA’s “Members of the Banks” regulation, set forth at 12 CFR part 1263, implements those statutory provisions on Bank membership and otherwise establishes substantive and procedural requirements relating to the initiation and termination of Bank membership. Many of the provisions in the membership regulation require that an institution submit information to a Bank or to FHFA, in most cases to demonstrate compliance with statutory or regulatory requirements or to request action by the Bank or FHFA.

There are four types of information collections that may occur under part 1263. First, the regulation provides that (with limited exceptions) no institution may become a member of a Bank unless it has submitted to that Bank an application that documents the applicant’s compliance with the statutory and regulatory membership eligibility requirements and that otherwise includes all required information and materials.⁵ Second, the regulation provides applicants that have been denied membership by a Bank the option of appealing the decision to FHFA. To file such an appeal, an applicant must submit to FHFA a copy

² See 12 U.S.C. 1424(a).

³ See 12 U.S.C. 1424(b).

⁴ See 12 U.S.C. 1426(d).

⁵ See 12 CFR 1263.2(a), 1263.6–1263.9, 1263.11–1263.18.

¹ Following the close of this notice’s 60-day comment period, FHFA will publish a second notice with a 30-day comment period as required by 44 U.S.C. 3507(b) and 5 CFR 1320.10(a).

of the Bank's decision resolution denying its membership application and a statement of the basis for the appeal containing sufficient facts, information, and analysis to support the applicant's position.⁶ Third, the regulation provides that, in order to initiate a voluntary withdrawal from Bank membership, a member must submit to its Bank a written notice of intent to withdraw.⁷ Fourth, under certain circumstances, the regulation permits a member of one Bank to transfer its membership to a second Bank "automatically" without either initiating a voluntary withdrawal from the first Bank or submitting a membership application to the second Bank. Despite the regulatory reference to such a transfer as being "automatic," a member meeting the criteria for an automatic transfer must initiate the transfer process by filing a request with its current Bank, which will then arrange the details of the transfer with the second Bank.⁸

The Banks use most of the information collected under part 1263 to determine whether an applicant satisfies the statutory and regulatory requirements for Bank membership and should be approved as a Bank member. The Banks may use some of the information collected under part 1263 as a means of learning that a member wishes to withdraw or to transfer its membership to a different Bank so that the Bank can begin to process those requests. FHFA may also use the collected information to determine whether an institution that has been denied membership by a Bank should be permitted to become a member of that Bank.

D. Burden Estimate

FHFA has analyzed the time burden imposed on respondents by the four collections under this control number and estimates that the average total annual hour burden imposed on all respondents by those collections over the next three years will be 1,637 hours. This estimate is derived from the following calculations:

1. Membership Applications

FHFA estimates that the average number of applications for Bank membership submitted annually will be 105 and that the average time to prepare and submit an application and supporting materials will be 15 hours. Accordingly, the estimate for the annual hour burden associated with preparation and submission of

applications for Bank membership is (105 applications × 15 hours per application) = 1,575 hours.

2. Appeals of Membership Denials

FHFA estimates that the average number of applicants that have been denied membership by a Bank that will appeal such a denial to FHFA will be 1 and that the average time to prepare and submit an application for appeal will be 50 hours. Accordingly, the estimate for the annual hour burden associated with the preparation and submission of membership appeals is (1 appellants × 50 hours per application) = 50 hours.

3. Notices of Intent To Withdraw From Membership

FHFA estimates that the average number of Bank members submitting a notice of intent to withdraw from membership annually will be 4 and that the average time to prepare and submit a notice will be 1.5 hours. Accordingly, the estimate for the annual hour burden associated with preparation and submission of notices of intent to withdraw is (4 withdrawing members × 1.5 hours per application) = 6 hours.

4. Requests for Transfer of Membership to Another Bank District

FHFA estimates that the average number of Bank members submitting a request for transfer to another Bank will be 3 and that the average time to prepare and submit a request will be 2 hours. Accordingly, the estimate for the annual hour burden associated with preparation and submission of requests for automatic transfer is (3 transferring members × 2 hours per request) = 6 hours.

E. Comment Request

FHFA requests written comments on the following: (1) Whether the collection of information is necessary for the proper performance of FHFA functions, including whether the information has practical utility; (2) the accuracy of FHFA's estimates of the burdens of the collection of information; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Shawn Bucholtz,

Chief Data Officer, Federal Housing Finance Agency.

[FR Doc. 2026–19168 Filed 9–17–26; 8:45 am]

BILLING CODE 8070–01–P

FEDERAL MARITIME COMMISSION

Notice of Request for Additional Information

The Commission gives notice that it has formally requested that the parties to the below listed agreement provide additional information pursuant to 46 U.S.C. 40304(d). This action prevents the agreement from becoming effective as originally scheduled. Interested parties may file comments within fifteen (15) days after publication of this notice in the **Federal Register**.

Agreement No.: 201476.

Agreement Name: Terminal Emissions Sustainability Agreement.

Parties: Everport Terminal Services, Inc.; International Transportation Services, LLC; LBCT LLC; Pacific Terminal Services Company, LLC; SSA Marine, Inc.; TraPac, LLC; West Basin Container Terminal; and Yusen Terminals, LLC.

By Order of the Federal Maritime Commission.

Dated: September 16, 2026.

David Eng,

Secretary.

[FR Doc. 2026–19203 Filed 9–17–26; 8:45 am]

BILLING CODE 6730–02–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at <https://www.federalreserve.gov/foia/request.htm>. Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments received are subject to public disclosure. In general, comments received will be made available without

⁶ See 12 CFR 1263.5.

⁷ See 12 CFR 1263.26.

⁸ See 12 CFR 1263.4(b), 1263.18(d), (e).

change and will not be modified to remove personal or business information including confidential, contact, or other identifying information. Comments should not include any information such as confidential information that would not be appropriate for public disclosure.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Benjamin W. McDonough, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551-0001, not later than October 5, 2026.

A. Federal Reserve Bank of Kansas City (Jeffrey Imgarten, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198-0001. Comments can also be sent electronically to KCAApplicationComments@kc.frb.org;

1. *Van Cleef Family Revocable Trust, Michael Van Cleef and Nancy Van Cleef, co-trustees, all of Carleton, Nebraska*; to join the Van Cleef Family Control Group, a group acting in concert, to acquire voting shares of Carleton Agency, Inc., and thereby indirectly acquire voting shares of Citizens State Bank, both of Carleton, Nebraska. Michael Van Cleef has previously been permitted by the Federal Reserve System to acquire voting shares of Carleton Agency, Inc. in his individual capacity.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Associate Secretary of the Board.

[FR Doc. 2026-19194 Filed 9-17-26; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at

the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at <https://www.federalreserve.gov/foia/request.htm>. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments received are subject to public disclosure. In general, comments received will be made available without change and will not be modified to remove personal or business information including confidential, contact, or other identifying information. Comments should not include any information such as confidential information that would not be appropriate for public disclosure.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Benjamin W. McDonough, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551-0001, not later than October 19, 2026.

A. Federal Reserve Bank of Boston (Prabal Chakrabarti, Executive Vice President) 600 Atlantic Avenue, Boston, Massachusetts 02210-2204. Comments can also be sent electronically to BOS.SRC.Applications.Comments@bos.frb.org;

1. *Hometown Financial Group, Inc., Easthampton, Massachusetts* ("Applicant"); a newly-formed Maryland corporation, to become a bank holding company by acquiring TruNorth Bank, Easthampton, Massachusetts ("Bank"), in connection with the conversion of Hometown Financial Group, MHC (the "MHC"), Easthampton, Massachusetts, from mutual form to stock form (the "Conversion"). As part of the Conversion, the MHC would merge with its subsidiary, Hometown Financial Group, Inc., a Massachusetts corporation and the mid-tier holding company of Bank. As a result of the Conversion, the Applicant would become the stock holding company of Bank and the MHC and Hometown Financial Group, Inc. would both cease to exist. In addition, Bank to acquire Primary Bank, Bedford, New Hampshire.

B. Federal Reserve Bank of Minneapolis (Mark Nagle, Assistant Vice President) 90 Hennepin Avenue, Minneapolis, Minnesota 55480-0291. Comments can also be sent electronically to MA@mpls.frb.org;

1. *Bank Forward Employee Stock Ownership Plan and Trust, Fargo, North*

Dakota; to acquire additional voting shares, up to 45.15 percent, of Security State Bank Holding Company, and thereby indirectly acquire additional voting shares of Bank Forward, both of Fargo, North Dakota.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Associate Secretary of the Board.

[FR Doc. 2026-19195 Filed 9-17-26; 8:45 am]

BILLING CODE P

FEDERAL TRADE COMMISSION

[File No. 261 0091]

Beretta and Ruger; Analysis of Proposed Agreement Containing Consent Order To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of Federal law prohibiting unfair methods of competition. The attached Analysis of Proposed Agreement Containing Consent Order to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before October 19, 2026.

ADDRESSES: Interested parties may file comments online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Please write "Beretta and Ruger; File No. 261 0091" on your comment and file your comment online at <https://www.regulations.gov> by following the instructions on the web-based form. If you prefer to file your comment on paper, please mail your comment to: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Ave. NW, Mail Stop H-144 (Annex G), Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of 30 days. The following Analysis to Aid Public Comment describes the terms of the consent agreement and the

allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained at <https://www.ftc.gov/news-events/commission-actions>.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before October 19, 2026. Write “Beretta and Ruger: File No. 261 0091” on your comment. Your comment—including your name and your State—will be placed on the public record of this proceeding, including, to the extent practicable, on the <https://www.regulations.gov> website.

We encourage you to submit comments through the <https://www.regulations.gov> website. Postal mail addressed to the Commission will be subject to delay because of heightened security screening. If you prefer to file your comment on paper, write “Beretta and Ruger: File No. 261 0091” on your comment and on the envelope, and send it via overnight service to: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Mail Stop H-144 (Annex G), Washington, DC 20580.

Because your comment will be placed on the publicly accessible website at <https://www.regulations.gov>, you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include sensitive personal information, such as your or anyone else’s Social Security number; date of birth; driver’s license number or other State identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any “trade secret or any commercial or financial information which . . . is privileged or confidential”—as provided by section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c). In particular, the written request for

confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the <https://www.regulations.gov> website—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from that website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit <https://www.ftc.gov> to read this document and the news release describing the proposed settlement. The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all responsive public comments it receives on or before October 19, 2026. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

Analysis of Agreement Containing Consent Orders To Aid Public Comment

I. Introduction

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from Beretta Holding S.A. (“Respondent”), a subsidiary of Upifra S.A. Pursuant to a Cooperation Agreement dated May 2, 2026, Beretta may acquire up to 25% of the outstanding shares of Sturm, Ruger & Company, Inc. (“Ruger”) for \$44.80 per share, for a total transaction value of approximately \$167 million (“Proposed Transaction”). In addition to this consideration, Beretta gained the right to “source” two members to be appointed and thereafter nominated to Ruger’s Board of Directors. The Consent Agreement is designed to be a prophylactic safeguard against any anticompetitive effects that may result from Beretta’s agreement with its direct competitor, Ruger. The Commission alleges in its Complaint that the Proposed Transaction, if consummated, would violate section 8 of the Clayton Act, as amended, 15 U.S.C. 19, and section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

The Proposed Transaction raises section 8 concerns. Specifically, Ruger’s obligation to facilitate the appointment of two Beretta-sourced directors to Ruger’s board raises concerns that Beretta could have access to Ruger’s competitively significant, nonpublic information and could participate in, or have influence over, competitive decision-making at Ruger. The agreement expressly provides that the parties could waive any restrictions on Beretta officers, employees, agents, representatives, or directors from serving as Ruger directors. Under section 8 of the Clayton Act, it is illegal for directors and officers to serve, whether directly or indirectly, on the boards of competitors (subject to limited safe harbors), as would occur here because of Beretta’s right to source two of its designees to the board of its competitor, Ruger.

The Consent Agreement is designed to remedy allegations in the Commission’s Complaint that Beretta’s proposed acquisition would provide the right to source two Beretta designees to appoint and nominate for a seat on the Ruger Board of Directors. This would result in an illegal interlocking directorate in violation of section 8 of the Clayton Act, 15 U.S.C. 19, and an unfair method of competition in violation of section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 due to the potential exchange of confidential, competitively sensitive information.

The proposed settlement provides significant relief for this concern. The Consent Agreement and proposed Decision and Order (“D&O”) prohibit Beretta from appointing, sourcing, nominating, or occupying any director position on Ruger’s Board unless that director is independent of Beretta.

The proposed D&O imposes effective relief, while continuing to set important Commission precedent on the application of section 8 of the Clayton Act and section 5 of the FTC Act. By restricting future opportunities for the parties to engage in conduct that would result in section 8 violations, the proposed D&O signals the antitrust risks of excessive influence and anticompetitive information exchange.

The Commission has placed the Consent Agreement on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the comments received and decide whether it should withdraw, modify, or make the proposed Order final.

II. The Respondent

Respondent Beretta is the largest firearms manufacturer in the world. Beretta's headquarters are in Luxembourg, and its primary corporate offices in the United States are in Accokeek, Maryland.

III. The Cooperation Agreement

On May 2, 2026, Beretta and Ruger entered into a Cooperation Agreement, under which Beretta seeks to acquire up to 25% of Ruger's outstanding shares at \$44.80 per share, for a total transaction value of approximately \$167 million. Beretta already owns 9.96% of Ruger's shares. The Proposed Transaction would make Beretta one of Ruger's largest shareholders. Additionally, the Ruger Board of Directors "shall" "take such actions as are necessary to appoint two directors sourced by Beretta Holding" and renominate the Beretta directors at the 2027 and 2028 annual board meetings. The Cooperation Agreement refers to these appointments as the "Beretta Holding Director Appointments" and the directors are the "Beretta Holding Directors."

The Commission's Complaint alleges that the Proposed Transaction, as structured, would violate section 8 of the Clayton Act, 15 U.S.C. 19, as an illegal interlocking directorate, and that the Proposed Transaction constitutes an unfair method of competition in violation of section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, due to the risk of the exchange of competitively sensitive, nonpublic information.

IV. Line of Commerce

The production and sale of firearms, including pistols, shotguns, and rifles, are the relevant lines of commerce. Firearms serve a wide range of uses in the United States, including personal protection, sport shooting, hunting, law enforcement, and collecting. Buyers of firearms typically cannot substitute other products for these purposes without significant compromises in functionality.

The firearms market is characterized by a large set of established manufacturers. Major competitors include companies such as Smith & Wesson, SIG Sauer, Glock, Springfield Armory, and Browning Arms Company, among others, with each offering broad portfolios of firearms across price points and performance categories. Beretta is recognized as a premium, globally established manufacturer, with particular historical strength in shotguns and semiautomatic pistols, while Ruger is known as a purely U.S.

manufacturer with significant share in rifles and handguns. Both companies sell to overlapping customer groups, including recreational shooters, hunters, sports shooters, and law-enforcement agencies.

V. Effects of the Agreement

The Commission's Complaint addresses the theory of harm that interlocking directorates can present opportunities or temptations for anticompetitive conduct. Beretta's placement of a director or officer on Ruger's board—in violation of section 8 of the Clayton Act—would make Beretta a direct participant in Ruger's corporate governance. This interlocking directorate arrangement would provide Beretta with the ability to sway or influence Ruger's competitive decision-making and to access Ruger's competitively sensitive information. As an interlocked director or officer, Beretta's representative would have the opportunity to communicate directly within Ruger's highest levels of leadership and could discuss confidential business information or direct or otherwise influence Ruger's competitive actions or strategies. Knowledge gained via this prohibited interlocking relationship could also influence Beretta's own competitive decisions or development of new businesses involved in the production and sale of firearms.

VI. The Proposed Order

The proposed Order imposes several obligations designed to address the competitive concerns arising from Beretta's proposed acquisition of voting securities of Ruger and the potential for interlocking directorates or improper access to competitively sensitive information.

First, the proposed Order limits Beretta's ability to place representatives or agents on Ruger's board of directors. Beretta may not, directly or indirectly, including through its parent, appoint, nominate, or otherwise cause any person to serve on Ruger's board unless that person qualifies as independent from Beretta, *i.e.*, an "Independent Director" as defined in the Order. The proposed Order defines an Independent Director as a person who is not affiliated with Beretta, Upifra, or their controlled entities; has not recently served as an employee, officer, director, representative, or agent of a relevant person; has not recently received compensation from a relevant person; and does not have a material relationship that would reasonably be expected to impair the objectivity of the

director's judgment when serving on Ruger's board.

Second, the proposed Order requires Beretta to provide the Commission with advance written notice at least 15 days before appointing, designating, nominating, electing, or otherwise causing any person to become a member of Ruger's board of directors.

Third, the proposed Order restricts Beretta's relationships with any Independent Director it nominates to Ruger's board. Beretta may not, directly or indirectly, including through its parent, hire or enter into any financial or other relationship with such Independent Director that would involve violating the Independent Director's fiduciary duties or involve the exchange of Ruger's nonpublic information with Beretta, Upifra, or their affiliates. These restrictions remain in place until one year after the Independent Director has ceased serving on Ruger's board.

Fourth, the proposed Order prohibits Beretta from directly or indirectly seeking, receiving, or attempting to receive Ruger's nonpublic information from any Independent Director appointed pursuant to the Order. The Order defines nonpublic information broadly to include information not in the public domain, such as customer lists, price lists, strategic plans, contracts, expansion projects, cost information, marketing methods, competitively sensitive data or information, and other nonpublic information.

Fifth, the proposed Order requires Beretta to distribute the Order to each of its respective board members, officers, and directors, and to design, maintain, and operate an antitrust compliance program.

The purpose of this analysis is to facilitate public comment on the Consent Agreement and proposed Order to aid the Commission in determining whether it should make the proposed Order final. This analysis is not an official interpretation of the proposed Order and does not modify its terms in any way.

By direction of the Commission.

Joel Christie,

Acting Secretary.

[FR Doc. 2026-19189 Filed 9-17-26; 8:45 am]

BILLING CODE 6750-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–26–1072]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled “STI Surveillance Network (SSuN)” to the Office of Management and Budget (OMB) for review and approval. CDC previously published a “Proposed Data Collection Submitted for Public Comment and Recommendations” notice on December 5, 2025, to obtain comments from the public and affected agencies. CDC received three public comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

- (a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- (c) Enhance the quality, utility, and clarity of the information to be collected;
- (d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses; and
- (e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570. Comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open

for Public Comments” or by using the search function. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

Proposed Project

The STI Surveillance Network (SSuN) (OMB Control No. 0920–1072, Exp. 09/30/2026)—Revision—National Center for HIV, Viral Hepatitis, STD, TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention (CDC) is requesting a Revision of a currently approved information collection request (ICR) titled The STI Surveillance Network (SSuN) and approval for an additional period of three years. The Revision submitted for this ICR reflects changes to: (1) the title of the currently approved ICR; (2) the inclusion of Doxycycline Post-exposure Prophylaxis (Doxy PEP) data elements; (3) the deletion of multiple data elements no longer required; and (4) an updated anonymous patient clinic survey. The estimated burden hours for this revised collection decreases from the previously approved 7,510 to 7,237 due to decreases in the number of participating clinical sites and expected number of interviews conducted by funded jurisdictions, a result of declines in reported gonorrhea cases.

The purpose of the STI Surveillance Network (SSuN) is to enhance national capacity for STI surveillance. While U.S. jurisdictions voluntarily report STI cases to the CDC via the National Notifiable Diseases Surveillance System (NNDSS), these reports often lack essential patient demographics and detailed information on risk behaviors, treatment, co-infections, preventive services, and sexual networks.

SSuN enhances CDC’s STI surveillance efforts by:

1. Providing comprehensive behavioral and demographic data on STI cases not available from standard case-based surveillance;
2. Monitoring trends in STI and HIV co-infection, screening, prevention interventions, and healthcare access among patients with gonorrhea or other STIs;
3. Providing an additional sentinel monitoring system for emerging health threats like mpox;

These data help public health authorities better understand STI trends, assess disease burden inequalities, and monitor treatment outcomes and adverse health effects among STI patients. Data will be transmitted through CDC’s Secure Access Management System (SAMS) by the 15 state and local health jurisdictions (eight jurisdictions funded for both Strategy A and B, four Strategy A only jurisdictions, and three Strategy B only jurisdictions) funded to conduct SSuN activities. The revised project, SSuN Cycle 5 (2024–2029), comprises 15 US local/state health departments. SSuN recipients are funded to conduct either or both of the two core SSuN Strategies: Sentinel surveillance in specialty sexual health clinics (Strategy A) and enhanced population-based surveillance for persons diagnosed with gonorrhea and adult syphilis (Strategy B).

In Strategy A, data is abstracted from existing electronic medical records at 16 participating STI clinics across 12 funded jurisdictions (several sites utilize >1 clinical facility), utilizing information already collected during routine clinical care. This reflects a total of 384 burden hours (16 STI clinic respondents across 12 funded jurisdictions × six data transmissions × four hours per data transmission). These data are sent to the 12 funded health jurisdictions, where they are formatted and deduplicated by data managers into standardized formats. Records are also matched with the jurisdiction’s HIV surveillance registry, providing data on HIV co-infection not available from other multi-jurisdictional sources. All patient records are fully de-identified and securely transmitted to the CDC six times a year. Data managers at each of the 16 clinical facilities across 12 jurisdictions receiving funding are responsible for transmitting validated datasets for these activities to CDC every other month. This reflects 2,880 burden hours for Strategy A health department data management (12 health jurisdiction respondents × six data transmissions × 40 hours per data transmission). Participating Strategy A clinics are also required to administer a one-time brief (~five minute) clinic patient survey between years 2–5 of the cycle. Clinic patient surveys will be conducted with approximately 3,000 patients across all funded sites for a total of five minutes each, resulting in 250 burden hours.

The second core data collection activity, Strategy B, includes: (1) abstraction, recoding, and reporting of all gonorrhea and syphilis cases in the collaborating jurisdiction; (2) enhanced investigations of a random sample of diagnosed individuals; and (3) health

department abstraction and registry matching for a complete census of reported cases. Enhanced investigations include clinical data abstraction from providers, registry matching, and brief demographic and behavioral interviews. SSuN recipients implement data collection protocols that provide uniformly coded data on demographics, risk factors, clinical care, laboratory data, and healthcare-seeking behaviors, which are compiled into a national dataset after quality assurance at the

CDC. For Activity 1, data managers at participating health jurisdictions are responsible for transmitting validated datasets case datasets to CDC every other month, resulting in 2,640 burden hours (11 jurisdictions × six data transmissions × 40 hours per data transmission). In 2023, there were 187,833 cases of gonorrhea diagnosed and reported across the 11 Strategy B SSuN jurisdictions. Approximately 7%, or 13,148 gonorrhea cases were randomly sampled for enhanced

investigation. Over past cycles, approximately 50% of patients contacted for investigation responded; we estimate this will result in 1,083 burden hours for patients with gonorrhea.

The total estimated annual burden hours are 7,237. Respondents will not receive federal funds to participate in this project. There are no additional costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average hours per response
Data managers at sentinel STI clinics General Public—Adults (persons diagnosed with gonorrhea).	Electronic Clinical Record Abstraction Patient interviews for a random sample of gonorrhea cases.	16 6,500	6 1	4 10/60
Data Managers: local/state health departments (Strategy A).	Data cleaning/validation, HIV registry matching and data transmissions for all activity components.	12	6	40
Data Managers: local/state health departments (Strategy B).	Data cleaning/validation, HIV registry matching and data transmissions for all activity components.	11	6	40
General Public—Adults (persons presenting for care in STI Clinics).	Clinic patient surveys	3,000	1	5/60

Jeffrey M. Zirger,

*Lead, Information Collection Review Office,
Office of Public Health Ethics and
Regulations, Office of Science, Centers for
Disease Control and Prevention.*

[FR Doc. 2026–19170 Filed 9–17–26; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2026–D–9429]

Electronic Submission Template for Medical Device Premarket Approval Applications (PMAs); Draft Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of the draft guidance entitled “Electronic Submission Template for Medical Device Premarket Approval Applications (PMAs).” FDA is issuing this draft guidance for submitters of certain PMAs to the Center for Devices and Radiological Health (CDRH) and Center for Biologics Evaluation and Research (CBER). It introduces those submitters to the current publicly available resources and associated content developed to support electronic submissions of certain PMAs and PMA

supplements to FDA. This draft guidance, when finalized, is intended to represent one of several steps in meeting FDA’s commitment to the development of electronic submission templates to serve as guided submission preparation tools for industry to improve submission consistency and enhance efficiency in the review process. This draft guidance is not final nor is it for implementation at this time.

DATES: Submit either electronic or written comments on the draft guidance by November 17, 2026 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–2026–D–9429 for “Electronic Submission Template for Medical Device Premarket Approval Applications (PMAs).” Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the draft guidance document entitled “Electronic Submission Template for Medical Device Premarket Approval Applications (PMAs)” to the Office of Policy, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5441, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Erica Takai, Center for Devices and Radiological Health, Food and Drug Administration, 301-796-6353; or Phillip Kurs, Center for Biologics Evaluation and Research, Food and Drug Administration, 240-402-7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is issuing this draft guidance document to introduce submitters of certain PMAs to CDRH and CBER to the current resources and associated content developed and made publicly available to support electronic submissions of certain PMAs/PMA supplements to FDA. These include Original PMAs, Panel-Track Supplements, 180-day Supplements, Real Time Supplements, and 30-Day Notices/135-Day Supplements. This draft guidance is intended to represent one of several steps in meeting FDA’s commitment to the development of electronic submission templates to serve as guided submission preparation tools for industry to improve submission consistency and enhance efficiency in the review process. When finalized, this guidance will also facilitate the implementation of the FDA’s mandate under section 745A(b) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 379k-1(b)), amended by section 207 of the FDA Reauthorization Act of 2017 (FDARA) (Pub. L. 115-52), to provide further standards for the submission by electronic format, a timetable for establishment of these further standards, and criteria for waivers of and exemptions from the requirements.

FDA’s final guidance document published on July 15, 2020 (85 FR 42864): “Providing Regulatory Submissions for Medical Devices in Electronic Format—Submissions Under Section 745A(b) of the Federal Food, Drug, and Cosmetic Act” (hereafter referred to as the “745A(b) device parent guidance”) provides a process for the development of templates to facilitate the preparation, submission, and review of regulatory submissions for medical devices solely in electronic format. As described in the 745A(b) device parent guidance, FDA plans to implement the requirements of section 745A(b)(3) of the FD&C Act with individual guidances specifying the formats for specific submissions and corresponding timetables for implementation. When finalized, this guidance will provide such information for electronic submissions of certain PMAs/PMA supplements solely in electronic format.

In section 745A(b) of the FD&C Act, Congress granted explicit statutory authorization to FDA to specify in guidance the statutory requirement for electronic submissions solely in electronic format by providing standards, a timetable, and criteria for waivers and exemptions. To the extent that this draft guidance provides such requirements under section 745A(b)(3) of the FD&C Act (*i.e.*, standards, timetable, criteria for waivers of and exemptions), indicated by the use of the mandatory words, such as must or required, this document is not subject to the usual restrictions in FDA’s good guidance practice regulations, such as the requirement that guidances not establish legally enforceable responsibilities (see § 10.115(d)). To the extent that this draft guidance describes recommendations that are not standards, timetable, criteria for waivers of, or exemptions under section 745A(b)(3) of the FD&C Act, it is being issued consistent with FDA’s good guidance practices regulation (§ 10.115).

The draft guidance, when finalized, will represent the current thinking of FDA on Electronic Submission Template for PMAs/PMA supplements. 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.

As we develop final guidance on this topic, FDA will consider comments on costs or cost savings the guidance may generate, relevant for Executive Order 14192.

II. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at <https://www.fda.gov/medical-devices/device-advice-comprehensive-regulatory-assistance/guidance-documents-medical-devices-and-radiation-emitting-products>. This guidance document is also available at <https://www.regulations.gov>, <https://www.fda.gov/regulatory-information/search-fda-guidance-documents>, or <https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics>. Persons unable to download an electronic copy of “Electronic Submission Template for Medical Device Premarket Approval Applications (PMAs)” may send an email request to CDRH-Guidance@fda.hhs.gov to receive an electronic

copy of the document. Please use the document number GUI00007079 and complete title to identify the guidance you are requesting.

III. Paperwork Reduction Act of 1995

While this guidance contains no new collection of information, it does refer to previously approved FDA collections of information. The previously approved collections of information are subject to

review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521). The collections of information in the following table have been approved by OMB:

21 CFR part	Topic	OMB control No.
814, subparts A through E	Premarket approval	0910–0231
800, 801, 809, and 830	Medical Device Labeling Regulations; Unique Device Identification	0910–0485
820	Current Good Manufacturing Practice (CGMP); Quality Management System Regulation (QMSR).	0910–0073

Grace R. Graham,

Deputy Commissioner for Policy, Legislation, and International Affairs.

[FR Doc. 2026–19181 Filed 9–17–26; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2025–N–2787]

Biosimilar User Fee Act III Future Needs in the Development of Interchangeable Products Post-Workshop; Draft Strategy Document

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the publication of a draft strategy document titled “BsUFA III Future Needs in the Development of Interchangeable Products Post-Workshop Strategy Document” (Strategy Document). This draft Strategy Document is intended to summarize the discussion that occurred at the FDA public workshop, “Advancing the Development of Interchangeable Products: Identifying Future Needs,” held on September 19, 2025, and to describe FDA’s future directions to support interchangeable biosimilar products. FDA is issuing this draft Strategy Document to fulfill a commitment FDA made in the Biosimilar User Fee Act (BsUFA) reauthorization commitment letter for fiscal years 2023 through 2027 (BsUFA III) to publish a post-workshop draft strategy document for public comment. **DATES:** Submit either electronic or written comments on this draft Strategy Document by November 17, 2026 to ensure that the Agency considers your comment on this draft Strategy Document before it begins work on the final version of the Strategy Document.

ADDRESSES: You may submit either electronic or written comments 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–2025–N–2787 for “Biosimilar User Fee

Act III Future Needs in the Development of Interchangeable Products Post-Workshop; Draft Strategy Document.” Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions:** To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the

heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500.

FOR FURTHER INFORMATION CONTACT:

Sarah Ikenberry, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 1128, Silver Spring, MD 20993-0002, 301-796-6893, *CDER-BiologicsBiosimilarsInquiries@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of the draft Strategy Document titled "BsUFA III Future Needs in the Development of Interchangeable Products Post-Workshop Strategy Document." In section II.D.3 of the BsUFA III commitment letter (available at <https://www.fda.gov/media/152279/download?attachment>), FDA agreed to hold a public scientific workshop on the development of interchangeable biosimilar products to help identify future needs (e.g., guidance, research). FDA also agreed to issue a draft strategy document for public comment outlining the specific actions FDA will take to facilitate interchangeable biosimilar product development within 12 months following the public workshop. The public workshop was held on September 19, 2025 (90 FR 39395), with both virtual and in-person attendance, and representatives from trade associations (Association for Accessible Medicines (AAM), Pharmaceutical Research and Manufacturers of America (PhRMA), and Biosimilars Forum) provided their perspectives on future needs for development and adoption of interchangeable biosimilar products. FDA speakers from the Center for Drug Evaluation and Research discussed scientific topics related to analytical data considerations, user interface and human factors considerations, and other considerations to facilitate development of interchangeable biosimilar products. The draft Strategy Document summarizes the discussion that occurred during the workshop as well as comments received in the public docket. The major themes identified during the workshop and in comments submitted to the docket included timely communication of new scientific and policy developments, challenges with user interface development and human factors analyses, and approaches to interchangeability that follow the evolving science. Over the last 5 years, the development and approval of

interchangeable biosimilar products have advanced considerably. FDA's future efforts will focus on continuing to follow the evolving science, providing educational resources for healthcare providers and patients, and helping to ensure that stakeholders have confidence in the safety and effectiveness of interchangeable biosimilar products.

II. Electronic Access

The draft Strategy Document is available on the FDA web page for the public workshop at <https://www.fda.gov/industry/fda-public-workshop-future-needs-development-interchangeable-products-09192025#event-information>.

Grace R. Graham,

Deputy Commissioner for Policy, Legislation, and International Affairs.

[FR Doc. 2026-19166 Filed 9-17-26; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2026-D-7233]

Target Animal Safety Evaluation for Veterinary Monoclonal Antibody Products; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry (GFI) #298 (VICH GL62) titled "Target Animal Safety Evaluation for Veterinary Monoclonal Antibody Products." This draft guidance has been developed for veterinary use by the International Cooperation on Harmonisation of Technical Requirements for Registration of Veterinary Medicinal Products (VICH). This draft guidance contributes to the international harmonization of methods used for the target animal safety (TAS) evaluation of veterinary monoclonal antibody products (VMAPs) and aids in preparing and conducting VMAP TAS studies under laboratory and field conditions. A harmonized standard is intended to aid in development of mutually acceptable VMAP TAS programs.

DATES: Submit either electronic or written comments on the draft guidance by November 17, 2026 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-2026-D-7233 for "Target Animal Safety Evaluation for Veterinary Monoclonal Antibody Products; Draft Guidance for Industry; Availability." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240-402-7500.

- *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your

comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the guidance to the Policy and Regulations Staff, Center for Veterinary Medicine, Food and Drug Administration, 5001 Campus Drive, College Park, MD 20740. 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: Joy Rachel Ganchingco, Center for Veterinary Medicine, Food and Drug Administration, 5001 Campus Drive, College Park, MD 20740, 301-837-7327, joyrachel.ganchingco@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft GFI #298 (VICH GL62) titled

"Target Animal Safety Evaluation for Veterinary Monoclonal Antibody Products."

Currently, no VICH GL specifically supports marketing applications for VMAPs in the regions participating in the VICH. The VICH GLs available for TAS (*i.e.*, VICH GL43 for pharmaceutical products and VICH GL44 for vaccines) do not fully address the TAS evaluation for a VMAP. Furthermore, International Council for Harmonisation of Technical Requirements for Pharmaceuticals for Human Use (ICH) S6 (R1) for the preclinical safety evaluation of biotechnology-derived pharmaceuticals is not fully applicable to VMAPs. Hence, there is a need for specific guidance on the TAS evaluation of a VMAP. Therefore, this guideline summarizes scientifically acceptable general principles for the TAS evaluation of a VMAP and should be used in conjunction with VICH GL43.

This guideline is for VMAPs intended for use in companion animals and livestock animals. The active ingredient of a VMAP is a monoclonal antibody (mAb) or a mAb fragment, which could be engineered to be specific for a target animal and target(s). When needed, advice should be sought from the relevant regulatory authority for specific guidance on the design of the TAS study(ies) prior to their initiation or if the applicant determines an alternative approach to the TAS evaluation of a VMAP may be more appropriate.

FDA has participated in efforts to enhance harmonization and is committed to seeking scientifically based harmonized technical procedures for pharmaceutical development. One of the goals of harmonization is to identify, and then reduce, differences in technical requirements for drug development among regulatory agencies in different countries. FDA has actively participated in the International Conference on Harmonization of Technical Requirements for Approval of Pharmaceuticals for Human Use to develop harmonized technical requirements for the approval of human pharmaceutical and biological products among the European Union, Japan, and the United States. The VICH is a parallel initiative for veterinary medicinal products. The goal of the VICH is to develop harmonized technical requirements for the approval of veterinary medicinal products in the European Union, Japan, and the United States, and receives input from both regulatory and industry representatives.

The VICH Steering Committee is composed of founding member representatives from the European

Commission and European Medicines Agency; AnimalhealthEurope; FDA's Center for Veterinary Medicine; U.S. Department of Agriculture's Center for Veterinary Biologics; the U.S. Animal Health Institute; the Japanese Ministry of Agriculture, Forestry and Fisheries; and the Japanese Veterinary Products Association. There are 10 standing members to the VICH Steering Committee: 1 representative from government and 1 representative from industry of Australia, New Zealand, Canada, South Africa, and the United Kingdom. The World Organisation for Animal Health is an associate member of the VICH. The VICH Secretariat, which coordinates the preparation of documentation, is provided by HealthforAnimals.

This level 1 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 "Target Animal Safety Evaluation for Veterinary Monoclonal Antibody 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.

As we develop final guidance on this topic, FDA will consider comments on costs or cost savings the guidance may generate, relevant for Executive Order 14192.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. The previously approved collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501-3521). The collections of information in section 512(n)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(n)(1)) and in 21 CFR part 514 have been approved under OMB control number 0910-0032. The collections of information in 21 CFR part 511 have been approved under OMB control number 0910-0117.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at <https://www.fda.gov/AnimalVeterinary/GuidanceComplianceEnforcement/GuidanceforIndustry/default.htm>, <https://www.fda.gov/regulatory-information/search-fda-guidance->

documents, or <https://www.regulations.gov>.

Grace R. Graham,

Deputy Commissioner for Policy, Legislation, and International Affairs.

[FR Doc. 2026–19141 Filed 9–17–26; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Notice of Supplemental Funding; Rural Residency Planning and Development Technical Assistance Program

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice of supplemental funding.

SUMMARY: HRSA will provide additional award funds to the Rural Residency Planning and Development Technical Assistance (RRPD–TA) Program recipient, the University of North Carolina at Chapel Hill, to provide additional technical assistance on rural

graduate medical education and support the improvement of health care in rural areas.

FOR FURTHER INFORMATION CONTACT:

Jason Steele, Public Health Analyst, Federal Office of Rural Health Policy, HRSA, at ruralresidency@hrsa.gov and (301) 443–2203.

SUPPLEMENTARY INFORMATION:

Intended Recipient of the Award: The University of North Carolina at Chapel Hill.

Amount of Non-Competitive Award: One supplemental award for \$800,000.

Project Period: September 30, 2025, to September 29, 2030.

Assistance Listing Number: 93.746.

Award Instrument: Cooperative Agreement Supplement for Services.

Authority: Section 711 of the Social Security Act (42 U.S.C. 912).

TABLE 1—RECIPIENT AND AWARD AMOUNT

Grant number	Award recipient name	City, state	Supplemental award amount
UK6RH32513	University of North Carolina at Chapel Hill	Chapel Hill, NC	\$800,000

Justification: This funding will provide a one-time supplement to the University of North Carolina at Chapel Hill through the RRPD–TA Cooperative Agreement with a budget period of September 30, 2026, through September 29, 2027. This supplement will allow the University of North Carolina at Chapel Hill to build on past and ongoing projects supported by HRSA to support health care in rural areas by advancing the knowledge base regarding the unique considerations and barriers facing rural providers developing graduate medical education programs. The University of North Carolina at Chapel Hill is the recipient of the only award under the RRPD–TA program and has established relationships with rural stakeholders and has longstanding experience developing resources related to rural graduate medical education. The supplement to the RRPD–TA Cooperative Agreement will allow the University of North Carolina at Chapel Hill to provide additional technical assistance and develop additional resources to promote rural graduate

medical education development and sustainability.

Thomas J. Engels,
Administrator.

[FR Doc. 2026–19097 Filed 9–17–26; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Infant-Toddler Court Program—National Resource Center

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice of supplemental awards to the Infant-Toddler Court Program National Resource Center award recipient.

SUMMARY: HRSA is providing supplemental award funds of \$2,750,000 in federal fiscal year (FY) 2026 to ZERO TO THREE National Center for Infant, Toddler and Families, Inc., the current recipient of the Infant-Toddler Court Program (ITCP)—National Resource Center (NRC) cooperative agreement (HRSA–22–074).

These funds will support the activities that strengthen child welfare and early childhood systems and advance early developmental health and well-being through the Infant-Toddler Court (ITC) approach. Supplemental funding will provide financial and technical support to local infant-toddler court sites, support increased expansion of the ITC approach into new sites and states, and expand technical assistance needed to sustain and expand state award activities funded under HRSA–22–073/074.

FOR FURTHER INFORMATION CONTACT:

Ekaterina Zoubak, Early Childhood Systems Analyst, Division of Home Visiting and Early Childhood Systems, HRSA, at ezoubak@hrsa.gov and 240–475–8014.

SUPPLEMENTARY INFORMATION:

Intended Recipient of the Award: ZERO TO THREE National Center for Infant, Toddler and Families, Inc.

Amount of Award: \$2,750,000.

Project Period: September 30, 2026, to September 29, 2027.

Assistance Listing Number: 93.110.

Award Instrument: Non-competitive supplemental funding to the existing Cooperative Agreement.

Authority: 42 U.S.C. 701(a)(2) (Title V, § 501(a)(2) of the Social Security Act).

TABLE 1—RECIPIENTS AND AWARD AMOUNTS

Grant No.	Award recipient name	City, state	Award amount
U2DMC32394	ZERO TO THREE National Center for Infant, Toddler and Families, Inc.	Washington, DC	\$2,750,000

Justification: In FY 2022, under the authority for Special Projects of Regional and National Significance (SPRANS) (42 U.S.C. 701(a)(2) (Title V, § 501(a)(2) of the Social Security Act)), HRSA awarded the ITCP NRC to ZERO TO THREE National Center for Infant, Toddler and Families, Inc (HRSA–22–074). This award included expectations for the recipient to provide technical assistance to the ITCP (HRSA–22–073) state recipients and support the nationwide implementation and sustainability of the evidence-based ITC approach.

A Congressional Report accompanying the Further Consolidated Appropriations Act, 2024 (Pub. L. 118–47) included funding for this program to “continue and expand research-based Infant-Toddler Court Teams to change child welfare practices to improve wellbeing for infants, toddlers, and their families” (Senate Report 118–84). In addition, the Joint Explanatory Statement accompanying the FY 2024 appropriations act directed HRSA to “allocate funding to ensure continuation of existing grantees, technical assistance, and other activities.” In FY 2024, HRSA provided a supplement of \$1,750,000 in SPRANS to the NRC Program recipient to continue work initiated in FY 2023 with an increased SPRANS appropriation, to expand technical assistance to ITC teams, provide financial and technical support to local infant-toddler court sites that previously received funding under HRSA–18–123, and advance national-level reach and impact of the program.

In addition, a Congressional Report accompanying the FY 2025 appropriations act directed HRSA to “allocate funding to ensure continuation of existing grantees, technical assistance, and support other expansion activities,” (House Report 118–585). In response to the congressional intent, HRSA provided a supplement of \$1,750,000 to the NRC Program recipient in FY 2025 to continue work initiated in prior years to expand technical assistance to ITC teams, provide financial and technical support to local infant-toddler court sites that previously received funding under HRSA–18–123, and advance national-level reach and impact of the program.

A Congressional Report accompanying the Consolidated Appropriations Act, 2026 (Pub. L. 119–75) included an additional \$2,000,000, for a total of \$20,000,000 in funding “for research-based Infant-Toddler Court Teams to change child welfare practices to improve well-being for infants, toddlers, and their families,” (House Report 119–271). The Report also included a directive to “allocate funding to ensure continuation of existing grantees, technical assistance, and support other expansion activities,” (House Report 119–271).

Consistent with congressional intent, HRSA, through its Maternal and Child Health Bureau, will provide a supplement of \$2,750,000 in SPRANS funding to the ITCP NRC Program recipient. This funding will continue the number of ITC teams funded through subawards and continue to provide technical assistance to ITC teams, increase the number of ITC teams funded through subawards to new ITC teams, expand technical assistance to ITC teams funded under HRSA–22–073/074, and advance the national reach and impact of the program.

Thomas J. Engels,
Administrator.

[FR Doc. 2026–19145 Filed 9–17–26; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Vaccine Injury Compensation Program; List of Petitions Received

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HRSA is publishing this notice of petitions received under the National Vaccine Injury Compensation Program (the Program), as required by the Public Health Service (PHS) Act, as amended. While the Secretary of HHS is named as the respondent in all proceedings brought by the filing of petitions for compensation under the Program, the United States Court of

Federal Claims is charged by statute with responsibility for considering and acting upon the petitions.

FOR FURTHER INFORMATION CONTACT: For information about requirements for filing petitions, and the Program in general, contact Lisa L. Reyes, Clerk of Court, United States Court of Federal Claims, 717 Madison Place NW, Washington, DC 20005, (202) 357–6400. For information on HRSA’s role in the Program, contact the Director, Division of Injury Compensation Programs, 5600 Fishers Lane, Room 14W–17, Rockville, Maryland 20857; 1–800–338–2382, or visit our website at: <https://www.hrsa.gov/vaccine-compensation>.

SUPPLEMENTARY INFORMATION: The Program provides a system of no-fault compensation for certain individuals who have been injured by specified childhood vaccines. Subtitle 2 of Title XXI of the PHS Act, 42 U.S.C. 300aa–10 *et seq.*, provides that those seeking compensation are to file a petition with the United States Court of Federal Claims and to serve a copy of the petition to the Secretary of HHS, who is named as the respondent in each proceeding. The Secretary has delegated this responsibility under the Program to HRSA. The Court is directed by statute to appoint special masters who take evidence, conduct hearings as appropriate, and make initial decisions as to eligibility for, and amount of, compensation.

A petition may be filed with respect to injuries, disabilities, illnesses, conditions, and deaths resulting from vaccines described in the Vaccine Injury Table (the Table) set forth at 42 CFR 100.3. This Table lists for each covered childhood vaccine the conditions that may lead to compensation and, for each condition, the time period for occurrence of the first symptom or manifestation of onset or of significant aggravation after vaccine administration. Compensation may also be awarded for conditions not listed in the Table and for conditions that are manifested outside the time periods specified in the Table, but only if the petitioner shows that the condition was caused by one of the listed vaccines.

Section 2112(b)(2) of the PHS Act, 42 U.S.C. 300aa–12(b)(2), requires that “[w]ithin 30 days after the Secretary

receives service of any petition filed under section 2111 the Secretary shall publish notice of such petition in the **Federal Register**.” Set forth below is a list of petitions received by HRSA on August 1, 2026, through August 31, 2026. This list provides the name of the petitioner, city, and state of vaccination (if unknown then the city and state of the person or attorney filing the claim), and case number. In cases where the Court has redacted the name of a petitioner and/or the case number, the list reflects such redaction.

Section 2112(b)(2) also provides that the special master “shall afford all interested persons an opportunity to submit relevant, written information” relating to the following:

1. The existence of evidence “that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition,” and

2. Any allegation in a petition that the petitioner either:

a. “[S]ustained, or had significantly aggravated, any illness, disability, injury, or condition not set forth in the Vaccine Injury Table but which was caused by one of the vaccines referred to in the Table, or

b. “[S]ustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Vaccine Injury Table the first symptom or manifestation of the onset or significant aggravation of which did not occur within the time period set forth in the Table but which was caused by a vaccine” referred to in the Table.

In accordance with Section 2112(b)(2), all interested persons may submit written information relevant to the issues described above in the case of the petitions listed below. Any person choosing to do so should file an original and three copies of the information with the Clerk of the United States Court of Federal Claims at the address listed above (under the heading “For Further Information Contact”), with a copy to HRSA addressed to Director, Division of Injury Compensation Programs, Health Systems Bureau, 5600 Fishers Lane, 14W-17, Rockville, Maryland 20857. The Court’s caption (*Petitioner’s Name v. Secretary of HHS*) and the docket number assigned to the petition should be used as the caption for the written submission. Chapter 35 of Title 44, United States Code, related to paperwork reduction, does not apply to

information required for purposes of carrying out the Program.

Thomas J. Engels,
Administrator.

List of Petitions Filed

1. Aida Caron, Clermont, Florida, Court of Federal Claims No: 26–1103V
2. Anissa McClaron-Newkirk on behalf of Ursula Miller, San Diego, California, Court of Federal Claims No: 26–1106V
3. Emily Corbin, Dent, Kentucky, Court of Federal Claims No: 26–1107V
4. Kelley Ard, Anchorage, Alaska, Court of Federal Claims No: 26–1111V
5. Sherri Eisinger, Ocoee, Florida, Court of Federal Claims No: 26–1112V
6. Cynthia Wright, Somerville, New Jersey, Court of Federal Claims No: 26–1113V
7. Karen Knox, Marietta, Georgia, Court of Federal Claims No: 26–1115V
8. Nica Larkin, Chicago, Illinois, Court of Federal Claims No: 26–1117V
9. Wykena Beaty, Simpsonville, South Carolina, Court of Federal Claims No: 26–1119V
10. Brendy Gullion, Cincinnati, Ohio, Court of Federal Claims No: 26–1120V
11. Jenna Proulx, Hampton, Virginia, Court of Federal Claims No: 26–1122V
12. Dawn Davenport, Taylorsville, Utah, Court of Federal Claims No: 26–1123V
13. Barbara Ann Young, Savannah, Georgia, Court of Federal Claims No: 26–1124V
14. Roy Cochran, Asheville, North Carolina, Court of Federal Claims No: 26–1125V
15. Malekka Wells, Columbus, Ohio, Court of Federal Claims No: 26–1129V
16. Joel Flach, Rockford, Michigan, Court of Federal Claims No: 26–1130V
17. Rebecca Frenger, North Lima, Ohio, Court of Federal Claims No: 26–1131V
18. Darah Smith, High Point, North Carolina, Court of Federal Claims No: 26–1134V
19. Sandra Hazelgrove, Williamsburg, Virginia, Court of Federal Claims No: 26–1135V
20. Anthony Fletcher, Winston-Salem, North Carolina, Court of Federal Claims No: 26–1136V
21. Thomas Denniberg, Weeki Wachee, Florida, Court of Federal Claims No: 26–1137V
22. Judith Brown, Fort Washington, Maryland, Court of Federal Claims No: 26–1138V
23. Benjamin Ferguson, Seattle, Washington, Court of Federal Claims No: 26–1142V
24. Vickie Cecil, Quinton, Virginia, Court of Federal Claims No: 26–1143V
25. Jesse Gant, Newport Beach, California, Court of Federal Claims No: 26–1145V
26. Laura Evins, Washington, District of Columbia, Court of Federal Claims No: 26–1149V
27. Joan Havey, Washington, District of Columbia, Court of Federal Claims No: 26–1150V
28. Garrett M. Miller, Richmond, Virginia, Court of Federal Claims No: 26–1151V
29. Gordon Zacharias, Washington, District of Columbia, Court of Federal Claims No: 26–1152V
30. Ming-Hsin Fan, Beverly Hills, California, Court of Federal Claims No: 26–1153V
31. Andrea Harris, Washington, District of Columbia, Court of Federal Claims No: 26–1154V
32. Eric Dessommes, Washington, District of Columbia, Court of Federal Claims No: 26–1155V
33. Louise Renzi, Philadelphia, Pennsylvania, Court of Federal Claims No: 26–1156V
34. Kelly Walker-Borch, Beverly Hills, California, Court of Federal Claims No: 26–1157V
35. Ryan A. Shaw, Green Bay, Wisconsin, Court of Federal Claims No: 26–1160V
36. Mary Calhoun, Washington, District of Columbia, Court of Federal Claims No: 26–1161V
37. Erin Mutlu, New York, New York, Court of Federal Claims No: 26–1162V
38. Michael T. Kilburg, Allen Park, Michigan, Court of Federal Claims No: 26–1163V
39. Michele Steinhauer, Washington, District of Columbia, Court of Federal Claims No: 26–1164V
40. Elba Recinos, Bowling Green, Kentucky, Court of Federal Claims No: 26–1166V
41. Alex Rodriguez, Palmdale, California, Court of Federal Claims No: 26–1168V
42. Barbara Langhoff, New York, New York, Court of Federal Claims No: 26–1169V
43. Dave Merkes, Phoenix, Arizona, Court of Federal Claims No: 26–1170V
44. Walter Deland, Oswego, New York, Court of Federal Claims No: 26–1177V
45. Crystal Roncek, Gainesville, Florida, Court of Federal Claims No: 26–1179V

46. Renee Nelson, Desher, Pennsylvania, Court of Federal Claims No: 26–1180V
47. Michael Deep, Dresher, Pennsylvania, Court of Federal Claims No: 26–1181V
48. Tamara Newsome, Jacksonville, Florida, Court of Federal Claims No: 26–1185V
49. Patricia Canela, Phoenix, Arizona, Court of Federal Claims No: 26–1187V
50. Jesse Bogy, Jacksonville, North Carolina, Court of Federal Claims No: 26–1192V
51. Heather Huneycutt, Concord, North Carolina, Court of Federal Claims No: 26–1193V
52. Ricky Dean McLaren, Owosso, Michigan, Court of Federal Claims No: 26–1194V
53. Lisa H. Griffin, Chelsea, Alabama, Court of Federal Claims No: 26–1196V
54. Ryan Steinhoff, Waupun, Wisconsin, Court of Federal Claims No: 26–1199V
55. Michelle Lacombe, Naperville, Illinois, Court of Federal Claims No: 26–1200V
56. Kory Twigg, St. Louis Park, Minnesota, Court of Federal Claims No: 26–1202V
57. Marilyn Vlasak, Hamilton, Montana, Court of Federal Claims No: 26–1204V
58. Shewana Phillips, Woodridge, Illinois, Court of Federal Claims No: 26–1205V
59. Ellen Stewart, North Richland Hills, Texas, Court of Federal Claims No: 26–1206V
60. Michelle Sylvera, New Orleans, Louisiana, Court of Federal Claims No: 26–1208V
61. Carrie Asalon, Lexington, Kentucky, Court of Federal Claims No: 26–1209V
62. Virginia Swanson, Santee, California, Court of Federal Claims No: 26–1211V
63. Gerard Robson, Iselin, New Jersey, Court of Federal Claims No: 26–1212V
64. Donna Novitsky, Dresher, Pennsylvania, Court of Federal Claims No: 26–1213V
65. Karen Gatzemeier, Washington, District of Columbia, Court of Federal Claims No: 26–1214V
66. Jaclyn Boehm, Washington, District of Columbia, Court of Federal Claims No: 26–1216V
67. Delia Chua, Boston, Massachusetts, Court of Federal Claims No: 26–1218V
68. Emily Whitcomb, Hilo, Hawaii, Court of Federal Claims No: 26–1219V
69. Edwin Laureano, Turnersville, New Jersey, Court of Federal Claims No: 26–1222V
70. Danielle Schweitzer, Dresher, Pennsylvania, Court of Federal Claims No: 26–1223V
71. Alek Rothweiler, Dresher, Pennsylvania, Court of Federal Claims No: 26–1225V
72. Angela Varner, Dayton, Ohio, Court of Federal Claims No: 26–1226V
73. John Steach, Washington, District of Columbia, Court of Federal Claims No: 26–1227V
74. Jose Manuel Gonzalez, Pasadena, California, Court of Federal Claims No: 26–1230V
75. Wallace Drake, Pasadena, California, Court of Federal Claims No: 26–1232V
76. Calvin Antjuan Leggett, Redgranite, Wisconsin, Court of Federal Claims No: 26–1234V
77. Tami McDiffitt, Chicago, Illinois, Court of Federal Claims No: 26–1235V
78. Shannon Sprandio, Philadelphia, Pennsylvania, Court of Federal Claims No: 26–1236V
79. Bonnie Gallo, Memphis, Tennessee, Court of Federal Claims No: 26–1237V
80. Cordula Hodgins, Aventura, Florida, Court of Federal Claims No: 26–1240V
81. Carol E. D'Angelo, Coatesville, Pennsylvania, Court of Federal Claims No: 26–1243V
82. Sandra Weinzierl, Woodridge, Illinois, Court of Federal Claims No: 26–1244V
83. Sarah Zegree, Chicago, Illinois, Court of Federal Claims No: 26–1245V
84. Cynthia Massei, Dresher, Pennsylvania, Court of Federal Claims No: 26–1246V
85. Cheryl Martinez, El Segundo, California, Court of Federal Claims No: 26–1247V
86. Karl Wagner, Lebanon, Indiana, Court of Federal Claims No: 26–1248V
87. Brandy Grant, Richmond, Virginia, Court of Federal Claims No: 26–1251V
88. Justess Squire, Englewood, New Jersey, Court of Federal Claims No: 26–1253V
89. Lisa Erkins, Cincinnati, Ohio, Court of Federal Claims No: 26–1254V
90. Leslie Wheaton, Presque Isle, Maine, Court of Federal Claims No: 26–1255V
91. Brigitte Soles, Gallipolis, Ohio, Court of Federal Claims No: 26–1258V
92. Melvin Alex Dixon, Louisville, Kentucky, Court of Federal Claims No: 26–1262V
93. Maryann Gambella, Lynbrook, New York, Court of Federal Claims No: 26–1263V
94. Clifton Coulter, Jurupa Valley, California, Court of Federal Claims No: 26–1264V
95. Linda Olson, Seattle, Washington, Court of Federal Claims No: 26–1270V
96. Myron A. Gladney, Plymouth, Wisconsin, Court of Federal Claims No: 26–1272V
97. Chane L. Jones, Vienna, Illinois, Court of Federal Claims No: 26–1273V
98. Daniel C. Mohr on behalf of A.M., Elgin, Illinois, Court of Federal Claims No: 26–1274V

[FR Doc. 2026–19205 Filed 9–17–26; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Healthy Start Self-Measured Blood Pressure Monitoring

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice of supplemental funding.

SUMMARY: Through the Supporting Healthy Start Performance Project cooperative agreement (HRSA–24–038), HRSA provides funding to the National Institute for Children's Health Quality (NICHQ) to provide technical assistance and support to Healthy Start Initiative (Healthy Start) award recipients. HRSA will provide supplemental award funds to NICHQ in Fiscal Year (FY) 2026 to support the implementation of the Healthy Start Self-Measured Blood Pressure Monitoring initiative for Healthy Start award recipients.

FOR FURTHER INFORMATION CONTACT: Mabatemije Otubu, RN, MPH, Public Health Analyst, Division of Healthy Start and Perinatal Services, Maternal and Child Health Bureau, HRSA, at motubu@hrsa.gov and (301) 594–4462.

SUPPLEMENTARY INFORMATION: *Intended Recipient(s) of the Award:* The National Institute for Children's Health Quality. *Amount of Non-Competitive Award:* \$500,000.

Project Period: June 1, 2026, to May 31, 2027.

Assistance Listing Number: 93.926.

Award Instrument: Cooperative agreement.

Authority: 42 U.S.C. 254c–8 (Title III, § 330H of the Public Health Service Act).

TABLE 1—RECIPIENT(S) AND AWARD AMOUNT(S)

Grant No.	Award recipient name	City, state	Award amount
UF5MC32750	National Institute for Children's Health Quality	Boston, MA	\$500,000

Justification: NICHQ, as the current Healthy Start Technical Assistance and Support Center (TASC), provides national technical assistance and support to all HRSA-funded Healthy Start award recipients. Supplemental funds will support the expansion of a self-measured blood pressure (SMBP) monitoring initiative within Healthy Start communities to promote earlier identification of preeclampsia and other hypertensive disorders of pregnancy. Hypertensive disorders of pregnancy are a leading cause of maternal morbidity and mortality in the United States and disproportionately affect the types of populations served by Healthy Start. Preeclampsia, a life-threatening hypertensive disorder of pregnancy, affects as many as one in 12 pregnancies and can be effectively monitored through regular blood pressure measurement.

HRSA supplemented NICHQ's award with \$175,000 in FY 2023 and \$214,000 in FY 2024 (\$389,000 total) to support a successful SMBP monitoring pilot previously implemented across 15 Healthy Start sites in 12 states. In FY 2026, Congress directed HRSA to expand this effort by providing no less than \$250,000 to increase the number of states and Healthy Start sites able to benefit from the SMBP monitoring initiative. Specifically, the Explanatory Statement accompanying the Consolidated Appropriations Act, 2026 (Pub. L. 119–75) included “no less than \$250,000 for the Healthy Start blood pressure monitoring pilot, as described

in Senate Report 119–55.” In Senate Report 119–55, the Committee provided “no less than \$250,000 for more States to benefit from this pilot, and to the Healthy Start program to continue to support the self-measured blood pressure monitoring pilot, which works to identify preeclampsia during pregnancy at an earlier stage in high-risk communities by distributing blood pressure cuffs and patient information.”

As the Healthy Start TASC, NICHQ is well-positioned to support expanded implementation of the SMBP monitoring initiative among Healthy Start sites. Through this supplemental funding, NICHQ, as the Healthy Start TASC, will support Healthy Start award recipients in at least 15 states to expand access to SMBP monitoring for pregnant and postpartum women. This initiative will provide training, technical assistance, implementation guidance, and resources to selected Healthy Start sites in partnership with a subject matter expert in hypertensive disorders of pregnancy. This effort builds on lessons learned from the previous SMBP monitoring pilot and is intended to broaden participation beyond the original pilot sites so that additional Healthy Start communities may benefit. Further information on Healthy Start is available at: <https://www.hrsa.gov/services/healthy-start>.

Thomas J. Engels,
Administrator.

[FR Doc. 2026–19146 Filed 9–17–26; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Notice of Supplemental Funding, National Rural Health Information Clearinghouse Program

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice of supplemental funding.

SUMMARY: HRSA will provide additional award funds to the National Rural Health Information Clearinghouse Program recipient under HRSA–25–009, the University of North Dakota, to provide information, data, and tools related to rural health to support improving health care in rural areas.

FOR FURTHER INFORMATION CONTACT: Sarah Scott, Federal Office of Rural Health Policy, HRSA, at sscott2@hrsa.gov and (301) 287–2619.

SUPPLEMENTARY INFORMATION: *Intended Recipient of the Award:* The University of North Dakota.

Amount of Non-Competitive Award: One supplemental award for \$835,000.

Project Period: June 1, 2025, to May 31, 2030.

Assistance Listing Number: 93.223.

Award Instrument: Cooperative Agreement Supplement for Services.

Authority: Social Security Act § 711(b) (42 U.S.C. 912(b)).

TABLE 1—RECIPIENT AND AWARD AMOUNT

Grant number	Award recipient name	City, State	Supplemental award amount
U56RH05539	University of North Dakota	Grand Forks, ND	\$835,000

Justification: This funding provided a one-time supplement to the University of North Dakota via the National Rural Health Information Clearinghouse Program with a budget period of June 2026 through May 2027. This supplement allows the University of North Dakota to build on past and ongoing projects supported by the Federal Office of Rural Health Policy to improve health care in rural areas by

advancing the knowledge base regarding strategies to support and enhance rural community health. The University of North Dakota is the recipient of the only award under the program and has longstanding experience identifying, developing and disseminating resources like toolkits and webinars to support a broad range of rural health topics. The supplement will allow the University of North Dakota to create new tools and

resources on important topics related to rural community health and health care.

Margaret M. Bush,
Deputy Administrator.

[FR Doc. 2026–19101 Filed 9–17–26; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Health Resources and Services Administration****Notice of Supplemental Funding, Delta Region Community Health Systems Development Program**

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice of supplemental funding.

SUMMARY: HRSA is awarding supplemental funding under the Delta

Region Community Health Systems Development Program to one award recipient in fiscal year (FY) 2026 to provide technical assistance (TA) to rural health care organizations in the Delta region. This supplemental funding will support hospitals and clinics that previously completed program TA and need additional support to sustain improvements in financial and operational performance, quality of care, and access to essential health care services.

FOR FURTHER INFORMATION CONTACT: Sheena Johnson, Deputy Division Director, Hospital State Division,

Federal Office of Rural Health Policy, HRSA, at sjohnson@hrsa.gov and 872–271–6370.

SUPPLEMENTARY INFORMATION:

Intended Recipient of the Award: Rural Health Resource Center.

Amount of Non-competitive award: \$486,745.

Project Period: September 1, 2026, to August 31, 2027.

Assistance Listing Number: 93.912.

Award Instrument: Cooperative Agreement.

Authority: Section 711(b) of the Social Security Act (42 U.S.C. 912(b)).

TABLE 1—RECIPIENT AND AWARD AMOUNT

Grant No.	Award recipient name	City, state	Award amount
U65RH31261	Rural Health Resource Center	Duluth, MN	\$486,745

Justification: The Delta Region Community Health Systems Development Program provides comprehensive, multi-year TA to rural health care organizations in rural counties and parishes of the Delta region to strengthen health care delivery by improving financial and operational performance and quality of care. This funding will provide a one-time supplement to the Rural Health Resource Center to provide sustainability TA to hospitals and clinics that have previously completed program TA. This support may include targeted consultations, assessment of ongoing financial and operational challenges, review of progress on quality and performance improvement activities, and assistance with sustaining service delivery improvements.

This supplemental funding is consistent with the program's focus on helping rural health care organizations implement best practice recommendations, sustain the impacts

of TA, and respond to additional TA needs related to innovation, adaptability, and sustainability in rural health care organizations located in the Delta region.

Thomas J. Engels,
Administrator.

[FR Doc. 2026–19152 Filed 9–17–26; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Health Resources and Services Administration****Notice of Supplemental Funding, National Rural Health Policy, Community, and Collaboration Program**

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice of supplemental funding.

SUMMARY: HRSA will provide additional award funds to the National Rural Health Policy, Community, and Collaboration Program recipient, the National Rural Health Association, to identify, engage, educate, and collaborate with rural stakeholders on national rural health issues and promising practices to improve health care in rural areas nationwide.

FOR FURTHER INFORMATION CONTACT: Alexa Ofori, Senior Advisor, Federal Office of Rural Health Policy, HRSA, at aofori@hrsa.gov and 301–945–3986.

SUPPLEMENTARY INFORMATION:

Intended Recipient of the Award: The National Rural Health Association.

Amount of Non-Competitive Award: One supplemental award for \$660,000.

Project Period: August 1, 2024, to July 31, 2029.

Assistance Listing Number: 93.692.

Award Instrument: Cooperative Agreement Supplement for Services.

Authority: Section 711 of the Social Security Act (42 U.S.C. 912).

TABLE 1—RECIPIENT AND AWARD AMOUNT

Grant number	Award recipient name	City, State	Supplemental award amount
U16RH03702	National Rural Health Association	Leawood, KS	\$660,000

Justification: This funding will provide a one-time supplement to the National Rural Health Association through National Rural Health Policy, Community, and Collaboration Program with a budget period of August 1, 2026, through July 31, 2027. This supplement will allow the National Rural Health Association to identify, engage, educate,

and collaborate with rural stakeholders on national rural health issues and promising practices to improve health care in rural areas nationwide. These activities build on past and ongoing National Rural Health Association projects supported by HRSA and align with the goals of the program to educate rural stakeholders and facilitate

collaboration with key stakeholders to improve the exchange of information and promising practices that support rural health.

Margaret M. Bush,
Deputy Administrator.

[FR Doc. 2026–19104 Filed 9–17–26; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Partially Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Board of Scientific Counselors, National Library of Medicine.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The meeting can be accessed from the NIH Videocast at the following link: <https://videocast.nih.gov/>.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Library of Medicine, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, National Library of Medicine
Date: October 22, 2026.

Open: 9:00 a.m. to 10:20 a.m.

Agenda: Program Discussion and Investigator Report.

Closed: 10:20 a.m. to 11:05 a.m.

Agenda: To review and evaluate personnel qualifications and performance, and competence of individual investigators.

Open: 11:20 a.m. to 12:05 p.m.

Agenda: Program Discussion and Investigator Report.

Closed: 12:05 p.m. to 12:35 p.m.

Agenda: To review and evaluate personnel qualifications and performance, and competence of individual investigators.

Open: 12:35 p.m. to 1:05 p.m.

Agenda: Break.

Open: 1:05 p.m. to 1:35 p.m.

Agenda: Poster Session.

Open: 1:35 p.m. to 2:20 p.m.

Agenda: Program Discussion and Investigator Report.

Closed: 2:20 p.m. to 2:50 p.m.

Agenda: To review and evaluate personnel qualifications and performance, and competence of individual investigators.

Closed: 2:50 p.m. to 3:50 p.m.

Agenda: To review and evaluate personnel qualifications and performance, and competence of individual investigators.

Open: 4:00 p.m. to 5:00 p.m.

Agenda: Presentation: 2028–2032 NLM Strategic Plan Listening Session.

Address: National Library of Medicine Building 38A 8600 Rockville Pike Bethesda 20892 In Person and Virtual Meeting.

Meeting Format: In Person and Virtual Meeting.

Contact Person: David Landsman, Ph.D., Senior Investigator, National Library of Medicine, National Institutes of Health, 8600 Rockville Pike, Bethesda, MD 20894, 301–435–5981 landsman@nih.gov.

Registration is not required to attend the open portion of this meeting.

Any interested person may file written comments no later than 15 days in advance of the meeting by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

(Catalogue of Federal Domestic Assistance Program Nos. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: September 15, 2026.

Rosalind M Niamke,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2026–19114 Filed 9–17–26; 8:45 am]

BILLING CODE 4167–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the AIDS Research Advisory Committee, NIAID, September 23, 2026, 01:00 p.m. to September 23, 2026, 05:00 p.m., NIAID, 5601 Fishers Lane, Rockville, MD, 20892 which was published in the **Federal Register** on August 03, 2026, FR Doc. 2026–15696, 91 FR 48904.

Amendment to change public comment. Any member of the public interested in presenting oral comments to the committee may notify the Contact Person listed on the notice in advance of the meeting. Interested individuals and representatives of organizations may submit a letter of intent, a brief description of the organization represented, and a short description of the oral presentation. Only one representative of an organization may be allowed to present oral comments and if accepted by the committee, presentations may be limited to five minutes. Both printed and electronic copies are requested for the record. In addition, any interested person may file

written comments with the committee by forwarding their statement to the Contact Person listed on the notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person. The meeting is open to the public.

Dated: September 15, 2026.

Margaret N. Vardanian,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2026–19157 Filed 9–17–26; 8:45 am]

BILLING CODE 4167–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational Sciences; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Center for Advancing Translational Sciences Advisory Council, September 18, 2026, 11:00 a.m. to September 18, 2026, 05:30 p.m., National Center for Advancing Translational Sciences, 9609 Medical Center Drive, Rockville, MD, 20892 which was published in the **Federal Register** on August 03, 2026, FR Doc 2026–17686, 91 FR 48905.

Amendment to change the time of the closed session to 10:00 a.m.–10:30 a.m. and to change the time of the open session to 11:00 a.m.–3:00 p.m. The meeting is partially closed to the public.

Dated: September 15, 2026.

Margaret N. Vardanian,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2026–19112 Filed 9–17–26; 8:45 am]

BILLING CODE 4167–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; 60-Day Comment Request; Post-Award Reporting Requirements Including Research Performance Progress Report (OD)

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995 to provide opportunity for public comments on proposed data collection projects, the National Institutes of Health will publish periodic summaries of proposed

projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

DATES: Comments regarding this information collection are best assured of having their full effect if received by November 17, 2026.

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the data collection plans and instruments, submit comments in writing, or request more information on the proposed project, contact: Ms. Mikia P. Currie, Program Analyst, Office of Policy for Extramural Research Administration, 6705 Rockledge Drive, Suite 350, Bethesda, Maryland, 20892 or call non-toll-free number (301) 435-0941 or Email your request, including your address to: ProjectClearanceBranch@mail.nih.gov. Formal requests for additional plans and instruments must be requested in writing.

SUPPLEMENTARY INFORMATION: Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires: written comments and/or suggestions from the public and affected agencies are invited to address one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the

methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Proposed Collection Title: Public Health Service (PHS) Post-award Reporting Requirements Revision, OMB 0925-0002, Expiration Date 11/30/2027, Revision, Office of the Director, National Institutes of Health (NIH).

Need and Use of Information Collection: In Fiscal Year 2025, OMB approved through information collections 0925-0001 and 0925-0002, NIH's request to address progress on data management and sharing of NIH-funded research using the Research Performance and Progress Report (RPPR). The DMS Plan format contains six (6) Elements for applicants and recipients to submit free-text narratives explaining how scientific data will be managed and shared for NIH-funded research. Current public reporting burden for the DMS Plan as part of the RPPR information collection is an estimated 2 hours per response, including the time for reviewing instructions, gathering and maintaining the data, and reviewing the collection of information. After several years of implementation experience, NIH is

updating the DMS Plan Elements to provide a structured, simplified format to reduce burden and promote consistent information collection. Effective Fiscal Year 2026, NIH will require applicable recipients to use the updated DMS Plan format when reporting on data management and sharing progress. The updated plan format consists of "Yes, No, or Not Applicable" questions. Narrative text is required only for "No" and "Not Applicable" responses and the narrative response is limited to 300 words. This updated format continues building on trans-NIH initiatives to reduce the public reporting burden and promote consistency across all NIH. The RPPR is required to be used by all NIH, Food and Drug Administration (FDA), Centers for Disease Control and Prevention, and Agency for Healthcare Research and Quality (AHRQ) recipients. Interim progress reports are required to continue support of a PHS grant for each budget year within a competitive segment. Closeout of an award requires a Final Invention Statement (HHS 568) and Final Progress Report. Pre-award reporting requirements are simultaneously consolidated under 0925-0001 and the changes to the collection here are related.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 24,270.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Number of respondents	Number of responses per respondent	Average time per response (in hours)	Total annual burden hour
Reporting				
Data Management and Sharing Plan (Part of RPPR)	15,649	1	1	15,649
Data Management and Sharing Plan (Part of Final RPPR)	8,621	1	1	8,621
Total	24,270	1	1	24,270

The Deputy Director for Extramural Research, Jon Lorsch, having reviewed and approved this document, authorizes Alycia Booth, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Dated: September 16, 2026.
Alycia Booth,
Federal Register Liaison, National Institutes of Health.
[FR Doc. 2026-19156 Filed 9-17-26; 8:45 am]
BILLING CODE 4167-05-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES
National Institutes of Health
Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Applied Therapeutics for Cancer Integrated Review Group, Mechanisms of Cancer Therapeutics C Study Section, October 14, 2026, 08:30 a.m. to October 15, 2026, 07:00 p.m., National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD

20892 which was published in the **Federal Register** on August 20, 2026, 91 FR 53886, Doc No. 2026-16958.
This meeting is being amended to change the meeting from a 2-day to a 1-day meeting on October 15, 2026. And the start time to change from 8:30 a.m. to 8:00 a.m. The meeting is closed to the public.
Dated: September 15, 2006.
Rosalind M Niamke,
Program Analyst, Office of Federal Advisory Committee Policy.
[FR Doc. 2026-19113 Filed 9-17-26; 8:45 am]
BILLING CODE 4167-05-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****Proposed Collection; 60-Day Comment Request; PHS Applications and Pre-Award Reporting Requirements (OD)**

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995 to provide opportunity for public comments on proposed data collection projects, the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

DATES: Comments regarding this information collection are best assured of having their full effect if received by November 17, 2026.

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the data collection plans and instruments, submit comments in writing, or request more information on the proposed project, contact: Ms. Mikia P. Currie, Program Analyst, Office of Policy for Extramural Research Administration, 6705 Rockledge Drive, Suite 350, Bethesda, Maryland, 20892 or call non-toll-free number (301) 435-0941 or Email your request, including your address to: ProjectClearanceBranch@mail.nih.gov. Formal requests for additional plans and instruments must be requested in writing.

SUPPLEMENTARY INFORMATION: Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires: written comments and/or suggestions from the public and affected agencies are invited to address one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Proposed Collection Title: Public Health Service (PHS) Applications and Pre-Award Reporting Requirements, Revision, OMB 0925-0001 Expiration Date 12/31/2027, Revision, Office of the Director, National Institutes of Health (NIH).

Need and Use of Information Collection: Effective for due dates on or after May 25, 2026, NIH will be implementing a structured, simplified Data Management and Sharing (DMS) Plan format. With the release of the 2023 Data Management and Sharing (DMS) Policy, NIH issued supplemental information outlining desired elements of a DMS Plan. The NIH DMS Plan format contains six (6) Elements for

applicants and recipients to submit free-text narratives explaining how scientific data will be managed and shared. Current public reporting burden for the DMS Plan information collection is an estimated two (2) hours per response, including the time for reviewing instructions, searching for existing data sources, gathering, and maintaining the data needed and reviewing the collection of information. DMS Plans are provided to NIH through OMB approved information collections 0925-0001 and 0925-0002. After several years of implementation experience, NIH is updating the DMS Plan Elements to provide a structured, simplified format to reduce burden and promote consistent information collection. Effective Fiscal Year 2026, NIH will require applicable recipients to use the updated DMS Plan format containing "Yes, No, or Not Applicable" questions. A narrative response will be required only for "No" responses and the narrative response is limited to 300 words. This updated format continues building on trans-NIH initiatives to reduce the public reporting burden and promote consistency across all NIH. The application forms and associated instructions will be updated to align with these new requirements. The Data Management and Sharing (DMS) Plan form expires on 12/31/2027. Post-award reporting requirements are simultaneously consolidated under 0925-0002 and include the Research Performance Progress Report (RPPR).

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 73,117.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Number of respondents	Number of responses per respondent	Average time per response (in hours)	Total annual burden hour
Data Management and Sharing Plan	73,117	1	1	73,117
Total	73,117	1	1	73,117

The Deputy Director for Extramural Research, Jon Lorsch, having reviewed and approved this document, authorizes Alycia Booth, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Dated: September 16, 2026.

Alycia Booth,

Federal Register Liaison, National Institutes of Health.

[FR Doc. 2026-19155 Filed 9-17-26; 8:45 am]

BILLING CODE 4140-01-P

ADVISORY COUNCIL ON HISTORIC PRESERVATION**Adoption of Categorical Exclusion Pursuant to the National Environmental Policy Act**

AGENCY: Advisory Council on Historic Preservation.

ACTION: Notice.

SUMMARY: The Advisory Council on Historic Preservation (ACHP) is notifying the public and documenting

its adoption of the Department of the Interior (DOI) categorical exclusion (CE) for policies, directives, regulations, and guidelines, under section 109 of the National Environmental Policy Act (NEPA). This notice identifies the types of actions to which the ACHP will apply the CE, the considerations that the ACHP will use in determining the applicability of the CE, and the consultation between the agencies on the use of the CE, including application of extraordinary circumstance.

DATES: The adoption is effective on September 18, 2026.

FOR FURTHER INFORMATION CONTACT: Kelly Fanizzo, General Counsel, Advisory Council on Historic Preservation, (202) 517-0193, kfanizzo@achp.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The National Environmental Policy Act, 42 U.S.C. 4321–4347 (NEPA), requires all Federal agencies to consider the environmental impacts of their proposed actions before deciding whether and how to proceed. 42 U.S.C. 4321, 4332. Congress enacted NEPA to encourage productive and enjoyable harmony between humans and the environment, recognizing the profound impact of human activity and the critical importance of restoring and maintaining environmental quality to the overall welfare of humankind. 42 U.S.C. 4321, 4331. NEPA's aims are to ensure agencies consider the potential environmental effects of their proposed actions in their decision-making processes and inform and involve the public in that process. 42 U.S.C. 4332.

Under NEPA, a Federal agency may establish categorical exclusions (CE)—categories of actions that the agency has determined normally do not significantly affect the quality of the human environment, individually or in the aggregate, and, therefore, do not require preparation of an environmental assessment (EA) or an environmental impact statement (EIS)—in its agency NEPA procedures. 42 U.S.C. 4336e(1). If an agency determines that a CE covers a proposed action, the agency then evaluates the proposed action for any extraordinary circumstances in which a normally excluded action may have a significant effect. If no extraordinary circumstances are present, the agency may rely on the CE to approve the proposed action without preparing an EA or EIS. 42 U.S.C. 4336(a)(2). If extraordinary circumstances are present, and the proposed action has the potential to result in significant effects,

the agency is required to prepare an EA or EIS.

Section 109 of NEPA, 42 U.S.C. 4336c, provides that an agency may adopt a CE listed in another agency's NEPA procedures for a category of proposed agency actions. To adopt another agency's CE, the adopting agency must (1) identify the CE listed in the other agency's ("establishing agency") NEPA procedures that covers a category of proposed actions or related actions, (2) consult with the establishing agency to ensure the proposed adoption of the CE for a category of proposed actions is appropriate, (3) identify to the public the CE the agency plans to use for its proposed actions, and (4) document adoption of the CE. 42 U.S.C. 4336c.

The ACHP does not have any agency-specific NEPA regulations or procedures. The ACHP will maintain a list of CEs available to the ACHP at www.achp.gov/ACHP_NEPA_Compliance.

II. Identification of the Categorical Exclusion

The ACHP has identified the following CE established by the DOI at 43 CFR 46.210(i) for adoption.

Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.

The ACHP intends to use this CE to cover its promulgation of policies, directives, regulations, and guidelines as described in the CE.

III. Consideration of Extraordinary Circumstances

The ACHP does not have an agency-specific list of extraordinary circumstances. To ensure the ACHP's application of the CE is consistent with how the DOI applies the CE, the ACHP will evaluate proposed actions for whether there are any extraordinary circumstances using the DOI's list of extraordinary circumstances at 43 CFR 46.215. The DOI's list of extraordinary circumstances include, in part, consideration of impacts on public health and safety; natural resources; unique geographic characteristics; historic or cultural resources; park, recreation, or refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principal drinking water aquifers; prime farmlands; wetlands; floodplains; national monuments; migratory birds;

other ecologically significant or critical areas; unresolved conflicts concerning alternative uses of available resources; unique or unknown environmental risks; precedent for future decision-making; historic properties; listed species or critical habitat; access by Indian religious practitioners to, and for ceremonial use of, Indian sacred sites and the physical integrity of those sites; and contribution to the introduction, continued existence, or spread of invasive weeds or non-native invasive species. The responsible official will assess whether an extraordinary circumstance is present. If the responsible official cannot rely on the CE to support a decision to authorize or take a particular proposed action due to extraordinary circumstances, the responsible official will prepare an EA or EIS before doing so.

IV. Consultation With Department of the Interior

In July 2026, the ACHP consulted with the DOI on the appropriateness of the ACHP's adoption of the CE. The consultation included a review of the DOI's experience in establishing and applying the CE, as well as the ACHP's intended uses for the CE. Based on the consultation, the ACHP has determined that the types of actions the ACHP proposes to authorize are substantially similar to the actions for which the DOI has applied the CE. Accordingly, the impacts of the ACHP's actions would be substantially similar to the impacts of the DOI's actions, which are not significant, absent the existence of extraordinary circumstances. Therefore, the ACHP has determined that its adoption of the CE, as described within this notice, is appropriate.

V. Notice to the Public and Documentation of Adoption

This notice identifies to the public and documents the ACHP's adoption of the DOI CE at 43 CFR 46.210(i) for the promulgation of policies, directives, regulations, and guidelines as described in the CE. The notice identifies the category of actions to which the ACHP would apply the CE, as well as the considerations that the ACHP would use in determining whether an action is within the scope of the CE. Documentation of the adoption will also be available at www.achp.gov/ACHP_NEPA_Compliance. The CE is available for use by the ACHP, effective immediately.

Dated: September 16, 2026.

Reid Nelson,

Executive Director.

[FR Doc. 2026–19206 Filed 9–17–26; 8:45 am]

BILLING CODE 4310–K6–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Intent To Request Reinstatement With Revision From OMB of One Previous Public Collection of Information: Law Enforcement Officer (LEO) Reimbursement Request

AGENCY: Transportation Security Administration, DHS.

ACTION: 60-Day notice.

SUMMARY: The Transportation Security Administration (TSA) invites public comment on one previously approved Information Collection Request (ICR), Office of Management and Budget (OMB) control number 1652–0063, abstracted below that we will submit to OMB for a reinstatement with revision in compliance with the Paperwork Reduction Act. The ICR describes the nature of the information collection and its expected burden. The collection involves the reimbursement of expenses incurred by airport operators for the provision of law enforcement officers (LEOs) to support airport checkpoint screening.

DATES: Send your comments by November 17, 2026.

ADDRESSES: Comments may be emailed to TSAPRA@tsa.dhs.gov or delivered to the TSA PRA Officer, Information Technology, TSA–11, Transportation Security Administration, 6595 Springfield Center Drive, Springfield, VA 20598–6011.

FOR FURTHER INFORMATION CONTACT: Christina A. Walsh at the above address, or by telephone (571) 227–2062.

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The ICR documentation will be available at <https://www.reginfo.gov> upon its submission to OMB. Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for

the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

OMB Control Number 1652–0063; Law Enforcement Officer (LEO) Reimbursement Request. TSA has authority to enter into agreements with airport operators to reimburse them for expenses incurred in the provision of LEOs to support screening at airport checkpoints. *See* 49 U.S.C. 106(l) and (m) and 114(m). Consistent with these authorities, TSA created the LEO Reimbursement Program.

TSA requires participants in the LEO Reimbursement Program to record the details of all reimbursements sought. In order to provide for the orderly tracking of reimbursements, the LEO Reimbursement Program uses TSA Form 3503, *LEO Reimbursement Request Invoice*. The information collected includes, but is not limited to, information regarding the invoice, invoicing point of contact, banking and checkpoint log worksheet.

In 2024, TSA requested discontinuation of this collection due to the unavailability of funding to continue the LEO Reimbursement Program. *See* ICR Reference Number 202109–1652–0005. On April 30, 2026, however, Congress approved funding for the LEO Reimbursement Program as part of the Homeland Security and Further Additional Continuing Appropriations Act, 2026 (Pub. L. 119–86; 140 Stat. 773). TSA is now requesting the reinstatement of the collection, along with a revision.

The TSA Form 3503, *LEO Reimbursement Request Invoice*, is provided to participants upon the start of the agreement and is also available via request. Upon completion, participants submit the LEO Reimbursement Request form directly to the LEO Reimbursement Program via email, mail, or in person. Upon receipt, TSA reviews all request for reimbursement forms. The revision involves changes to Section I of the form, where TSA is replacing “DUNS”

with “UEI,¹” and in Section IV, where TSA will update links and contact numbers.

TSA estimates that there will be an average of 260 participant responses monthly, or 3,120 yearly. TSA estimates each respondent will spend approximately 1 hour to complete the request for reimbursement form, for a total annual hour burden of 3,120 hours.

Dated: September 16, 2026.

Christina A. Walsh,

Paperwork Reduction Act Officer, Information Technology, Transportation Security Administration.

[FR Doc. 2026–19204 Filed 9–17–26; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0123]

Agency Information Collection Activities: Extension, Without Change, of a Currently Approved Collection: Application for Provisional Unlawful Presence Waiver; Correction

ACTION: 60-Day notice; correction.

On September 14, 2026, the Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) published a 60-day Notice of Information Collection in the **Federal Register** at 91 FR 58150, requesting public comments in connection with Application for Provisional Unlawful Presence Waiver (Form I–601A) in accordance with the Paperwork Reduction Act of 1995.

The type of collection was inadvertently indicated as a Revision of a Currently Approved Collection instead of an Extension, Without Change, of a Currently Approved Collection.

Correction

Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Application for Provisional Unlawful Presence Waiver

(1) *Type of Information Collection:* Extension, Without Change, of a Currently Approved Collection.

The remainder of the published Notice is correct as presented and no changes have been made. The comment

¹ A UEI number is a 12-character alphanumeric code that replaced the DUNS number, a unique nine-digit business identifier assigned and managed by Dun & Bradstreet to track commercial entities and build business credit profiles.

period as listed in the original Notice publication remains unchanged and closes as posted.

Dated: September 14, 2026.

John R. Pfirrmann-Powell,

Acting Deputy Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2026–19138 Filed 9–17–26; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0020]

Agency Information Collection Activities: Extension, Without Change, of a Currently Approved Collection: Petition for Amerasian, Widow(er), or Special Immigrant; Correction Action: 60-Day Notice; Correction

On September 14, 2026, the Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) published a 60-day Notice of Information Collection in the **Federal Register** at 91 FR 58164, requesting public comments in connection with Petition for Amerasian, Widow(er), or Special Immigrant (Form I–360) in accordance with the Paperwork Reduction Act of 1995.

The type of collection was inadvertently indicated as a Revision of a Currently Approved Collection instead of an Extension, Without Change, of a Currently Approved Collection.

Correction

Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Petition for Amerasian, Widow(er), or Special Immigrant

(1) *Type of Information Collection:* Extension, Without Change, of a Currently Approved Collection.

The remainder of the published Notice is correct as presented and no changes have been made. The comment period as listed in the original Notice publication remains unchanged and closes as posted.

Dated: September 14, 2026.

John R. Pfirrmann-Powell,

Acting Deputy Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2026–19135 Filed 9–17–26; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0026]

Agency Information Collection Activities: Extension, Without Change, of a Currently Approved Collection: Immigrant Petition by Standalone Investor, Immigrant Petition by Regional Center Investor; Correction

ACTION: 60-Day notice; correction.

On September 14, 2026, the Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) published a 60-day Notice of Information Collection in the **Federal Register** at 91 FR 58144, requesting public comments in connection with the Immigrant Petition by Standalone Investor, Immigrant Petition by Regional Center Investor (Form I–526) in accordance with the Paperwork Reduction Act of 1995.

The type of collection was inadvertently indicated as a Revision of a Currently Approved Collection instead of an Extension, Without Change, of a Currently Approved Collection.

Correction

Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Immigrant Petition by Standalone Investor, Immigrant Petition by Regional Center Investor

(1) *Type of Information Collection:* Extension, Without Change, of a Currently Approved Collection.

The remainder of the published Notice is correct as presented and no changes have been made. The comment period as listed in the original Notice publication remains unchanged and closes as posted.

Dated: September 14, 2026.

John R. Pfirrmann-Powell,

Acting Deputy Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2026–19136 Filed 9–17–26; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0029]

Agency Information Collection Activities: Extension, Without Change, of a Currently Approved Collection: Application for Waiver of Grounds of Inadmissibility; Correction

ACTION: 60-Day notice; correction.

On September 14, 2026, the Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) published a 60-day Notice of Information Collection in the **Federal Register** at 91 FR 58157, requesting public comments in connection with Application for Waiver of Grounds of Inadmissibility (Form I–601) in accordance with the Paperwork Reduction Act of 1995.

The type of collection was inadvertently indicated as a Revision of a Currently Approved Collection instead of an Extension, Without Change, of a Currently Approved Collection.

Correction

Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Application for Waiver of Grounds of Inadmissibility

(1) *Type of Information Collection:* Extension, Without Change, of a Currently Approved Collection.

The remainder of the published Notice is correct as presented and no changes have been made. The comment period as listed in the original Notice publication remains unchanged and closes as posted.

Dated: September 14, 2026.

John R. Pfirrmann-Powell,

Acting Deputy Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2026–19137 Filed 9–17–26; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–DTS#–43735; PPWOCRADIO, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting electronic comments on the significance of properties nominated before September 5, 2026, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted by October 5, 2026.

ADDRESSES: Comments are encouraged to be submitted electronically to *National_Register_Submissions@nps.gov* with the subject line “Public Comment on <property or proposed district name, (County) State>.” If you have no access to email, you may send them via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C Street NW, MS 2013, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Sherry A. Frear, Chief, National Register of Historic Places/National Historic Landmarks Program, 1849 C Street NW, MS 2013, Washington, DC 20240, *sherry_frear@nps.gov*, 202–913–3763.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before September 5, 2026. Pursuant to 36 CFR 60.13, comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

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.

Nominations submitted by State or Tribal Historic Preservation Officers.

Key: State, County, Property Name, Multiple Name(if applicable), Address/Boundary, City, Vicinity, Reference Number.

ARIZONA**Pima County**

Tohono Chul Park, 7366 N Paseo del Norte, Oro Valley, SG100013518

IOWA**Henry County**

Mount Pleasant Downtown Historic District, 14 blocks around Central Park, including

properties on N Jefferson, S. Jefferson, N Main, S. Main, E Washington, W Washington, E Monroe, W Monroe, W Madison, E Clay, S Adams, and S Harrison streets, Mount Pleasant, SG100013524

Johnson County

Iowa City Municipal Airport Terminal, 1801 South Riverside Drive, Iowa City, SG100013526

Mills County

Mills County Sheriff's Residence and Jail, (Municipal, County and State Corrections Properties MPS), 23 N Vine Street, Glenwood, MP100013525

KANSAS**Douglas County**

Bayles Residence, 1647 Mississippi Street, Lawrence, SG100013520

Marshall County

Marysville Downtown Historic District, 5th Street to 11th Street along Broadway, from 6th to 9th Streets on the north side of Center Street (Hwy 36), and from 8th to 10th Streets on both sides of Elm Street, Marysville, SG100013523

LOUISIANA**Caddo Parish**

First National Bank Tower, 400 Texas Street, Shreveport, SG100013521

MISSISSIPPI**Panola County**

Nunnally-Carter Family Farm House, 4716 Old Panola Road, Sardis vicinity, SG100013517

OKLAHOMA**Tulsa County**

Hawk Dairies, 2415 E. 11th St. S, Tulsa, 08000854
First Christian Church, 913 South Boulder Avenue, Tulsa, SG100013527

OREGON**Douglas County**

Pass Creek Covered Bridge, W A Avenue, Drain, SG100013522

VIRGINIA**Prince Edward County**

Green Bay School, 140 Green Bay Road, Green Bay, SG100013530

Richmond INDEPENDENT CITY

The Virginia Home, 1101 Hampton Street, Richmond, SG100013529

A request for removal has been made for the following resource(s):

ARKANSAS**Benton County**

Morris House, (Benton County MRA), 407 SW Fourth St., Bentonville, OT87002316
Markey House, (Benton County MRA), Rt. 1, Garfield vicinity, OT87002354
Sellers Farm, (Benton County MRA), Old Hwy. on State Line, Maysville, OT87002369

Piercy Farmstead, (Benton County MRA), Osage Mills Rd., Osage Mills, OT87002379
McIntyre House, (Benton County MRA), Logan Rd., Logan Community vicinity, OT87002382

Rife House, (Benton County MRA), 1515 S. Eighth St., Rogers, OT87002406

Smith House, (Benton County MRA), 806 NW A St., Bentonville, OT96001273

Additional documentation has been received for the following resource(s):

ARIZONA**Pima County**

Sam Hughes Neighborhood Historic District (Boundary Increase II)(Additional Documentation), Roughly bounded by Speedway Blvd., Country Club Blvd., Broadway Blvd., and Campbell Ave., Tucson, AD100008614

Authority: 36 CFR 60.13.

Sherry A. Frear,

*Chief, National Register of Historic Places/
National Historic Landmarks Program.*

[FR Doc. 2026–19144 Filed 9–17–26; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR**National Park Service**

[NPS–WASO–CRPS–NPS0043383; OMB Control Number 1024–0271 PPWOCRADIO, PPMRSCR1Y.Y00000, P103601 (222)]

Agency Information Collection

Activities: Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes

AGENCY: National Park Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the National Park Service (NPS) are requesting an extension of a currently approved information collection.

DATES: Interested persons are invited to submit comments on or before October 19, 2026.

ADDRESSES: Send written comments on this information collection request (ICR) to Phadrea Ponds, Information Collection Clearance Officer, National Park Service, 13461 Sunrise Valley Drive, (MS–263) Reston, VA 20191 (mail) or *phadrea_ponds@ios.doi.gov* (email). Please refer to OMB Control Number 1024–0271 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT:

Alisha Hall, Tribal Relations Specialist in the Washington Support Office, by email at *Alisha_Hall@nps.gov*, or by telephone at (202) 641–0748. Please reference OMB Control Number 1024–

0271 in the subject line of your comments. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point of contact in the United States. You may also view the ICR at <http://www.reginfo.gov/public/do/PRAMain>.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, (PRA, 44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), all information collections require approval under the PRA. We may not conduct, or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on June 11, 2026, (91 FR 35550). No comments were received.

We are especially interested in public comments addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility.

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used.

(3) Ways to enhance the quality, utility, and clarity of the information to be collected.

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submission of response).

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 personally identifiable information in your comment, you should be aware that your entire comment—including your personally identifiable information—may be made publicly available at any time. While you can ask us in your comment to withhold your personally identifiable information from public review, we cannot guarantee that we will be able to do so.

Abstract: In most cases, people are not allowed to collect plants in national parks. However, federal law and certain regulations (36 CFR 2.1(c)) allow exceptions, including situations where a federally recognized Tribe has the legal right to gather plants for traditional purposes.

Under 36 CFR 2.6, members of federally recognized Tribes may gather plants or plant parts in a park if their Tribe has a gathering agreement with the National Park Service (NPS). These agreements honor Tribal sovereignty, support government-to-government relationships, and ensure that NPS applies the rules consistently across parks.

Section 2.6(f) of the regulations explains how NPS and a Tribe work together to create a plant-gathering agreement. After an agreement is completed, NPS issues a permit that authorizes Tribal members to gather specific plants. Only enrolled Tribal members who are designated by the tribe to gather and whose Tribe has a long-standing, historical connection to the park—and whose connection existed before the park was created—may gather plants. The gathering must be for traditional cultural purposes, must be sustainable, and cannot be for commercial use. The information collection covered by these rules includes:

- A Tribe's request to enter into a plant-gathering agreement.
- Information needed to develop the agreement, such as the Tribe's traditional connection to the park, the cultural purpose for gathering, and details about the types and amounts of plants to be gathered.
- Information submitted if a Tribe appeals an NPS decision denying a request, such as documentation of the Tribe's historical connection to the park, traditional practices, or potential effects on park resources.

Title of Collection: Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes.

OMB Control Number: 1024–0271.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Indian Tribes.

Total Estimated Number of Annual Responses: 30.

Estimated Completion Time per Response: Varies from 4 to 80 hrs. (times vary depending upon the activity).

Total Estimated Number of Annual Burden Hours: 530 hrs.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Non Hour

Burden Cost: None.

An agency may not conduct, or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Phadrea Ponds,

*Information Collection Clearance Officer,
National Park Service.*

[FR Doc. 2026–19151 Filed 9–17–26; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Safety and Environmental Enforcement

[Docket ID BSEE–2025–0332;
EEEE500000—256E1700D2—
ET1SF0000.EAQ000 OMB Control Number
1014–0002]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Oil and Gas Production Measurement Surface Commingling, and Security

AGENCY: Bureau of Safety and Environmental Enforcement, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Bureau of Safety and Environmental Enforcement (BSEE) proposes to renew an information collection.

DATES: Interested persons are invited to submit comments on or before October 19, 2026.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Please provide a copy of your comments to Kelly Odom, Acting BSEE ICCO, 45600 Woodland Road, Sterling, VA 20166; or by email to Kelly.Odom@bsee.gov. Please reference OMB Control Number 1014–0002 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about

this ICR, contact Kelly Odom by email at Kelly.Odom@bsee.gov, or by telephone at (703) 787-1775. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. You may also view the ICR at <http://www.reginfo.gov/public/do/PRAMain>.

SUPPLEMENTARY INFORMATION: In accordance with the PRA and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on June 17, 2026 [91 FR 36607]. No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The regulations at 30 CFR 250, subpart L, Oil and Gas Production Measurement, Surface Commingling, and Security, are the subject of this collection. This request also covers the related Notices to Lessees and Operators (NTLs) that BSEE issues to clarify, supplement, or provide additional guidance on some aspects of our regulations. BSEE uses the information collected under subpart L to ensure that the volumes of hydrocarbons produced are measured accurately, and royalties are paid on the proper volumes. Specifically, BSEE needs the information to:

Liquid Hydrocarbon Measurement

- Determine if measurement equipment is properly installed, provides accurate measurement of production on which royalty is due, and is operating properly;
- Ascertain if all removals of oil and condensate from the lease are reported;
- Obtain rates of production measured at royalty meters, which can be examined during field inspections;

Gas Measurement

- Ensure that the sales location is secure and production cannot be removed without the volumes being recorded;

Surface Commingling

- Review gas volume statements and compare them with the Oil and Gas Operations Reports to verify accuracy.

Miscellaneous & Recordkeeping

- Review proving reports to verify that data on run tickets are calculated and reported accurately.

Title of Collection: 30 CFR 250, Subpart L, Oil and Gas Production Measurement Surface Commingling, and Security.

OMB Control Number: 1014-0002.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Potential respondents include Federal OCS oil, gas, and sulfur lessees and/or operators and holders of pipeline rights-of-way.

Total Estimated Number of Annual Respondents: Currently there are approximately 550 Federal OCS oil, gas, and sulfur lessees and holders of pipeline rights-of-way. Not all the potential respondents will submit information in any given year, and some may submit multiple times.

Total Estimated Number of Annual Responses: 3,548.

Estimated Completion Time per Response: Varies from 10 minutes to 35 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 1,621.

Respondent's Obligation: Responses are mandatory, while others are required to obtain or retain benefits, or are voluntary.

Frequency of Collection: Submissions are generally on occasion and monthly.

Total Estimated Annual Nonhour Burden Cost: \$54,270.

BILLING CODE 4310-VH-P

Citation 30 CFR 250 Subpart L	Reporting or Recordkeeping Requirement+	Hour Burden	Average No. of Annual Responses	Annual Burden Hours (rounded)
		Non-Hour Cost Burdens		
Liquid Hydrocarbon Measurement				
1202(a)(1), (b)(1); 1203(b)(1); 1204(a)(1)	Submit application for liquid hydrocarbon or gas measurement procedures or changes; or for commingling of production or changes.	Simple: 9 hours	10 Simple Applications	90
		\$1,371 simple fee x 10 applications = \$13,710		
		Complex: 35 hours	10 Complex Applications	350
		\$4,056 complex fee x 10 applications = \$40,560		
1202	Submit meter status and other notifications.	2 hours	24 notifications	48
1202(a)(4)	Copy & send pipeline (retrograde) condensate volumes upon request.	2 hours	4 volumes	8
1202(c)(1), (2); 1202(e)(4); 1202(h)(1)-(4); 1202(i)(1)(iv), (2)(iii); 1202(j)	Record observed data, correction factors & net standard volume on royalty meter and tank run tickets. Record master meter calibration runs. Record mechanical-displacement prover, master meter, or tank prover proof runs. Record liquid hydrocarbon royalty meter malfunction and repair or adjustment on proving report; record unregistered production on run ticket. List Cpl and Ctl factors on run tickets.	Respondents record these items as part of normal business records & practices to verify accuracy of production measured for sale purposes.		0
1202(c)(4)*	Copy and send each liquid hydrocarbon run ticket monthly.	0.5 hour	50 tickets	25
1202(d)(1); (d)(4); (k)(9); 1204(b)(1)	Permit BSEE to witness testing; request approval for proving on a schedule other than monthly; request approval for well testing on a schedule other than every 60 days.	2.5 hours	5 proving requests	13
		2.5 hours	24 well test requests	60
1202(d)(5)*	Copy & submit each liquid hydrocarbon royalty meter proving report monthly & request waiver as needed.	1 hour	24 reports	24
1202(f)(2)*	Copy & submit each mechanical-displacement prover & tank prover calibration report.	1 hour	24 reports	24
1202(i)(2)*	Copy & submit each royalty tank calibration chart before using for royalty measurement.	1 hour	4 charts	4

Citation 30 CFR 250 Subpart L	Reporting or Recordkeeping Requirement+	Hour Burden	Average No. of Annual Responses	Annual Burden Hours (rounded)
		Non-Hour Cost Burdens		
1202(i)(3)*	Copy & submit each inventory tank calibration chart upon request; retain charts for as long as tanks are in use.	1 hour 0.5 hour	1 charts 2 charts	1 1
Gas Measurement				
1203(b)(6), (8), (9)*	Copy & submit each gas quality and volume statement monthly or as requested.	0.5 hour	24 Statements	12
1203(c)(1)	Request approval for gas calibration on a schedule other than monthly.	1 hour	6 requests	6
1203(c)(4)*; (c)(5)	Copy & submit gas meter calibration reports upon request; retain for 2 years; permit BSEE to witness calibrations.	0.33 hour 0.167 hour	1 report 1 report	0 0
1203(e)(1)*	Copy & submit gas processing plant records upon request.	0.75 hour	1 record.	1
1203(f)(5)	Copy & submit measuring records of gas lost or used on lease upon request.	1 hour	1 records	1
Surface Commingling				
1204(a)(2)	Provide State production volumetric and/or fractional analysis data upon request.	10 hours	1 report	10
1205(a)(2)	Post signs at royalty or inventory tank used in royalty determination process.	2 hours	2 signs	4
1205(a)(4)	Report security problems (telephone).	0.5 hour	1 calls	1
Miscellaneous and Recordkeeping				
1202(e)(6)	Retain master meter calibration reports for 2 years.	0.33 hour	12 reports	4
1202(k)(5)	Retain liquid hydrocarbon allocation meter proving reports for 2 years.	0.33 hour	12 reports	4
1203(f)(4)	Document & retain measurement records on gas lost or used on lease for 2 years at field location and minimum 7 years at location of respondent's choice.	0.33 hour	104 records	34
1204(b)(3)	Retain well test data for 2 years.	0.33 hour	1,200 tests	396
1205(b)(3), (4)	Retain seal records for 2 years; make records available for BSEE inspection.	0.25 hour	2,000 records	500
Total Burden			3,548 responses	1,621 hours
			\$54,270 Non-Hour Cost Burdens	

BILLING CODE 4310-VH-C

An agency may not conduct, or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Kirk Malstrom,

Chief, Regulations and Standards Branch.

[FR Doc. 2026–19153 Filed 9–17–26; 8:45 am]

BILLING CODE 4310-VH-P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1488]

Certain Gyro-Stabilized Electric Unicycles and Components Thereof and Products Containing the Same; Notice of a Commission Determination Not To Review an Initial Determination Granting Complainants' Unopposed Motion To Amend the Complaint and Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's ("ALJ") initial determination ("ID") (Order No. 18), granting complainants' unopposed motion to amend the complaint and notice of investigation to add Guangzhou Coyote Intelligent Equipment Co., Ltd. d/b/a LeaperKim ("LeaperKim Coyote") as a respondent.

FOR FURTHER INFORMATION CONTACT:

Cathy Chen, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone 202–205–2392. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. General information concerning the Commission may also be obtained by accessing its internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on March 5, 2026, based on a complaint

filed on behalf of Inventist, Inc. of Camas, WA and Alien Technology Group, Inc. d/b/a Alien Rides. of San Francisco, CA (collectively, "Complainants"). 91 FR 10,827 (Mar. 5, 2026). The complaint, as amended, alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain gyro-stabilized electric unicycles and components thereof and products containing the same by reason of the infringement of certain claims of U.S. Patent No. 8,807,250 and the claim of U.S. Patent No. D729,698. *Id.* The complaint, as amended, further alleged that an industry in the United States exists or is in the process of being established as required by the applicable Federal Statute. *Id.* The Commission's notice of investigation named the following respondents: Immotion Technologies Co., Ltd. d/b/a Immotion ("Immotion"); Guangzhou Veteran Intelligent Technology Co., Ltd. d/b/a LeaperKim; Dong Guan BECODE Intelligent Technology Co., Ltd. d/b/a BECODE; Shenzhen King Song Intelligence Technology Co., Ltd. d/b/a Kingsong; Guangzhou JiDongTai Intelligent Equipment Co., Ltd. d/b/a Nosfet, all of Guangdong, China. *Id.* The Office of Unfair Import Investigations ("OUII") was also named as a party in this investigation. *Id.*

Respondent Immotion has been terminated from the investigation based on a settlement agreement. Order No. 11 (May 21, 2026), *unreviewed by Comm'n* Notice (Jun. 18, 2026).

On August 7, 2026, Complainants filed a motion to amend the complaint and notice of investigation to add LeaperKim Coyote as a respondent pursuant to Commission Rule 210.14(b). OUII filed a response in support of the motion.

On August 18, 2026, the ALJ issued the subject ID (Order No. 18), granting the motion to amend the complaint and notice of investigation to add LeaperKim Coyote as a respondent. The ID found Complainants demonstrated good cause to grant the motion. Order No. 18 at 2 (Aug. 18, 2026). Specifically, the ID observed that good cause exists to grant the motion because Complainants recently "learned through LeaperKim Coyote's former *pro se* representative [] that the originally named LeaperKim respondent, Guangzhou Veteran Intelligent Technology Co., Ltd. d/b/a LeaperKim [], is allegedly defunct, and that LeaperKim Coyote is allegedly a separate legal entity that currently owns

the LeaperKim trademark." *Id.* (quoting Mot. at 1, Doc. ID No. 890866 (Aug. 7, 2026)). The ID noted that Complainants argued that "[g]ranteeing the requested amendment will not prejudice any party or the public interest." *Id.* (quoting Mot. at 1). No petitions for review were filed.

The Commission has determined not to review the subject ID. Respondent LeaperKim Coyote is added as a respondent in this investigation.

The Commission vote for this determination took place on September 15, 2026.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in Part 210 of the Commission's Rules of Practice and Procedure, 19 CFR part 210.

By order of the Commission.

Issued: September 16, 2026.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2026–19165 Filed 9–17–26; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1480]

Certain Wireless Communication Devices and Components Thereof; Notice of a Commission Determination Not To Review an Initial Determination Terminating the Investigation as to Certain Respondents; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission ("Commission") has determined not to review an initial determination ("ID") (Order No. 32) of the presiding administrative law judge ("ALJ") granting the unopposed motion to terminate certain respondents from the above-captioned investigation based on settlement and terminate the investigation. The investigation is terminated.

FOR FURTHER INFORMATION CONTACT:

Jonathan D. Link, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–3103. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email

EDIS3Help@usitc.gov. General information concerning the Commission may also be obtained by accessing its internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on January 21, 2026, based on a complaint filed by Active Wireless Technologies LLC ("AWT") of Marshall, Texas. 91 FR 2559-560 (Jan. 21, 2026). The complaint, as supplemented, alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain wireless communication devices and components thereof by reason of infringement of certain claims of U.S. Patent No. 10,531,443; U.S. Patent No. 10,601,566; U.S. Patent No. 10,785,764; U.S. Patent No. 10,805,955; U.S. Patent No. 10,855,432; and U.S. Patent No. 11,019,557. *Id.* The complaint further alleges that a domestic industry exists. *Id.* The Commission's notice of investigation named as respondents BLU Products, Inc. ("BLU") of Doral, Florida; Coosea USA Technologies, Inc. ("Coosea") of San Diego, California; Qualcomm Technologies, Inc. ("Qualcomm") of San Diego, California; DISH Wireless LLC ("DISH") of Englewood, Colorado; EchoStar Corporation ("EcoStar") of Englewood, Colorado; HTC Corporation ("HTC") of New Taipei City, Taiwan; LG Electronics Inc. ("LGE") of Seoul, Korea; OnePlus Technology (Shenzhen) Co., Ltd. ("OnePLUS") of Shenzhen, China; TCL Communication Ltd. of Hong Kong and TTE Technology, Inc. d/b/a TCL North America of Irvine, California and TCL Technology Group Corporation of Huizhou City, China (collectively "TCL"); and T-Mobile USA, Inc. ("T-Mobile") of Bellevue, Washington. *Id.* The Office of Unfair Import Investigations is not participating in the investigation. *Id.*

On April 28, 2026, the Commission terminated the investigation as to DISH, EchoStar, HTC, and OnePlus based on withdrawal of the investigation. *See* Order No. 16 (Apr. 8, 2026), *unreviewed by* Comm'n Notice (Apr. 28, 2026). On May 1, 2026, the Commission terminated the investigation as to Qualcomm based on settlement. *See* Order No. 17 (Apr. 19, 2026), *unreviewed by* Comm'n Notice (May 1, 2026). On June 16, 2026, the

Commission terminated the investigation as to LGE based on settlement. *See* Order No. 25 (May 15, 2026), *unreviewed by* Comm'n Notice (June 16, 2026). On June 16, 2026, the Commission terminated the investigation as to Coosea based on settlement. *See* Order No. 27 (May 27, 2026), *unreviewed by* Comm'n Notice (June 24, 2026). On September 3, 2026, the Commission terminated the investigation as to BLU based on settlement. *See* Order No. 31 (Aug. 5, 2026), *unreviewed by* Comm'n Notice (Sept. 3, 2026).

On July 31, 2026, AWT filed an unopposed motion to terminate TCL and T-Mobile from the investigation on the basis of settlement. AWT certified that the motion is unopposed. On August 10, 2026, T-Mobile filed a response to the motion identifying an additional agreement between AWT and T-Mobile.

On August 14, 2026, the ALJ issued the subject ID (Order No. 32), granting the motion to terminate the investigation as to TCL and T-Mobile, the last remaining respondents, and terminating the investigation in its entirety. The subject ID finds that the motion meets the requirements of Commission Rules 210.21(b)(1) and 210.50(b)(2) (19 CFR 210.21(b)(1), 210.50(b)(2)), and that there are no extraordinary circumstances that would prevent the requested termination of the investigation. No petition for review of the ID was filed.

The Commission has determined not to review the subject ID. Accordingly, the Commission terminates the last remaining respondents TCL and T-Mobile from the investigation and thus terminates the investigation in its entirety.

The Commission vote for this determination took place on September 15, 2026.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR Part 210).

By order of the Commission.

Issued: September 15, 2026.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2026-19096 Filed 9-17-26; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1521]

Certain Electronic Devices With Certain Audio Technologies; Notice of Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on August 14, 2026, under section 337 of the Tariff Act of 1930, as amended, on behalf of BoomCloud 360 Inc. of Encinitas, California. A supplement was filed on August 31, 2026. The complaint, as supplemented, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain electronic devices with certain audio technologies by reason of the infringement of certain claims of U.S. Patent No. 10,524,078 ("the '078 patent"); U.S. Patent 11,533,560 ("the '560 patent"); and U.S. Patent 11,051,121 ("the '121 patent"). The complaint, as supplemented, further alleges that an industry in the United States exists as required by the applicable Federal Statute.

The complainant requests that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205-2000. General information concerning the Commission may also be obtained by accessing its internet server at <https://www.usitc.gov>.

FOR FURTHER INFORMATION CONTACT: Pathenia M. Proctor, The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205-2560.

SUPPLEMENTARY INFORMATION:

Authority: The authority for institution of this investigation is

contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2025).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on September 15, 2026, ordered that—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 1–23 of the '078 patent; claims 1–43 of the '560 patent; and claims 1–30 of the '121 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is “electronic devices with certain audio technologies, such as mobile phones, tablets, and products containing certain audio features such as spatial enhancement for stereo speakers using gain adjustment of spatial and nonspatial components together with adjustments for asymmetries between left and right speakers; dynamic audio enhancement that applies enhancements based on rendering system information and metadata indicative of an audio consumption software application; and/or spatial audio enhancement using crosstalk processing together with compensation for spectral defects caused by the crosstalk processing”;

(3) Pursuant to Commission Rule 210.50(b)(1), 19 CFR 210.50(b)(1), the presiding administrative law judge shall take evidence or other information and hear arguments from the parties or other interested persons with respect to the public interest in this investigation, as appropriate, and provide the Commission with findings of fact and a recommended determination on this issue, which shall be limited to the statutory public interest factors set forth in 19 U.S.C. 1337(d)(1), (f)(1), (g)(1);

(4) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is:

BoomCloud 360 Inc., 687 S Coast Hwy
101 Ste 239, Encinitas, CA 92024

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Apple, Inc., One Apple Park Way,
Cupertino, CA 95014

Samsung Electronics Co., Ltd., 129
Samsung-Ro, Yeongtong-gu, Suwon-
si, Gyeonggi-do, 443–742, South
Korea

Samsung Electronics America, Inc., 85
Challenger Rd., Ridgefield Park, NJ
07660

Google LLC, 1600 Amphitheatre
Parkway, Mountain View, CA 94043

(b) The Office of Unfair Import
Investigations, U.S. International Trade
Commission, 500 E Street SW, Suite
401, Washington, DC 20436; and

(5) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: September 16, 2026.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2026–19175 Filed 9–17–26; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1110–0088]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Extension of a Previously Approved Collection; Title—Lawful Access Data Collection (LADC)

AGENCY: Federal Bureau of Investigation (FBI), Department of Justice (DOJ).

ACTION: 60-Day notice.

SUMMARY: The Criminal Justice Information Services (CJIS) Division, FBI, DOJ, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until November 16, 2026.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Matthew Fancher, Unit Chief, Crime and Law Enforcement Statistics Unit, FBI, CJIS Division, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306, 304.625.4830, email ucr@fbi.gov.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the FBI, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g.,

permitting electronic submission of responses.

Abstract: The LADC will act as the collection tool for tracking the volume of investigations that are impacted by device and software encryption and provide valuable data to decision makers to help mitigate these lawful access impacts.

Overview of This Information Collection

1. *Type of Information Collection:* Extension of previously approved collection.

2. *The Title of the Form/Collection:* Lawful Access Data Collection.

3. *The agency number, if any, and the applicable component of the Department sponsoring the collection:* The sponsor is the CJIS Division, FBI, DOJ.

4. *Affected public who will be asked or required to respond, as well as the obligation to respond:* Affected Public federal, state, county, city, tribal, and territorial law enforcement agencies. The obligation to respond is voluntary and at the discretion of the contributing agency.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* Due to limited participation

and limited data reported, the number of respondents for the LADC is based on estimates from initial usability testing.

The estimated time per response is 3 minutes, 12 seconds to complete a LADC submission.

CIV estimates that 950,000 respondents will take 3 minutes and 12 seconds to complete the form.

6. *An estimate of the total annual burden (in hours) associated with the collection:* The total annual burden hours for this collection is 50,667 hours.

CIV estimates total 50,667 burden hours (950000 × 192 seconds)/60/60 = 50,667).

Activity	Number of respondents	Frequency (annually)	Total annual responses	Time per response	Total annual burden (hours)
Ex: Survey (individuals or households)	950,000	50	950,000	3 min. 12 sec	50,667
Unduplicated Totals	950,000	.....	950,000	.....	50,667

7. *An estimate of the total annual cost burden associated with the collection, if applicable:* According to the cost model provided by the FBI's CJIS Division, Resources Management Section, Fee

Programs Unit (FPU), the following are projections based upon prior collection activity. The cost module does not separate the costs between the two methods of collecting UCR data. The

FPU cannot provide an itemized breakdown of separate UCR collections, so provided is a total cost of the FBI's UCR Program and its collection activities.

DATA COLLECTION AND PROCESSING COSTS

Activity	Cost	Full-Time equivalent
CJIS Systems Agency/Officer Development and Support	\$4,805.07	0.03
Collaborate with Law Enforcement and Critical Incident Management Services	8,479.06	0.06
Conduct Field Office, Office of Partner Engagement, and Legal Attache Engagement Activities	18,456.52	0.15
Conduct Liaison, Education, and Promotion	530,655.46	4.03
Conduct Other Crime Data Services Activities	392,300.68	2.81
Conduct Other Partner Engagement Activities	41,822.65	0.27
Conduct Quality, Process, and System Management Activities	10,191.78	0.06
Conduct research and release studies on collected data	221,358.28	1.79
Conduct State and Local Agency Engagement Activities	71,379.09	0.56
Conduct Tribal Engagement Activities	9,865.78	0.09
Develop and Maintain Partner Outreach Materials	8,365.12	0.06
Develop and Manage Policy	52,028.62	0.36
Direct Customer Engagement for Product/Service Use and Expansion	156,869.82	1.03
Manage Strategic Communications	9,212.45	0.06
Perform Administrative and Human Resource tasks	260,597.57	1.90
Perform Advisory Policy Board (APB) tasks	60,450.64	0.41
Perform Budget, Strategic Planning, and Program Control	151,704.61	0.91
Perform Contracting Officer's Representative Duties	33,935.03	0.21
Perform Quality Assurance	160,033.71	1.24
Perform Quality Management	16,624.04	0.10
Perform Scaled Agile Framework Duties	457,011.19	3.81
Perform Statistical Reporting	930.39	0.01
Perform Strategy Management	40,890.38	0.23
Perform workload management	16,487.43	0.09
Planning and Implementing New Data Collections	87,978.26	0.70
Process Media, Freedom of Information Act, and Congressional requests	79,491.70	0.53
Provide CJIS Multimedia Support	3,159.67	0.03
Provide End User Support Services	88,656.10	0.65
Provide Management and Administration	532,640.20	3.36
Provide Support to Other FBI Units Sections (Temporary Duty, Surge)	20,154.92	0.20
Respond to Data Calls, Media Requests, etc.	260,146.69	1.91
Respond to Internal and External Data Calls	119,149.70	0.69
Support CJIS APB	51,763.19	0.36
Support CJIS Division Community Outreach Program	10,105.00	0.09
Support CJIS Systems Officer Training and Communications	3,899.61	0.03

DATA COLLECTION AND PROCESSING COSTS—Continued

Activity	Cost	Full-Time equivalent
Support Crime in the United States data release	469,426.78	3.58
Support Law Enforcement Employee Counts Data Collection	147,784.63	1.16
Support Law Enforcement Suicide Data Collection	102,405.30	0.80
Support Law Enforcement Training	10,572.66	0.12
Support LEOKA Collection and data release	275,957.77	2.25
Support National Incident-Based Reporting System	178,076.89	1.38
Support National Use-of-Force Data Collection	206,931.23	1.72
Support ORI Administration	7,799.21	0.06
Support Reports, Releases, and Publications	71,322.10	0.61
Support the FBI's Crime Data Explorer	186,781.39	1.50
Support the Hate Crime Data Collection and data release	152,748.80	1.18
Support the Law Enforcement Public Contact Data Collection	40,623.54	0.30
Support the Lawful Access Data Collection	49,628.26	0.33
Support the Quarterly Uniform Crime Report	78,946.16	0.56
Total	5,970,605.15	44.37

If additional information is required contact: Darwin Arceo, Department Clearance Officer, United States Department of Justice, Justice Management Division, Enterprise Portfolio Management, Two Constitution Square, 145 N Street NE, 4W-218, Washington, DC.

Dated: September 15, 2026.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2026-19095 Filed 9-17-26; 8:45 am]

BILLING CODE 4410-02-P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 26-053]

Aerospace Safety Advisory Panel; Meeting

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the National Aeronautics and Space Administration announces a forthcoming meeting of the Aerospace Safety Advisory Panel (ASAP).

DATES: Thursday, October 22, 2026, 1:30 p.m. to 3:00 p.m., eastern time.

ADDRESSES: Public attendance will be virtual only. See dial in information below under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Ms. Marcia Guignard, Committee Management Specialist, NASA Headquarters, Washington, DC 20546, marcia.guignard@nasa.gov.

SUPPLEMENTARY INFORMATION: The Aerospace Safety Advisory Panel

(ASAP) will hold its Fourth Quarterly Meeting for 2026. This discussion is pursuant to carrying out its statutory duties for which the Panel reviews, identifies, evaluates, and advises on those program activities, systems, procedures, and management activities that can contribute to program risk. Priority is given to those programs that involve the safety of human flight. The agenda will include:

- Updates on the International Space Station Program
- Updates on the Commercial Crew Program
- Update on Commercial LEO Development Programs
- Updates on Artemis Programs

This meeting is only available telephonically. Any interested person may call the USA toll free conference call number 800-369-3107; passcode 3116192 and then the # sign. At the beginning of the meeting, members of the public may make a verbal presentation to the Panel on the subject of safety in NASA, not to exceed 5 minutes in length. To do so, members of the public must contact Ms. Marcia Guignard, at marcia.guignard@nasa.gov at least 48 hours in advance. Any member of the public is permitted to file a written statement with the Panel via electronic submission to Ms. Guignard at the email address previously noted. Verbal presentations and written statements should be limited to the subject of safety in NASA. It is imperative that the meeting be held on this date to accommodate the

scheduling priorities of the key participants.

Jamie M. Krauk,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2026-19188 Filed 9-17-26; 8:45 am]

BILLING CODE 7510-13-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-106369; File No. SR-CboeBYX-2026-032]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Introduce a Data Vendor Program

September 15, 2026.

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 September 8, 2026, Cboe BYX Exchange, Inc. (the “Exchange” or “BYX”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Cboe BYX Exchange, Inc. (the “Exchange” or “BYX”) proposes to introduce a Data Vendor Program,

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

which includes introducing a new defined term of Data Vendor, along with other clarifying changes. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Commission's website (<https://www.sec.gov/rules/sro.shtml>), the Exchange's website (https://www.cboe.com/us/equities/regulation/rule_filings/byx/), and at the principal office of the Exchange.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to (i) introduce a definition of Data Vendor; (ii) codify the existing definition (as defined in the Exchange's applicable North American Market Data Policies) of Extranet Service Provider; (iii) codify an existing practice that permits an External Distributor of both Cboe One Summary and Cboe One Premium to be liable only for the External Distribution Fee for Cboe One Premium; and (iv) create a program for Data Vendors in order to incentivize Data Vendors to build out the applicable feeds and make them commercially available to subscribers.³ The proposed program will provide fee waivers (as described below) for External Distribution Fees for Data Vendors for the Cboe One Summary Feed and Cboe One Premium Feed.

Proposed Definitions

In connection with this proposed program, the Exchange first proposes to adopt a definition for a specific category of participants. Specifically, the Exchange proposes to establish the term

"Data Vendor" to mean "an External Distributor that (i) is actively engaged, as part of its primary business objective, in the solicitation of unaffiliated third-party Distributors to redistribute a transformed Market Data Product; (ii) does not maintain a brokerage relationship with Users in connection with the receipt or use of the applicable Market Data Product; and (iii) is not an Extranet Service Provider." As part of this new definition, and as further described below, the Exchange proposes to codify the existing definition of Extranet Service Provider within the Cboe Global North American Market Data Policies to be within its Fee Schedule.

The Exchange has also established objective, verifiable criteria for determining eligibility as a Data Vendor. The following criteria, which will be reflected in the Exchange's Fee Schedule, must be satisfied: (1) the External Distributor must identify itself as a Data Vendor in publicly available marketing materials; (2) the External Distributor must transform the applicable Market Data Product before redistribution, which may include aggregation across multiple data sources, normalization into a consistent format, enrichment with reference data or analytics, or repackaging into a proprietary delivery mechanism (e.g., terminal, API, or proprietary feed); (3) the External Distributor must redistribute the applicable transformed Market Data Product to downstream Distributors as part of a paid commercial offering; (4) the External Distributor must not maintain a brokerage relationship with any User to whom it distributes the applicable Market Data Product; (5) the External Distributor must not be an Extranet Service Provider; and (6) the External Distributor must be actively engaged in the solicitation of unaffiliated third-party Distributors to subscribe to and redistribute the applicable transformed Market Data Product. Upon request, the External Distributor must provide a written attestation certifying compliance with the foregoing criteria. The Exchange may request supporting documentation, including but not limited to Distributor subscriber lists, revenue breakdowns by recipient type, and descriptions of the transformations applied to the Market Data Product. These objective eligibility criteria ensure that the Data Vendor Program is equitably applied to all similarly situated market participants.

External Distributor

To begin, "Data Vendor" is intended to only encompass External Distributors

and not Internal Distributors. An External Distributor is defined as a Distributor that receives the Exchange Market Data product and then distributes that data to a third party or one or more Users outside the Distributor's own entity.⁴ The Exchange seeks to adopt this program in order to encourage broader redistribution of this data. As such, the Exchange limits this to External Distributors as the intent of this program is to have data distributed outside one's own entity.

Primary Business Is To Redistribute to Distributors

To be eligible as a Data Vendor, an External Distributor must be taking in data for the primary business purpose of selling access to the applicable feed as a service in its own right, not merely redistributing data in incidental support of broader business functions such as trade execution, account management, or brokerage services. The Exchange notes that, as part of its business, a Data Vendor may redistribute a market data product to Users, but the primary purpose must be to redistribute data to Distributors. The Exchange will assess whether an External Distributor's primary business purpose satisfies this criterion based on the External Distributor's publicly available marketing materials. If the Exchange were to modify this requirement to permit a primary business purpose of redistribution to either Distributors or Users, it would unintentionally include firms that may redistribute only to Users and that are not traditionally considered data vendors (e.g., a media outlet or a bank).

Transformed Market Data Product

To be eligible, the Exchange requires that the Data Vendor not simply pass through data in its original form. Transformation may include aggregation across multiple sources, normalization into a consistent format, enrichment with derived analytics, repackaging into a proprietary delivery mechanism (e.g., terminal, API, feed), or any other value-added processing that distinguishes the output from the original source data.

No Brokerage Relationship With Users

Next, the Exchange proposes that the definition of Data Vendor include a stipulation that a Data Vendor must not maintain a brokerage relationship with Users who receive the market data product. The Exchange already has programs aimed at retail brokers, for example, both the Small Retail Broker Program and the Small Retail Broker

³ The Exchange initially submitted the proposed rule change on July 1, 2026 (SR-CboeBYX-2026-027). On July 15, 2026, the Exchange withdrew that filing and submitted SR-CboeBYX-2026-028. On September 8, 2026, the Exchange withdrew that filing and submitted this filing.

⁴ See BYX Equities Fee Schedule.

Hosted Solutions Program.⁵ This proposed program is intended to encourage Data Vendors specifically to take in the applicable feeds and distribute them. A Data Vendor's service model is different from a retail broker's, as a Data Vendor's business model is built around providing data to firms and Users alike, whereas a retail broker's business model is focused on connecting Users to markets in order to trade and may include providing market data as part of its offering to its Users. As the Exchange already has programs specifically for retail brokers, the Exchange does not believe it would be appropriate to include retail brokers here. The Exchange notes that if a Data Vendor that is currently receiving a fee waiver under this Program subsequently commences a brokerage relationship with its Users, it will no longer satisfy the definition of Data Vendor and will cease to be eligible for the Program. In such case, the External Distributor would be assessed the standard External Distribution Fee for the applicable feed as of the date it no longer satisfies the definition of Data Vendor.

Not an Extranet Service Provider

As noted above, the Exchange proposes also to define Extranet Service Provider when it introduces the definition of Data Vendor into its Fee Schedule. Today, this term already exists in the Cboe Global Markets North American Data Policies.⁶ The Exchange proposes to codify this definition in its Fee Schedule because the proposed definition of Data Vendor directly references this defined term. Specifically, the Exchange proposes to codify that an Extranet Service Provider is "an entity that has entered into a Cboe Global Markets Global Data Agreement and Transmits an Exchange Market Data Product, via an extranet operated by such entity, to data recipients. 'Transmit' means to direct an Exchange Market Data Product to one or more data recipients without modification of the content, format, or other characteristics of the Exchange Market Data Product." An Extranet Service Provider is not authorized to use or process an Exchange Market Data Product for any purpose.

Applicable Data Feeds

By way of background, the Exchange offers the Cboe One Premium Data Feed, which is a data feed that disseminates, on a real-time basis, the aggregate best bid and offer ("BBO") of all displayed orders for securities traded on the

Exchange and its affiliated equities exchanges and enables recipients to receive aggregated two-sided quotations from BYX and its affiliated equities exchanges for up to twelve (12) price levels (and, for a limited time, up to five (5) price levels).⁷ The Cboe One Premium Data Feed is created using the data from the Exchange and each of its affiliated equities exchanges' Summary Depth data feeds (allowing for up to 48 total price levels).

The Exchange also offers the Cboe One Summary Data Feed, which disseminates, on a real-time basis, the aggregate BBO of all displayed orders for securities traded on BYX and its affiliated equities exchanges and also contains individual last sale information for BYX and its affiliated equities exchanges.⁸

External Distribution Fees for Cboe One Premium and Cboe One Summary

The proposed rule change also clarifies that External Distributors of both Cboe One Summary and Cboe One Premium shall only be responsible for paying the External Distribution Fee for Cboe One Premium. The current fee schedule provides that "Cboe One Summary User Fees can be applied to Cboe One Summary and Cboe One Premium External Distribution Fees." Under the Exchange's existing application of this provision, an External Distributor receiving both Cboe One Summary and Cboe One Premium is assessed only the Cboe One Premium External Distribution Fee⁹, and User

⁷ BYX filed to increase the levels of the Cboe One Premium Data Feed from five (5) levels to twelve (12) levels. To help in this transition, it is currently supporting both the five and twelve level feeds; however, as stated in its rule, BYX shall sunset the five (5) level feed of Cboe One Premium by December 31, 2026 (with the date to be announced via Exchange Notice). See Rule 11.22(i).

⁸ The Cboe One Summary Feed is distinguishable from the Cboe One Premium Feed in that it does not provide depth of book data. In contrast, the Cboe One Premium Feed contains all the available data in the Cboe One Summary Feed and also provides depth of book data.

⁹ To better illustrate this concept, consider the following examples. Example 1: If a firm subscribes to only Cboe One Summary, its User costs will be used to offset the External Distribution Fee for Cboe One Summary. In the event the firm's User costs total \$2,000, the firm will pay \$2,000 in User fees and \$3,000 (\$5,000 – \$2,000) for its External Distribution Fee. Example 2: If a firm subscribes only to Cboe One Premium, its User costs will be used to offset the External Distribution Fee for Cboe One Premium. In the event a firm's User costs total \$10,000, the firm will pay \$10,000 in User fees and \$2,500 (\$12,500 – \$10,000) for its External Distribution Fee. Example 3: If a firm subscribes to both Cboe One Summary and Cboe One Premium, only the External Distribution Fee for Cboe One Premium is assessed and this fee may be offset by both Cboe One Summary and Cboe One Premium User fees. In the event a firm's User costs are \$2,000 for Cboe One Summary and \$10,000 for Cboe One

Fees for both Cboe One Summary and Cboe One Premium may be applied to offset that fee.

The Exchange is now proposing to make this treatment explicit by adding clarifying language to the fee schedule stating that External Distributors of both feeds are only responsible for paying the External Distribution Fee for Cboe One Premium. This amendment does not alter the economic substance of the Exchange's existing fee structure, nor does it impose any new or increased fees on market participants. Rather, it reduces potential ambiguity by expressly codifying the Exchange's existing application of the user fee offset provisions. The Exchange believes this clarification will promote transparency and reduce confusion among External Distributors regarding their fee obligations under the Cboe One market data product offerings.

Impact of Proposed Program

As noted above, the proposed program would waive External Distribution Fees for Data Vendors of the Cboe One Summary Feed and the Cboe One Premium Feed (each, an "Applicable Feed") that satisfy certain eligibility requirements. A Data Vendor must not have received the Applicable Feed for which it seeks the waiver during the 18 months¹⁰ preceding the waiver application date, and must integrate, or be actively in the process of integrating, the Applicable Feed and making it commercially available to its subscribers. The Data Vendor need not have fully integrated the Applicable Feed or made it commercially available before the waiver begins. For a qualifying Data Vendor, the applicable waiver commences on the date it first receives the Applicable Feed, and, if that date occurs mid-month, that partial month counts as the first month of the waiver period. Specifically, the Exchange proposes to waive the External Distribution Fee of \$5,000 per month for Cboe One Summary for 12 months (the "Summary Waiver Period"), except that a Data Vendor is not eligible for a Summary Waiver Period if it is receiving Cboe One Premium because Cboe One Summary is included in the Cboe One Premium External Distribution Fee as noted herein. To clarify, because a Data Vendor receiving Cboe One Premium pays only the Cboe One Premium

Premium, the firm will pay a total of \$12,000 in User fees (\$10,000 + \$2,000) and it will pay \$500 for its External Distribution Fee (\$12,500 – (\$10,000 + \$2,000)).

¹⁰ The Exchange notes that this same 18-month requirement is the standard for its other fee waiver programs. See BYX Fee Schedule.

⁵ See BYX Equities Fee Schedule.

⁶ See Market_Data_Policies.pdf.

External Distribution Fee (and no separate fee is assessed for Cboe One Summary), there is no separate Cboe One Summary External Distribution Fee to waive for such a firm.¹¹ The Exchange proposes to waive the External Distribution Fee of \$12,500 per month for Cboe One Premium for 24 months (the “Premium Waiver Period”).

If an eligible Data Vendor already receives Cboe One Summary, it may still receive the Premium Waiver Period if it has not received Cboe One Premium during the 18 months preceding the waiver application date and satisfies the integration and commercial availability requirement with respect to Cboe One Premium. During the Premium Waiver Period, the Data Vendor’s Cboe One Summary subscription would be covered under the Premium Waiver, and no separate External Distribution Fee would be assessed for Cboe One Summary. Similarly, an eligible Data Vendor that builds out both feeds simultaneously would receive only the Premium Waiver Period.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.¹² Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹³ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹⁴ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes the proposed rule change promotes just

and equitable principles of trade by establishing a clear, objective, and transparent definition of “Data Vendor” that properly captures the characteristics distinguishing Data Vendors from other categories of External Distributors. The proposed definition sets forth specific, verifiable criteria—namely, that a Data Vendor must (i) be an External Distributor; (ii) be actively engaged, as part of its primary business objective, in the solicitation of unaffiliated third-party Distributors to redistribute a transformed Market Data Product; (iii) not maintain a brokerage relationship with Users; and (iv) not be an Extranet Service Provider. By establishing objective eligibility criteria, the proposed rule change ensures that similarly situated market participants are treated consistently and that the benefits of the Data Vendor Program are available to all External Distributors that meet the defined qualifications.

The Exchange further believes that the codification of the existing Extranet Service Provider definition within the Fee Schedule promotes just and equitable principles of trade. Because the proposed Data Vendor definition directly references the term “Extranet Service Provider,” market participants seeking to understand their eligibility for the Program should not be required to consult the Cboe Global Markets North American Data Policies to determine how that term applies. By incorporating both defined terms into the Fee Schedule itself, the Exchange ensures that participants have access to the complete framework.

The Exchange further believes that the proposed rule change removes impediments to and perfects the mechanism of a free and open market and a national market system. The Data Vendor Program is designed to incentivize Data Vendors to integrate the Applicable Feeds, make them commercially available to subscribers, and redistribute them by providing fee waivers for External Distribution Fees for the Cboe One Summary Feed and Cboe One Premium Feed. By waiving the External Distribution Fee of \$5,000 per month for Cboe One Summary for the Summary Waiver Period and waiving the External Distribution Fee of \$12,500 per month for Cboe One Premium for the Premium Waiver Period, the Exchange encourages broader redistribution of its market data products. Broader distribution of market data enhances price transparency and supports informed decision-making across the national market system, which in turn perfects the mechanism of a free and open market by ensuring that

market participants have access to comprehensive, competitive data offerings.

By allowing the waiver to begin while an eligible Data Vendor is actively integrating the Applicable Feed and working to make it commercially available, the Program lowers barriers to entry during the build-out period and incentivizes a broader set of market participants to enter the Cboe One distribution chain, thereby expanding the availability of consolidated multi-exchange market data throughout the national market system.

The proposed rule change also protects investors and the public interest. By encouraging Data Vendors to take in, transform, and redistribute market data feeds, the proposed program promotes greater availability of enriched market data products to downstream Distributors and Users. The transformation requirement—which may include aggregation across multiple sources, normalization into a consistent format, enrichment with derived analytics, or repackaging into a proprietary delivery mechanism such as a terminal, API, or feed—is a key element of qualifying as a Data Vendor and ensures that meaningful value is added to the data before redistributing it, thereby increasing the utility and accessibility of market information. To the extent the Program achieves its purpose and results in more widespread redistribution of the Cboe One feeds, market participants may benefit from enhanced access to consolidated, real-time price and last sale information through the distribution channels developed by Data Vendors.

Additionally, the codification of the existing Extranet Service Provider definition within the Fee Schedule provides additional clarity on the program requirements and codifies the definition that exists already in the Cboe Global Markets North American Market Data Policies. Furthermore, the clarification that External Distributors of both Cboe One Summary and Cboe One Premium are only responsible for paying the External Distribution Fee for Cboe One Premium promotes transparency by expressly codifying a practice that is already reflected in the Exchange’s existing application of the fee provision. This reduces potential confusion among market participants regarding their fee obligations.

Not Unfairly Discriminatory

The Exchange believes that the proposed Data Vendor Program is consistent with and complementary to its existing programs for other categories of market participants, and that offering

¹¹ As noted above, a firm that subscribes to both Cboe One Premium and Cboe One Summary is only charged the External Distribution Fee for Cboe One Premium. Accordingly, an eligible Data Vendor that builds out both feeds simultaneously receives only the Premium Waiver Period.

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(5).

¹⁴ *Id.*

a targeted fee waiver program specifically for Data Vendors does not constitute unfair discrimination. The Exchange has a history of establishing differentiated programs that recognize the distinct roles of different market participants. For example, the Small Retail Broker Distribution Program provides discounted Distribution Fees and Data Consolidation Fees for eligible broker-dealers distributing the applicable feeds to Non-Professional Data Users with whom the broker-dealer has a brokerage relationship.¹⁵ This program is designed to address the specific characteristics and economic needs of small retail broker-dealers. Similarly, the Small Retail Broker Hosted Solutions Program provides fee waivers for eligible Small Retail Brokers that provide the applicable feeds to other Small Retail Brokers via hosted solutions.¹⁶ This program recognizes that smaller retail brokers face unique integration challenges and cost constraints when building out hosted data solutions. In addition, the New Internal Distributor Waiver for the BYX Depth Data Feed waives Internal Distribution Fees for three months for Internal Distributors that have not received the BYX Depth Data Feed during the prior 18 months.¹⁷ This program incentivizes new Internal Distributors to integrate the depth-of-book feed into their systems. Lastly, the Exchange's affiliated options exchange, Cboe Exchange, Inc., introduced a 24-month waiver for qualifying retail brokers for its Complex Order Book Feed.¹⁸

The proposed Data Vendor Program is consistent with the Exchange's practice of creating a distinct program to serve a specific use case. Data Vendors occupy a distinct role in the market data distribution ecosystem. Unlike retail brokers, whose primary business is providing trade execution and account management services to Users (with market data distribution as an ancillary feature), Data Vendors are primarily engaged in the business of transforming and redistributing market data to other Distributors. This fundamental difference in business model justifies a distinct program with tailored eligibility criteria and waiver periods. The waiver periods under the proposed Data Vendor Program—12 months for Cboe One Summary and 24 months for Cboe One Premium—are designed to reflect

the relative complexity of integrating each feed. Depth-of-book products such as Cboe One Premium typically require more extensive technical build-out, including handling of larger data volumes, more complex display and aggregation logic, and more rigorous quality assurance processes. Additionally, Cboe One Premium is more expensive relative to the top of book feed. This means that Data Vendors require additional interest from clients in these products before they can even break even. Accordingly, the Exchange believes a 24-month waiver period for this product is appropriate to provide sufficient time for Data Vendors to complete their build-out. Top-of-book and summary products, in contrast, are generally less complex to integrate, and the Exchange believes a 12-month waiver period is appropriate for Cboe One Summary.

Data Vendors' cost and investment trade-offs further support this distinction. A Data Vendor's primary commercial objective is to transform market data and make the resulting product available to unaffiliated downstream Distributors, rather than to provide market data only incidentally in support of another business (in comparison to retail brokers). Because a single Data Vendor can make a Cboe data product available through its platform to multiple downstream Distributors, the waiver is targeted to participants capable of materially expanding the product's distribution footprint. Like any business operator, a Data Vendor evaluates whether to add an Applicable Feed based on expected return on investment, weighing expected revenue against the upfront costs of connectivity, programming, technical integration, and sales and marketing, as well as the ongoing exchange market data fees associated with making the product available to subscribers. In many cases, a Data Vendor may need to add three to five new downstream Distributors merely to offset the ongoing External Distribution Fee. These costs are typically incremental: Data Vendors may already offer one or more equity feeds to clients and add an Applicable Feed only where it is expected to provide return on investment beyond their current offerings. A retail broker's determination is different. A retail broker will often migrate or swap from a competitor's product, and may be able to implement the change through a Data Vendor API into its front-end with a simple entitlement change, without bearing the same upfront connectivity and technical build-out costs.

The waiver periods under the proposed Data Vendor Program are longer than certain other Exchange programs because they support more than initial feed access or recruitment of a first User.¹⁹ A qualifying Data Vendor must complete significant technical and commercial build-out before it can distribute the product and begin recovering its upfront costs. Its downstream Distributors may then have their own evaluation, contracting, and integration cycles, further extending the path to meaningful adoption; as noted above, a Data Vendor may need to add three to five new downstream Distributors to offset the ongoing External Distribution Fee.

The Exchange does not maintain comparable fee waiver programs for larger broker-dealers that distribute market data to their brokerage customers. The Exchange believes this distinction is appropriate. The Small Retail Broker programs are specifically designed to address the cost constraints faced by smaller broker-dealers in building out market data distribution capabilities. Larger broker-dealers typically have established data infrastructure and greater resources to absorb market data distribution costs as part of their overall brokerage operations, and, as such, their cost per user is meaningfully lower. Data distribution by large broker-dealers is typically an ancillary component of brokerage services offered. In contrast, a Data Vendor must incur incremental buildout fees and ongoing External Distribution Fees to establish and support a new external redistribution channel. The relevant distinction is therefore the nature of the service and the associated barriers to distribution, not the size or identity of the participant.

The Data Vendor Program is intended to address a different need: incentivizing specialized data redistribution firms to build out the Applicable Feeds and bring on additional downstream Distributors. By encouraging Data Vendors to invest in the transformation and redistribution of the Exchange's market data products, the Program expands the reach and availability of this data throughout the national market system, benefiting end users and promoting competition. The Exchange therefore believes that creating a targeted program for Data Vendors, in addition to its existing programs for Small Retail Brokers and Internal Distributors, among others, is

¹⁵ See BYX Equities Fee Schedule.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See Securities Exchange Act Release No. 105198 (April 10, 2026), 91 FR 20204 (April 15, 2026) (SR-CBOE-2026-033).

¹⁹ However, as noted above, Cboe Exchange, Inc., offers a 24-month waiver for qualifying retail brokers for its Complex Order Book Feed.

consistent with Section 6(b)(5) of the Act and does not constitute unfair discrimination.

The Exchange also believes the proposed rule change is consistent with Section 6(b)(5) of the Act in that it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Data Vendor Program is available to all External Distributors that satisfy the objective criteria set forth in the proposed definition of Data Vendor and, for waiver eligibility, the additional objective criteria regarding the 18-month lookback for prior receipt of the Applicable Feed and integration or active integration of the Applicable Feed for commercial availability. The distinctions drawn by the definition—(i) requiring that a Data Vendor's primary business objective be the solicitation of unaffiliated third-party Distributors, (ii) that it not maintain a brokerage relationship with Users, and (iii) that it not be an Extranet Service Provider—reflect meaningful differences in business models and market functions.

External Distributors

The Exchange believes that limiting the Data Vendor Program to External Distributors is not unfairly discriminatory. Internal Distributors and External Distributors occupy fundamentally different roles in the market data distribution ecosystem and are not similarly situated participants. An Internal Distributor receives a market data product and distributes it solely within its own entity, whereas an External Distributor redistributes data outside its entity to Users or other Distributors—and a Data Vendor, as a specialized category of External Distributor, further serves the specific function of soliciting unaffiliated third-party Distributors to redistribute a transformed market data product. The Data Vendor Program is designed precisely to incentivize and expand this type of external redistribution, a purpose that has no meaningful application to Internal Distributors who, by definition, cannot advance the proposed program's goal of broadening the reach of the Exchange's market data to downstream Distributors and end-user investors. Furthermore, the Exchange already offers programs for its Internal Distributors that it does not offer for External Distributors.²⁰

Primary Business Is To Redistribute to Distributors

To be eligible as a Data Vendor, an External Distributor must be taking in data for the primary business purpose of selling access to the applicable feed as a service in its own right—not merely redistributing data in incidental support of broader business functions such as trade execution, account management, or brokerage services. The Exchange notes that as part of its business, a Data Vendor may redistribute a market data product to Users, but the primary purpose must be the redistribution of data to Distributors. The Exchange will assess whether an External Distributor's primary business purpose satisfies this criterion based on the External Distributor's publicly available marketing materials. This requirement is not unfairly discriminatory because it is directly tied to the purpose of the Program: encouraging entities whose core commercial activity is the transformation and redistribution of market data to build out the Cboe One feeds and bring on additional downstream Distributors, thereby expanding the reach and availability of the Exchange's data products. An entity that distributes market data only incidentally—as an ancillary feature of a brokerage, execution, or account management business—does not serve this purpose.

Transformed Market Data Product

The Exchange believes it is not unfairly discriminatory to require that a Data Vendor transform market data as a condition of eligibility, as transformation is a definitional characteristic that goes to the core of what distinguishes a Data Vendor from other categories of External Distributors and is directly tied to the Program's purpose of incentivizing participants that create new, differentiated distribution channels for the Exchange's consolidated market data. This reasoning is directly analogous to the rationale for excluding Extranet Service Providers—entities that transmit data without modification and therefore cannot create the type of value-added products, whether delivered via terminal, API, or proprietary feed, that the Program is designed to incentivize. Because the transformation requirement ensures that the Program's fee incentives are directed only at entities whose business is built around adding that value, the Exchange believes this criterion is reasonable and does not constitute unfair discrimination.

No Brokerage Relationship With Users

The Exchange believes it is not unfairly discriminatory to require that Data Vendors not maintain a brokerage relationship with Users. The Exchange already maintains separate programs specifically for qualifying broker-dealers that distribute market data to their brokerage customers. Specifically, the Exchange offers the Small Retail Broker Distribution Program, which provides discounted Distribution Fees and Data Consolidation Fees for eligible broker-dealers distributing the applicable feeds to Non-Professional Data Users with whom the broker-dealer has a brokerage relationship. The Exchange also offers the Small Retail Broker Hosted Solutions Program, which provides fee waivers and lower data costs for Small Retail Brokers that provide the applicable feeds to other Small Retail Brokers via hosted solutions. These existing programs are specifically designed to encourage retail brokers to distribute market data, and the eligibility criteria for those programs reflect the characteristics of the retail brokerage business model.

The proposed Data Vendor Program does not displace or reduce the benefits available to retail brokers under those existing programs. Rather, it creates a parallel and complementary framework for a distinct category of participants—Data Vendors—that do not maintain brokerage relationships with Users, and whose primary business purpose is categorically different from that of a retail broker. Just as it would not be appropriate to extend the Small Retail Broker Program to Data Vendors, it is similarly appropriate—and not unfairly discriminatory—not to extend the Data Vendor Program to retail brokers or other participants that maintain brokerage relationships with their Users, whose needs are separately addressed by the Exchange's existing programs.

Not an Extranet Service Provider

The Exchange also believes it is not unfairly discriminatory to exclude Extranet Service Providers from the Data Vendor Program. An Extranet Service Provider, as defined, is an entity that transmits a market data product to data recipients without modification of the content, format, or other characteristics of the product. Extranet Service Providers do not transform, enrich, or add value to the data they transmit—they serve as conduits, passing data through in its original form. This is fundamentally distinct from the function of a Data Vendor, which, by definition, must transform the Market

²⁰ See, e.g., BYX Equities Fee Schedule that describes the New Internal Distributor Waiver for BYX Depth Data Feed.

Data Product as part of its service offering.

The Data Vendor Program is specifically premised on the value that transformation adds to the data distribution ecosystem. By enabling Data Vendors to create differentiated products—delivered via a terminal, API, proprietary feed, or other value-added mechanism—that appeal to a broader range of downstream Distributors, the Program advances the Exchange's goal of maximizing the reach and utility of its consolidated market data throughout the national market system. Extending the Program to Extranet Service Providers, which do not perform this transformative function, would undermine the Program's core purpose and would not serve the policy goal of broadening distribution of market data products in readily accessible, value-added formats.

The Exchange has created programs to address the distinct needs and business models of different categories of market participants, and the proposed Data Vendor Program is a natural extension of this approach. In addition to the Small Retail Broker programs described above, the Exchange also offers fee waivers for eligible Internal Distributors of the BYX Depth Data Feed, which are intended to incentivize new Internal Distributors to integrate data feeds into their systems. The differentiation between Data Vendors and other categories of market participants reflects the distinct roles these entities play and the distinct incentive structures appropriate to each and does not constitute unfair discrimination.

18-Month and Integration Requirements

The Exchange further believes it is not unfairly discriminatory to limit the Program to Data Vendors that have not received the Applicable Feed for which they seek a waiver during the 18 months preceding the waiver application date, and that have integrated, or are actively in the process of integrating,²¹ the Applicable Feed and making it commercially available to subscribers. The 18-month limitation is designed to ensure that the fee waivers serve their intended purpose of reducing the upfront cost barriers for new market participants. This approach is directly consistent with the analogous frameworks the Exchange has adopted in prior programs—including the Internal Distributor Waiver for the BYX Depth Data Feed, which similarly limits fee relief to distributors that have not

received the relevant feed in the prior 18 months. The integration and commercial availability requirement is likewise reasonable because it ensures that the waiver is directed to Data Vendors that are undertaking the build-out necessary to distribute the Applicable Feed to subscribers, while not requiring full integration or commercial availability before the waiver begins. The Exchange therefore believes that these objective limitations are reasonable and appropriate, prevent the Program from operating as a permanent subsidy for established distributors, and are not unfairly discriminatory.

The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) of the Act,²² which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities. The proposed fee waivers represent a reasonable and equitable allocation of charges. The fee waivers for External Distribution Fees are limited in duration—the Summary Waiver Period for Cboe One Summary and the Premium Waiver Period for Cboe One Premium—and are available only to Data Vendors that have not received the Applicable Feed for which they seek a waiver during the 18 months preceding the waiver application date and that have integrated, or are actively in the process of integrating, the Applicable Feed and making it commercially available to subscribers. This time-limited structure ensures that the waivers serve their intended purpose of incentivizing new market entry and build-out of data feeds. The 18-month lookback requirement further ensures the equitable allocation of fees by limiting the Program to new feeds for Data Vendors, and the integration and commercial availability requirement ensures that the waiver is tied to actual build-out and distribution activity. The Exchange notes that this same 18-month standard is consistent with the requirements applied in its other fee waiver programs.

The clarification that External Distributors of both Cboe One Summary and Cboe One Premium shall only be responsible for paying the External Distribution Fee for Cboe One Premium does not alter the economic substance of the Exchange's existing fee structure and does not impose any new or increased fees on market participants. Rather, it expressly codifies the Exchange's existing application of the

user fee offset provisions—under which an External Distributor disseminating both products is assessed only the Cboe One Premium External Distribution Fee—thereby ensuring that all market participants have a clear and equitable understanding of their fee obligations. The Exchange therefore believes the proposed rule change provides for the equitable allocation of reasonable fees among persons using its facilities.

Lastly, the Exchange believes that the limitations regarding the waiver structure for both Cboe One Premium and Cboe One Summary equitably allocate fees. With respect to the Cboe One Summary waiver, only Data Vendors that (i) have not received Cboe One Summary during the 18 months preceding the waiver application date, (ii) are integrating or actively in the process of integrating Cboe One Summary and making it commercially available to subscribers, and (iii) are not receiving Cboe One Premium are eligible for the Summary Waiver Period. The Exchange believes that this is reasonable, as a firm that subscribes to Cboe One Premium already may elect to receive (without incurring an additional External Distribution Fee) Cboe One Summary Feed. For this reason, there is no need to provide a separate Summary Waiver Period while a firm receives Cboe One Premium, because that firm may receive the Cboe One Summary Feed without paying an additional External Distribution Fee that the proposed program seeks to waive.

Next, the Exchange notes that if a Data Vendor currently receives Cboe One Summary and elects to receive Cboe One Premium under the proposed program, so long as the Data Vendor has not received the Cboe One Premium Feed during the 18 months preceding the waiver application date and satisfies the integration and commercial availability requirement with respect to Cboe One Premium, the Data Vendor may receive the Premium Waiver Period. During that period, the Data Vendor's existing Cboe One Summary²³ subscription will be covered under the Premium Waiver, and no separate External Distribution Fee will be assessed for Cboe One Summary. This is because the Cboe One Summary External Distribution Fee is subsumed

²¹ The Exchange notes that no specific step is required for this, only that Data Vendor is working to integrate the Applicable Feed into its system.

²² 15 U.S.C. 78f(b)(4).

²³ For example, if a Data Vendor currently subscribes to Cboe One Summary Feed and is eligible for the proposed program for the Cboe One Premium Feed, no separate External Distribution Fee would be assessed for Cboe One Summary during the Premium Waiver Period because Cboe One Summary is included in the Cboe One Premium subscription. The Data Vendor would receive the Premium Waiver Period and would not receive a separate Summary Waiver Period during that time.

within the Cboe One Premium External Distribution Fee—accordingly, there is no separate Cboe One Summary fee to waive for a firm receiving Cboe One Premium. The Exchange believes this treatment is reasonable because it avoids providing overlapping or duplicative waiver relief while still incentivizing an existing Summary subscriber to build out Cboe One Premium.

Lastly, if a Data Vendor has not received either Applicable Feed during the 18 months preceding the waiver application date and elects to build out to both simultaneously, the Data Vendor will not receive separate Summary and Premium waivers. Instead, because the Cboe One Summary External Distribution Fee is subsumed within the Cboe One Premium External Distribution Fee, the Data Vendor will receive only the Premium Waiver Period, and no separate Summary Waiver Period will apply while it receives Cboe One Premium.

For all of the foregoing reasons, the Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder, including, in particular, the requirements of Sections 6(b)(4)²⁴ and 6(b)(5)²⁵ of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe the proposed rule change imposes any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed Data Vendor Program is available to all External Distributors that satisfy the objective, clearly defined criteria set forth in the proposed definition of “Data Vendor” and the Program’s waiver eligibility standards. Any External Distributor that, as part of its primary business objective, solicits unaffiliated third-party Distributors to redistribute a transformed Market Data Product, does not maintain a brokerage relationship with Users in connection with the applicable Market Data Product, is not an Extranet Service Provider, has not received the Applicable Feed for which it seeks a waiver during the 18 months preceding the waiver application date, and has integrated or is actively integrating the Applicable Feed and making it

commercially available to subscribers may qualify for the Program on equal terms. Because eligibility is determined by objective, verifiable criteria rather than by subjective or discretionary determinations, no External Distributor is advantaged or disadvantaged relative to any other similarly situated participant.

To the extent that certain External Distributors—such as retail broker-dealers or Extranet Service Providers—do not qualify for the Data Vendor Program, this does not impose a burden on intramarket competition. As described above, retail broker-dealers and Extranet Service Providers are not similarly situated to Data Vendors. Retail broker-dealers distribute market data to their own brokerage customers as an ancillary feature of their core business of providing trade execution and account management services, and their data distribution needs are more appropriately addressed by the Exchange’s existing Small Retail Broker Distribution Program and Small Retail Broker Hosted Solutions Program. Extranet Service Providers, by contrast, transmit data in its original form without transformation, and therefore do not serve the same function in the data distribution ecosystem as Data Vendors, which aggregate, transform, and redistribute data to downstream Distributors. Designing a fee program specifically targeted to Data Vendors, rather than applying it uniformly across all categories of External Distributors, does not burden intramarket competition—it reflects the materially different roles, business models, and barriers of these distinct categories of participants.

Similarly, limiting the Data Vendor Program to External Distributors and not extending it to Internal Distributors does not impose a burden on intramarket competition. Internal Distributors receive and use market data solely within their own legal entities and do not redistribute data to third parties outside their organizations. They are therefore not participants in the same competitive market for external data redistribution that the Program is designed to promote, and their needs are separately addressed through the Exchange’s existing Internal Distributor programs—including the New Internal Distributor Waiver for the BYX Depth Data Feed. The proposed Program is specifically designed to incentivize external redistribution of the Cboe One feeds, a purpose that has no meaningful application to Internal Distributors and that creates no competitive disadvantage for them.

The Exchange does not believe the proposed rule change imposes any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes the proposed rule change will enhance intermarket competition by incentivizing a broader class of market participants to subscribe to and redistribute the Exchange’s market data products, thereby increasing the Exchange’s ability to compete with other national securities exchanges and data vendors for the business of Data Vendors and their downstream Distributor clients.

The market for equity market data is highly competitive. Numerous national securities exchanges offer products that compete directly with the Cboe One Summary Feed and Cboe One Premium Feed. Market participants can obtain comprehensive market data from numerous sources, including competing exchanges (such as NYSE and Nasdaq), the consolidated tape (SIP), and alternative trading systems. Prospective Data Vendors evaluating whether to build out the Cboe One feeds must weigh the upfront costs of connectivity, software development, integration, and commercial launch against the commercial opportunity presented by the Exchange’s data products. The Data Vendor Program is designed to make the Exchange’s market data offering competitively priced relative to alternative options, encouraging Data Vendors to enter the Cboe One distribution chain and thereby expanding the availability and reach of the Exchange’s consolidated multi-exchange market data throughout the national market system.

Far from burdening intermarket competition, the proposed rule change is a direct response to competitive market forces. The Exchange’s decision to offer targeted fee waivers to new Data Vendors reflects its recognition that it must compete aggressively for the participation of data redistribution firms, and that reducing the upfront cost of entry is a legitimate and necessary competitive tool in the market for exchange data products. The Commission has recognized that exchanges operate in a competitive environment with respect to market data, and that exchange fee programs designed to attract new participants and expand market data distribution are consistent with the Act’s goals of promoting competition and efficiency in the national market system.

The proposed clarification that External Distributors of both Cboe One Summary and Cboe One Premium are

²⁴ 15 U.S.C. 78f(b)(4).

²⁵ 15 U.S.C. 78f(b)(5).

only responsible for paying the External Distribution Fee for Cboe One Premium similarly does not impose any burden on intermarket competition. This change does not alter the economic substance of the Exchange's existing fee structure and does not impose any new fees on any market participant. It simply makes explicit the Exchange's existing application of the user fee offset provisions, reducing potential confusion and ensuring that all market participants have a clear and consistent understanding of their fee obligations. Regulatory clarity of this nature promotes, rather than burdens, competition by enabling market participants to make fully informed decisions about their participation in the Exchange's market data programs.

With respect to the Cboe One Summary and Cboe One Premium feeds specifically, the Exchange notes that the proposed Data Vendor Program does not impose any burden on competition arising from differential pricing between Cboe One and the applicable underlying equities feeds.²⁶ The Exchange notes that historically, its pricing for Cboe One products has been based on the sum of the External Distribution Fees for the four underlying equities feeds.²⁷ As an initial matter, not all underlying equities feeds are offered under this Program. The proposed Data Vendor Program applies only to the following feeds: EDGX Top, EDGX Summary Depth, BZX Summary Depth, Cboe One Premium, and Cboe One Summary. A Data Vendor may choose to receive a waiver for Cboe One Summary or Cboe One Premium, or for EDGX Top, or for EDGX Summary Depth, or for BZX Summary Depth, or any combination thereof, subject to the applicable eligibility requirements. However, the proposed Program does not offer fee

waivers for BZX Top, BYX Top, or EDGA Top data feeds, nor does it offer fee waivers for BYX Summary Depth or EDGA Summary Depth. Accordingly, the applicable underlying equities feeds do not "sum" to the applicable Cboe One feed under this proposed Program.²⁸

The Exchange has selected the products covered by the Program based on where it sees the greatest opportunity to expand distribution and align Data Vendor coverage with downstream end-user demand. This product-specific focus is not unfairly discriminatory. All qualifying Data Vendors are subject to the same product-specific eligibility requirements, and offering waivers for some, rather than all four, of the underlying feeds does not result in unequal treatment among similarly situated participants.

Even setting aside the foregoing, the Exchange does not believe that pricing the Cboe One Summary or Cboe One Premium feeds differently from the underlying equities feeds imposes any burden on competition. To date, the Exchange is not aware of any distributor that purchases the underlying equities feeds (either the Top or Summary Depth Feeds) for the purpose of creating its own consolidated product comparable to Cboe One Summary or Cboe One Premium. This demonstrates that the practical market concern underlying any perceived burden—that distributors might be disadvantaged by differential pricing on Cboe One that is not extended to the underlying feeds—does not correspond to actual market behavior.

Moreover, Cboe One Summary and Cboe One Premium are distinct, independent data products—they are not merely consolidations of data from the four underlying equities feeds. In addition to consolidating data from BZX, BYX, EDGX, and EDGA, Cboe One includes supplementary data elements not found in the individual underlying feeds, including data derived from the Securities Information Processor ("SIP") containing information on the national cumulative volume. This additional content makes Cboe One a distinct product with independent utility. Market participants subscribe to the underlying equities feeds and Cboe One for fundamentally different purposes. For example, a subscriber may be interested only in top-of-book data from a single exchange, such as EDGX, for

trading, routing or compliance purposes. Such a subscriber has no need for a consolidated product. Conversely, subscribers seeking a comprehensive, cross-exchange view of Cboe liquidity choose Cboe One precisely because it offers consolidated data with additional enhancements. These distinct use cases support differentiated pricing treatment.

Data Vendors may, in theory, choose to purchase each of the four underlying equities feeds and create their own consolidated product. However, the \$1,000 monthly Data Consolidation Fee associated with purchasing Cboe One (and the primary pricing differential) provides access to a production-ready, supported consolidated product, and a vendor seeking to create a comparable offering independently would bear not only the applicable source-feed, but also the costs of developing and maintaining multiple feed handlers, normalizing the data, applying aggregation logic, performing quality assurance, supporting specification changes, and monitoring production feed health. Clients also generally prefer an official exchange product, such as Cboe One, over a vendor-derived consolidated product that requires reporting across multiple exchange products. From a user-experience perspective, the exchange-provided Cboe One is therefore a better solution. A simple combination of the four underlying feeds also would not recreate all Cboe One content, including supplementary SIP-derived information. The Exchange therefore believes that the \$1,000 monthly Data Consolidation Fee is less than the full economic cost of independently creating and maintaining a comparable product, particularly for a vendor that does not already operate the required infrastructure.

Section 6(b)(8) of the Exchange Act requires that exchange rules not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Cboe One Summary, Cboe One Premium, and the applicable underlying equities feeds are separate products serving different market needs. Just as the Commission has permitted exchanges to offer different fees for depth-of-book data versus top-of-book data, the Exchange should have discretion to price its consolidated summary product differently from its component feeds.

Finally, the proposed Data Vendor Program is pro-competitive. By reducing the cost of consolidated and top-of-book data products for qualifying Data Vendors, the Exchange enables broader distribution of comprehensive market information to downstream distributors and, ultimately, to retail and

²⁶ For Cboe One Summary, the four equities feeds are BZX Top, BYX Top, EDGA Top, and EDGX Top. For Cboe One Premium, the four equities feeds are BZX Summary Depth, BYX Summary Depth, EDGA Summary Depth, and EDGX Summary Depth.

²⁷ For example, under the Small Retail Broker Distribution Program, the discounted External Distribution Fee for Cboe One Summary is \$3,500 per month, which equals the sum of the External Distribution Fees for the four underlying Top feeds: BZX Top (\$2,500), BYX Top (\$250), EDGA Top (\$0), and EDGX Top (\$750). See Cboe BZX, BYX, EDGA, and EDGX U.S. Equities Exchange Fee Schedules. Because the proposed Data Vendor Program does not offer fee waivers for BZX Top, BYX Top, EDGA Top, BYX Summary Depth, or EDGA Summary Depth, the External Distribution Fee for each of those feeds would remain in effect for any Data Vendor receiving those feeds, while the External Distribution Fee for Cboe One Summary (\$0 during the Summary Waiver Period) or Cboe One Premium (\$0 during the Premium Waiver Period) would be waived. This results in a pricing differential between the sum of the underlying equities feeds and the Cboe One feeds under this Program.

²⁸ For example, the External Distribution Fee is \$0 for Cboe One Summary under the proposed Program, but the sum of the four underlying equities feeds under the proposed Program is \$2,750 (\$0 EDGX Top + \$2,500 BZX Top + \$250 BYX Top + \$0 EDGA Top).

institutional investors. Wider access to market data promotes informed investment decisions, enhances market efficiency, and supports the Exchange Act's goals of investor protection and fair and efficient markets. The Exchange does not view external distributors as competitors for its real-time feed offerings; rather, distributors serve as essential conduits that expand delivery of Cboe real-time market data to end users who do not have the technical capability or commercial need to connect directly to Cboe's individual market data feeds. This is particularly important for the retail community, as retail investors typically access market data through vendors rather than purchasing it directly from exchanges. By offering the proposed Data Vendor Program, the Exchange enables distributors to deliver competitively priced, comprehensive market data to a broader audience, thereby enhancing—not burdening—competition in the market data landscape.

For the foregoing reasons, the Exchange does not believe that the proposed rule 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 Act²⁹ and paragraph (f) of Rule 19b-4³⁰ 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeBYX-2026-032 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-CboeBYX-2026-032. 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 (<https://www.sec.gov/rules/sro.shtml>). Copies of the filing will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-CboeBYX-2026-032 and should be submitted on or before October 9, 2026.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³¹

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2026-19134 Filed 9-17-26; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-106377; File No. SR-NYSENAT-2026-25]

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 7.12 Concerning the Resumption of Trading Following a Level 3 Market-Wide Circuit Breaker Halt in Connection With the Industry's Expansion of Trading Hours to 23 Hours Per Day, 5 Days Per Week

September 15, 2026.

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 September 4, 2026, NYSE National, Inc. ("NYSE National" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 7.12 ("Trading Halts Due to Extraordinary Market Volatility") concerning the resumption of trading following a Level 3 market-wide circuit breaker halt in connection with the industry's expansion of trading hours to 23 hours per day, 5 days per week. The proposed rule change is available on the Exchange's website at www.nyse.com and at the principal office of the Exchange.

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.

²⁹ 15 U.S.C. 78s(b)(3)(A).

³⁰ 17 CFR 240.19b-4(f).

³¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE National, Inc. ("NYSE National" or the "Exchange") proposes to amend Rule 7.12 ("Trading Halts Due to Extraordinary Market Volatility") concerning the resumption of trading following a Level 3 market-wide circuit breaker ("MWCB") halt ("Level 3 Market Decline") in connection with the industry's expansion of trading hours to 23 hours per day, 5 days per week ("23/5 Trading"). Some exchanges, including the Exchange's affiliate exchange, NYSE Arca, Inc. ("NYSE Arca"), are planning to offer overnight trading,³ and as a result, the uniform Level 3 Market Decline rules of each exchange are being modified, as explained further below.

Background

The MWCB mechanism under Rule 7.12 provides an important, automatic mechanism that is invoked to promote stability and investor confidence during a period of significant stress when U.S. securities markets experience extreme broad-based declines. All U.S. equity exchanges and FINRA (collectively, the self-regulatory organizations or "SROs") adopted uniform rules relating to the MWCB mechanism in 2012, which are designed to slow the effects of extreme price movement through coordinated trading halts across U.S. securities markets when severe price declines reach levels that may exhaust market liquidity.⁴ Such market-wide circuit breakers provide for trading halts in all U.S. cash equity and equities options markets during a severe market decline as measured by a single-day decline in the S&P 500 Index during regular trading hours.

Pursuant to Rule 7.12, a market-wide trading halt will be triggered if the S&P 500 Index declines in price by specified percentages from the prior day's closing price of that index. Currently, the triggers are set at three circuit breaker thresholds: 7% (Level 1), 13% (Level 2), and 20% (Level 3). A market decline

that triggers a Level 1 or Level 2 halt after 9:30 a.m. ET and before 3:25 p.m. ET would halt market-wide trading for 15 minutes, while a similar market decline at or after 3:25 p.m. ET would not halt market-wide trading. If a Level 3 Market Decline occurs at any time during the trading day, trading in all stocks will halt on the Exchange for the remainder of the trading day, and will resume the following trading day at 7:00 a.m. ET.

Proposal

The Exchange now proposes to amend Rule 7.12 to reflect extended trading hours under 23/5 Trading. On December 6, 2026, several exchanges, including NYSE Arca, intend to offer new overnight trading sessions that would be available from 9:00 p.m. ET to 4:00 a.m. ET, significantly increasing their hours of operation in response to customer demand.

As discussed, consistent with the uniform rules in place across all SROs, current Rule 7.12(b)(ii) provides that if a Level 3 Market Decline occurs at any time during the trading day, the Exchange shall halt trading in all stocks on the Exchange for the remainder of the trading day. Currently, that means that the earliest that any exchange would re-open trading after a Level 3 Market Decline is 4:00 a.m. ET the following day, since no SROs are open for trading before 4:00 a.m. ET.

Unless amended, when 23/5 Trading is launched, the current rule's reference to halting "for the remainder of the trading day"⁵ would require SROs participating in 23/5 Trading to re-open trading at an earlier time, *i.e.*, 9:00 p.m. ET on the same calendar day, when those SROs' systems would generally become available for overnight trading. The Exchange does not believe that this is an expected or desired result and is therefore amending this rule in coordination with the other SROs such that trading on any SRO will not resume until 4:00 a.m. ET or later on the following trading day, consistent with current market practice. This proposed rule change is therefore not intended to make any substantive changes to the MWCB mechanism. Rather, the proposed rule change would preserve the current resumption time following a Level 3 Market Decline.

To effect this change, the Exchange proposes to delete the language in Rule 7.12(b)(ii) that provides that trading in all stocks will halt on the Exchange "for the remainder of the trading day" if a Level 3 Market Decline occurs at any time during the trading day, and replace

it with new language that explicitly provides that trading in all stocks would halt on the Exchange until 4:00 a.m. ET or later on the following trading day.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁶ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁷ in particular, 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.

The MWCB mechanism described in Rule 7.12 is an important, automatic mechanism that is invoked to promote stability and investor confidence during periods of significant stress when U.S. securities markets experience extreme broad-based declines. The proposed rule change, when applied uniformly by all SROs, would ensure that the current 4:00 a.m. ET resumption time following a Level 3 halt continues to apply under 23/5 Trading, notwithstanding current rule text implying that the resumption time would coincide with the start of overnight trading on SROs operating an overnight session.

Rather than leave the rule in place as is, which would result in an earlier resumption time than originally contemplated when the rule was adopted, the Exchange, the other U.S. equity exchanges, and FINRA met alongside industry representatives to determine the appropriate resumption time. Following those discussions, the collective decision was made to retain the 4:00 a.m. ET resumption time, notwithstanding the fact that an earlier resumption time would be possible with the introduction of 23/5 Trading. The proposed rule change codifies this decision into the Exchange's rules. The Exchange understands that the other SROs will also be filing similar proposed rule changes. As a result, the market as a whole, including on- and off-exchange, will continue to be subject to harmonized rules for the resumption of trading following a Level 3 Market Decline.

While the SROs had previously decided to tie the resumption time following a Level 3 halt to the earliest SRO opening time, the upcoming transition to 23/5 Trading raises various concerns that warrant a change from the current approach.

First, the Exchange notes that the MWCB mechanism was designed to

³ See, e.g., Securities Exchange Act Release No. 105532 (May 21, 2026), 91 FR 31509 (May 27, 2026) (SR-NYSEARCA-2026-53) ("NYSE Arca 23/5 Trading Notice"). The Exchange does not intend to implement 23/5 Trading at this time.

⁴ See Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR-BATS-2011-038; SR-BYX-2011-025; SR-BX-2011-068; SR-CBOE-2011-087; SR-C2-2011-024; SR-CHX-2011-30; SR-EDGA-2011-31; SR-EDGX-2011-30; SR-FINRA-2011-054; SR-ISE-2011-61; SR-NASDAQ-2011-131; SR-NSX-2011-11; SR-NYSE-2011-48; SR-NYSEAmex-2011-73; SR-NYSEArca-2011-68; SR-Phlx-2011-129) ("MWCB Approval Order").

⁵ See Rule 7.12(b)(ii).

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

provide a cooling-off period where market participants would be provided with additional time to evaluate the market events that led to the decline before determining how to position their trading activity for the next day. With the introduction of 23/5 Trading and the start of overnight trading on some SROs at 9:00 p.m. ET, however, this cooling-off period could be materially shortened, reducing one of the key benefits that the MWCB mechanism was designed to provide in the first place. Rather than shorten the cooling-off period and risk this benefit, the Exchange believes the market would be better served by a change to the length of the associated trading halt that mirrors current market practice. Under the proposed rule, as is the case today, after a Level 3 halt, all SROs would reopen trading at 4:00 a.m. ET or later, and no SRO would offer an overnight trading session starting on the day of a Level 3 halt.

Second, overnight trading may be subject to different liquidity and participation considerations than the current pre-market sessions that start at or after 4:00 a.m. ET. Notably, while retail investors have expressed interest in overnight trading, the Exchange expects that institutional investors will take more time to transition to a round-the-clock model. However, such institutional participation may be of heightened importance following a Level 3 halt, as these investors are likely to have views on the underlying market events that led to the Level 3 Market Decline in the first place. The Exchange is concerned that opening during hours that such participants do not normally trade may impact the quality of price discovery at a time of significant market volatility. Waiting until 4:00 a.m. ET to resume trading would facilitate broader participation and therefore price discovery.

Finally, the Exchange notes that the Commission recently approved an amendment to the Plan to Address Extraordinary Market Volatility (“LULD Plan”) that would establish new price protections from 9:00 p.m. ET to 4:00 a.m. ET.⁸ While these price bands would help to assure a fair and orderly market during normal market conditions, it is possible that they would instead prevent normal price discovery following a Level 3 Market Decline. Rather than allowing trading to

resume with such price bands in effect, which would represent a change from the current trading reopening following a Level 3 Market Decline, the Exchange believes that requiring SROs to wait until 4:00 a.m. ET or later to resume trading would ensure that price discovery can occur unimpeded during pre-market trading, as it does today, which may further inform prices going into the opening auction and regular market hours trading following a Level 3 halt.

Given the factors discussed above, the Exchange believes that trading in all securities on the Exchange should not resume before 4:00 a.m. ET on the trading day after a Level 3 halt. This decision, which the Exchange understands will also be reflected in the rules of the other SROs, would promote a fair and orderly market at a time of significant market volatility, and thereby protect investors and the public interest. In addition, while the actual Level 3 resumption time would not be changing in practice—as proposed, the current resumption time and future resumption time would both be 4:00 a.m. ET at the earliest—the Exchange believes that it is appropriate to amend its rules to ensure that its rules reflect the upcoming changes due to 23/5 Trading. Without this change, market participants may mistakenly believe that the Exchange intends for trading to reopen on overnight trading exchanges at 9:00 p.m. ET following a Level 3 halt. The proposed rule change would therefore facilitate operational transparency while providing for a fair and orderly market.

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 because the proposal would ensure the continued, uninterrupted operation of a consistent mechanism to halt trading across U.S. securities markets. Further, the Exchange understands that the other SROs intend to file proposed rule changes to ensure a consistent resumption time at 4:00 a.m. or later ET across markets. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act⁹ and subparagraph (f)(6) of Rule 19b–4 thereunder.¹⁰

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR–NYSENAT–2026–25 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.

⁹ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁰ 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

⁸ See Securities Exchange Act Release No. 106042 (August 5, 2026), 91 FR 51515 (August 10, 2026) (Order Granting Approval of the Twenty-Seventh Amendment to the National Market System Plan to Address Extraordinary Market Volatility to Establish Temporary Price Band Protections in Overnight Trading).

All submissions should refer to file number SR-NYSENAT-2026-25. 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 (<https://www.sec.gov/rules/sro.shtml>). Copies of the filing will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NYSENAT-2026-25 and should be submitted on or before October 9, 2026.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2026-19122 Filed 9-17-26; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-106373; File No. SR-CboeEDGA-2026-028]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Introduce a Data Vendor Program

September 15, 2026.

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 September 8, 2026, Cboe EDGA Exchange, Inc. (the "Exchange" or "EDGA") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGA Exchange, Inc. (the "Exchange" or "EDGA") proposes to

introduce a Data Vendor Program, which includes introducing a new defined term of Data Vendor, along with other clarifying changes. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Commission's website (<https://www.sec.gov/rules/sro.shtml>), the Exchange's website (https://www.cboe.com/us/equities/regulation/rule_filings/edga/), and at the principal office of the Exchange.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to (i) introduce a definition of Data Vendor; (ii) codify the existing definition (as defined in the Exchange's applicable North American Market Data Policies) of Extranet Service Provider; (iii) codify an existing practice that permits an External Distributor of both Cboe One Summary and Cboe One Premium to be liable only for the External Distribution Fee for Cboe One Premium; and (iv) create a program for Data Vendors in order to incentivize Data Vendors to build out the applicable feeds and make them commercially available to subscribers.³ The proposed program will provide fee waivers (as described below) for External Distribution Fees for Data Vendors for the Cboe One Summary Feed and Cboe One Premium Feed.

Proposed Definitions

In connection with this proposed program, the Exchange first proposes to adopt a definition for a specific category of participants. Specifically, the

Exchange proposes to establish the term "Data Vendor" to mean "an External Distributor that (i) is actively engaged, as part of its primary business objective, in the solicitation of unaffiliated third-party Distributors to redistribute a transformed Market Data Product; (ii) does not maintain a brokerage relationship with Users in connection with the receipt or use of the applicable Market Data Product; and (iii) is not an Extranet Service Provider." As part of this new definition, and as further described below, the Exchange proposes to codify the existing definition of Extranet Service Provider within the Cboe Global North American Market Data Policies to be within its Fee Schedule.

The Exchange has also established objective, verifiable criteria for determining eligibility as a Data Vendor. The following criteria, which will be reflected in the Exchange's Fee Schedule, must be satisfied: (1) the External Distributor must identify itself as a Data Vendor in publicly available marketing materials; (2) the External Distributor must transform the applicable Market Data Product before redistribution, which may include aggregation across multiple data sources, normalization into a consistent format, enrichment with reference data or analytics, or repackaging into a proprietary delivery mechanism (e.g., terminal, API, or proprietary feed); (3) the External Distributor must redistribute the applicable transformed Market Data Product to downstream Distributors as part of a paid commercial offering; (4) the External Distributor must not maintain a brokerage relationship with any User to whom it distributes the applicable Market Data Product; (5) the External Distributor must not be an Extranet Service Provider; and (6) the External Distributor must be actively engaged in the solicitation of unaffiliated third-party Distributors to subscribe to and redistribute the applicable transformed Market Data Product. Upon request, the External Distributor must provide a written attestation certifying compliance with the foregoing criteria. The Exchange may request supporting documentation, including but not limited to Distributor subscriber lists, revenue breakdowns by recipient type, and descriptions of the transformations applied to the Market Data Product. These objective eligibility criteria ensure that the Data Vendor Program is equitably applied to all similarly situated market participants.

¹¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Exchange initially submitted the proposed rule change on July 1, 2026 (SR-CboeEDGA-2026-023). On July 15, 2026, the Exchange withdrew that filing and submitted SR-CboeEDGA-2026-024. On September 8, 2026, the Exchange withdrew that filing and submitted this filing.

External Distributor

To begin, “Data Vendor” is intended to only encompass External Distributors and not Internal Distributors. An External Distributor is defined as a Distributor that receives the Exchange Market Data product and then distributes that data to a third party or one or more Users outside the Distributor’s own entity.⁴ The Exchange seeks to adopt this program in order to encourage broader redistribution of this data. As such, the Exchange limits this to External Distributors as the intent of this program is to have data distributed outside one’s own entity.

Primary Business Is To Redistribute to Distributors

To be eligible as a Data Vendor, an External Distributor must be taking in data for the primary business purpose of selling access to the applicable feed as a service in its own right, not merely redistributing data in incidental support of broader business functions such as trade execution, account management, or brokerage services. The Exchange notes that, as part of its business, a Data Vendor may redistribute a market data product to Users, but the primary purpose must be to redistribute data to Distributors. The Exchange will assess whether an External Distributor’s primary business purpose satisfies this criterion based on the External Distributor’s publicly available marketing materials. If the Exchange were to modify this requirement to permit a primary business purpose of redistribution to either Distributors or Users, it would unintentionally include firms that may redistribute only to Users and that are not traditionally considered data vendors (e.g., a media outlet or a bank).

Transformed Market Data Product

To be eligible, the Exchange requires that the Data Vendor not simply pass through data in its original form. Transformation may include aggregation across multiple sources, normalization into a consistent format, enrichment with derived analytics, or repackaging into a proprietary delivery mechanism (e.g., terminal, API, feed), or any other value-added processing that distinguishes the output from the original source data.

No Brokerage Relationship with Users

Next, the Exchange proposes that the definition of Data Vendor include a stipulation that a Data Vendor must not maintain a brokerage relationship with Users who receive the market data

product. The Exchange already has programs aimed at retail brokers, for example, both the Small Retail Broker Program and the Small Retail Broker Hosted Solutions Program.⁵ This proposed program is intended to encourage Data Vendors specifically to take in the applicable feeds and distribute them. A Data Vendor’s service model is different from a retail broker’s, as a Data Vendor’s business model is built around providing data to firms and Users alike, whereas a retail broker’s business model is focused on connecting Users to markets in order to trade and may include providing market data as part of its offering to its Users. As the Exchange already has programs specifically for retail brokers, the Exchange does not believe it would be appropriate to include retail brokers here. The Exchange notes that if a Data Vendor that is currently receiving a fee waiver under this Program subsequently commences a brokerage relationship with its Users, it will no longer satisfy the definition of Data Vendor and will cease to be eligible for the Program. In such case, the External Distributor would be assessed the standard External Distribution Fee for the applicable feed as of the date it no longer satisfies the definition of Data Vendor.

Not an Extranet Service Provider

As noted above, the Exchange proposes also to define Extranet Service Provider when it introduces the definition of Data Vendor into its Fee Schedule. Today, this term already exists in the Cboe Global Markets North American Data Policies.⁶ The Exchange proposes to codify this definition in its Fee Schedule because the proposed definition of Data Vendor directly references this defined term. Specifically, the Exchange proposes to codify that an Extranet Service Provider is “an entity that has entered into a Cboe Global Markets Global Data Agreement and Transmits an Exchange Market Data Product, via an extranet operated by such entity, to data recipients. ‘Transmit’ means to direct an Exchange Market Data Product to one or more data recipients without modification of the content, format, or other characteristics of the Exchange Market Data Product.” An Extranet Service Provider is not authorized to use or process an Exchange Market Data Product for any purpose.

Applicable Data Feeds

By way of background, the Exchange offers the Cboe One Premium Data Feed,

which is a data feed that disseminates, on a real-time basis, the aggregate best bid and offer (“BBO”) of all displayed orders for securities traded on the Exchange and its affiliated equities exchanges and enables recipients to receive aggregated two-sided quotations from EDGA and its affiliated equities exchanges for up to twelve (12) price levels (and, for a limited time, up to five (5) price levels).⁷ The Cboe One Premium Data Feed is created using the data from the Exchange and each of its affiliated equities exchanges’ Summary Depth data feeds (allowing for up to 48 total price levels).

The Exchange also offers the Cboe One Summary Data Feed, which disseminates, on a real-time basis, the aggregate BBO of all displayed orders for securities traded on EDGA and its affiliated equities exchanges and also contains individual last sale information for EDGA and its affiliated equities exchanges.⁸

External Distribution Fees for Cboe One Premium and Cboe One Summary

The proposed rule change also clarifies that External Distributors of both Cboe One Summary and Cboe One Premium shall only be responsible for paying the External Distribution Fee for Cboe One Premium. The current fee schedule provides that “Cboe One Summary User Fees can be applied to Cboe One Summary and Cboe One Premium External Distribution Fees.” Under the Exchange’s existing application of this provision, an External Distributor receiving both Cboe One Summary and Cboe One Premium is assessed only the Cboe One Premium External Distribution Fee⁹, and User

⁷ EDGA filed to increase the levels of the Cboe One Premium Data Feed from five (5) levels to twelve (12) levels. To help in this transition, it is currently supporting both the five and twelve level feeds; however, as stated in its rule, EDGA shall sunset the five (5) level feed of Cboe One Premium by December 31, 2026 (with the date to be announced via Exchange Notice). See Rule 13.8(b)(i).

⁸ The Cboe One Summary Feed is distinguishable from the Cboe One Premium Feed in that it does not provide depth of book data. In contrast, the Cboe One Premium Feed contains all the available data in the Cboe One Summary Feed and also provides depth of book data.

⁹ To better illustrate this concept, consider the following examples. Example 1: If a firm subscribes to only Cboe One Summary, its User costs will be used to offset the External Distribution Fee for Cboe One Summary. In the event the firm’s User costs total \$2,000, the firm will pay \$2,000 in User fees and \$3,000 (\$5,000 – \$2,000) for its External Distribution Fee. Example 2: If a firm subscribes only to Cboe One Premium, its User costs will be used to offset the External Distribution Fee for Cboe One Premium. In the event a firm’s User costs total \$10,000, the firm will pay \$10,000 in User fees and \$2,500 (\$12,500 – \$10,000) for its External

⁴ See EDGA Equities Fee Schedule.

⁵ See EDGA Equities Fee Schedule.

⁶ See Market Data Policies.pdf.

Fees for both Cboe One Summary and Cboe One Premium may be applied to offset that fee.

The Exchange is now proposing to make this treatment explicit by adding clarifying language to the fee schedule stating that External Distributors of both feeds are only responsible for paying the External Distribution Fee for Cboe One Premium. This amendment does not alter the economic substance of the Exchange's existing fee structure, nor does it impose any new or increased fees on market participants. Rather, it reduces potential ambiguity by expressly codifying the Exchange's existing application of the user fee offset provisions. The Exchange believes this clarification will promote transparency and reduce confusion among External Distributors regarding their fee obligations under the Cboe One market data product offerings.

Impact of Proposed Program

As noted above, the proposed program would waive External Distribution Fees for Data Vendors of the Cboe One Summary Feed and the Cboe One Premium Feed (each, an "Applicable Feed") that satisfy certain eligibility requirements. A Data Vendor must not have received the Applicable Feed for which it seeks the waiver during the 18 months¹⁰ preceding the waiver application date, and must integrate, or be actively in the process of integrating, the Applicable Feed and making it commercially available to its subscribers. The Data Vendor need not have fully integrated the Applicable Feed or made it commercially available before the waiver begins. For a qualifying Data Vendor, the applicable waiver commences on the date it first receives the Applicable Feed, and, if that date occurs mid-month, that partial month counts as the first month of the waiver period. Specifically, the Exchange proposes to waive the External Distribution Fee of \$5,000 per month for Cboe One Summary for 12 months (the "Summary Waiver Period"), except that a Data Vendor is not eligible for a Summary Waiver Period if it is receiving Cboe One

Premium because Cboe One Summary is included in the Cboe One Premium External Distribution Fee as noted herein. To clarify, because a Data Vendor receiving Cboe One Premium pays only the Cboe One Premium External Distribution Fee (and no separate fee is assessed for Cboe One Summary), there is no separate Cboe One Summary External Distribution Fee to waive for such a firm.¹¹ The Exchange proposes to waive the External Distribution Fee of \$12,500 per month for Cboe One Premium for 24 months (the "Premium Waiver Period").

If an eligible Data Vendor already receives Cboe One Summary, it may still receive the Premium Waiver Period if it has not received Cboe One Premium during the 18 months preceding the waiver application date and satisfies the integration and commercial availability requirement with respect to Cboe One Premium. During the Premium Waiver Period, the Data Vendor's Cboe One Summary subscription would be covered under the Premium Waiver, and no separate External Distribution Fee would be assessed for Cboe One Summary. Similarly, an eligible Data Vendor that builds out both feeds simultaneously would receive only the Premium Waiver Period.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.¹² Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹³ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with

the Section 6(b)(5)¹⁴ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes the proposed rule change promotes just and equitable principles of trade by establishing a clear, objective, and transparent definition of "Data Vendor" that properly captures the characteristics distinguishing Data Vendors from other categories of External Distributors. The proposed definition sets forth specific, verifiable criteria—namely, that a Data Vendor must (i) be an External Distributor; (ii) be actively engaged, as part of its primary business objective, in the solicitation of unaffiliated third-party Distributors to redistribute a transformed Market Data Product; (iii) not maintain a brokerage relationship with Users; and (iv) not be an Extranet Service Provider. By establishing objective eligibility criteria, the proposed rule change ensures that similarly situated market participants are treated consistently and that the benefits of the Data Vendor Program are available to all External Distributors that meet the defined qualifications.

The Exchange further believes that the codification of the existing Extranet Service Provider definition within the Fee Schedule promotes just and equitable principles of trade. Because the proposed Data Vendor definition directly references the term "Extranet Service Provider," market participants seeking to understand their eligibility for the Program should not be required to consult the Cboe Global Markets North American Data Policies to determine how that term applies. By incorporating both defined terms into the Fee Schedule itself, the Exchange ensures that participants have access to the complete framework.

The Exchange further believes that the proposed rule change removes impediments to and perfects the mechanism of a free and open market and a national market system. The Data Vendor Program is designed to incentivize Data Vendors to integrate the Applicable Feeds, make them commercially available to subscribers, and redistribute them by providing fee waivers for External Distribution Fees for the Cboe One Summary Feed and Cboe One Premium Feed. By waiving the External Distribution Fee of \$5,000 per month for Cboe One Summary for the Summary Waiver Period and waiving the External Distribution Fee of \$12,500 per month for Cboe One Premium for the Premium Waiver

Distribution Fee. Example 3: If a firm subscribes to both Cboe One Summary and Cboe One Premium, only the External Distribution Fee for Cboe One Premium is assessed and this fee may be offset by both Cboe One Summary and Cboe One Premium User fees. In the event a firm's User costs are \$2,000 for Cboe One Summary and \$10,000 for Cboe One Premium, the firm will pay a total of \$12,000 in User fees (\$10,000 + \$2,000) and it will pay \$500 for its External Distribution Fee (\$12,500 – (\$10,000 + \$2,000)).

¹⁰ The Exchange notes that this same 18-month requirement is the standard for its other fee waiver programs. See EDGA Equities Fee Schedule.

¹¹ As noted above, a firm that subscribes to both Cboe One Premium and Cboe One Summary is only charged the External Distribution Fee for Cboe One Premium. Accordingly, an eligible Data Vendor that builds out both feeds simultaneously receives only the Premium Waiver Period.

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(5).

¹⁴ *Id.*

Period, the Exchange encourages broader redistribution of its market data products. Broader distribution of market data enhances price transparency and supports informed decision-making across the national market system, which in turn perfects the mechanism of a free and open market by ensuring that market participants have access to comprehensive, competitive data offerings.

By allowing the waiver to begin while an eligible Data Vendor is actively integrating the Applicable Feed and working to make it commercially available, the Program lowers barriers to entry during the build-out period and incentivizes a broader set of market participants to enter the Cboe One distribution chain, thereby expanding the availability of consolidated multi-exchange market data throughout the national market system.

The proposed rule change also protects investors and the public interest. By encouraging Data Vendors to take in, transform, and redistribute market data feeds, the proposed program promotes greater availability of enriched market data products to downstream Distributors and Users. The transformation requirement—which may include aggregation across multiple sources, normalization into a consistent format, enrichment with derived analytics, or repackaging into a proprietary delivery mechanism such as a terminal, API, or feed—is a key element of qualifying as a Data Vendor and ensures that meaningful value is added to the data before redistributing it, thereby increasing the utility and accessibility of market information. To the extent the Program achieves its purpose and results in more widespread redistribution of the Cboe One feeds, market participants may benefit from enhanced access to consolidated, real-time price and last sale information through the distribution channels developed by Data Vendors.

Additionally, the codification of the existing Extranet Service Provider definition within the Fee Schedule provides additional clarity on the program requirements and codifies the definition that exists already in the Cboe Global Markets North American Market Data Policies. Furthermore, the clarification that External Distributors of both Cboe One Summary and Cboe One Premium are only responsible for paying the External Distribution Fee for Cboe One Premium promotes transparency by expressly codifying a practice that is already reflected in the Exchange's existing application of the fee provision. This reduces potential

confusion among market participants regarding their fee obligations.

Not Unfairly Discriminatory

The Exchange believes that the proposed Data Vendor Program is consistent with and complementary to its existing programs for other categories of market participants, and that offering a targeted fee waiver program specifically for Data Vendors does not constitute unfair discrimination. The Exchange has a history of establishing differentiated programs that recognize the distinct roles of different market participants. For example, the Small Retail Broker Distribution Program provides discounted Distribution Fees and Data Consolidation Fees for eligible broker-dealers distributing the applicable feeds to Non-Professional Data Users with whom the broker-dealer has a brokerage relationship.¹⁵ This program is designed to address the specific characteristics and economic needs of small retail broker-dealers. Similarly, the Small Retail Broker Hosted Solutions Program provides fee waivers for eligible Small Retail Brokers that provide the applicable feeds to other Small Retail Brokers via hosted solutions.¹⁶ This program recognizes that smaller retail brokers face unique integration challenges and cost constraints when building out hosted data solutions. In addition, the New Internal Distributor Waiver for the EDGA Depth Data Feed waives Internal Distribution Fees for three months for Internal Distributors that have not received the EDGA Depth Data Feed during the prior 18 months.¹⁷ This program incentivizes new Internal Distributors to integrate the depth-of-book feed into their systems. Lastly, the Exchange's affiliated options exchange, Cboe Exchange, Inc., introduced a 24-month waiver for qualifying retail brokers for its Complex Order Book Feed.¹⁸

The proposed Data Vendor Program is consistent with the Exchange's practice of creating a distinct program to serve a specific use case. Data Vendors occupy a distinct role in the market data distribution ecosystem. Unlike retail brokers, whose primary business is providing trade execution and account management services to Users (with market data distribution as an ancillary feature), Data Vendors are primarily engaged in the business of transforming and redistributing market data to other

Distributors. This fundamental difference in business model justifies a distinct program with tailored eligibility criteria and waiver periods. The waiver periods under the proposed Data Vendor Program—12 months for Cboe One Summary and 24 months for Cboe One Premium—are designed to reflect the relative complexity of integrating each feed. Depth-of-book products such as Cboe One Premium typically require more extensive technical build-out, including handling of larger data volumes, more complex display and aggregation logic, and more rigorous quality assurance processes. Additionally, Cboe One Premium is more expensive relative to the top of book feed. This means that Data Vendors require additional interest from clients in these products before they can even break even. Accordingly, the Exchange believes a 24-month waiver period for this product is appropriate to provide sufficient time for Data Vendors to complete their build-out. Top-of-book and summary products, in contrast, are generally less complex to integrate, and the Exchange believes a 12-month waiver period is appropriate for Cboe One Summary.

Data Vendors' cost and investment trade-offs further support this distinction. A Data Vendor's primary commercial objective is to transform market data and make the resulting product available to unaffiliated downstream Distributors, rather than to provide market data only incidentally in support of another business (in comparison to retail brokers). Because a single Data Vendor can make a Cboe data product available through its platform to multiple downstream Distributors, the waiver is targeted to participants capable of materially expanding the product's distribution footprint. Like any business operator, a Data Vendor evaluates whether to add an Applicable Feed based on expected return on investment, weighing expected revenue against the upfront costs of connectivity, programming, technical integration, and sales and marketing, as well as the ongoing exchange market data fees associated with making the product available to subscribers. In many cases, a Data Vendor may need to add three to five new downstream Distributors merely to offset the ongoing External Distribution Fee. These costs are typically incremental: Data Vendors may already offer one or more equity feeds to clients and add an Applicable Feed only where it is expected to provide return on investment beyond their current offerings. A retail broker's

¹⁵ See EDGA Equities Fee Schedule.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See Securities Exchange Act Release No. 105198 (April 10, 2026), 91 FR 20204 (April 15, 2026) (SR-CBOE-2026-033).

determination is different. A retail broker will often migrate or swap from a competitor's product, and may be able to implement the change through a Data Vendor API into its front-end with a simple entitlement change, without bearing the same upfront connectivity and technical build-out costs.

The waiver periods under the proposed Data Vendor Program are longer than certain other Exchange programs because they support more than initial feed access or recruitment of a first User.¹⁹ A qualifying Data Vendor must complete significant technical and commercial build-out before it can distribute the product and begin recovering its upfront costs. Its downstream Distributors may then have their own evaluation, contracting, and integration cycles, further extending the path to meaningful adoption; as noted above, a Data Vendor may need to add three to five new downstream Distributors to offset the ongoing External Distribution Fee.

The Exchange does not maintain comparable fee waiver programs for larger broker-dealers that distribute market data to their brokerage customers. The Exchange believes this distinction is appropriate. The Small Retail Broker programs are specifically designed to address the cost constraints faced by smaller broker-dealers in building out market data distribution capabilities. Larger broker-dealers typically have established data infrastructure and greater resources to absorb market data distribution costs as part of their overall brokerage operations, and, as such, their cost per user is meaningfully lower. Data distribution by large broker-dealers is typically an ancillary component of brokerage services offered. In contrast, a Data Vendor must incur incremental buildout fees and ongoing External Distribution Fees to establish and support a new external redistribution channel. The relevant distinction is therefore the nature of the service and the associated barriers to distribution, not the size or identity of the participant.

The Data Vendor Program is intended to address a different need: incentivizing specialized data redistribution firms to build out the Applicable Feeds and bring on additional downstream Distributors. By encouraging Data Vendors to invest in the transformation and redistribution of the Exchange's market data products, the Program expands the reach and

availability of this data throughout the national market system, benefiting end users and promoting competition. The Exchange therefore believes that creating a targeted program for Data Vendors, in addition to its existing programs for Small Retail Brokers and Internal Distributors, among others, is consistent with Section 6(b)(5) of the Act and does not constitute unfair discrimination.

The Exchange also believes the proposed rule change is consistent with Section 6(b)(5) of the Act in that it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Data Vendor Program is available to all External Distributors that satisfy the objective criteria set forth in the proposed definition of Data Vendor and, for waiver eligibility, the additional objective criteria regarding the 18-month lookback for prior receipt of the Applicable Feed and integration or active integration of the Applicable Feed for commercial availability. The distinctions drawn by the definition—(i) requiring that a Data Vendor's primary business objective be the solicitation of unaffiliated third-party Distributors, (ii) that it not maintain a brokerage relationship with Users, and (iii) that it not be an Extranet Service Provider—reflect meaningful differences in business models and market functions.

External Distributors

The Exchange believes that limiting the Data Vendor Program to External Distributors is not unfairly discriminatory. Internal Distributors and External Distributors occupy fundamentally different roles in the market data distribution ecosystem and are not similarly situated participants. An Internal Distributor receives a market data product and distributes it solely within its own entity, whereas an External Distributor redistributes data outside its entity to Users or other Distributors—and a Data Vendor, as a specialized category of External Distributor, further serves the specific function of soliciting unaffiliated third-party Distributors to redistribute a transformed market data product. The Data Vendor Program is designed precisely to incentivize and expand this type of external redistribution, a purpose that has no meaningful application to Internal Distributors who, by definition, cannot advance the proposed program's goal of broadening the reach of the Exchange's market data to downstream Distributors and end-user investors. Furthermore, the Exchange already offers programs for its

Internal Distributors that it does not offer for External Distributors.²⁰

Primary Business Is To Redistribute to Distributors

To be eligible as a Data Vendor, an External Distributor must be taking in data for the primary business purpose of selling access to the applicable feed as a service in its own right—not merely redistributing data in incidental support of broader business functions such as trade execution, account management, or brokerage services. The Exchange notes that as part of its business, a Data Vendor may redistribute a market data product to Users, but the primary purpose must be the redistribution of data to Distributors. The Exchange will assess whether an External Distributor's primary business purpose satisfies this criterion based on the External Distributor's publicly available marketing materials. This requirement is not unfairly discriminatory because it is directly tied to the purpose of the Program: encouraging entities whose core commercial activity is the transformation and redistribution of market data to build out the Cboe One feeds and bring on additional downstream Distributors, thereby expanding the reach and availability of the Exchange's data products. An entity that distributes market data only incidentally—as an ancillary feature of a brokerage, execution, or account management business—does not serve this purpose.

Transformed Market Data Product

The Exchange believes it is not unfairly discriminatory to require that a Data Vendor transform market data as a condition of eligibility, as transformation is a definitional characteristic that goes to the core of what distinguishes a Data Vendor from other categories of External Distributors and is directly tied to the Program's purpose of incentivizing participants that create new, differentiated distribution channels for the Exchange's consolidated market data. This reasoning is directly analogous to the rationale for excluding Extranet Service Providers—entities that transmit data without modification and therefore cannot create the type of value-added products, whether delivered via terminal, API, or proprietary feed, that the Program is designed to incentivize. Because the transformation requirement ensures that the Program's fee incentives are directed only at entities

¹⁹ However, as noted above, Cboe Exchange, Inc., offers a 24-month waiver for qualifying retail brokers for its Complex Order Book Feed.

²⁰ See, e.g., EDGA Equities Fee Schedule that describes the New Internal Distributor Waiver for EDGA Depth Data Feed.

whose business is built around adding that value, the Exchange believes this criterion is reasonable and does not constitute unfair discrimination.

No Brokerage Relationship With Users

The Exchange believes it is not unfairly discriminatory to require that Data Vendors not maintain a brokerage relationship with Users. The Exchange already maintains separate programs specifically for qualifying broker-dealers that distribute market data to their brokerage customers. Specifically, the Exchange offers the Small Retail Broker Distribution Program, which provides discounted Distribution Fees and Data Consolidation Fees for eligible broker-dealers distributing the applicable feeds to Non-Professional Data Users with whom the broker-dealer has a brokerage relationship. The Exchange also offers the Small Retail Broker Hosted Solutions Program, which provides fee waivers and lower data costs for Small Retail Brokers that provide the applicable feeds to other Small Retail Brokers via hosted solutions. These existing programs are specifically designed to encourage retail brokers to distribute market data, and the eligibility criteria for those programs reflect the characteristics of the retail brokerage business model.

The proposed Data Vendor Program does not displace or reduce the benefits available to retail brokers under those existing programs. Rather, it creates a parallel and complementary framework for a distinct category of participants—Data Vendors—that do not maintain brokerage relationships with Users, and whose primary business purpose is categorically different from that of a retail broker. Just as it would not be appropriate to extend the Small Retail Broker Program to Data Vendors, it is similarly appropriate—and not unfairly discriminatory—not to extend the Data Vendor Program to retail brokers or other participants that maintain brokerage relationships with their Users, whose needs are separately addressed by the Exchange's existing programs.

Not an Extranet Service Provider

The Exchange also believes it is not unfairly discriminatory to exclude Extranet Service Providers from the Data Vendor Program. An Extranet Service Provider, as defined, is an entity that transmits a market data product to data recipients without modification of the content, format, or other characteristics of the product. Extranet Service Providers do not transform, enrich, or add value to the data they transmit—they serve as conduits, passing data through in its original form. This is

fundamentally distinct from the function of a Data Vendor, which, by definition, must transform the Market Data Product as part of its service offering.

The Data Vendor Program is specifically premised on the value that transformation adds to the data distribution ecosystem. By enabling Data Vendors to create differentiated products—delivered via a terminal, API, proprietary feed, or other value-added mechanism—that appeal to a broader range of downstream Distributors, the Program advances the Exchange's goal of maximizing the reach and utility of its consolidated market data throughout the national market system. Extending the Program to Extranet Service Providers, which do not perform this transformative function, would undermine the Program's core purpose and would not serve the policy goal of broadening distribution of market data products in readily accessible, value-added formats.

The Exchange has created programs to address the distinct needs and business models of different categories of market participants, and the proposed Data Vendor Program is a natural extension of this approach. In addition to the Small Retail Broker programs described above, the Exchange also offers fee waivers for eligible Internal Distributors of the EDGA Depth Data Feed, which are intended to incentivize new Internal Distributors to integrate data feeds into their systems. The differentiation between Data Vendors and other categories of market participants reflects the distinct roles these entities play and the distinct incentive structures appropriate to each and does not constitute unfair discrimination.

18-Month and Integration Requirements

The Exchange further believes it is not unfairly discriminatory to limit the Program to Data Vendors that have not received the Applicable Feed for which they seek a waiver during the 18 months preceding the waiver application date, and that have integrated, or are actively in the process of integrating,²¹ the Applicable Feed and making it commercially available to subscribers. The 18-month limitation is designed to ensure that the fee waivers serve their intended purpose of reducing the upfront cost barriers for new market participants. This approach is directly consistent with the analogous frameworks the Exchange has adopted in prior programs—including the

Internal Distributor Waiver for the EDGA Depth Data Feed, which similarly limits fee relief to distributors that have not received the relevant feed in the prior 18 months. The integration and commercial availability requirement is likewise reasonable because it ensures that the waiver is directed to Data Vendors that are undertaking the build-out necessary to distribute the Applicable Feed to subscribers, while not requiring full integration or commercial availability before the waiver begins. The Exchange therefore believes that these objective limitations are reasonable and appropriate, prevent the Program from operating as a permanent subsidy for established distributors, and are not unfairly discriminatory.

The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) of the Act,²² which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities. The proposed fee waivers represent a reasonable and equitable allocation of charges. The fee waivers for External Distribution Fees are limited in duration—the Summary Waiver Period for Cboe One Summary and the Premium Waiver Period for Cboe One Premium—and are available only to Data Vendors that have not received the Applicable Feed for which they seek a waiver during the 18 months preceding the waiver application date and that have integrated, or are actively in the process of integrating, the Applicable Feed and making it commercially available to subscribers. This time-limited structure ensures that the waivers serve their intended purpose of incentivizing new market entry and build-out of data feeds. The 18-month lookback requirement further ensures the equitable allocation of fees by limiting the Program to new feeds for Data Vendors, and the integration and commercial availability requirement ensures that the waiver is tied to actual build-out and distribution activity. The Exchange notes that this same 18-month standard is consistent with the requirements applied in its other fee waiver programs.

The clarification that External Distributors of both Cboe One Summary and Cboe One Premium shall only be responsible for paying the External Distribution Fee for Cboe One Premium does not alter the economic substance of the Exchange's existing fee structure and does not impose any new or

²¹ The Exchange notes that no specific step is required for this, only that Data Vendor is working to integrate the Applicable Feed into its system.

²² 15 U.S.C. 78f(b)(4).

increased fees on market participants. Rather, it expressly codifies the Exchange's existing application of the user fee offset provisions—under which an External Distributor disseminating both products is assessed only the Cboe One Premium External Distribution Fee—thereby ensuring that all market participants have a clear and equitable understanding of their fee obligations. The Exchange therefore believes the proposed rule change provides for the equitable allocation of reasonable fees among persons using its facilities.

Lastly, the Exchange believes that the limitations regarding the waiver structure for both Cboe One Premium and Cboe One Summary equitably allocate fees. With respect to the Cboe One Summary waiver, only Data Vendors that (i) have not received Cboe One Summary during the 18 months preceding the waiver application date, (ii) are integrating or actively in the process of integrating Cboe One Summary and making it commercially available to subscribers, and (iii) are not receiving Cboe One Premium are eligible for the Summary Waiver Period. The Exchange believes that this is reasonable, as a firm that subscribes to Cboe One Premium already may elect to receive (without incurring an additional External Distribution Fee) Cboe One Summary Feed. For this reason, there is no need to provide a separate Summary Waiver Period while a firm receives Cboe One Premium, because that firm may receive the Cboe One Summary Feed without paying an additional External Distribution Fee that the proposed program seeks to waive.

Next, the Exchange notes that if a Data Vendor currently receives Cboe One Summary and elects to receive Cboe One Premium under the proposed program, so long as the Data Vendor has not received the Cboe One Premium Feed during the 18 months preceding the waiver application date and satisfies the integration and commercial availability requirement with respect to Cboe One Premium, the Data Vendor may receive the Premium Waiver Period. During that period, the Data Vendor's existing Cboe One Summary²³ subscription will be covered under the Premium Waiver, and no separate External Distribution Fee will be

assessed for Cboe One Summary. This is because the Cboe One Summary External Distribution Fee is subsumed within the Cboe One Premium External Distribution Fee—accordingly, there is no separate Cboe One Summary fee to waive for a firm receiving Cboe One Premium. The Exchange believes this treatment is reasonable because it avoids providing overlapping or duplicative waiver relief while still incentivizing an existing Summary subscriber to build out Cboe One Premium.

Lastly, if a Data Vendor has not received either Applicable Feed during the 18 months preceding the waiver application date and elects to build out to both simultaneously, the Data Vendor will not receive separate Summary and Premium waivers. Instead, because the Cboe One Summary External Distribution Fee is subsumed within the Cboe One Premium External Distribution Fee, the Data Vendor will receive only the Premium Waiver Period, and no separate Summary Waiver Period will apply while it receives Cboe One Premium.

For all of the foregoing reasons, the Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder, including, in particular, the requirements of Sections 6(b)(4)²⁴ and 6(b)(5)²⁵ of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe the proposed rule change imposes any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed Data Vendor Program is available to all External Distributors that satisfy the objective, clearly defined criteria set forth in the proposed definition of "Data Vendor" and the Program's waiver eligibility standards. Any External Distributor that, as part of its primary business objective, solicits unaffiliated third-party Distributors to redistribute a transformed Market Data Product, does not maintain a brokerage relationship with Users in connection with the applicable Market Data Product, is not an Extranet Service Provider, has not received the Applicable Feed for which it seeks a waiver during the 18 months preceding

the waiver application date, and has integrated or is actively integrating the Applicable Feed and making it commercially available to subscribers may qualify for the Program on equal terms. Because eligibility is determined by objective, verifiable criteria rather than by subjective or discretionary determinations, no External Distributor is advantaged or disadvantaged relative to any other similarly situated participant.

To the extent that certain External Distributors—such as retail broker-dealers or Extranet Service Providers—do not qualify for the Data Vendor Program, this does not impose a burden on intramarket competition. As described above, retail broker-dealers and Extranet Service Providers are not similarly situated to Data Vendors. Retail broker-dealers distribute market data to their own brokerage customers as an ancillary feature of their core business of providing trade execution and account management services, and their data distribution needs are more appropriately addressed by the Exchange's existing Small Retail Broker Distribution Program and Small Retail Broker Hosted Solutions Program. Extranet Service Providers, by contrast, transmit data in its original form without transformation, and therefore do not serve the same function in the data distribution ecosystem as Data Vendors, which aggregate, transform, and redistribute data to downstream Distributors. Designing a fee program specifically targeted to Data Vendors, rather than applying it uniformly across all categories of External Distributors, does not burden intramarket competition—it reflects the materially different roles, business models, and barriers of these distinct categories of participants.

Similarly, limiting the Data Vendor Program to External Distributors and not extending it to Internal Distributors does not impose a burden on intramarket competition. Internal Distributors receive and use market data solely within their own legal entities and do not redistribute data to third parties outside their organizations. They are therefore not participants in the same competitive market for external data redistribution that the Program is designed to promote, and their needs are separately addressed through the Exchange's existing Internal Distributor programs—including the New Internal Distributor Waiver for the EDGA Depth Data Feed. The proposed Program is specifically designed to incentivize external redistribution of the Cboe One feeds, a purpose that has no meaningful application to Internal Distributors and

²³ For example, if a Data Vendor currently subscribes to Cboe One Summary Feed and is eligible for the proposed program for the Cboe One Premium Feed, no separate External Distribution Fee would be assessed for Cboe One Summary during the Premium Waiver Period because Cboe One Summary is included in the Cboe One Premium subscription. The Data Vendor would receive the Premium Waiver Period and would not receive a separate Summary Waiver Period during that time.

²⁴ 15 U.S.C. 78f(b)(4).

²⁵ 15 U.S.C. 78f(b)(5).

that creates no competitive disadvantage for them.

The Exchange does not believe the proposed rule change imposes any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes the proposed rule change will enhance intermarket competition by incentivizing a broader class of market participants to subscribe to and redistribute the Exchange's market data products, thereby increasing the Exchange's ability to compete with other national securities exchanges and data vendors for the business of Data Vendors and their downstream Distributor clients.

The market for equity market data is highly competitive. Numerous national securities exchanges offer products that compete directly with the Cboe One Summary Feed and Cboe One Premium Feed. Market participants can obtain comprehensive market data from numerous sources, including competing exchanges (such as NYSE and Nasdaq), the consolidated tape (SIP), and alternative trading systems. Prospective Data Vendors evaluating whether to build out the Cboe One feeds must weigh the upfront costs of connectivity, software development, integration, and commercial launch against the commercial opportunity presented by the Exchange's data products. The Data Vendor Program is designed to make the Exchange's market data offering competitively priced relative to alternative options, encouraging Data Vendors to enter the Cboe One distribution chain and thereby expanding the availability and reach of the Exchange's consolidated multi-exchange market data throughout the national market system.

Far from burdening intermarket competition, the proposed rule change is a direct response to competitive market forces. The Exchange's decision to offer targeted fee waivers to new Data Vendors reflects its recognition that it must compete aggressively for the participation of data redistribution firms, and that reducing the upfront cost of entry is a legitimate and necessary competitive tool in the market for exchange data products. The Commission has recognized that exchanges operate in a competitive environment with respect to market data, and that exchange fee programs designed to attract new participants and expand market data distribution are consistent with the Act's goals of promoting competition and efficiency in the national market system.

The proposed clarification that External Distributors of both Cboe One Summary and Cboe One Premium are only responsible for paying the External Distribution Fee for Cboe One Premium similarly does not impose any burden on intermarket competition. This change does not alter the economic substance of the Exchange's existing fee structure and does not impose any new fees on any market participant. It simply makes explicit the Exchange's existing application of the user fee offset provisions, reducing potential confusion and ensuring that all market participants have a clear and consistent understanding of their fee obligations. Regulatory clarity of this nature promotes, rather than burdens, competition by enabling market participants to make fully informed decisions about their participation in the Exchange's market data programs.

With respect to the Cboe One Summary and Cboe One Premium feeds specifically, the Exchange notes that the proposed Data Vendor Program does not impose any burden on competition arising from differential pricing between Cboe One and the applicable underlying equities feeds.²⁶ The Exchange notes that historically, its pricing for Cboe One products has been based on the sum of the External Distribution Fees for the four underlying equities feeds.²⁷ As an initial matter, not all underlying equities feeds are offered under this Program. The proposed Data Vendor Program applies only to the following feeds: EDGX Top, EDGX Summary Depth, BZX Summary Depth, Cboe One Premium, and Cboe One Summary. A Data Vendor may choose to receive a waiver for Cboe One Summary or Cboe One Premium, or for EDGX Top, or for EDGX Summary Depth, or for BZX Summary Depth, or any combination

thereof, subject to the applicable eligibility requirements. However, the proposed Program does not offer fee waivers for BZX Top, BYX Top, or EDGA Top data feeds, nor does it offer fee waivers for BYX Summary Depth or EDGA Summary Depth. Accordingly, the applicable underlying equities feeds do not "sum" to the applicable Cboe One feed under this proposed Program.²⁸

The Exchange has selected the products covered by the Program based on where it sees the greatest opportunity to expand distribution and align Data Vendor coverage with downstream end-user demand. This product-specific focus is not unfairly discriminatory. All qualifying Data Vendors are subject to the same product-specific eligibility requirements, and offering waivers for some, rather than all four, of the underlying feeds does not result in unequal treatment among similarly situated participants.

Even setting aside the foregoing, the Exchange does not believe that pricing the Cboe One Summary or Cboe One Premium feeds differently from the underlying equities feeds imposes any burden on competition. To date, the Exchange is not aware of any distributor that purchases the underlying equities feeds (either the Top or Summary Depth Feeds) for the purpose of creating its own consolidated product comparable to Cboe One Summary or Cboe One Premium. This demonstrates that the practical market concern underlying any perceived burden—that distributors might be disadvantaged by differential pricing on Cboe One that is not extended to the underlying feeds—does not correspond to actual market behavior.

Moreover, Cboe One Summary and Cboe One Premium are distinct, independent data products—they are not merely consolidations of data from the four underlying equities feeds. In addition to consolidating data from BZX, BYX, EDGX, and EDGA, Cboe One Summary includes supplementary data elements not found in the individual underlying feeds, including data derived from the Securities Information Processor ("SIP") containing information on the national cumulative volume. This additional content makes Cboe One a distinct product with independent utility. Market participants subscribe to the underlying equities feeds and Cboe One for fundamentally

²⁶ For Cboe One Summary, the four equities feeds are BZX Top, BYX Top, EDGA Top, and EDGX Top. For Cboe One Premium, the four equities feeds are BZX Summary Depth, BYX Summary Depth, EDGA Summary Depth, and EDGX Summary Depth.

²⁷ For example, under the Small Retail Broker Distribution Program, the discounted External Distribution Fee for Cboe One Summary is \$3,500 per month, which equals the sum of the External Distribution Fees for the four underlying Top feeds: BZX Top (\$2,500), BYX Top (\$250), EDGA Top (\$0), and EDGX Top (\$750). See Cboe BZX, BYX, EDGA, and EDGX U.S. Equities Exchange Fee Schedules. Because the proposed Data Vendor Program does not offer fee waivers for BZX Top, BYX Top, EDGA Top, BYX Summary Depth, or EDGA Summary Depth, the External Distribution Fee for each of those feeds would remain in effect for any Data Vendor receiving those feeds, while the External Distribution Fee for Cboe One Summary (\$0 during the Summary Waiver Period) or Cboe One Premium (\$0 during the Premium Waiver Period) would be waived. This results in a pricing differential between the sum of the underlying equities feeds and the Cboe One feeds under this Program.

²⁸ For example, the External Distribution Fee is \$0 for Cboe One Summary under the proposed Program, but the sum of the four underlying equities feeds under the proposed Program is \$2,750 (\$0 EDGX Top + \$2,500 BZX Top + \$250 BYX Top + \$0 EDGA Top).

different purposes. For example, a subscriber may be interested only in top-of-book data from a single exchange, such as EDGX, for trading, routing or compliance purposes. Such a subscriber has no need for a consolidated product. Conversely, subscribers seeking a comprehensive, cross-exchange view of Cboe liquidity choose Cboe One precisely because it offers consolidated data with additional enhancements. These distinct use cases support differentiated pricing treatment.

Data Vendors may, in theory, choose to purchase each of the four underlying equities feeds and create their own consolidated product. However, the \$1,000 monthly Data Consolidation Fee associated with purchasing Cboe One (and the primary pricing differential) provides access to a production-ready, supported consolidated product, and a vendor seeking to create a comparable offering independently would bear not only the applicable source-feed, but also the costs of developing and maintaining multiple feed handlers, normalizing the data, applying aggregation logic, performing quality assurance, supporting specification changes, and monitoring production feed health. Clients also generally prefer an official exchange product, such as Cboe One, over a vendor-derived consolidated product that requires reporting across multiple exchange products. From a user-experience perspective, the exchange-provided Cboe One is therefore a better solution. A simple combination of the four underlying feeds also would not recreate all Cboe One content, including supplementary SIP-derived information. The Exchange therefore believes that the \$1,000 monthly Data Consolidation Fee is less than the full economic cost of independently creating and maintaining a comparable product, particularly for a vendor that does not already operate the required infrastructure.

Section 6(b)(8) of the Exchange Act requires that exchange rules not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Cboe One Summary, Cboe One Premium, and the applicable underlying equities feeds are separate products serving different market needs. Just as the Commission has permitted exchanges to offer different fees for depth-of-book data versus top-of-book data, the Exchange should have discretion to price its consolidated summary product differently from its component feeds.

Finally, the proposed Data Vendor Program is pro-competitive. By reducing the cost of consolidated and top-of-book data products for qualifying Data

Vendors, the Exchange enables broader distribution of comprehensive market information to downstream distributors and, ultimately, to retail and institutional investors. Wider access to market data promotes informed investment decisions, enhances market efficiency, and supports the Exchange Act's goals of investor protection and fair and efficient markets. The Exchange does not view external distributors as competitors for its real-time feed offerings; rather, distributors serve as essential conduits that expand delivery of Cboe real-time market data to end users who do not have the technical capability or commercial need to connect directly to Cboe's individual market data feeds. This is particularly important for the retail community, as retail investors typically access market data through vendors rather than purchasing it directly from exchanges. By offering the proposed Data Vendor Program, the Exchange enables distributors to deliver competitively priced, comprehensive market data to a broader audience, thereby enhancing—not burdening—competition in the market data landscape.

For the foregoing reasons, the Exchange does not believe that the proposed rule 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 Act²⁹ and paragraph (f) of Rule 19b-4³⁰ 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.

²⁹ 15 U.S.C. 78s(b)(3)(A).

³⁰ 17 CFR 240.19b-4(f).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeEDGA-2026-028 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-CboeEDGA-2026-028. 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 (<https://www.sec.gov/rules/sro.shtml>). Copies of the filing will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection.

All submissions should refer to file number SR-CboeEDGA-2026-028 and should be submitted on or before October 9, 2026.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³¹

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2026-19118 Filed 9-17-26; 8:45 am]

BILLING CODE 8011-01-P

³¹ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–106382; File No. SR–CboeEDGX–2026–060]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Introduce a Data Vendor Program

September 15, 2026.

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 September 8, 2026, Cboe EDGX Exchange, Inc. (the “Exchange” or “EDGX”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the “Exchange” or “EDGX”) proposes to introduce a Data Vendor Program, which includes introducing a new defined term of Data Vendor, along with other clarifying changes. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Commission’s website (<https://www.sec.gov/rules/sro.shtml>), the Exchange’s website (https://www.cboe.com/us/equities/regulation/rule_filings/edgx/), and at the principal office of the Exchange.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to (i) introduce a definition of Data Vendor; (ii) codify the existing definition (as defined in the Exchange’s applicable North American Market Data Policies) of Extranet Service Provider; (iii) codify an existing practice that permits an External Distributor of both Cboe One Summary and Cboe One Premium to be liable only for the External Distribution Fee for Cboe One Premium; and (iv) create a program for Data Vendors in order to incentivize Data Vendors to build out the applicable feeds and make them commercially available to subscribers.³ The proposed program will provide fee waivers (as described below) for External Distribution Fees for Data Vendors for the Cboe One Summary Feed, Cboe One Premium Feed, EDGX Summary Depth Data Feed, and EDGX Top Data Feed.

Proposed Definitions

In connection with this proposed program, the Exchange first proposes to adopt a definition for a specific category of participants. Specifically, the Exchange proposes to establish the term “Data Vendor” to mean “an External Distributor that (i) is actively engaged, as part of its primary business objective, in the solicitation of unaffiliated third-party Distributors to redistribute a transformed Market Data Product; (ii) does not maintain a brokerage relationship with Users in connection with the receipt or use of the applicable Market Data Product; and (iii) is not an Extranet Service Provider.” As part of this new definition, and as further described below, the Exchange proposes to codify the existing definition of Extranet Service Provider within the Cboe Global North American Market Data Policies to be within its Fee Schedule.

The Exchange has also established objective, verifiable criteria for determining eligibility as a Data Vendor. The following criteria, which will be reflected in the Exchange’s Fee Schedule, must be satisfied: (1) the External Distributor must identify itself as a Data Vendor in publicly available marketing materials; (2) the External Distributor must transform the

applicable Market Data Product before redistribution, which may include aggregation across multiple data sources, normalization into a consistent format, enrichment with reference data or analytics, or repackaging into a proprietary delivery mechanism (e.g., terminal, API, or proprietary feed); (3) the External Distributor must redistribute the applicable transformed Market Data Product to downstream Distributors as part of a paid commercial offering; (4) the External Distributor must not maintain a brokerage relationship with any User to whom it distributes the applicable Market Data Product; (5) the External Distributor must not be an Extranet Service Provider; and (6) the External Distributor must be actively engaged in the solicitation of unaffiliated third-party Distributors to subscribe to and redistribute the applicable transformed Market Data Product. Upon request, the External Distributor must provide a written attestation certifying compliance with the foregoing criteria. The Exchange may request supporting documentation, including but not limited to Distributor subscriber lists, revenue breakdowns by recipient type, and descriptions of the transformations applied to the Market Data Product. These objective eligibility criteria ensure that the Data Vendor Program is equitably applied to all similarly situated market participants.

External Distributor

To begin, “Data Vendor” is intended to only encompass External Distributors and not Internal Distributors. An External Distributor is defined as a Distributor that receives the Exchange Market Data product and then distributes that data to a third party or one or more Users outside the Distributor’s own entity.⁴ The Exchange seeks to adopt this program in order to encourage broader redistribution of this data. As such, the Exchange limits this to External Distributors as the intent of this program is to have data distributed outside one’s own entity.

Primary Business Is To Redistribute to Distributors

To be eligible as a Data Vendor, an External Distributor must be taking in data for the primary business purpose of selling access to the applicable feed as a service in its own right, not merely redistributing data in incidental support of broader business functions such as trade execution, account management, or brokerage services. The Exchange notes that, as part of its business, a Data

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ The Exchange initially submitted the proposed rule change on July 1, 2026 (SR–CboeEDGX–2026–048). On July 15, 2026, the Exchange withdrew that filing and submitted SR–CboeEDGX–2026–049. On September 8, 2026, the Exchange withdrew that filing and submitted this filing.

⁴ See EDGX Equities Fee Schedule.

Vendor may redistribute a market data product to Users, but the primary purpose must be to redistribute data to Distributors. The Exchange will assess whether an External Distributor's primary business purpose satisfies this criterion based on the External Distributor's publicly available marketing materials. If the Exchange were to modify this requirement to permit a primary business purpose of redistribution to either Distributors or Users, it would unintentionally include firms that may redistribute only to Users and that are not traditionally considered data vendors (e.g., a media outlet or a bank).

Transformed Market Data Product

To be eligible, the Exchange requires that the Data Vendor not simply pass through data in its original form. Transformation may include aggregation across multiple sources, normalization into a consistent format, enrichment with derived analytics, or repackaging into a proprietary delivery mechanism (e.g., terminal, API, feed), or any other value-added processing that distinguishes the output from the original source data.

No Brokerage Relationship With Users

Next, the Exchange proposes that the definition of Data Vendor include a stipulation that a Data Vendor must not maintain a brokerage relationship with Users who receive the market data product. The Exchange already has programs aimed at retail brokers, for example, both the Small Retail Broker Program and the Small Retail Broker Hosted Solutions Program.⁵ This proposed program is intended to encourage Data Vendors specifically to take in the applicable feeds and distribute them. A Data Vendor's service model is different from a retail broker's, as a Data Vendor's business model is built around providing data to firms and Users alike, whereas a retail broker's business model is focused on connecting Users to markets in order to trade and may include providing market data as part of its offering to its Users. As the Exchange already has programs specifically for retail brokers, the Exchange does not believe it would be appropriate to include retail brokers here. The Exchange notes that if a Data Vendor that is currently receiving a fee waiver under this Program subsequently commences a brokerage relationship with its Users, it will no longer satisfy the definition of Data Vendor and will cease to be eligible for the Program. In such case, the External Distributor

would be assessed the standard External Distribution Fee for the applicable feed as of the date it no longer satisfies the definition of Data Vendor.

Not an Extranet Service Provider

As noted above, the Exchange proposes also to define Extranet Service Provider when it introduces the definition of Data Vendor into its Fee Schedule. Today, this term already exists in the Cboe Global Markets North American Data Policies.⁶ The Exchange proposes to codify this definition in its Fee Schedule because the proposed definition of Data Vendor directly references this defined term. Specifically, the Exchange proposes to codify that an Extranet Service Provider is "an entity that has entered into a Cboe Global Markets Global Data Agreement and Transmits an Exchange Market Data Product, via an extranet operated by such entity, to data recipients. 'Transmit' means to direct an Exchange Market Data Product to one or more data recipients without modification of the content, format, or other characteristics of the Exchange Market Data Product." An Extranet Service Provider is not authorized to use or process an Exchange Market Data Product for any purpose.

Applicable Data Feeds

By way of background, the Exchange offers the Cboe One Premium Data Feed, which is a data feed that disseminates, on a real-time basis, the aggregate best bid and offer ("BBO") of all displayed orders for securities traded on the Exchange and its affiliated equities exchanges and enables recipients to receive aggregated two-sided quotations from EDGX and its affiliated equities exchanges for up to twelve (12) price levels (and, for a limited time, up to five (5) price levels).⁷ The Cboe One Premium Data Feed is created using the data from the Exchange and each of its affiliated equities exchanges' Summary Depth data feeds (allowing for up to 48 total price levels).

The Exchange also offers the Cboe One Summary Data Feed, which disseminates, on a real-time basis, the aggregate BBO of all displayed orders for securities traded on EDGX and its affiliated equities exchanges and also contains individual last sale information

for EDGX and its affiliated equities exchanges.⁸

The Exchange offers the EDGX Summary Depth Data Feed, which is a data feed that offers aggregated two-sided quotations up to twelve price levels for all displayed orders entered into the System, and the EDGX Top Data Feed, which is a data feed that offers top-of-book quotations and last sale information based on orders entered into the Exchange's System.

External Distribution Fees for Cboe One Premium and Cboe One Summary

The proposed rule change also clarifies that External Distributors of both Cboe One Summary and Cboe One Premium shall only be responsible for paying the External Distribution Fee for Cboe One Premium. The current fee schedule provides that "Cboe One Summary User Fees can be applied to Cboe One Summary and Cboe One Premium External Distribution Fees." Under the Exchange's existing application of this provision, an External Distributor receiving both Cboe One Summary and Cboe One Premium is assessed only the Cboe One Premium External Distribution Fee⁹, and User Fees for both Cboe One Summary and Cboe One Premium may be applied to offset that fee.

The Exchange is now proposing to make this treatment explicit by adding clarifying language to the fee schedule stating that External Distributors of both feeds are only responsible for paying the External Distribution Fee for Cboe One Premium. This amendment does not alter the economic substance of the Exchange's existing fee structure, nor does it impose any new or increased

⁸ The Cboe One Summary Feed is distinguishable from the Cboe One Premium Feed in that it does not provide depth of book data. In contrast, the Cboe One Premium Feed contains all the available data in the Cboe One Summary Feed and also provides depth of book data.

⁹ To better illustrate this concept, consider the following examples. Example 1: If a firm subscribes to only Cboe One Summary, its User costs will be used to offset the External Distribution Fee for Cboe One Summary. In the event the firm's User costs total \$2,000, the firm will pay \$2,000 in User fees and \$3,000 (\$5,000 – \$2,000) for its External Distribution Fee. Example 2: If a firm subscribes only to Cboe One Premium, its User costs will be used to offset the External Distribution Fee for Cboe One Premium. In the event a firm's User costs total \$10,000, the firm will pay \$10,000 in User fees and \$2,500 (\$12,500 – \$10,000) for its External Distribution Fee. Example 3: If a firm subscribes to both Cboe One Summary and Cboe One Premium, only the External Distribution Fee for Cboe One Premium is assessed and this fee may be offset by both Cboe One Summary and Cboe One Premium User fees. In the event a firm's User costs are \$2,000 for Cboe One Summary and \$10,000 for Cboe One Premium, the firm will pay a total of \$12,000 in User fees (\$10,000 + \$2,000) and it will pay \$500 for its External Distribution Fee (\$12,500 – (\$10,000 + \$2,000)).

⁶ See Market Data Policies.pdf

⁷ EDGX filed to increase the levels of the Cboe One Premium Data Feed from five (5) levels to twelve (12) levels. To help in this transition, it is currently supporting both the five and twelve level feeds; however, as stated in its rule, EDGX shall sunset the five (5) level feed of Cboe One Premium by December 31, 2026 (with the date to be announced via Exchange Notice). See Rule 13.8(b)(i).

⁵ See EDGX Equities Fee Schedule.

fees on market participants. Rather, it reduces potential ambiguity by expressly codifying the Exchange's existing application of the user fee offset provisions. The Exchange believes this clarification will promote transparency and reduce confusion among External Distributors regarding their fee obligations under the Cboe One market data product offerings.

Impact of Proposed Program

As noted above, the proposed program would waive External Distribution Fees for Data Vendors of the Cboe One Summary Feed, Cboe One Premium Feed, EDGX Summary Depth Data Feed, and EDGX Top Data Feed (each, an "Applicable Feed") that satisfy certain eligibility requirements. A Data Vendor must not have received the Applicable Feed for which it seeks the waiver during the 18 months¹⁰ preceding the waiver application date, and must integrate, or be actively in the process of integrating, the Applicable Feed and making it commercially available to its subscribers. The Data Vendor need not have fully integrated the Applicable Feed or made it commercially available before the waiver begins. For a qualifying Data Vendor, the applicable waiver commences on the date it first receives the Applicable Feed, and, if that date occurs mid-month, that partial month counts as the first month of the waiver period. Specifically, the Exchange proposes to waive the External Distribution Fee of \$5,000 per month for Cboe One Summary for 12 months (the "Summary Waiver Period"), except that a Data Vendor is not eligible for a Summary Waiver Period if it is receiving Cboe One Premium because Cboe One Summary is included in the Cboe One Premium External Distribution Fee as noted herein. To clarify, because a Data Vendor receiving Cboe One Premium pays only the Cboe One Premium External Distribution Fee (and no separate fee is assessed for Cboe One Summary), there is no separate Cboe One Summary External Distribution Fee to waive for such a firm.¹¹ The Exchange proposes to waive the External Distribution Fee of \$12,500 per month for Cboe One Premium for 24 months (the "Premium Waiver Period").

If an eligible Data Vendor already receives Cboe One Summary, it may still receive the Premium Waiver Period if it has not received Cboe One Premium during the 18 months preceding the waiver application date and satisfies the integration and commercial availability requirement with respect to Cboe One Premium. During the Premium Waiver Period, the Data Vendor's Cboe One Summary subscription would be covered under the Premium Waiver, and no separate External Distribution Fee would be assessed for Cboe One Summary. Similarly, an eligible Data Vendor that builds out both Cboe One feeds simultaneously would receive only the Premium Waiver Period.

Lastly, for eligible Data Vendors, the Exchange also proposes to waive the External Distribution Fee of \$2,500 per month for EDGX Summary Depth for 24 months (the "Summary Depth Waiver Period") and the External Distribution Fee for EDGX Top of \$2,250 for 12 months (the "Top Waiver Period").

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.¹² Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹³ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹⁴ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes the proposed rule change promotes just and equitable principles of trade by establishing a clear, objective, and transparent definition of "Data Vendor" that properly captures the characteristics distinguishing Data Vendors from other categories of

External Distributors. The proposed definition sets forth specific, verifiable criteria—namely, that a Data Vendor must (i) be an External Distributor; (ii) be actively engaged, as part of its primary business objective, in the solicitation of unaffiliated third-party Distributors to redistribute a transformed Market Data Product; (iii) not maintain a brokerage relationship with Users; and (iv) not be an Extranet Service Provider. By establishing objective eligibility criteria, the proposed rule change ensures that similarly situated market participants are treated consistently and that the benefits of the Data Vendor Program are available to all External Distributors that meet the defined qualifications.

The Exchange further believes that the codification of the existing Extranet Service Provider definition within the Fee Schedule promotes just and equitable principles of trade. Because the proposed Data Vendor definition directly references the term "Extranet Service Provider," market participants seeking to understand their eligibility for the Program should not be required to consult the Cboe Global Markets North American Data Policies to determine how that term applies. By incorporating both defined terms into the Fee Schedule itself, the Exchange ensures that participants have access to the complete framework.

The Exchange further believes that the proposed rule change removes impediments to and perfects the mechanism of a free and open market and a national market system. The Data Vendor Program is designed to incentivize Data Vendors to integrate the Applicable Feeds, make them commercially available to subscribers, and redistribute them by providing fee waivers for External Distribution Fees for the Cboe One Summary Feed, Cboe One Premium Feed, EDGX Summary Depth Data Feed, and EDGX Top Data Feed. By waiving the External Distribution Fee for Cboe One Summary for 12 months, Cboe One Premium for 24 months, EDGX Summary Depth for 24 months, and EDGX Top for 12 months, the Exchange encourages broader redistribution of its market data products. Broader distribution of market data enhances price transparency and supports informed decision-making across the national market system, which in turn perfects the mechanism of a free and open market by ensuring that market participants have access to comprehensive, competitive data offerings.

By allowing the waiver to begin while an eligible Data Vendor is actively integrating the Applicable Feed and

¹⁰ The Exchange notes that this same 18-month requirement is the standard for its other fee waiver programs. See EDGX Equities Fee Schedule.

¹¹ As noted above, a firm that subscribes to both Cboe One Premium and Cboe One Summary is only charged the External Distribution Fee for Cboe One Premium. Accordingly, an eligible Data Vendor that builds out both feeds simultaneously receives only the Premium Waiver Period.

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(5).

¹⁴ *Id.*

working to make it commercially available, the Program lowers barriers to entry during the build-out period and incentivizes a broader set of market participants to enter the Exchange's data distribution chain, thereby expanding the availability of market data throughout the national market system.

The proposed rule change also protects investors and the public interest. By encouraging Data Vendors to take in, transform, and redistribute market data feeds, the proposed program promotes greater availability of enriched market data products to downstream Distributors and Users. The transformation requirement—which may include aggregation across multiple sources, normalization into a consistent format, enrichment with derived analytics, or repackaging into a proprietary delivery mechanism such as a terminal, API, or feed—is a key element of qualifying as a Data Vendor and ensures that meaningful value is added to the data before redistributing it, thereby increasing the utility and accessibility of market information. To the extent the Program achieves its purpose and results in more widespread redistribution of the Applicable Feeds, market participants may benefit from enhanced access to consolidated real-time price, depth-of-book, top-of-book, and last sale information through the distribution channels developed by Data Vendors.

Additionally, the codification of the existing Extranet Service Provider definition within the Fee Schedule provides additional clarity on the program requirements and codifies the definition that exists already in the Cboe Global Markets North American Market Data Policies. Furthermore, the clarification that External Distributors of both Cboe One Summary and Cboe One Premium are only responsible for paying the External Distribution Fee for Cboe One Premium promotes transparency by expressly codifying a practice that is already reflected in the Exchange's existing application of the fee provision. This reduces potential confusion among market participants regarding their fee obligations.

Not Unfairly Discriminatory

The Exchange believes that the proposed Data Vendor Program is consistent with and complementary to its existing programs for other categories of market participants, and that offering a targeted fee waiver program specifically for Data Vendors does not constitute unfair discrimination. The Exchange has a history of establishing differentiated programs that recognize the distinct roles of different market

participants. For example, the Small Retail Broker Distribution Program provides discounted Distribution Fees and Data Consolidation Fees for eligible broker-dealers distributing the applicable feeds to Non-Professional Data Users with whom the broker-dealer has a brokerage relationship.¹⁵ This program is designed to address the specific characteristics and economic needs of small retail broker-dealers. Similarly, the Small Retail Broker Hosted Solutions Program provides fee waivers for eligible Small Retail Brokers that provide the applicable feeds to other Small Retail Brokers via hosted solutions.¹⁶ This program recognizes that smaller retail brokers face unique integration challenges and cost constraints when building out hosted data solutions. In addition, the New Internal Distributor Waiver for the EDGX Depth Data Feed waives Internal Distribution Fees for three months for Internal Distributors that have not received the EDGX Depth Data Feed during the prior 18 months.¹⁷ This program incentivizes new Internal Distributors to integrate the depth-of-book feed into their systems. Lastly, the Exchange's affiliated options exchange, Cboe Exchange, Inc., introduced a 24-month waiver for qualifying retail brokers for its Complex Order Book Feed.¹⁸

The proposed Data Vendor Program is consistent with the Exchange's practice of creating a distinct program to serve a specific use case. Data Vendors occupy a distinct role in the market data distribution ecosystem. Unlike retail brokers, whose primary business is providing trade execution and account management services to Users (with market data distribution as an ancillary feature), Data Vendors are primarily engaged in the business of transforming and redistributing market data to other Distributors. This fundamental difference in business model justifies a distinct program with tailored eligibility criteria and waiver periods. The waiver periods under the proposed Data Vendor Program—12 months for Cboe One Summary and EDGX Top, and 24 months for Cboe One Premium and EDGX Summary Depth—are designed to reflect the relative complexity of integrating each feed. Depth-of-book products such as Cboe One Premium and EDGX Summary Depth typically require more extensive technical build-

out, including handling of larger data volumes, more complex display and aggregation logic, and more rigorous quality assurance processes. Additionally, EDGX Summary Depth and Cboe One Premium are more expensive relative to the top-of-book feeds. This means that Data Vendors require additional interest from clients in these products before they can even break even. Accordingly, the Exchange believes a 24-month waiver period for these products is appropriate to provide sufficient time for Data Vendors to complete their build-out. Top-of-book and summary products, in contrast, are generally less complex to integrate, and the Exchange believes a 12-month waiver period is appropriate for these feeds.

Data Vendors' cost and investment trade-offs further support this distinction. A Data Vendor's primary commercial objective is to transform market data and make the resulting product available to unaffiliated downstream Distributors, rather than to provide market data only incidentally in support of another business (in comparison to retail brokers). Because a single Data Vendor can make a Cboe data product available through its platform to multiple downstream Distributors, the waiver is targeted to participants capable of materially expanding the product's distribution footprint. Like any business operator, a Data Vendor evaluates whether to add an Applicable Feed based on expected return on investment, weighing expected revenue against the upfront costs of connectivity, programming, technical integration, and sales and marketing, as well as the ongoing exchange market data fees associated with making the product available to subscribers. In many cases, a Data Vendor may need to add three to five new downstream Distributors merely to offset the ongoing External Distribution Fee. These costs are typically incremental: Data Vendors may already offer one or more equity feeds to clients and add an Applicable Feed only where it is expected to provide return on investment beyond their current offerings. A retail broker's determination is different. A retail broker will often migrate or swap from a competitor's product, and may be able to implement the change through a Data Vendor API into its front-end with a simple entitlement change, without bearing the same upfront connectivity and technical build-out costs.

The waiver periods under the proposed Data Vendor Program are longer than certain other Exchange programs because they support more

¹⁵ See EDGX Equities Fee Schedule.

¹⁶ See EDGX Equities Fee Schedule.

¹⁷ *Id.*

¹⁸ See Securities Exchange Act Release No. 105198 (April 10, 2026), 91 FR 20204 (April 15, 2026) (SR-CBOE-2026-033).

than initial feed access or recruitment of a first User.¹⁹ A qualifying Data Vendor must complete significant technical and commercial build-out before it can distribute the product and begin recovering its upfront costs. Its downstream Distributors may then have their own evaluation, contracting, and integration cycles, further extending the path to meaningful adoption; as noted above, a Data Vendor may need to add three to five new downstream Distributors to offset the ongoing External Distribution Fee.

The Exchange does not maintain comparable fee waiver programs for larger broker-dealers that distribute market data to their brokerage customers. The Exchange believes this distinction is appropriate. The Small Retail Broker programs are specifically designed to address the cost constraints faced by smaller broker-dealers in building out market data distribution capabilities. Larger broker-dealers typically have established data infrastructure and greater resources to absorb market data distribution costs as part of their overall brokerage operations, and, as such, their cost per user is meaningfully lower. Data distribution by large broker-dealers is typically an ancillary component of brokerage services offered. In contrast, a Data Vendor must incur incremental buildout fees and ongoing External Distribution Fees to establish and support a new external redistribution channel. The relevant distinction is therefore the nature of the service and the associated barriers to distribution, not the size or identity of the participant.

The Data Vendor Program is intended to address a different need: incentivizing specialized data redistribution firms to build out the Applicable Feeds and bring on additional downstream Distributors. By encouraging Data Vendors to invest in the transformation and redistribution of the Exchange's market data products, the Program expands the reach and availability of this data throughout the national market system, benefiting end users and promoting competition. The Exchange therefore believes that creating a targeted program for Data Vendors, in addition to its existing programs for Small Retail Brokers and Internal Distributors, among others, is consistent with Section 6(b)(5) of the Act and does not constitute unfair discrimination.

The Exchange also believes the proposed rule change is consistent with Section 6(b)(5) of the Act in that it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Data Vendor Program is available to all External Distributors that satisfy the objective criteria set forth in the proposed definition of Data Vendor and, for waiver eligibility, the additional objective criteria regarding the 18-month lookback for prior receipt of the Applicable Feed and integration or active integration of the Applicable Feed for commercial availability. The distinctions drawn by the definition—(i) requiring that a Data Vendor's primary business objective be the solicitation of unaffiliated third-party Distributors, (ii) that it not maintain a brokerage relationship with Users, and (iii) that it not be an Extranet Service Provider—reflect meaningful differences in business models and market functions.

External Distributors

The Exchange believes that limiting the Data Vendor Program to External Distributors is not unfairly discriminatory. Internal Distributors and External Distributors occupy fundamentally different roles in the market data distribution ecosystem and are not similarly situated participants. An Internal Distributor receives a market data product and distributes it solely within its own entity, whereas an External Distributor redistributes data outside its entity to Users or other Distributors—and a Data Vendor, as a specialized category of External Distributor, further serves the specific function of soliciting unaffiliated third-party Distributors to redistribute a transformed market data product. The Data Vendor Program is designed precisely to incentivize and expand this type of external redistribution, a purpose that has no meaningful application to Internal Distributors who, by definition, cannot advance the proposed program's goal of broadening the reach of the Exchange's market data to downstream Distributors and end-user investors. Furthermore, the Exchange already offers programs for its Internal Distributors that it does not offer for External Distributors.²⁰

Primary Business Is To Redistribute to Distributors

To be eligible as a Data Vendor, an External Distributor must be taking in data for the primary business purpose of

selling access to the applicable feed as a service in its own right—not merely redistributing data in incidental support of broader business functions such as trade execution, account management, or brokerage services. The Exchange notes that as part of its business, a Data Vendor may redistribute a market data product to Users, but the primary purpose must be the redistribution of data to Distributors. The Exchange will assess whether an External Distributor's primary business purpose satisfies this criterion based on the External Distributor's publicly available marketing materials. This requirement is not unfairly discriminatory because it is directly tied to the purpose of the Program: encouraging entities whose core commercial activity is the transformation and redistribution of market data to build out the Applicable Feeds and bring on additional downstream Distributors, thereby expanding the reach and availability of the Exchange's data products. An entity that distributes market data only incidentally—as an ancillary feature of a brokerage, execution, or account management business—does not serve this purpose.

Transformed Market Data Product

The Exchange believes it is not unfairly discriminatory to require that a Data Vendor transform market data as a condition of eligibility, as transformation is a definitional characteristic that goes to the core of what distinguishes a Data Vendor from other categories of External Distributors and is directly tied to the Program's purpose of incentivizing participants that create new, differentiated distribution channels for the Exchange's consolidated market data. This reasoning is directly analogous to the rationale for excluding Extranet Service Providers—entities that transmit data without modification and therefore cannot create the type of value-added products, whether delivered via terminal, API, or proprietary feed, that the Program is designed to incentivize. Because the transformation requirement ensures that the Program's fee incentives are directed only at entities whose business is built around adding that value, the Exchange believes this criterion is reasonable and does not constitute unfair discrimination.

No Brokerage Relationship With Users

The Exchange believes it is not unfairly discriminatory to require that Data Vendors not maintain a brokerage relationship with Users. The Exchange already maintains separate programs specifically for qualifying broker-dealers

¹⁹ However, as noted above, Cboe Exchange, Inc., offers a 24-month waiver for qualifying retail brokers for its Complex Order Book Feed.

²⁰ See, e.g., EDGX Equities Fee Schedule that describes the New Internal Distributor Waiver for EDGX Depth Data Feed.

that distribute market data to their brokerage customers. Specifically, the Exchange offers the Small Retail Broker Distribution Program, which provides discounted Distribution Fees and Data Consolidation Fees for eligible broker-dealers distributing the applicable feeds to Non-Professional Data Users with whom the broker-dealer has a brokerage relationship. The Exchange also offers the Small Retail Broker Hosted Solutions Program, which provides fee waivers and lower data costs for Small Retail Brokers that provide the applicable feeds to other Small Retail Brokers via hosted solutions. These existing programs are specifically designed to encourage retail brokers to distribute market data, and the eligibility criteria for those programs reflect the characteristics of the retail brokerage business model.

The proposed Data Vendor Program does not displace or reduce the benefits available to retail brokers under those existing programs. Rather, it creates a parallel and complementary framework for a distinct category of participants—Data Vendors—that do not maintain brokerage relationships with Users, and whose primary business purpose is categorically different from that of a retail broker. Just as it would not be appropriate to extend the Small Retail Broker Program to Data Vendors, it is similarly appropriate—and not unfairly discriminatory—not to extend the Data Vendor Program to retail brokers or other participants that maintain brokerage relationships with their Users, whose needs are separately addressed by the Exchange's existing programs.

Not an Extranet Service Provider

The Exchange also believes it is not unfairly discriminatory to exclude Extranet Service Providers from the Data Vendor Program. An Extranet Service Provider, as defined, is an entity that transmits a market data product to data recipients without modification of the content, format, or other characteristics of the product. Extranet Service Providers do not transform, enrich, or add value to the data they transmit—they serve as conduits, passing data through in its original form. This is fundamentally distinct from the function of a Data Vendor, which, by definition, must transform the Market Data Product as part of its service offering.

The Data Vendor Program is specifically premised on the value that transformation adds to the data distribution ecosystem. By enabling Data Vendors to create differentiated products—delivered via a terminal, API, proprietary feed, or other value-added

mechanism—that appeal to a broader range of downstream Distributors, the Program advances the Exchange's goal of maximizing the reach and utility of its consolidated market data throughout the national market system. Extending the Program to Extranet Service Providers, which do not perform this transformative function, would undermine the Program's core purpose and would not serve the policy goal of broadening distribution of market data products in readily accessible, value-added formats.

The Exchange has created programs to address the distinct needs and business models of different categories of market participants, and the proposed Data Vendor Program is a natural extension of this approach. In addition to the Small Retail Broker programs described above, the Exchange also offers fee waivers for eligible Internal Distributors of the EDGX Depth Data Feed, which are intended to incentivize new Internal Distributors to integrate data feeds into their systems. The differentiation between Data Vendors and other categories of market participants reflects the distinct roles these entities play and the distinct incentive structures appropriate to each and does not constitute unfair discrimination.

18-Month and Integration Requirements

The Exchange further believes it is not unfairly discriminatory to limit the Program to Data Vendors that have not received the Applicable Feed for which they seek a waiver during the 18 months preceding the waiver application date, and that have integrated, or are actively in the process of integrating,²¹ the Applicable Feed and making it commercially available to subscribers. The 18-month limitation is designed to ensure that the fee waivers serve their intended purpose of reducing the upfront cost barriers for new market participants. This approach is directly consistent with the analogous frameworks the Exchange has adopted in prior programs—including the Internal Distributor Waiver for the EDGX Depth Data Feed, which similarly limits fee relief to distributors that have not received the relevant feed in the prior 18 months. The integration and commercial availability requirement is likewise reasonable because it ensures that the waiver is directed to Data Vendors that are undertaking the build-out necessary to distribute the Applicable Feed to subscribers, while not requiring full integration or

commercial availability before the waiver begins. The Exchange therefore believes that these objective limitations are reasonable and appropriate, prevent the Program from operating as a permanent subsidy for established distributors, and are not unfairly discriminatory.

The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) of the Act,²² which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities. The proposed fee waivers represent a reasonable and equitable allocation of charges. The fee waivers for External Distribution Fees are limited in duration—12 months for Cboe One Summary, 24 months for Cboe One Premium, 24 months for EDGX Summary Depth, and 12 months for EDGX Top—and are available only to Data Vendors that have not received the Applicable Feed for which they seek a waiver during the 18 months preceding the waiver application date and that have integrated, or are actively in the process of integrating, the Applicable Feed and making it commercially available to subscribers. This time-limited structure ensures that the waivers serve their intended purpose of incentivizing new market entry and build-out of data feeds. The 18-month lookback requirement further ensures the equitable allocation of fees by limiting the Program to new feeds for Data Vendors, and the integration and commercial availability requirement ensures that the waiver is tied to actual build-out and distribution activity. The Exchange notes that this same 18-month standard is consistent with the requirements applied in its other fee waiver programs.

The clarification that External Distributors of both Cboe One Summary and Cboe One Premium shall only be responsible for paying the External Distribution Fee for Cboe One Premium does not alter the economic substance of the Exchange's existing fee structure and does not impose any new or increased fees on market participants. Rather, it expressly codifies the Exchange's existing application of the user fee offset provisions—under which an External Distributor disseminating both products is assessed only the Cboe One Premium External Distribution Fee—thereby ensuring that all market participants have a clear and equitable understanding of their fee obligations. The Exchange therefore believes the

²¹ The Exchange notes that no specific step is required for this, only that Data Vendor is working to integrate the Applicable Feed into its system.

²² 15 U.S.C. 78f(b)(4).

proposed rule change provides for the equitable allocation of reasonable fees among persons using its facilities.

Lastly, the Exchange believes that the limitations regarding the waiver structure for both Cboe One Premium and Cboe One Summary equitably allocate fees. With respect to the Cboe One Summary waiver, only Data Vendors that (i) have not received Cboe One Summary during the 18 months preceding the waiver application date, (ii) are integrating or actively in the process of integrating Cboe One Summary and making it commercially available to subscribers, and (iii) are not receiving Cboe One Premium are eligible for the Summary Waiver Period. The Exchange believes that this is reasonable, as a firm that subscribes to Cboe One Premium already may elect to receive (without incurring an additional External Distribution Fee) Cboe One Summary Feed. For this reason, there is no need to provide a separate Summary Waiver Period while a firm receives Cboe One Premium, because that firm may receive the Cboe One Summary Feed without paying an additional External Distribution Fee that the proposed program seeks to waive.

Next, the Exchange notes that if a Data Vendor currently receives Cboe One Summary and elects to receive Cboe One Premium under the proposed program, so long as the Data Vendor has not received the Cboe One Premium Feed during the 18 months preceding the waiver application date and satisfies the integration and commercial availability requirement with respect to Cboe One Premium, the Data Vendor may receive the Premium Waiver Period. During that period, the Data Vendor's existing Cboe One Summary²³ subscription will be covered under the Premium Waiver, and no separate External Distribution Fee will be assessed for Cboe One Summary. This is because the Cboe One Summary External Distribution Fee is subsumed within the Cboe One Premium External Distribution Fee—accordingly, there is no separate Cboe One Summary fee to waive for a firm receiving Cboe One Premium. The Exchange believes this treatment is reasonable because it avoids providing overlapping or duplicative waiver relief while still

incentivizing an existing Summary subscriber to build out Cboe One Premium.

Lastly, if a Data Vendor has not received either Cboe One Summary or Cboe One Premium during the 18 months preceding the waiver application date and elects to build out both Cboe One feeds simultaneously, the Data Vendor will not receive separate Summary and Premium waivers. Instead, because the Cboe One Summary External Distribution Fee is subsumed within the Cboe One Premium External Distribution Fee, the Data Vendor will receive only the Premium Waiver Period, and no separate Summary Waiver Period will apply while it receives Cboe One Premium.

With respect to EDGX Summary Depth and EDGX Top, the Exchange believes that the applicable waiver periods also equitably allocate fees. The 24-month Summary Depth Waiver Period is reasonable because integrating a depth-of-book product may require a more substantial build-out by a Data Vendor, while the 12-month Top Waiver Period is reasonable because EDGX Top provides top-of-book and last sale information and generally should require a less extensive integration effort. In each case, the waiver is available only if the Data Vendor satisfies the 18-month lookback and integration or active-integration requirements for the applicable feed.

For all of the foregoing reasons, the Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder, including, in particular, the requirements of Sections 6(b)(4)²⁴ and 6(b)(5)²⁵ of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe the proposed rule change imposes any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed Data Vendor Program is available to all External Distributors that satisfy the objective, clearly defined criteria set forth in the proposed definition of "Data Vendor" and the Program's waiver eligibility standards. Any External Distributor that, as part of its primary business objective, solicits

unaffiliated third-party Distributors to redistribute a transformed Market Data Product, does not maintain a brokerage relationship with Users in connection with the applicable Market Data Product, is not an Extranet Service Provider, has not received the Applicable Feed for which it seeks a waiver during the 18 months preceding the waiver application date, and has integrated or is actively integrating the Applicable Feed and making it commercially available to subscribers may qualify for the Program on equal terms. Because eligibility is determined by objective, verifiable criteria rather than by subjective or discretionary determinations, no External Distributor is advantaged or disadvantaged relative to any other similarly situated participant.

To the extent that certain External Distributors—such as retail broker-dealers or Extranet Service Providers—do not qualify for the Data Vendor Program, this does not impose a burden on intramarket competition. As described above, retail broker-dealers and Extranet Service Providers are not similarly situated to Data Vendors. Retail broker-dealers distribute market data to their own brokerage customers as an ancillary feature of their core business of providing trade execution and account management services, and their data distribution needs are more appropriately addressed by the Exchange's existing Small Retail Broker Distribution Program and Small Retail Broker Hosted Solutions Program. Extranet Service Providers, by contrast, transmit data in its original form without transformation, and therefore do not serve the same function in the data distribution ecosystem as Data Vendors, which aggregate, transform, and redistribute data to downstream Distributors. Designing a fee program specifically targeted to Data Vendors, rather than applying it uniformly across all categories of External Distributors, does not burden intramarket competition—it reflects the materially different roles, business models, and barriers of these distinct categories of participants.

Similarly, limiting the Data Vendor Program to External Distributors and not extending it to Internal Distributors does not impose a burden on intramarket competition. Internal Distributors receive and use market data solely within their own legal entities and do not redistribute data to third parties outside their organizations. They are therefore not participants in the same competitive market for external data redistribution that the Program is designed to promote, and their needs

²³ For example, if a Data Vendor currently subscribes to Cboe One Summary Feed and is eligible for the proposed program for the Cboe One Premium Feed, no separate External Distribution Fee would be assessed for Cboe One Summary during the Premium Waiver Period because Cboe One Summary is included in the Cboe One Premium subscription. The Data Vendor would receive the Premium Waiver Period and would not receive a separate Summary Waiver Period during that time.

²⁴ 15 U.S.C. 78f(b)(4).

²⁵ 15 U.S.C. 78f(b)(5).

are separately addressed through the Exchange's existing Internal Distributor programs—including the New Internal Distributor Waiver for the EDGX Depth Data Feed. The proposed Program is specifically designed to incentivize external redistribution of the Applicable Feeds, a purpose that has no meaningful application to Internal Distributors and that creates no competitive disadvantage for them.

The Exchange does not believe the proposed rule change imposes any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes the proposed rule change will enhance intermarket competition by incentivizing a broader class of market participants to subscribe to and redistribute the Exchange's market data products, thereby increasing the Exchange's ability to compete with other national securities exchanges and data vendors for the business of Data Vendors and their downstream Distributor clients.

The market for equity market data is highly competitive. Numerous national securities exchanges offer products that compete directly with the Cboe One Summary Feed, Cboe One Premium Feed, EDGX Summary Depth Data Feed, and EDGX Top Data Feed. Market participants can obtain comprehensive market data from numerous sources, including competing exchanges (such as NYSE and Nasdaq), the consolidated tape (SIP), and alternative trading systems. Prospective Data Vendors evaluating whether to build out the Applicable Feeds must weigh the upfront costs of connectivity, software development, integration, and commercial launch against the commercial opportunity presented by the Exchange's data products. The Data Vendor Program is designed to make the Exchange's market data offering competitively priced relative to alternative options, encouraging Data Vendors to enter the Exchange's data distribution chain and thereby expanding the availability and reach of the Exchange's market data throughout the national market system.

Far from burdening intermarket competition, the proposed rule change is a direct response to competitive market forces. The Exchange's decision to offer targeted fee waivers to new Data Vendors reflects its recognition that it must compete aggressively for the participation of data redistribution firms, and that reducing the upfront cost of entry is a legitimate and necessary competitive tool in the market for exchange data products. The

Commission has recognized that exchanges operate in a competitive environment with respect to market data, and that exchange fee programs designed to attract new participants and expand market data distribution are consistent with the Act's goals of promoting competition and efficiency in the national market system.

The proposed clarification that External Distributors of both Cboe One Summary and Cboe One Premium are only responsible for paying the External Distribution Fee for Cboe One Premium similarly does not impose any burden on intermarket competition. This change does not alter the economic substance of the Exchange's existing fee structure and does not impose any new fees on any market participant. It simply makes explicit the Exchange's existing application of the user fee offset provisions, reducing potential confusion and ensuring that all market participants have a clear and consistent understanding of their fee obligations. Regulatory clarity of this nature promotes, rather than burdens, competition by enabling market participants to make fully informed decisions about their participation in the Exchange's market data programs.

With respect to the Cboe One Summary and Cboe One Premium feeds specifically, the Exchange notes that the proposed Data Vendor Program does not impose any burden on competition arising from differential pricing between Cboe One and the applicable underlying equities feeds.²⁶ The Exchange notes that historically, its pricing for Cboe One products has been based on the sum of the External Distribution Fees for the four underlying equities feeds.²⁷ As an initial matter, not all underlying equities feeds are offered under this Program. The proposed Data Vendor

²⁶ For Cboe One Summary, the four equities feeds are BZX Top, BYX Top, EDGA Top, and EDGX Top. For Cboe One Premium, the four equities feeds are BZX Summary Depth, BYX Summary Depth, EDGA Summary Depth, and EDGX Summary Depth.

²⁷ For example, under the Small Retail Broker Distribution Program, the discounted External Distribution Fee for Cboe One Summary is \$3,500 per month, which equals the sum of the External Distribution Fees for the four underlying Top feeds: BZX Top (\$2,500), BYX Top (\$250), EDGA Top (\$0), and EDGX Top (\$750). See Cboe BZX, BYX, EDGA, and EDGX U.S. Equities Exchange Fee Schedules. Because the proposed Data Vendor Program does not offer fee waivers for BZX Top, BYX Top, EDGA Top, BYX Summary Depth, or EDGA Summary Depth, the External Distribution Fee for each of those feeds would remain in effect for any Data Vendor receiving those feeds, while the External Distribution Fee for Cboe One Summary (\$0 during the Summary Waiver Period) or Cboe One Premium (\$0 during the Premium Waiver Period) would be waived. This results in a pricing differential between the sum of the underlying equities feeds and the Cboe One feeds under this Program.

Program applies only to the following feeds: EDGX Top, EDGX Summary Depth, BZX Summary Depth, Cboe One Premium, and Cboe One Summary. A Data Vendor may choose to receive a waiver for Cboe One Summary or Cboe One Premium, or for EDGX Top, or for EDGX Summary Depth, or for BZX Summary Depth, or any combination thereof, subject to the applicable eligibility requirements. However, the proposed Program does not offer fee waivers for BZX Top, BYX Top, or EDGA Top data feeds, nor does it offer fee waivers for BYX Summary Depth or EDGA Summary Depth. Accordingly, the applicable underlying equities feeds do not "sum" to the applicable Cboe One feed under this proposed Program.²⁸

The Exchange has selected the products covered by the Program based on where it sees the greatest opportunity to expand distribution and align Data Vendor coverage with downstream end-user demand. This product-specific focus is not unfairly discriminatory. All qualifying Data Vendors are subject to the same product-specific eligibility requirements, and offering waivers for some, rather than all four, of the underlying feeds does not result in unequal treatment among similarly situated participants.

Even setting aside the foregoing, the Exchange does not believe that pricing the Cboe One Summary or Cboe One Premium feeds differently from the underlying equities feeds imposes any burden on competition. To date, the Exchange is not aware of any distributor that purchases the underlying equities feeds (either the Top or Summary Depth Feeds) for the purpose of creating its own consolidated product comparable to Cboe One Summary or Cboe One Premium. This demonstrates that the practical market concern underlying any perceived burden—that distributors might be disadvantaged by differential pricing on Cboe One that is not extended to the underlying feeds—does not correspond to actual market behavior.

Moreover, Cboe One Summary and Cboe One Premium are distinct, independent data products—they are not merely consolidations of data from the four underlying equities feeds. In addition to consolidating data from BZX, BYX, EDGX, and EDGA, Cboe One Summary includes supplementary data elements not found in the individual

²⁸ For example, the External Distribution Fee is \$0 for Cboe One Summary under the proposed Program, but the sum of the four underlying equities feeds under the proposed Program is \$2,750 (\$0 EDGX Top + \$2,500 BZX Top + \$250 BYX Top + \$0 EDGA Top).

underlying feeds, including data derived from the Securities Information Processor (“SIP”) containing information on the national cumulative volume. This additional content makes Cboe One a distinct product with independent utility. Market participants subscribe to the underlying equities feeds and Cboe One for fundamentally different purposes. For example, a subscriber may be interested only in top-of-book data from a single exchange, such as EDGX, for trading, routing or compliance purposes. Such a subscriber has no need for a consolidated product. Conversely, subscribers seeking a comprehensive, cross-exchange view of Cboe liquidity choose Cboe One precisely because it offers consolidated data with additional enhancements. These distinct use cases support differentiated pricing treatment.

Data Vendors may, in theory, choose to purchase each of the four underlying equities feeds and create their own consolidated product. However, the \$1,000 monthly Data Consolidation Fee associated with purchasing Cboe One (and the primary pricing differential) provides access to a production-ready, supported consolidated product, and a vendor seeking to create a comparable offering independently would bear not only the applicable source-feed, but also the costs of developing and maintaining multiple feed handlers, normalizing the data, applying aggregation logic, performing quality assurance, supporting specification changes, and monitoring production feed health. Clients also generally prefer an official exchange product, such as Cboe One, over a vendor-derived consolidated product that requires reporting across multiple exchange products. From a user-experience perspective, the exchange-provided Cboe One is therefore a better solution. A simple combination of the four underlying feeds also would not recreate all Cboe One content, including supplementary SIP-derived information. The Exchange therefore believes that the \$1,000 monthly Data Consolidation Fee is less than the full economic cost of independently creating and maintaining a comparable product, particularly for a vendor that does not already operate the required infrastructure.

Section 6(b)(8) of the Exchange Act requires that exchange rules not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Cboe One Summary, Cboe One Premium, and the applicable underlying equities feeds are separate products serving different market needs. Just as the Commission has permitted exchanges to offer

different fees for depth-of-book data versus top-of-book data, the Exchange should have discretion to price its consolidated summary product differently from its component feeds.

Finally, the proposed Data Vendor Program is pro-competitive. By reducing the cost of consolidated and top-of-book data products for qualifying Data Vendors, the Exchange enables broader distribution of comprehensive market information to downstream distributors and, ultimately, to retail and institutional investors. Wider access to market data promotes informed investment decisions, enhances market efficiency, and supports the Exchange Act’s goals of investor protection and fair and efficient markets. The Exchange does not view external distributors as competitors for its real-time feed offerings; rather, distributors serve as essential conduits that expand delivery of Cboe real-time market data to end users who do not have the technical capability or commercial need to connect directly to Cboe’s individual market data feeds. This is particularly important for the retail community, as retail investors typically access market data through vendors rather than purchasing it directly from exchanges. By offering the proposed Data Vendor Program, the Exchange enables distributors to deliver competitively priced, comprehensive market data to a broader audience, thereby enhancing—not burdening—competition in the market data landscape.

For the foregoing reasons, the Exchange does not believe that the proposed rule 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 Act²⁹ and paragraph (f) of Rule 19b-4³⁰ 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeEDGX-2026-060 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-CboeEDGX-2026-060. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the filing will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-CboeEDGX-2026-060 and should be submitted on or before October 9, 2026.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³¹

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2026-19127 Filed 9-17-26; 8:45 am]

BILLING CODE 8011-01-P

²⁹ 15 U.S.C. 78s(b)(3)(A).

³⁰ 17 CFR 240.19b-4(f).

³¹ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-106371; File No. SR-MX2-2026-05]

Self-Regulatory Organizations; MX2 LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt the Framework of the Exchange's Initial Fee Schedule and Establish an Options Regulatory Fee ("ORF")

September 15, 2026.

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 September 9, 2026, MX2 LLC ("MX2" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the 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 with the Commission a proposed rule change to adopt the framework of the Exchange's initial fee schedule applicable to Members³ and Non-Members of the Exchange pursuant to Exchange Rules 15.1(a) and (c) and to establish an Options Regulatory Fee ("ORF"). The text of the proposed rule change is provided in Exhibit 5.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In preparation for the launch of the Exchange's options market ("MX2 Options"),⁴ the Exchange proposes to adopt the framework of the Exchange's initial fee schedule (the "Options Fee Schedule")⁵ applicable to the use of the Exchange and establish an ORF in the amount of \$0.0200 per contract side. The Exchange will commence operations as a national securities exchange on September 14, 2026, and thus, proposes the ORF to be effective on that date.

The amount of the proposed fee is based on historical industry volume, projected volumes on the Exchange, and projected Exchange regulatory costs. The Exchange's proposed ORF should balance the Exchange's regulatory revenue against the anticipated regulatory costs.

The Exchange will assess ORF for options transactions cleared by the Options Clearing Corporation ("OCC") in the "customer" range by Exchange Members that occur on the Exchange ("On Exchange ORF"). Specifically, the ORF would be collected by OCC on behalf of the Exchange from Members and Non-Members for all customer transactions executed on MEMX Options. ORF would be assessed and

⁴ On September 30, 2025, the Commission approved SR-MX2-2025-01, which proposed rules for the trading of options on the Exchange. See Securities Exchange Act Release No. 104152 (September 30, 2025), 90 FR 47867 (October 2, 2025) (SR-MX2-2025-01). The Exchange plans to launch MEMX Options in September of 2026.

⁵ Given that this is the first fee filing for MX2 Options, the Exchange wishes to establish the overall framework for the Options Fee Schedule applicable to Members and non-Members of MX2 Options by including headings for the other anticipated sections of the Fee Schedule, including Transaction Fees, Market Data Fees, and Other Fees. It is proposing to leave these sections blank, and it will file separately to adopt those specific fees at a later date.

⁶ The ORF is assessed by MX2 Options and collected via OCC on executions for the account of Public Customers, including Professionals, and Broker-Dealers including Foreign Broker-Dealers. These market participants clear in the "C" range at OCC. On the Exchange, a "Public Customer" means a person that is not a broker or dealer in securities and includes both Priority Customers and Professionals. A "Priority Customer" means a person or entity that is a Public Customer and is not a Professional. A "Professional" is any person or entity that (a) is not a broker or dealer in securities, and (b) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). Executions for the account of an OCC clearing member firm proprietary account, joint back office account clearing in the Firm range, or account of a market maker clearing in the Market Maker range will not be charged an ORF.

collected on all ultimately cleared customer contracts, taking into account adjustments for Clearing Member Trade Assignment ("CMTA") that were provided to the Exchange on the same day as the trade. Further, the Exchange would bill ORF according to the clearing instructions provided on the execution. More specifically, the Exchange proposes to assess ORF based on the clearing instruction provided on the execution on the trade date and would not take into consideration CMTA changes or transfers that occur at OCC.⁷

The following scenarios reflect how the On Exchange ORF will be assessed and collected:

1. If a Member is the executing clearing firm on a transaction that occurred on the Exchange, the fee would be assessed to and collected from that Member by OCC on behalf of the Exchange.

2. If a Member is the executing clearing firm and the transaction is "given up" to a clearing give-up (the "clearing firm"), the On-Exchange ORF is assessed to the executing clearing firm, (the On-Exchange ORF remains the obligation of the executing clearing firm under the proposal), but the On-Exchange ORF will be collected from the clearing firm, regardless of whether that clearing firm is a Member of the Exchange.

The Exchange expects to provide Members sufficient information in connection with their invoice in order to reconcile charges associated with ORF. In addition, the proposed method for collecting On-Exchange ORF will only consider CMTAs reported to the Exchange and not those reported directly to OCC. The Exchange understands that a CMTA may be added at order entry, via post-trade edit on the Exchange, or post-trade at OCC. CMTA transfers that occur at OCC do not necessarily contain reliable information regarding the Exchange on which the original transaction occurred. Without specific information as to where the original transaction occurred, the Exchange would not be able to accurately account for CMTA transfers that occur at OCC. Therefore, the Exchange will only account for CMTAs that occur on the Exchange (which may be a non-Member) and exclude CMTAs occurring at OCC.

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of Members' customer

⁷ As noted previously, the Exchange will take into account CMTA transfers that were made the same day as the trade on MEMX Options.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Exchange Rule 1.5(p).

options business, including performing routine surveillances and investigations, as well as policy, rulemaking, interpretive and enforcement activities. The Exchange believes that revenue generated from the ORF, when combined with all of the Exchange's other regulatory fees and fines, will cover a material portion, but not all, of the Exchange's regulatory costs. Regulatory costs include direct regulatory expenses and certain indirect expenses for work allocated in support of the regulatory function. The direct expenses include in-house and third-party service provider costs to support the day-to-day regulatory work such as surveillance, investigations and examinations. The indirect expenses include support from personnel in such areas as human resources, legal, information technology, facilities and accounting as well as shared costs necessary to operate the Exchange and to carry out its regulatory function, such as hardware, data center costs and connectivity. The Exchange acknowledges that these indirect expenses are also allocated towards other business operations, such as providing connectivity and market data services, for which the Exchange has also conducted a cost-based analysis. As such, when analyzing the indirect expenses associated with its regulatory program, the Exchange did not double-count any expenses, but instead, allocated a portion of the cost not already allocated to other fees imposed by the Exchange. Indirect expenses are anticipated to be approximately 20% of the total regulatory costs for 2026. Thus, direct expenses are anticipated to be approximately 80% of the total regulatory costs for 2026. The Exchange notes that its regulatory responsibilities with respect to Member compliance with options sales practice rules have been allocated to the Financial Industry Regulatory Authority ("FINRA") under a 17d-2 Agreement. The ORF is not designed to cover the cost of options sales practice regulation. Finally, the Exchange notes that it takes into account all regulatory sources of funding, including fines collected by the Exchange in connection with disciplinary matters, when determining the appropriate ORF rate.

The Exchange will monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. More specifically, the Exchange will ensure that revenue generated from ORF not exceed 75% of total annual regulatory costs. The

Exchange will monitor regulatory costs and revenues at a minimum on a semi-annual basis. If the Exchange determines regulatory revenues exceed or are insufficient to cover a material portion of its regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission. Going forward, the Exchange will notify Members of adjustments to the ORF via Regulatory Notice at least 30 calendar days prior to the effective date of the change and is proposing to codify this practice in the Options Fee Schedule.

The Exchange notes that other exchanges currently impose an On Exchange ORF, and most of the options exchanges launched over the last 15 years have implemented an ORF on the day of launch or shortly thereafter in order to properly fund their regulatory programs.⁸

The Exchange notified current and future Members via a Regulatory Circular of the proposed ORF prior to the proposed operative date, on August 18, 2026.⁹ The Exchange believes that the prior notification to future market participants will ensure that the future market participants are prepared to configure their systems to properly account for the proposed ORF.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act¹⁰ in general, and furthers the objectives of Section 6(b)(4) of the Act¹¹ 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 Act¹² 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 that establishing an ORF in the amount of

\$0.0200 is reasonable because the Exchange's collection of ORF needs to be balanced against the amount of projected regulatory costs incurred by the Exchange. The Exchange believes that the amount proposed herein will serve to balance the Exchange's regulatory revenue against the anticipated regulatory costs. Moreover, the proposed amount is lower than the amount of ORF assessed on other exchanges.¹³

The Exchange believes the proposed ORF is equitable and not unfairly discriminatory because it is objectively allocated to Members in that it is charged to all Members on all their transactions on MX2 Options that clear as customer at the OCC. Moreover, the Exchange believes the ORF ensures fairness by assessing fees to those Members that are directly based on the amount of customer options business they conduct. Regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., Member proprietary transactions) of its regulatory program.

The ORF is designed to recover a material portion of the costs of supervising and regulating Members' customer options business including performing routine surveillances and investigations, as well as policy, rulemaking, interpretive, and enforcement activities. The Exchange will monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. The Exchange has designed the ORF to generate revenues that, when combined with all of the Exchange's other regulatory fees, will be less than 75% of the Exchange's regulatory costs, which is consistent with the Exchange's by-laws that state in Section 17.4(b): "[a]ny Regulatory Funds shall not be used for non-regulatory purposes or distributed,

⁸ MEMX Options—effective 9/27/23, launch same; MIAx Options—effective 1/2/13, launch 12/7/12; ISE Topaz—effective 8/5/13, launch same; MIAx Pearl—effective 2/6/17, launch same; MIAx Emerald—effective 3/1/19, launch same.

⁹ See MX2 Options Regulatory Notice 26–10, <https://www.memxtrading.com/alerts-and-notices/regulatory-notice-26-10-mx2-options-regulatory-fee>.

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, e.g., the BOX Options Fee Schedule Section II(C), which provides an ORF rate of \$0.0220 per contract. See also the MIAx Pearl Fee Schedule, Section 2(b), which provides an ORF rate of \$0.0240 per contract, the MIAx Emerald Fee Schedule, Section 2(b), which provides an ORF rate of \$0.0220 per contract, and the MIAx Sapphire Fee Schedule, Section 2(b), which provides an ORF rate of \$0.0220 per contract.

advanced or allocated to any Company Member, but rather, shall be applied to fund regulatory operations of the Company (including surveillance and enforcement activities). . . .¹⁴ In this regard, the Exchange believes that the amount of the fee is reasonable.

The Exchange believes that the proposal to provide at least 30 days advance notice to any change in the ORF is reasonable because it will give participants certainty on the timing of changes, if any, and better enable them to properly account for ORF charges among their customers.

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. This proposal will not create an unnecessary or inappropriate intra-market burden on competition because the ORF will apply to all customer activity on the Exchange, and is designed to enable the Exchange to recover a material portion of the Exchange's cost related to its regulatory activities. This proposal will not create an unnecessary or inappropriate inter-market burden on competition because it will be a regulatory fee that supports regulation and customer protection in furtherance of the purposes of the Act. The Exchange is obligated to ensure that the amount of regulatory revenue collected from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs. Unilateral action by the Exchange in establishing fees for services provided to its Members and others using its facilities will not have an impact on competition. The Exchange's proposed ORF, as described herein, is lower than or comparable to fees charged by other options exchanges.

The Exchange notes that while it does not believe that its proposed ORF will impose any burden on inter-market competition, the Exchange not charging an ORF or being precluded from charging an ORF would, in fact, represent a significant burden on competition. As noted above, the Exchange is a new entrant in the highly competitive environment for equity options trading. As also noted above, all seventeen (17) [sic] registered options exchanges currently impose ORF on their members, and, similar to the Exchange, the majority of the options exchanges launched over the last decade have implemented an ORF on the day

of launch or shortly thereafter.¹⁵ The Exchange believes that in order to compete with these existing options exchanges, it must, in fact, impose an ORF on its Members, and that the inability to do so would result in an unfair competitive disadvantage to the Exchange.

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 Act¹⁶ and paragraph (f) of Rule 19b-4¹⁷ 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 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-MX2-2026-05 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-MX2-2026-05. 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 (<https://www.sec.gov/rules/sro.shtml>). Copies of the filing will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-MX2-2026-05 and should be submitted on or before October 9, 2026.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁸

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2026-19117 Filed 9-17-26; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-106376; File No. SR-NYSETEX-2026-34]

Self-Regulatory Organizations; NYSE Texas, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 7.12 Concerning the Resumption of Trading Following a Level 3 Market-Wide Circuit Breaker Halt in Connection With the Industry's Expansion of Trading Hours to 23 Hours per Day, 5 Days per Week

September 15, 2026.

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 September 4, 2026, NYSE Texas, Inc. ("NYSE Texas" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 7.12 ("Trading Halts Due to

¹⁵ See *supra*, note 8.

¹⁶ 15 U.S.C. 78s(b)(3)(A).

¹⁷ 17 CFR 240.19b-4(f).

¹⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

¹⁴ See MX2 LLC—LLC Agreement at <https://info.memxtrading.com/regulation/governance/>.

Extraordinary Market Volatility”) concerning the resumption of trading following a Level 3 market-wide circuit breaker halt in connection with the industry’s expansion of trading hours to 23 hours per day, 5 days per week. The proposed rule change is available on the Exchange’s website at www.nyse.com and at the principal office of the Exchange.

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 Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE Texas, Inc. (“NYSE Texas” or the “Exchange”) proposes to amend Rule 7.12 (“Trading Halts Due to Extraordinary Market Volatility”) concerning the resumption of trading following a Level 3 market-wide circuit breaker (“MWCB”) halt (“Level 3 Market Decline”) in connection with the industry’s expansion of trading hours to 23 hours per day, 5 days per week (“23/5 Trading”). Some exchanges, including the Exchange’s affiliate exchange, NYSE Arca, Inc. (“NYSE Arca”), are planning to offer overnight trading,³ and as a result, the uniform Level 3 Market Decline rules of each exchange are being modified, as explained further below.

Background

The MWCB mechanism under Rule 7.12 provides an important, automatic mechanism that is invoked to promote stability and investor confidence during a period of significant stress when U.S. securities markets experience extreme broad-based declines. All U.S. equity exchanges and FINRA (collectively, the self-regulatory organizations or “SROs”) adopted uniform rules relating to the MWCB mechanism in 2012, which are

designed to slow the effects of extreme price movement through coordinated trading halts across U.S. securities markets when severe price declines reach levels that may exhaust market liquidity.⁴ Such market-wide circuit breakers provide for trading halts in all U.S. cash equity and equities options markets during a severe market decline as measured by a single-day decline in the S&P 500 Index during regular trading hours.

Pursuant to Rule 7.12, a market-wide trading halt will be triggered if the S&P 500 Index declines in price by specified percentages from the prior day’s closing price of that index. Currently, the triggers are set at three circuit breaker thresholds: 7% (Level 1), 13% (Level 2), and 20% (Level 3). A market decline that triggers a Level 1 or Level 2 halt after 9:30 a.m. ET and before 3:25 p.m. ET would halt market-wide trading for 15 minutes, while a similar market decline at or after 3:25 p.m. ET would not halt market-wide trading. If a Level 3 Market Decline occurs at any time during the trading day, trading in all stocks will halt on the Exchange for the remainder of the trading day, and will resume the following trading day at 7:00 a.m. ET.

Proposal

The Exchange now proposes to amend Rule 7.12 to reflect extended trading hours under 23/5 Trading. On December 6, 2026, several exchanges, including NYSE Arca, intend to offer new overnight trading sessions that would be available from 9:00 p.m. ET to 4:00 a.m. ET, significantly increasing their hours of operation in response to customer demand.

As discussed, consistent with the uniform rules in place across all SROs, current Rule 7.12(b)(ii) provides that if a Level 3 Market Decline occurs at any time during the trading day, the Exchange shall halt trading in all stocks on the Exchange for the remainder of the trading day. Currently, that means that the earliest that any exchange would re-open trading after a Level 3 Market Decline is 4:00 a.m. ET the following day, since no SROs are open for trading before 4:00 a.m. ET.

Unless amended, when 23/5 Trading is launched, the current rule’s reference to halting “for the remainder of the

trading day”⁵ would require SROs participating in 23/5 Trading to re-open trading at an earlier time, *i.e.*, 9:00 p.m. ET on the same calendar day, when those SROs’ systems would generally become available for overnight trading. The Exchange does not believe that this is an expected or desired result and is therefore amending this rule in coordination with the other SROs such that trading on any SRO will not resume until 4:00 a.m. ET or later on the following trading day, consistent with current market practice. This proposed rule change is therefore not intended to make any substantive changes to the MWCB mechanism. Rather, the proposed rule change would preserve the current resumption time following a Level 3 Market Decline.

To effect this change, the Exchange proposes to delete the language in Rule 7.12(b)(ii) that provides that trading in all stocks will halt on the Exchange “for the remainder of the trading day” if a Level 3 Market Decline occurs at any time during the trading day, and replace it with new language that explicitly provides that trading in all stocks would halt on the Exchange until 4:00 a.m. ET or later on the following trading day.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁶ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁷ in particular, 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.

The MWCB mechanism described in Rule 7.12 is an important, automatic mechanism that is invoked to promote stability and investor confidence during periods of significant stress when U.S. securities markets experience extreme broad-based declines. The proposed rule change, when applied uniformly by all SROs, would ensure that the current 4:00 a.m. ET resumption time following a Level 3 halt continues to apply under 23/5 Trading, notwithstanding current rule text implying that the resumption time would coincide with the start of overnight trading on SROs operating an overnight session.

Rather than leave the rule in place as is, which would result in an earlier resumption time than originally contemplated when the rule was adopted, the Exchange, the other U.S.

³ See, *e.g.*, Securities Exchange Act Release No. 105532 (May 21, 2026), 91 FR 31509 (May 27, 2026) (SR-NYSEARCA-2026-53) (“NYSE Arca 23/5 Trading Notice”). The Exchange does not intend to implement 23/5 Trading at this time.

⁴ See Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR-BATS-2011-038; SR-BYX-2011-025; SR-BX-2011-068; SR-CBOE-2011-087; SR-C2-2011-024; SR-CHX-2011-30; SR-EDGA-2011-31; SR-EDGX-2011-30; SR-FINRA-2011-054; SR-ISE-2011-61; SR-NASDAQ-2011-131; SR-NSX-2011-11; SR-NYSE-2011-48; SR-NYSEAmex-2011-73; SR-NYSEArca-2011-68; SR-Phlx-2011-129) (“MWCB Approval Order”).

⁵ See Rule 7.12(b)(ii).

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

equity exchanges, and FINRA met alongside industry representatives to determine the appropriate resumption time. Following those discussions, the collective decision was made to retain the 4:00 a.m. ET resumption time, notwithstanding the fact that an earlier resumption time would be possible with the introduction of 23/5 Trading. The proposed rule change codifies this decision into the Exchange's rules. The Exchange understands that the other SROs will also be filing similar proposed rule changes. As a result, the market as a whole, including on- and off-exchange, will continue to be subject to harmonized rules for the resumption of trading following a Level 3 Market Decline.

While the SROs had previously decided to tie the resumption time following a Level 3 halt to the earliest SRO opening time, the upcoming transition to 23/5 Trading raises various concerns that warrant a change from the current approach.

First, the Exchange notes that the MWCB mechanism was designed to provide a cooling-off period where market participants would be provided with additional time to evaluate the market events that led to the decline before determining how to position their trading activity for the next day. With the introduction of 23/5 Trading and the start of overnight trading on some SROs at 9:00 p.m. ET, however, this cooling-off period could be materially shortened, reducing one of the key benefits that the MWCB mechanism was designed to provide in the first place. Rather than shorten the cooling-off period and risk this benefit, the Exchange believes the market would be better served by a change to the length of the associated trading halt that mirrors current market practice. Under the proposed rule, as is the case today, after a Level 3 halt, all SROs would re-open trading at 4:00 a.m. ET or later, and no SRO would offer an overnight trading session starting on the day of a Level 3 halt.

Second, overnight trading may be subject to different liquidity and participation considerations than the current pre-market sessions that start at or after 4:00 a.m. ET. Notably, while retail investors have expressed interest in overnight trading, the Exchange expects that institutional investors will take more time to transition to a round-the-clock model. However, such institutional participation may be of heightened importance following a Level 3 halt, as these investors are likely to have views on the underlying market events that led to the Level 3 Market Decline in the first place. The Exchange

is concerned that opening during hours that such participants do not normally trade may impact the quality of price discovery at a time of significant market volatility. Waiting until 4:00 a.m. ET to resume trading would facilitate broader participation and therefore price discovery.

Finally, the Exchange notes that the Commission recently approved an amendment to the Plan to Address Extraordinary Market Volatility ("LULD Plan") that would establish new price protections from 9:00 p.m. ET to 4:00 a.m. ET.⁸ While these price bands would help to assure a fair and orderly market during normal market conditions, it is possible that they would instead prevent normal price discovery following a Level 3 Market Decline. Rather than allowing trading to resume with such price bands in effect, which would represent a change from the current trading reopening following a Level 3 Market Decline, the Exchange believes that requiring SROs to wait until 4:00 a.m. ET or later to resume trading would ensure that price discovery can occur unimpeded during pre-market trading, as it does today, which may further inform prices going into the opening auction and regular market hours trading following a Level 3 halt.

Given the factors discussed above, the Exchange believes that trading in all securities on the Exchange should not resume before 4:00 a.m. ET on the trading day after a Level 3 halt. This decision, which the Exchange understands will also be reflected in the rules of the other SROs, would promote a fair and orderly market at a time of significant market volatility, and thereby protect investors and the public interest. In addition, while the actual Level 3 resumption time would not be changing in practice—as proposed, the current resumption time and future resumption time would both be 4:00 a.m. ET at the earliest—the Exchange believes that it is appropriate to amend its rules to ensure that its rules reflect the upcoming changes due to 23/5 Trading. Without this change, market participants may mistakenly believe that the Exchange intends for trading to re-open on overnight trading exchanges at 9:00 p.m. ET following a Level 3 halt. The proposed rule change would therefore facilitate operational

transparency while providing for a fair and orderly market.

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 because the proposal would ensure the continued, uninterrupted operation of a consistent mechanism to halt trading across U.S. securities markets. Further, the Exchange understands that the other SROs intend to file proposed rule changes to ensure a consistent resumption time at 4:00 a.m. or later ET across markets. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act⁹ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁰

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.

⁹ 15 U.S.C. 78s(b)(3)(A)(iii).

⁸ See Securities Exchange Act Release No. 106042 (August 5, 2026), 91 FR 51515 (August 10, 2026) (Order Granting Approval of the Twenty-Seventh Amendment to the National Market System Plan to Address Extraordinary Market Volatility to Establish Temporary Price Band Protections in Overnight Trading).

¹⁰ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NYSETEX-2026-34 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-NYSETEX-2026-34. 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 (<https://www.sec.gov/rules/sro.shtml>). Copies of the filing will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NYSETEX-2026-34 and should be submitted on or before October 9, 2026.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2026-19121 Filed 9-17-26; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 36331; File No. 812-15825]

OneAscent Capital Opportunities Fund, et al.

September 15, 2026.

AGENCY: Securities and Exchange Commission ("Commission" or "SEC").

ACTION: Notice.

Notice of application for an order under sections 17(d) and 57(i) of the Investment Company Act of 1940 (the "Act") and rule 17d-1 under the Act to permit certain joint transactions otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and rule 17d-1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain business development companies ("BDCs"), closed-end management investment companies, and open-end management investment companies to co-invest in portfolio companies with each other and with certain affiliated investment entities.

APPLICANTS: OneAscent Capital Opportunities Fund, OneAscent Capital LLC, OAC Evergreen I, LLC and OneAscent Capital Impact Fund I, LP.

FILING DATES: The application was filed on June 2, 2025, and amended on June 11, 2025, September 12, 2025, June 16, 2026, July 28, 2026 and September 8, 2026.

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 on any application by emailing the SEC's Secretary at Secretaries-Office@sec.gov and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below. The email should include the file number referenced above. Hearing requests should be received by the Commission by 5:30 p.m., Eastern time, on October 13, 2026, 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 at Secretaries-Office@sec.gov.

ADDRESSES: The Commission: Secretaries-Office@sec.gov. Applicants: John Siverling, OneAscent Capital LLC, jsiverling@oneascent.com and Megan W. Clement, Esq. and Briana D. Armand, Esq., Thompson Hine LLP, Megan.Clement@ThompsonHine.com and Briana.Armand@thompsonhine.com.

FOR FURTHER INFORMATION CONTACT:

Adam Large, Senior Special Counsel, or

Laura L. Solomon, Senior Counsel at (202) 551-6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal analysis, and conditions, please refer to Applicants' fifth amended application, filed September 8, 2026, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field, on the SEC's EDGAR system.

The SEC's EDGAR system may be searched at <https://www.sec.gov/search-filings>. You may also call the SEC's Office of Investor Education and Assistance at (202) 551-8090.

For the Commission, by the Division of Investment Management, under delegated authority.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2026-19111 Filed 9-17-26; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-106370; File No. SR-NYSEARCA-2026-93]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of a Proposed Rule Change To Permit the Listing of Binary KPI Options

September 15, 2026.

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 September 3, 2026, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") a proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Rules to permit the listing of binary options overlying key performance indicators ("KPIs") reported by certain issuers of stock ("binary KPI options"). The proposed rule change is available on the Exchange's website at

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

¹¹ 17 CFR 200.30-3(a)(12).

www.nyse.com and at the principal office of the Exchange.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Rules to permit the listing of binary options overlying KPIs reported by certain issuers of stock ("binary KPI options").⁴

Binary options are based on the same framework as traditional, standardized options traded on the Exchange, except the payout of a binary option is an amount contingent upon the occurrence of the option being in- or at-the-money rather than the degree to which the option is in-the-money. As a result, payout at expiration of a binary option is an all-or-nothing occurrence.

Under current Exchange Rules, the Exchange may list binary return derivatives ("ByRDS").⁵ The Exchange proposes to amend its Rules to permit the listing of binary KPI options. Binary KPI options are European-style, cash-settled options contracts listed on an underlying KPI of an issuer whose exercise settlement value is determined not by the market price of the issuer's stock, but by whether a specific financial or operating metric reported by

the issuer in an earnings-related filing submitted to the U.S. Securities and Exchange Commission (the "Commission") meets or exceeds a pre-specified strike level.

First, similar to ByRDS and NYSE American Options Broad-Based Index Binary Options, the Exchange proposes to adopt Section 9 (Binary KPI Options) to describe binary KPI options. The Rules in proposed Section 9 apply only to binary KPI options. All other Rules apply to the trading of binary KPI options, except as otherwise provided or the context otherwise requires.

Specifically, the Exchange proposes to adopt Rule 5.96–O (Applicability, Definitions). Like other standardized options, binary KPI options have standardized terms that are established by the Exchange. Standardized terms for binary KPI options include the exercise criteria that is the condition or criteria of a binary KPI option, the exercise settlement amount (*i.e.*, payout amount), strike prices, expiration dates, settlement type as A.M.-settlement or P.M.-settlement, the settlement style (as European), and the requirements used to determine if the KPI condition or criteria of a binary KPI option has been met (the "payout determination requirement"). The Exchange proposes to establish these terms in new Rule 5.96–O and additional provisions in proposed 5.96–O(b), as described below.

The Exchange proposes to define a "binary KPI option" in new Rule 5.96–O(b) as a cash-settled option contract listed on an underlying KPI of an issuer with an exercise settlement amount that is established at the creation of the option and with a settlement value that is determined by whether a specific KPI disclosed by the issuer in an earnings-related filing submitted to the Commission meets or exceeds its exercise price. Binary KPI options are paid out if the reported value of the applicable KPI (1) equals or is greater than (as the payout determination requirement) the exercise price for a call binary KPI option or (2) is less than (as the payout determination requirement) the exercise price for a put binary KPI option. The Exchange also proposes to provide that unless the context dictates otherwise, the terms underlying security, equity, or index, or any variations of these terms, in the Rules mean KPI for purposes of binary KPI options.

The Exchange proposes to define a "call binary KPI option" as an option contract that returns an exercise settlement amount if the settlement value of the underlying KPI is at or

above the exercise price at expiration (*i.e.*, in- or at-the-money).⁶

The term "Clearing Corporation" would mean the registered clearing agency designated by the Exchange to clear binary KPI options.⁷

The Exchange proposes to define "exercise price" (also referred to as "strike price") as the value⁸ to which the settlement value of the underlying KPI is compared to the exercise settlement amount. For binary KPI options, the exercise price is the exercise threshold of an option contract that establishes a number, value, or measure that is compared against the price of the settlement value of the underlying index or the KPI to determine if the cash payout amount (*i.e.*, the exercise settlement amount) will be paid out. In other words, binary options will have a threshold number as the exercise price that will be used to determine if the exercise criteria of the binary option has been met and the option will be exercised (and if holders will receive the cash payout amount). For binary KPI options, the exercise threshold will be a number that reflects or is compared to the underlying KPI of the binary option.

The Exchange proposes to define the term KPI (or "key performance indicator") as a key financial or operating metric disclosed by an issuer in its earnings-related filings submitted to the Commission (*i.e.*, Form 8–K, Form 10–Q, or Form 10–K, as applicable).⁹

The Exchange proposes to define "put binary KPI option" as an option contract that returns an exercise settlement amount if the settlement value of the underlying KPI is below the exercise price at expiration (*i.e.*, in-the-money).¹⁰

The Exchange proposes to define "settlement value" as the value of the underlying KPI that is used to determine whether a binary KPI option is in-, at-, or out-of-the-money.¹¹ The proposed

⁶ See proposed Rule 5.96–O(b)(2).

⁷ See proposed Rule 5.96–O(b)(3). The definition of Clearing Corporation reflects that the Exchange may designate the Options Clearing Corporation ("OCC") or another registered clearing agency to clear binary KPI options. References in this filing to the Clearing Corporation therefore are intended to be clearing agency-neutral. The proposed definition does not alter the requirement that clearing and settlement occur through a registered clearing agency subject to the applicable provisions of the Act and the rules and oversight applicable to that clearing agency.

⁸ See proposed Rule 5.96–O(b)(4). The value of an exercise price is measured in the applicable units of the KPI. For example, some KPIs are measured in U.S. dollars while others may be measured in percentages or numbers.

⁹ See proposed Rule 5.96–O(b)(6).

¹⁰ See proposed Rule 5.96–O(b)(7).

¹¹ See proposed Rule 5.96–O(b)(8).

⁴ The Exchange's proposal is similar to recent proposals filed by Cboe Exchange, Inc. ("Cboe") and MEMX LLC ("MEMX"). See Securities Exchange Act Release No. 105877 (July 10, 2026), 91 FR 43418 (July 15, 2026) (SR-CBOE-2026-061) ("Notice of Filing of a Proposed Rule Change to Amend its Rules to Permit the Listing of Binary Options Overlying Key Performance Indicators ("KPIs") Reported by Certain Issuers of Stock ("Binary KPI Options")) and Securities Exchange Act Release No. 106182 (August 24, 2026) (SR-MEMX-2026-25). In addition, the Exchange notes that the proposal is similar to the trading of Broad-Based Index Binary Options approved on its related options exchange NYSE American (see NYSE American Rules 18 (Broad-Based Index Binary Optionssm)).

⁵ See NYSE ARCA Rules Section 8 (Binary Return Derivativessm).

definition specifies that the “settlement value” is the value of the applicable KPI as disclosed in the applicable issuer’s earnings-related filing submitted to, the Commission on applicable expiration date (for both A.M.-settled and P.M.-settled binary KPI options).¹² The Exchange designates the applicable KPI and the relevant reporting period (for example, a calendar quarter) at the time of listing a binary KPI option. Proposed paragraph (b) of the settlement value definition provides if the applicable KPI is not reported or otherwise unavailable

on the expiration date (and will not be reported), settlement (including any payout of the exercise settlement amount) will occur in accordance with the Rules of the Clearing Corporation.

Additionally, proposed paragraph (c) of the settlement value definition states if an applicable KPI is restated after the expiration date and settlement of a binary KPI option, the settlement value (and the exercise settlement amount) of the binary KPI option does not change. In other words, the value of the applicable KPI as reported by the issuer on the applicable expiration date is

final, and the amount paid (or not paid) at settlement will not change, regardless of whether it is later restated by the issuer.

The Exchange proposes to adopt Rule 5.97–O(a) (Designation of Binary KPI Option Contracts) to identify the binary KPI options that may be listed for trading on the Exchange. Pursuant to proposed Rule 5.97–O(a), the Exchange may from time to time approve for listing and trading on the Exchange any of the following binary KPI options contracts for the following issuers:

Company	KPI (each financial metric is measured in \$ unless otherwise specified)
Apple, Inc	Earnings per share: diluted. Total net sales. Net sales by category: iPhone. Net sales by category: Services. Net sales by reportable segment: Americas. Net sales by reportable segment: Greater China.
Advanced Micro Devices, Inc	GAAP Diluted earnings per share. GAAP Revenue. Net Revenue: Data Center Segment. Net Revenue: Client and Gaming Segment.
Alphabet Inc	GAAP Operating Margin (%) Diluted net income per share. Revenues. YouTube ads Revenues. Google Cloud Revenues
Amazon.com, Inc	Diluted earnings per share. Total Net sales. AWS: Net sales. North America: Net sales. International: Net sales. Net Sales: Advertising services
Bank of America Corporation	Diluted earnings per share. Total Revenue, net of interest expense. Net Interest Income. Provision for credit losses. Net Income
Citigroup Inc	Diluted earnings per share. Total Revenue, net of interest expense. Net Interest Income. Total Provision for credit losses. Net Income
Coinbase Global, Inc	Net income per share—Diluted. Total Revenue. Transaction Revenue. Total Trading Volume.
Ford Motor Company	Subscription and Services Revenue GAAP Earnings per share—Diluted. Total Revenues. Ford Pro Segment: Revenue. Ford Model e Segment: Revenue. Ford Blue Segment: Revenue
Intel Corporation	GAAP Earnings per share attributable to Intel—diluted. Net revenue. Revenue: Client Computing Group (CCG). Revenue: Data Center and AI (DCAI). Revenue: Intel Foundry. GAAP operating margin (%)

¹² While the timing of an issuer’s official announcement informs whether the Exchange will establish a binary KPI option as A.M.-settled or P.M.-settled (as further discussed below), the

Exchange will use the KPI value included in an issuer’s report submitted to the Commission (and not the press release announcing earnings results, for example) as the settlement value. The Exchange

understands, however, these values are generally the same.

Company	KPI (each financial metric is measured in \$ unless otherwise specified)
JPMorgan Chase & Co	Earnings per share—diluted. Net revenue—reported. Net Interest Income. Provision for credit losses. Net Income
Marathon Digital Holdings, Inc	Earnings (Net loss) per share of common stock—diluted. Revenues. Number of Blocks Won (# Bitcoin (BTC)). Energized Hashrate (EH) (# EH/s). Total Bitcoin Holdings (# BTC). BTC Produced (# BTC). BTC Purchased (# BTC)
Meta Platforms, Inc	Earnings per share: Diluted. Revenue. Family Daily Active People (DAP) (#). Revenue: Advertising. Operating Margin (%)
Microsoft Corporation	Diluted Earnings per Share. Revenue. Intelligent Cloud: Revenue. Microsoft Cloud revenue. More Personal Computing: Revenue
Netflix, Inc	Earnings per share: Diluted. Revenues. United States and Canada (UCAN): Revenue. Europe, Middle East, and Africa (EMEA): Revenue
NVIDIA Corporation	Operating Margin (%) GAAP Diluted earnings per share. Revenue. Data Center Revenue. Edge Computing Revenue. Automotive Revenue
Palantir Technologies Inc	Earnings per share attributable to common stockholders, diluted. Revenue. Net Income. Closed Deals of at Least \$1 Million (#)
Robinhood Markets, Inc	Net income attributable to Robinhood common stockholders: Diluted. Total net revenues. Funded Customers (#). Average Revenue Per User (“ARPU”). Robinhood Gold Subscribers (#)
SoFi Technologies, Inc	Earnings per share attributable to common stockholders—diluted. Total net revenue. Total net revenue—Technology Platform. Total net revenue—Financial Services. Total net revenue—Lending
Space Exploration Technologies Corp	Earnings per share: Diluted. Total Revenues
Super Micro Computer, Inc	Net income per common share: Diluted. Net sales. Gross Margin (%). Cash flow used in operations. Net Income
Target Corporation	Diluted earnings per share. Net sales. Food & Beverage Net sales. Apparel & Accessories Net sales. Operating income: Rate (%)
Tesla, Inc	Net Income per share of common stocks attributable to common stockholders: diluted. Total Revenues. Total Automotive Revenue. Model 3/Y Production (#). Supercharger Connectors (#). Free Cash Flow
The Walt Disney Company	Diluted earnings per share. Revenues. Entertainment Subscription Video On Demand (SVOD) Operating Income. Revenues: Experiences. Segment operating income: Sports

The Exchange proposes to add Rule 5.97–O(b) to clarify that binary KPI options are a separate class from other options overlying the stock of the issuer and are a separate class from other binary KPI options with differently underlying KPIs for the same issuer. The Exchange believes this is reasonable given that an individual KPI is the specific underlying of binary KPI options, and generally options with different underlyings (*e.g.*, different underlying security or index) are different option classes.

Next, the Exchange proposes to adopt Rule 5.98–O (Terms of Binary KPI Option Contracts) to describe the permissible terms of binary KPI option series. Proposed Rule 5.98–O provides that binary KPI options listed and traded on the Exchange are designated as to expiration date, exercise price, settlement type, settlement style, exercise settlement amount, contract multiplier, and underlying KPI. After approving a particular binary KPI option class for listing and trading on the Exchange, the Exchange from time to time may open for trading series of options in that binary KPI option class.

Proposed Rule 5.98–O(a) states binary KPI options have European-style settlement. Proposed Rule 5.98–O(a) further provides that the Exchange may designate the settlement type for binary KPI options as A.M.-settled or P.M.-settled. Binary KPI options for issuers¹³ that disclose their earnings results before the open of the Core Trading Session on a given trading day are designated as A.M.-settled binary KPI options, and binary KPI options for issuers that disclose their earnings results after the close of RTH on a given trading day are designated as P.M.-settled binary KPI options. The Exchange notes that the proposed concepts of A.M.-settlement and P.M.-settlement for binary KPI options differ compared to traditional options, for which “P.M.-settled” generally means that the expiration of an option so designated will settle to the closing price of the underlying security or index value and “A.M.-settled” generally means that the expiration of an option so designated will settle to the opening price of the underlying. While different than how these terms apply to standard and binary index options, the Exchange believes the proposed description of A.M.-settlement and P.M.-settlement appropriately reflect the earnings disclosure practices of issuers.

¹³ The Exchange determines whether an issuer discloses its earnings results before or after the close of the Core trading hours on a given trading day based on publicly available information regarding the issuer’s disclosure practice.

Additionally, while the timing of the event that will determine whether the Exchange designates a binary KPI option as A.M.-settled or P.M.-settled is different than that for traditional options and binary index options, the trading hours on expiration dates for each of A.M.-settled and P.M.-settled binary KPI options are consistent with those of A.M.-settled and P.M.-settled index options (traditional and binary) today.

Proposed Rule 5.98–O(b) describes permissible expirations for binary KPI options. Specifically, the proposed rule change will permit the Exchange to list series that expire on the date the issuer announces its earnings results for the applicable reporting period (such as calendar quarter). The expiration date for a binary KPI option will be the date on which an issuer discloses the applicable KPI in its earnings results (for example, the date on which it issues an earnings results press release) for the specified reporting period (with the specific expiration date to be finalized when an issuer announces the date on which it will disclose its earnings results for that reporting period).¹⁴ If that date is a Tuesday, Wednesday, Thursday, or Friday and the Exchange is not open for business on that date, the expiration date will be the first business day immediately prior to that day. If that date is a Monday and the Exchange is not open for business on that date, the expiration date will be the first business day immediately following that Monday. The disclosed KPIs relate to a specific reporting period (such as a calendar quarter), which KPIs an issuer publicly announces on a date following the end of that reporting period.

While an expiration date for a binary KPI option will be a specific date, as is the case for traditional options, the Exchange’s proposed designation of expiration dates for binary KPI options will differ to reflect standard issuer disclosure practices. In some instances, an issuer might not establish the specific date on which it will announce its earnings results for a reporting period until weeks prior to the release date. Consequently, unlike standard

¹⁴ For example, for a binary KPI option series, the Exchange may designate the reporting period for a series to be the fourth quarter of 2026. The expiration date for that series would be the date on which the applicable issuer establishes as the date it will announce earnings results for that quarter. The Exchange will issue a Trader Update when the specific expiration date for a binary KPI option is finalized. Additionally, the Exchange will maintain a reference data file for each issuer KPI on which the Exchange lists binary KPI options (as will be described in the Exchange’s technical specifications available on its public website), and that reference data file will be updated with the specific expiration date for a binary KPI option once known.

equity and index options that have an exact expiration date when strikes are first listed, a binary KPI option will be listed for trading with a placeholder expiration date if the date the KPI information will be released by the issuer is not publicly known. If a placeholder expiration date is required, it will be set as the first trading day that is three months following the date of the prior quarterly release date for a KPI (for KPIs announced quarterly) and six months following the date of the prior semiannual release date for a KPI (for KPIs announced semiannually, if the Commission approves proposed rules that would permit such reporting). Once the KPI issuer announces the release date of the KPI information, the expiration date will be updated as the finalized expiration date of the option contract. Ultimately, however, the expiration date for a binary KPI option is an issuer’s earnings release date at the time the series is listed (even if the exact date is unknown) until expiration.

The Exchange may designate binary KPI option series to expire up to 12 months from the time they are listed and may list up to two expirations at one time for a binary KPI option (per KPI per issuer). The Exchange may open for trading a series of binary KPI options at least one business week prior to the expiration date of a binary KPI option. First, the proposed rule change permits the Exchange to list binary KPI options to expire up to 12 months from the time they are listed. The proposed rule change also limits the Exchange to list up to two expirations at one time for binary KPI options.

The proposal to list expirations at least one business week prior to the expiration date of binary KPI option (as well as the proposed language regarding shifting an expiration date to the immediately business day before or after an expiration date that falls on a day the Exchange is not open for business) is substantially similar to current Exchange rules applicable to binary equity options,¹⁵ as well as the rules of another options exchange applicable to short term equity options series.¹⁶ The Exchange believes it is appropriate to permit listing of binary KPI options that expire up to 12 months from the time they are listed to accommodate different issuer reporting periods (including semiannual reporting if the Commission approves recently proposed rules to permit such reporting), as well as to permit the Exchange to list expirations for consecutive calendar quarter periods or for a calendar quarter and annual

¹⁵ See Rule 5.85–O(b).

¹⁶ See Cboe Rule 4.5(d).

reporting period at the same time. As discussed above, issuers disclose KPIs in their periodic reports submitted to the Commission.

Proposed Rule 5.98–O(c) describes the automatic exercise feature of binary KPI options. Specifically, the proposed rule states that binary KPI options will be automatically exercised at expiration if the settlement value of the underlying KPI is equal to or greater than the exercise price of a call binary KPI option or less than the exercise price in the case of a put binary KPI option.

Proposed Rule 5.98–O(d) describes the permissible exercise prices (or strike prices) the Exchange may designate for series of binary KPI options. Proposed Rule 5.98–O(c)(1) describes how the value of exercise prices of binary KPI options are measured. Specifically, the exercise price of each binary KPI option series will be fixed at an amount equal to a value of the underlying KPI. Because the value of certain KPIs may be very large (e.g., billions of dollars), the Exchange proposes that the exercise price value of the underlying KPI will be divided by a scaling factor based on the value of the KPI in the issuer's most recent earnings-related disclosure as of the time a binary KPI option class is listed) as follows:

- if the most recently disclosed KPI value is greater than or equal to one trillion, the exercise price equals that value divided by one trillion (e.g., for such KPIs, an exercise price of 27.00 is equivalent to a KPI value of 27,000,000,000,000.00);
- if the most recently disclosed KPI value is greater than or equal to one billion but less than one trillion, the exercise price equals that value divided by one billion (e.g., for such KPIs, an exercise price of 112.00 is equivalent to a KPI value of 112,000,000,000.00);
- if the most recently disclosed KPI value is greater than or equal to one million but less than one billion, the exercise price equals that value divided by one million (e.g., for such KPIs, an exercise price of 900.00 is equivalent to a KPI value of 900,000,000.00);
- if the most recently disclosed KPI value is greater than or equal to one thousand but less than one million, the exercise price equals that value divided by one thousand (e.g., for such KPIs, an exercise price of 42.00 is equivalent to a KPI value of 42,000.00); and
- if the most recently disclosed KPI value is less than one thousand, the exercise price equals that value and is not divided by a scaling factor (e.g., for

such KPIs, an exercise price of 774.00 is equivalent to a KPI value of 774.00).¹⁷

The Exchange will apply a different scaling factor to newly listed binary KPI option series for a new expiration only after the value of the KPI in the issuer's earnings-related disclosures has a value in a different scaling tier for four consecutive reporting periods or if the Exchange deems it necessary in the interests of a fair and orderly market. Application of a different scaling factor will not affect the exercise prices of any series of the binary KPI options previously opened. For example, if the Exchange begins listing a new class of binary KPI options and the most recently disclosed KPI value for the issuer at the time of that listing was for the third quarter of 2026 and was \$892,000, the exercise prices for that class of binary KPI options will be scaled by 1,000, and thus exercise prices of 895, 995, and 1005, would represent \$895,000, \$995,000, and \$1,005,000, respectively. If the issuer discloses a KPI value of \$1,020,000 in its fourth quarter 2026 earnings disclosure, the Exchange will continue to list exercise prices scaled by 1,000. If the issuer then discloses KPI values of \$1,112,000, \$1,237,000, and \$1,064,000 for the first, second, and third quarters, respectively, of 2027, the Exchange will begin scaling the exercise prices by 1,000,000 for the fourth quarter 2027 expirations (or for the first quarter 2028 expirations if the Exchange had already listed fourth quarter 2027 expirations prior to the disclosure of the third quarter 2027 KPI value). The Exchange believes this will permit consistency for listing scaled KPI values while allowing the Exchange to update strike prices to reflect long-term changes to an issuer's KPI values.

The Exchange will announce via Trader Update if the scaling factor applied to a binary KPI options changes (for example, the KPIs will be scaled in billions rather than in millions). Additionally, the Exchange will update this information in the Exchange's technical specifications regarding binary KPI options and reference data file that describes the terms of binary KPI options, both of which will be available on the Exchange's website (customers receive notifications of such updates). This is consistent with how the Exchange provides information regarding product information (including updates) for all options the Exchange lists for trading.

¹⁷ When applying the scaling factor, the Exchange will not round the scaled KPI value and instead will truncate the value so the scaled strike price value fits within standard strike listing format.

It is possible for a KPI to have a negative value, such as earnings per share (which is equivalent to a loss per share). Proposed Rule 5.98–O(c)(1)(B) provides the Exchange may list binary KPI options series with exercise prices representing negative KPI values. For these series, the exercise price will equal the absolute value of the KPI and will be scaled as described above. For example, if an issuer's earnings per share in the last reporting period was –\$3.52 (and thus was a loss per share), a binary KPI option for such issuer with a strike of 3.58 will reflect an expected loss of \$3.58 per share. The Exchange will incorporate into symbology for binary KPI options whether the value of the strike price is positive or negative, including if the Exchange lists binary KPI option series with both positive and negative strike prices. Whether a symbol reflects a positive or negative value will be available on contract specifications as well as the reference data file for the specific binary KPI option on the Exchange's public website.

Proposed Rule 5.98–O(d)(2) provides the minimum interval between strike prices for binary KPI options series is:

- 0.01 where the strike price is less than 10;
- 0.10 where the strike price is 10 or greater but less than 100;
- 1.00 where the strike price is 100 or greater but less than 1,000;
- 10.00 where the strike price is 1,000 or greater but less than 10,000; and
- 100.00 where the strike price is 10,000 or greater.

As discussed above, while KPI values above 1,000 are generally scaled, there may be circumstances in which the Exchange lists strikes above 1,000 or even 10,000 given the Exchange's proposal to maintain a lower scale level until a KPI value is consistently above a certain level (e.g., above one billion for four consecutive quarters). This may occur when a KPI value is near the top of a scaling range; for continuity, the Exchange will continue listing strike prices using the lower scaling factor and not change to a higher scaling factor until the KPI value is regularly within that higher range. Suppose a KPI value is 995,000,000; in this case, strike prices will be scaled by 1,000,000. Thus, the Exchange may list binary KPI options above and below 995 (995,000,000 divided by 1,000,000). However, there is potential that the KPI may increase to above 1,000,000,000. As proposed, the Exchange may list strike prices, for example, of 1,000 (representing 1,000,000,000) and above, for expirations until the KPI value is above 1,000,000,000 for four consecutive reporting periods. To reduce confusion,

the Exchange would not scale strike prices using different scaling factors within a single expiration (and would not change the scale until the KPI value is consistently at the higher level). Therefore, it is possible the Exchange may list strikes greater than 1,000. Similarly, while strikes above 10,000 may be rare, given the Exchange proposes to maintain a lower scale level until a KPI value is consistently above a certain level (e.g., above one billion for four consecutive quarters, as proposed), depending on market factors and demand, it is possible (although unlikely) the Exchange may determine it is appropriate to list strikes above 10,000 if market factors or expectations signify a significant increase of the KPI value. The proposed strike intervals accommodate the listing of binary KPI options in these circumstances before the Exchange shifts the strike prices for an issuer's KPI to a different scaling level.

The proposed strike intervals are generally consistent with current Exchange Rules for other options, which provide for larger strike intervals as the values of strike prices increase. Given the scaling factor for larger KPI values, it may appear the proposed rule change will permit smaller strike intervals for larger KPI values if those intervals are considered solely on a nominal basis. However, that is not the case if the actual values of the strike intervals are considered. The corresponding actual value of the strike interval for a strike price that was subject to a larger scale value is higher than the actual value of the strike interval for a strike price that was subject to a smaller scale value. For example, suppose a strike price of 950 represents \$950 million. The proposed rule change would permit strike intervals of \$1.00. However, that \$1.00 corresponds to \$1,000,000. In other words, if the Exchange listed strikes of 950, 951, and 952, the difference in values of those strikes are \$1 million, not \$1 (i.e., the strikes represent values of \$950,000,000, \$951,000,000, and \$952,000,000). Similarly, suppose a strike price of 3 represents \$3,000,000,000. The proposed rule change would permit strike intervals of \$0.01. However, that corresponds to \$10,000,000. If the Exchange listed strikes of 3.00, 3.01, and 3.02, the difference in values of those strikes are \$10,000,000, not \$0.01 (i.e., the strikes represent values of \$3,000,000,000, \$3,010,000,000, and \$3,020,000,000, respectively). As a result, the permissible strike intervals for strike prices representing values in the billions are actually larger than the

permissible strike intervals for strike prices representing values in the millions. This is consistent with the general premise underlying current strike intervals that larger strike intervals apply to larger strike values.

Proposed Rule 5.98–O(e) describes the automatic exercise feature of binary KPI options. Specifically, the proposed rule states that binary KPI options will be automatically exercised at expiration if the settlement value of the underlying KPI is equal to or greater than the exercise price of a call binary KPI option or less than the exercise price in the case of a put binary KPI option.

Proposed Rule 5.98–O(f) describes the initial series of a binary KPI option the Exchange may open for trading. Specifically, the Exchange may open for trading one or more binary KPI option series with a fixed KPI value as the strike price, with approximately the same number of strike prices being opened above and below the at-the-money KPI value (i.e., the value of the KPI in the issuer's most recent earnings-related disclosure) at the time the binary KPI options are opened. The Exchange will list strike prices for binary KPI option series that are reasonably close to the at-the-money KPI value at the time of listing. A strike is “reasonably close” to the at-the-money KPI value if (1) for KPIs less than or equal to 10, it is no more than 100% above or below the at-the-money KPI value; and (2) for KPIs greater than 10, it is no more than 30% above or below the at-the-money KPI value. The Exchange may also open binary KPI option series that are more than 30% above or below the at-the-money KPI value (if the KPI is greater than 10) provided demonstrated customer interest exists for such series, as expressed by institutional, corporate or individual customers or their brokers.

The Exchange may add new series of binary KPI options series when the Exchange deems it necessary to maintain a fair and orderly market or to meet customer demand. To the extent the Exchange lists binary KPI options series for an expiration before then-currently listed binary KPI options expire (and thus before the applicable issuer has disclosed the KPI value for the reporting period immediately preceding the reporting period for these newly listed options), the Exchange may list additional series after the KPI value for the immediately preceding reporting period is disclosed using that disclosed KPI value as the at-the-money KPI. For example, before expiration of a binary KPI options series set to expire on the date of an issuer's disclosure of its third quarter earnings results, the Exchange lists series of that binary KPI option to

expire on the date of an issuer's disclosure of its fourth quarter earnings results (using the KPI from the second quarter earnings results as the at-the-money KPI value). After the issuer discloses its third quarter earnings results, including the applicable KPI, the Exchange may list additional series for the fourth quarter binary KPI options using the third quarter KPI result as the at-the-money KPI value. Any additional strike prices the Exchange lists will be reasonably close (as defined above) to the at-the-money KPI value at the time of listing.

Continuing the above example, suppose the Exchange lists binary KPI options for the fourth quarter before the binary KPI options for the third quarter have expired. As proposed, the Exchange would list strikes above and below the at-the-money strike, which at the time of listing would be the settlement value KPI from the issuer's second quarter earnings results disclosure, as that is the most recently available KPI. If the KPI for the option was net sales, and the second quarter value was \$45.093 billion, the at-the-money strike would be 45.10, and the Exchange could list strikes within 50% of that value, and additional series based on customer demand or market changes. After the Exchange lists those series, the issuer announces its third quarter earnings results, including net sales of \$57.241 billion. As proposed, after that announcement, the Exchange may list additional strikes within 50% of \$57.24 to reflect the change in value of the underlying (as well as additional series based on customer demand or market changes).

This proposed framework for listing and adding series is similar to the framework in current Rules for listing and adding series of equity options. While the proposed strike intervals are narrower than these rules, the permissible ranges are also narrower. The Exchange acknowledges the proposed framework would still permit the Exchange to list a large number of strikes per KPI per expiration. However, the Exchange intends to apply its standard strike listing practices to binary KPI options. Specifically, the Exchange generally lists strikes at wider intervals as they move farther away from the at-the-money value, while listing more granular intervals for strikes closer to the at-the-money value. The Exchange also generally delists granular strikes that are deep out-of-the-money if the Exchange determines they are sufficiently covered by wider strike intervals that are close in value.

These proposed provisions regarding the listing of binary KPI option series

are similar to provisions regarding permissible series of other options. The Exchange believes it is reasonable to list binary KPI options for a new reporting period prior to the expiration of then-listed binary KPI options for the immediately preceding reporting period (e.g., listing binary KPI options for the fourth quarter before expiration of binary KPI options for the third quarter), and thus before the settlement value of the applicable KPI is known for the immediately preceding reporting period for these options, to permit investors to roll positions from one expiration to the next. As proposed, once the settlement value for the immediately preceding reporting period is known (the third quarter in this example), the Exchange may list additional series of the binary KPI options that reflect that KPI value. This is consistent with current practice if there is a change (including a substantial change) in the price of underlying security or value of an underlying index. For example, Rule 6.4–O(a) provides that the Exchange may open additional series of a short-term option series overlying a security when the market price of the underlying security moves substantially from the exercise price or prices of the series already opened, subject to the “reasonably close” parameters set forth in that rule. Disclosure of, as an example, the third quarter KPI value after the fourth quarter binary KPI options series were listed based on the second quarter KPI value (if the third quarter KPI value differs from the second quarter KPI value) is similar to the move in the price of an underlying security, which may result in the Exchange listing additional series based on the updated price of the underlying security. Similarly consistent with current practice for other options (as set forth in Rule 6.4–O, Commentary .07(d), for example), opening of binary KPI options based on this later-disclosed KPI value will not affect any other series of options of the same binary KPI options class previously opened.

Proposed Rule 5.98–O(f) provides that the contract multiplier for each class of binary KPI options is one.

The Exchange proposes to add new Rule 5.99–O (Determination of Settlement Value) to establish that binary KPI options that are “at-the-money,” “in-the-money,” or “out-of-the-money” are a function of the settlement value of the underlying KPI in relation to the type of binary KPI option (*i.e.*, put or call) and the exercise price. As described above, the settlement value for a binary KPI option is the value of the KPI as disclosed in the applicable issuer’s earnings related filing. While

the timing of an announcement of a KPI value factor into the determination of whether the Exchange lists a binary KPI option as A.M.-settled or P.M.-settled, the Exchange will source the settlement value from the filing the issuers submits to the Commission. Generally, companies issue press releases that contain earnings results and near contemporaneously submit a Form 8–K to the Commission with the press release as an exhibit. Therefore, it is unlikely the value of the KPI in the Commission filing will differ from the value in the initial announcement; however, the value in the Commission filing will be the ultimate settlement value.

Proposed Rule 5.100–O (Adjustment) provides that binary KPI option contracts are subject to adjustment only in accordance with and to the extent specified in the Rules of the Clearing Corporation. When any such adjustment has been determined, the Exchange will announce this adjustment via Trader Update, which will become effective as of the time specified in that announcement.

As described above, binary KPI options would be cleared by the Clearing Corporation, which would serve as the central counterparty to each transaction and facilitate standardized clearing, settlement, and contract administration processes pursuant to its Rules. Consistent with this centralized clearing framework, proposed Rule 5.100–O provides that binary KPI options would be subject to adjustment only in accordance with and to the extent specified in the Rules of the Clearing Corporation. When any such adjustment has been determined, the Exchange will announce this adjustment via Trader Update, which will become effective at the time specified in that announcement. The Exchange believes that limiting contract adjustments to those provided under the Rules of the Clearing Corporation provides a clear and transparent framework under which any adjustments to binary KPI options would be administered. A registered clearing agency designated to clear binary KPI options would be subject to Commission oversight and would possess expertise in the clearance and settlement of financial products. Because binary KPI options represent a novel product type, the Exchange anticipates that the Clearing Corporation would develop adjustment procedures designed to address the unique characteristics of these contracts and the types of events that may require adjustment. To the extent the Clearing Corporation adopts new adjustment procedures for binary KPI options, those

procedures would be subject to the applicable regulatory process, including review and approval by the Commission, as applicable, before the Exchange commences trading in the product.

Next, the Exchange proposes to Rule 5.101–O to provide that binary KPI options, may be traded on the Exchange from 9:30 a.m. to 4:00 p.m.¹⁸ Further, the last day of trading for P.M.-settled binary KPI options is the day of expiration, and the last day of trading for A.M.-settled binary KPI options is the trading day prior to expiration.

The Exchange recognizes it is possible, although unusual and unlikely, that KPI information may become available at unexpected times. The proposed rules address the impact on trading and expiration that such disclosure may have. First, the proposed rule change provides if the Exchange confirms an issuer discloses the KPI prior to the expiration date, trading in the applicable binary KPI options series will cease, and the expiration date for the option accelerates to a date on or shortly after the date of that disclosure in accordance with the Rules of the OCC.¹⁹ This may occur if, for example, the applicable issuer releases the KPI information in advance of the expiration date of the option. If the issuer releases KPI information after the expiration date, which may be the case if, for example, the issuer’s earnings are delayed, trading in the option will not be impacted and will cease as of the expiration date. While the expiration date will not change, expiration processing of such options will be delayed until the KPI information becomes available, in accordance with the rules of the Clearing Corporation. Additionally, the proposed rule change provides if there is an unofficial disclosure of the KPI prior to the expiration date, the Exchange may determine to halt (and resume) trading in the applicable binary KPI options series in accordance with Rule 953NY. In certain circumstances, the expiration date for the option may accelerate in accordance with the Clearing Corporation rules; if this occurs, trading in the binary KPI will cease. This proposed provision addresses the unlikely event that KPI information becomes available through sources other than the issuer in advance of the expiration date. If the Exchange

¹⁸ Unless otherwise specified, all times in this proposal are Eastern Time.

¹⁹ The proposed acceleration of binary KPI options is similar to the existing acceleration process for equity options when the underlying security of such options has been converted entirely to cash. See OCC Rule 807.

determines the KPI information reported from the unofficial source is unreliable, trading in the binary KPI option may resume until it expires.

The Exchange believes proposed Rule 5.101–O(d), which provides that for binary KPI options, the System initiates the opening rotation at 9:30 a.m., is consistent with the opening auction framework already applicable to other index options listed on the Exchange and ensures that binary KPI options open for trading in an orderly and transparent manner.

The Exchange proposes to amend Rule 6.72–O to establish the minimum increment for bids and offers on orders for binary KPI options, which may not be less than \$0.01.

The Exchange proposes to adopt Rule 5.102–O (Position Limits for Binary KPI Options) to set forth position limit requirements for binary KPI options. The Exchange proposes to adopt Rule 5.102–O to provide that in determining compliance with Rule 6.8 (Position Limits), the position limit for binary KPI options is the same as the applicable position limit for the stock of the issuer per expiration and 100 binary KPI option contracts equal one standard option contract.

Per proposed rule 5.102–O(b), positions in binary KPI options on the same KPI that have different expiration dates are not aggregated, and positions in binary KPI options for the same issuer with different underlying KPIs are not aggregated. In addition, the Exchange proposes to adopt Rule 5.102(c) to provide that Binary KPI options are not aggregated with non-binary options contracts overlying the stock of the issuer. Finally, per Rule 5.102–O, with respect to binary KPI options, a binary KPI option short position coupled with a binary KPI option short call position, regardless of the KPI option strike, shall be exempt from the established position limits proscribed in Rule 6.8–O.

The Exchange also proposes to adopt Rule 5.103–O (Reporting of Positions) Positions in binary KPI options shall be reported pursuant to Rule 6.6–O, except, in computing reportable binary KPI options thereunder, aggregation of positions shall be in accordance with Rule 5.102–O. The proposed Rule 5–103–O further provides that for purposes of this report, 100 binary KPI option contracts equal one standard option contract. The Exchange believes this is reasonable given that binary KPI options have a multiplier of 1 while standard equity option contracts have a multiplier of 100.

Except as otherwise described above, all binary KPI options will be listed and

traded on the Exchange in a substantially similar manner as standard equity and index options and binary index options are permitted to be listed and traded under current Rules. The Rules that apply to the listing and trading of non-binary options on the Exchange, including those related to customer accounts, margin requirements and trading halt procedures,²⁰ which are designed to prevent fraudulent and manipulative acts and practices, will apply to the listing and trading of binary KPI options. The Exchange has analyzed its capacity and represents that it believes the Exchange has the necessary systems capacity to handle any potential additional message traffic associated with the listing of binary KPI options.

The Exchange will support electronic trading, floor trading, and complex orders. Trading in Flexible Execution (“FLEX”) options will not be offered. The Exchange may determine to support particular order types, order instructions, or times-in-force on a class-by-class basis. Consistent with current practice, if the Exchange modifies the applicability of any functionality or order instructions for binary KPI options, it will notify ATP Holders via Trader Update.

The Exchange will send quotation and transaction price information for binary KPI options to The Options Price Reporting Authority (“OPRA”) in the same manner it sends this information to OPRA for all other options the Exchange lists. Additionally, the Exchange understands from OPRA that it will disseminate information regarding binary KPI options in the same manner it does for all other options the Exchange lists. The Exchange intends to follow OPRA’s standard capacity monitoring process for binary KPI options (in accordance with OPRA instructions), which includes submission of quarterly capacity projections (the Exchange will include its projected binary KPI option volume in the applicable submission). Further, the Exchange understands from OPRA that no technical changes are required to accommodate the reporting to OPRA of quotation and transaction information regarding binary KPI options (the Exchange represents, if later required by OPRA, it will adhere to any new technical requirements

²⁰ Binary KPI options will not be tied to the trading state of the underlying issuer stock and thus, trading in binary KPI options will not be affected by halts in the underlying issuer stock. The binary KPI options will halt in accordance with Rule 6.65–O

OPRA deems necessary to accommodate binary KPI options).²¹

The Exchange does not believe Option Trade Permit (“OTP”) Holders and OTP Firms will experience any capacity issues as a result of this proposal and represents that it will monitor the trading volume associated with binary options and the effect (if any) of binary options on market fragmentation and the capacity of the Exchange’s automated system.

The Exchange represents that the same surveillance procedures applicable to all other options currently listed and traded on the Exchange will apply to binary KPI options, and that it has the necessary systems capacity to support the option series. The Exchange’s existing surveillance and reporting safeguards are designed to deter and detect possible manipulative behavior and other improper trading. In addition, the Exchange has a Regulatory Services Agreement with the Financial Industry Regulatory Authority, Inc. (“FINRA”). Pursuant to a multi-party 17d–2 joint plan, all options exchanges allocate regulatory responsibilities to FINRA to conduct certain options-related market surveillances.²² The Exchange is also a member of the Intermarket Surveillance Group (“ISG”) under the ISG Agreement. ISG members work together to coordinate surveillance and investigative information sharing in the stock, options, and futures markets. Further, the Exchange will implement any new surveillance procedures it deems necessary to effectively monitor the trading of binary KPI options.

The Exchange will report any information regarding binary KPI options required to be reported to the Consolidated Audit Trail (“CAT”) in the same manner it reports this information to CAT for all other options the

²¹ The Exchange understands OPRA may need to update how it disseminates open interest information for binary KPI options, as its current process incorporates information from OCC and references in this filing are clearing agency-neutral.

²² Section 19(g)(1) of the Act, among other things, requires every self-regulatory organization (“SRO”) registered as a national securities exchange or national securities association to comply with the Act, the rules and regulations thereunder, and the SRO’s own rules, and, absent reasonable justification or excuse, enforce compliance by its members and persons associated with its members. See 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d–2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain responsibilities with respect to members of the SRO who are also members of another SRO. Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of its responsibilities to: (i) receive regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; or (iii) carry out other specified regulatory responsibilities with respect to such members.

Exchange lists.²³ The Exchange represents, if later required by FINRA CAT, it will adhere to any new technical requirements FINRA CAT deems necessary to accommodate binary KPI options).

Pursuant to the Options Order Protection and Locked/Crossed Market Plan ("Linkage Plan"),²⁴ participant exchanges to the Linkage Plan established a framework to provide order protection. The Linkage Plan (and Exchange Rules 6.92–O through 6.96–O regarding intermarket linkage) applies during all trading sessions during which multiply listed options trade. Rule 6.96–O addresses order routing away from the Exchange to promote compliance with the Linkage Plan. If the proposed binary KPI options become multiply listed options, Users may designate an order for routing (or not available for routing), and the Exchange System is designed to, at all times, prevent trade-throughs and avoid displaying locked/crossed markets in accordance with the Linkage Plan (and Exchange Rules 6.94–O through 6.96–O regarding intermarket linkage).

Upon launch, binary KPI options will clear through the Clearing Corporation as that term is defined in proposed Rule 5.96–O. In doing so, the proposal would bring these securities products within the established regulatory infrastructure applicable to listed options, including exchange trading and surveillance, standardized disclosure, and centralized clearance and settlement through a registered clearing agency, as further described below. Additionally, binary KPI Options would be cleared through a registered clearing agency, which would serve as the central counterparty to each transaction and facilitate risk mitigation through established clearing, settlement, contract adjustment, and other standardized operational processes.

The Options Listings Procedure Plan (the "OLPP") sets forth procedures to facilitate the listing and trading of

standardized options. This plan currently describes procedures with respect to options issued by and cleared at the OCC. If the Exchange ultimately does not designate the OCC as the Clearing Corporation for the purposes of the definition set forth in proposed Rule 5.96–O, the Exchange will take steps necessary and within its authority to amend the OLPP to reflect listing procedures applicable to binary KPI Options to the extent not cleared by the OCC.

The Exchange represents it will not list for trading binary KPI options until the registered clearing agency designated as the Clearing Corporation is authorized and operationally ready to clear the options and until all applicable filings and documents of the Clearing Corporation related to securities event contracts being cleared through the Clearing Corporation are approved by the Commission or effective after review by the Commission, as applicable.

As discussed in further detail below, the Exchange intends for binary KPI options to be treated as listed standardized options. Rule 9b–1 under the Act establishes a disclosure framework for standardized options pursuant to which investors receive a disclosure document describing the terms, characteristics, and risks of the product before trading. Depending on which registered clearing agency is designated as the Clearing Corporation, the applicable Rule 9b–1 disclosure document may be based on an existing options disclosure document utilized by that clearing agency, as modified or supplemented, as appropriate, or another comparable disclosure document prepared in connection with the clearance of securities event contracts. In either case, the disclosure document would contain substantially similar information regarding the terms, characteristics, risks, settlement mechanics, and other material features of securities event contracts and would be tailored, as necessary, to address the product's unique features and distinctions from traditional listed options. The Exchange believes that disclosure through the Rule 9b–1 framework would better serve the informational needs of investors than a traditional prospectus because securities event contracts are standardized options for which the principal investor considerations relate to the contract's terms, payout structure, settlement mechanics, and trading characteristics rather than the disclosure typically provided in connection with an offering of a corporate issuer's securities.

The Exchange will not commence listing and trading of securities event

contracts until a registered clearing agency is authorized and operationally ready to clear the contracts; the applicable disclosure document under Rule 9b–1 is in place; any necessary changes relating to CAT, FINRA, OPRA, the Linkage Plan, and OLPP have been completed; and the Exchange has issued an implementation notice to Members.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,²⁵ in general, and furthers the objectives of Section 6(b)(5) of the Act,²⁶ in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. In addition, the Exchange believes that the proposed rule change is consistent with the Section 6(b)(5)²⁷ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Binary KPI Options Are Securities and Standardized Options

As an initial matter, the Exchange's proposal is identical to the proposal made by the Cboe to list binary KPI options.²⁸ The Exchange believes that the binary KPI options proposed herein would be "securities" under the Act.²⁹ Section 3(a)(10) of the Act³⁰ defines the term "security" to include, among other instruments, "any . . . option . . . on any security . . . including any interest therein or based on the value thereof."³¹

Standardized options are generally offered based on the price of the underlying security or index and include puts, calls, and other complex instruments whose value is based on the price of the underlying security or securities. The binary KPI options will

²⁵ 15 U.S.C. 78f(b).

²⁶ 15 U.S.C. 78f(b)(5).

²⁷ 15 U.S.C. 78f(b)(5).

²⁸ See Securities Exchange Act Release No. 105877 (July 10, 2026) (SR–CBOE–2026–061) ("Notice of Filing of a Proposed Rule Change to Amend its Rules to Permit the Listing of Binary Options Overlying Key Performance Indicators ("KPIs") Reported by Certain Issuers of Stock ("Binary KPI Options"))

²⁹ The Exchange also believes that binary KPI options are also "securities" under the Securities Act of 1933, as amended (the "Securities Act"). See 15 U.S.C. 77b(a)(1).

³⁰ 15 U.S.C. 78c(a)(10).

³¹ *Id.*

²³ CAT reporting requirements will apply to broker-dealers with respect to binary KPI options in the same manner as they apply to any other options the Exchange lists. The Exchange understands from FINRA CAT there will be no changes to the reporting specifications for broker-dealers to accommodate the reporting of information regarding binary KPI options to CAT.

²⁴ The Linkage Plan requires U.S. options exchanges to establish a framework for providing order protection and addressing locked and crossed markets in eligible options classes. The Linkage Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Act and Rule 608 thereunder. The full text of the Linkage Plan is available at https://www.theocc.com/getcontentasset/7fc629d9-4e54-4b99-9f11-c0e4db1a2266/dfc3d011-8f63-43f6-9ed8-4b444333a1d0/options_order_protection_plan.pdf.

operate in substantially the same manner as these binary options but with a different underlying. The Exchange's proposal would expand the universe of listed options to include contracts based on proposed KPIs, including net income, net sales, net interest income, provision for credit losses, and specified expense metrics, that relate to the valuation of the issuer's stock. Such options contracts would reference financial metrics that are material to the value of the underlying security and are therefore included in the issuer's financial reports submitted to the Commission, including Form 8-K, Form 10-K and Form 10-Q filings.

In addition, the Exchange believes that trading such instruments as binary KPI options would promote a fair and orderly market and facilitate new investment and hedging opportunities on a Commission-regulated exchange. In certain cases, financial instruments may contain features similar to both options contracts and security-based swaps. As compared to characterizing an instrument as a security-based swap, which would typically be traded bilaterally in the over-the-counter ("OTC") market, categorizing an instrument as an options contract comes with a more robust set of regulatory requirements and market practices that the Exchange believes would aid in the development of such binary KPI options. To the extent there is uncertainty regarding how best to characterize these contracts under the statute, the Exchange believes that the best interpretation is the one that promotes innovation and competition while providing robust investor protection guardrails on a regulated exchange.

As discussed above, the Exchange is proposing to list and trade binary KPI options. The Exchange currently trades standardized options (puts and calls) based on the price of an underlying NMS stock. Binary KPI options would be different from these contracts in primarily two respects: (1) binary KPI options contracts would have a fixed or "binary" payout at expiration, regardless of the magnitude of the difference between the option's exercise price and the settlement value for the underlying; and (2) the price of such contracts would be based on the issuer achieving financial metrics that are material to the price of the underlying stock rather than the stock's share price itself. The Exchange does not believe that either of those differences is germane to whether this product is an options contract as defined in the Act.

The Exchange notes that options as defined in Section 3(a)(10) encompass

not only options on a security but further include options on any interest in a security or based on the value thereof. This broad statutory language is sufficient to support the trading of binary KPI options on a Commission-regulated options exchange, including contracts that reference an issuer's earnings, revenues, sales, or other financial metrics on which investors traditionally base investment decisions. Such options contracts would reference financial metrics that are material to the value of the underlying security and are therefore included in the issuer's financial reports submitted to the Commission, including Form 8-K, Form 10-K and Form 10-Q filings.

This is consistent with the Commission's own interpretation of the statute when analyzing its application to similar products offered by another national securities exchange. Consider the Commission's approval of proposals by Cboe to list and trade: (1) credit default options;³² and (2) credit default basket options.³³ As the Commission explained in its order approving credit default options for trading on Cboe, "credit default options . . . are binary options that are automatically exercised upon the occurrence of specified credit events or expire worthless."³⁴ While such products were therefore different in certain important respects from existing options contracts, "[a]fter careful analysis, the Commission [found] that credit default options are options based on the value of a security or securities"³⁵ and also "options on an interest in, or based on the value of an interest in, a security or securities." The Commission made a similar finding when it later approved Cboe's proposal to introduce credit default basket options.

All of this would also be true of the proposed binary KPI options. Similar to Cboe's credit default options and credit default basket options, the proposed binary KPI options are "binary options that are automatically exercised upon the occurrence of specified . . . events or expire worthless."³⁶ The Commission has repeatedly found that contracts with a binary payout structure may nevertheless be properly classified as options contracts under the Act and, while most options contracts have historically had a variable payment

structure, such a structure is not required by the Act, which does not specify a particular payment structure. In addition, while in some cases binary options offered by other securities exchanges have referenced the price of some underlying security or index, such binary options also encompass contracts like the ones discussed above.

The Commodity Exchange Act's ("CEA") lends further support to the classification of binary KPI options as securities. Specifically, pursuant to Section 3(a)(68) of the Act,³⁷ a "security-based swap"³⁸ is a "swap"³⁹ as defined in the Commodity Exchange Act that is based on: (1) "an index that is a narrow-based security index, including any interest therein or on the value thereof;"⁴⁰ (2) "a single security or loan, including any interest therein or on the value thereof;"⁴¹ or (3) "the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer."⁴² In turn, the Commodity Exchange Act defines "swap" to include "any agreement, contract, or transaction . . . that is a put, call, cap floor, collar, or similar option of any kind that is for the purchase or sale, or based on the value, of 1 or more . . . securities."⁴³

This is also the case with the binary KPI options identified in the proposal. The KPIs selected are "material to the value" of a particular security, and payouts of binary KPI options are conditioned on those terms. Indeed, the nexus between the proposed KPIs and the value of the underlying security is, if anything, more direct than in the case of CD options. Whereas CD options reference a credit event (a contingency that may or may not affect the market value of the reference security depending on recovery rates and market conditions), binary KPI options reference the issuer's actual reported financial or operating performance and are the metrics investors consider when determining the value of a stock. Unlike an external event that merely holds the potential to trigger potential financial consequence for a security, each of the proposed KPIs (whether measured at the consolidated or segment level)

³² See Securities Exchange Act Release No. 55871 (June 6, 2007), 72 FR 32372 (June 12, 2007) (SR-CBOE-2006-84).

³³ See Securities Exchange Act Release No. 56275 (August 17, 2007), 72 FR 47097 (August 22, 2007) (SR-CBOE-2007-26).

³⁴ See supra note 34.

³⁵ *Id.*

³⁶ *Id.*

³⁷ 15 U.S.C. 78c(a)(68).

³⁸ *Id.*

³⁹ 7 U.S.C. 1a(47).

⁴⁰ 15 U.S.C. 78c(a)(68)(A)(ii)(I).

⁴¹ 15 U.S.C. 78c(a)(68)(A)(ii)(II).

⁴² 15 U.S.C. 78c(a)(68)(A)(ii)(III).

⁴³ 15 U.S.C. 78c(a)(68)(A)(ii)(III).

ultimately constitutes a material component of the issuer's financial results that itself forms the basis for investors' measurements of a company's (and its stock's) intrinsic value.

Each binary KPI option proposed herein provides a cash payout based on the disclosed KPI, some of which are directly tied to a pecuniary interest in a security, such as earnings per share and others of which are indirectly tied to the pecuniary interest of a security, such as the issuer's net revenue and income, which determine the issuer's capacity to generate returns for security holders. A stockholder's pecuniary interest in a security is not limited to contractual payment rights (such as declared dividends) but encompasses the right to benefit from the issuer's earnings capacity, as reflected in the market price of the security. Binary KPI options based on earnings metrics therefore reference a core component of the stockholder's pecuniary interest.

Classifying binary KPI options as securities options under the Act is consistent with the Commission's established regulatory framework for binary options, including investor protection objectives, and preserves the integrity of antimanipulation restrictions, insider trading prohibitions, and material nonpublic information controls. More specifically, because these contracts are tied to Commission disclosure rules and regulations and material nonpublic information ("MNPI") risks that are substantially identical to those present in traditional securities trading, aligning binary KPI options with the securities regulatory framework preserves the integrity of insider trading prohibitions and the Commission's disclosure regime. Listing binary KPI options on a registered national securities exchange subjects trading activity to SRO and Commission surveillance for, among other things, manipulative trading and insider trading, affording investors the full protections of the federal securities laws. Further, classifying binary KPI options as security options under the Act allows these contracts to be offered by the same liquidity providers that offer listed options today, all of whom are Commission-registered and regulated broker-dealers who are also subject to FINRA and exchange SRO oversight, and allows such contracts to be traded by the same retail customer base that trade binary options (and KPI-related contracts) today.

For these reasons, the Exchange believes that binary KPI options, as proposed, are appropriately classified as binary options eligible to trade on a registered national securities exchange

and as standardized options subject to the disclosure framework established by Rule 9b-1. This classification reflects the economic substance and standardized structure of the product, is consistent with the Act and the Commission's prior interpretations, and is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster regulatory and clearing coordination, and protect investors and the public interest consistent with Section 6(b)(5) of the Act.⁴⁴

Proposal

The Exchange believes the proposal is consistent with Section 6(b) of the Act, in general, and furthers the objectives of Section 6(b)(5) of the Act,⁴⁵ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Specifically, the Exchange believes the proposed rule change will 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 because it establishes a clear and transparent framework for a new category of listed options (binary KPI options) that are tied to financial and operating metrics of issuers that are publicly disclosed in required Commission reports. Currently, investors wishing to position their investment strategies around earnings announcements must rely primarily on equity options, whose pricing is affected by a wide range of variables beyond the reported financial or operating measure of interest (e.g., implied volatility, delta, time value, and general market movement). Binary KPI options allow investors to take a targeted, defined-risk position directly on a specific financial or operating measure (i.e., a KPI) for a particular reporting period. The Exchange believes this additional investment tool will protect investors and the public interest because it will promote market efficiency, enable more precise price discovery around earnings events, allow investors to hedge against potential idiosyncratic risks, and remove a gap in current national

securities exchange-listed products available to market participants.

The Exchange believes the proposed list of issuers and KPIs on which the Exchange may list binary KPI options will prevent fraudulent and manipulative acts and practices, 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. First, as noted above, the Exchange is proposing to list binary KPI contracts based on specific financial and operating metrics reported by the following issuers in their earnings-related disclosures submitted to the Commission: Apple, Inc.; Advanced Micro Devices, Inc.; Alphabet Inc.; Amazon.com, Inc.; Bank of America Corporation; Citigroup Inc.; Coinbase Global, Inc.; Ford Motor Company; Intel Corporation; JPMorgan Chase & Co.; Marathon Digital Holdings, Inc.; Meta Platforms, Inc.; Microsoft Corporation; Netflix, Inc.; NVIDIA Corporation; Palantir Technologies Inc.; SoFi Technologies, Inc.; Space Exploration Technologies Corp.; Super Micro Computer, Inc.; Target Corporation; Tesla, Inc.; and The Walt Disney Company. The Exchange believes offering investors an additional investment tool on a national securities exchange related to some of the most actively traded stocks and options will perfect the mechanism of a free and open market and benefit investors by allowing them to further refine their investment strategies, including using these options to hedge idiosyncratic, even-specific risk embedded in the specific KPIs (as further discussed below), for these actively traded companies.

The Exchange believes the proposed universe of issuers will prevent fraudulent and manipulative acts and practices, because the proposed issuers are large, well-capitalized, and widely followed issuers with highly liquid underlying securities and options markets. As noted in its filing to amend its rules to permit the listing of binary KPI options,⁴⁶ Cboe noted that during May 2026, each of the issuers exceeded \$3 billion in market capitalization and ranked among the top 200 U.S. companies by average daily options or stock volume, with the exception of Space Exploration Technologies Corp (commonly referred to as SpaceX),

⁴⁴ 15 U.S.C. 78f(b).

⁴⁵ 15 U.S.C. 78f(b).

⁴⁶ See Securities Exchange Act Release No. 105877 (July 10, 2026), 91 FR 43418 (July 15, 2026) (SR-CBOE-2026-061) ("Notice of Filing of a Proposed Rule Change to Amend its Rules to Permit the Listing of Binary Options Overlaying Key Performance Indicators ("KPIs") Reported by Certain Issuers of Stock ("Binary KPI Options")).

which had not been trading for a full calendar month but which the Exchange believes will satisfy these measures with its first month of trading results based on its volumes since it began trading.⁴⁷

Securities with high market capitalizations and liquid markets are generally less susceptible to manipulation because of the substantial capital required to artificially influence prices of those securities. The depth and breadth of trading activity for securities with significant market capitalizations, such as the stocks of the proposed issuers, make it unlikely that a single market participant would be able to exert undue influence on the price of such a stock, as large volumes of buyers and sellers are what ultimately continuously reflect the true market value of the stock. The Exchange believes the KPIs of issuers with high market capitalizations proposed to underlie binary KPI options are similarly less susceptible to manipulation because any attempt to distort a financial metric of such an issuer would require an enormous and economically impractical deployment of capital, which would likely exceed the fixed payout of a binary KPI option. Therefore, like stocks of large-cap issuers, KPIs of large-cap issuers are less susceptible to manipulation due to the structural barriers that would make manipulating KPI values operationally difficult and financially irrational (in addition to the rigorous financial oversight to which these issuers are subject, as further discussed below).

In addition to the proposed issuers being highly capitalized and having actively traded stocks and options on such stocks, the Exchange also believes the proposed limited universe of issuers for binary KPI options to those proposed will prevent fraudulent and manipulative acts and practices because each issuer is subject to periodic reporting requirements under the Act. Therefore, each of the proposed issuers must file annual reports on Form 10-K, quarterly reports on Form 10-Q, and current reports on Form 8-K with the Commission, which as discussed above disclose information the issuer believes is necessary for an investor to understand its financial condition, changes in financial condition and results of operations, which can include KPIs. Further, each issuer maintains audited financial statements prepared in accordance with U.S. Generally Accepted Accounting Principles

(“GAAP”) and is subject to executive certification requirements under the Sarbanes-Oxley Act. As a result, the settlement-determining KPI values for each eligible issuer are produced within the Commission’s supervisory jurisdiction, are publicly verifiable from a Commission-regulated source and are subject to relevant anti-fraud provisions under the Act, which the Exchange believes will reduce the potential for manipulation of the underlying KPIs as well as the applicable issuer’s stock.

Further, the Exchange believes the proposed limited universe of issuers will introduce binary KPI options in a well-developed, well-understood, and transparent Commission-regulated market environment. Each issuer is among the most widely followed, actively traded, and extensively analyzed issuer in its respective sector, with deep and liquid equity and derivatives markets and a broad institutional and retail investor base. The depth of existing market activity surrounding these issuers supports fair and orderly pricing by ensuring that binary KPI options are listed in markets where price discovery is well-established, liquidity is readily available, and participants have broad access to the information necessary to form and express informed views on KPI outcomes. The Exchange believes the continuous public scrutiny to which these issuers are subject substantially reduces the likelihood that any market participant could obtain or maintain an informational advantage sufficient to manipulate the settlement value of the binary KPI options.

The Exchange believes the proposed KPI metrics will similarly prevent fraudulent and manipulative acts and practices, 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’s proposal limits eligible KPIs to GAAP and non-GAAP measures and other statistics related to an issuer’s financial condition and operational results, all of which the proposed issuers disclose in their earnings-related filings (*i.e.*, Forms 8-K, 10-Q, and 10-K) submitted to the Commission. As such, the settlement values of the proposed binary KPI options are derived exclusively from information that issuers deem as material information required to be disclosed in reports submitted to the Commission. These metrics are routinely referenced and tracked in the investment community and are figures that the market recognizes as a meaningful and central indicator of issuer performance. The

Exchange believes that the inclusion of well-established metrics as eligible KPIs expands the value of binary KPI options for investors without compromising the integrity of trading processes, including the settlement process.

The proposed KPI metrics are among the most widely followed and extensively analyzed measures for the proposed issuers. Specifically, the Exchange proposes to be able to list a binary KPI option on earnings per share (prepared in accordance with GAAP) for each proposed issuer. This metric is among the most widely followed and extensively analyzed figures in public company financial disclosure and is disclosed in each issuer’s periodic Commission filings. Similarly, the Exchange proposes to list binary KPI options on revenue, prepared in accordance with the applicable GAAP, for each issuer. As is the case for earnings per share, revenue is a widely followed financial metric for publicly reporting companies and is the subject of extensive analyst coverage.

The Exchange proposes KPIs representing revenues broken out by applicable reportable segment, business unit, or product category, including cloud and artificial intelligence infrastructure revenues, streaming and geographic subscription revenues, automotive segment revenues, financial services segment revenues, consumer product category revenues, and digital asset exchange transaction and subscription revenues, among others, for several of the proposed issuers. Each such metric is a GAAP-defined figure required to be disclosed in the issuer’s periodic Commission filings. The Exchange understands these metrics enable market participants to express views on specific high-profile business lines that are extensively covered by analysts and subject to a high volume of publicly available forecasts.

The Exchange proposes KPIs for the proposed financial institution issuers that are specific to financial institution income statement presentation, including net interest income, provision for credit losses, and net income. Each such metric reflects the distinct GAAP reporting framework applicable to banking institutions and is subject to the same periodic disclosures as other proposed KPIs.

The proposed rule change also includes operating margin, gross margin, or cash flow from operations KPIs for several issuers, each of which is computed directly from GAAP financial statement line items disclosed in the issuer’s periodic Commission filings. These metrics provide market participants with insight into issuer

⁴⁷ As noted by Cboe, the ADV of SpaceX stock between June 12 and June 22, 2026 was approximately 290,009,963 shares. The market capitalization of SpaceX as of June 22, 2026 was \$2.145 trillion.

profitability and capital generation and complement other revenue and earnings figures when market participants are evaluating the value of an issuer and its stock.

The Exchange also proposes several non-financial operational KPIs that issuers disclosed in their periodic Commission filings, including relevant production volumes, network and infrastructure counts, user engagement metrics, deal counts, digital asset trading volume, and digital asset mining and holdings metrics. Each designated non-financial operational metric is closely tied to the core economic activity of the respective issuer's business and is a figure that the issuer has affirmatively chosen to disclose to the public as a key indicator of business performance. Issuers typically designate and disclose such metrics precisely because they are understood by the market to be among the most meaningful measures of their business activities. As discussed above, this is consistent with Commission guidance that an issuer should include KPIs in these report that the issuer believes an investor needs to gain understanding of its financial condition, changes in financial condition and results of operations, as such KPIs present the "pulse" of the issuer's business. The market significance of these metrics is further reflected in the extensive analyst coverage and investor attention, particularly near each reporting date. Each metric is subject to executive certification as part of the periodic report in which it appears and is widely tracked by financial data services and equity research analysts.

Overall, the Exchange believes that the proposed well-established, publicly reported metrics as eligible KPIs will expand the value of binary KPI options for investors without compromising the integrity of trading processes, including the settlement process. As a result, the Exchange believes the proposed KPIs will protect investors and the public interest as it will permit the Exchange to offer investors additional investment and hedging tools on the Exchange that investors can incorporate into their investment strategies regarding the proposed issuers.

The Exchange believes the proposed contract terms for binary KPI options will promote just and equitable principles of trade, remove impediments to and perfect a free and open market and national market system, and protect investors. As discussed above, the Exchange believes the proposed contract terms for binary KPI options are standardized option terms. Like standard option contracts

and binary index option contracts currently listed for trading on the Exchange, each proposed binary KPI option will be a call or a put, will have an underlying, exercise price, an expiration date, a settlement type, a settlement style, and a multiplier. As is the case for binary index options, each proposed binary KPI option will have an exercise settlement amount paid depending on how the settlement value of the underlying compares to the exercise price.

The proposed binary KPI options will function in a substantially similar manner to binary index options, with the proposed contract terms substantially similar to the contract terms of binary index options. The proposed definitions of binary KPI option, call binary KPI option, exercise price, and put binary KPI option are the same as those terms for binary index options (as previously approved by the Commission), differing only in reference to the underlying (KPI v. index).

The proposed definition of settlement value for binary KPI options is generally similar to the definition for binary index options (as previously approved by the Commission), with certain differences necessary to be addressed due to the different nature of a KPI as the underlying. The Exchange believes the proposed \$1 exercise settlement amount is reasonable given the retail nature of the proposed binary KPI options and merely adds specificity to the Rules for binary KPI options. The Exchange notes binary KPI options differ from standardized index options (which are also cash-settled) in that the exercise settlement amount is \$1.00 rather than the cash difference amount between the settlement value of the index and the strike price of an option. Since the \$1.00 exercise settlement amount will be paid out to the option holder if the criteria of the binary KPI option have been met, binary KPI options utilize a fixed exercise settlement amount.

The Exchange proposes new Rule 5.96–O to list the specific binary KPI contracts with the KPI criteria for each option contract. Such KPI criteria are established as the set KPI events that will be used to determine an option contract should be exercised by comparing the strike price of the binary KPI option to the KPI value. The Exchange believes these proposed contracts (including the issuers and KPIs) are consistent with the Act for the reasons set forth above.

The Exchange believes the proposed expirations for binary KPI options will remove impediments to and perfect the mechanism of a free and open market and a national market system because

they will align with the reporting periods for which the proposed issuers disclose earnings results and submit corresponding reports to the Commission. These expirations will, therefore, permit investors to incorporate binary KPI options into their investment strategies that correspond to issuers' earnings results. Further, as discussed above, the Exchange believes aligning expirations with Commission-regulated sources will reduce the potential for manipulation of the underlying KPIs, which will ultimately protect investors and the public interest.

The proposed rule establishes a strike regime for binary KPI options similar to that for traditional options. As is the case for traditional options and binary index options, the proposed rule change establishes permissible strike intervals, the amounts of which increase as the value of the strike increases. Additionally, the Exchange proposes to list initial and additional series pursuant to a similar framework as traditional equity options. The differences in the proposed strike regime compared to that of standard equity and index options are necessary and appropriate to reflect the static nature of KPIs (unlike underlying equities and indexes, the values of which change throughout the trading day) and the timing of their disclosure. As noted above, the Exchange intends to list binary KPI options aligned with the cadence of the KPI announcements as their expiration cycle (generally quarterly). The Exchange intends to list for trading binary KPI options with expirations for the then-current reporting period (e.g., third quarter) as well as the following period (e.g., fourth quarter) prior to the expiration of the binary KPI options for the then-current reporting period.

As the Exchange does for standard options, the Exchange lists strikes (subject to its Rules) based on relevant market information—including the then-current value of the underlying—and customer demand. As described above, the Exchange intends to do the same for binary KPI options by listing strikes relative to the then current value of the underlying KPI. The Exchange believes it is consistent with just and equitable principles of trade to permit the Exchange to list strikes for a new expiration based on the most recently disclosed KPI value, which may not be for the immediately preceding reporting period, and then add strikes based on the disclosed KPI for the immediately preceding reporting period (which would be the settlement value for binary KPI options that expire in the prior

reporting period). This will enable the Exchange to respond to changes in market conditions in the same manner it is able to do today to respond to changes in values of (and market conditions related to) other underlyings. The Exchange believes this flexibility is appropriate for binary KPI options because the value of a KPI changes only when an issuer discloses that KPI, which generally happens every three months, unlike other underlyings that change every trading day. While this proposed strike listing regime differs from that of other options, the concept is the same, which is to permit the Exchange to list strikes reflective of the then-current value of the underlying. It is possible the changed value of an underlying KPI may be more sudden and pronounced than changes in the value of an underlying equity or index (which are susceptible to sudden value changes); however, like the listing rules for equity and index options, the proposed rules permit the Exchange to list strikes to reflect potentially significant changes in the value of the underlying.

The Exchange believes the proposed scaling of strike prices is reasonable and will protect investors, as it will permit the Exchange to list strike values in amounts similar to current strike values for other options. As noted above, values of certain KPIs may be large (e.g., in the billions). The proposed scaling will permit the Exchange, for example, to list a strike of 27 rather than 27,000,000,000, which the Exchange believes will be simpler for investors to understand (as it will be made clear that 27 will reflect billions in this example) and consistent with current strike levels. The proposed scaling also permits the strike prices for binary KPI options to fit within current system capabilities regarding strike price values. The Exchange believes scaling rather than modifying its systems (and potentially causing investors to modify their systems) will benefit investors by allowing them to trade binary KPI options in the same manner as they trade other options today.

The Exchange believes the proposed strike intervals promote just and equitable principles of trade because it will permit the Exchange to list commercially meaningful strikes that will permit investors to tailor their trading strategies with precision. The Exchange acknowledges the proposed strike intervals are smaller than those in current Rules for other types of options. However, the Exchange believes the precision is appropriate and necessary given the nature of KPIs and the proposed options. The purpose of

binary KPI options is to permit investors to take discrete and precise positions on KPIs. Therefore, the Exchange needs the ability to list strikes with the precision necessary to permit investors to take these positions. For example, earnings per share is generally a relatively small number (under \$10). While strike intervals for other options are limited to \$0.50 intervals, that would not be meaningful in the context of binary KPI options when investors are looking to take positions for a specific KPI, which will be measured in penny intervals. Therefore, the Exchange believes smaller strike intervals will benefit investors because they will allow the Exchange to list binary KPI options that will enable investors to use these options in the precise nature for which they are intended and provide sufficient flexibility for the Exchange to list series to respond to changes in market conditions and customer demand, while other rules will place bounds around the strikes the Exchange may list.

Further, as discussed above, the proposed strike intervals are consistent with current rules for other options, which provide for larger strike intervals as the value of strike prices increases. Given the scaling factor for larger KPI values, while it may appear the proposed rule change will permit smaller strike intervals for larger KPI values, that may be true on a nominal basis but is not the case if the actual value of the strike intervals is considered. The corresponding actual value of the strike interval for a strike price that was subject to a larger scale value is higher than the actual value of the strike interval for a strike price that was subject to a smaller scale value. As a result, the permissible strike intervals for strike prices representing higher KPI values are actually larger than the permissible strike intervals for strike prices representing lower KPI values. This is consistent with general premise underlying current strike intervals that larger strike intervals apply to larger strike values and, therefore, the Exchange believes the proposed rule change will promote just and equitable principles of trade.

The Exchange believes this proposed rule change clearly describes the proposed terms of binary KPI options, such as with respect to expirations (including the Exchange's announcement of the specific expiration date after binary KPI options series for that expiration are listed) and exercise prices (including the scaling factor, negative values, and potential changes to that scaling factor for a binary KPI option class) for all investors. As discussed above, these terms and

changes to such terms will be described in Exchange notices, technical specifications (including binary KPI option reference data files), and contract specifications (all of which are posted on the Exchange's public website and thus available to all investors). Exchange ATP Holders and retail brokerage firms are highly sophisticated investors that intake information regarding other Exchange-listed options (including changes) in the same manner that the Exchange plans to release this information for binary KPI options. Therefore, the Exchange expects retail customers to have access to all relevant information regarding the terms of binary KPI options they choose to trade, including changes to expiration dates and exercise price values as announced by the Exchange.

The proposed rule change specifies a multiplier of one for binary KPI options rather than require the Exchange to designate a multiplier of at least one as the rules for binary index options do. This proposed multiplier is consistent with the definition of contract multiplier for binary index options (as that requires a multiplier of at least one) and merely adds specificity to the Rules.

The Exchange believes proposed Rule 5.101-O, which establishes Regular Trading Hours for binary KPI options is consistent with the Act, protects investors, and prevents fraudulent and manipulative practices. The Exchange believes the proposed structure ensures that trading in binary KPI options ceases before the earnings announcement that determines settlement. The distinction between A.M.- and P.M.-settled contracts mirrors the settlement terms already applicable to binary index options, as well as other Exchange products.

The Exchange believes proposed Rule 6.71-O(d), which addresses bid and offer conventions for binary options with multipliers other than 100, will provide clarity and consistency in market quotations relative to the notional size of the option, promotes investor understanding of the cost and value of binary KPI option contracts. Therefore, the Exchange believes the proposed rule change is consistent with just and equitable principles of trade because it creates a pricing structure that reflects the notional value of an option based on its multiplier.

The Exchange believes proposed Rule 5.101-O(e), which provides that for binary KPI options, the System initiates the opening rotation at 9:30 a.m., removes impediments to a free and open market by applying the same proven opening process to binary KPI options that governs other listed options classes

on the Exchange. Additionally, unlike equity options, for which the underlying opens for trading and can trigger the opening rotation, KPIs do not trade, so triggering the opening rotation based on a set time is reasonable for binary KPI options.

The Exchange believes excluding binary KPI options from the obvious error provisions in Rule 6.85–O is consistent with the Act and promotes just and equitable principles of trade because the standard obvious error framework, which evaluates whether an execution price deviates from a “theoretical value” by a prescribed amount, is incompatible with the structure of binary KPI options. Binary KPI options have no continuously observable theoretical value (unlike equity and index options) prior to the date of the earnings-related disclosure. Rather, their exercise settlement amount is fixed at either a pre-specified dollar amount or zero, depending entirely on whether the reported KPI satisfies the exercise condition, which itself is based on a single, publicly verifiable metric, disclosed in Commission filings. Applying an obvious error framework premised on theoretical value calculations to a product with a binary, fixed payout would be technically inapplicable and could produce unjust or arbitrary results. Moreover, because settlement of binary KPI options is determined by issuer-reported metrics disclosed through Commission filings (*i.e.*, figures produced pursuant to established accounting standards, subject to independent audit, and certified under the Sarbanes-Oxley Act), the settlement process is itself governed by a comprehensive external regulatory framework. The Exchange believes that establishing any alternative dispute mechanism in this context would be not only unnecessary, but potentially disruptive to market integrity, as it may introduce an element of post-hoc discretion into a settlement process that is expressly designed to be objective, verifiable, and rule-bound.

The Exchange believes the proposed amendments related to position limits for binary KPI options are consistent with the Act because they establish a rational position limit framework for binary KPI options that protects against manipulation while facilitating legitimate trading activity in a novel product. The Exchange believes that setting the position limit for binary KPI options as the same as the applicable position limit for the stock of the issuer, with 100 binary KPI option contracts equaling one standard option contract, is appropriate. As proposed, binary KPI options with a multiplier of one will

count toward applicable limits on a proportional basis relative to standard equity options on the issuer’s stock, which carry a multiplier of 100.

The Exchange further believes the proposal is reasonable given the nature of binary KPI options and their relationship to the underlying issuer. Because binary KPI options have a fixed maximum notional value and settle on an all-or-nothing basis based on a KPI of the issuer rather than the price of the issuer’s stock as with a standard equity option, the Exchange believes the proposed position limits appropriately reflects the distinct structure of these contracts and limits the potential for any single market participant to exert undue influence over binary KPI option settlement. With respect to binary KPI options, the economic risk of a position is binary, in that the contract either settles in-the-money at \$1.00 or out-of-the money at \$0.00. Additionally, with respect to binary KPI options, the maximum notional exposure per contract is fixed in advance; it cannot exceed \$1.00 multiplied by the contract multiplier. Moreover, unlike stock prices or index values, binary KPI option positions would not influence a company’s financial or operational outcomes; the number of option contracts outstanding or trading volume, for instance, has no effect on revenue or operational metrics.

Further, the Exchange’s proposal to provide that positions in binary KPI options on the same KPI with different expiration dates and positions in binary KPI options for the same issuer with different underlying KPIs are not aggregated reflects the distinct structure of binary KPI options. Each binary KPI option expiration corresponds to a separate event tied to a specific issuer reporting period. Thus, the Exchange believes aggregating positions across different expiration dates would not accurately reflect the risk profile of these positions and would impose an unnecessary burden on market participants seeking exposure to company KPI events across different reporting periods. In determining that position limits should not be aggregated across all binary KPI options referencing a single issuer, the Exchange analyzed the degree to which KPIs of a given issuer are correlated with one another.

Similarly, the Exchange believes it is reasonable to provide that binary KPI options are not aggregated with non-binary options contracts overlying the stock of the issuer. Because binary KPI options and equity options overlying the same issuer have different risk profile (*i.e.*, binary KPI options settle based on a KPI of the issuer rather than its stock

price), the Exchange believes it would be inappropriate and misleading to require aggregation of these positions for purposes of position limits. As noted above, binary KPI options are based solely on whether a single, specified-issuer KPI meets a discrete threshold at a defined future date, and their value reflects the market’s probability assessment of that singular outcome. Standard equity options, on the other hand, reflect a broad array of factors bearing on the price of the underlying security, including macroeconomic conditions and sector dynamics, of which any individual KPI is only one component. Because the two products are not priced off of a common reference and do not represent economically equivalent or fungible exposures, aggregating positions across them would not meaningfully advance the prevention of manipulative practices with respect to the underlying security.

The Exchange further notes that this proposed non-aggregation framework is not unprecedented. Rule 5.86–O(b) provides that positions in binary return derivatives shall not be aggregated with options contracts on the same or similar underlying security. The Exchange believes that there was no need to aggregate positions across the two product types to prevent manipulative practices involving the underlying.

Finally, the Exchange believes the amendments to the hedge exemption provision in proposed Rule 5.102–O(d) is consistent with the Act because it facilitates legitimate hedging activity in binary KPI options. Because a market participant simultaneously holding a short put and short call position in binary KPI options has taken opposing sides of the potential binary outcome (*i.e.*, the short call is at risk if the KPI is met and the short put is at risk if the KPI is not met), the Exchange believes such a position represents a defined, bounded risk profile that does not present the same potential for manipulation or market disruption that position limits are designed to prevent. The Exchange therefore believes the hedge exemption as proposed will encourage market-making activity and liquidity provision in binary KPI options while protecting investors and the public.

The Exchange also believes the proposed adoption of Rule 5.103–O consistent with the Act. By establishing tailored reporting requirements for binary KPI options, the Exchange will be able to monitor ATP Holder positions effectively and detect any accumulation of positions that may approach or exceed applicable limits, to the benefit of investors. The Exchange believes it is

consistent with just and equitable principles of trade for 100 binary KPI option contracts to equal one standard option contract for purposes of determining whether the report in proposed Rule 5.103–O is required given the size of binary KPI contracts. As discussed above, proposed binary KPI options have a multiplier of one, while standard option contracts have a multiplier of 100. Therefore, the notional value of a binary KPI option is significantly less than the notional value of standard option contracts. For example, 200 contracts with a value of \$1.00 with a multiplier of 100 would equate to \$20,000 notional value, while 200 binary KPI option contracts with a value of \$1.00 (which is the fixed maximum value of a binary KPI option contract) with a multiplier of one would equate to \$200 notional value. Counting 100 binary KPI contracts as one standard option contract for purposes of this report effectively calibrates the reporting requirement so that investors are required to submit the report for an economically equivalent number of contracts, which promotes just and equitable principles of trade.

The Exchange believes the proposal will provide the Exchange and regulators with visibility into large position concentrations in binary KPI options, preserving the ability to identify unusual activity and respond to any unforeseen concerns, while calibrating the threshold to a metric that is meaningful for this contract given its smaller multiplier relative to that of standard equity options. The Exchange believes this reporting framework, coupled with the position limits amendments, provides a fully adequate regulatory framework for these instruments.

Further, as noted above, the Exchange believes it has an adequate surveillance program in place to detect potentially manipulative trading in binary KPI options. The Exchange notes that manipulation of the reported KPI would constitute securities fraud and expose the issuer to liability under federal securities law, separate and apart from any exchange-related violation.

The Exchange believes the proposed binary KPI options will serve as a vehicle to hedge idiosyncratic, event-specific risk embedded in the specific KPIs. Standard equity options are calibrated to the price of the underlying security and capture a full spectrum of factors or risks which may affect issue value, such as macroeconomic conditions or sector dynamics. Because equity option pricing incorporates this full spectrum, a participant seeking to hedge exposure to a single, discrete KPI

outcome cannot do so precisely using standard equity options. Because settlement of a binary KPI option is determined solely by whether a specified-issuer KPI meets a defined threshold, the contract effectively isolates certain individual risks an investor may seek to manage. For example, consider an investor holding a long-term position in a particular issuer stock, who believes the issuer's quarterly revenue will fall short of expectations (for reasons unrelated to the issuer's long-term prospects). The investor may utilize the binary KPI option to hedge precisely against the near-term risk without disruption to the underlying equity position. This targeted hedging utility represents a distinct and additive function relative to existing listed products, which the Exchange believes will serve the interests of investors and provide an efficient mechanism for managing event-specific, KPI-driven risk.

The Exchange believes the proposed rule change will facilitate transactions in securities, 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, because it will provide investors with a securities exchange-listed investment choice for these instruments, offering price transparency and the regulatory protections of a national securities exchange. The Exchange believes the proposed rule change will permit investors to manage their risk exposures and carry out their investment objectives on a securities exchange with more flexibility and broader applicability. The Exchange also believes the proposed rule change will promote competition, as it will meet demands of investors that currently may trade products structured in substantively the same manner as the proposed binary KPI options in other markets (as further discussed below). Binary KPI options would provide investors with a straightforward means of expressing a directional view on key financial and operating metrics. The Exchange further believes the proposed rule change is consistent with the protection of investors and the public interest, as binary KPI options would be subject to the Exchange's existing rules governing the listing and trading of options. The Exchange believes expanding the universe of binary options will benefit investors, particularly retail investors and other investors who prefer simplicity, as a complementary offering to current exchange-traded options.

The proposed rule change will permit the Exchange to list binary KPI options on a national securities exchange as alternatives to products that are structured in substantially the same manner as binary options currently available in the OTC market and on other platforms. The Exchange understands investors have traded binary options similar to the proposed binary options in OTC markets for many years but may prefer to trade such options in a listed environment to receive the benefits of trading listing options. These benefits include: (1) enhanced efficiency in initiating and closing out positions; (2) increased market transparency; and (3) heightened contra-party creditworthiness. The Exchange believes the proposed rule change may encourage liquidity to shift from the OTC market onto the Exchange, which the Exchange believes would increase market transparency as well as enhance the process of price discovery conducted on the Exchange through increased order flow. The proposed rule change is intended to provide a market for binary KPI options as a standardized product without the credit risk of an individual issuer. By providing a listed and standardized market for more classes of binary options, the Exchange seeks to attract investors who desire the simplicity of a binary option with the certainty and safeguards of a regulated and standardized marketplace. Additionally, unlike an OTC binary option, counterparty credit risk for Exchange-listed binary KPI options is significantly reduced through the issuance and guarantee of the contracts by a registered clearing agency. Further, as an exchange-traded option, binary options will have the advantage of liquidity provided by Market-Makers, which the Exchange believes may lead to tighter spreads than those in the OTC market. The Exchange also believes that standardization will enable more interested parties to become market participants.

In addition to the OTC market, various market platforms that are not registered as national securities exchanges currently offer products structured in substantively the same manner as binary options that the Exchange may list pursuant to current Rules and as proposed. These platforms offer binary option products overlying securities indexes, which may be settled at varying points of the day (not just at the open and close of the trading day). However, as these venues are not national securities exchanges, they do not offer investors the benefits of

centralized liquidity, market transparency, or securities regulations intended to protect investors. The Exchange believes listing competitive products on a national securities exchange would create a centralized and standardized marketplace for these products, which promotes price discovery and transparency, within an established regulatory framework designed to afford investors in securities with important protections. In other words, the Exchange believes its proposal offers a more transparent platform than the OTC market or other market platforms offer. It would contribute to leveling the playing field with these alternative markets and provide investors with safeguards associated with Commission and SRO oversight of the trading activity in these exchange-listed binary KPI options.

Ultimately, the Exchange believes the proposed rule change will provide investors with greater trading tools and opportunities and flexibility, resulting in investors having additional means to carry out their investment objectives and manage their risk exposures through products listed and traded on a national securities exchange. The Exchange believes the proposed rule change will offer market participants a simplified, transparent, and limited risk investment choice overlying securities and securities indexes, which may be more aligned with their specific timing needs and investment and hedging strategies and risk tolerances. The Exchange believes it benefits the investing public to continue to enhance its listed product offerings to respond to continuously changing needs of investors and to a continuously changing competitive environment.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act, because binary KPI options will be available to all market participants who wish to trade such options on the same terms and in the same manner (including with respect to the payout terms and amount). All market participants will be subject to the same rules applicable to binary KPI options, as described in this proposed rule change. Except as set forth in the proposed rule change, binary KPI

options will trade in the same manner as other options, including binary index options, on the Exchange.

The Exchange does not believe 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 options exchanges may propose similar products. Additionally, as noted above, substantively similar products to binary KPI options, as proposed, are available in the OTC market and various other markets.

The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues who offer similar products. The Exchange believes the proposed rule change will provide investors with a comparable alternative to the OTC market and other venues. The Exchange believes it may be a more attractive alternative to the OTC market and these other venues, as market participants will benefit from being able to trade these options in an exchange environment, which provides, among other things: (1) enhanced efficiency in initiating and closing out positions; (2) increased market transparency; and (3) heightened counterparty creditworthiness. As a result, the Exchange believes that the proposed rule change may relieve any burden on, or otherwise promote, competition, as it will allow the Exchange to offer a securities exchange-listed alternative to the products currently available in these other markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

- A. by order approve or disapprove such proposed rule change, or
- B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NYSEARCA-2026-93 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-2026-93. 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 (<https://www.sec.gov/rules/sro.shtml>). Copies of the filing will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NYSEARCA-2026-93 and should be submitted on or before October 9, 2026.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁸

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2026-19139 Filed 9-17-26; 8:45 am]

BILLING CODE 8011-01-P

⁴⁸ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–106367; File No. SR–NYSEAMER–2026–82]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing of a Proposed Rule Change To Permit the Listing of Binary KPI Options

September 15, 2026.

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 September 3, 2026, NYSE American LLC (“NYSE American” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Rules to permit the listing of binary options overlying key performance indicators (“KPIs”) reported by certain issuers of stock (“binary KPI options”). The proposed rule change is available on the Exchange’s website at www.nyse.com and at the principal office of the Exchange.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Rules to permit the listing of binary options overlying KPIs reported by

certain issuers of stock (“binary KPI options”).⁴

Binary options are based on the same framework as traditional, standardized options traded on the Exchange, except the payout of a binary option is an amount contingent upon the occurrence of the option being in- or at-the-money rather than the degree to which the option is in-the-money. As a result, payout at expiration of a binary option is an all-or-nothing occurrence.

Under current Exchange Rules, the Exchange may list binary return derivatives (“ByRDS”) and binary options on broad-based indexes.⁵ The Exchange proposes to amend its Rules to permit the listing of binary KPI options. Binary KPI options are European-style, cash-settled options contracts listed on an underlying KPI of an issuer whose exercise settlement value is determined not by the market price of the issuer’s stock, but by whether a specific financial or operating metric reported by the issuer in an earnings-related filing submitted to the U.S. Securities and Exchange Commission (the “Commission”) meets or exceeds a pre-specified strike level.

First, similar to ByRDS and Broad-Based Index Binary Options, the Exchange proposes to adopt Section 20 (Binary KPI Options) to describe binary KPI options. The Rules in proposed Section 20 apply only to binary KPI options. All other Rules apply to the trading of binary KPI options, except as otherwise provided or the context otherwise requires.

Specifically, the Exchange proposes to adopt 900KPI (Applicability, Definitions). Like other standardized options, binary KPI options have standardized terms that are established by the Exchange. Standardized terms for binary KPI options include the exercise criteria that is the condition or criteria of a binary KPI option, the exercise settlement amount (*i.e.*, payout amount), strike prices, expiration dates, settlement type as A.M.-settlement or P.M.-settlement, the settlement style (as European), and the requirements used to determine if the KPI condition or

criteria of a binary KPI option has been met (the “payout determination requirement”). The Exchange proposes to establish these terms in new Rule 900KPI and additional provisions in proposed Rule 900KPI(b), as described below.

The Exchange proposes to define a “binary KPI option” in new Rule 900KPI(b) as a cash-settled option contract listed on an underlying KPI of an issuer with an exercise settlement amount that is established at the creation of the option and with a settlement value that is determined by whether a specific KPI disclosed by the issuer in an earnings-related filing submitted to the Commission meets or exceeds its exercise price. Binary KPI options are paid out if the reported value of the applicable KPI (1) equals or is greater than (as the payout determination requirement) the exercise price for a call binary KPI option or (2) is less than (as the payout determination requirement) the exercise price for a put binary KPI option. The Exchange also proposes to provide that unless the context dictates otherwise, the terms underlying security, equity, or index, or any variations of these terms, in the Rules mean KPI for purposes of binary KPI options.

The Exchange proposes to define a “call binary KPI option” as an option contract that returns an exercise settlement amount if the settlement value of the underlying KPI is at or above the exercise price at expiration (*i.e.*, in- or at-the-money).⁶

The term “Clearing Corporation” would mean the registered clearing agency designated by the Exchange to clear binary KPI options.⁷

The Exchange proposes to define “exercise price” (also referred to as “strike price”) as the value⁸ to which the settlement value of the underlying KPI is compared to the exercise settlement amount. For binary KPI options, the exercise price is the exercise threshold of an option contract that establishes a number, value, or

⁶ See proposed Rule 900KPI(b)(2).

⁷ See proposed Rule 900KPI(b)(3). The definition of Clearing Corporation reflects that the Exchange may designate the Options Clearing Corporation (“OCC”) or another registered clearing agency to clear binary KPI options. References in this filing to the Clearing Corporation therefore are intended to be clearing agency-neutral. The proposed definition does not alter the requirement that clearing and settlement occur through a registered clearing agency subject to the applicable provisions of the Act and the rules and oversight applicable to that clearing agency.

⁸ See proposed Rule 900KPI(b)(4). The value of an exercise price is measured in the applicable units of the KPI. For example, some KPIs are measured in U.S. dollars while others may be measured in percentages or numbers.

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b–4.

⁴ The Exchange’s proposal is similar to recent proposals filed by Cboe Exchange, Inc. (“Cboe”) and MEMX LLC (“MEMX”). See Securities Exchange Act Release No. 105877 (July 10, 2026), 91 FR 43418 (July 15, 2026) (SR–CBOE–2026–061) (“Notice of Filing of a Proposed Rule Change to Amend its Rules to Permit the Listing of Binary Options Overlying Key Performance Indicators (“KPIs”) Reported by Certain Issuers of Stock (“Binary KPI Options”)”) and Securities Exchange Act Release No. 106182 (August 24, 2026) (SR–MEMX–2026–25).

⁵ See NYSE American Rules Section 17 (Binary Return Derivativessm) and Section 18 (Broad-Based Index Binary Optionssm).

measure that is compared against the price of the settlement value of the underlying index or the KPI to determine if the cash payout amount (*i.e.*, the exercise settlement amount) will be paid out. In other words, binary options will have a threshold number as the exercise price that will be used to determine if the exercise criteria of the binary option has been met and the option will be exercised (and if holders will receive the cash payout amount). For binary KPI options, the exercise threshold will be a number that reflects or is compared to the underlying KPI of the binary option.

The Exchange proposes to define the term KPI (or “key performance indicator”) as a key financial or operating metric disclosed by an issuer in its earnings-related filings submitted to the Commission (*i.e.*, Form 8-K, Form 10-Q, or Form 10-K, as applicable).⁹

The Exchange proposes to define “put binary KPI option” as an option contract

that returns an exercise settlement amount if the settlement value of the underlying KPI is below the exercise price at expiration (*i.e.*, in-the-money).¹⁰

The Exchange proposes to define “settlement value” as the value of the underlying KPI that is used to determine whether a binary KPI option is in-, at-, or out-of-the-money.¹¹ The proposed definition specifies that the “settlement value” is the value of the applicable KPI as disclosed in the applicable issuer’s earnings-related filing submitted to, the Commission on applicable expiration date (for both A.M.-settled and P.M.-settled binary KPI options). The Exchange designates the applicable KPI and the relevant reporting period (for example, a calendar quarter) at the time of listing a binary KPI option. Proposed paragraph (b) of the settlement value definition provides if the applicable KPI is not reported or otherwise unavailable on the expiration date (and will not be reported), settlement (including any payout of the exercise settlement

amount) will occur in accordance with the Rules of the Clearing Corporation.

Additionally, proposed paragraph (c) of the settlement value definition states if an applicable KPI is restated after the expiration date and settlement of a binary KPI option, the settlement value (and the exercise settlement amount) of the binary KPI option does not change. In other words, the value of the applicable KPI as reported by the issuer on the applicable expiration date is final, and the amount paid (or not paid) at settlement will not change, regardless of whether it is later restated by the issuer.

The Exchange proposes to adopt Rule 901KPI(a) (Designation of Binary KPI Option Contracts) to identify the binary KPI options that may be listed for trading on the Exchange. Pursuant to proposed Rule 901KPI(a), the Exchange may from time to time approve for listing and trading on the Exchange any of the following binary KPI options contracts for the following issuers:

Company	KPI (each financial metric is measured in \$ unless otherwise specified)
Apple, Inc	Earnings per share: diluted. Total net sales. Net sales by category: iPhone. Net sales by category: Services. Net sales by reportable segment: Americas. Net sales by reportable segment: Greater China
Advanced Micro Devices, Inc	GAAP Diluted earnings per share. GAAP Revenue. Net Revenue: Data Center Segment. Net Revenue: Client and Gaming Segment. GAAP Operating Margin (%)
Alphabet Inc	Diluted net income per share. Revenues. YouTube ads Revenues. Google Cloud Revenues
Amazon.com, Inc	Diluted earnings per share. Total Net sales. AWS: Net sales. North America: Net sales. International: Net sales. Net Sales: Advertising services.
Bank of America Corporation	Diluted earnings per share. Total Revenue, net of interest expense. Net Interest Income. Provision for credit losses. Net Income.
Citigroup Inc	Diluted earnings per share. Total Revenue, net of interest expense. Net Interest Income. Total Provision for credit losses. Net Income.
Coinbase Global, Inc	Net income per share—Diluted. Total Revenue. Transaction Revenue. Total Trading Volume. Subscription and Services Revenue.

⁹ See proposed Rule 900KPI(b)(6).

¹⁰ See proposed Rule 900KPI(b)(7).

¹¹ See proposed Rule 900KPI(b)(8).

Company	KPI (each financial metric is measured in \$ unless otherwise specified)
Ford Motor Company	GAAP Earnings per share—Diluted. Total Revenues. Ford Pro Segment: Revenue. Ford Model e Segment: Revenue. Ford Blue Segment: Revenue.
Intel Corporation	GAAP Earnings per share attributable to Intel—diluted. Net revenue. Revenue: Client Computing Group (CCG). Revenue: Data Center and AI (DCAI). Revenue: Intel Foundry. GAAP operating margin (%).
JPMorgan Chase & Co	Earnings per share—diluted. Net revenue—reported. Net Interest Income. Provision for credit losses. Net Income.
Marathon Digital Holdings, Inc	Earnings (Net loss) per share of common stock—diluted. Revenues. Number of Blocks Won (# Bitcoin (BTC)). Energized Hashrate (EH) (# EH/s). Total Bitcoin Holdings (# BTC). BTC Produced (# BTC). BTC Purchased (# BTC).
Meta Platforms, Inc	Earnings per share: Diluted. Revenue. Family Daily Active People (DAP) (#). Revenue: Advertising. Operating Margin (%).
Microsoft Corporation	Diluted Earnings per Share. Revenue. Intelligent Cloud: Revenue. Microsoft Cloud revenue. More Personal Computing: Revenue.
Netflix, Inc	Earnings per share: Diluted. Revenues. United States and Canada (UCAN): Revenue. Europe, Middle East, and Africa (EMEA): Revenue Operating Margin (%).
NVIDIA Corporation	GAAP Diluted earnings per share. Revenue. Data Center Revenue. Edge Computing Revenue. Automotive Revenue.
Palantir Technologies Inc	Earnings per share attributable to common stockholders, diluted. Revenue. Net Income. Closed Deals of at Least \$1 Million (#).
Robinhood Markets, Inc	Net income attributable to Robinhood common stockholders: Diluted. Total net revenues. Funded Customers (#). Average Revenue Per User (“ARPU”). Robinhood Gold Subscribers (#).
SoFi Technologies, Inc	Earnings per share attributable to common stockholders—diluted. Total net revenue. Total net revenue—Technology Platform. Total net revenue—Financial Services. Total net revenue—Lending.
Space Exploration Technologies Corp	Earnings per share: Diluted. Total Revenues.
Super Micro Computer, Inc	Net income per common share: Diluted. Net sales. Gross Margin (%). Cash flow used in operations. Net Income.
Target Corporation	Diluted earnings per share. Net sales. Food & Beverage Net sales. Apparel & Accessories Net sales. Operating income: Rate (%).

Company	KPI (each financial metric is measured in \$ unless otherwise specified)
Tesla, Inc	Net Income per share of common stocks attributable to common stockholders: diluted. Total Revenues. Total Automotive Revenue. Model 3/Y Production (#). Supercharger Connectors (#). Free Cash Flow.
The Walt Disney Company	Diluted earnings per share. Revenues. Entertainment Subscription Video On Demand (SVOD) Operating Income. Revenues: Experiences. Segment operating income: Sports.

The Exchange proposes to add Rule 901KPI(b) to clarify that binary KPI options are a separate class from other options overlying the stock of the issuer and are a separate class from other binary KPI options with differently underlying KPIs for the same issuer. The Exchange believes this is reasonable given that an individual KPI is the specific underlying of binary KPI options, and generally options with different underlyings (e.g., different underlying security or index) are different option classes.

Next, the Exchange proposes to adopt Rule 902KPI (Terms of Binary KPI Option Contracts) to describe the permissible terms of binary KPI option series. Proposed Rule 902KPI provides that binary KPI options listed and traded on the Exchange are designated as to expiration date, exercise price, settlement type, settlement style, exercise settlement amount, contract multiplier, and underlying KPI. After approving a particular binary KPI option class for listing and trading on the Exchange, the Exchange from time to time may open for trading series of options in that binary KPI option class.

Proposed Rule 902KPI(a) states binary KPI options have European-style settlement, which is consistent with the rules regarding binary index options, as noted above. Proposed Rule 902KPI(a) further provides that the Exchange may designate the settlement type for binary KPI options as A.M.-settled or P.M.-settled. Binary KPI options for issuers¹² that disclose their earnings results before the open of the Core Trading Session on a given trading day are designated as A.M.-settled binary KPI options, and binary KPI options for issuers that disclose their earnings results after the close of the Core Trading Session on a given trading day are designated as P.M.-settled binary

KPI options. The Exchange notes that the proposed concepts of A.M.-settlement and P.M.-settlement for binary KPI options differ compared to traditional options, for which “P.M.-settled” generally means that the expiration of an option so designated will settle to the closing price of the underlying security or index value and “A.M.-settled” generally means that the expiration of an option so designated will settle to the opening price of the underlying. While different than how these terms apply to standard and binary index options, the Exchange believes the proposed description of A.M.-settlement and P.M.-settlement appropriately reflect the earnings disclosure practices of issuers. Additionally, while the timing of the event that will determine whether the Exchange designates a binary KPI option as A.M.-settled or P.M.-settled is different than that for traditional options and binary index options, the trading hours on expiration dates for each of A.M.-settled and P.M.-settled binary KPI options are consistent with those of A.M.-settled and P.M.-settled index options (traditional and binary) today.

Proposed Rule 902KPI(b) describes permissible expirations for binary KPI options. Specifically, the proposed rule change will permit the Exchange to list series that expire on the date the issuer announces its earnings results for the applicable reporting period (such as calendar quarter). The expiration date for a binary KPI option will be the date on which an issuer discloses the applicable KPI in its earnings results (for example, the date on which it issues an earnings results press release) for the specified reporting period (with the specific expiration date to be finalized when an issuer announces the date on which it will disclose its earnings results for that reporting period).¹³ If

that date is a Tuesday, Wednesday, Thursday, or Friday and the Exchange is not open for business on that date, the expiration date will be the first business day immediately prior to that day. If that date is a Monday and the Exchange is not open for business on that date, the expiration date will be the first business day immediately following that Monday. The disclosed KPIs relate to a specific reporting period (such as a calendar quarter), which KPIs an issuer publicly announces on a date following the end of that reporting period.

While an expiration date for a binary KPI option will be a specific date, as is the case for traditional options and binary index options, the Exchange’s proposed designation of expiration dates for binary KPI options will differ to reflect standard issuer disclosure practices. In some instances, an issuer might not establish the specific date on which it will announce its earnings results for a reporting period until weeks prior to the release date. Consequently, unlike standard equity and index options that have an exact expiration date when strikes are first listed, a binary KPI option will be listed for trading with a placeholder expiration date if the date the KPI information will be released by the issuer is not publicly known. If a placeholder expiration date is required, it will be set as the first trading day that is three months following the date of the prior quarterly release date for a KPI (for KPIs announced quarterly) and six months following the date of the prior semiannual release date for a KPI (for KPIs announced semiannually, if the Commission approves proposed rules that would permit such reporting). Once

which the applicable issuer establishes as the date it will announce earnings results for that quarter. The Exchange will issue a Trader Update when the specific expiration date for a binary KPI option is finalized. Additionally, the Exchange will maintain a reference data file for each issuer KPI on which the Exchange lists binary KPI options (as will be described in the Exchange’s technical specifications available on its public website), and that reference data file will be updated with the specific expiration date for a binary KPI option once known.

¹² The Exchange determines whether an issuer discloses its earnings results before or after the close of the Core Trading Session on a given trading day based on publicly available information regarding the issuer’s disclosure practice.

¹³ For example, for a binary KPI option series, the Exchange may designate the reporting period for a series to be the fourth quarter of 2026. The expiration date for that series would be the date on

the KPI issuer announces the release date of the KPI information, the expiration date will be updated as the finalized expiration date of the option contract. Ultimately, however, the expiration date for a binary KPI option is an issuer's earnings release date at the time the series is listed (even if the exact date is unknown) until expiration.

The Exchange may designate binary KPI option series to expire up to 12 months from the time they are listed and may list up to two expirations at one time for a binary KPI option (per KPI per issuer). The Exchange may open for trading a series of binary KPI options at least one business week prior to the expiration date of a binary KPI option. The proposed permissible expirations for binary KPI options are similar to current Rules. First, the proposed rule change permits the Exchange to list binary KPI options to expire up to 12 months from the time they are listed. Current rules regarding binary index options permit these expirations, in addition to expirations out more than 12 months up to 36 months from the time they are listed.¹⁴ The proposed rule change also limits the Exchange to list up to two expirations at one time for binary KPI options. Therefore, the proposed scope of permissible expirations for binary KPI options is narrower than that permitted for binary index options under current Rules (as previously approved by the Commission).

The proposal to list expirations at least one business week prior to the expiration date of binary KPI option (as well as the proposed language regarding shifting an expiration date to the immediately business day before or after an expiration date that falls on a day the Exchange is not open for business) is substantially similar to current Exchange rules applicable to binary equity options,¹⁵ as well as the rules of another options exchange applicable to short term equity options series.¹⁶ The Exchange believes it is appropriate to permit listing of binary KPI options that expire up to 12 months from the time they are listed to accommodate different issuer reporting periods (including semiannual reporting if the Commission approves recently proposed rules to permit such reporting), as well as to permit the Exchange to list expirations for consecutive calendar quarter periods or for a calendar quarter and annual reporting period at the same time. As discussed above, issuers disclose KPIs

in their periodic reports submitted to the Commission.

Proposed Rule 902KPI(c) describes the automatic exercise feature of binary KPI options. Specifically, the proposed rule states that binary KPI options will be automatically exercised at expiration if the settlement value of the underlying KPI is equal to or greater than the exercise price of a call binary KPI option or less than the exercise price in the case of a put binary KPI option.

Proposed Rule 902KPI(d) describes the permissible exercise prices (or strike prices) the Exchange may designate for series of binary KPI options. Proposed Rule 902KPI(d)(1) describes how the value of exercise prices of binary KPI options are measured. Specifically, the exercise price of each binary KPI option series will be fixed at an amount equal to a value of the underlying KPI. Because the value of certain KPIs may be very large (e.g., billions of dollars), the Exchange proposes that the exercise price value of the underlying KPI will be divided by a scaling factor based on the value of the KPI in the issuer's most recent earnings-related disclosure as of the time a binary KPI option class is listed) as follows:

- if the most recently disclosed KPI value is greater than or equal to one trillion, the exercise price equals that value divided by one trillion (e.g., for such KPIs, an exercise price of 27.00 is equivalent to a KPI value of 27,000,000,000,000.00);
- if the most recently disclosed KPI value is greater than or equal to one billion but less than one trillion, the exercise price equals that value divided by one billion (e.g., for such KPIs, an exercise price of 112.00 is equivalent to a KPI value of 112,000,000,000.00);
- if the most recently disclosed KPI value is greater than or equal to one million but less than one billion, the exercise price equals that value divided by one million (e.g., for such KPIs, an exercise price of 900.00 is equivalent to a KPI value of 900,000,000.00);
- if the most recently disclosed KPI value is greater than or equal to one thousand but less than one million, the exercise price equals that value divided by one thousand (e.g., for such KPIs, an exercise price of 42.00 is equivalent to a KPI value of 42,000.00); and
- if the most recently disclosed KPI value is less than one thousand, the exercise price equals that value and is not divided by a scaling factor (e.g., for such KPIs, an exercise price of 774.00 is equivalent to a KPI value of 774.00).¹⁷

The Exchange will apply a different scaling factor to newly listed binary KPI option series for a new expiration only after the value of the KPI in the issuer's earnings-related disclosures has a value in a different scaling tier for four consecutive reporting periods or if the Exchange deems it necessary in the interests of a fair and orderly market. Application of a different scaling factor will not affect the exercise prices of any series of the binary KPI options previously opened. For example, if the Exchange begins listing a new class of binary KPI options and the most recently disclosed KPI value for the issuer at the time of that listing was for the third quarter of 2026 and was \$892,000, the exercise prices for that class of binary KPI options will be scaled by 1,000, and thus exercise prices of 895, 995, and 1005, would represent \$895,000, \$995,000, and \$1,005,000, respectively. If the issuer discloses a KPI value of \$1,020,000 in its fourth quarter 2026 earnings disclosure, the Exchange will continue to list exercise prices scaled by 1,000. If the issuer then discloses KPI values of \$1,112,000, \$1,237,000, and \$1,064,000 for the first, second, and third quarters, respectively, of 2027, the Exchange will begin scaling the exercise prices by 1,000,000 for the fourth quarter 2027 expirations (or for the first quarter 2028 expirations if the Exchange had already listed fourth quarter 2027 expirations prior to the disclosure of the third quarter 2027 KPI value). The Exchange believes this will permit consistency for listing scaled KPI values while allowing the Exchange to update strike prices to reflect long-term changes to an issuer's KPI values.

The Exchange will announce via Trader Update if the scaling factor applied to a binary KPI options changes (for example, the KPIs will be scaled in billions rather than in millions). Additionally, the Exchange will update this information in the Exchange's technical specifications regarding binary KPI options and reference data file that describes the terms of binary KPI options, both of which will be available on the Exchange's website (customers receive notifications of such updates). This is consistent with how the Exchange provides information regarding product information (including updates) for all options the Exchange lists for trading.

It is possible for a KPI to have a negative value, such as earnings per share (which is equivalent to a loss per share). Proposed Rule 902KPI(d)(1)(B) provides the Exchange may list binary KPI options series with exercise prices representing negative KPI values. For these series, the exercise price will

¹⁴ See Rule 901BIN(c).

¹⁵ See Rule 903ByRDS(b).

¹⁶ See Cboe Rule 4.5(d).

¹⁷ When applying the scaling factor, the Exchange will not round the scaled KPI value and instead will truncate the value so the scaled strike price value fits within standard strike listing format.

equal the absolute value of the KPI and will be scaled as described above. For example, if an issuer's earnings per share in the last reporting period was $-\$3.52$ (and thus was a loss per share), a binary KPI option for such issuer with a strike of 3.58 will reflect an expected loss of $\$3.58$ per share. The Exchange will incorporate into symbology for binary KPI options whether the value of the strike price is positive or negative, including if the Exchange lists binary KPI option series with both positive and negative strike prices. Whether a symbol reflects a positive or negative value will be available on contract specifications as well as the reference data file for the specific binary KPI option on the Exchange's public website.

Proposed Rule 902KPI(d)(2) provides the minimum interval between strike prices for binary KPI options series is:

- 0.01 where the strike price is less than 10;
- 0.10 where the strike price is 10 or greater but less than 100;
- 1.00 where the strike price is 100 or greater but less than 1,000;
- 10.00 where the strike price is 1,000 or greater but less than 10,000; and
- 100.00 where the strike price is 10,000 or greater.

As discussed above, while KPI values above 1,000 are generally scaled, there may be circumstances in which the Exchange lists strikes above 1,000 or even 10,000 given the Exchange's proposal to maintain a lower scale level until a KPI value is consistently above a certain level (e.g., above one billion for four consecutive quarters). This may occur when a KPI value is near the top of a scaling range; for continuity, the Exchange will continue listing strike prices using the lower scaling factor and not change to a higher scaling factor until the KPI value is regularly within that higher range. Suppose a KPI value is 995,000,000; in this case, strike prices will be scaled by 1,000,000. Thus, the Exchange may list binary KPI options above and below 995 (995,000,000 divided by 1,000,000). However, there is potential that the KPI may increase to above 1,000,000,000. As proposed, the Exchange may list strike prices, for example, of 1,000 (representing 1,000,000,000) and above, for expirations until the KPI value is above 1,000,000,000 for four consecutive reporting periods. To reduce confusion, the Exchange would not scale strike prices using different scaling factors within a single expiration (and would not change the scale until the KPI value is consistently at the higher level). Therefore, it is possible the Exchange may list strikes greater than 1,000. Similarly, while strikes above 10,000

may be rare, given the Exchange proposes to maintain a lower scale level until a KPI value is consistently above a certain level (e.g., above one billion for four consecutive quarters, as proposed), depending on market factors and demand, it is possible (although unlikely) the Exchange may determine it is appropriate to list strikes above 10,000 if market factors or expectations signify a significant increase of the KPI value. The proposed strike intervals accommodate the listing of binary KPI options in these circumstances before the Exchange shifts the strike prices for an issuer's KPI to a different scaling level.

The proposed strike intervals are generally consistent with current Exchange Rules for other options, which provide for larger strike intervals as the values of strike prices increase. Given the scaling factor for larger KPI values, it may appear the proposed rule change will permit smaller strike intervals for larger KPI values if those intervals are considered solely on a nominal basis. However, that is not the case if the actual values of the strike intervals are considered. The corresponding actual value of the strike interval for a strike price that was subject to a larger scale value is higher than the actual value of the strike interval for a strike price that was subject to a smaller scale value. For example, suppose a strike price of 950 represents $\$950$ million. The proposed rule change would permit strike intervals of $\$1.00$. However, that $\$1.00$ corresponds to $\$1,000,000$. In other words, if the Exchange listed strikes of 950, 951, and 952, the difference in values of those strikes are $\$1$ million, not $\$1$ (i.e., the strikes represent values of $\$950,000,000$, $\$951,000,000$, and $\$952,000,000$). Similarly, suppose a strike price of 3 represents $\$3,000,000,000$. The proposed rule change would permit strike intervals of $\$0.01$. However, that corresponds to $\$10,000,000$. If the Exchange listed strikes of 3.00, 3.01, and 3.02, the difference in values of those strikes are $\$10,000,000$, not $\$0.01$ (i.e., the strikes represent values of $\$3,000,000,000$, $\$3,010,000,000$, and $\$3,020,000,000$, respectively). As a result, the permissible strike intervals for strike prices representing values in the billions are actually larger than the permissible strike intervals for strike prices representing values in the millions. This is consistent with the general premise underlying current strike intervals that larger strike intervals apply to larger strike values.

Proposed Rule 902KPI(e) addresses bid and offer conventions for binary options with multipliers other than 100.

It will provide clarity and consistency in market quotations relative to the notional size of the option, promotes investor understanding of the cost and value of binary KPI option contracts. Therefore, the Exchange believes the proposed rule change is consistent with just and equitable principles of trade because it creates a pricing structure that reflects the notional value of an option based on its multiplier.

Proposed Rule 902KPI(f) describes the initial series of a binary KPI option the Exchange may open for trading. Specifically, the Exchange may open for trading one or more binary KPI option series with a fixed KPI value as the strike price, with approximately the same number of strike prices being opened above and below the at-the-money KPI value (i.e., the value of the KPI in the issuer's most recent earnings-related disclosure) at the time the binary KPI options are opened. The Exchange will list strike prices for binary KPI option series that are reasonably close to the at-the-money KPI value at the time of listing. A strike is "reasonably close" to the at-the-money KPI value if (1) for KPIs less than or equal to 10, it is no more than 100% above or below the at-the-money KPI value; and (2) for KPIs greater than 10, it is no more than 30% above or below the at-the-money KPI value. The Exchange may also open binary KPI option series that are more than 30% above or below the at-the-money KPI value (if the KPI is greater than 10) provided demonstrated customer interest exists for such series, as expressed by institutional, corporate or individual customers or their brokers.

The Exchange may add new series of binary KPI options series when the Exchange deems it necessary to maintain a fair and orderly market or to meet customer demand. To the extent the Exchange lists binary KPI options series for an expiration before then-currently listed binary KPI options expire (and thus before the applicable issuer has disclosed the KPI value for the reporting period immediately preceding the reporting period for these newly listed options), the Exchange may list additional series after the KPI value for the immediately preceding reporting period is disclosed using that disclosed KPI value as the at-the-money KPI. For example, before expiration of a binary KPI options series set to expire on the date of an issuer's disclosure of its third quarter earnings results, the Exchange lists series of that binary KPI option to expire on the date of an issuer's disclosure of its fourth quarter earnings results (using the KPI from the second quarter earnings results as the at-the-money KPI value). After the issuer

discloses its third quarter earnings results, including the applicable KPI, the Exchange may list additional series for the fourth quarter binary KPI options using the third quarter KPI result as the at-the-money KPI value. Any additional strike prices the Exchange lists will be reasonably close (as defined above) to the at-the-money KPI value at the time of listing.

Continuing the above example, suppose the Exchange lists binary KPI options for the fourth quarter before the binary KPI options for the third quarter have expired. As proposed, the Exchange would list strikes above and below the at-the-money strike, which at the time of listing would be the settlement value KPI from the issuer's second quarter earnings results disclosure, as that is the most recently available KPI. If the KPI for the option was net sales, and the second quarter value was \$45.093 billion, the at-the-money strike would be 45.10, and the Exchange could list strikes within 50% of that value, and additional series based on customer demand or market changes. After the Exchange lists those series, the issuer announces its third quarter earnings results, including net sales of \$57.241 billion. As proposed, after that announcement, the Exchange may list additional strikes within 50% of \$57.24 to reflect the change in value of the underlying (as well as additional series based on customer demand or market changes).

This proposed framework for listing and adding series is similar to the framework in current Rules for listing and adding series of equity options. While the proposed strike intervals are narrower than these rules, the permissible ranges are also narrower. The Exchange acknowledges the proposed framework would still permit the Exchange to list a large number of strikes per KPI per expiration. However, the Exchange intends to apply its standard strike listing practices to binary KPI options. Specifically, the Exchange generally lists strikes at wider intervals as they move farther away from the at-the-money value, while listing more granular intervals for strikes closer to the at-the-money value. The Exchange also generally delists granular strikes that are deep out-of-the-money if the Exchange determines they are sufficiently covered by wider strike intervals that are close in value.

These proposed provisions regarding the listing of binary KPI option series are similar to provisions regarding permissible series of other options. The Exchange believes it is reasonable to list binary KPI options for a new reporting period prior to the expiration of then-

listed binary KPI options for the immediately preceding reporting period (e.g., listing binary KPI options for the fourth quarter before expiration of binary KPI options for the third quarter), and thus before the settlement value of the applicable KPI is known for the immediately preceding reporting period for these options, to permit investors to roll positions from one expiration to the next. As proposed, once the settlement value for the immediately preceding reporting period is known (the third quarter in this example), the Exchange may list additional series of the binary KPI options that reflect that KPI value. This is consistent with current practice if there is a change (including a substantial change) in the price of underlying security or value of an underlying index. For example, Rule 903(d) provides that the Exchange may open additional series of a short-term option series overlying a security when the market price of the underlying security moves substantially from the exercise price or prices of the series already opened, subject to the "reasonably close" parameters set forth in that rule. Disclosure of, as an example, the third quarter KPI value after the fourth quarter binary KPI options series were listed based on the second quarter KPI value (if the third quarter KPI value differs from the second quarter KPI value) is similar to the move in the price of an underlying security, which may result in the Exchange listing additional series based on the updated price of the underlying security. Similarly consistent with current practice for other options (as set forth in Rule 903, Commentary .10(c), for example), opening of binary KPI options based on this later-disclosed KPI value will not affect any other series of options of the same binary KPI options class previously opened.

Proposed Rule 902KPI(h) provides that the contract multiplier for each class of binary KPI options is one.

The Exchange proposes to add new Rule 903KPI (Determination of Settlement Value) to establish that binary KPI options that are "at-the-money," "in-the-money," or "out-of-the-money" are a function of the settlement value of the underlying KPI in relation to the type of binary KPI option (*i.e.*, put or call) and the exercise price. As described above, the settlement value for a binary KPI option is the value of the KPI as disclosed in the applicable issuer's earnings related filing. While the timing of an announcement of a KPI value factor into the determination of whether the Exchange lists a binary KPI option as A.M.-settled or P.M.-settled, the Exchange will source the settlement

value from the filing the issuers submits to the Commission. Generally, companies issue press releases that contain earnings results and near contemporaneously submit a Form 8-K to the Commission with the press release as an exhibit. Therefore, it is unlikely the value of the KPI in the Commission filing will differ from the value in the initial announcement; however, the value in the Commission filing will be the ultimate settlement value.

Proposed Rule 904KPI (Adjustment) provides that binary KPI options are subject to adjustment only in accordance with and to the extent specified in the Rules of the Clearing Corporation. When any such adjustment has been determined, the Exchange will announce this adjustment via Trader Update, which will become effective as of the time specified in that announcement.

As described above, binary KPI options would be cleared by the Clearing Corporation, which would serve as the central counterparty to each transaction and facilitate standardized clearing, settlement, and contract administration processes pursuant to its Rules. Consistent with this centralized clearing framework, proposed Rule 904KPI provides that binary KPI options would be subject to adjustment only in accordance with and to the extent specified in the Rules of the Clearing Corporation. When any such adjustment has been determined, the Exchange will announce this adjustment via Trader Update, which will become effective at the time specified in that announcement. The Exchange believes that limiting contract adjustments to those provided under the Rules of the Clearing Corporation provides a clear and transparent framework under which any adjustments to binary KPI options would be administered. A registered clearing agency designated to clear binary KPI options would be subject to Commission oversight and would possess expertise in the clearance and settlement of financial products. Because binary KPI options represent a novel product type, the Exchange anticipates that the Clearing Corporation would develop adjustment procedures designed to address the unique characteristics of these contracts and the types of events that may require adjustment. To the extent the Clearing Corporation adopts new adjustment procedures for binary KPI options, those procedures would be subject to the applicable regulatory process, including review and approval by the Commission, as applicable, before the

Exchange commences trading in the product.

Next, the Exchange proposes to Rule 905KPI to provide that binary KPI options, may be traded on the Exchange from 9:30 a.m. to 4:00 p.m.¹⁸ Further, the last day of trading for P.M.-settled binary KPI options is the day of expiration, and the last day of trading for A.M.-settled binary KPI options is the trading day prior to expiration.

The Exchange recognizes it is possible, although unusual and unlikely, that KPI information may become available at unexpected times. The proposed rules address the impact on trading and expiration that such disclosure may have. First, the proposed rule change provides if the Exchange confirms an issuer discloses the KPI prior to the expiration date, trading in the applicable binary KPI options series will cease, and the expiration date for the option accelerates to a date on or shortly after the date of that disclosure in accordance with the Rules of the OCC.¹⁹ This may occur if, for example, the applicable issuer releases the KPI information in advance of the expiration date of the option. If the issuer releases KPI information after the expiration date, which may be the case if, for example, the issuer's earnings are delayed, trading in the option will not be impacted and will cease as of the expiration date. While the expiration date will not change, expiration processing of such options will be delayed until the KPI information becomes available, in accordance with the rules of the Clearing Corporation. Additionally, the proposed rule change provides if there is an unofficial disclosure of the KPI prior to the expiration date, the Exchange may determine to halt (and resume) trading in the applicable binary KPI options series in accordance with Rule 953NY. In certain circumstances, the expiration date for the option may accelerate in accordance with the Clearing Corporation rules; if this occurs, trading in the binary KPI will cease. This proposed provision addresses the unlikely event that KPI information becomes available through sources other than the issuer in advance of the expiration date. If the Exchange determines the KPI information reported from the unofficial source is unreliable,

trading in the binary KPI option may resume until it expires.

The Exchange believes proposed Rule 905KPI(f), which provides that for binary KPI options, the System initiates the opening rotation at 9:30 a.m., is consistent with the opening auction framework already applicable to other index options listed on the Exchange and ensures that binary KPI options open for trading in an orderly and transparent manner.

The Exchange proposes to amend Rule 960NY to establish the minimum increment for bids and offers on orders for binary KPI options, which may not be less than \$0.01.

The Exchange proposes to adopt Rule 906KPI (Position Limits for Binary KPI Options) to set forth position limit requirements for binary KPI options. The Exchange proposes to adopt Rule 906KPI(a) to provide that in determining compliance with Rule 904 (Position Limits), the position limit for binary KPI options is the same as the applicable position limit for the stock of the issuer per expiration and 100 binary KPI option contracts equal one standard option contract.

Per proposed rule 906KPI(b), positions in binary KPI options on the same KPI that have different expiration dates are not aggregated, and positions in binary KPI options for the same issuer with different underlying KPIs are not aggregated. In addition, the Exchange proposes to adopt Rule 906KPI(c) to provide that Binary KPI options are not aggregated with non-binary options contracts overlying the stock of the issuer. Finally, per Rule 906KPI(d), with respect to binary KPI options, a binary KPI option short position coupled with a binary KPI option short call position, regardless of the KPI option strike, shall be exempt from the established position limits proscribed in Rule 904.

The Exchange also proposes to adopt Rule 907KPI (Reporting of Positions) Positions in binary KPI options shall be reported pursuant to Rule 904, except, in computing reportable binary KPI options thereunder, aggregation of positions shall be in accordance with Rule 906KPI. The proposed Rule 907KPI further provides that for purposes of this report, 100 binary KPI option contracts equal one standard option contract. The Exchange believes this is reasonable given that binary KPI options have a multiplier of 1 while standard equity option contracts have a multiplier of 100.

Except as otherwise described above, all binary KPI options will be listed and traded on the Exchange in a substantially similar manner as standard

equity and index options and binary index options are permitted to be listed and traded under current Rules. The Rules that apply to the listing and trading of non-binary options on the Exchange, including those related to customer accounts, margin requirements and trading halt procedures,²⁰ which are designed to prevent fraudulent and manipulative acts and practices, will apply to the listing and trading of binary KPI options. The Exchange has analyzed its capacity and represents that it believes the Exchange has the necessary systems capacity to handle any potential additional message traffic associated with the listing of binary KPI options.

The Exchange will support electronic trading, floor trading, and complex orders. Trading in Flexible Execution ("FLEX") options will not be offered. The Exchange may determine to support particular order types, order instructions, or times-in-force on a class-by-class basis. Consistent with current practice, if the Exchange modifies the applicability of any functionality or order instructions for binary KPI options, it will notify ATP Holders via Trader Update.

The Exchange will send quotation and transaction price information for binary KPI options to The Options Price Reporting Authority ("OPRA") in the same manner it sends this information to OPRA for all other options the Exchange lists. Additionally, the Exchange understands from OPRA that it will disseminate information regarding binary KPI options in the same manner it does for all other options the Exchange lists. The Exchange intends to follow OPRA's standard capacity monitoring process for binary KPI options (in accordance with OPRA instructions), which includes submission of quarterly capacity projections (the Exchange will include its projected binary KPI option volume in the applicable submission). Further, the Exchange understands from OPRA that no technical changes are required to accommodate the reporting to OPRA of quotation and transaction information regarding binary KPI options (the Exchange represents, if later required by OPRA, it will adhere to any new technical requirements OPRA deems necessary to accommodate binary KPI options).²¹

²⁰ Binary KPI options will not be tied to the trading state of the underlying issuer stock and thus, trading in binary KPI options will not be affected by halts in the underlying issuer stock. The binary KPI options will halt in accordance with Rule 953NY.

²¹ The Exchange understands OPRA may need to update how it disseminates open interest information for binary KPI options, as its current

¹⁸ Unless otherwise specified, all times in this proposal are Eastern Time.

¹⁹ The proposed acceleration of binary KPI options is similar to the existing acceleration process for equity options when the underlying security of such options has been converted entirely to cash. See OCC Rule 807.

The Exchange does not believe American Trade Permit (“ATP”) Holders will experience any capacity issues as a result of this proposal and represents that it will monitor the trading volume associated with binary options and the effect (if any) of binary options on market fragmentation and the capacity of the Exchange’s automated system.

The Exchange represents that the same surveillance procedures applicable to all other options currently listed and traded on the Exchange will apply to binary KPI options, and that it has the necessary systems capacity to support the option series. The Exchange’s existing surveillance and reporting safeguards are designed to deter and detect possible manipulative behavior and other improper trading. In addition, the Exchange has a Regulatory Services Agreement with the Financial Industry Regulatory Authority, Inc. (“FINRA”). Pursuant to a multi-party 17d–2 joint plan, all options exchanges allocate regulatory responsibilities to FINRA to conduct certain options-related market surveillances.²² The Exchange is also a member of the Intermarket Surveillance Group (“ISG”) under the ISG Agreement. ISG members work together to coordinate surveillance and investigative information sharing in the stock, options, and futures markets. Further, the Exchange will implement any new surveillance procedures it deems necessary to effectively monitor the trading of binary KPI options.

The Exchange will report any information regarding binary KPI options required to be reported to the Consolidated Audit Trail (“CAT”) in the same manner it reports this information to CAT for all other options the Exchange lists.²³ The Exchange

represents, if later required by FINRA CAT, it will adhere to any new technical requirements FINRA CAT deems necessary to accommodate binary KPI options).

Pursuant to the Options Order Protection and Locked/Crossed Market Plan (“Linkage Plan”),²⁴ participant exchanges to the Linkage Plan established a framework to provide order protection. The Linkage Plan (and Exchange Rules 990NY through 993NY regarding intermarket linkage) applies during all trading sessions during which multiply listed options trade. Rule 993NY addresses order routing away from the Exchange to promote compliance with the Linkage Plan. If the proposed binary KPI options become multiply listed options, Users may designate an order for routing (or not available for routing), and the Exchange System is designed to, at all times, prevent trade-throughs and avoid displaying locked/crossed markets in accordance with the Linkage Plan (and Exchange Rules 990NY through 993NY regarding intermarket linkage).

Upon launch, binary KPI options will clear through the Clearing Corporation as that term is defined in proposed Rule 900KPI(b). In doing so, the proposal would bring these securities products within the established regulatory infrastructure applicable to listed options, including exchange trading and surveillance, standardized disclosure, and centralized clearance and settlement through a registered clearing agency, as further described below. Additionally, binary KPI options would be cleared through a registered clearing agency, which would serve as the central counterparty to each transaction and facilitate risk mitigation through established clearing, settlement, contract adjustment, and other standardized operational processes.

The Options Listings Procedure Plan (the “OLPP”) sets forth procedures to facilitate the listing and trading of standardized options. This plan currently describes procedures with respect to options issued by and cleared at the OCC. If the Exchange ultimately does not designate the OCC as the

Clearing Corporation for the purposes of the definition set forth in proposed Rule 900KPI(b), the Exchange will take steps necessary and within its authority to amend the OLPP to reflect listing procedures applicable to binary KPI options to the extent not cleared by the OCC.

The Exchange represents it will not list for trading binary KPI options until the registered clearing agency designated as the Clearing Corporation is authorized and operationally ready to clear the contracts and until all applicable filings and documents of the Clearing Corporation related to binary KPI options being cleared through the Clearing Corporation are approved by the Commission or effective after review by the Commission, as applicable.

As discussed in further detail below, the Exchange intends for binary KPI options to be treated as listed standardized options. Rule 9b–1 under the Act establishes a disclosure framework for standardized options pursuant to which investors receive a disclosure document describing the terms, characteristics, and risks of the product before trading. Depending on which registered clearing agency is designated as the Clearing Corporation, the applicable Rule 9b–1 disclosure document may be based on an existing options disclosure document utilized by that clearing agency, as modified or supplemented, as appropriate, or another comparable disclosure document prepared in connection with the clearance of binary KPI options. In either case, the disclosure document would contain substantially similar information regarding the terms, characteristics, risks, settlement mechanics, and other material features of binary KPI options and would be tailored, as necessary, to address the product’s unique features and distinctions from traditional listed options. The Exchange believes that disclosure through the Rule 9b–1 framework would better serve the informational needs of investors than a traditional prospectus because binary KPI options are standardized options for which the principal investor considerations relate to the contract’s terms, payout structure, settlement mechanics, and trading characteristics rather than the disclosure typically provided in connection with an offering of a corporate issuer’s securities.

The Exchange will not commence listing and trading of binary KPI options until a registered clearing agency is authorized and operationally ready to clear the contracts; the applicable disclosure document under Rule 9b–1 is in place; any necessary changes relating

process incorporates information from OCC and references in this filing are clearing agency-neutral.

²² Section 19(g)(1) of the Act, among other things, requires every self-regulatory organization (“SRO”) registered as a national securities exchange or national securities association to comply with the Act, the rules and regulations thereunder, and the SRO’s own rules, and, absent reasonable justification or excuse, enforce compliance by its members and persons associated with its members. See 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d–2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain responsibilities with respect to members of the SRO who are also members of another SRO. Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of its responsibilities to: (i) receive regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; or (iii) carry out other specified regulatory responsibilities with respect to such members.

²³ CAT reporting requirements will apply to broker-dealers with respect to binary KPI options in the same manner as they apply to any other options the Exchange lists. The Exchange understands from FINRA CAT there will be no changes to the

reporting specifications for broker-dealers to accommodate the reporting of information regarding binary KPI options to CAT.

²⁴ The Linkage Plan requires U.S. options exchanges to establish a framework for providing order protection and addressing locked and crossed markets in eligible options classes. The Linkage Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Act and Rule 608 thereunder. The full text of the Linkage Plan is available at https://www.theocc.com/getcontentasset/7fc629d9-4e54-4b99-9f11-c0e4db1a2266/dfc3d011-8f63-43f6-9ed8-4b444333a1d0/options_order_protection_plan.pdf.

to CAT, FINRA, OPRA, the Linkage Plan, and OLPP have been completed; and the Exchange has issued an implementation notice to Members.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,²⁵ in general, and furthers the objectives of Section 6(b)(5) of the Act,²⁶ in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. In addition, the Exchange believes that the proposed rule change is consistent with the Section 6(b)(5)²⁷ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Binary KPI Options Are Securities and Standardized Options

As an initial matter, the Exchange's proposal is identical to the proposal made by the Cboe to list binary KPI options.²⁸ The Exchange believes that the binary KPI options proposed herein would be "securities" under the Act.²⁹ Section 3(a)(10) of the Act³⁰ defines the term "security" to include, among other instruments, "any . . . option . . . on any security . . . including any interest therein or based on the value thereof."³¹

Standardized options are generally offered based on the price of the underlying security or index and include puts, calls, and other complex instruments whose value is based on the price of the underlying security or securities. The binary KPI options will operate in substantially the same manner as these binary options but with a different underlying. The Exchange's proposal would expand the universe of listed options to include contracts based

on proposed KPIs, including net income, net sales, net interest income, provision for credit losses, and specified expense metrics, that relate to the valuation of the issuer's stock. Such options contracts would reference financial metrics that are material to the value of the underlying security and are therefore included in the issuer's financial reports submitted to the Commission, including Form 8-K, Form 10-K and Form 10-Q filings.

In addition, the Exchange believes that trading such instruments as binary KPI options would promote a fair and orderly market and facilitate new investment and hedging opportunities on a Commission-regulated exchange. In certain cases, financial instruments may contain features similar to both options contracts and security-based swaps. As compared to characterizing an instrument as a security-based swap, which would typically be traded bilaterally in the over-the-counter ("OTC") market, categorizing an instrument as an options contract comes with a more robust set of regulatory requirements and market practices that the Exchange believes would aid in the development of such binary KPI options. To the extent there is uncertainty regarding how best to characterize these contracts under the statute, the Exchange believes that the best interpretation is the one that promotes innovation and competition while providing robust investor protection guardrails on a regulated exchange.

As discussed above, the Exchange is proposing to list and trade binary KPI options. The Exchange currently trades standardized options (puts and calls) based on the price of an underlying NMS stock. Binary KPI options would be different from these contracts in primarily two respects: (1) binary KPI options contracts would have a fixed or "binary" payout at expiration, regardless of the magnitude of the difference between the option's exercise price and the settlement value for the underlying; and (2) the price of such contracts would be based on the issuer achieving financial metrics that are material to the price of the underlying stock rather than the stock's share price itself. The Exchange does not believe that either of those differences is germane to whether this product is an options contract as defined in the Act.

The Exchange notes that options as defined in Section 3(a)(10) encompass not only options on a security but further include options on any interest in a security or based on the value thereof. This broad statutory language is sufficient to support the trading of

binary KPI options on a Commission-regulated options exchange, including contracts that reference an issuer's earnings, revenues, sales, or other financial metrics on which investors traditionally base investment decisions. Such options contracts would reference financial metrics that are material to the value of the underlying security and are therefore included in the issuer's financial reports submitted to the Commission, including Form 8-K, Form 10-K and Form 10-Q filings.

This is consistent with the Commission's own interpretation of the statute when analyzing its application to similar products offered by another national securities exchange. Consider the Commission's approval of proposals by Cboe to list and trade: (1) credit default options;³² and (2) credit default basket options.³³ As the Commission explained in its order approving credit default options for trading on Cboe, "credit default options . . . are binary options that are automatically exercised upon the occurrence of specified credit events or expire worthless."³⁴ While such products were therefore different in certain important respects from existing options contracts, "[a]fter careful analysis, the Commission [found] that credit default options are options based on the value of a security or securities"³⁵ and also "options on an interest in, or based on the value of an interest in, a security or securities." The Commission made a similar finding when it later approved Cboe's proposal to introduce credit default basket options.

All of this would also be true of the proposed binary KPI options. Similar to Cboe's credit default options and credit default basket options, the proposed binary KPI options are "binary options that are automatically exercised upon the occurrence of specified . . . events or expire worthless."³⁶ The Commission has repeatedly found that contracts with a binary payout structure may nevertheless be properly classified as options contracts under the Act and, while most options contracts have historically had a variable payment structure, such a structure is not required by the Act, which does not specify a particular payment structure. In addition, while in some cases binary options offered by other securities

²⁵ 15 U.S.C. 78f(b).

²⁶ 15 U.S.C. 78f(b)(5).

²⁷ 15 U.S.C. 78f(b)(5).

²⁸ See Securities Exchange Act Release No. 105877 (July 10, 2026) (SR-CBOE-2026-061) ("Notice of Filing of a Proposed Rule Change to Amend its Rules to Permit the Listing of Binary Options Overlaying Key Performance Indicators ("KPIs") Reported by Certain Issuers of Stock ("Binary KPI Options").

²⁹ The Exchange also believes that binary KPI options are also "securities" under the Securities Act of 1933, as amended (the "Securities Act"). See 15 U.S.C. 77b(a)(1).

³⁰ 15 U.S.C. 78c(a)(10).

³¹ *Id.*

³² See Securities Exchange Act Release No. 55871 (June 6, 2007), 72 FR 32372 (June 12, 2007) (SR-CBOE-2006-84).

³³ See Securities Exchange Act Release No. 56275 (August 17, 2007), 72 FR 47097 (August 22, 2007) (SR-CBOE-2007-26).

³⁴ See *supra* note 34.

³⁵ *Id.*

³⁶ *Id.*

exchanges have referenced the price of some underlying security or index, such binary options also encompass contracts like the ones discussed above.

The Commodity Exchange Act's ("CEA") lends further support to the classification of binary KPI options as securities. Specifically, pursuant to Section 3(a)(68) of the Act,³⁷ a "security-based swap"³⁸ is a "swap"³⁹ as defined in the Commodity Exchange Act that is based on: (1) "an index that is a narrow-based security index, including any interest therein or on the value thereof;"⁴⁰ (2) "a single security or loan, including any interest therein or on the value thereof;"⁴¹ or (3) "the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer."⁴² In turn, the Commodity Exchange Act defines "swap" to include "any agreement, contract, or transaction . . . that is a put, call, cap floor, collar, or similar option of any kind that is for the purchase or sale, or based on the value, of 1 or more . . . securities."⁴³

This is also the case with the binary KPI options identified in the proposal. The KPIs selected are "material to the value" of a particular security, and payouts of binary KPI options are conditioned on those terms. Indeed, the nexus between the proposed KPIs and the value of the underlying security is, if anything, more direct than in the case of CD options. Whereas CD options reference a credit event (a contingency that may or may not affect the market value of the reference security depending on recovery rates and market conditions), binary KPI options reference the issuer's actual reported financial or operating performance and are the metrics investors consider when determining the value of a stock. Unlike an external event that merely holds the potential to trigger potential financial consequence for a security, each of the proposed KPIs (whether measured at the consolidated or segment level) ultimately constitutes a material component of the issuer's financial results that itself forms the basis for investors' measurements of a company's (and its stock's) intrinsic value.

Each binary KPI option proposed herein provides a cash payout based on the disclosed KPI, some of which are directly tied to a pecuniary interest in a security, such as earnings per share and others of which are indirectly tied to the pecuniary interest of a security, such as the issuer's net revenue and income, which determine the issuer's capacity to generate returns for security holders. A stockholder's pecuniary interest in a security is not limited to contractual payment rights (such as declared dividends) but encompasses the right to benefit from the issuer's earnings capacity, as reflected in the market price of the security. Binary KPI options based on earnings metrics therefore reference a core component of the stockholder's pecuniary interest.

Classifying binary KPI options as securities options under the Act is consistent with the Commission's established regulatory framework for binary options, including investor protection objectives, and preserves the integrity of antimanipulation restrictions, insider trading prohibitions, and material nonpublic information controls. More specifically, because these contracts are tied to Commission disclosure rules and regulations and material nonpublic information ("MNPI") risks that are substantially identical to those present in traditional securities trading, aligning binary KPI options with the securities regulatory framework preserves the integrity of insider trading prohibitions and the Commission's disclosure regime. Listing binary KPI options on a registered national securities exchange subjects trading activity to SRO and Commission surveillance for, among other things, manipulative trading and insider trading, affording investors the full protections of the federal securities laws. Further, classifying binary KPI options as security options under the Act allows these contracts to be offered by the same liquidity providers that offer listed options today, all of whom are Commission-registered and regulated broker-dealers who are also subject to FINRA and exchange SRO oversight, and allows such contracts to be traded by the same retail customer base that trade binary options (and KPI-related contracts) today.

For these reasons, the Exchange believes that binary KPI options, as proposed, are appropriately classified as binary options eligible to trade on a registered national securities exchange and as standardized options subject to the disclosure framework established by Rule 9b–1. This classification reflects the economic substance and standardized structure of the product, is

consistent with the Act and the Commission's prior interpretations, and is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster regulatory and clearing coordination, and protect investors and the public interest consistent with Section 6(b)(5) of the Act.⁴⁴

Proposal

The Exchange believes the proposal is consistent with Section 6(b) of the Act, in general, and furthers the objectives of Section 6(b)(5) of the Act,⁴⁵ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Specifically, the Exchange believes the proposed rule change will 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 because it establishes a clear and transparent framework for a new category of listed options (binary KPI options) that are tied to financial and operating metrics of issuers that are publicly disclosed in required Commission reports. Currently, investors wishing to position their investment strategies around earnings announcements must rely primarily on equity options, whose pricing is affected by a wide range of variables beyond the reported financial or operating measure of interest (e.g., implied volatility, delta, time value, and general market movement). Binary KPI options allow investors to take a targeted, defined-risk position directly on a specific financial or operating measure (i.e., a KPI) for a particular reporting period. The Exchange believes this additional investment tool will protect investors and the public interest because it will promote market efficiency, enable more precise price discovery around earnings events, allow investors to hedge against potential idiosyncratic risks, and remove a gap in current national securities exchange-listed products available to market participants.

The Exchange believes the proposed list of issuers and KPIs on which the Exchange may list binary KPI options

³⁷ 15 U.S.C. 78c(a)(68).

³⁸ *Id.*

³⁹ 7 U.S.C. 1a(47).

⁴⁰ 15 U.S.C. 78c(a)(68)(A)(ii)(I).

⁴¹ 15 U.S.C. 78c(a)(68)(A)(ii)(II).

⁴² 15 U.S.C. 78c(a)(68)(A)(ii)(III).

⁴³ 15 U.S.C. 78c(a)(68)(A)(ii)(III).

⁴⁴ 15 U.S.C. 78f(b).

⁴⁵ 15 U.S.C. 78f(b).

will prevent fraudulent and manipulative acts and practices, 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. First, as noted above, the Exchange is proposing to list binary KPI contracts based on specific financial and operating metrics reported by the following issuers in their earnings-related disclosures submitted to the Commission: Apple, Inc.; Advanced Micro Devices, Inc.; Alphabet Inc.; Amazon.com, Inc.; Bank of America Corporation; Citigroup Inc.; Coinbase Global, Inc.; Ford Motor Company; Intel Corporation; JPMorgan Chase & Co.; Marathon Digital Holdings, Inc.; Meta Platforms, Inc.; Microsoft Corporation; Netflix, Inc.; NVIDIA Corporation; Palantir Technologies Inc.; SoFi Technologies, Inc.; Space Exploration Technologies Corp.; Super Micro Computer, Inc.; Target Corporation; Tesla, Inc.; and The Walt Disney Company. The Exchange believes offering investors an additional investment tool on a national securities exchange related to some of the most actively traded stocks and options will perfect the mechanism of a free and open market and benefit investors by allowing them to further refine their investment strategies, including using these options to hedge idiosyncratic, even-specific risk embedded in the specific KPIs (as further discussed below), for these actively traded companies.

The Exchange believes the proposed universe of issuers will prevent fraudulent and manipulative acts and practices, because the proposed issuers are large, well-capitalized, and widely followed issuers with highly liquid underlying securities and options markets. During May 2026, each of the issuers exceeded \$3 billion in market capitalization and ranked among the top 200 U.S. companies by average daily options or stock volume, with the exception of Space Exploration Technologies Corp (commonly referred to as SpaceX), which had not been trading for a full calendar month but which the Exchange believes will satisfy these measures with its first month of trading results based on its volumes since it began trading.⁴⁶

Securities with high market capitalizations and liquid markets are generally less susceptible to manipulation because of the substantial

capital required to artificially influence prices of those securities. The depth and breadth of trading activity for securities with significant market capitalizations, such as the stocks of the proposed issuers, make it unlikely that a single market participant would be able to exert undue influence on the price of such a stock, as large volumes of buyers and sellers are what ultimately continuously reflect the true market value of the stock. The Exchange believes the KPIs of issuers with high market capitalizations proposed to underlie binary KPI options are similarly less susceptible to manipulation because any attempt to distort a financial metric of such an issuer would require an enormous and economically impractical deployment of capital, which would likely exceed the fixed payout of a binary KPI option. Therefore, like stocks of large-cap issuers, KPIs of large-cap issuers are less susceptible to manipulation due to the structural barriers that would make manipulating KPI values operationally difficult and financially irrational (in addition to the rigorous financial oversight to which these issuers are subject, as further discussed below).

In addition to the proposed issuers being highly capitalized and having actively traded stocks and options on such stocks, the Exchange also believes the proposed limited universe of issuers for binary KPI options to those proposed will prevent fraudulent and manipulative acts and practices because each issuer is subject to periodic reporting requirements under the Act. Therefore, each of the proposed issuers must file annual reports on Form 10-K, quarterly reports on Form 10-Q, and current reports on Form 8-K with the Commission, which as discussed above disclose information the issuer believes is necessary for an investor to understand its financial condition, changes in financial condition and results of operations, which can include KPIs. Further, each issuer maintains audited financial statements prepared in accordance with U.S. Generally Accepted Accounting Principles ("GAAP") and is subject to executive certification requirements under the Sarbanes-Oxley Act. As a result, the settlement-determining KPI values for each eligible issuer are produced within the Commission's supervisory jurisdiction, are publicly verifiable from a Commission-regulated source and are subject to relevant anti-fraud provisions under the Act, which the Exchange believes will reduce the potential for manipulation of the underlying KPIs as well as the applicable issuer's stock.

Further, the Exchange believes the proposed limited universe of issuers will introduce binary KPI options in a well-developed, well-understood, and transparent Commission-regulated market environment. Each issuer is among the most widely followed, actively traded, and extensively analyzed issuers in its respective sector, with deep and liquid equity and derivatives markets and a broad institutional and retail investor base. The depth of existing market activity surrounding these issuers supports fair and orderly pricing by ensuring that binary KPI options are listed in markets where price discovery is well-established, liquidity is readily available, and participants have broad access to the information necessary to form and express informed views on KPI outcomes. The Exchange believes the continuous public scrutiny to which these issuers are subject substantially reduces the likelihood that any market participant could obtain or maintain an informational advantage sufficient to manipulate the settlement value of the binary KPI options.

The Exchange believes the proposed KPI metrics will similarly prevent fraudulent and manipulative acts and practices, 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's proposal limits eligible KPIs to GAAP and non-GAAP measures and other statistics related to an issuer's financial condition and operational results, all of which the proposed issuers disclose in their earnings-related filings (*i.e.*, Forms 8-K, 10-Q, and 10-K) submitted to the Commission. As such, the settlement values of the proposed binary KPI options are derived exclusively from information that issuers deem as material information required to be disclosed in reports submitted to the Commission. These metrics are routinely referenced and tracked in the investment community and are figures that the market recognizes as a meaningful and central indicator of issuer performance. The Exchange believes that the inclusion of well-established metrics as eligible KPIs expands the value of binary KPI options for investors without compromising the integrity of trading processes, including the settlement process.

The proposed KPI metrics are among the most widely followed and extensively analyzed measures for the proposed issuers. Specifically, the Exchange proposes to be able to list a binary KPI option on earnings per share (prepared in accordance with GAAP) for

⁴⁶ The ADV of SpaceX stock between June 12 and June 22, 2026 was approximately 290,009,963 shares. The market capitalization of SpaceX as of June 22, 2026 was \$2.145 trillion.

each proposed issuer. This metric is among the most widely followed and extensively analyzed figures in public company financial disclosure and is disclosed in each issuer's periodic Commission filings. Similarly, the Exchange proposes to list binary KPI options on revenue, prepared in accordance with the applicable GAAP, for each issuer. As is the case for earnings per share, revenue is a widely followed financial metric for publicly reporting companies and is the subject of extensive analyst coverage.

The Exchange proposes KPIs representing revenues broken out by applicable reportable segment, business unit, or product category, including cloud and artificial intelligence infrastructure revenues, streaming and geographic subscription revenues, automotive segment revenues, financial services segment revenues, consumer product category revenues, and digital asset exchange transaction and subscription revenues, among others, for several of the proposed issuers. Each such metric is a GAAP-defined figure required to be disclosed in the issuer's periodic Commission filings. The Exchange understands these metrics enable market participants to express views on specific high-profile business lines that are extensively covered by analysts and subject to a high volume of publicly available forecasts.

The Exchange proposes KPIs for the proposed financial institution issuers that are specific to financial institution income statement presentation, including net interest income, provision for credit losses, and net income. Each such metric reflects the distinct GAAP reporting framework applicable to banking institutions and is subject to the same periodic disclosures as other proposed KPIs.

The proposed rule change also includes operating margin, gross margin, or cash flow from operations KPIs for several issuers, each of which is computed directly from GAAP financial statement line items disclosed in the issuer's periodic Commission filings. These metrics provide market participants with insight into issuer profitability and capital generation and complement other revenue and earnings figures when market participants are evaluating the value of an issuer and its stock.

The Exchange also proposes several non-financial operational KPIs that issuers disclosed in their periodic Commission filings, including relevant production volumes, network and infrastructure counts, user engagement metrics, deal counts, digital asset trading volume, and digital asset mining

and holdings metrics. Each designated non-financial operational metric is closely tied to the core economic activity of the respective issuer's business and is a figure that the issuer has affirmatively chosen to disclose to the public as a key indicator of business performance. Issuers typically designate and disclose such metrics precisely because they are understood by the market to be among the most meaningful measures of their business activities. As discussed above, this is consistent with Commission guidance that an issuer should include KPIs in these reports that the issuer believes an investor needs to gain understanding of its financial condition, changes in financial condition and results of operations, as such KPIs present the "pulse" of the issuer's business. The market significance of these metrics is further reflected in the extensive analyst coverage and investor attention, particularly near each reporting date. Each metric is subject to executive certification as part of the periodic report in which it appears and is widely tracked by financial data services and equity research analysts.

Overall, the Exchange believes that the proposed well-established, publicly reported metrics as eligible KPIs will expand the value of binary KPI options for investors without compromising the integrity of trading processes, including the settlement process. As a result, the Exchange believes the proposed KPIs will protect investors and the public interest as it will permit the Exchange to offer investors additional investment and hedging tools on the Exchange that investors can incorporate into their investment strategies regarding the proposed issuers.

The Exchange believes the proposed contract terms for binary KPI options will promote just and equitable principles of trade, remove impediments to and perfect a free and open market and national market system, and protect investors. As discussed above, the Exchange believes the proposed contract terms for binary KPI options are standardized option terms. Like standard option contracts and binary index option contracts currently listed for trading on the Exchange, each proposed binary KPI option will be a call or a put, will have an underlying, exercise price, an expiration date, a settlement type, a settlement style, and a multiplier. As is the case for binary index options, each proposed binary KPI option will have an exercise settlement amount paid depending on how the settlement value of the underlying compares to the exercise price.

The proposed binary KPI options will function in a substantially similar manner to binary index options, with the proposed contract terms substantially similar to the contract terms of binary index options. The proposed definitions of binary KPI option, call binary KPI option, exercise price, and put binary KPI option are the same as those terms for binary index options (as previously approved by the Commission), differing only in reference to the underlying (KPI v. index).

The proposed definition of settlement value for binary KPI options is generally similar to the definition for binary index options (as previously approved by the Commission), with certain differences necessary to be addressed due to the different nature of a KPI as the underlying. The Exchange believes the proposed \$1 exercise settlement amount is reasonable given the retail nature of the proposed binary KPI options and merely adds specificity to the Rules for binary KPI options. The Exchange notes binary KPI options differ from standardized index options (which are also cash-settled) in that the exercise settlement amount is \$1.00 rather than the cash difference amount between the settlement value of the index and the strike price of an option. Since the \$1.00 exercise settlement amount will be paid out to the option holder if the criteria of the binary KPI option have been met, binary KPI options utilize a fixed exercise settlement amount.

The Exchange proposes new Rule 901KPI to list the specific binary KPI contracts with the KPI criteria for each option contract. Such KPI criteria are established as the set KPI events that will be used to determine an option contract should be exercised by comparing the strike price of the binary KPI option to the KPI value. The Exchange believes these proposed contracts (including the issuers and KPIs) are consistent with the Act for the reasons set forth above.

The Exchange believes the proposed expirations for binary KPI options will remove impediments to and perfect the mechanism of a free and open market and a national market system because they will align with the reporting periods for which the proposed issuers disclose earnings results and submit corresponding reports to the Commission. These expirations will, therefore, permit investors to incorporate binary KPI options into their investment strategies that correspond to issuers' earnings results. Further, as discussed above, the Exchange believes aligning expirations with Commission-regulated sources will reduce the potential for manipulation of

the underlying KPIs, which will ultimately protect investors and the public interest.

The proposed rule establishes a strike regime for binary KPI options similar to that for traditional options and binary index options. As is the case for traditional options and binary index options, the proposed rule change establishes permissible strike intervals, the amounts of which increase as the value of the strike increases. Additionally, the Exchange proposes to list initial and additional series pursuant to a similar framework as traditional equity options. The differences in the proposed strike regime compared to that of standard equity and index options are necessary and appropriate to reflect the static nature of KPIs (unlike underlying equities and indexes, the values of which change throughout the trading day) and the timing of their disclosure. As noted above, the Exchange intends to list binary KPI options aligned with the cadence of the KPI announcements as their expiration cycle (generally quarterly). The Exchange intends to list for trading binary KPI options with expirations for the then-current reporting period (e.g., third quarter) as well as the following period (e.g., fourth quarter) prior to the expiration of the binary KPI options for the then-current reporting period.

As the Exchange does for standard options, as well as binary index options, the Exchange lists strikes (subject to its Rules) based on relevant market information—including the then-current value of the underlying—and customer demand. As described above, the Exchange intends to do the same for binary KPI options by listing strikes relative to the then current value of the underlying KPI. The Exchange believes it is consistent with just and equitable principles of trade to permit the Exchange to list strikes for a new expiration based on the most recently disclosed KPI value, which may not be for the immediately preceding reporting period, and then add strikes based on the disclosed KPI for the immediately preceding reporting period (which would be the settlement value for binary KPI options that expire in the prior reporting period). This will enable the Exchange to respond to changes in market conditions in the same manner it is able to do today to respond to changes in values of (and market conditions related to) other underlyings. The Exchange believes this flexibility is appropriate for binary KPI options because the value of a KPI changes only when an issuer discloses that KPI, which generally happens every three

months, unlike other underlyings that change every trading day. While this proposed strike listing regime differs from that of other options, the concept is the same, which is to permit the Exchange to list strikes reflective of the then-current value of the underlying. It is possible the changed value of an underlying KPI may be more sudden and pronounced than changes in the value of an underlying equity or index (which are susceptible to sudden value changes); however, like the listing rules for equity and index options, the proposed rules permit the Exchange to list strikes to reflect potentially significant changes in the value of the underlying.

The Exchange believes the proposed scaling of strike prices is reasonable and will protect investors, as it will permit the Exchange to list strike values in amounts similar to current strike values for other options. As noted above, values of certain KPIs may be large (e.g., in the billions). The proposed scaling will permit the Exchange, for example, to list a strike of 27 rather than 27,000,000,000, which the Exchange believes will be simpler for investors to understand (as it will be made clear that 27 will reflect billions in this example) and consistent with current strike levels. The proposed scaling also permits the strike prices for binary KPI options to fit within current system capabilities regarding strike price values. The Exchange believes scaling rather than modifying its systems (and potentially causing investors to modify their systems) will benefit investors by allowing them to trade binary KPI options in the same manner as they trade other options today.

The Exchange believes the proposed strike intervals promote just and equitable principles of trade because it will permit the Exchange to list commercially meaningful strikes that will permit investors to tailor their trading strategies with precision. The Exchange acknowledges the proposed strike intervals are smaller than those in current Rules for other types of options. However, the Exchange believes the precision is appropriate and necessary given the nature of KPIs and the proposed options. The purpose of binary KPI options is to permit investors to take discrete and precise positions on KPIs. Therefore, the Exchange needs the ability to list strikes with the precision necessary to permit investors to take these positions. For example, earnings per share is generally a relatively small number (under \$10). While strike intervals for other options are limited to \$0.50 intervals, that would not be meaningful in the context of binary KPI

options when investors are looking to take positions for a specific KPI, which will be measured in penny intervals. Therefore, the Exchange believes smaller strike intervals will benefit investors because they will allow the Exchange to list binary KPI options that will enable investors to use these options in the precise nature for which they are intended and provide sufficient flexibility for the Exchange to list series to respond to changes in market conditions and customer demand, while other rules will place bounds around the strikes the Exchange may list.

Further, as discussed above, the proposed strike intervals are consistent with current rules for other options, which provide for larger strike intervals as the value of strike prices increases. Given the scaling factor for larger KPI values, while it may appear the proposed rule change will permit smaller strike intervals for larger KPI values, that may be true on a nominal basis but is not the case if the actual value of the strike intervals is considered. The corresponding actual value of the strike interval for a strike price that was subject to a larger scale value is higher than the actual value of the strike interval for a strike price that was subject to a smaller scale value. As a result, the permissible strike intervals for strike prices representing higher KPI values are actually larger than the permissible strike intervals for strike prices representing lower KPI values. This is consistent with general premise underlying current strike intervals that larger strike intervals apply to larger strike values and, therefore, the Exchange believes the proposed rule change will promote just and equitable principles of trade.

The Exchange believes this proposed rule change clearly describes the proposed terms of binary KPI options, such as with respect to expirations (including the Exchange's announcement of the specific expiration date after binary KPI options series for that expiration are listed) and exercise prices (including the scaling factor, negative values, and potential changes to that scaling factor for a binary KPI option class) for all investors. As discussed above, these terms and changes to such terms will be described in Exchange notices, technical specifications (including binary KPI option reference data files), and contract specifications (all of which are posted on the Exchange's public website and thus available to all investors). Exchange ATP Holders and retail brokerage firms are highly sophisticated investors that intake information regarding other Exchange-listed options

(including changes) in the same manner that the Exchange plans to release this information for binary KPI options. Therefore, the Exchange expects retail customers to have access to all relevant information regarding the terms of binary KPI options they choose to trade, including changes to expiration dates and exercise price values as announced by the Exchange.

The proposed rule change specifies a multiplier of one for binary KPI options rather than require the Exchange to designate a multiplier of at least one as the rules for binary index options do. This proposed multiplier is consistent with the definition of contract multiplier for binary index options (as that requires a multiplier of at least one) and merely adds specificity to the Rules.

The Exchange believes proposed Rule 905KPI, which establishes Regular Trading Hours for binary KPI options is consistent with the Act, protects investors, and prevents fraudulent and manipulative practices. The Exchange believes the proposed structure ensures that trading in binary KPI options ceases before the earnings announcement that determines settlement. The distinction between A.M.- and P.M.-settled contracts mirrors the settlement terms already applicable to binary index options, as well as other Exchange products.

The Exchange believes proposed Rule 905KPI(e), which provides that for binary KPI options, the System initiates the opening rotation at 9:30 a.m., removes impediments to a free and open market by applying the same proven opening process to binary KPI options that governs other listed options classes on the Exchange. Additionally, unlike equity options, for which the underlying opens for trading and can trigger the opening rotation, KPIs do not trade, so triggering the opening rotation based on a set time is reasonable for binary KPI options.

The Exchange believes excluding binary KPI options from the obvious error provisions in Rule 975NY is consistent with the Act and promotes just and equitable principles of trade because the standard obvious error framework, which evaluates whether an execution price deviates from a "theoretical value" by a prescribed amount, is incompatible with the structure of binary KPI options. Binary KPI options have no continuously observable theoretical value (unlike equity and index options) prior to the date of the earnings-related disclosure. Rather, their exercise settlement amount is fixed at either a pre-specified dollar amount or zero, depending entirely on whether the reported KPI satisfies the

exercise condition, which itself is based on a single, publicly verifiable metric, disclosed in Commission filings. Applying an obvious error framework premised on theoretical value calculations to a product with a binary, fixed payout would be technically inapplicable and could produce unjust or arbitrary results. Moreover, because settlement of binary KPI options is determined by issuer-reported metrics disclosed through Commission filings (*i.e.*, figures produced pursuant to established accounting standards, subject to independent audit, and certified under the Sarbanes-Oxley Act), the settlement process is itself governed by a comprehensive external regulatory framework. The Exchange believes that establishing any alternative dispute mechanism in this context would be not only unnecessary, but potentially disruptive to market integrity, as it may introduce an element of post-hoc discretion into a settlement process that is expressly designed to be objective, verifiable, and rule-bound.

The Exchange believes the proposed amendments related to position limits for binary KPI options are consistent with the Act because they establish a rational position limit framework for binary KPI options that protects against manipulation while facilitating legitimate trading activity in a novel product. The Exchange believes that setting the position limit for binary KPI options as the same as the applicable position limit for the stock of the issuer, with 100 binary KPI option contracts equaling one standard option contract, is appropriate. As proposed, binary KPI options with a multiplier of one will count toward applicable limits on a proportional basis relative to standard equity options on the issuer's stock, which carry a multiplier of 100.

The Exchange further believes the proposal is reasonable given the nature of binary KPI options and their relationship to the underlying issuer. Because binary KPI options have a fixed maximum notional value and settle on an all-or-nothing basis based on a KPI of the issuer rather than the price of the issuer's stock as with a standard equity option, the Exchange believes the proposed position limits appropriately reflects the distinct structure of these contracts and limits the potential for any single market participant to exert undue influence over binary KPI option settlement. With respect to binary KPI options, the economic risk of a position is binary, in that the contract either settles in-the-money at \$1.00 or out-of-the-money at \$0.00. Additionally, with respect to binary KPI options, the maximum notional exposure per

contract is fixed in advance; it cannot exceed \$1.00 multiplied by the contract multiplier. Moreover, unlike stock prices or index values, binary KPI option positions would not influence a company's financial or operational outcomes; the number of option contracts outstanding or trading volume, for instance, has no effect on revenue or operational metrics.

Further, the Exchange's proposal to provide that positions in binary KPI options on the same KPI with different expiration dates and positions in binary KPI options for the same issuer with different underlying KPIs are not aggregated reflects the distinct structure of binary KPI options. Each binary KPI option expiration corresponds to a separate event tied to a specific issuer reporting period. Thus, the Exchange believes aggregating positions across different expiration dates would not accurately reflect the risk profile of these positions and would impose an unnecessary burden on market participants seeking exposure to company KPI events across different reporting periods. In determining that position limits should not be aggregated across all binary KPI options referencing a single issuer, the Exchange analyzed the degree to which KPIs of a given issuer are correlated with one another.

Similarly, the Exchange believes it is reasonable to provide that binary KPI options are not aggregated with non-binary options contracts overlying the stock of the issuer. Because binary KPI options and equity options overlying the same issuer have different risk profile (*i.e.*, binary KPI options settle based on a KPI of the issuer rather than its stock price), the Exchange believes it would be inappropriate and misleading to require aggregation of these positions for purposes of position limits. As noted above, binary KPI options are based solely on whether a single, specified-issuer KPI meets a discrete threshold at a defined future date, and their value reflects the market's probability assessment of that singular outcome. Standard equity options, on the other hand, reflect a broad array of factors bearing on the price of the underlying security, including macroeconomic conditions and sector dynamics, of which any individual KPI is only one component. Because the two products are not priced off of a common reference and do not represent economically equivalent or fungible exposures, aggregating positions across them would not meaningfully advance the prevention of manipulative practices with respect to the underlying security.

The Exchange further notes that this proposed non-aggregation framework is

not unprecedented. Rule 904ByRDs provides that positions in binary return derivatives shall not be aggregated with options contracts on the same or similar underlying security. The Exchange believes that there was no need to aggregate positions across the two product types to prevent manipulative practices involving the underlying.

Finally, the Exchange believes the amendments to the hedge exemption provision in proposed Rule 906KPI(d) is consistent with the Act because it facilitates legitimate hedging activity in binary KPI options. Because a market participant simultaneously holding a short put and short call position in binary KPI options has taken opposing sides of the potential binary outcome (*i.e.*, the short call is at risk if the KPI is met and the short put is at risk if the KPI is not met), the Exchange believes such a position represents a defined, bounded risk profile that does not present the same potential for manipulation or market disruption that position limits are designed to prevent. The Exchange therefore believes the hedge exemption as proposed will encourage market-making activity and liquidity provision in binary KPI options while protecting investors and the public.

The Exchange also believes the proposed adoption of Rule 907KPI consistent with the Act. By establishing tailored reporting requirements for binary KPI options, the Exchange will be able to monitor ATP Holder positions effectively and detect any accumulation of positions that may approach or exceed applicable limits, to the benefit of investors. The Exchange believes it is consistent with just and equitable principles of trade for 100 binary KPI option contracts to equal one standard option contract for purposes of determining whether the report in proposed Rule 907KPI is required given the size of binary KPI contracts. As discussed above, proposed binary KPI options have a multiplier of one, while standard option contracts have a multiplier of 100. Therefore, the notional value of a binary KPI option is significantly less than the notional value of standard option contracts. For example, 200 contracts with a value of \$1.00 with a multiplier of 100 would equate to \$20,000 notional value, while 200 binary KPI option contracts with a value of \$1.00 (which is the fixed maximum value of a binary KPI option contract) with a multiplier of one would equate to \$200 notional value. Counting 100 binary KPI contracts as one standard option contract for purposes of this report effectively calibrates the reporting requirement so that investors

are required to submit the report for an economically equivalent number of contracts, which promotes just and equitable principles of trade.

The Exchange believes the proposal will provide the Exchange and regulators with visibility into large position concentrations in binary KPI options, preserving the ability to identify unusual activity and respond to any unforeseen concerns, while calibrating the threshold to a metric that is meaningful for this contract given its smaller multiplier relative to that of standard equity options. The Exchange believes this reporting framework, coupled with the position limits amendments, provides a fully adequate regulatory framework for these instruments.

Further, as noted above, the Exchange believes it has an adequate surveillance program in place to detect potentially manipulative trading in binary KPI options. The Exchange notes that manipulation of the reported KPI would constitute securities fraud and expose the issuer to liability under federal securities law, separate and apart from any exchange-related violation.

The Exchange believes the proposed binary KPI options will serve as a vehicle to hedge idiosyncratic, event-specific risk embedded in the specific KPIs. Standard equity options are calibrated to the price of the underlying security and capture a full spectrum of factors or risks which may affect issue value, such as macroeconomic conditions or sector dynamics. Because equity option pricing incorporates this full spectrum, a participant seeking to hedge exposure to a single, discrete KPI outcome cannot do so precisely using standard equity options. Because settlement of a binary KPI option is determined solely by whether a specified-issuer KPI meets a defined threshold, the contract effectively isolates certain individual risks an investor may seek to manage. For example, consider an investor holding a long-term position in a particular issuer stock, who believes the issuer's quarterly revenue will fall short of expectations (for reasons unrelated to the issuer's long-term prospects). The investor may utilize the binary KPI option to hedge precisely against the near-term risk without disruption to the underlying equity position. This targeted hedging utility represents a distinct and additive function relative to existing listed products, which the Exchange believes will serve the interests of investors and provide an efficient mechanism for managing event-specific, KPI-driven risk.

The Exchange believes the proposed rule change will facilitate transactions in securities, 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, because it will provide investors with a securities exchange-listed investment choice for these instruments, offering price transparency and the regulatory protections of a national securities exchange. The Exchange believes the proposed rule change will permit investors to manage their risk exposures and carry out their investment objectives on a securities exchange with more flexibility and broader applicability. The Exchange also believes the proposed rule change will promote competition, as it will meet demands of investors that currently may trade products structured in substantively the same manner as the proposed binary KPI options in other markets (as further discussed below). Binary KPI options would provide investors with a straightforward means of expressing a directional view on key financial and operating metrics. The Exchange further believes the proposed rule change is consistent with the protection of investors and the public interest, as binary KPI options would be subject to the Exchange's existing rules governing the listing and trading of options. The Exchange believes expanding the universe of binary options will benefit investors, particularly retail investors and other investors who prefer simplicity, as a complementary offering to current exchange-traded options.

The proposed rule change will permit the Exchange to list binary KPI options on a national securities exchange as alternatives to products that are structured in substantially the same manner as binary options currently available in the OTC market and on other platforms. The Exchange understands investors have traded binary options similar to the proposed binary options in OTC markets for many years but may prefer to trade such options in a listed environment to receive the benefits of trading listing options. These benefits include: (1) enhanced efficiency in initiating and closing out positions; (2) increased market transparency; and (3) heightened contra-party creditworthiness. The Exchange believes the proposed rule change may encourage liquidity to shift from the OTC market onto the Exchange, which the Exchange believes would increase market transparency as well as enhance the process of price

discovery conducted on the Exchange through increased order flow. The proposed rule change is intended to provide a market for binary KPI options as a standardized product without the credit risk of an individual issuer. By providing a listed and standardized market for more classes of binary options, the Exchange seeks to attract investors who desire the simplicity of a binary option with the certainty and safeguards of a regulated and standardized marketplace. Additionally, unlike an OTC binary option, counterparty credit risk for Exchange-listed binary KPI options is significantly reduced through the issuance and guarantee of the contracts by a registered clearing agency. Further, as an exchange-traded option, binary options will have the advantage of liquidity provided by Market-Makers, which the Exchange believes may lead to tighter spreads than those in the OTC market. The Exchange also believes that standardization will enable more interested parties to become market participants.

In addition to the OTC market, various market platforms that are not registered as national securities exchanges currently offer products structured in substantively the same manner as binary options that the Exchange may list pursuant to current Rules and as proposed. These platforms offer binary option products overlying securities indexes, which may be settled at varying points of the day (not just at the open and close of the trading day). However, as these venues are not national securities exchanges, they do not offer investors the benefits of centralized liquidity, market transparency, or securities regulations intended to protect investors. The Exchange believes listing competitive products on a national securities exchange would create a centralized and standardized marketplace for these products, which promotes price discovery and transparency, within an established regulatory framework designed to afford investors in securities with important protections. In other words, the Exchange believes its proposal offers a more transparent platform than the OTC market or other market platforms offer. It would contribute to leveling the playing field with these alternative markets and provide investors with safeguards associated with Commission and SRO oversight of the trading activity in these exchange-listed binary KPI options.

Ultimately, the Exchange believes the proposed rule change will provide investors with greater trading tools and opportunities and flexibility, resulting

in investors having additional means to carry out their investment objectives and manage their risk exposures through products listed and traded on a national securities exchange. The Exchange believes the proposed rule change will offer market participants a simplified, transparent, and limited risk investment choice overlying securities and securities indexes, which may be more aligned with their specific timing needs and investment and hedging strategies and risk tolerances. The Exchange believes it benefits the investing public to continue to enhance its listed product offerings to respond to continuously changing needs of investors and to a continuously changing competitive environment.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act, because binary KPI options will be available to all market participants who wish to trade such options on the same terms and in the same manner (including with respect to the payout terms and amount). All market participants will be subject to the same rules applicable to binary KPI options, as described in this proposed rule change. Except as set forth in the proposed rule change, binary KPI options will trade in the same manner as other options, including binary index options, on the Exchange.

The Exchange does not believe 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 options exchanges may propose similar products. Additionally, as noted above, substantively similar products to binary KPI options, as proposed, are available in the OTC market and various other markets.

The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues who offer similar products. The Exchange believes the proposed rule change will provide investors with a comparable alternative to the OTC market and other venues. The Exchange believes it may be a more attractive alternative to the OTC market and these other venues, as market participants will benefit from

being able to trade these options in an exchange environment, which provides, among other things: (1) enhanced efficiency in initiating and closing out positions; (2) increased market transparency; and (3) heightened counterparty creditworthiness. As a result, the Exchange believes that the proposed rule change may relieve any burden on, or otherwise promote, competition, as it will allow the Exchange to offer a securities exchange-listed alternative to the products currently available in these other markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

- A. by order approve or disapprove such proposed rule change, or
- B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NYSEAMER-2026-82 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-2026-82. 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 (<https://www.sec.gov/rules/sro.shtml>). Copies of the filing will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NYSEAMER-2026-82 and should be submitted on or before October 9, 2026.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁷

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2026-19132 Filed 9-17-26; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-106386; File No. SR-GEMX-2026-32]

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Options 2, Section 3, Appointment of Market Makers

September 15, 2026.

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 September 2, 2026, Nasdaq GEMX, LLC ("GEMX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Options 2, Section 3, Appointment of Market Makers.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/>

rulebook/gemx/rulefilings, and at the principal office of the Exchange.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Options 2, Section 3, Appointment of Market Makers, at paragraph (b) to change the current requirement that a Primary Market Maker ("PMM")³ shall be appointed to each options class traded on the Exchange. The Exchange proposes instead to state that a PMM may be appointed to each options class traded on the Exchange. The proposed amendment would replace a mandatory requirement to appoint a PMM to every options class with a permissive standard, affording the Exchange the flexibility to determine, based on prevailing market conditions and the availability of qualified applicants, whether a PMM appointment is appropriate for a particular options class.

Today, there are a number of Competitive Market Makers ("CMMs")⁴ on GEMX that would continue to provide liquidity in the absence of a PMM appointment under this proposal. CMMs are subject to continuous quoting and other market making obligations set forth in Options 2, Section 4 (Obligations of Market Makers), and are required to provide two-sided quotations in 60% of the series in each of the option classes to which they are appointed pursuant to the quoting requirements of Options 2, Section 5 (Market Maker Quotations). CMMs are also not capped in number and may

actively quote in a broad range of option classes.

The proposed amendment aligns GEMX's rule with Nasdaq Phlx LLC ("Phlx") Options 2, Section 12(a)⁵ which expressly permits, but does not require, Phlx to designate a Lead Market Maker for a particular options series. In addition, until July 2026, The Nasdaq Options Market LLC ("NOM") did not adopt rules for a class of market maker similar to a PMM. NOM operated its markets for nearly twenty years without such a category of market maker. The Exchange believes that the current mandatory standard is not necessary to protect investors or to ensure a fair and orderly market on GEMX. Options classes traded on the Exchange vary widely in their liquidity profiles, order flow, and level of market maker interest. Circumstances may arise in which no eligible Member seeks or is well-suited for a PMM appointment in a particular options class, or in which appointing a PMM is not economically viable for any prospective applicant. The Exchange will monitor instances in which a PMM is not fulfilling its obligations or is not in good standing and will seek to replace it with another qualified PMM. In those cases, the mandatory standard in the current rule provides no operable path forward. A permissive standard would enable the Exchange to determine, on a class-by-class basis, whether a PMM appointment serves the interests of the market and the investing public.

The proposed change is not intended to, and would not, alter the substantive obligations or privileges of a PMM once appointed. A PMM appointed to an options class would remain subject to the full set of obligations set forth in GEMX Options 2, Sections 3, 4, and 5, including the Valid Width Quote requirement during the Options Opening Process in Options 3, Section 8, and the 90% two-sided quoting obligation on an intra-day basis. The Exchange further notes that CMMs are available to provide liquidity in options classes traded on the Exchange, and the appointment of a PMM is not a prerequisite for maintaining a fair and orderly market in any given class. In options classes for which no PMM is appointed, quoting and liquidity provision would proceed pursuant to the CMM framework in Options 2, Sections 4 (Obligations of Market Makers) and 5 (Market Maker Quotations).

³ The term "Primary Market Maker" means a Member that is approved to exercise trading privileges associated with PMM Rights. See Options 1, Section 1(b)(35).

⁴ The term "Competitive Market Maker" means a Member that is approved to exercise trading privileges associated with CMM Rights. See Options 1, Section 1(b)(12).

⁵ Phlx Options 2, Section 12(a) provides that a Lead Market Maker is not required to be assigned to an options series. A Lead Market Maker on Phlx is analogous to a Primary Market Maker on GEMX.

⁴⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁶ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁷ in particular, 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.

The proposed amendment to Options 2, Section 3(b) protects investors and the public interest and promotes just and equitable principles of trade because CMMs will continue to provide liquidity on the Exchange. There are a number of CMMs on GEMX that would continue to provide liquidity in the absence of a PMM appointment under this proposal. CMMs are subject to continuous quoting and other market making obligations set forth in Options 2, Section 4 (Obligations of Market Makers), and are required to provide two-sided quotations in 60% of the series in each of the option classes to which they are appointed pursuant to the quoting requirements of Options 2, Section 5 (Market Maker Quotations). CMMs are also not capped in number and may actively quote in a broad range of option classes. Further, the amendment affords the Exchange the flexibility to determine whether the appointment of a PMM is appropriate in a given options class, rather than requiring the Exchange to appoint a PMM in every class irrespective of market conditions or applicant availability.⁸

The proposed permissive standard is substantively identical to the framework already in place on Phlx, which provides at Options 2, Section 12(a) that a Lead Market Maker “is not required to be assigned to an options series.” Finally, the proposed change does not reduce or otherwise modify the obligations of a PMM. As a result, the proposal enhances the Exchange’s administrative flexibility with respect to PMM appointments while preserving all of the substantive market-quality protections that flow from a PMM’s obligations. For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change would apply uniformly to all Members that seek or hold PMM appointments on GEMX. Further, the Exchange notes that there is competition among CMMs who are required to provide two-sided quotations in 60% of the series in each of the option classes to which they are appointed pursuant to the quoting requirements of Options 2, Section 5 (Market Maker Quotations).

Members currently appointed as PMMs will retain their appointments and will continue to be subject to the same obligations and eligible for the same entitlements. Members seeking new PMM appointments will continue to be evaluated under the same standards set forth in Options 2, Section 3. The proposal does not favor any Member or class of Members over another, and it does not modify the rights or obligations of CMMs.

The Exchange does not believe 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. The proposed change would harmonize GEMX Options 2, Section 3(b) with the analogous framework on Phlx.⁹ In addition, affording the Exchange greater flexibility to administer its PMM program may allow the Exchange to compete more effectively for order flow with other options markets.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has

become effective pursuant to Section 19(b)(3)(A)(iii) of the Act¹⁰ and subparagraph (f)(6) of Rule 19b–4 thereunder.¹¹

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR–GEMX–2026–32 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–GEMX–2026–32. 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 (<https://www.sec.gov/rules/sro.shtml>). Copies of the filing will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection.

¹⁰ 15 U.S.C. 78s(b)(3)(A)(iii).

¹¹ 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

⁸ The Exchange notes that not every Market Maker is eligible to be a PMM. A Market Maker may not be in good standing or may not have superior technology to handle the demands of additional quoting obligations (90% versus 60%) as described in Options 2, Section 5.

⁹ See Phlx Options 2, Section 12(a).

All submissions should refer to file number SR–GEMX–2026–32 and should be submitted on or before October 9, 2026.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2026–19129 Filed 9–17–26; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–106368; File No. SR–CboeBZX–2026–074]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Introduce a Data Vendor Program

September 15, 2026.

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 September 8, 2026, Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) 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 BZX Exchange, Inc. (the “Exchange” or “BZX”) proposes to introduce a Data Vendor Program, which includes introducing a new defined term of Data Vendor, along with other clarifying changes. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Commission’s website (<https://www.sec.gov/rules/sro.shtml>), the Exchange’s website (https://www.cboe.com/us/equities/regulation/rule_filings/bzx/), and at the principal office of the Exchange.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to (i) introduce a definition of Data Vendor; (ii) codify the existing definition (as defined in the Exchange’s applicable North American Market Data Policies) of Extranet Service Provider; (iii) codify an existing practice that permits an External Distributor of both Cboe One Summary and Cboe One Premium to be liable only for the External Distribution Fee for Cboe One Premium; and (iv) create a program for Data Vendors in order to incentivize Data Vendors to build out the applicable feeds and make them commercially available to subscribers.³ The proposed program will provide fee waivers (as described below) for External Distribution Fees for Data Vendors for the Cboe One Summary Feed, Cboe One Premium Feed, and BZX Summary Depth Feed.

Proposed Definitions

In connection with this proposed program, the Exchange first proposes to adopt a definition for a specific category of participants. Specifically, the Exchange proposes to establish the term “Data Vendor” to mean “an External Distributor that (i) is actively engaged, as part of its primary business objective, in the solicitation of unaffiliated third-party Distributors to redistribute a transformed Market Data Product; (ii) does not maintain a brokerage relationship with Users in connection with the receipt or use of the applicable Market Data Product; and (iii) is not an Extranet Service Provider.” As part of

this new definition, and as further described below, the Exchange proposes to codify the existing definition of Extranet Service Provider within the Cboe Global North American Market Data Policies to be within its Fee Schedule.

The Exchange has also established objective, verifiable criteria for determining eligibility as a Data Vendor. The following criteria, which will be reflected in the Exchange’s Fee Schedule, must be satisfied: (1) the External Distributor must identify itself as a Data Vendor in publicly available marketing materials; (2) the External Distributor must transform the applicable Market Data Product before redistribution, which may include aggregation across multiple data sources, normalization into a consistent format, enrichment with reference data or analytics, or repackaging into a proprietary delivery mechanism (e.g., terminal, API, or proprietary feed); (3) the External Distributor must redistribute the applicable transformed Market Data Product to downstream Distributors as part of a paid commercial offering; (4) the External Distributor must not maintain a brokerage relationship with any User to whom it distributes the applicable Market Data Product; (5) the External Distributor must not be an Extranet Service Provider; and (6) the External Distributor must be actively engaged in the solicitation of unaffiliated third-party Distributors to subscribe to and redistribute the applicable transformed Market Data Product. Upon request, the External Distributor must provide a written attestation certifying compliance with the foregoing criteria. The Exchange may request supporting documentation, including but not limited to Distributor subscriber lists, revenue breakdowns by recipient type, and descriptions of the transformations applied to the Market Data Product. These objective eligibility criteria ensure that the Data Vendor Program is equitably applied to all similarly situated market participants.

External Distributor

To begin, “Data Vendor” is intended to only encompass External Distributors and not Internal Distributors. An External Distributor is defined as a Distributor that receives the Exchange Market Data product and then distributes that data to a third party or one or more Users outside the Distributor’s own entity.⁴ The Exchange seeks to adopt this program in order to encourage broader redistribution of this

¹² 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ The Exchange initially submitted the proposed rule change on July 1, 2026 (SR–CboeBZX–2026–059). On July 15, 2026, the Exchange withdrew that filing and submitted SR–CboeBZX–2026–060. On September 8, 2026, the Exchange withdrew that filing and submitted this filing.

⁴ See BZX Equities Fee Schedule.

data. As such, the Exchange limits this to External Distributors as the intent of this program is to have data distributed outside one's own entity.

Primary Business Is To Redistribute to Distributors

To be eligible as a Data Vendor, an External Distributor must be taking in data for the primary business purpose of selling access to the applicable feed as a service in its own right, not merely redistributing data in incidental support of broader business functions such as trade execution, account management, or brokerage services. The Exchange notes that, as part of its business, a Data Vendor may redistribute a market data product to Users, but the primary purpose must be to redistribute data to Distributors. The Exchange will assess whether an External Distributor's primary business purpose satisfies this criterion based on the External Distributor's publicly available marketing materials. If the Exchange were to modify this requirement to permit a primary business purpose of redistribution to either Distributors or Users, it would unintentionally include firms that may redistribute only to Users and that are not traditionally considered data vendors (e.g., a media outlet or a bank).

Transformed Market Data Product

To be eligible, the Exchange requires that the Data Vendor not simply pass through data in its original form. Transformation may include aggregation across multiple sources, normalization into a consistent format, enrichment with derived analytics, or repackaging into a proprietary delivery mechanism (e.g., terminal, API, feed), or any other value-added processing that distinguishes the output from the original source data.

No Brokerage Relationship With Users

Next, the Exchange proposes that the definition of Data Vendor include a stipulation that a Data Vendor must not maintain a brokerage relationship with Users who receive the market data product. The Exchange already has programs aimed at retail brokers, for example, both the Small Retail Broker Program and the Small Retail Broker Hosted Solutions Program.⁵ This proposed program is intended to encourage Data Vendors specifically to take in the applicable feeds and distribute them. A Data Vendor's service model is different from a retail broker's, as a Data Vendor's business model is built around providing data to firms and

Users alike, whereas a retail broker's business model is focused on connecting Users to markets in order to trade and may include providing market data as part of its offering to its Users. As the Exchange already has programs specifically for retail brokers, the Exchange does not believe it would be appropriate to include retail brokers here. The Exchange notes that if a Data Vendor that is currently receiving a fee waiver under this Program subsequently commences a brokerage relationship with its Users, it will no longer satisfy the definition of Data Vendor and will cease to be eligible for the Program. In such case, the External Distributor would be assessed the standard External Distribution Fee for the applicable feed as of the date it no longer satisfies the definition of Data Vendor.

Not an Extranet Service Provider

As noted above, the Exchange proposes also to define Extranet Service Provider when it introduces the definition of Data Vendor into its Fee Schedule. Today, this term already exists in the Cboe Global Markets North American Data Policies.⁶ The Exchange proposes to codify this definition in its Fee Schedule because the proposed definition of Data Vendor directly references this defined term. Specifically, the Exchange proposes to codify that an Extranet Service Provider is "an entity that has entered into a Cboe Global Markets Global Data Agreement and Transmits an Exchange Market Data Product, via an extranet operated by such entity, to data recipients. 'Transmit' means to direct an Exchange Market Data Product to one or more data recipients without modification of the content, format, or other characteristics of the Exchange Market Data Product." An Extranet Service Provider is not authorized to use or process an Exchange Market Data Product for any purpose.

Applicable Data Feeds

By way of background, the Exchange offers the Cboe One Premium Data Feed, which is a data feed that disseminates, on a real-time basis, the aggregate best bid and offer ("BBO") of all displayed orders for securities traded on the Exchange and its affiliated equities exchanges and enables recipients to receive aggregated two-sided quotations from BZX and its affiliated equities exchanges for up to twelve (12) price levels (and, for a limited time, up to five (5) price levels).⁷ The Cboe One

Premium Data Feed is created using the data from the Exchange and each of its affiliated equities exchanges' Summary Depth data feeds (allowing for up to 48 total price levels).

The Exchange also offers the Cboe One Summary Data Feed, which disseminates, on a real-time basis, the aggregate BBO of all displayed orders for securities traded on BZX and its affiliated equities exchanges and also contains individual last sale information for BZX and its affiliated equities exchanges.⁸

The Exchange also offers the BZX Summary Depth Data Feed, which is a data feed that offers aggregated two-sided quotations for up to 12 price levels for all displayed orders entered into the System.

External Distribution Fees for Cboe One Premium and Cboe One Summary

The proposed rule change also clarifies that External Distributors of both Cboe One Summary and Cboe One Premium shall only be responsible for paying the External Distribution Fee for Cboe One Premium. The current fee schedule provides that "Cboe One Summary User Fees can be applied to Cboe One Summary and Cboe One Premium External Distribution Fees." Under the Exchange's existing application of this provision, an External Distributor receiving both Cboe One Summary and Cboe One Premium is assessed only the Cboe One Premium External Distribution Fee,⁹ and User

(12) levels. To help in this transition, it is currently supporting both the five and twelve level feeds; however, as stated in its rule, BZX shall sunset the five (5) level feed of Cboe One Premium by December 31, 2026 (with the date to be announced via Exchange Notice). See Rule 11.22(i).

⁸ The Cboe One Summary Feed is distinguishable from the Cboe One Premium Feed in that it does not provide depth of book data. In contrast, the Cboe One Premium Feed contains all the available data in the Cboe One Summary Feed and also provides depth of book data.

⁹ To better illustrate this concept, consider the following examples. Example 1: If a firm subscribes to only Cboe One Summary, its User costs will be used to offset the External Distribution Fee for Cboe One Summary. In the event the firm's User costs total \$2,000, the firm will pay \$2,000 in User fees and \$3,000 (\$5,000 - \$2,000) for its External Distribution Fee. Example 2: If a firm subscribes only to Cboe One Premium, its User costs will be used to offset the External Distribution Fee for Cboe One Premium. In the event a firm's User costs total \$10,000, the firm will pay \$10,000 in User fees and \$2,500 (\$12,500 - \$10,000) for its External Distribution Fee. Example 3: If a firm subscribes to both Cboe One Summary and Cboe One Premium, only the External Distribution Fee for Cboe One Premium is assessed and this fee may be offset by both Cboe One Summary and Cboe One Premium User fees. In the event a firm's User costs are \$2,000 for Cboe One Summary and \$10,000 for Cboe One Premium, the firm will pay a total of \$12,000 in User fees (\$10,000 + \$2,000) and it will pay \$500

Continued

⁵ See BZX Equities Fee Schedule.

⁶ See Market Data Policies.pdf.

⁷ BZX filed to increase the levels of the Cboe One Premium Data Feed from five (5) levels to twelve

Fees for both Cboe One Summary and Cboe One Premium may be applied to offset that fee.

The Exchange is now proposing to make this treatment explicit by adding clarifying language to the fee schedule stating that External Distributors of both feeds are only responsible for paying the External Distribution Fee for Cboe One Premium. This amendment does not alter the economic substance of the Exchange's existing fee structure, nor does it impose any new or increased fees on market participants. Rather, it reduces potential ambiguity by expressly codifying the Exchange's existing application of the user fee offset provisions. The Exchange believes this clarification will promote transparency and reduce confusion among External Distributors regarding their fee obligations under the Cboe One market data product offerings.

Impact of Proposed Program

As noted above, the proposed program would waive External Distribution Fees for Data Vendors of the Cboe One Summary Feed, the Cboe One Premium Feed, and the BZX Summary Depth Feed (each, an "Applicable Feed") that satisfy certain eligibility requirements. A Data Vendor must not have received the Applicable Feed for which it seeks the waiver during the 18 months¹⁰ preceding the waiver application date, and must integrate, or be actively in the process of integrating, the Applicable Feed and making it commercially available to its subscribers. The Data Vendor need not have fully integrated the Applicable Feed or made it commercially available before the waiver begins. For a qualifying Data Vendor, the applicable waiver commences on the date it first receives the Applicable Feed, and, if that date occurs mid-month, that partial month counts as the first month of the waiver period. Specifically, the Exchange proposes to waive the External Distribution Fee of \$5,000 per month for Cboe One Summary for 12 months (the "Summary Waiver Period"), except that a Data Vendor is not eligible for a Summary Waiver Period if it is receiving Cboe One Premium because Cboe One Summary is included in the Cboe One Premium External Distribution Fee as noted herein. To clarify, because a Data Vendor receiving Cboe One Premium pays only the Cboe One Premium External Distribution Fee (and no

for its External Distribution Fee (\$12,500 – (\$10,000 + \$2,000)).

¹⁰ The Exchange notes that this same 18-month requirement is the standard for its other fee waiver programs. See BZX Equities Fee Schedule.

separate fee is assessed for Cboe One Summary), there is no separate Cboe One Summary External Distribution Fee to waive for such a firm.¹¹ The Exchange proposes to waive the External Distribution Fee of \$12,500 per month for Cboe One Premium for 24 months (the "Premium Waiver Period").

If an eligible Data Vendor already receives Cboe One Summary, it may still receive the Premium Waiver Period if it has not received Cboe One Premium during the 18 months preceding the waiver application date and satisfies the integration and commercial availability requirement with respect to Cboe One Premium. During the Premium Waiver Period, the Data Vendor's Cboe One Summary subscription would be covered under the Premium Waiver, and no separate External Distribution Fee would be assessed for Cboe One Summary. Similarly, an eligible Data Vendor that builds out both Cboe One feeds simultaneously would receive only the Premium Waiver Period.

Lastly, for eligible Data Vendors, the Exchange also proposes to waive the External Distribution Fee of \$5,000 per month for BZX Summary Depth for 24 months (the "Summary Depth Waiver Period").

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.¹² Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹³ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹⁴ requirement that

¹¹ As noted above, a firm that subscribes to both Cboe One Premium and Cboe One Summary is only charged the External Distribution Fee for Cboe One Premium. Accordingly, an eligible Data Vendor that builds out both feeds simultaneously receives only the Premium Waiver Period.

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(5).

¹⁴ *Id.*

the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes the proposed rule change promotes just and equitable principles of trade by establishing a clear, objective, and transparent definition of "Data Vendor" that properly captures the characteristics distinguishing Data Vendors from other categories of External Distributors. The proposed definition sets forth specific, verifiable criteria—namely, that a Data Vendor must (i) be an External Distributor; (ii) be actively engaged, as part of its primary business objective, in the solicitation of unaffiliated third-party Distributors to redistribute a transformed Market Data Product; (iii) not maintain a brokerage relationship with Users; and (iv) not be an Extranet Service Provider. By establishing objective eligibility criteria, the proposed rule change ensures that similarly situated market participants are treated consistently and that the benefits of the Data Vendor Program are available to all External Distributors that meet the defined qualifications.

The Exchange further believes that the codification of the existing Extranet Service Provider definition within the Fee Schedule promotes just and equitable principles of trade. Because the proposed Data Vendor definition directly references the term "Extranet Service Provider," market participants seeking to understand their eligibility for the Program should not be required to consult the Cboe Global Markets North American Data Policies to determine how that term applies. By incorporating both defined terms into the Fee Schedule itself, the Exchange ensures that participants have access to the complete framework.

The Exchange further believes that the proposed rule change removes impediments to and perfects the mechanism of a free and open market and a national market system. The Data Vendor Program is designed to incentivize Data Vendors to integrate the Applicable Feeds, make them commercially available to subscribers, and redistribute them by providing fee waivers for External Distribution Fees for the Cboe One Summary Feed, Cboe One Premium Feed, and BZX Summary Depth Feed. By waiving the External Distribution Fee of \$5,000 per month for Cboe One Summary for the Summary Waiver Period, waiving the External Distribution Fee of \$12,500 per month for Cboe One Premium for the Premium Waiver Period, and waiving the External Distribution Fee of \$5,000 per month for BZX Summary Depth for the Summary

Depth Waiver Period, the Exchange encourages broader redistribution of its market data products. Broader distribution of market data enhances price transparency and supports informed decision-making across the national market system, which in turn perfects the mechanism of a free and open market by ensuring that market participants have access to comprehensive, competitive data offerings.

By allowing the waiver to begin while an eligible Data Vendor is actively integrating the Applicable Feed and working to make it commercially available, the Program lowers barriers to entry during the build-out period and incentivizes a broader set of market participants to enter the Exchange's market data distribution chain, thereby expanding the availability of market data throughout the national market system.

The proposed rule change also protects investors and the public interest. By encouraging Data Vendors to take in, transform, and redistribute market data feeds, the proposed program promotes greater availability of enriched market data products to downstream Distributors and Users. The transformation requirement—which may include aggregation across multiple sources, normalization into a consistent format, enrichment with derived analytics, or repackaging into a proprietary delivery mechanism such as a terminal, API, or feed—is a key element of qualifying as a Data Vendor and ensures that meaningful value is added to the data before redistributing it, thereby increasing the utility and accessibility of market information. To the extent the Program achieves its purpose and results in more widespread redistribution of the Applicable Feeds, market participants may benefit from enhanced access to consolidated, real-time price, last sale, and depth information through the distribution channels developed by Data Vendors.

Additionally, the codification of the existing Extranet Service Provider definition within the Fee Schedule provides additional clarity on the program requirements and codifies the definition that exists already in the Cboe Global Markets North American Market Data Policies. Furthermore, the clarification that External Distributors of both Cboe One Summary and Cboe One Premium are only responsible for paying the External Distribution Fee for Cboe One Premium promotes transparency by expressly codifying a practice that is already reflected in the Exchange's existing application of the fee provision. This reduces potential

confusion among market participants regarding their fee obligations.

Not Unfairly Discriminatory

The Exchange believes that the proposed Data Vendor Program is consistent with and complementary to its existing programs for other categories of market participants, and that offering a targeted fee waiver program specifically for Data Vendors does not constitute unfair discrimination. The Exchange has a history of establishing differentiated programs that recognize the distinct roles of different market participants. For example, the Small Retail Broker Distribution Program provides discounted Distribution Fees and Data Consolidation Fees for eligible broker-dealers distributing the applicable feeds to Non-Professional Data Users with whom the broker-dealer has a brokerage relationship.¹⁵ This program is designed to address the specific characteristics and economic needs of small retail broker-dealers. Similarly, the Small Retail Broker Hosted Solutions Program provides fee waivers for eligible Small Retail Brokers that provide the applicable feeds to other Small Retail Brokers via hosted solutions.¹⁶ This program recognizes that smaller retail brokers face unique integration challenges and cost constraints when building out hosted data solutions. In addition, the New Internal Distributor Waiver for the BZX Depth Data Feed waives Internal Distribution Fees for three months for Internal Distributors that have not received the BZX Depth Data Feed during the prior 18 months.¹⁷ This program incentivizes new Internal Distributors to integrate the depth-of-book feed into their systems. Lastly, the Exchange's affiliated options exchange, Cboe Exchange, Inc., introduced a 24-month waiver for qualifying retail brokers for its Complex Order Book Feed.¹⁸

The proposed Data Vendor Program is consistent with the Exchange's practice of creating a distinct program to serve a specific use case. Data Vendors occupy a distinct role in the market data distribution ecosystem. Unlike retail brokers, whose primary business is providing trade execution and account management services to Users (with market data distribution as an ancillary feature), Data Vendors are primarily engaged in the business of transforming and redistributing market data to other

Distributors. This fundamental difference in business model justifies a distinct program with tailored eligibility criteria and waiver periods. The waiver periods under the proposed Data Vendor Program—12 months for Cboe One Summary and 24 months for Cboe One Premium and BZX Summary Depth—are designed to reflect the relative complexity of integrating each feed. Depth-of-book products such as Cboe One Premium and BZX Summary Depth typically require more extensive technical build-out, including handling of larger data volumes, more complex display and aggregation logic, and more rigorous quality assurance processes. Additionally, BZX Summary Depth and Cboe One Premium are more expensive relative to the top of book feeds. This means that Data Vendors require additional interest from clients in these products before they can even break even. Accordingly, the Exchange believes a 24-month waiver period for these products is appropriate to provide sufficient time for Data Vendors to complete their build-out. Top-of-book and summary products, in contrast, are generally less complex to integrate, and the Exchange believes a 12-month waiver period is appropriate for Cboe One Summary.

Data Vendors' cost and investment trade-offs further support this distinction. A Data Vendor's primary commercial objective is to transform market data and make the resulting product available to unaffiliated downstream Distributors, rather than to provide market data only incidentally in support of another business (in comparison to retail brokers). Because a single Data Vendor can make a Cboe data product available through its platform to multiple downstream Distributors, the waiver is targeted to participants capable of materially expanding the product's distribution footprint. Like any business operator, a Data Vendor evaluates whether to add an Applicable Feed based on expected return on investment, weighing expected revenue against the upfront costs of connectivity, programming, technical integration, and sales and marketing, as well as the ongoing exchange market data fees associated with making the product available to subscribers. In many cases, a Data Vendor may need to add three to five new downstream Distributors merely to offset the ongoing External Distribution Fee. These costs are typically incremental: Data Vendors may already offer one or more equity feeds to clients and add an Applicable Feed only where it is expected to provide return on

¹⁵ See BZX Equities Fee Schedule.

¹⁶ See BZX Equities Fee Schedule.

¹⁷ *Id.*

¹⁸ See Securities Exchange Act Release No. 105198 (April 10, 2026), 91 FR 20204 (April 15, 2026) (SR-CBOE-2026-033).

investment beyond their current offerings. A retail broker's determination is different. A retail broker will often migrate or swap from a competitor's product, and may be able to implement the change through a Data Vendor API into its front-end with a simple entitlement change, without bearing the same upfront connectivity and technical build-out costs.

The waiver periods under the proposed Data Vendor Program are longer than certain other Exchange programs because they support more than initial feed access or recruitment of a first User.¹⁹ A qualifying Data Vendor must complete significant technical and commercial build-out before it can distribute the product and begin recovering its upfront costs. Its downstream Distributors may then have their own evaluation, contracting, and integration cycles, further extending the path to meaningful adoption; as noted above, a Data Vendor may need to add three to five new downstream Distributors to offset the ongoing External Distribution Fee.

The Exchange does not maintain comparable fee waiver programs for larger broker-dealers that distribute market data to their brokerage customers. The Exchange believes this distinction is appropriate. The Small Retail Broker programs are specifically designed to address the cost constraints faced by smaller broker-dealers in building out market data distribution capabilities. Larger broker-dealers typically have established data infrastructure and greater resources to absorb market data distribution costs as part of their overall brokerage operations, and, as such, their cost per user is meaningfully lower. Data distribution by large broker-dealers is typically an ancillary component of brokerage services offered. In contrast, a Data Vendor must incur incremental buildout fees and ongoing External Distribution Fees to establish and support a new external redistribution channel. The relevant distinction is therefore the nature of the service and the associated barriers to distribution, not the size or identity of the participant.

The Data Vendor Program is intended to address a different need: incentivizing specialized data redistribution firms to build out the Applicable Feeds and bring on additional downstream Distributors. By encouraging Data Vendors to invest in the transformation and redistribution of

the Exchange's market data products, the Program expands the reach and availability of this data throughout the national market system, benefiting end users and promoting competition. The Exchange therefore believes that creating a targeted program for Data Vendors, in addition to its existing programs for Small Retail Brokers and Internal Distributors, among others, is consistent with Section 6(b)(5) of the Act and does not constitute unfair discrimination.

The Exchange also believes the proposed rule change is consistent with Section 6(b)(5) of the Act in that it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Data Vendor Program is available to all External Distributors that satisfy the objective criteria set forth in the proposed definition of Data Vendor and, for waiver eligibility, the additional objective criteria regarding the 18-month lookback for prior receipt of the Applicable Feed and integration or active integration of the Applicable Feed for commercial availability. The distinctions drawn by the definition—(i) requiring that a Data Vendor's primary business objective be the solicitation of unaffiliated third-party Distributors, (ii) that it not maintain a brokerage relationship with Users, and (iii) that it not be an Extranet Service Provider—reflect meaningful differences in business models and market functions.

External Distributors

The Exchange believes that limiting the Data Vendor Program to External Distributors is not unfairly discriminatory. Internal Distributors and External Distributors occupy fundamentally different roles in the market data distribution ecosystem and are not similarly situated participants. An Internal Distributor receives a market data product and distributes it solely within its own entity, whereas an External Distributor redistributes data outside its entity to Users or other Distributors—and a Data Vendor, as a specialized category of External Distributor, further serves the specific function of soliciting unaffiliated third-party Distributors to redistribute a transformed market data product. The Data Vendor Program is designed precisely to incentivize and expand this type of external redistribution, a purpose that has no meaningful application to Internal Distributors who, by definition, cannot advance the proposed program's goal of broadening the reach of the Exchange's market data to downstream Distributors and end-user investors. Furthermore, the

Exchange already offers programs for its Internal Distributors that it does not offer for External Distributors.²⁰

Primary Business Is To Redistribute to Distributors

To be eligible as a Data Vendor, an External Distributor must be taking in data for the primary business purpose of selling access to the applicable feed as a service in its own right—not merely redistributing data in incidental support of broader business functions such as trade execution, account management, or brokerage services. The Exchange notes that as part of its business, a Data Vendor may redistribute a market data product to Users, but the primary purpose must be the redistribution of data to Distributors. The Exchange will assess whether an External Distributor's primary business purpose satisfies this criterion based on the External Distributor's publicly available marketing materials. This requirement is not unfairly discriminatory because it is directly tied to the purpose of the Program: encouraging entities whose core commercial activity is the transformation and redistribution of market data to build out the Applicable Feeds and bring on additional downstream Distributors, thereby expanding the reach and availability of the Exchange's data products. An entity that distributes market data only incidentally—as an ancillary feature of a brokerage, execution, or account management business—does not serve this purpose.

Transformed Market Data Product

The Exchange believes it is not unfairly discriminatory to require that a Data Vendor transform market data as a condition of eligibility, as transformation is a definitional characteristic that goes to the core of what distinguishes a Data Vendor from other categories of External Distributors and is directly tied to the Program's purpose of incentivizing participants that create new, differentiated distribution channels for the Exchange's consolidated market data. This reasoning is directly analogous to the rationale for excluding Extranet Service Providers—entities that transmit data without modification and therefore cannot create the type of value-added products, whether delivered via terminal, API, or proprietary feed, that the Program is designed to incentivize. Because the transformation requirement ensures that the Program's fee

¹⁹ However, as noted above, Cboe Exchange, Inc., offers a 24-month waiver for qualifying retail brokers for its Complex Order Book Feed.

²⁰ See, e.g., BZX Equities Fee Schedule that describes the New Internal Distributor Waiver for BZX Depth Data Feed.

incentives are directed only at entities whose business is built around adding that value, the Exchange believes this criterion is reasonable and does not constitute unfair discrimination.

No Brokerage Relationship With Users

The Exchange believes it is not unfairly discriminatory to require that Data Vendors not maintain a brokerage relationship with Users. The Exchange already maintains separate programs specifically for qualifying broker-dealers that distribute market data to their brokerage customers. Specifically, the Exchange offers the Small Retail Broker Distribution Program, which provides discounted Distribution Fees and Data Consolidation Fees for eligible broker-dealers distributing the applicable feeds to Non-Professional Data Users with whom the broker-dealer has a brokerage relationship. The Exchange also offers the Small Retail Broker Hosted Solutions Program, which provides fee waivers and lower data costs for Small Retail Brokers that provide the applicable feeds to other Small Retail Brokers via hosted solutions. These existing programs are specifically designed to encourage retail brokers to distribute market data, and the eligibility criteria for those programs reflect the characteristics of the retail brokerage business model.

The proposed Data Vendor Program does not displace or reduce the benefits available to retail brokers under those existing programs. Rather, it creates a parallel and complementary framework for a distinct category of participants—Data Vendors—that do not maintain brokerage relationships with Users, and whose primary business purpose is categorically different from that of a retail broker. Just as it would not be appropriate to extend the Small Retail Broker Program to Data Vendors, it is similarly appropriate—and not unfairly discriminatory—not to extend the Data Vendor Program to retail brokers or other participants that maintain brokerage relationships with their Users, whose needs are separately addressed by the Exchange's existing programs.

Not an Extranet Service Provider

The Exchange also believes it is not unfairly discriminatory to exclude Extranet Service Providers from the Data Vendor Program. An Extranet Service Provider, as defined, is an entity that transmits a market data product to data recipients without modification of the content, format, or other characteristics of the product. Extranet Service Providers do not transform, enrich, or add value to the data they transmit—they serve as conduits, passing data

through in its original form. This is fundamentally distinct from the function of a Data Vendor, which, by definition, must transform the Market Data Product as part of its service offering.

The Data Vendor Program is specifically premised on the value that transformation adds to the data distribution ecosystem. By enabling Data Vendors to create differentiated products—delivered via a terminal, API, proprietary feed, or other value-added mechanism—that appeal to a broader range of downstream Distributors, the Program advances the Exchange's goal of maximizing the reach and utility of its consolidated market data throughout the national market system. Extending the Program to Extranet Service Providers, which do not perform this transformative function, would undermine the Program's core purpose and would not serve the policy goal of broadening distribution of market data products in readily accessible, value-added formats.

The Exchange has created programs to address the distinct needs and business models of different categories of market participants, and the proposed Data Vendor Program is a natural extension of this approach. In addition to the Small Retail Broker programs described above, the Exchange also offers fee waivers for eligible Internal Distributors of the BZX Depth Data Feed, which are intended to incentivize new Internal Distributors to integrate data feeds into their systems. The differentiation between Data Vendors and other categories of market participants reflects the distinct roles these entities play and the distinct incentive structures appropriate to each and does not constitute unfair discrimination.

18-Month and Integration Requirements

The Exchange further believes it is not unfairly discriminatory to limit the Program to Data Vendors that have not received the Applicable Feed for which they seek a waiver during the 18 months preceding the waiver application date, and that have integrated, or are actively in the process of integrating,²¹ the Applicable Feed and making it commercially available to subscribers. The 18-month limitation is designed to ensure that the fee waivers serve their intended purpose of reducing the upfront cost barriers for new market participants. This approach is directly consistent with the analogous frameworks the Exchange has adopted

in prior programs—including the Internal Distributor Waiver for the BZX Depth Data Feed, which similarly limits fee relief to distributors that have not received the relevant feed in the prior 18 months. The integration and commercial availability requirement is likewise reasonable because it ensures that the waiver is directed to Data Vendors that are undertaking the build-out necessary to distribute the Applicable Feed to subscribers, while not requiring full integration or commercial availability before the waiver begins. The Exchange therefore believes that these objective limitations are reasonable and appropriate, prevent the Program from operating as a permanent subsidy for established distributors, and are not unfairly discriminatory.

The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) of the Act,²² which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities. The proposed fee waivers represent a reasonable and equitable allocation of charges. The fee waivers for External Distribution Fees are limited in duration—the Summary Waiver Period for Cboe One Summary, the Premium Waiver Period for Cboe One Premium, and the Summary Depth Waiver Period for BZX Summary Depth—and are available only to Data Vendors that have not received the Applicable Feed for which they seek a waiver during the 18 months preceding the waiver application date and that have integrated, or are actively in the process of integrating, the Applicable Feed and making it commercially available to subscribers. This time-limited structure ensures that the waivers serve their intended purpose of incentivizing new market entry and build-out of data feeds. The 18-month lookback requirement further ensures the equitable allocation of fees by limiting the Program to new feeds for Data Vendors, and the integration and commercial availability requirement ensures that the waiver is tied to actual build-out and distribution activity. The Exchange notes that this same 18-month standard is consistent with the requirements applied in its other fee waiver programs.

The clarification that External Distributors of both Cboe One Summary and Cboe One Premium shall only be responsible for paying the External Distribution Fee for Cboe One Premium

²¹ The Exchange notes that no specific step is required for this, only that Data Vendor is working to integrate the Applicable Feed into its system.

²² 15 U.S.C. 78f(b)(4).

does not alter the economic substance of the Exchange's existing fee structure and does not impose any new or increased fees on market participants. Rather, it expressly codifies the Exchange's existing application of the user fee offset provisions—under which an External Distributor disseminating both products is assessed only the Cboe One Premium External Distribution Fee—thereby ensuring that all market participants have a clear and equitable understanding of their fee obligations. The Exchange therefore believes the proposed rule change provides for the equitable allocation of reasonable fees among persons using its facilities.

Lastly, the Exchange believes that the limitations regarding the waiver structure for both Cboe One Premium and Cboe One Summary equitably allocate fees. With respect to the Cboe One Summary waiver, only Data Vendors that (i) have not received Cboe One Summary during the 18 months preceding the waiver application date, (ii) are integrating or actively in the process of integrating Cboe One Summary and making it commercially available to subscribers, and (iii) are not receiving Cboe One Premium are eligible for the Summary Waiver Period. The Exchange believes that this is reasonable, as a firm that subscribes to Cboe One Premium already may elect to receive (without incurring an additional External Distribution Fee) Cboe One Summary Feed. For this reason, there is no need to provide a separate Summary Waiver Period while a firm receives Cboe One Premium, because that firm may receive the Cboe One Summary Feed without paying an additional External Distribution Fee that the proposed program seeks to waive.

Next, the Exchange notes that if a Data Vendor currently receives Cboe One Summary and elects to receive Cboe One Premium under the proposed program, so long as the Data Vendor has not received the Cboe One Premium Feed during the 18 months preceding the waiver application date and satisfies the integration and commercial availability requirement with respect to Cboe One Premium, the Data Vendor may receive the Premium Waiver Period. During that period, the Data Vendor's existing Cboe One Summary ²³

²³ For example, if a Data Vendor currently subscribes to Cboe One Summary Feed and is eligible for the proposed program for the Cboe One Premium Feed, no separate External Distribution Fee would be assessed for Cboe One Summary during the Premium Waiver Period because Cboe One Summary is included in the Cboe One Premium subscription. The Data Vendor would receive the Premium Waiver Period and would not receive a separate Summary Waiver Period during that time.

subscription will be covered under the Premium Waiver, and no separate External Distribution Fee will be assessed for Cboe One Summary. This is because the Cboe One Summary External Distribution Fee is subsumed within the Cboe One Premium External Distribution Fee—accordingly, there is no separate Cboe One Summary fee to waive for a firm receiving Cboe One Premium. The Exchange believes this treatment is reasonable because it avoids providing overlapping or duplicative waiver relief while still incentivizing an existing Summary subscriber to build out Cboe One Premium.

Lastly, if a Data Vendor has not received either Cboe One Summary or Cboe One Premium during the 18 months preceding the waiver application date and elects to build out both Cboe One feeds simultaneously, the Data Vendor will not receive separate Summary and Premium waivers. Instead, because the Cboe One Summary External Distribution Fee is subsumed within the Cboe One Premium External Distribution Fee, the Data Vendor will receive only the Premium Waiver Period, and no separate Summary Waiver Period will apply while it receives Cboe One Premium.

With respect to the BZX Summary Depth waiver, a Data Vendor is eligible for the Summary Depth Waiver Period only if it has not received the BZX Summary Depth Feed during the 18 months preceding the waiver application date and satisfies the integration and commercial availability requirement with respect to BZX Summary Depth. The Exchange believes this treatment is reasonable because it applies the same objective eligibility standards to BZX Summary Depth while providing a 24-month period intended to facilitate the build-out and commercial launch of that feed.

For all of the foregoing reasons, the Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder, including, in particular, the requirements of Sections 6(b)(4) ²⁴ and 6(b)(5) ²⁵ of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe the proposed

rule change imposes any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed Data Vendor Program is available to all External Distributors that satisfy the objective, clearly defined criteria set forth in the proposed definition of "Data Vendor" and the Program's waiver eligibility standards. Any External Distributor that, as part of its primary business objective, solicits unaffiliated third-party Distributors to redistribute a transformed Market Data Product, does not maintain a brokerage relationship with Users in connection with the applicable Market Data Product, is not an Extranet Service Provider, has not received the Applicable Feed for which it seeks a waiver during the 18 months preceding the waiver application date, and has integrated or is actively integrating the Applicable Feed and making it commercially available to subscribers may qualify for the Program on equal terms. Because eligibility is determined by objective, verifiable criteria rather than by subjective or discretionary determinations, no External Distributor is advantaged or disadvantaged relative to any other similarly situated participant.

To the extent that certain External Distributors—such as retail broker-dealers or Extranet Service Providers—do not qualify for the Data Vendor Program, this does not impose a burden on intramarket competition. As described above, retail broker-dealers and Extranet Service Providers are not similarly situated to Data Vendors. Retail broker-dealers distribute market data to their own brokerage customers as an ancillary feature of their core business of providing trade execution and account management services, and their data distribution needs are more appropriately addressed by the Exchange's existing Small Retail Broker Distribution Program and Small Retail Broker Hosted Solutions Program. Extranet Service Providers, by contrast, transmit data in its original form without transformation, and therefore do not serve the same function in the data distribution ecosystem as Data Vendors, which aggregate, transform, and redistribute data to downstream Distributors. Designing a fee program specifically targeted to Data Vendors, rather than applying it uniformly across all categories of External Distributors, does not burden intramarket competition—it reflects the materially different roles, business models, and barriers of these distinct categories of participants.

²⁴ 15 U.S.C. 78f(b)(4).

²⁵ 15 U.S.C. 78f(b)(5).

Similarly, limiting the Data Vendor Program to External Distributors and not extending it to Internal Distributors does not impose a burden on intramarket competition. Internal Distributors receive and use market data solely within their own legal entities and do not redistribute data to third parties outside their organizations. They are therefore not participants in the same competitive market for external data redistribution that the Program is designed to promote, and their needs are separately addressed through the Exchange's existing Internal Distributor programs—including the New Internal Distributor Waiver for the BZX Summary Depth Data Feed. The proposed Program is specifically designed to incentivize external redistribution of the Applicable Feeds, a purpose that has no meaningful application to Internal Distributors and that creates no competitive disadvantage for them.

The Exchange does not believe the proposed rule change imposes any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes the proposed rule change will enhance intermarket competition by incentivizing a broader class of market participants to subscribe to and redistribute the Exchange's market data products, thereby increasing the Exchange's ability to compete with other national securities exchanges and data vendors for the business of Data Vendors and their downstream Distributor clients.

The market for equity market data is highly competitive. Numerous national securities exchanges offer products that compete directly with the Cboe One Summary Feed, Cboe One Premium Feed, and BZX Summary Depth Feed. Market participants can obtain comprehensive market data from numerous sources, including competing exchanges (such as NYSE and Nasdaq), the consolidated tape (SIP), and alternative trading systems. Prospective Data Vendors evaluating whether to build out the Applicable Feeds must weigh the upfront costs of connectivity, software development, integration, and commercial launch against the commercial opportunity presented by the Exchange's data products. The Data Vendor Program is designed to make the Exchange's market data offering competitively priced relative to alternative options, encouraging Data Vendors to enter the Exchange's market data distribution chain and thereby expanding the availability and reach of

the Exchange's market data throughout the national market system.

Far from burdening intermarket competition, the proposed rule change is a direct response to competitive market forces. The Exchange's decision to offer targeted fee waivers to new Data Vendors reflects its recognition that it must compete aggressively for the participation of data redistribution firms, and that reducing the upfront cost of entry is a legitimate and necessary competitive tool in the market for exchange data products. The Commission has recognized that exchanges operate in a competitive environment with respect to market data, and that exchange fee programs designed to attract new participants and expand market data distribution are consistent with the Act's goals of promoting competition and efficiency in the national market system.

The proposed clarification that External Distributors of both Cboe One Summary and Cboe One Premium are only responsible for paying the External Distribution Fee for Cboe One Premium similarly does not impose any burden on intermarket competition. This change does not alter the economic substance of the Exchange's existing fee structure and does not impose any new fees on any market participant. It simply makes explicit the Exchange's existing application of the user fee offset provisions, reducing potential confusion and ensuring that all market participants have a clear and consistent understanding of their fee obligations. Regulatory clarity of this nature promotes, rather than burdens, competition by enabling market participants to make fully informed decisions about their participation in the Exchange's market data programs.

With respect to the Cboe One Summary and Cboe One Premium feeds specifically, the Exchange notes that the proposed Data Vendor Program does not impose any burden on competition arising from differential pricing between Cboe One and the applicable underlying equities feeds.²⁶ The Exchange notes that historically, its pricing for Cboe One products has been based on the sum of the External Distribution Fees for the four underlying equities feeds.²⁷ As

²⁶ For Cboe One Summary, the four equities feeds are BZX Top, BYX Top, EDGA Top, and EDGX Top. For Cboe One Premium, the four equities feeds are BZX Summary Depth, BYX Summary Depth, EDGA Summary Depth, and EDGX Summary Depth.

²⁷ For example, under the Small Retail Broker Distribution Program, the discounted External Distribution Fee for Cboe One Summary is \$3,500 per month, which equals the sum of the External Distribution Fees for the four underlying Top feeds: BZX Top (\$2,500), BYX Top (\$250), EDGA Top (\$0), and EDGX Top (\$750). See Cboe BZX, BYX, EDGA,

an initial matter, not all underlying equities feeds are offered under this Program. The proposed Data Vendor Program applies only to the following feeds: EDGX Top, EDGX Summary Depth, BZX Summary Depth, Cboe One Premium, and Cboe One Summary. A Data Vendor may choose to receive a waiver for Cboe One Summary or Cboe One Premium, or for EDGX Top, or for EDGX Summary Depth, or for BZX Summary Depth, or any combination thereof, subject to the applicable eligibility requirements. However, the proposed Program does not offer fee waivers for BZX Top, BYX Top, or EDGA Top data feeds, nor does it offer fee waivers for BYX Summary Depth or EDGA Summary Depth. Accordingly, the applicable underlying equities feeds do not "sum" to the applicable Cboe One feed under this proposed Program.²⁸

The Exchange has selected the products covered by the Program based on where it sees the greatest opportunity to expand distribution and align Data Vendor coverage with downstream end-user demand. This product-specific focus is not unfairly discriminatory. All qualifying Data Vendors are subject to the same product-specific eligibility requirements, and offering waivers for some, rather than all four, of the underlying feeds does not result in unequal treatment among similarly situated participants.

Even setting aside the foregoing, the Exchange does not believe that pricing the Cboe One Summary or Cboe One Premium feeds differently from the underlying equities feeds imposes any burden on competition. To date, the Exchange is not aware of any distributor that purchases the underlying equities feeds (either the Top or Summary Depth Feeds) for the purpose of creating its own consolidated product comparable to Cboe One Summary or Cboe One Premium. This demonstrates that the practical market concern underlying any perceived burden—that distributors

and EDGX U.S. Equities Exchange Fee Schedules. Because the proposed Data Vendor Program does not offer fee waivers for BZX Top, BYX Top, EDGA Top, BYX Summary Depth, or EDGA Summary Depth, the External Distribution Fee for each of those feeds would remain in effect for any Data Vendor receiving those feeds, while the External Distribution Fee for Cboe One Summary (\$0 during the Summary Waiver Period) or Cboe One Premium (\$0 during the Premium Waiver Period) would be waived. This results in a pricing differential between the sum of the underlying equities feeds and the Cboe One feeds under this Program.

²⁸ For example, the External Distribution Fee is \$0 for Cboe One Summary under the proposed Program, but the sum of the four underlying equities feeds under the proposed Program is \$2,750 (\$0 EDGX Top + \$2,500 BZX Top + \$250 BYX Top + \$0 EDGA Top).

might be disadvantaged by differential pricing on Cboe One that is not extended to the underlying feeds—does not correspond to actual market behavior.

Moreover, Cboe One Summary and Cboe One Premium are distinct, independent data products—they are not merely consolidations of data from the four underlying equities feeds. In addition to consolidating data from BZX, BYX, EDGX, and EDGA, Cboe One includes supplementary data elements not found in the individual underlying feeds, including data derived from the Securities Information Processor (“SIP”) containing information on the national cumulative volume. This additional content makes Cboe One a distinct product with independent utility. Market participants subscribe to the underlying equities feeds and Cboe One for fundamentally different purposes. For example, a subscriber may be interested only in top-of-book data from a single exchange, such as EDGX, for trading, routing or compliance purposes. Such a subscriber has no need for a consolidated product. Conversely, subscribers seeking a comprehensive, cross-exchange view of Cboe liquidity choose Cboe One precisely because it offers consolidated data with additional enhancements. These distinct use cases support differentiated pricing treatment.

Data Vendors may, in theory, choose to purchase each of the four underlying equities feeds and create their own consolidated product. However, the \$1,000 monthly Data Consolidation Fee associated with purchasing Cboe One (and the primary pricing differential) provides access to a production-ready, supported consolidated product, and a vendor seeking to create a comparable offering independently would bear not only the applicable source-feed, but also the costs of developing and maintaining multiple feed handlers, normalizing the data, applying aggregation logic, performing quality assurance, supporting specification changes, and monitoring production feed health. Clients also generally prefer an official exchange product, such as Cboe One, over a vendor-derived consolidated product that requires reporting across multiple exchange products. From a user-experience perspective, the exchange-provided Cboe One is therefore a better solution. A simple combination of the four underlying feeds also would not recreate all Cboe One content, including supplementary SIP-derived information. The Exchange therefore believes that the \$1,000 monthly Data Consolidation Fee is less than the full economic cost of independently creating and maintaining

a comparable product, particularly for a vendor that does not already operate the required infrastructure.

Section 6(b)(8) of the Exchange Act requires that exchange rules not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Cboe One Summary, Cboe One Premium, and the applicable underlying equities feeds are separate products serving different market needs. Just as the Commission has permitted exchanges to offer different fees for depth-of-book data versus top-of-book data, the Exchange should have discretion to price its consolidated summary product differently from its component feeds.

Finally, the proposed Data Vendor Program is pro-competitive. By reducing the cost of consolidated and top-of-book data products for qualifying Data Vendors, the Exchange enables broader distribution of comprehensive market information to downstream distributors and, ultimately, to retail and institutional investors. Wider access to market data promotes informed investment decisions, enhances market efficiency, and supports the Exchange Act’s goals of investor protection and fair and efficient markets. The Exchange does not view external distributors as competitors for its real-time feed offerings; rather, distributors serve as essential conduits that expand delivery of Cboe real-time market data to end users who do not have the technical capability or commercial need to connect directly to Cboe’s individual market data feeds. This is particularly important for the retail community, as retail investors typically access market data through vendors rather than purchasing it directly from exchanges. By offering the proposed Data Vendor Program, the Exchange enables distributors to deliver competitively priced, comprehensive market data to a broader audience, thereby enhancing—not burdening—competition in the market data landscape.

For the foregoing reasons, the Exchange does not believe that the proposed rule 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 Act²⁹ and paragraph (f) of Rule 19b-4³⁰ 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeBZX-2026-074 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-CboeBZX-2026-074. 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 (<https://www.sec.gov/rules/sro.shtml>). Copies of the filing will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-CboeBZX-2026-074 and should be submitted on or before October 9, 2026.

²⁹ 15 U.S.C. 78s(b)(3)(A).

³⁰ 17 CFR 240.19b-4(f).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³¹

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2026–19133 Filed 9–17–26; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–106375; File No. SR–PEARL–2026–39]

Self-Regulatory Organizations; MIAx PEARL, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 2628 Concerning the Resumption of Trading Following a Level 3 Market-Wide Circuit Breaker Halt in Connection With the Industry's Expansion of Trading Hours to 23 Hours per Day, 5 Days per Week

September 15, 2026.

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 September 3, 2026, MIAx PEARL, LLC (“MIAx Pearl” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange to amend Rule 2628 (“Trading Halts Due to Extraordinary Market Volatility”) concerning the resumption of trading following a Level 3 market-wide circuit breaker halt in connection with the industry's expansion of trading hours to 23 hours per day, 5 days per week. The text of the proposed rule change is available on the Exchange's website at <https://www.miaxglobal.com/markets/us-equities/pearl-equities/rule-filings>, and at MIAx Pearl's principal office.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, MIAx Pearl 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. MIAx Pearl has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 2628 (“Trading Halts Due to Extraordinary Market Volatility”) concerning the resumption of trading following a Level 3 market-wide circuit breaker (“MWCB”) halt (“Level 3 Market Decline”) in connection with the industry's expansion of trading hours to 23 hours per day, 5 days per week (“23/5 Trading”). Some exchanges are planning to offer overnight trading, ³ and as a result, the uniform Level 3 Market Decline rules of each exchange are being modified, as explained further below.

Background

The MWCB mechanism under Rule 2628 provides an important, automatic mechanism that is invoked to promote stability and investor confidence during a period of significant stress when U.S. securities markets experience extreme broad-based declines. All U.S. equity exchanges and FINRA (collectively, the self-regulatory organizations or “SROs”) adopted uniform rules relating to the MWCB mechanism in 2012, which are designed to slow the effects of extreme price movement through coordinated trading halts across U.S. securities markets when severe price declines reach levels that may exhaust market liquidity. ⁴ Such market-wide circuit breakers provide for trading halts in all U.S. cash equity and equities options markets during a severe market decline as measured by a single-day decline in the S&P 500 Index during regular trading hours.

³ See, e.g., Securities Exchange Act Release No. 105532 (May 21, 2026), 91 FR 31509 (May 27, 2026) (SR–NYSEARCA–2026–53) (“NYSE Arca 23/5 Trading Notice”).

⁴ See Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–BATS–2011–038; SR–BYX–2011–025; SR–BX–2011–068; SR–CBOE–2011–087; SR–C2–2011–024; SR–CHX–2011–30; SR–EDGA–2011–31; SR–EDGX–2011–30; SR–FINRA–2011–054; SR–ISE–2011–61; SR–NASDAQ–2011–131; SR–NSX–2011–11; SR–NYSE–2011–48; SR–NYSEAmex–2011–73; SR–NYSEArca–2011–68; SR–Phlx–2011–129) (“MWCB Approval Order”).

Pursuant to Rule 2628, a market-wide trading halt will be triggered if the S&P 500 Index declines in price by specified percentages from the prior day's closing price of that index. Currently, the triggers are set at three circuit breaker thresholds: 7% (Level 1), 13% (Level 2), and 20% (Level 3). A market decline that triggers a Level 1 or Level 2 halt after 9:30 a.m. ET and before 3:25 p.m. ET would halt market-wide trading for 15 minutes, while a similar market decline at or after 3:25 p.m. ET would not halt market-wide trading. If a Level 3 Market Decline occurs at any time during the trading day, trading in all stocks will halt on the Exchange for the remainder of the trading day, and will resume the following trading day at 4:00 a.m. ET.

Proposal

The Exchange now proposes to amend Rule 2628 to reflect extended trading hours under 23/5 Trading. On December 6, 20206 [sic], several exchanges intend to offer new overnight trading sessions that would be available from 9:00 p.m. ET to 4:00 a.m. ET, increasing their hours of operation.

As discussed, consistent with the uniform rules in place across all SROs, current Rule 2628(b)(2) provides that if a Level 3 Market Decline occurs at any time during the trading day, the Exchange shall halt trading in all stocks on the Exchange for the remainder of the trading day. Currently, that means that the earliest that any exchange would re-open trading after a Level 3 Market Decline is 4:00 a.m. ET the following day, since no SROs are open for trading before 4:00 a.m. ET.

Unless amended, when 23/5 Trading is launched, the current rule's reference to halting “for the remainder of the trading day” ⁵ would require SROs participating in 23/5 Trading to re-open trading at an earlier time, i.e., 9:00 p.m. ET on the same calendar day, when those SROs' systems would generally become available for overnight trading. The Exchange does not believe that this is an expected or desired result and is therefore amending this rule in coordination with the other SROs such that trading on any SRO will not resume until 4:00 a.m. ET or later on the following trading day, consistent with current market practice. This proposed rule change is therefore not intended to make any substantive changes to the MWCB mechanism. Rather, the proposed rule change would preserve the current resumption time following a Level 3 Market Decline.

⁵ See Rule 2628(b)(2).

³¹ 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

To effect this change, the Exchange proposes to delete the language in Rule 26258(b)(2) [sic] that provides that trading in all stocks will halt on the Exchange “for the remainder of the trading day” if a Level 3 Market Decline occurs at any time during the trading day, and replace it with new language that explicitly provides that trading in all stocks would halt on the Exchange until 4:00 a.m. ET or later on the following trading day.

Implementation

The Exchange plans to implement the proposed rule change on December 6, 2026, the date on which several exchanges intend to offer new overnight trading sessions that would be available from 9:00 p.m. ET to 4:00 a.m. ET.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁶ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁷ in particular, 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.

The MWCB mechanism described in Rule 2628 is an important, automatic mechanism that is invoked to promote stability and investor confidence during periods of significant stress when U.S. securities markets experience extreme broad-based declines. The proposed rule change, when applied uniformly by all SROs, would ensure that the current 4:00 a.m. ET resumption time following a Level 3 halt continues to apply under 23/5 Trading, notwithstanding current rule text implying that the resumption time would coincide with the start of overnight trading on SROs operating an overnight session.

Rather than leave the rule in place as is, which would result in an earlier resumption time than originally contemplated when the rule was adopted, the Exchange, the other U.S. equity exchanges, and FINRA met alongside industry representatives to determine the appropriate resumption time. Following those discussions, the collective decision was made to retain the 4:00 a.m. ET resumption time, notwithstanding the fact that an earlier resumption time would be possible with the introduction of 23/5 Trading. The proposed rule change codifies this decision into the Exchange’s rules. The Exchange understands that the other

SROs will also be filing similar proposed rule changes. As a result, the market as a whole, including on- and off-exchange, will continue to be subject to harmonized rules for the resumption of trading following a Level 3 Market Decline.

While the SROs had previously decided to tie the resumption time following a Level 3 halt to the earliest SRO opening time, the upcoming transition to 23/5 Trading raises various concerns that warrant a change from the current approach.

First, the Exchange notes that the MWCB mechanism was designed to provide a cooling-off period where market participants would be provided with additional time to evaluate the market events that led to the decline before determining how to position their trading activity for the next day. With the introduction of 23/5 Trading and the start of overnight trading on some SROs at 9:00 p.m. ET, however, this cooling-off period could be materially shortened, reducing one of the key benefits that the MWCB mechanism was designed to provide in the first place. Rather than shorten the cooling-off period and risk this benefit, the Exchange believes the market would be better served by a change to the length of the associated trading halt that mirrors current market practice. Under the proposed rule, as is the case today, after a Level 3 halt, all SROs would reopen trading at 4:00 a.m. ET or later, and no SRO would offer an overnight trading session starting on the day of a Level 3 halt.

Second, overnight trading may be subject to different liquidity and participation considerations than the current pre-market sessions that start at or after 4:00 a.m. ET. Notably, while retail investors have expressed interest in overnight trading, the Exchange expects that institutional investors will take more time to transition to a round-the-clock model. However, such institutional participation may be of heightened importance following a Level 3 halt, as these investors are likely to have views on the underlying market events that led to the Level 3 Market Decline in the first place. The Exchange is concerned that opening during hours that such participants do not normally trade may impact the quality of price discovery at a time of significant market volatility. Waiting until 4:00 a.m. ET to resume trading would facilitate broader participation and therefore price discovery.

Finally, the Exchange notes that the Commission recently approved an amendment to the Plan to Address Extraordinary Market Volatility (“LULD

Plan”) that would establish new price protections from 9:00 p.m. ET to 4:00 a.m. ET.⁸ While these price bands would help to assure a fair and orderly market during normal market conditions, it is possible that they would instead prevent normal price discovery following a Level 3 Market Decline. Rather than allowing trading to resume with such price bands in effect, which would represent a change from the current trading reopening following a Level 3 Market Decline, the Exchange believes that requiring SROs to wait until 4:00 a.m. ET or later to resume trading would ensure that price discovery can occur unimpeded during pre-market trading, as it does today, which may further inform prices going into the opening auction and regular market hours trading following a Level 3 halt.

Given the factors discussed above, the Exchange believes that trading in all securities on the Exchange should not resume before 4:00 a.m. ET on the trading day after a Level 3 halt. This decision, which the Exchange understands will also be reflected in the rules of the other SROs, would promote a fair and orderly market at a time of significant market volatility, and thereby protect investors and the public interest. In addition, while the actual Level 3 resumption time would not be changing in practice—as proposed, the current resumption time and future resumption time would both be 4:00 a.m. ET at the earliest—the Exchange believes that it is appropriate to amend its rules to ensure that its rules reflect the upcoming changes due to 23/5 Trading. Without this change, market participants may mistakenly believe that the Exchange intends for trading to reopen on overnight trading exchanges at 9:00 p.m. ET following a Level 3 halt. The proposed rule change would therefore facilitate operational transparency while providing for a fair and orderly market.

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 because the proposal would ensure the continued, uninterrupted operation of a consistent mechanism to halt trading across U.S.

⁸ See Securities Exchange Act Release No. 106042 (August 5, 2026), 91 FR 51515 (August 10, 2026) (Order Granting Approval of the Twenty-Seventh Amendment to the National Market System Plan to Address Extraordinary Market Volatility to Establish Temporary Price Band Protections in Overnight Trading).

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

securities markets. Further, the Exchange understands that the other SROs intend to file proposed rule changes to ensure a consistent resumption time at 4:00 a.m. or later ET across markets. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days 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)(iii) of the Act⁹ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁰

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 (<https://www.sec.gov/rules/sro.shtml>); or

- Send an email to rule-comments@sec.gov. Please include file number SR-PEARL-2026-39 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. All submissions should refer to file number SR-PEARL-2026-39. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the filing will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-PEARL-2026-39 and should be submitted on or before October 9, 2026.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2026-19120 Filed 9-17-26; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-106356; File No. SR-NYSE-2026-41]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 7.18 Regarding Trading Halts

September 15, 2026.

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 September 1, 2026, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared

by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 7.18 ("Trading Halts") to set forth specific requirements for halting and resuming trading in a security that is subject to certain corporate actions. The proposed rule change is available on the Exchange's website at www.nyse.com and at the principal office of the Exchange.

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

New York Stock Exchange LLC ("NYSE" or the "Exchange") proposes to amend Rule 7.18 ("Trading Halts") to set forth specific requirements for halting and resuming trading in a security that is subject to certain corporate actions.

In conjunction with the industry's plans for the introduction of trading 23 hours a day, 5 days a week ("23/5 Trading"), the Exchange's affiliate exchange, NYSE Arca, Inc. ("NYSE Arca"), filed with the Commission a proposal to amend its rules to set forth specific requirements for halting trading in a security for which the Exchange is the Primary Listing Market that is subject to certain issuer-related corporate actions and for resuming trading in that security using a Trading Halt Auction. NYSE Arca explained that the proposal would expand on the framework already in place with respect to its authority to declare a mandatory regulatory halt in advance of a reverse stock split, thereby providing greater transparency and clarity with respect to the situations in which trading certain

⁹ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁰ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

¹¹ 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.

securities subject to issuer-related corporate actions will be halted and the process through which that halt will be implemented and terminated. On July 8, 2026, the Commission published a notice of filing and immediate effectiveness of NYSE Arca's proposal.⁴

The Exchange now proposes to make the same changes to its own rules. The Exchange understands that the other Primary Listing Markets also plan to implement substantially identical versions of this rule to ensure consistent treatment of corporate actions across the market.

Background

In 2024, the Commission noticed for immediate effectiveness the Exchange's filing establishing the Exchange's authority to declare a mandatory regulatory halt in a security for which the Exchange is the Primary Listing Market when that security is subject to a reverse stock split.⁵ Specifically, the Exchange proposed halting such a security before the end of post-market trading on other markets on the day immediately before the effective date of a reverse stock split, with trading to resume with a Trading Halt Auction after 9:30 a.m. Eastern Time ("ET") on the next trading day, at the start of the Exchange's Core Trading Session.⁶ The Exchange noted that because it processes reverse stock splits overnight, having the security reopen for trading on other markets at 4:00 a.m. ET raised the "potential for errors resulting in a material effect on the market resulting from market participants' processing of the reverse stock split, including incorrect adjustment or entry of orders."⁷ The Exchange explained that this concern could be rectified by imposing a trading halt, "which would

prohibit pre-market trading immediately after a reverse stock split" and open trading in such securities with a Trading Halt Auction after 9:30 a.m., at the start of the Exchange's Core Trading Session.⁸ The Exchange further noted that imposing such a trading halt and deferring the opening of the security until after 9:30 a.m. ET would "allow the Exchange and market participants to better detect any errors or problems with orders for the security resulting from the reverse stock split before trading in the security begins and thereby avoid any material effect on the market."⁹ In approving the substantively identical proposal of another market, the Commission noted that the proposal was "designed to promote fair and orderly trading on the Exchange by reducing the potential for order entry or other system-related errors associated with a reverse stock split in a security for which [the Exchange] is the Primary Listing Market."¹⁰

With the launch of 23/5 Trading later this year, the concerns that led the Exchange to adopt a regulatory halt framework for reverse stock splits will likewise arise with respect to a broader set of corporate actions. Although the Exchange does not currently plan to extend its own trading hours, the Exchange is a Primary Listing Market whose listed securities may trade on any venue, including NYSE Arca and other exchanges that opt to offer 23/5 Trading. Under the current market structure, the Exchange processes corporate action-related changes and updates for its listed securities during overnight hours. Other market participants, including broker-dealers, likewise use that overnight period to process corporate action-related information and adjust quotes, orders, and related instructions accordingly.

Under 23/5 Trading, however, trading in the Exchange's listed securities will resume on other markets at 9:00 p.m., only one hour after the close of trading at 8:00 p.m. Consequently, there will no longer be a substantial non-trading window during which the Exchange and market participants can process such corporate actions without potentially impacting overnight trading on other markets. These corporate actions require coordinated updates across Exchange

and market-participant systems—including adjustments to orders, quotes, and related instructions—to ensure orderly trading and accurate pricing and execution in the affected security. With only a one-hour pause between trading days, neither the Exchange nor other market participants would have sufficient time to process and incorporate corporate action-related information—such as adjustments to systems, orders, quotes, and related instructions—without the risk that trading could occur in the affected security based on incomplete or inconsistent information. In short, the continued trading of securities undergoing such corporate actions could potentially result in price dislocations, investor confusion, erroneous executions, and general operational risk.

To address these concerns, the Exchange proposes to implement substantially the same changes that the Commission recently noticed for immediate effectiveness on NYSE Arca. The Exchange proposes to build on the framework established under Rule 7.18 for reverse stock splits by extending that rule's mandatory regulatory halt requirement to additional corporate actions that, much like reverse stock splits, require a clearly defined and transparent pause in trading to permit coordinated processing. As proposed, under 23/5 Trading, if a security is affected by any of the corporate actions enumerated in the proposal, the Exchange would implement a mandatory regulatory halt¹¹ in that security before the start of overnight trading on other markets at 9:00 p.m. ET, and trading would resume with a Trading Halt Auction after 9:30 a.m. ET. The Exchange believes these changes would provide important operational safeguards by ensuring that both the Exchange and market participants have adequate time to process such corporate actions in a nearly continuous trading environment, thereby preserving a protection that has historically been implicit in a market structure with limited trading hours.

Proposed Rule Change

Implicit in Rule 7.18 is the recognition that certain corporate actions—such as reverse stock splits—require a clearly defined and transparent pause in trading to permit their coordinated processing and thereby avoid the risks associated with concurrent trading in the affected

⁴ See Securities Exchange Release No. 105862 (July 8, 2026), 91 FR 42999 (July 13, 2026) (SR-NYSEARCA-2026-71) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rule 7.18—E Regarding Regulatory Halts for Corporate Actions and Issuer-Related Events).

⁵ See Securities Exchange Act Release No. 99974 (April 17, 2024), 89 FR 30415 (April 23, 2024) (SR-NYSE-2024-22) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rule 123D) ("Reverse Stock Split Proposal").

⁶ The Exchange noted in its filing that its affiliates NYSE American LLC and NYSE Arca, Inc. had filed similar rule changes proposing to re-open a security subject to a reverse stock split trading halt with a Trading Halt Auction at 9:00 a.m., during those exchanges' Early Trading Sessions. The Exchange explained that because it does not have an early trading session for securities for which it is the Primary Listing Market, it instead proposed that a security for which the Exchange is the Primary Listing Market that is subject to a reverse stock split trading halt would re-open with a Trading Halt Auction after 9:30 a.m., at the start of the Exchange's Core Trading Session. See Reverse Stock Split Proposal, *supra* note 5, at 30416 n.10.

⁷ *Id.*, 89 FR at 30417.

⁸ *Id.*, 89 FR at 30416.

⁹ *Id.*

¹⁰ See Securities Exchange Act Release No. 98878 (November 7, 2023), 88 FR 78081 (November 14, 2023) SR-NASDAQ-2023-036) (Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of Proposed Change, as Modified by Amendment No. 1, Relating to Nasdaq Rules 4120 and 4753).

¹¹ Notification of the declaration and termination of the proposed regulatory halt would be provided in accordance with Rule 7.18.

security while that processing is underway. The same principle applies to the categories of corporate actions addressed in this proposal, particularly in the context of nearly continuous trading.

In the context of 23/5 Trading, the Exchange has determined—based on discussions both internal and with industry participants, including the other Primary Listing Markets—that, similar to reverse stock splits, certain other corporate actions require a clearly defined and transparent pause in trading to facilitate their coordinated processing by the Exchange and other market participants before orderly trading may resume in the affected security.

Specifically, the Exchange believes that the following issuer-related corporate actions are analogous to reverse stock splits with respect to processing requirements and thus warrant analogous treatment with respect to their categorization and regulatory response: (1) changes in trading symbol; (2) changes in CUSIP number; (3) dividends equal to at least 25% of the Official Closing Price;¹² (4) stock splits (including forward and reverse stock splits); (5) De-SPAC transactions; (6) spin-off transactions; (7) security-type changes; (8) mergers or similar mandatory exchanges of shares; and (9) any other corporate action or issuer-related event not enumerated above, for which the Exchange determines that a regulatory halt is appropriate for the maintenance of fair and orderly markets, the protection of investors, or otherwise in the public interest, as described below. Like reverse stock splits, these corporate actions all involve non-discretionary changes to core security characteristics that require synchronized updates across Exchange and market-participant systems.

Accordingly, the Exchange proposes to amend Rule 7.18 and make certain conforming changes to incorporate such corporate actions into the regulatory framework established for corporate actions consisting of reverse stock splits, as follows.

The Exchange proposes to amend Rule 7.18(b)(1)(A)(iii) to extend the current reverse stock split regulatory halt framework to the categories of other corporate actions discussed above that, in addition to reverse stock splits, would be subject to the mandatory regulatory requirements of that rule. The Exchange accordingly proposes to delete the current text of Rule 7.18(b)(1)(A)(iii)

and replace it with revised text stating that the Exchange will declare a Regulatory Halt:

for a security for which the Exchange is the Primary Listing Market that is the subject of an issuer corporate action or other issuer-related event referenced below after the end of post-market trading on other markets and before 9:00 p.m. ET on the day immediately preceding the market effective date of such issuer corporate action or issuer-related event (“Corporate Action Halt”). A security subject to an issuer corporate action or issuer event-related Regulatory Halt pursuant to this rule will resume trading with a Trading Halt Auction after 9:30 a.m. ET on the market effective date of such corporate action or issuer-related event.

The Exchange proposes to further amend Rule 7.18(b)(1)(A)(iii) to provide that “[f]or purposes of this rule, the following shall be deemed corporate actions or issuer-related events subject to the mandatory Regulatory Halt provisions of this rule,” followed by the nine categories of corporate actions discussed above that would be subject to a mandatory regulatory halt under that provision. As proposed, the nine categories of enumerated corporate actions subject to a mandatory regulatory halt would consist of the following corporate actions: (1) trading symbol changes;¹³ (2) changes in CUSIP;¹⁴ (3) dividends equal to at least 25% of the Official Closing Price;¹⁵ (4) forward (and reverse) stock splits;¹⁶ (5)

¹³ As proposed, Rule 7.18(b)(1)(A)(iii)(1) would define changes to any “Trading Symbol” as “a change in the issuer’s trading symbol.”

¹⁴ As proposed, Rule 7.18(b)(1)(A)(iii)(2) would define changes in “CUSIP” as “[a] change in the issuer’s Committee on Uniform Securities Identification Procedures (“CUSIP”).”

¹⁵ As proposed, Rule 7.18(b)(1)(A)(iii)(3) would define “Dividend” transactions as “[s]tock dividends, whether payable in cash, stock, or another security of the issuer (or a subsidiary or other affiliate of the issuer), or any combination thereof, other than stock splits or similar adjustments described in paragraph (4), where the Exchange determines that such dividend has an aggregate value per share that is equal to at least 25% of the Official Closing Price of the affected security on the date immediately preceding the ex-date of such dividend; provided, however, that if no such Official Closing Price is available, the Exchange shall use the most recent available Official Closing Price for such shares (or other securities).”

¹⁶ As proposed, Rule 7.18(b)(1)(A)(iii)(4) would define “Forward, Reverse Stock Splits” as “[a]ny stock split or similar adjustment that affects the number of outstanding shares of an issuer or changes the relative equity ownership of holders of such shares, including any forward or reverse stock split, subdivision, reclassification, or combination of shares, or any similar transaction that has the effect of adjusting the number of outstanding shares or the relative equity ownership of holders, whether effected pursuant to a fixed or variable exchange ratio or otherwise, and whether occurring as a stand-alone action or in conjunction with any other corporate action or issuer-related event.”

de-SPAC transactions;¹⁷ (6) spin-off transactions;¹⁸ (7) security-type changes;¹⁹ (8) mergers/mandatory exchanges;²⁰ and (9) other corporate actions or issuer-related events not specifically enumerated in (1)–(8) above as more particularly described below.²¹

Specifically, proposed Rule 7.18(b)(1)(A)(iii)(9) would require the Exchange to declare a regulatory halt for any other corporate action or issuer-related event not enumerated in (1)–(8) above for which the Exchange determines, based on the totality of the circumstances and any information available to it, including without limitation information obtained from the issuer, that a regulatory halt is necessary or appropriate for the maintenance of fair and orderly markets, the protection of investors, or otherwise in the public interest.

This residual provision is designed to capture issuer-related corporate actions that, while not enumerated in Rule 7.18(b)(1)(A)(iii)(1)–(8), raise operational or market-integrity concerns comparable to those actions. Once the Exchange determines that such a corporate action warrants a Regulatory Halt based on its application of the

¹⁷ As proposed, Rule 7.18(b)(1)(A)(iii)(5) would define a “De-SPAC” transaction as “[a]ny De-SPAC transaction, as that term is defined in Item 1601(a) of Regulation S-K.”

¹⁸ As proposed, Rule 7.18(b)(1)(A)(iii)(6) would define a “Spin-off” transactions as “[a]ny transaction in which an issuer distributes to its security holders, on a pro rata basis, (i) equity securities of a subsidiary or other business that is separated into a new or existing standalone issuer; or (ii) any different class of securities.”

¹⁹ As proposed, Rule 7.18(b)(1)(A)(iii)(7) would define a “Security Type Change” as “[a]ny change in the form, type, class, or designation of a listed security, including, without limitation, (i) American Depositary Receipts or American Depositary Shares (“ADR”/“ADS”) to ordinary shares (and ordinary shares to ADR/ADS); (ii) conversions between ordinary shares and common stock (in either direction); and (iii) similar transactions.”

²⁰ As proposed, Rule 7.18(b)(1)(A)(iii)(8) would define a “Merger/Mandatory Exchange” as “[a]ny merger, consolidation, statutory share exchange, or similar business combination or corporate action that results in the affected security being mandatorily exchanged, converted, redeemed, or cancelled for cash, securities, or other consideration (including an exchange into securities of a successor issuer); provided, however, that this paragraph (8) does not include transactions that solely effect a change in the issuer’s (company) name without a mandatory exchange of the affected security.”

²¹ As proposed, Rule 7.18(b)(1)(A)(iii)(9) would define any “Other Corporate Action or Issuer-Related Event” as “[a]ny other corporate action or issuer-related event not enumerated in (1)–(8) above for which the Exchange determines, based on the totality of the circumstances and any information available to it, including without limitation information obtained from the issuer, that a Regulatory Halt is necessary or appropriate for the maintenance of fair and orderly markets, the protection of investors, or otherwise in the public interest.”

¹² The term “Official Closing Price” is defined in Rule 1.1(u).

standards in Rule 7.18(b)(1)(A)(iii)(9), implementation of the regulatory halt would be required.²² Accordingly, the provision is intended to promote consistent regulatory treatment across comparable corporate actions and to preserve transparency and uniformity in the application of the proposed framework in a 23/5 Trading environment.

Timing of Corporate Action Regulatory Halts

The Exchange proposes that under 23/5 Trading, the mandatory regulatory halts described above in proposed Rule 7.18(b)(1)(A)(iii) would be implemented after the conclusion of post-market trading on other markets and before the start of overnight trading on other markets at 9:00 p.m. ET. This timing differs from the Exchange's current process for reverse stock split regulatory halts, pursuant to which the Exchange implements the mandatory regulatory halt at 7:50 p.m. ET, before the end of post-market trading on other markets, on the day immediately before the reverse split becomes effective. That approach has been feasible in the reverse stock split context, but this proposal would extend the mandatory regulatory halt framework beyond reverse stock splits to a broader set of corporate actions that, although differing in form, share the need for coordinated systems and reference-data updates before trading may resume in an orderly manner. Because some of those actions may involve entirely new symbols or CUSIPs that would not yet exist at 7:50 p.m. ET on the prior trading day, the Exchange does not believe that the current reverse stock split timing can practicably be applied across the full set of covered corporate actions. The Exchange therefore believes it is reasonable, in the context of 23/5 Trading, to adopt a single, uniform implementation time for all halts under proposed Rule 7.18(b)(1)(A)(iii)—after the end of post-market trading on other markets and before overnight trading begins on other markets at 9:00 p.m. ET—which would facilitate consistent treatment of covered corporate actions and enable the halts to be implemented through an automated process.²³ This

timing would apply to each of the corporate actions addressed in this filing, as well as to the Exchange's existing reverse stock split regulatory halt. The proposed change to the timing for the implementation of the reverse stock split regulatory halt is therefore conforming in nature, as it is intended only to align that halt with the trading session structure under 23/5 Trading.

Resumption of Trading After Corporate Action-Related Regulatory Halts

The Exchange proposes to amend Rule 7.18(b)(5)(B)(iii) to provide that under 23/5 Trading, trading in a security halted pursuant to proposed Rule 7.18(b)(1)(A)(iii) would resume “with a Trading Halt Auction after 9:30 a.m. ET on the market effective date of such corporate action or issuer-related event.”²⁴ This is identical to the Exchange's current process with respect to reverse stock split regulatory halts, where the Exchange resumes trading with a Trading Halt Auction after 9:30 a.m. ET on the effective date of the reverse stock split. This proposal is designed to promote uniformity and transparency with respect to the resumption of trading in securities subject to a corporate actions-related regulatory halt under proposed Rule 7.18(b)(1)(A)(iii).

In sum, the corporate actions addressed in this proposal raise operational and market integrity concerns in a 23/5 Trading environment that mirror the concerns addressed by the Commission in approving the Exchange's Reverse Stock Split Proposal. Under 23/5 Trading, the Exchange will no longer have a substantial non-trading window during which it and other market participants can process these corporate actions before trading resumes. With only one hour between trading days, neither the

notification, market notice, and public dissemination mechanisms. Under the Exchange's existing listing and related rules and/or procedures, listed issuers are required in various circumstances to provide the Exchange advance notice of corporate actions and to publicly disclose such events before they become effective. In addition, the Exchange's established corporate action processing and market notification procedures generally result in the Exchange receiving notice of, and disseminating information concerning, other covered corporate actions sufficiently in advance of their effectiveness to support the orderly implementation of the proposed halt process. Accordingly, the Exchange believes that ATSS and other market participants would have adequate advance awareness of the types of corporate actions addressed by this proposal to make informed business decisions with respect to the affected securities, and that proposed Rule 7.18(b)(1)(A)(iii) thus provides a transparent and appropriate mechanism for addressing such corporate actions in a 23/5 Trading environment.

²⁴ See proposed Rule 7.18(b)(5)(B)(iii).

Exchange nor other market participants would have sufficient time to process and incorporate corporate action-related information, resulting in a risk of price dislocations, investor confusion, erroneous executions, and broader operational issues. The Exchange believes that extending its reverse stock split regulatory framework to the additional corporate actions described herein would appropriately preserve, in a 23/5 Trading environment, the safeguard implicit in the current market structure—specifically, the overnight pause in trading that allows for coordinated processing and related systems and reference-data updates. Accordingly, the proposal would promote fair and orderly trading, mitigate operational risk, and help ensure that trading resumes only after those updates have been completed.

Implementation

The Exchange understands that the other Primary Listing Exchanges plan to implement substantially identical versions of this rule to ensure consistent treatment of corporate actions across the market. The Exchange proposes that the changes in this proposal and in the other Primary Listing Exchanges' similar filings would become operative at the commencement of 23/5 Trading.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²⁵ in general, and furthers the objectives of Section 6(b)(5) of the Act,²⁶ in particular, 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. The Exchange believes that the proposed rules will provide greater transparency and clarity with respect to the situations in which trading will be halted due to certain corporate actions and the process through which that halt will be implemented and terminated, as discussed below.

The Exchange believes that extending the reverse stock split regulatory halt framework to the additional, analogous corporate actions addressed in this proposal would promote free and open trade, protect investors, and serve the public interest by helping to ensure fair and orderly markets. Specifically, the proposal would preserve and apply an established, transparent framework for pausing and resuming trading in

²² Such determination would be made by the Exchange's senior trading and regulatory officials in advance of the corporate action effective date.

²³ See Exchange proposed Rule 7.18(b)(1)(A)(iii). Shifting the implementation time for such regulatory halts from 7:50 p.m. to before 9:00 p.m. would not have a material effect on market participants. The Exchange notes that market participants, including alternative trading systems (“ATSS”), would have advance notice of the types of issuer corporate actions addressed in this proposal through the Exchange's existing issuer

²⁵ 15 U.S.C. 78f(b).

²⁶ 15 U.S.C. 78f(b)(5).

securities subject to reverse stock splits to certain corporate actions with analogous processing requirements, so that trading in an affected security does not occur before the corporate action has been processed and the related systems and reference-data updates have been completed and applied across the market.

With respect to the specific categories of corporate actions addressed in this proposal, the Exchange believes that it is reasonable and appropriate to extend the regulatory halt framework applicable to reverse stock splits to certain categories of corporate actions with analogous processing requirements, as more specifically described above. Like reverse stock splits, these corporate actions all involve non-discretionary changes to core security characteristics that require synchronized updates across Exchange and market-participant systems.

Under the current market structure, an overnight pause in trading has historically provided a defined non-trading window during which the Exchange and other market participants have sufficient time to process such corporate actions in an orderly and coordinated manner prior to the resumption of trading. But in the 23/5 Trading environment, with only one hour of non-trading time between trading days, there is a substantial chance that trading in an impacted security could occur based on incomplete, inconsistent, or partially updated information, giving rise to pricing anomalies, investor confusion, erroneous executions, and heightened operational risk. The Exchange believes the proposed approach promotes fair and orderly markets by helping to ensure that trading resumes only once systems and reference data concerning these corporate actions have been fully and consistently updated across the marketplace.

With respect to the mandatory regulatory halts specifically enumerated in proposed Rule 7.18(b)(1)(A)(iii)(1)–(8), if the corporate action falls within the categories enumerated in the rule, the Exchange will not have discretion about whether to declare a trading halt in the affected security.

In addition, proposed Rule 7.18(b)(1)(A)(iii)(9) is intended to operate as a residual provision covering issuer-related corporate actions not enumerated in Rule 7.18(b)(1)(A)(iii)(1)–(8) that nonetheless raise operational or market-integrity concerns comparable to those presented by the enumerated actions. Under that provision, when the Exchange determines, based on the totality of the circumstances and the

information available to it, including information obtained from the issuer, that it is necessary or appropriate for the maintenance of fair and orderly markets, the protection of investors, or otherwise in the public interest, it would be required to declare a regulatory halt in that security. Once the Exchange makes that determination, the regulatory halt would be mandatory, thereby avoiding ad hoc treatment once the applicable standard has been met. In that respect, proposed Rule 7.18(b)(1)(A)(iii)(9) serves as a narrow residual mechanism designed to promote consistent regulatory treatment across comparable corporate actions and to preserve transparency and uniformity in the application of proposed Rule 7.18(b)(1)(A)(iii) in a 23/5 Trading environment by requiring the Exchange to declare a regulatory halt in such cases. The Exchange therefore believes that it is reasonable and appropriate to extend its authority to declare a regulatory halt in this instance.

In all cases under proposed Rule 7.18(b)(1)(A)(iii), a mandatory regulatory halt in the affected security would be implemented after the conclusion of post-market trading on other markets and before the start of overnight trading on other markets at 9:00 p.m. ET on the date immediately preceding the market-effective date of the corporate action.

The Exchange also believes it is reasonable and appropriate to use a Trading Halt Auction under Rule 7.35 to re-open trading in a security that is subject to a regulatory halt pursuant to this proposal because it is consistent with the process that the Exchange currently uses to re-open a security after a reverse stock split regulatory halt, and the operational complexity and processing demands associated with such corporate actions are comparable to those involved regarding reverse stock splits. Furthermore, using a Trading Halt Auction to re-open trading after the regulatory halts addressed in this proposal is consistent with the process that is typically used by the Exchange when re-opening a security that has been halted under Rule 7.18. Applying a uniform, previously approved framework enhances transparency and predictability for issuers, investors, and market participants.

The Exchange's proposal to make conforming changes to its existing reverse stock split regulatory halt structure to harmonize the halt time with the time proposed in this filing is reasonable and would promote transparency and predictability for issuers, investors, and market

participants. As described above, the current practice of implementing a mandatory regulatory halt for a security undergoing a reverse stock split at 7:50 p.m. ET has been feasible in the reverse stock split context, but this proposal would extend the mandatory regulatory halt framework beyond reverse stock splits to a broader set of corporate actions that, although differing in form, share the need for coordinated systems and reference-data updates before trading may resume in an orderly manner. Because some of those actions may involve entirely new symbols or CUSIPs that would not yet exist at 7:50 p.m. ET on the prior trading day, the Exchange does not believe that the current reverse stock split timing can practicably be applied across the full set of covered corporate actions. The Exchange therefore believes it is reasonable, in the context of 23/5 Trading, to adopt a single, uniform implementation time for all halts under proposed Rule 7.18(b)(1)(A)(iii)—after the end of post-market trading on other markets and before overnight trading begins on other markets at 9:00 p.m. ET—which would facilitate consistent treatment of comparable corporate actions, enhance transparency and predictability for issuers, investors, and market participants, and support the orderly and automated implementation of such halts. The Exchange also believes that the proposal is consistent with Section 6(b)(5) of the Act because the Exchange's existing issuer notification, market notice, and public dissemination mechanisms generally provide market participants with advance awareness of the types of corporate actions addressed herein, thereby supporting the orderly implementation of the proposed halt process and helping to protect investors and the public interest.

The Exchange believes that resuming trading in the corporate action-impacted securities addressed in this proposal with a Trading Halt Auction after 9:30 a.m. ET, just as it currently does for reverse stock split halts, would remove impediments to and perfect the mechanism of a free and open market and a national market system by creating uniformity and transparency with respect to the re-opening times for securities subject to a corporate actions-related regulatory halt under proposed Rule 7.18(b)(1)(A)(iii).

The Exchange notes that these timing harmonization changes are purely conforming and that, by aligning the reverse stock split provisions with the corporate action-related halts described in this filing, the proposal promotes a consistent and harmonized rule

structure, enhances transparency and predictability for issuers, investors, and market participants, and reduces the potential for confusion.

Overall, establishing mandatory trading halts for securities that are subject to the corporate actions addressed in this filing and resuming trading thereafter promotes fair and orderly markets and the protection of investors, because it allows the Exchange to protect the broader interests of the national market system and addresses potential concerns that system errors may affect immediate trading in those securities. The Exchange believes that with the advent of 23/5 Trading, the proposed rules will help the Exchange reduce the potential for errors resulting in a material effect on the market resulting from the challenge of processing such corporate actions with only a one-hour non-trading window between trading days. As discussed above, in a 23/5 Trading environment, overnight trading on other markets will begin only one hour after trading closes on the Exchange, meaning that there will no longer be a substantial overnight period during which the Exchange can process corporate actions of the type addressed in this proposal. By extending the existing reverse stock split regulatory halt framework to those categories of corporate actions, the proposal is designed to preserve the safeguards currently afforded by that overnight pause.

For these reasons, the Exchange believes that the proposed rule change is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system by mitigating operational and market integrity risks that would otherwise arise in a nearly continuous trading environment. By helping to ensure that trading resumes only after corporate action processing has been completed in an orderly and coordinated manner, the proposed rule change promotes just and equitable principles of trade and protects investors and the public interest, consistent with Sections 6(b) and 6(b)(5) of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes the proposal will not impose a burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed rule change is designed to protect investors and facilitate a fair and orderly market, which are both important purposes of the Act. To the extent that there is any impact on

intermarket competition, it is incidental to these objectives.

Rather, the proposed changes will promote competition by ensuring that trading in corporate action-affected securities resumes only when the Exchange has processed corporate actions in a coordinated manner across Exchange and market participants' systems, consistent with its obligations as a Primary Listing Market, thereby avoiding concurrent trading and potential confusion with respect to the affected securities while such corporate action processing is underway. In addition, the Exchange believes that the proposal does not impose any burden on competition because it applies equally to all issuers and market participants. The proposal builds on an established, uniform, and transparent framework governing the timing of trading halts and resumptions in trading in connection with certain corporate actions and is designed to address operational and market-integrity concerns, rather than competitive considerations. In substance, the proposal preserves an operational safeguard implicit in the current market structure and adapts that safeguard to a nearly continuous trading environment by extending the well-established reverse stock split framework to analogous corporate actions. By helping to ensure that trading resumes only after systems and reference data have been updated in a coordinated manner, the proposal promotes fair and orderly markets and enhances, rather than burdens, competition.

The Exchange does not believe that the proposed rule change imposes a burden on intra-market competition because the provisions apply to all market participants and issuers equally. In addition, information regarding the halting and resumption of trading will be disseminated using several freely accessible sources to ensure the widespread availability of that information.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become

operative for 30 days after 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)(iii) of the Act²⁷ and subparagraph (f)(6) of Rule 19b-4 thereunder.²⁸

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)²⁹ 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NYSE-2026-41 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.
- All submissions should refer to file number SR-NYSE-2026-41. 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 (<https://www.sec.gov/rules/sro.shtml>). Copies of the filing will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should

²⁷ 15 U.S.C. 78s(b)(3)(A)(iii).

²⁸ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

²⁹ 15 U.S.C. 78s(b)(2)(B).

submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NYSE-2026-41 and should be submitted on or before October 9, 2026.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁰

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2026-19131 Filed 9-17-26; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-106384; File No. SR-CboeEDGX-2026-057]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rules 11.1, 11.6, 11.7, and 11.8 To Add a New Time-in-Force Designation Known as “Regular ‘til Post Market”

September 15, 2026.

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 September 9, 2026, Cboe EDGX Exchange, Inc. (the “Exchange” or “EDGX”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (“EDGX” or the “Exchange”) proposes to amend Exchange Rules 11.1, 11.6, 11.7, and 11.8 to add a new Time-in-Force (“TIF”) designation known as “Regular ‘til Post Market” (“RTP”). The Exchange also proposes to amend Rule 11.8(c) and Rule 11.8(d) to include references to “Regular Hours Only” (“RHO”) where it has been erroneously excluded from certain rule text. The Exchange has designated the proposed rule change as noncontroversial and provided the

Commission with the notice required by Rule 19b-4(f)(6)(iii) under the Act.³ The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Commission’s website (<https://www.sec.gov/rules/sro.shtml>), the Exchange’s website (https://www.cboe.com/us/equities/regulation/rule_filings/edgx/), and at the principal office of the Exchange.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 11.6(q) (“Time-in-Force”) to add a new TIF designation known as “Regular ‘til Post Market” or “RTP.” As proposed, an RTP order would be a limit order designated for execution during both Regular Trading Hours⁴ and the Post-Closing Session,⁵ with any unexecuted portion expiring at the end of the Post-Closing Session. In connection with the introduction of the RTP TIF, the Exchange also proposes conforming amendments to Rules 11.1, 11.7, and 11.8 to reflect the availability of the RTP TIF across the Exchange’s order handling, order type, and opening process rules.

Currently, Rule 11.6(q) provides Users⁶ with the following TIF options

³ 17 CFR 240.19b-4(f)(6)(iii).

⁴ See Exchange Rule 1.5(y). The term “Regular Trading Hours” means the time between 9:30 a.m. and 4:00 p.m. Eastern Time.

⁵ See Exchange Rule 1.5(r). The Post-Closing Session on EDGX means the time between 4:00 p.m. and 8:00 p.m. Eastern Time.

⁶ See Exchange Rule 1.5(ee). “User” is defined as “any Member or Sponsored Participant who is authorized to obtain access to the System pursuant to Rule 11.3.” The “System” is “the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing away.” See Exchange Rule 1.5(cc). The term “Member” means any registered broker or dealer that has been admitted to

membership in the Exchange. See Exchange Rule 1.5(n).

for order entry.⁷ An “Immediate-or-Cancel” (“IOC”) order⁸ is an instruction the User may attach to an order stating the order is to be executed in whole or in part as soon as such order is received. Any unexecuted portion of an IOC order is cancelled. A “Day” order⁹ is an instruction the User may attach to an order stating that an order to buy or sell which, if not executed, expires at the end of Regular Trading Hours. A “Fill-or-Kill” (“FOK”) order¹⁰ is an instruction the User may attach to an order stating that the order is to be executed in its entirety as soon as it is received and, if not so executed, cancelled. A “Good ‘til Day” (“GTD”) order¹¹ is an instruction the User may attach to an order specifying the time of day at which the order expires. Any unexecuted portion of an order with a TIF instruction of GTD will be cancelled at the expiration of the User’s specified time, which can be no later than the close of the Post-Closing Session. A “Good ‘til Extended Day” (“GTX”) order¹² is an instruction the User may attach to an order to buy or sell which, if not executed, will be cancelled by the close of the Post-Closing Session. A “Regular Hours Only” (“RHO”) order¹³ is an instruction a User may attach to an order designating it for execution only during Regular Trading Hours, which includes the Opening Process and Re-Opening Process¹⁴ following a halt suspension or pause. A “Pre-Opening Session Plus” (“PRE”) order¹⁵ is a limit order designated for execution during the Pre-Opening Session¹⁶ and Regular Trading Hours. Any portion not executed expires at the end of Regular Trading Hours. A “Pre-Opening Session ‘til Extended Day” (“PTX”) order¹⁷ is a limit order designated for execution during the Pre-Opening Session, Regular Trading Hours, and the Post-Closing Session. Any portion not executed expires at the end of the Post-Closing Session. A “Pre-Opening Session ‘til Day” (“PTD”) order¹⁸ is a limit order designated for execution during the Pre-Opening Session, Regular Trading

membership in the Exchange. See Exchange Rule 1.5(n).

⁷ See Exchange Rule 11.6(q).

⁸ See Exchange Rule 11.6(q)(1).

⁹ See Exchange Rule 11.6(q)(2).

¹⁰ See Exchange Rule 11.6(q)(3).

¹¹ See Exchange Rule 11.6(q)(4).

¹² See Exchange Rule 11.6(q)(5).

¹³ See Exchange Rule 11.6(q)(6).

¹⁴ See Exchange Rule 11.7.

¹⁵ See Exchange Rule 11.6(q)(7).

¹⁶ See Exchange Rule 1.5(s). The term “Pre-Opening Session” shall mean the time between 8:00 a.m. and 9:30 a.m. Eastern Time.

¹⁷ See Exchange Rule 11.6(q)(8).

¹⁸ See Exchange Rule 11.6(q)(9).

³⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Hours, and the Post-Closing Session. Any portion not executed will be cancelled at the expiration time assigned to the order, which can be no later than the close of the Post-Closing Session. While EDGX currently offers a wide range of TIF designations, the Exchange does not presently offer a TIF that specifically combines Regular Trading Hours with the Post-Closing Session in a single, dedicated designation.

Against this backdrop, the Exchange proposes to introduce the RTP TIF as a new, dedicated TIF option on EDGX. As proposed, the RTP TIF would permit a User to submit a single limit order that is eligible for execution during Regular Trading Hours and that, if not fully executed during Regular Trading Hours, would remain active and eligible for execution during the Post-Closing Session. Any portion of an RTP order not executed by the end of the Post-Closing Session would expire. An RTP order may be modified or cancelled in accordance with Rule 11.10(e) and order priority will be determined pursuant to Rule 11.9(a), just as is the case for RHO orders currently. The Exchange believes that adding the RTP TIF to its suite of available TIF designations in Rule 11.6(q) would provide Users with a convenient, single-instruction mechanism to participate in both Regular Trading Hours and the Post-Closing Session without the need to submit separate orders for each session.

In connection with the introduction of the RTP TIF, the Exchange also proposes to amend Rule 11.1 (“Hours of Trading and Trading Days”) to add RTP to the list of TIF designations that are subject to restrictions on order entry prior to the applicable Start times.¹⁹ Rule 11.1(a) currently provides that the Exchange will not accept, prior to 4:00 a.m. Eastern Time (or prior to 7:00 a.m. Eastern Time for orders eligible for a 7:00 a.m. Start), among other orders, orders with a Minimum Execution Quantity instruction that also include a Time-in-Force of Regular Hours Only.²⁰ Because an RTP order, like an RHO order, is designed for execution during Regular Trading Hours (and, in the case of RTP, extending into the Post-Closing Session), the Exchange proposes to add RTP to this restriction so that orders with a Minimum Execution Quantity instruction that also include a Time-in-

Force of RTP will also not be accepted prior to 4:00 a.m. Eastern Time (or prior to 7:00 a.m. Eastern Time for orders eligible for a 7:00 a.m. Start). This proposed change is consistent with the treatment of RHO orders and ensures that orders combining the Minimum Execution Quantity condition with the RTP TIF are not entered into the System before the applicable trading sessions for such orders have commenced.

The Exchange also proposes amendments to Rule 11.7 (“Opening Process”) to add RTP alongside RHO throughout that rule’s provisions governing eligibility for and participation in the Opening Process and the Re-Opening Process.²¹ Specifically, the Exchange proposes to amend Rule 11.7(a) to provide that, prior to the beginning of the Regular Session, Users who wish to participate in the Opening Process may enter orders to buy or sell that are designated as either RHO or RTP orders. All existing restrictions applicable to RHO orders in Rules 11.7(a)(1) and 11.7(a)(2) would apply equally to RTP orders, including the restriction prohibiting EDGX Post Only Orders, ISOs, and Minimum Quantity Orders from participating in the Opening Process. The Exchange further proposes to amend Rule 11.7(e)(1)(A) to provide that, consistent with non-RHO orders, non-RTP orders will be eligible for participation in the Re-Opening Process following a Regulatory Halt, subject to the same exceptions and limitations that currently apply to non-RHO orders.²² These amendments ensure that the RTP TIF is integrated consistently into the Exchange’s opening and re-opening processes for securities, on the same terms applicable to RHO orders.

The Exchange also proposes conforming amendments to Rule 11.8 (“Order Types”) to add RTP to the list of permissible TIF instructions for the order types that will support the new designation.²³ Specifically, the Exchange proposes to add RTP as an available TIF instruction for Limit Orders (Rule 11.8(b)), Intermarket Sweep Orders (Rule 11.8(c)), MidPoint Peg Orders (Rule 11.8(d)), Market Maker Peg Orders (Rule 11.8(e)), Supplemental Peg Orders (Rule 11.8(f)), and MidPoint Discretionary Orders (Rule 11.8(g)), in

each case alongside the existing RHO instruction and subject to the same handling, display, and re-pricing provisions applicable to those order types. These conforming amendments ensure that the RTP TIF is available across the Exchange’s order types in a manner consistent with the treatment of the existing RHO TIF. The Exchange also proposes to amend Rule 11.8(c) and Rule 11.8(d) to include RHO where it has been erroneously excluded from certain rule text. Specifically, the Exchange proposes to add RHO as a permissible TIF to Rule 11.8(c)(1), Rule 11.8(c)(3), Rule 11.8(c)(5), Rule 11.8(c)(6), and Rule 11.8(d)(1). The Exchange notes that Rule 11.8(c)(1) and Rule 11.8(d)(1) each includes RHO as a permissible TIF in its opening sentence, but the remainder of Rule 11.8(c) and Rule 11.8(d) does not include RHO even though other similar TIFs (*e.g.*, GTD and GTX, which are both TIFs active during Regular Trading Hours) are permissible. Including RHO in Rules 11.8(c)(1), (3), (5), and (6) and Rule 11.8(d)(1) where other TIFs that apply during Regular Trading Hours are similarly included ensures that ISOs²⁴ and MidPoint Peg Orders containing a TIF of RHO are treated similarly to other TIFs active during Regular Trading Hours.

Comparison to Other Exchange Times-in-Force

The Exchange has also considered how other national securities exchanges handle TIF requirements for order entry when it comes to spanning the regular and after-hours trading sessions. NYSE Arca’s trading rules provide for three trading sessions: the Early Trading Session, the Core Trading Session, and the Late Trading Session.²⁵ Under NYSE Arca’s framework, orders entered into the NYSE Arca Marketplace must include a designation for which trading session(s) the order will remain in effect.²⁶ An order is eligible to participate in the designated trading session(s) only and may remain in effect for one or more consecutive trading sessions on a particular day.²⁷ Orders may be accepted by the exchange that

²⁴ An “ISO” refers to an Intermarket Sweep Order as defined in Regulation NMS Rule 600(a)(47).

²⁵ See NYSE Arca Rule 7.34–E(a). NYSE Arca’s Early Trading Session runs from 4:00 a.m. to 9:30 a.m. Eastern Time, its Core Trading Session runs from 9:30 a.m. to 4:00 p.m. Eastern Time, and its Late Trading Session runs from the conclusion of the Core Trading Session until 8:00 p.m. Eastern Time. Under Rule 7.34–E, all order types and modifiers defined in Rule 7.31–E that are designated for the Early Trading Session are eligible to participate in the Early Trading Session, subject to certain order-type restrictions.

²⁶ See NYSE Arca Rule 7.34–E(b)(1).

²⁷ Id.

¹⁹ See Exchange Rule 11.1(a).

²⁰ See Exchange Rule 11.1(a). Rule 11.1(a) provides in part that the Exchange will not accept, prior to 4:00 a.m. Eastern Time (or prior to 7:00 a.m. Eastern Time for orders eligible for a 7:00 a.m. Start), orders with a Minimum Execution Quantity instruction that also include a Time-in-Force of Regular Hours Only.

²¹ See Exchange Rule 11.7(a). Currently, only orders designated as RHO are eligible to participate in the Opening Process for securities prior to the beginning of Regular Trading Hours.

²² See Exchange Rule 11.7(e)(1)(A). Currently, non-RHO orders are eligible for participation in the Re-Opening Process, but IOC, FOK, EDGX Post Only Orders, and Minimum Quantity Orders will be cancelled or rejected, as applicable, and any ISO that is not IOC or FOK will be converted.

²³ See Exchange Rule 11.8.

are not eligible to trade until a later trading session begins.²⁸ Thus, NYSE Arca offers comparable functionality as proposed by the Exchange as it permits orders to be entered during its Early Trading Session that are eligible to trade in both the Core Trading Session and the Late Trading Session, which is analogous to the Exchange's proposed RTP TIF.

Similarly, Nasdaq's Time-in-Force framework, set forth in Nasdaq Equity Rule 4703(a), provides that the TIF assigned to an order designates the period of time that the Nasdaq Market Center will hold the order for potential execution, with Participants specifying both a time at which the order becomes active and a time at which the order ceases to be active.²⁹ Nasdaq does refer to certain periods of times with explicit TIFs throughout its rulebook, including "IOC," "System Hours Day," "System Hours Expire Time," and "Market Hours Day," however these terms are derived from the specific start and end times appended to orders, similar to the NYSE Arca functionality described supra. As such, Nasdaq offers comparable functionality as proposed by the Exchange but does so through the ability of orders to be entered with specific start and end times as opposed to a specific TIF as proposed by the Exchange.

Implementation

The Exchange plans to implement the proposed rule change during the early fourth quarter of 2026 and will announce the implementation date via Trade Desk Notice.

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) of the Act,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 regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market

and a national market system, and, in general, to protect investors and the public interest.

The Exchange believes the proposed rule change promotes just and equitable principles of trade, removes impediments to and perfects the mechanism of a free and open market and national market system, and protects investors and the public interest by providing Users with a convenient, streamlined mechanism to participate in both Regular Trading Hours and the Post-Closing Session through the submission of a single order. Currently, Users seeking to maintain trading interest across both Regular Trading Hours and the Post-Closing Session must either submit separate orders for each session or utilize broader TIF designations that may include trading sessions not desired by the User. The introduction of the RTP TIF in Rule 11.6 directly addresses this gap by offering a dedicated, purpose-built TIF designation that permits a User to submit a single order eligible for execution during Regular Trading Hours and, if not fully executed, to have such order remain active through the end of the Post-Closing Session.

This streamlined approach promotes just and equitable principles of trade by enabling Users to efficiently express their trading interest across the regular and post-close sessions in a single instruction, thereby reducing operational complexity, administrative burden, and the potential for order entry errors that may arise from the need to manage multiple orders across trading sessions.

Furthermore, the conforming amendments to Rules 11.1, 11.7, and 11.8 ensure that the RTP TIF is fully integrated into the Exchange's existing order handling, order type, and opening process framework in a manner that is consistent with the treatment of the existing limit RHO TIF. By aligning the treatment of RTP orders with RHO limit orders for purposes of participation in the Opening Process and Re-Opening Process, the Exchange ensures that RTP orders are processed in a manner that is transparent, predictable, and fair to all Users. The consistent treatment of RTP orders across the Exchange's rules promotes just and equitable principles of trade by providing Users with certainty as to how their RTP orders will be handled throughout the trading day. Additionally, the proposed amendments to Rules 11.8(c) and Rule 11.8(d) to include RHO as a permissible TIF alongside other TIFs that are active during Regular Trading Hours similarly promotes just and equitable principles

of trade by providing Users with certainty as to how their orders designated as ISO and MidPoint Peg orders will be handled throughout the trading day.

Moreover, the proposed rule change perfects the mechanism of a free and open market and supports a national market system by offering Users functionality that is comparable to that available on other national securities exchanges. As discussed above, NYSE Arca permits orders to be entered during its Early Trading Session that are eligible to trade in both the Core Trading Session and the Late Trading Session, providing comparable functionality to the Exchange's proposed RTP TIF. Similarly, Nasdaq's Time-in-Force framework permits Participants to specify both a time at which an order becomes active and a time at which the order ceases to be active, enabling comparable order entry flexibility. The Exchange's adoption of the RTP TIF ensures that Users have access to trading functionality on EDGX that is consistent with industry practice and supports the efficient operation of the national market system by enabling Users to express their trading interest in a manner that is compatible with the trading mechanisms employed by other market centers.

Finally, the Exchange believes that the proposed rule change is not designed to permit unfair discrimination. The RTP TIF would be available to all Users on an equal and non-discriminatory basis. The use of the RTP TIF is entirely optional, and no User is required to utilize the RTP TIF in connection with order submission to the Exchange. Users who do not wish to use the RTP TIF may continue to submit orders using any of the other TIF designations currently offered by the Exchange, including the Day, RHO, and PTX TIF designations.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The RTP TIF is an optional designation offered by the Exchange, and Users are free to decide whether to use the RTP TIF in connection with order submission to the Exchange. The Exchange believes that the proposed RTP TIF and associated conforming amendments do not impose any intramarket burden on competition as they represent an enhancement to existing functionality that would be available to all Users on an equal and non-discriminatory basis. The proposed

²⁸ Id.

²⁹ See Nasdaq Equity Rule 4703(a). Nasdaq provides a list of acceptable times to activate and deactivate orders, which includes Regular Market Hours (similar to the Exchange's RHO TIF) and the end of System Hours (pursuant to Nasdaq Equity 1, Section 1(a)(9), the end of System Hours is defined as 8:00 p.m. ET, which is identical to the end time of the Exchange's Post-Closing Session).

³⁰ 15 U.S.C. 78f.

³¹ 15 U.S.C. 78f(b)(5).

changes do not alter the way in which orders are prioritized, executed, or otherwise processed on the Exchange; they simply provide Users with an additional TIF option and integrate that option consistently into existing rules.

The Exchange believes that the proposed rule change does not impose any undue burden on intermarket competition. On the contrary, the proposed changes are being made to provide Users with enhanced order entry flexibility that may improve their ability to interact across Regular Trading Hours and the Post-Closing Session that is comparable to order entry flexibility on competitor exchanges, therefore promoting competition between venues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from Members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date 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)(iii) of the Act³² and subparagraph (f)(6) of Rule 19b-4 thereunder.³³

A proposed rule change filed under Rule 19b-4(f)(6)³⁴ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),³⁵ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. The Exchange

states that it is seeking to introduce the proposed functionality early in the fourth quarter of 2026 and waiver of the operative delay will permit the proposed rule changes to become effective immediately. The Exchange further states that waiver of the operative delay will allow the Exchange to offer a TIF that is competitive with TIF offerings of Nasdaq³⁶ and NYSE Arca,³⁷ each of which permits Users to submit orders during the respective Pre-Opening Session that become active during Regular Trading Hours and remain active through the end of the Post-Closing Session. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest as the proposal does not raise any new or novel issues. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change to be operative upon filing.³⁸

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)³⁹ 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeEDGX-2026-057 on the subject line.

³⁶ *Supra* note 29.

³⁷ *Supra* note 25.

³⁸ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

³⁹ 15 U.S.C. 78s(b)(2)(B).

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-2026-057. 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 (<https://www.sec.gov/rules/sro.shtml>). Copies of the filing will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-CboeEDGX-2026-057 and should be submitted on or before October 9, 2026.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁰

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2026-19128 Filed 9-17-26; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-106378; File No. SR-NYSEARCA-2026-94]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 7.12-E Concerning the Resumption of Trading Following a Level 3 Market-Wide Circuit Breaker Halt in Connection With the Expansion of Trading Hours to 23 Hours per Day, 5 Days per Week

September 15, 2026.

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 September 4, 2026, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory

⁴⁰ 17 CFR 200.30-3(a)(12), (59).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³² 15 U.S.C. 78s(b)(3)(A)(iii).

³³ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

³⁴ 17 CFR 240.19b-4(f)(6).

³⁵ 17 CFR 240.19b-4(f)(6)(iii).

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 Rule 7.12-E ("Trading Halts Due to Extraordinary Market Volatility") concerning the resumption of trading following a Level 3 market-wide circuit breaker halt in connection with the extension of exchange trading hours to 23 hours per day, 5 days per week. The proposed rule change is available on the Exchange's website at www.nyse.com and at the principal office of the Exchange.

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 Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") proposes to amend Rule 7.12-E ("Trading Halts Due to Extraordinary Market Volatility") concerning the resumption of trading following a Level 3 market-wide circuit breaker ("MWCB") halt ("Level 3 Market Decline") in connection with the extension of exchange trading hours to 23 hours per day, 5 days per week ("23/5 Trading").³ As discussed herein, the proposed rule change would retain the current 4:00 a.m. ET resumption time following a Level 3 Market Decline, notwithstanding the fact that the Exchange would normally open for overnight trading at 9:00 p.m. ET once the Exchange has implemented 23/5 Trading.

³ See Securities Exchange Act Release No. 105532 (May 21, 2026), 91 FR 31509 (May 27, 2026) (SR-NYSEARCA-2026-53) ("NYSE Arca 23/5 Trading Notice").

Background

The MWCB mechanism under Rule 7.12-E provides an important, automatic mechanism that is invoked to promote stability and investor confidence during a period of significant stress when U.S. securities markets experience extreme broad-based declines. All U.S. equity exchanges and FINRA (collectively, the self-regulatory organizations or "SROs") adopted uniform rules relating to the MWCB mechanism in 2012, which are designed to slow the effects of extreme price movement through coordinated trading halts across U.S. securities markets when severe price declines reach levels that may exhaust market liquidity.⁴ Such market-wide circuit breakers provide for trading halts in all U.S. cash equity and equities options markets during a severe market decline as measured by a single-day decline in the S&P 500 Index during regular trading hours.

Pursuant to Rule 7.12-E, a market-wide trading halt will be triggered if the S&P 500 Index declines in price by specified percentages from the prior day's closing price of that index. Currently, the triggers are set at three circuit breaker thresholds: 7% (Level 1), 13% (Level 2), and 20% (Level 3). A market decline that triggers a Level 1 or Level 2 halt after 9:30 a.m. ET and before 3:25 p.m. ET would halt market-wide trading for 15 minutes, while a similar market decline at or after 3:25 p.m. ET would not halt market-wide trading. If a Level 3 Market Decline occurs at any time during the trading day, trading in all stocks will halt on the Exchange for the remainder of the trading day and will resume the following trading day at 4:00 a.m. ET during the Early Trading Session.

Proposal

The Exchange now proposes to amend Rule 7.12-E to reflect extended trading hours, *i.e.*, 23/5 Trading. Currently, the Exchange offers three trading sessions on each day it is open for trading: (1) the Early Trading Session (4:00 a.m. ET to 9:30 a.m. ET); (2) the Core Trading Session (9:30 a.m. ET to 4:00 p.m. ET); and (3) the Late Trading Session (4:00 p.m. ET to 8:00 p.m.). On December 6, 2026, the Exchange intends to offer a

⁴ See Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR-BATS-2011-038; SR-BYX-2011-025; SR-BX-2011-068; SR-CBOE-2011-087; SR-C2-2011-024; SR-CHX-2011-30; SR-EDGA-2011-31; SR-EDGX-2011-30; SR-FINRA-2011-054; SR-ISE-2011-61; SR-NASDAQ-2011-131; SR-NSX-2011-11; SR-NYSE-2011-48; SR-NYSEAmex-2011-73; SR-NYSEArca-2011-68; SR-Phlx-2011-129) ("MWCB Approval Order").

new Overnight Trading Session, which would be available from 9:00 p.m. ET to 4:00 a.m. ET, significantly increasing the Exchange's hours of operation in response to customer demand.

As discussed, current Rule 7.12-E (b)(ii) provides that if a Level 3 Market Decline occurs at any time during the trading day, trading in all stocks will halt on the Exchange for the remainder of the trading day. Currently, this means the Exchange would re-open at its normal time, *i.e.*, 4:00 ET a.m., following a Level 3 Market Decline. However, the Exchange intends to begin 23/5 Trading on December 6, 2026.⁵

Unless amended, when the Exchange launches overnight trading, the current rule's reference to halting "for the remainder of the trading day"⁶ would require that the Exchange re-open trading at an earlier time, *i.e.*, at 9:00 p.m. ET on the same calendar day, when the Exchange's systems would generally become available for the Overnight Trading Session. The Exchange does not believe that this is an expected or desired result and is therefore amending this rule in coordination with the other SROs such that trading on the Exchange will not resume until 4:00 a.m. ET or later on the following trading day, consistent with current market practice. This proposed rule change is therefore not intended to make any substantive changes to the MWCB mechanism. Rather, the proposed rule change would preserve the current resumption time following a Level 3 Market Decline, notwithstanding changes to the Exchange's rules that would otherwise allow the Exchange to resume trading at 9:00 p.m. ET as it would on any other trading day.

To effect this change, the Exchange proposes to delete the language in Rule 7.12-E(b)(ii) that provides that trading in all stocks will halt on the Exchange "for the remainder of the trading day" if a Level 3 Market Decline occurs at any time during the trading day, and replace it with new language that explicitly provides that trading in all stocks would halt on the Exchange until 4:00 a.m. ET or later on the following trading day.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁷ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁸ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and

⁵ See *supra* note 3.

⁶ See Rule 7.12-E(b)(ii).

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(5).

perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The MWCB mechanism described in Rule 7.12-E is an important, automatic mechanism that is invoked to promote stability and investor confidence during periods of significant stress when U.S. securities markets experience extreme broad-based declines. The proposed rule change would ensure that the Exchange's current 4:00 a.m. ET resumption time following a Level 3 halt continues to apply when the Exchange and various other U.S. equities exchanges begin trading on a 23/5 basis, notwithstanding current rule text implying that the resumption time would coincide with the start of overnight trading on the Exchange.

Rather than leave the rule in place as is, which would result in an earlier resumption time than originally contemplated when the rule was adopted, the Exchange, the other U.S. equity exchanges, and FINRA met alongside industry representatives to determine the appropriate resumption time. Following those discussions, the collective decision was made to retain the 4:00 a.m. ET resumption time, notwithstanding the fact that an earlier resumption time would be possible with the introduction of 23/5 Trading. The proposed rule change codifies this decision into the Exchange's rules. The Exchange understands that the other SROs will also be filing similar proposed rule changes. As a result, the market as a whole, including on- and off-exchange, will continue to be subject to harmonized rules for the resumption of trading following a Level 3 Market Decline.

While the SROs had previously decided to tie the resumption time following a Level 3 halt to the earliest SRO opening time, the upcoming transition to 23/5 Trading raises various concerns that warrant a change from the current approach.

First, the Exchange notes that the MWCB mechanism was designed to provide a cooling-off period where market participants would be provided with additional time to evaluate the market events that led to the decline before determining how to position their trading activity for the next day. With the introduction of 23/5 Trading and the start of the Overnight Trading Session at 9:00 p.m. ET, however, this cooling-off period could be materially shortened, reducing one of the key benefits that the MWCB mechanism was designed to provide in the first place. Rather than shorten the cooling-off period and risk this benefit, the Exchange believes the

market would be better served by a change to the length of the associated trading halt that mirrors current market practice. Under the proposed rule, as is the case today, after a Level 3 halt, the Exchange would re-open for the Early Trading Session at 4:00 a.m. ET and would not offer an Overnight Trading Session starting on the day of a Level 3 halt.

Second, the new Overnight Trading Session may be subject to different liquidity and participation considerations than the current Early Trading Session. Notably, while retail investors have expressed interest in overnight trading, the Exchange expects that institutional investors will take more time to transition to a round-the-clock model. However, such institutional participation may be of heightened importance following a Level 3 halt, as these investors are likely to have views on the underlying market events that led to the Level 3 Market Decline in the first place. The Exchange is concerned that opening during hours that such participants do not normally trade may impact the quality of price discovery at a time of significant market volatility. Waiting until 4:00 a.m. ET to resume trading would facilitate broader participation and therefore price discovery.

Finally, the Exchange notes that the Commission recently approved an amendment to the Plan to Address Extraordinary Market Volatility ("LULD Plan") that would establish new price protections from 9:00 p.m. ET to 4:00 a.m. ET.⁹ While these price bands would help to assure a fair and orderly market during normal market conditions, it is possible that they would instead prevent normal price discovery following a Level 3 Market Decline. Rather than allowing trading to resume with such price bands in effect, which would represent a change from the current trading reopening following a Level 3 Market Decline, the Exchange believes that waiting until 4:00 a.m. ET to resume trading would ensure that price discovery can occur unimpeded during pre-market trading, as it does today, which may further inform prices going into the opening auction and regular market hours trading following a Level 3 halt.

Given the factors discussed above, the Exchange believes that trading in all securities on the Exchange should not

resume before at 4:00 a.m. ET on the trading day after a Level 3 halt. This decision, which the Exchange understands will also be reflected in the rules of the other SROs, would promote a fair and orderly market at a time of significant market volatility, and thereby protect investors and the public interest. In addition, while the actual Level 3 resumption time would not be changing in practice—as proposed, the current resumption time and future resumption time would both be 4:00 a.m. ET at the earliest—the Exchange believes that it is appropriate to amend its rules to ensure that its rules reflect the upcoming changes to the Exchange's hours of operation. Without this change, market participants may mistakenly believe that the Exchange's intention is to re-open trading on the Exchange at 9:00 p.m. ET following a Level 3 halt. The proposed rule change would therefore facilitate operational transparency while providing for a fair and orderly market.

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 because the proposal would ensure the continued, uninterrupted operation of a consistent mechanism to halt trading across U.S. securities markets. Further, the Exchange understands that the other SROs intend to file proposed rule changes to ensure a consistent resumption time 4:00 a.m. ET or later across markets. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section

⁹ See Securities Exchange Act Release No. 106042 (August 5, 2026), 91 FR 51515 (August 10, 2026) (Order Granting Approval of the Twenty-Seventh Amendment to the National Market System Plan to Address Extraordinary Market Volatility to Establish Temporary Price Band Protections in Overnight Trading).

19(b)(3)(A)(iii) of the Act¹⁰ and subparagraph (f)(6) of Rule 19b–4 thereunder.¹¹

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR–NYSEARCA–2026–94 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–2026–94. 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 (<https://www.sec.gov/rules/sro.shtml>). Copies of the filing will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer

to file number SR–NYSEARCA–2026–94 and should be submitted on or before October 9, 2026.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2026–19123 Filed 9–17–26; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–106381; File No. SR–FINRA–2026–001]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change, as Modified by Partial Amendment No. 1, To Adopt FINRA Rule 3290 (Outside Activities Requirements)

September 15, 2026.

I. Introduction

On January 22, 2026, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”) ¹ and Rule 19b–4 thereunder,² a proposed rule change to adopt FINRA Rule 3290 (Outside Activities Requirements) to replace existing FINRA Rules 3270 (Outside Business Activities of Registered Persons) and 3280 (Private Securities Transactions of an Associated Person).

The proposed rule change was published for comment in the **Federal Register** on February 3, 2026.³ The public comment period closed on February 24, 2026. The Commission received comment letters in response to the Notice.⁴ On March 13, 2026, FINRA consented to an extension of the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to May 4, 2026.⁵

¹² 17 CFR 200.30–3(a)(12).

¹⁵ U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Exchange Act Release No. 104746 (Jan. 29, 2026), 91 FR 5003 (Feb. 3, 2026) (File No. SR–FINRA–2026–001) (“Notice”).

⁴ The comment letters are available at <https://www.sec.gov/rules-regulations/public-comments/sr-finra-2026-001>.

⁵ See letter from Alicia Goldin, Vice President and Associate General Counsel, Office of General Counsel, FINRA (dated Mar. 13, 2026), <https://www.finra.org/sites/default/files/2026-07/FINRA-2026-001-Extension-2.pdf>.

On May 1, 2026, FINRA responded to the comment letters received in response to the Notice and filed a partial amendment to modify the proposed rule change (“Amendment No. 1”).⁶ On May 1, 2026, the Commission published a notice of the filing of Amendment No. 1 and an order instituting proceedings (“OIP”) to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1 (hereinafter referred to as the “proposed rule change” unless otherwise specified).⁷ The public comment period closed on May 27, 2026. The Commission received additional comment letters in response to the notice of the filing of the amendment and OIP.⁸ On June 11, 2026, FINRA responded to the comment letters received in response to the OIP.⁹ On July 24, 2026, FINRA consented to extend until October 1, 2026, the time period in which the Commission must approve or disapprove the proposed rule change.¹⁰ This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposed Rule Change

A. Background

1. FINRA Rule 3270 (Outside Business Activities of Registered Persons)

Subject to several exemptions, FINRA Rule 3270 prohibits a registered person from being an employee, independent contractor, sole proprietor, officer, director or partner of another person, or being compensated, or having the reasonable expectation of compensation, by any other person as a result of any business activity outside the scope of the relationship with his or her member firm (outside business activities or “OBA”), unless he or she has provided

www.finra.org/sites/default/files/2026-03/SR-FINRA-2026-001-Extension1.pdf.

⁶ See letter from Matthew E. Vitek, Associate General Counsel, Office of General Counsel, FINRA (dated May 1, 2026) (“FINRA I”), <https://www.sec.gov/comments/SR-FINRA-2026-001/srfinra2026001-765807-2350615.pdf>; see also Amendment No. 1.

⁷ See Exchange Act Release No. 105355 (May 1, 2026), 91 FR 24613 (May 6, 2026) (File No. SR–FINRA–2026–001).

⁸ See *supra* note 4.

⁹ See letter from Matthew E. Vitek, Associate General Counsel, Office of General Counsel, FINRA (dated June 11, 2026) (“FINRA II”), <https://www.sec.gov/comments/SR-FINRA-2026-001/srfinra2026001-814261-2480673.pdf>.

¹⁰ See letter from Alicia Goldin, Vice President and Associate General Counsel, Office of General Counsel, FINRA (dated July 24, 2026), <https://www.finra.org/sites/default/files/2026-07/FINRA-2026-001-Extension-2.pdf>.

¹⁰ 15 U.S.C. 78s(b)(3)(A)(iii).

¹¹ 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

prior written notice to the member, in such form as specified by the member.¹¹

Upon receipt of a written notice, FINRA Rule 3270.01 requires the member to consider whether the proposed activity will: (1) interfere with or otherwise compromise the registered person's responsibilities to the member and/or the member's customers; or (2) be viewed by customers or the public as part of the member's business based upon, among other factors, the nature of the proposed activity and the manner in which it will be offered. Based on the member's review of such factors, the member must evaluate whether to condition, limit, or prohibit a registered person's outside activity.¹² FINRA Rule 3270.01 also requires a member to evaluate the registered person's proposed activity to determine whether the activity is properly characterized as an OBA or a private securities transaction ("PST") subject to the requirements of FINRA Rule 3280. Additionally, FINRA Rule 3270.01 requires a member to keep a record of its compliance with these obligations with respect to each written notice received and must preserve this record in accordance with the time and accessibility requirements of Exchange Act Rule 17a-4(e)(1).

2. FINRA Rule 3280 (Private Securities Transactions of an Associated Person)

FINRA Rule 3280(a) prohibits an associated person of a member from participating in any manner in a PST¹³ except in accordance with the following requirements:

- FINRA Rule 3280(b) requires an associated person, prior to participating in any private securities transaction, to provide written notice to the member with which he or she is associated, describing in detail the proposed transaction and the person's proposed role therein and stating whether he or she has received or may receive selling

compensation in connection with the transaction;¹⁴

- FINRA Rule 3280(c)(1) requires a member that has received notice from one of its associated persons regarding a proposed transaction for which the associated person has received or may receive selling compensation to advise the associated person in writing whether it approves or disapproves the person's participation in the proposed transaction;

- FINRA Rule 3280(c)(2) requires a member that approves its associated person's participation in a proposed transaction to record the transaction on its books and records supervise the associated person's participation in the transaction as if the transaction were executed on behalf of the member;

- FINRA Rule 3280(c)(3) prohibits an associated person from participating in a transaction if the member disapproves its associated person's participation in the proposed transaction; and

- FINRA Rule 3280(d) requires a member that has received notice from one of its associated persons regarding a proposed transaction or series of related transactions for which the associated person has not and will not receive any selling compensation to provide the associated person prompt written acknowledgment of his or her notice.¹⁵

B. The Proposed Rule Change

The proposed rule change would replace current FINRA Rules 3270 and 3280 with new FINRA Rule 3290. Proposed FINRA Rule 3290 would retain, or be substantially similar to, many of the existing requirements of the current rules under two distinct categories of activities: (1) outside investment-related activities of registered persons and (2) outside securities transactions of associated persons.¹⁶ Similar to the obligations imposed under current Rules 3270 and 3280, associated persons generally would be required to report outside securities transactions, while only registered persons would be required to report outside activities.

As discussed in more detail below, the proposed rule would narrow the scope of reportable activities of registered persons from outside business

activities to outside investment-related activities (defined as "outside activities" of registered persons). Under proposed FINRA Rule 3290, "investment-related activity" would cover a range of activities involving financial assets beyond securities but would be subject to certain exclusions and exceptions. The proposed rule change would also: (1) recharacterize certain associated person activities (such as those involving an unaffiliated investment adviser) that are currently treated as PSTs under FINRA Rule 3280 as outside activities (rather than as outside securities transactions); (2) codify the treatment of certain activities as outside activities; and (3) exclude from the rule's coverage activity conducted by associated persons (including registered persons) on behalf of an affiliate of a member, certain personal real estate activities, and personal investments in non-securities.

While the proposed rule change would change the scope of activities covered by, or the characterization of certain activities under (*i.e.*, as an outside activity instead of as an outside securities transaction) the proposed rule, many of the obligations imposed on outside activities or outside securities transactions would either be retained or would be substantially similar to the existing requirements for an OBA or a PST, including: (1) requiring that a registered person who intends to participate in certain outside activities and an associated person who intends to participate in outside securities transactions (as defined below) provide prior written notice to the member; (2) requiring members receiving a notice to assess, among other things, whether to permit, prohibit, or limit the person's participation in the identified proposed activity; (3) requiring members' prior written approval or disapproval of certain activities; and (4) requiring member supervision and recordkeeping of certain activities.¹⁷

FINRA stated that, consistent with existing FINRA Rules 3270 and 3280, both the notice requirements and member obligations upon receiving the notice would differ depending on the type of activity (outside activity, outside securities transaction not for selling compensation, or outside securities transaction for selling compensation).¹⁸ The member's obligations after conducting an assessment would also depend on the type of activity, with the

¹¹ FINRA Rule 3270 exempts from its operative requirements passive investments and private securities transactions subject to the requirements of FINRA Rule 3280.

¹² See FINRA Rule 3270.01.

¹³ FINRA Rule 3280(e)(1) defines a PST as any securities transaction outside the regular course or scope of an associated person's employment with a member, excluding: (1) transactions subject to the notification requirements of FINRA Rule 3210 (Accounts at Other Broker-Dealers and Financial Institutions); (2) transactions among immediate family members (as defined in FINRA Rule 5130 (Restrictions on the Purchase and Sale of Initial Equity Public Offerings)) for which no associated person receives any selling compensation; and (3) personal transactions in investment company and variable annuity securities. FINRA Rule 3280(e)(2) defines "selling compensation" as any compensation paid directly or indirectly from whatever source in connection with, or as a result of, the purchase or sale of a security.

¹⁴ In the case of a series of related transactions in which no selling compensation has been or will be received, an associated person may provide a single written notice. FINRA Rule 3280(b).

¹⁵ The member may also require the associated person to adhere to specified conditions in connection with his or her participation in the transaction. See FINRA Rule 3280(d).

¹⁶ The term "associated persons" includes "registered persons." See Notice at 5005.

¹⁷ Notice at 5004. The proposed rule change would also retain the definition of "selling compensation" set forth in FINRA Rule 3280(e)(2).

¹⁸ Notice at 5005.

greatest member obligations applying to outside securities transactions for selling compensation.¹⁹

Importantly, the proposed rule change would not limit a member's ability to expand the scope of its assessment for reportable activities beyond the minimum requirements established in the proposed rule change or to exercise discretion to apply stricter criteria and impose conditions or prohibitions based on the member's own assessment of the risk presented by the identified activity.²⁰ Additionally, nothing in the proposed rule change would alter the well-settled principle that members must investigate "red flags" indicating problematic activities.²¹

FINRA stated that by merging the two existing rules, the proposed rule change would enhance members' regulatory efficiency without compromising protections for investors and members relating to outside activities.²² FINRA stated that reducing or eliminating the regulatory burden on members for activities that FINRA believes are lower risk would enable members to redirect supervisory and compliance resources away from activities that pose fewer investor protection concerns and toward higher-risk investment-related activities.²³ For example, FINRA stated that the proposed rule would focus on those outside activities that are appropriately within the members' purview that are a potential risk to members and the public.²⁴ At the same time, FINRA stated that the proposed rule would provide exclusions for certain activities that FINRA has assessed pose lower risk to its members or the public, including activity conducted at an affiliate or activities such as bartending or refereeing sports games.²⁵ As such, FINRA stated that the proposed rule change would serve the public interest by maintaining the core investor protections of the existing rules and addressing the treatment of business activities and securities transactions that are outside the regular scope of individuals' association with a member, while narrowing the scope of reportable activities to those that present higher risk, particularly the risk that customers or the public would view the activities as part of the member's business.²⁶ In this way, FINRA stated, the rule would promote more effective

risk-based oversight and, as a result, enhance investor protection.²⁷

Each of the proposed rule changes is discussed below in turn.

1. Outside Activities

a. Registered Person's Obligations

Proposed FINRA Rule 3290(a) (Obligations of a Registered Person for Outside Activity) would require a registered person who intends to participate in an "outside activity" (that is, an investment-related activity²⁸ outside the scope of such person's relationship with the member that is not in connection with a securities transaction) to provide prior written notice to the member regarding such outside activity. In addition, proposed FINRA Rule 3290(a) would require a registered person to update any prior written notice to the member if there is a material change to the outside activity. For any notice provided pursuant to the proposed rule, the registered person would be required to describe in detail the proposed outside activity and the person's proposed role therein.²⁹

b. Obligations of a Member for a Registered Person's Outside Activity

Proposed Rule 3290(c) (Obligations of a Member for a Registered Person's Outside Activity) would require a member receiving written notice of a registered person's outside activity to assess, at a minimum, whether the outside activity: (1) is an outside securities transaction;³⁰ (2) involves a customer of the registered person; (3) will interfere with or otherwise compromise the registered person's responsibilities to the member or the member's customers; and (4) will be viewed by the member's customers or the public as part of the member's business based upon, among other factors, the nature of the proposed activity and the manner in which it will

be offered.³¹ FINRA stated that the proposed rule change would add factor (2) (regarding whether the outside activity involves a customer of a registered person) to factors (1), (3), and (4) above, which are consistent with the existing requirements for an OBA under FINRA Rule 3270.³²

Based on the member's review of such factors, the member would be required to evaluate whether to condition, limit, or prohibit a registered person's outside activity.³³

If a member imposes conditions or limitations on an associated person's participation in such an outside activity, proposed FINRA Rule 3290.06 would require the member to reasonably supervise the person's compliance with such conditions or limitations.³⁴ FINRA stated that this obligation is already implicit in existing FINRA Rule 3270, but would be made explicit in proposed FINRA Rule 3290.³⁵

2. Outside Securities Transactions

a. Associated Person's Obligations

Proposed FINRA Rule 3290(b) (Obligations of an Associated Person for Outside Securities Transactions) would require an associated person who intends to participate in an "outside securities transaction" (that is, an investment-related activity³⁶ outside the scope of the associated person's relationship with the member that is in connection with a securities transaction) to provide prior written notice to the member, describing in detail the proposed transaction, the person's proposed role therein, and whether the person will receive selling compensation.³⁷ In addition, FINRA

³¹ Proposed FINRA Rule 3290(c)(1).

³² Notice at 5005.

³³ See proposed FINRA Rule 3290(c)(2).

³⁴ See Amendment No. 1.

³⁵ See FINRA I at 16; see also Amendment No. 1.

³⁶ See *infra* Section II.B.3. (Proposed Definition of Investment-Related Activity) for discussion of "investment-related activity."

³⁷ Proposed FINRA Rules 3290(b)(1) and (3). A separate notice would be required for each outside securities transaction unless an exception applies that allows the use of a single notice. See Notice at 5005. Proposed FINRA Rule 3290(b)(1)(A) would permit an associated person who intends to participate in an outside securities transaction that is in connection with a series of related securities transactions not for selling compensation to provide a single prior written notice to the member. Similarly, proposed FINRA Rule 3290(b)(1)(B) would permit an associated person acting as portfolio manager or investment committee member for registered investment companies, unregistered investment companies, business development companies, real estate investment trusts, and entities that are recognized as tax exempt, and who is not selling an entity's shares for selling compensation, to provide a single prior written notice to the member. See proposed FINRA Rule

Continued

¹⁹ *Id.*

²⁰ *Id.* at 5007.

²¹ See *id.* at 5005, note 8.

²² *Id.* at 5004.

²³ *Id.* at 5007.

²⁴ See *id.* at 5004.

²⁵ *Id.*

²⁶ *Id.* at 5007.

²⁷ *Id.*

²⁸ Proposed FINRA Rule 3290(f)(3) would define the term "investment-related activity." See *infra* Section II.B.3. (Proposed Definition of Investment-Related Activity). Proposed FINRA Rule 3290 also contains exclusions and exceptions for certain activities that would otherwise fall within the definition of "investment-related activity." See *infra* Section II.B.5 (Exclusions from Proposed FINRA Rule 3290); Section II.B.6. (Associated Person Activities Subject to a Contractual Arrangement).

²⁹ Proposed FINRA Rule 3290(a).

³⁰ FINRA stated that a person may, mistakenly or intentionally, mischaracterize an activity. For this reason, among others, a member must analyze whether the activity is properly characterized to determine its obligations, which vary depending on the activity. See Notice at 5005. If the member determines that the activity is an outside securities transaction, the member would be required to comply with the obligations listed in proposed FINRA Rule 3290(d), as discussed below.

Rule 3290(b)(2) would require an associated person to update any prior written notice if there is a material change to the outside securities transaction described in such notice. Where the associated person intends to participate in an outside securities transaction for selling compensation, the associated person also would need to obtain prior written approval from the member (including approval for any material change to any information provided pursuant to proposed FINRA Rule 3290(b)(1)).³⁸

b. Obligations of a Member for an Associated Person's Outside Securities Transactions

Proposed Rule 3290(d)(1) would require a member receiving written notice of an associated person's outside securities transaction to assess, at a minimum, whether the outside securities transaction: (1) is a securities transaction for selling compensation;³⁹ (2) involves a customer of the associated person;⁴⁰ (3) will interfere with or otherwise compromise the associated person's responsibilities to the member or the member's customers;⁴¹ and (4) will be viewed by the member's customers or the public as part of the member's business based upon, among other factors, the nature of the proposed activity and the manner in which it will be offered.⁴² FINRA stated that while existing FINRA Rule 3280 does not require consideration of the four factors identified in proposed FINRA Rule 3290(d) when assessing a PST, FINRA understands that the proposed rule change is consistent with members' current practices.⁴³

A member's obligations for an associated person's outside securities transactions would depend, in part, on whether the outside securities transaction is for selling compensation. If the outside securities transaction is not for selling compensation, proposed

FINRA Rule 3290(d)(2) would require the member to: (1) provide the associated person prompt written acknowledgement of such notice;⁴⁴ and (2) at the member's discretion, require the associated person to adhere to specified conditions⁴⁵ in connection with the associated person's participation in the transaction. If, instead, the outside securities transaction is for selling compensation, proposed FINRA Rule 3290(d)(3) would require the member to notify the associated person in writing of the member's decision to: (1) approve the proposed transaction after making a reasonable determination based on the criteria enumerated in proposed FINRA Rule 3290(d)(1); (2) approve the proposed transaction subject to specific conditions or limitations after a reasonable determination based on the criteria enumerated in proposed FINRA Rule 3290(d)(1); or (3) disapprove the proposed transaction.⁴⁶

If a member imposes conditions or limitations on an associated person's participation in such an outside securities transaction, proposed FINRA Rule 3290.06 would require the member to reasonably supervise the person's compliance with such conditions or limitations.⁴⁷ FINRA stated that this obligation is already implicit in existing FINRA Rule 3280, but would be made explicit in proposed FINRA Rule 3290.⁴⁸

Further, proposed FINRA Rule 3290(d)(4) would require a member to record each approved outside securities transaction for selling compensation on the books and records of the member and supervise the person's participation in the transaction as if executed on behalf of the member. However, if a member approves an associated person's participation in an outside securities transaction involving selling compensation and that person is associated with more than one member, proposed FINRA Rule 3290.01 would permit members to develop a written allocation arrangement whereby at least one member agrees to be responsible for compliance with respect to all applicable securities laws and regulations and FINRA rules regarding the proposed activity, including those

requiring member supervision and recordkeeping.⁴⁹ FINRA stated that the proposed rule change would codify existing guidance in NASD Notice to Members 96-33, allowing for potential efficiency gains for members that may have been unaware of such previous guidance.⁵⁰

3. Proposed Definition of Investment-Related Activity

The obligations of proposed FINRA Rules 3290(a)–(d) are triggered by the participation of a member's associated person in an investment-related activity that is outside the scope of the associated person's or registered person's relationship with the member. Proposed FINRA Rule 3290(f)(3) would define the term "investment-related activity" as pertaining to financial assets including, but not limited to, securities, crypto assets, commodities, derivatives (such as futures and swaps), currency, banking, real estate or insurance. The term includes, but is not limited to: (1) acting as or being associated with a broker-dealer, issuer, insurance agent or company, investment company, investment adviser, futures commission merchant, commodity trading advisor, commodity pool operator, municipal advisor, futures sponsor, money services business, bank, savings association, or credit union; and (2) an associated person's participation in any manner in a personal investment involving a securities transaction (sometimes referred to as "buying away"), other than transactions indicated in proposed FINRA Rule 3290(g)(3)(A).⁵¹ FINRA stated that by focusing the application of proposed Rule 3290 on activities involving financial assets, the proposed rule change would eliminate the burdens associated with the reporting and assessment of activities that FINRA

⁴⁹ Proposed FINRA Rule 3290.01.

⁵⁰ See Notice at 5006, 5008.

⁵¹ Proposed FINRA Rule 3290(g)(3)(A) would exclude from the definition of "investment-related activity" an associated person's personal investments involving securities transactions subject to or delineated in FINRA Rule 3210. FINRA Rule 3210 applies to securities transactions effected by the associated person or their related persons, as delineated in FINRA Rule 3210.02, at any financial institution other than the member that employs the associated person. FINRA Rule 3210.03 excludes some transactions and accounts from that rule: transactions in unit investment trusts, municipal fund securities as defined under MSRB Rule D-12, qualified tuition programs pursuant to Section 529 of the Internal Revenue Code, variable contracts or redeemable securities of companies registered under the Investment Company Act of 1940, or accounts that are limited to transactions in such securities, or monthly-investment-plan-type accounts, or accounts pursuant to Section 530A of the Internal Revenue Code. FINRA Rule 3210.03 (Transactions and Accounts not Subject to this Rule).

3290.02; see also *infra* Section II.B.4.a. (Associated Persons Acting as Portfolio Managers and Investment Committee Members).

³⁸ See proposed FINRA Rules 3290(b)(1), (2). FINRA Rule 3290(f)(5) would define "selling compensation" as any compensation paid directly or indirectly from whatever source in connection with or as a result of the purchase, sale or exchange of a security. The proposed definition of "selling compensation" is consistent with the definition in FINRA Rule 3280(e)(2).

³⁹ Proposed FINRA Rule 3290(d)(1)(A).

⁴⁰ Proposed FINRA Rule 3290(d)(1)(B).

⁴¹ Proposed FINRA Rule 3290(d)(1)(C).

⁴² Proposed FINRA Rule 3290(d)(1)(D). Pursuant to proposed FINRA Rule 3290(d)(1), a member would not be required to assess an outside securities transaction for selling compensation when disapproving it under proposed Rule 3290(d)(3)(C).

⁴³ See Notice at 5005.

⁴⁴ A single written acknowledgement may be used in the case of a series of related outside securities transactions not for selling compensation. See proposed FINRA Rule 3290(d)(2).

⁴⁵ See Amendment No.1 (FINRA stated that adding a reference to "limitations" in proposed FINRA Rule 3290(d)(2) would improve consistency with proposed FINRA Rules 3290(c)(2) and (d)(3)).

⁴⁶ Proposed FINRA Rule 3290(d)(3)(A)–(C).

⁴⁷ See Amendment No. 1.

⁴⁸ See FINRA I at 16; see also Amendment No. 1.

views as having lower risk (such as refereeing sports games and bartending), allowing members to dedicate resources to activities presenting higher risk to investors, particularly the risk that investors or the public would view the activities as part of the member's business and thus under its supervision.⁵²

4. Specific Activities Treated as Outside Activities for Purposes of Proposed FINRA Rule 3290

a. Associated Persons Acting as Portfolio Managers and Investment Committee Members

Proposed FINRA Rule 3290.02 states that an associated person would not be considered to be participating in an outside securities transaction to the extent the associated person's activities are limited to acting as portfolio manager or investment committee member for registered investment companies (e.g., mutual funds, exchange traded funds, unit investment trusts, or registered closed-end funds), unregistered investment companies, business development companies, real estate investment trusts, and entities that are recognized as tax exempt. Such activity would be treated as an outside activity and not an outside securities transaction.⁵³

However, proposed FINRA Rule 3290.02 also states that the proposed exception would not include an associated person's activities related to purchasing or selling such entities' shares. Those activities would instead be considered an outside securities transaction subject to the applicable notice and assessment requirements in proposed FINRA Rule 3290(b) and (d) unless otherwise excluded under proposed FINRA Rule 3290(g) (discussed *infra*).

FINRA stated that this proposed rule change would codify FINRA staff's position that: (1) an associated person would need to provide prior written notice for activities related to purchasing or selling such entities' shares, and (2) the member would not be required to supervise and maintain records for the activity, unless the associated person is selling such entities' shares for selling compensation and such activity is not otherwise excluded under the proposed rule.⁵⁴

b. Associated Person Activity at an Unaffiliated Registered Investment Adviser ("RIA")

Proposed FINRA Rule 3290.03 states that an associated person's activity at an investment adviser registered either with the Commission under Section 203 of the Investment Advisers Act ("Advisers Act") or with a state securities commission (or any agency or office performing like functions) would be treated as an outside activity of a registered person (and not an outside securities transaction).⁵⁵

FINRA stated that the proposed rule change would eliminate members' supervision and recordkeeping obligations for investment advisory activities performed by associated persons at unaffiliated investment advisers, which were set forth in FINRA guidance issued in the 1990s.⁵⁶ FINRA stated that this prior guidance has caused significant confusion and practical challenges, including privacy challenges to members seeking account information for clients of an unaffiliated investment adviser through which the member's associated person may be acting in an investment advisory capacity.⁵⁷ FINRA stated that without access to information necessary to meaningfully supervise outside unaffiliated investment advisory activities, members would unreasonably bear regulatory responsibility and potential liability without adequate means to fulfill their regulatory obligations.⁵⁸ In addition, FINRA stated that such investment advisers are generally directly regulated by either the Commission or the states, and subject to fiduciary obligation to their clients.⁵⁹

c. Associated Person Outside Securities Activity Subject to the Gramm-Leach-Bliley Act (GLBA) or Exchange Act Regulation R

Proposed FINRA Rule 3290.05 states that an associated person's securities activity that qualifies under the GLBA or SEC Regulation R's exception to broker or dealer⁶⁰ registration

requirements and that is not otherwise covered by proposed FINRA Rule 3290.04⁶¹ would be treated as an outside activity (and not an outside securities transaction).⁶² FINRA stated that the proposed rule change would codify FINRA staff's position with respect to this outside activity.⁶³ Specifically, it would clarify that an associated person's securities activity under proposed Rule 3290.05 would have a prior written notice and assessment requirement but would not be subject to member supervision and recordkeeping by the member.⁶⁴

5. Exclusions From Proposed FINRA Rule 3290

a. Associated Person Activity on Behalf of a Member or an Affiliate

Proposed FINRA Rule 3290(g) would exclude from proposed FINRA Rule 3290 an associated person's activity on behalf of a member or its affiliate.⁶⁵ Proposed FINRA Rule 3290(f)(1) would define "affiliate" as any entity that controls, is controlled by, or is under common control with a member. According to FINRA, this exclusion would include activity such as investment advisory activity at a member that is registered as both a broker-dealer and an investment adviser, as well as investment advisory, insurance, or banking activity conducted on behalf of an affiliate.⁶⁶ FINRA stated that this exclusion for activity conducted on behalf of a member or its affiliate recognizes members' and their control persons' ability to implement meaningful controls across business lines.⁶⁷

b. Securities Transactions Among Immediate Family Members of an Associated Person

Proposed FINRA Rule 3290(g) would exclude from proposed FINRA Rule 3290 an associated person's securities transactions among immediate family for which the associated person receives no selling compensation.⁶⁸ Proposed FINRA Rule 3290(f)(2) would define "immediate family" to have the same meaning as in paragraph (c) of Rule

⁵⁵ Such activity would be subject to the requirements of proposed FINRA Rules 3290(a) and (c). See *supra* note 53.

⁵⁶ See, e.g., Notice at 5006; NASD Notice to Members 94-44 (May 1994) and 96-33 (May 1996).

⁵⁷ See Notice at 5006.

⁵⁸ *Id.* at 5011.

⁵⁹ *Id.* at 5006.

⁶⁰ The GLBA amended the Exchange Act to except specified securities activities conducted by banks from broker or dealer registration. See Exchange Act Section 3(a)(4)(B). See also Definitions of Terms and Exemptions Relating to the "Broker" Exceptions for Banks, Exchange Act Release No. 56501, 72 FR 56514 (Oct. 3, 2007); Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Saving Banks

Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934, Exchange Act Release No. 47364 (Feb. 14, 2003), 68 FR 8686 (Feb. 24, 2003).

⁶¹ See *infra* Section II.B.6 (Associated Person Activities Subject to a Contractual Arrangement).

⁶² Such activity would be subject to the requirements of proposed FINRA Rules 3290(a) and (c). See *supra* note 53.

⁶³ See Notice at 5006.

⁶⁴ *Id.*

⁶⁵ Proposed FINRA Rule 3290(g)(1).

⁶⁶ See Notice at 5005.

⁶⁷ *Id.* at 5005-6.

⁶⁸ Proposed FINRA Rule 3290(g)(2).

⁵² See Notice at 5004.

⁵³ As an "outside activity," such activity would be subject to the notice and assessment requirements of proposed FINRA Rules 3290(a) and (c).

⁵⁴ See Notice at 5006.

3240 (Prohibition on Borrowing from or Lending to Customers).⁶⁹ FINRA stated that this exclusion recognizes the lower risks to investors and members associated with this activity and the inefficiency of members' having to expend significant resources reviewing it.⁷⁰

c. Certain Personal Investments of an Associated Person

Proposed FINRA Rule 3290(g)(3) would exclude from proposed FINRA Rule 3290 the following personal investments of an associated person: (1) securities transactions subject to or delineated in FINRA Rule 3210 (Accounts at Other Broker-Dealers and Financial Institutions);⁷¹ (2) personal investments in non-securities; and (3) the purchase, sale, rental or lease of a main home and up to two secondary homes⁷² that are: (a) solely owned by the associated person or the associated person and immediate family;⁷³ (b) owned by the associated person as a sole proprietorship; (c) owned by a corporation, LLC, partnership, limited partnership, or other entity that is solely owned by the associated person or the associated person and immediate family;⁷⁴ or (d) owned by a trust with the associated person or the associated person and immediate family as the sole beneficiaries.⁷⁵ FINRA stated that these exclusions recognize the lower risks to investors and members associated with these activities and the inefficiency of members' having to expend significant resources reviewing them.⁷⁶

6. Associated Person Activities Subject to a Contractual Arrangement

Proposed FINRA Rule 3290.04 states that an associated person's activity that is pursuant to a contract between a member and another entity (e.g., banking or insurance networking arrangement) would not be subject to proposed FINRA Rule 3290 if such

activity is conducted on behalf of the member as it is within the scope of the associated person's relationship with the member. FINRA stated that the proposed rule change is consistent with current requirements and, as is currently required, such activity already would be subject to broker-dealer supervision under FINRA Rule 3110.⁷⁷

7. Recordkeeping

Proposed FINRA Rule 3290(e) would require a member to keep a record of its compliance with the obligations under proposed FINRA Rule 3290 and preserve this record in accordance with the time and accessibility requirements of Exchange Act Rule 17a-4(e)(1).⁷⁸

8. General Exemptive Authority

Proposed FINRA Rule 3290(h) would authorize FINRA staff, for good cause shown after taking into consideration all relevant factors, to conditionally or unconditionally grant an exemption pursuant to the FINRA Rule 9600 Series from any provision of proposed FINRA Rule 3290 to the extent that such exemption is consistent with the purpose of the rule, the protection of investors, and the public interest. FINRA stated that while the proposed rule change is broadly applicable, having the flexibility to provide relief from a particular provision of proposed Rule 3290 where specific factual circumstances justify an exemption would be useful and appropriate.⁷⁹ FINRA also proposed a conforming amendment to FINRA Rule 9610 to add proposed FINRA Rule 3290 to the list of FINRA rules for which members may seek exemptive relief.⁸⁰

III. Discussion and Commission Findings

After careful review of the proposed rule change, comment letters received, and FINRA's responses to the comments, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to a national securities association.⁸¹ Specifically, the Commission finds that

the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act, 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.⁸²

The proposed rule change is reasonably designed to focus member supervisory and compliance resources on the types of outside activities—that is, investment-related activities—of a member's registered or associated persons that are appropriately within the member's purview, particularly where the activities are most likely to be viewed by investors or other members of the public as part of the member's business and thus under its supervision. The proposed rule change reasonably imposes on members different obligations depending on the nature of the identified activity and its associated risk to the member, investors, and the public. The member's obligation is greatest for those activities that present heightened potential risk to investors and to the public, namely when the activity is an associated person's outside securities transaction for selling compensation.

Other categories of activity—an associated person's outside securities transaction not for selling compensation and a registered person's outside activity that is outside the scope of their employment with the member (including activity that is subject to another regulatory regime such as activity at an unaffiliated registered investment adviser or a bank)—require the member to assess or restrict the activity as the member determines is necessary but does not require the member to explicitly approve or supervise that activity. For these categories of activity, the risk to investors or the public, including the risk that they will view the activity as part of the member's business and under its supervision, is lower, and reasonably calibrates a member's obligations in accordance with that risk. The proposed rule change also enables a member to impose conditions or limitations, which could include subjecting the activity to the member's supervision, if the member deems it necessary to manage its own risk. Finally, the proposed rule change eliminates reporting obligations for outside activities that are lower risk, either because the activities are inherently unlikely to pose risks to investors or the public (e.g., refereeing sports games), or the member is likely

⁶⁹ FINRA Rule 3240 defines the term "immediate family" as "parents, grandparents, mother-in-law or father-in-law, spouse or domestic partner, brother or sister, brother-in-law or sister-in-law, son-in-law or daughter-in-law, children, grandchildren, cousin, aunt or uncle, or niece or nephew, and any other person who resides in the same household as the registered person and the registered person financially supports, directly or indirectly, to a material extent. The term includes step and adoptive relationships."

⁷⁰ Notice at 5006.

⁷¹ See *supra* note 51.

⁷² Proposed FINRA Rule 3290(f)(4) would define "secondary home" as a property that is used for residential purposes by the associated person for at least part of the year.

⁷³ See *supra* note 69 and accompanying text.

⁷⁴ Proposed FINRA Rule 3290(g)(3)(C)(3).

⁷⁵ Proposed FINRA Rule 3290(g)(3)(C)(4).

⁷⁶ Notice at 5006.

⁷⁷ *Id.* at 5006 n.13 (and accompanying text).

⁷⁸ Rule 17a-4(e)(1) states that members subject to Exchange Act Rule 17a-3 must maintain and preserve in an easily accessible place all records required under Rule 17a-3(a)(12) until at least three years after the associated person's employment and any other connection with the member has terminated.

⁷⁹ Notice at 5006.

⁸⁰ *Id.* at 5006 n.15.

⁸¹ In approving this rule change, the Commission has considered the rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁸² 15 U.S.C. 78o-3(b)(6).

either to be already aware of the activity or to have ready access to information about the activity (e.g., activities on behalf of an affiliate).

The overall process established by the proposed rule, under which the member's obligations vary based on the nature of the activity, will allow individual members to tailor their oversight of outside activities based on the member's business model, supervisory structure, and the member's risk assessment of the outside activity at issue.

Importantly, the proposed rule change would not limit a member's ability to impose more robust supervision of, or to condition, limit, or prohibit, as appropriate, outside activities at the member's discretion. For example, a member may expand the scope of its assessment or implement additional appropriate safeguards, limitations, or prohibitions, beyond the minimum requirements established here.⁸³ In addition, although the affiliate exclusion in proposed FINRA Rule 3290(g) permits members to exclude activity on behalf of a member or its affiliate, members are free to impose a notice and assessment requirement for this activity if the member has determined additional safeguards are appropriate for its business.⁸⁴ Similarly, the proposed rule change does not alter members' overarching supervisory responsibilities under the federal securities law and FINRA Rule 3110 to supervise its business and to investigate and act upon red flags indicating potential misconduct. Accordingly, and as explained in more detail below, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act.⁸⁵ The Commission addresses the proposed rule change's specific provisions, and any related comments, in turn.

A. Proposed FINRA Rule 3290(a)–(d)

As stated above, the proposed rule change would replace current FINRA Rules 3270 and 3280 with proposed FINRA Rule 3290. Proposed FINRA Rule 3290(a)–(d) would retain many of the existing requirements of the current rules as part of two distinct categories of activities: (1) outside activities of registered persons, and (2) outside securities transactions of associated persons. Specifically, proposed FINRA Rule 3290(a) and (c) would address the obligations of registered persons and members, respectively, with respect to

outside activities of registered persons; proposed FINRA Rule 3290(b) and (d) would address the obligations of associated persons and members, respectively, with respect to outside securities transactions of associated persons. The discussion below addresses the obligations triggered by these two categories.

1. Outside Activities of Registered Persons—Obligations of Registered Persons (Proposed FINRA Rule 3290(a)) and Members (Proposed FINRA Rule 3290(c))

As stated above, the proposed rule change would, among other things, require a registered person who intends to participate in an outside activity that is not in connection with a securities transaction to provide prior written notice to the member describing in detail the proposed outside activity and the person's proposed role therein.⁸⁶ In the event of a material change to the outside activity, a registered person would be required to provide an updated prior written notice.⁸⁷

The proposed rule change would require a member receiving a notice to assess, at a minimum, whether the outside activity: (1) is an outside securities transaction; (2) involves a customer of the registered person; (3) will interfere with or otherwise compromise the registered person's responsibilities to the member or the member's customers; and (4) will be viewed by the member's customers or the public as part of the member's business based upon, among other factors, the nature of the proposed activity and the manner in which it will be offered.⁸⁸ Based on the member's review of such factors, the member would be required to evaluate whether to condition, limit, or prohibit a registered person's outside activity.⁸⁹ If a member imposes conditions or limitations on a registered person's outside activity, proposed FINRA Rule 3290.06 would require the member to reasonably supervise the person's compliance with such conditions or limitations.⁹⁰

2. Outside Securities Transactions of Associated Persons—Obligations of Associated Persons (Proposed FINRA Rule 3290(b)) and Members (Proposed FINRA Rule 3290(d))

As stated above, the proposed rule change would require an associated

person of a member who intends to participate in an outside securities transaction to provide prior written notice to the member, describing in detail the proposed transaction, the person's proposed role therein, and whether the person will receive selling compensation.⁹¹ The associated person must provide prior written notice (and if the transaction is for selling compensation, receive prior written approval) for each separate transaction, with two exceptions: (1) a series of related securities transactions not for selling compensation; and (2) where the associated person is acting as a portfolio manager or investment committee member for an entity as described in proposed FINRA Rule 3290.02 and is not selling the entity's shares for selling compensation.⁹² In those two cases, the associated person may provide a single prior written notice.⁹³ In the event of a material change to the outside securities transaction, an associated person would be required to update any prior written notice and, if the outside securities transaction is for selling compensation, obtain prior written approval from the member for the material change.⁹⁴

Upon receiving the notice, the proposed rule change would require a member to assess, at a minimum, whether the securities transaction: (1) is a securities transaction for selling compensation; (2) involves a customer of the associated person; (3) will interfere with or otherwise compromise the associated person's responsibilities to the member or the member's customers; and (4) will be viewed by the member's customers or the public as part of the member's business based upon, among other factors, the nature of the proposed activity and the manner in which it will be offered.⁹⁵

If the outside securities transaction is not for selling compensation, the proposed rule change would require the member to: (1) provide the associated person prompt written acknowledgement of such notice, and (2) at the member's discretion, require the associated person to adhere to specified conditions in connection with the associated person's participation in the transaction.⁹⁶

If the outside securities transaction is for selling compensation, proposed FINRA Rule 3290(d)(3) would require the member to notify the associated person in writing of the member's

⁸³ See, e.g., Notice at 5011; FINRA I at 9; FINRA II at 4.

⁸⁴ See FINRA I at 9.

⁸⁵ 15 U.S.C. 78o–3(b)(6).

⁸⁶ Proposed FINRA Rule 3290(a).

⁸⁷ *Id.*

⁸⁸ Proposed FINRA Rule 3290(c)(1).

⁸⁹ Proposed FINRA Rule 3290(c)(2).

⁹⁰ Proposed FINRA Rule 3290.06.

⁹¹ Proposed FINRA Rule 3290(b)(1), (3).

⁹² Proposed FINRA Rule 3290(b)(1)(A)–(B).

⁹³ Proposed FINRA Rule 3290(b)(1)(A)–(B).

⁹⁴ Proposed FINRA Rule 3290(b)(2).

⁹⁵ Proposed FINRA Rule 3290(d)(1).

⁹⁶ Proposed FINRA Rule 3290(d)(2).

decision to: (1) approve the proposed transaction after making a reasonable determination based on the criteria enumerated in proposed FINRA Rule 3290(d)(1); (2) approve the proposed transaction subject to specific conditions or limitations after a reasonable determination based on the criteria enumerated in proposed FINRA Rule 3290(d)(1); or (3) disapprove the proposed transaction.⁹⁷ In addition, proposed FINRA Rule 3290(d)(4) would require a member to record each approved outside securities transaction for selling compensation on its books and records and to supervise the person's participation in the transaction as if executed on behalf of the member.⁹⁸ Further, if a member imposes conditions or limitations on an associated person's participation in an outside securities transaction (whether or not for selling compensation), proposed FINRA Rule 3290.06 would require the member to reasonably supervise the person's compliance with such conditions or limitations.⁹⁹

As stated above, proposed FINRA Rule 3290.01 would provide that if a member approves an associated person's participation in an outside securities transaction involving selling compensation and that person is associated with more than one member, the members may develop a written allocation arrangement whereby at least one member agrees to be responsible for compliance with respect to all applicable securities laws and regulations and FINRA rules regarding the proposed activity, including those requiring member supervision and recordkeeping.

3. Comments on Proposed FINRA Rule 3290(a)–(d) and FINRA's Response, Including Amendment

Many commenters supported the proposed consolidation of FINRA Rules 3270 and 3280 into proposed FINRA Rule 3290(a)–(d),¹⁰⁰ stating that

consolidating the OBA and PST reporting requirements and member obligations would promote efficiency and allow compliance personnel to focus on higher-risk activities.¹⁰¹

www.sec.gov/comments/sr-finja-2026-001/srfinja2026001-715747-2239634.pdf (“CAI”); David T. Bellaire, Executive Vice President & General Counsel, Financial Services Institute, at 1 (dated Feb. 24, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinja2026001-715027-2237882.pdf> (“FSI I”); Matthew Morningstar, Group Managing Director, Chief Legal Officer, LPL Financial at 2 (dated Feb. 24, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinja2026001-712287-2235534.pdf> (“LPL I”); Mark Quinn, Director of Regulatory Affairs, Cetera Financial Group, at 1 (dated Feb. 23, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinja2026001-710532-2232937.pdf> (“Cetera I”); Matt Billings, President, Robinhood Financial LLC and Robinhood Securities, LLC, at 2 (dated Feb. 24, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinja2026001-714489-2237294.pdf> (“Robinhood”); Jennifer Brunner, Alicia Strout, Susan La Fond, and Gordon Taylor, Chief Compliance Officers, ACA Foreside, at 1 (dated Feb. 24, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinja2026001-715308-2238374.pdf> (“ACA”); Seth A. Miller, General Counsel, President, Advocacy & Administration, Cambridge Investment Research, Inc., at 2 (dated Feb. 24, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinja2026001-712247-2235514.pdf> (“Cambridge I”); Katherine M. Flouton, CEO, PKS Securities (dated Feb. 24, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinja2026001-716667-2242714.pdf> (“PKS”); Elissa Germaine and Christine Lazaro, Supervising Attorneys, Securities Arbitration Clinic at St. John's University School of Law, at 1 (dated Feb. 24, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinja2026001-715267-2238295.pdf> (“St. John's Law”); Frank C. Lawrance, Wealth Advisor, Seacrest Wealth Management, at 1 (dated Feb. 21, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinja2026001-712989-2236235.pdf> (“Lawrance”); Ben Shamberger, Independent Financial Advisor, at 1–2 (dated Feb. 21, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinja2026001-708847-2231674.pdf> (“Shamberger”); Ryan Naugle, Independent Financial Advisor, Advice & Planning Services, at 2 (dated Feb. 22, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinja2026001-708347-2229754.pdf> (“A&P Services”); Jaime Benedetti, Managing Partner, BEAM Wealth Advisors (dated Feb. 23, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinja2026001-2231114.htm> (“Benedetti”); Form Letter A, <https://www.sec.gov/comments/SR-FINRA-2026-001/srfinja2026001-typea.htm>; Form Letter B, https://www.sec.gov/comments/SR-FINRA-2026-001/srfinja2026001-typeb_1.htm; Form Letter C, https://www.sec.gov/comments/SR-FINRA-2026-001/srfinja2026001-typec_0.htm; and Form Letter D, https://www.sec.gov/comments/SR-FINRA-2026-001/srfinja2026001-typed_0.htm.

¹⁰¹ See, e.g., FSI I at 1, 4 (stating that streamlining two rules into proposed Rule 3290 would make a time-consuming process for broker-dealer compliance departments more efficient and focus the efforts of compliance personnel on activities that are likely to impact investor protection); letter from David T. Bellaire, Executive Vice President and General Counsel, Financial Services Institute, at 2 (dated May 27, 2026), <https://www.sec.gov/comments/SR-FINRA-2026-001/srfinja2026001-791919-2397389.pdf> (“FSI II”); CAI at 2; Cambridge I at 1, 2; ASA I at 1, 2; LPL I at 2; letter from Matthew Morningstar, Group Managing Director, Chief Legal Officer, LPL Financial at 1 (dated May 27, 2026), <https://www.sec.gov/comments/SR->

Specifically, commenters supported the proposed requirement under FINRA Rule 3290(c)(1) and (d)(1) that a member assess whether a proposed activity involves a customer of the registered person or associated person, respectively, rather than a customer of the member.¹⁰² One of these commenters stated that the more limited assessment would establish an obligation tied to a relationship that members can realistically identify and verify.¹⁰³ In contrast, another commenter recommended that FINRA expand the assessment requirements to include consideration of whether the activity or transaction involves a customer of the member or, at a minimum, to specify that the involvement of a member's customer after the initial notice is a “material change” that would require an updated notice and assessment, stating that as proposed, the proposed rule change would increase the risk that members will fail to adequately consider potential risks to their customers, such as the risk presented by the outside securities transactions of an associated person employed in an operational role with access to customer information or member systems.¹⁰⁴

FINRA responded that customer confusion and the associated reputational and legal risks to the member are most acute when the customer has a direct relationship with the associated person conducting the outside activity.¹⁰⁵ As such, requiring members to assess whether the activity involves a customer of the associated person is a targeted approach that focuses on situations presenting heightened risk.¹⁰⁶ Additionally, FINRA stated that requiring members to assess whether the proposed activity involves customers of a member (as opposed to customers of a registered person or associated person) would not meaningfully enhance investor protection, as customers who have no relationship with the particular associated person conducting the outside activity face lower risk of

[FINRA-2026-001/srfinja2026001-790579-2395826.pdf](https://www.sec.gov/comments/sr-finja-2026-001/srfinja2026001-790579-2395826.pdf) (“LPL II”); Robinhood at 2 (stating that the consolidation of the OBA and PST regimes into a single rule promotes clarity and simplifies supervisory analysis).

¹⁰² See, e.g., Cambridge I at 2, FSI I at 4, SIFMA I at 2.

¹⁰³ See SIFMA I at 2.

¹⁰⁴ See letter from Marni Rock Gibson, President and Commissioner, North American Securities Administrators Association, Inc., at 5–6 (Feb. 24, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinja2026001-713528-2236594.pdf> (“NASAA”).

¹⁰⁵ See FINRA I at 7.

¹⁰⁶ See *id.* at 8.

⁹⁷ Proposed FINRA Rule 3290(d)(3).

⁹⁸ Proposed FINRA Rule 3290(d)(4).

⁹⁹ Proposed FINRA Rule 3290.06.

¹⁰⁰ See, e.g., letters from Bernard V. Canepa, Managing Director & Associate General Counsel, Securities Industry and Financial Markets Association (“SIFMA”), at 1 (dated Feb. 24, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinja2026001-715007-2237915.pdf> (“SIFMA I”); Alyssa Pompei, Vice President & Assistant General Counsel, SIFMA, at 1 (dated May 27, 2026), <https://www.sec.gov/comments/SR-FINRA-2026-001/srfinja2026001-791999-2397527.pdf> (“SIFMA II”); Jessica R. Giroux, Chief Legal Officer, American Securities Association, at 1 (dated Feb. 24, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinja2026001-714947-2237677.pdf> (“ASA I”); Clifford Kirsch and Eric Arnold, Eversheds Sutherland (US) LLP for the Committee of Annuity Insurers, at 2 (dated Feb. 25, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinja2026001-715007-2237915.pdf>

confusion about the member's involvement in the proposed activity.¹⁰⁷

FINRA also stated that the proposed rule change would standardize the minimum assessment that members must conduct upon receiving notice of registered persons' outside activities and associated persons' outside securities transactions to include the assessment required by FINRA Rule 3270, and add a new requirement to assess whether the activity involves the customer of the registered or associated person.¹⁰⁸ FINRA stated, however, that the proposed rule change would not limit a member's ability to expand the scope of its assessment if the member determines a broader scope is appropriate for its business.¹⁰⁹

Other commenters recommended that FINRA expand or clarify other aspects of the assessment requirement through amendments to the proposed rule change or additional guidance. Specifically, one commenter recommended that FINRA require members to inspect the personal and operating bank accounts of its independent registered representatives.¹¹⁰ Several commenters also made various requests for further guidance, including whether the rule would limit a member's ability to conduct a more robust assessment or implement safeguards beyond the minimum required by the proposed rule change,¹¹¹ and what would constitute a "material change" to an outside activity.¹¹²

In response, FINRA stated that the proposed rule change would not limit a member's ability to expand the scope of its assessment or to implement safeguards beyond the minimum requirements established in proposed FINRA Rule 3290.¹¹³ That is, under the proposed rule change, members would maintain the flexibility to develop and implement supervisory systems that reflect their respective business models. For these reasons, FINRA declined to amend the proposed rule change to

provide the additional guidance requested by commenters.¹¹⁴ FINRA stated, however, that if the Commission approves the proposed rule change, it will consider providing additional guidance as appropriate.¹¹⁵

FINRA also declined to modify the proposed rule change to require members to inspect the personal and operating bank accounts of its independent registered representatives, stating that a blanket bank account inspection requirement would raise "significant privacy concerns and be operationally infeasible."¹¹⁶

Finally, one commenter recommended that FINRA explicitly require members to supervise any conditions or limitations they impose on approved outside activities.¹¹⁷ In response, FINRA amended the proposed rule change to include proposed FINRA Rule 3290.06 (Supervision of Imposed Conditions or Limitations) to state if a member imposes conditions or limitations pursuant to paragraphs (c)(2), (d)(2) or (d)(3) of Proposed Rule 3290, the member would be required to reasonably supervise compliance with such conditions or limitations.¹¹⁸ FINRA stated that, while this obligation has always been implicit in the existing rules, the amendment would provide greater clarity to its members.¹¹⁹

Three commenters supported this amendment, stating that although this obligation was already implicit under FINRA Rules 3270 and 3280, explicitly codifying it in proposed FINRA Rule 3290.06 would remove ambiguity and reinforce that a member's imposition of conditions or limitations on an outside activity carries a supervisory obligation to assess compliance with those conditions or limitations.¹²⁰

Another commenter opposed this amendment, stating that the proposed supervisory requirement is "irreconcilable with the legal and ethical obligations that govern law firm outside business activities" ("professional OBAs").¹²¹ This commenter recommended that FINRA

amend proposed Rule 3290.06 to: clarify that members' obligations to supervise conditions or limitations on licensed professionals' outside activities does not require such members to obtain or review privileged material; establish safe harbors from the proposed supervision obligation for members that impose certain good faith limitations or conditions on licensed professionals' outside activities; and, highlight that members may seek an exemption from proposed Rule 3290.06 pursuant to proposed FINRA Rule 3290(h).¹²² In addition, the commenter requested that FINRA provide guidance to help members design conditions and limitation on supervising professional activities that would not require access to privileged information.¹²³

In response, FINRA stated that proposed FINRA Rule 3290.06 would not require that a member impose conditions or limitations on professional OBAs; rather, it would require that if a member imposes conditions or limitations, it must reasonably supervise for compliance with the conditions or limitations.¹²⁴ As such, members would have discretion to determine whether to impose any conditions or limitations, and if they do, what types of conditions or limitations would be appropriate given the nature of the activity.¹²⁵ FINRA also noted that proposed Rule 3290(h) would include general exemptive authority to permit FINRA staff to conditionally or unconditionally grant an exemption for good cause shown pursuant to the FINRA Rule 9600 Series.¹²⁶ Consequently, FINRA stated that a general safe harbor or exemptive relief for professional OBAs is not necessary.¹²⁷ For these reasons, FINRA declined to modify the proposed rule change in this respect. FINRA stated, however, that it remains open to considering whether to provide additional guidance or exemptive relief on a case-by-case basis where specific facts and circumstances demonstrate that such guidance or relief is appropriate.¹²⁸

4. Commission Findings on Proposed FINRA Rule 3290(a)–(d), 3290.01, and 3290.06

The proposed rule change is reasonably designed to establish uniform minimum standards by which

¹⁰⁷ *Id.* at 7. Further, FINRA stated that a broader requirement could present practical challenges. For example, some members may face operational challenges cross-referencing outside activity participants against the member's entire customer base. *Id.* at 7–8 and n.20.

¹⁰⁸ *Id.* at 7.

¹⁰⁹ *Id.* at 8.

¹¹⁰ See letter from Michael Hill, Esq., Menzel & Hill, P.A., (dated Feb. 24, 2026), <https://www.sec.gov/comments/sr-fina-2026-001/srfina2026001-713728-2236715.html> ("Hill").

¹¹¹ See ASA I at 3–4; letter from Jessica Giroux, Chief Legal Officer, American Securities Association, at 2 (dated May 27, 2026), <https://www.sec.gov/comments/SR-FINRA-2026-001/srfina2026001-791659-2397067.pdf> ("ASA II").

¹¹² See Robinhood at 2–3.

¹¹³ See FINRA II at 4.

¹¹⁴ See FINRA I at 9; FINRA II at 4.

¹¹⁵ See FINRA I at 17; FINRA II at 4.

¹¹⁶ See FINRA I at 8.

¹¹⁷ See FSI I at 3–4 (stating that supervision of any conditions or limitations is implied but stating it plainly would provide "regulatory cover" to members that impose them).

¹¹⁸ See FINRA I at 16.

¹¹⁹ See Amendment No. 1 at 5; see also FINRA I at 16.

¹²⁰ See ASA II at 3; see also SIFMA II at 2–3; FSI II at 2.

¹²¹ See letter from Jeffrey Burg, President, AlphaTrust Advisors, at 1 (dated May 15, 2026), <https://www.sec.gov/comments/SR-FINRA-2026-001/srfina2026001-779208-2374616.pdf> ("AlphaTrust").

¹²² *Id.* at 3–4.

¹²³ See *id.*

¹²⁴ See FINRA I at 14; FINRA II at 8.

¹²⁵ See FINRA II at 8.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

registered persons report outside activities, associated persons report outside securities transactions, and members assess and supervise such activities. In doing so, the proposed rule change would both maintain and build on many of the existing requirements for the notice and assessment process in existing FINRA Rules 3270 and 3280. This approach would permit associated persons, registered persons, and members to leverage established supervisory practices designed to comply with existing obligations where applicable, enhancing regulatory and compliance efficiency.

The proposed rule change would incorporate existing obligations by requiring that a registered person or associated person provide prior written notice to the member describing in detail the proposed outside activity or outside securities transaction, respectively, and the person's role therein. The proposed rule change would also add a requirement for associated and registered persons to update their notice prior to continuing the activity in case of a material change prior.

By enumerating the information that must be included in such notices the proposed rule will set a minimum information requirement so that members have the information that they need to discharge their supervisory obligations. Further, the obligation to provide an updated prior written notice in case of a material change will help ensure that members have current information necessary to fulfill their supervisory obligations. In addition, with respect to the commenter's request for guidance on what constitutes a material change, FINRA will consider providing additional guidance as appropriate if the Commission approves the proposed rule change.

Turning to a member's obligations upon receiving a notice of an outside activity or outside securities transaction, by requiring a member to assess an outside activity or outside securities transaction, the proposed rule change provides a uniform regulatory framework with respect to risk assessment, requiring members to consider the potential risks associated with an outside activity or securities transaction and whether to limit, condition or prohibit the outside activity or outside securities transaction.

Specifically, requiring a member to assess whether an activity is properly characterized as an outside activity, rather than an outside securities transaction, or, if it is an outside securities transaction, whether it is for selling compensation, should help

members address any mistaken or intentional mischaracterization by their associated persons, and help ensure the appropriate obligations apply to the proposed activity.

By requiring a member to consider whether the outside activity or outside securities transaction involves a customer of the registered person or an associated person, respectively, rather than a customer of the member as a commenter suggested, the proposed rule change reasonably focuses a member's attention on the relationships where the risk of customer confusion, and the associated reputational and legal risks to the member, are greatest—those where the customer has a direct relationship with the registered person or associated person engaged in the outside activity or outside securities transaction. Further, by requiring the member to assess whether the activity or transaction would be viewed by the member's customers or the public as part of the member's business, a member would be required to more broadly consider the potential for confusion to the member's customers or the public. Moreover, the proposed rule would require a member to assess whether the outside activity or outside securities transaction will interfere with or otherwise compromise the registered person's or associated person's responsibilities to the member or the member's customers, which again imposes a broad obligation on the member to evaluate the risk of the proposed activity to the member and the member's customers. Finally, the obligations imposed by the proposed rule change are a floor, not a ceiling. Accordingly, a member can expand the scope of its assessment if the member determines a broader scope is appropriate for its business.

Also, it was reasonable for FINRA to decline to impose an overarching obligation for members to inspect personal bank accounts of its independent registered representatives, given that such an obligation could create privacy challenges and could be operationally difficult to implement without a commensurate benefit to the supervisory program of the member. Moreover, even without such an explicit requirement, a member would still be subject to its general supervisory obligations under federal law or FINRA Rule 3110, including responsibility to investigate and act in light of "red flags" suggesting possible misconduct such as an undisclosed outside securities transaction.

Requiring a member to evaluate the advisability of imposing specific conditions or limitations on a registered person's outside activity, including

where circumstances warrant, prohibiting the activity, will require members to reasonably consider the facts and circumstances associated with the outside activity, to evaluate the nature of the risk associated with the activity, and to determine what conditions and limitations, if any, are appropriate, or whether the activity should be prohibited. In doing so, the proposed rule would impose a uniform minimum assessment process for members, while also providing flexibility to members to determine whether to condition, limit, or prohibit an activity, based on the member's assessment of the risks to customers and the member presented by the activity in light of the member's business model and risk profile.

Further, delineating a member's obligations related to an outside securities transaction based on whether the associated person will receive selling compensation maintains existing requirements under FINRA Rule 3280 and is reasonably calibrated to require the member to focus the most supervisory and compliance resources on those activities that pose greater risks to members and their customers. Specifically, for transactions not involving selling compensation, the proposed rule change would reasonably impose fewer obligations—notably requiring a member to assess the proposed transaction and acknowledge the notice—and would leave to the member's discretion to determine whether to impose any conditions on the transaction based on the member's assessment of the enumerated factors set forth in proposed FINRA Rule 3290(d)(1). For transactions involving selling compensation, however, the proposed rule change would impose more stringent obligations on members, reflecting the increased risks associated with an outside securities transaction involving selling compensation, and the corresponding need for heightened scrutiny. In particular, members would be required to assess the proposed transaction and, based on that assessment, approve (with or without limitations or conditions) or disapprove the transaction. If a member approves a proposed securities transaction for selling compensation, the member would be required to record the transaction on its books and records and supervise the associated person's participation in the transaction as if it was executed on behalf of the member.

As the proposed rule change permits, but does not require, members to limit or condition an outside activity or an outside securities transaction (and gives members flexibility in determining any

such limitations or conditions), and enables members to seek an exemption from any provision of the proposed rule change for unique factual scenarios (as discussed further below), it is reasonable for FINRA not to address all unique factual scenarios at the outset, such as those associated with professional licenses.

In addition, as discussed more fully below, the proposed rule change would require a member to supervise any imposed limitations or conditions on an outside activity or outside securities transaction, which will help ensure that any limitations and conditions that a member determines are necessary are observed. Moreover, as noted, the obligations imposed by the proposed rule change are a floor, not a ceiling. Accordingly, the proposed rule change does not restrict a member's ability to limit, condition, or prohibit any outside activities or outside securities transactions where the member has determined such a prohibition is appropriate for its own risk management.

Finally, by permitting members to develop a written allocation agreement regarding regulatory obligations for an associated person's participation in an outside securities transaction involving selling compensation, the proposed rule change promotes regulatory efficiency and minimizes duplicative regulatory oversight, while preserving investor protection.

For these reasons, the proposed rule change is reasonably 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.

B. Proposed Definition of Investment-Related Activity

As stated earlier, the obligations of proposed FINRA Rules 3290(a)–(d) are triggered based on the participation of a member's associated person in "investment-related activity." As originally proposed, the term would have been defined as "pertaining to financial assets, including securities, crypto assets, commodities, derivatives (such as futures and swaps), currency, banking, real estate or insurance." The term would have included but not have been limited to, "acting as or being associated with a broker-dealer; issuer; insurance agent or company; investment company; investment adviser; futures commission merchant; commodity trading advisor; commodity pool operator; municipal advisor; futures sponsor; bank; savings association; or

credit union."¹²⁹ The proposed definition also included "an associated person's participation in any manner in a personal investment involving a securities transaction, sometimes referred to as "buying away," other than transactions indicated in proposed FINRA Rule 3290(g)(3)(A)."¹³⁰

Many commenters supported the proposed definition of "investment-related activity" as originally proposed, stating that it would streamline the process of reporting outside activities by eliminating the obligation to report routine activities (such as volunteer youth sports coaching, serving on a local civic board, and farming) that do not cause harm to members or investors and the reporting of which diverts member resources.¹³¹ In particular, commenters stated that the current reporting requirements require members to expend compliance resources on reviewing disclosures of low-risk, non-financial activities that ultimately result in increased costs for financial advisors and their clients.¹³²

Some commenters requested that the proposed definition be broadened, narrowed, or clarified.¹³³ More specifically, with respect to broadening the definition, some commenters opposed the proposed definition as too

narrow, stating that disclosures of OBAs should be robust and not limited to investment-related activity in order to ensure that members can evaluate the OBAs for potential conflicts of interest and the risk of securities fraud.¹³⁴ One commenter stated in particular that the boundary between investment-related and non-investment-related activity is rarely clear, so restricting the type of activities that could be reported to, and assessed by, members, would create gaps in supervision that could obscure misconduct.¹³⁵ One commenter opposed the definition because it excluded significant categories of agent conduct that may pose risks to investors.¹³⁶ One commenter recommended broadening the proposed definition to include, among other things, activities pertaining to money transmission, collectibles, and lending, and to add the phrase "but not limited to" before the list of examples to clarify that the examples are illustrative rather than exhaustive.¹³⁷ Another commenter recommended broadening the proposed definition to include, among other things, financial planning, tax advice, and business advice, stating that

¹²⁹ See proposed FINRA Rule 3290(f)(3)(A).

¹³⁰ See *supra* note 51.

¹³¹ See Form Letter A (identifying volunteer youth sports coaching, serving on a local civic board, and farming as examples of such low risk activities); Form Letter B (stating the definition focuses reporting requirements on activities that matter for investor protection and removes obligations to report low-risk activities); FSI I at 4 (noting that narrowing the focus to investment-related activities will benefit investor protection by allowing compliance personnel to spend their time on higher-risk activities); Robinhood at 2 (stating that the focus on investment-related activities will reduce unnecessary burdens while maintaining core investor protections of the existing FINRA Rules 3270 and 3280). See also CAI at 2; LPL II at 1–2; ACA at 1–2. Commenters also recommended that FINRA amend Form U4 to align with the proposed rule change because requiring registered representatives to disclose non-investment-related outside activities pursuant to Question 14 of Form U4 would negate the benefits of the proposed rule change. See, e.g., SIFMA I at 2; SIFMA II at 3; see also CAI at 3; FSI I at 5; NASAA at 2, n.5; Robinhood at 2. In response, FINRA declined to amend the proposed rule change, stating that Form U4 disclosures are outside the scope of the proposed rule change; but FINRA also stated that it would endeavor to work with the Commission and state regulators to harmonize the Form U4 disclosure obligations where appropriate. See FINRA I at 16; FINRA II at 8–9. FINRA reasonably declined to amend the proposed rule change in response, as the comment is outside the scope of the proposed rule change.

¹³² See, e.g., Form Letter B; SIFMA II at 2; see also Robinhood at 2 (stating that narrowing the proposed rule change to investment-related activities reduces the administrative and operational burdens of reporting low-risk activities).

¹³³ See, e.g., CAI at 3; NASAA at 2–3; St. John's Law at 2; ASA I at 1.

¹³⁴ See, e.g., letters from Michael C. Bixby, President, Public Investors Advocate Bar Association ("PIABA"), at 9 (dated Feb. 18, 2026), <https://www.sec.gov/comments/sr-firna-2026-001/srfinra2026001-704987-2220895.pdf> ("PIABA I"); Michael C. Bixby, President, PIABA, at 2 (dated June 10, 2026), <https://www.sec.gov/comments/SR-FINRA-2026-001/srfinra2026001-811619-2471170.pdf> ("PIABA II"); Nicholas J. Guiliano, The Guiliano Law Group, at 2–3 (dated Feb. 24, 2026), https://www.sec.gov/comments/sr-firna-2026-001/srfinra2026001-715187-2238215_0.pdf ("Guiliano"); Courtney M. Werning, Principal, Meyer Wilson Werning, at 1 (dated Feb. 19, 2026), <https://www.sec.gov/comments/sr-firna-2026-001/srfinra2026001-706827-2225236.pdf> ("Werning"); Peter J. Mougey, Levin Papantonio Proctor Buchanan O'Brien Barr Mougey P.A., at 1 (dated Feb. 25, 2026), <https://www.sec.gov/comments/sr-firna-2026-001/srfinra2026001-716067-2240135.pdf> ("Mougey"); Samuel B. Edwards, Shepherd Smith Edwards & Kantas, LLP, at 1–2 (dated Feb. 19, 2026), <https://www.sec.gov/comments/sr-firna-2026-001/srfinra2026001-706147-2223534.pdf> ("Edwards"); Robert Savage, Savage Villock Law, PLLC, at 1 (dated Feb. 19, 2026), <https://www.sec.gov/comments/sr-firna-2026-001/srfinra2026001-706367-2223934.pdf> ("Savage"); Robert H. Rex, Esq., Rex Securities Law, at 1–2 (dated Feb. 19, 2026), <https://www.sec.gov/comments/sr-firna-2026-001/srfinra2026001-706188-2223574.pdf> ("Rex"); Richard A. Lewins, Lewins Law, PC, at 1–2 (dated Feb. 19, 2026), <https://www.sec.gov/comments/SR-FINRA-2026-001/srfinra2026001-706327-2223876.pdf> ("Lewins"); Melinda Jane Steuer, at 1 (dated Feb. 19, 2026), <https://www.sec.gov/comments/sr-firna-2026-001/srfinra2026001-706547-2224354.pdf> ("Steuer").

¹³⁵ See Werning at 1.

¹³⁶ See letter from William Galvin, Secretary of the Commonwealth, Commonwealth of Massachusetts, at 3 (dated Feb. 24, 2026), <https://www.sec.gov/comments/sr-firna-2026-001/srfinra2026001-713987-2236877.pdf> ("Massachusetts").

¹³⁷ See NASAA at 2–3.

investors could perceive these activities as part of a member's business.¹³⁸

By contrast, one commenter suggested narrowing the proposed definition to securities transactions in order to exclude transactions with which a member may not have familiarity, such as transactions in non-securities insurance or banking products.¹³⁹ Another commenter suggested narrowing the proposed definition to exclude fundraising for non-profit organizations and the receipt of residual insurance commissions.¹⁴⁰

With respect to clarifying the proposed definition, one commenter requested guidance regarding the scope of categories such as banking, insurance, and real estate.¹⁴¹ Another commenter requested guidance regarding whether the proposed definition included real estate, and in particular rental properties.¹⁴²

In response to commenters generally opposed to the proposed definition because they viewed it as too narrow, leading to an unduly limited application of the proposed rule change's operative provisions, FINRA stated that the framework under current FINRA rules, in which all OBAs, including those that are non-investment-related, are reported creates significant compliance burdens without commensurate investor protection benefits.¹⁴³ FINRA also stated that by eliminating the notice and assessment requirements for non-investment-related activities, which present minimal investor protection concerns, the proposed rule change would free members to focus resources and attention on activities more likely to involve potential customer confusion or harm.¹⁴⁴ FINRA stated that members would still be required to maintain a system to supervise activities that is reasonably designed to achieve compliance with applicable securities laws and regulations and FINRA rules.¹⁴⁵ In addition, FINRA stated that the proposed definition expressly encompasses "all activities pertaining to financial assets" even if not individually listed, and clarified that

the listed examples in the proposed definition are not exclusive.¹⁴⁶ Further, FINRA stated that members would retain discretion to prohibit or condition activity based on risk.¹⁴⁷ For these reasons, FINRA stated that the scope of the proposed definition strikes the right balance regarding disclosure of activities that may pose a greater risk to the investing public and members.¹⁴⁸ As such, FINRA declined to amend the proposed rule change. However, FINRA also stated if the Commission approves the proposed rule change, it will consider providing additional guidance regarding the scope of investment-related activity as appropriate.¹⁴⁹

FINRA also responded to comments about the coverage of specific activities. In response to comments regarding broadening the scope of the definition to include specific activities, such as money transmission and financial planning, FINRA stated that the list of activities in the proposed definition of investment-related activities was not meant to be exhaustive and therefore activities pertaining to financial assets and other related roles or associations would be covered even if not expressly listed among the examples in the proposed definition. As such, FINRA stated the proposed definition already captures money transmission, lending, collectible activity, and financial planning to the extent they pertain to financial assets.¹⁵⁰ Nevertheless, FINRA amended the proposed rule change to add both the broader phrase "money services business" to provide regulatory clarity and the phrase "but not limited to" before the list of examples in proposed Rule 3290(f)(3) to confirm that the listed examples are illustrative rather than exhaustive.¹⁵¹ FINRA also stated that the proposed definition already captures tax advice and other similar types of services to the extent that are performed concomitant to investment-related activity.¹⁵²

In response to comments requesting the exclusion of specific activities from the scope of the proposed definition, FINRA stated that narrowing the definition to only securities transactions would inappropriately exclude activities that present risks to investors and members, particularly the risk that investors or the public would view the activities as part of the member's

business.¹⁵³ With regard to excluding fundraising activities for non-profit organizations, FINRA stated that depending on the specific facts and circumstances, fundraising activity could be investment-related; as such, excluding all fundraising for non-profit organizations from the proposed definition could exclude activities that present risks to investors and members.¹⁵⁴ With respect to comments seeking to exclude residual insurance commissions, FINRA stated that FINRA Rules 2320 and 2341 already address the receipt of residual insurance commissions, because those rules prohibit associated persons of a member from accepting any compensation in connection with the outside sale and distribution of variable contracts or investment company securities.¹⁵⁵ With respect to comments seeking clarity regarding real estate and particularly rental properties, FINRA stated that real estate is expressly included in the definition of investment-related activity and would be subject to the proposed rule change unless such activity met the exclusion in proposed Rule 3290(g)(3)(C) for a main home and up to two secondary homes.¹⁵⁶

In response to comments that the proposed definition lacks clarity and would cause registered persons to make subjective determinations, FINRA explained that the proposed definition expressly covers "all activities pertaining to financial assets," including those that are not securities-related, and that the examples cited are not exclusive.

Also in response to comments, FINRA proposed a clarifying amendment to make explicit the breadth of the definition with respect to money services business and to confirm that the listed examples are illustrative rather than exhaustive. In addition, FINRA further stated that the definition captures activities related to capital raising, lending, financial planning, selling private funds, investment partnerships, and crypto-asset development, promotion or market intermediation, and that consulting, marketing, accounting, legal and tax advice services concomitant to investment-related activity would also be covered.¹⁵⁷ With the proposed amendment and statements, FINRA

¹³⁸ See St. John's Law at 2 (stating that including these activities within the definition of "investment-related activity" would help avoid confusion and potential conflicts regarding the nature of such services); see also Massachusetts at 3 (stating that the proposed rule change excludes consulting, legal, tax, and marketing functions, as well as accountancy and financial control positions that can be precursors to larger fraudulent activity).

¹³⁹ See LPL I at 3.

¹⁴⁰ See CAI at 3.

¹⁴¹ See Robinhood at 3.

¹⁴² See ASA I at 3; ASA II at 3–4.

¹⁴³ See FINRA I at 3.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 12–13, n.36.

¹⁴⁶ *Id.* at 4.

¹⁴⁷ *Id.* at 12.

¹⁴⁸ *Id.* at 5.

¹⁴⁹ *Id.* at 17; FINRA II at 4.

¹⁵⁰ See FINRA I at 4–5.

¹⁵¹ *Id.* at 2, 4–5; see also Amendment No. 1.

¹⁵² *Id.* at 5.

¹⁵³ *Id.* at 6 (citing the example of a registered representative selling fixed annuities, crypto assets or commodities away from the member as particular risks).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See FINRA I at 6; FINRA II at 3.

¹⁵⁷ See FINRA I at 4.

clarified that the proposed definition should be interpreted broadly.

The proposed rule change reasonably focuses members' oversight of outside activities on those that present the greatest potential harm to members or investors. The proposed definition of investment-related activity is designed to scope into the operative provisions of proposed FINRA Rule 3290 associated persons' activities where the risk associated with the activity, such as the potential for customer confusion about the registered person and their broker-dealer's involvement in the activity, is most acute. Although excluding any category of activity from the scope of the proposed rule may result in a member having less visibility into those activities, members have limited compliance resources, and it is thus reasonable for FINRA to adopt a risk-based approach by narrowing the scope of reportable activities to those with greater potential for harm to investors and to the member. Moreover, members would still be required to maintain a system to supervise activities that is reasonably designed to achieve compliance with applicable securities laws and regulations and FINRA rules. In that regard, members could impose reporting requirements on activities that do not fall within the definition of investment-related activity, or prohibit or condition activities, as appropriate. Additionally, nothing in the proposed rule change would alter the well-settled principle that members must investigate "red flags" indicating problematic activities.

The proposed definition would broadly cover activities pertaining to financial assets, subject to certain targeted exclusions, which are more likely to involve potential customer confusion or harm: activities that are either directly securities-related or otherwise associated with common financial services, such as insurance, banking and crypto assets.

The proposed definition of "investment-related activity" as amended is reasonably expansive to capture and focus on activity that has greater potential to cause customer confusion or harm to investors and to members—activities that pertain to financial assets. The proposed definition, coupled with the clarifications and explanations offered, should provide a reasonable compliance roadmap for both members and their associated persons, and help ensure that the proposed rule change will result in members being notified of activities that are more likely to expose members and investors to risk. By enabling members to redirect supervisory and compliance

resources toward higher-risk investment-related activities, including investment-related activities that are not securities-related, the proposed rule change should promote more effective risk-based oversight. FINRA also indicated it would consider providing additional guidance on the scope of investment-related activity if the proposed rule changed is approved, where appropriate.

For these reasons, the proposed rule change is reasonably 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.

C. Activities Treated as Outside Activities for Purposes of Proposed FINRA Rule 3290

1. Associated Persons Acting as Portfolio Managers and Investment Committee Members

As stated above, proposed FINRA Rule 3290.02 states that an associated person would not be considered to be participating in an outside securities transaction to the extent that the associated person's activities are limited to acting as portfolio manager or investment committee member for registered investment companies (*e.g.*, mutual funds, exchange traded funds, unit investment trusts, or registered closed-end funds), unregistered investment companies, business development companies, real estate investment trusts, and entities that are recognized as tax exempt. Such activity would be considered an outside activity of a registered person. However, the proposed exception would not include an associated person's activities related to purchasing or selling such entities' shares, which would be considered outside securities transactions unless otherwise excluded under proposed FINRA Rule 3290(g). FINRA Rule 3290.02 would codify FINRA's staff positions on member requirements applicable to these activities.¹⁵⁸

One commenter opposed the proposed rule change as too broad, stating that associated persons engaged in the activities described above are subject to a range of conflicts, including compensation-related conflicts, as well as other risks and thus there should not be a *per se* exclusion of these activities from treatment as outside securities transactions and the associated requirements to supervise and maintain records of that activity.¹⁵⁹ In the context

of a tax-exempt organization, this commenter stated that there may be risks and conflicts that could harm the organization, particularly since these roles may also pay substantial compensation.¹⁶⁰

In response, FINRA stated that the activities deemed to be outside activities under proposed Rule 3290.02 typically involve management of third-party capital with associated fiduciary duties and regulatory oversight, and thus do not present the same level of risk as direct participation in securities transactions.¹⁶¹ As such, requiring the associated person to notify its members of the activity and the member to assess the proposed activity is sufficient to enable members to evaluate any associated risks.¹⁶² Further, FINRA stated that members retain discretion to impose conditions or limitations on the activity based on the member's evaluation of the particular risk, and to the extent a member does impose conditions or limitations on the activity, the member would be required to supervise compliance with the conditions or limitations under proposed FINRA Rule 3290.06.¹⁶³ Additionally, if the associated person begins selling fund shares for compensation, shifting from a governance or management role to a sales capacity, then the proposed rule change's approval, member supervision and recordkeeping requirements would apply.¹⁶⁴ FINRA also stated that the proposed rule change is consistent with how FINRA staff has interpreted FINRA Rules 3270 and 3280.¹⁶⁵

The proposed rule change, which codifies FINRA's current treatment of these activities under existing FINRA Rules 3270 and 3280, reasonably treats certain limited activities of an associated person who acts as a portfolio manager or investment committee member for specified entities as outside activities of a registered person, subject to the notice and member assessment in proposed FINRA Rule 3290(a) and (c), rather than as outside securities transactions, subject to the notice, assessment, and applicable approval requirements in proposed FINRA Rule 3290(b) and (d). The proposed rule change reasonably tailors the obligations of members and associated persons in light of the risk presented by the activity. For example,

¹⁶⁰ *Id.*

¹⁶¹ See FINRA I at 10.

¹⁶² *Id.*

¹⁶³ See proposed FINRA Rule 3290.06; FINRA I at 10.

¹⁶⁴ See FINRA I at 10.

¹⁶⁵ *Id.*

¹⁵⁸ See Notice at 5006.

¹⁵⁹ See Massachusetts at 4.

portfolio managers and investment committee members of registered investment companies are subject to regulatory oversight under the Advisers Act and the Investment Company Act of 1940 ("Investment Company Act") or oversight by state regulators, as applicable.

Treating this activity as an outside activity is designed to help ensure that the member is aware of the proposed activity, assesses the associated risks, and imposes conditions and limitations (including prohibiting the activity) based on its assessment. Further, proposed FINRA Rule 3290.06 would explicitly impose a new requirement for the member to supervise compliance with any conditions or limitations. Finally, if the activity involves selling shares for compensation, the additional notice, assessment, and approval obligations applicable to outside securities transactions would apply to address the additional risks presented by that activity. For these reasons, the proposed rule change is reasonably 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.

2. Associated Person Activity at an Unaffiliated RIA

As stated above, proposed FINRA Rule 3290.03 states that an associated person's activity at an unaffiliated RIA registered either with the Commission under Advisers Act Section 203 or with a state securities commission (or any agency or office performing like functions) would be considered an outside activity of a registered person and not an outside securities transaction for purposes of proposed FINRA Rule 3290. As a result, the associated person would be required to provide prior written notice of such activity under proposed FINRA Rule 3290(a), and the member would be required to conduct an assessment pursuant to the criteria set forth in proposed FINRA Rule 3290(c), but the member would not be required to supervise or keep records of that activity.¹⁶⁶ FINRA stated that as a result, the proposed rule change would "revise[] the member obligations imposed via a series of Notices to Members issued in the 1990s."¹⁶⁷

The majority of commenters supported the proposed rule change,¹⁶⁸

generally stating that activities at unaffiliated RIAs are already effectively regulated by the Commission and state regulators, making the existing requirements duplicative.¹⁶⁹ As such, commenters stated that the existing framework creates a situation in which compliance resources are spent on redundant review rather than investor protection.¹⁷⁰ Commenters also stated that the existing requirements create an uneven regulatory landscape between broker-dealers and investment advisers because registered investment adviser firms without FINRA-registered personnel are not subject to the additional layer of FINRA regulation.¹⁷¹

789421-2394167.pdf ("Cetera II"); Mark Quinn, Director of Regulatory Affairs, Cetera Financial Group, at 1–2 (dated June 10, 2026), <https://www.sec.gov/comments/SR-FINRA-2026-001/srfinra2026001-815939-2484510.pdf> ("Cetera III"); Gail Bernstein and Monique Botkin, General Counsel and Head of Public Policy and Associate General Counsel, Investment Adviser Association, at 1 (dated Feb. 24, 2026), <https://www.sec.gov/comments/sr-finra-2026-001/srfinra2026001-715090-2238074.pdf> ("IAA"); CAI at 2; LPL I at 2; SIFMA I at 1–2; letters from Doug Baxley, Chief Compliance Officer, Merit Financial Advisors, at 1 (dated Feb. 22, 2026), <https://www.sec.gov/comments/sr-finra-2026-001/srfinra2026001-708947-2231755.pdf> ("Baxley"); John Ramirez, Financial Advisor, Woodlands Portfolio Management, at 1 (dated Feb. 22, 2026), <https://www.sec.gov/comments/sr-finra-2026-001/srfinra2026001-708307-2229695.pdf> ("Ramirez"); Cline E. Reasor, Managing Partner, Gratus Wealth Advisors, LLC, at 2 (dated Feb. 24, 2026), <https://www.sec.gov/comments/sr-finra-2026-001/srfinra2026001-713067-2236294.pdf> ("Reasor"); David Gutierrez, Gutierrez Wealth Advisory, at 1 (dated Feb. 24, 2026) <https://www.sec.gov/comments/sr-finra-2026-001/srfinra2026001-714427-2237214.pdf> ("Gutierrez"); Scott R. Solod, Chief Compliance Officer, Hammond Iles Wealth Advisors, at 1 (dated Feb. 24, 2026) https://www.sec.gov/comments/SR-FINRA-2026-001/srfinra2026001-712567-2235796_0.pdf ("Solod"); Timothy E. Flatley, President & CEO, Sterling Investment Advisors, Ltd., at 1 (dated Feb. 23, 2026) <https://www.sec.gov/comments/sr-finra-2026-001/srfinra2026001-712951-2236161.pdf> ("Flatley"); Brian Nguyen, Twin Peaks Wealth Advisors, at 1 (dated Feb. 22, 2026), <https://www.sec.gov/comments/sr-finra-2026-001/srfinra2026001-711028-2233350.pdf> ("Nguyen"); Michael McLane, Owner, Redwood Financial Planning at 2 (dated Feb. 22, 2026), <https://www.sec.gov/comments/sr-finra-2026-001/srfinra2026001-708427-2229934.pdf> ("Redwood"); Shamberger at 1; A&P Services at 1; Benedetti at 1; Lawrance at 1.

¹⁶⁹ See Form Letter A; SIFMA II at 2–3; Gutierrez at 1; Lawrance at 1; Solod at 1; Flatley at 1; Baxley at 1; Ramirez at 1.

¹⁷⁰ See Form Letter B. See also Shamberger at 1; Naugle at 1; Benedetti at 1; Cetera III at 3–4 (stating recently adopted requirements, under Regulation Best Interest and Form CRS, require disclosure to investors of information that should eliminate any potential customer confusion regarding the role and capacity of a representative, which FINRA Rule 3280 was adopted to prevent); letter from Jamal Mahmood, Certified Financial Planner, Main Street Financial Solutions (dated Feb. 24, 2026), <https://www.sec.gov/comments/sr-finra-2026-001/srfinra2026001-2238614.htm> ("J. Mahmood").

¹⁷¹ See Form Letters C and D; Reasor at 2; Nguyen at 1; Redwood at 2; IAA at 1–3; Baxley at 1; Ramirez at 1.

Other commenters stated that the existing obligation to supervise unaffiliated RIA activity of their associated persons exposes members to an unreasonable liability risk in the event of investor losses stemming from advice provided by the unaffiliated RIA firm.¹⁷² Finally, several supportive commenters stated that the proposed rule change would help eliminate privacy concerns¹⁷³ and other barriers to regulatory compliance caused by the current rules.¹⁷⁴

Commenters opposed to the proposed rule change stated that investment adviser oversight by the Commission or state regulators is an inadequate substitute for broker-dealer supervision,¹⁷⁵ with some noting in particular the length of time that may pass between Commission or state

¹⁷² See Form Letter A, see also IAA at 3 (stating that members' inability to obtain such information subjects them to potential regulatory responsibility and liability without providing adequate means to protect themselves); CAI at 2.

¹⁷³ See Reasor at 1 (stating that the current rules require associated persons registered with broker-dealers and with investment advisers to share their advisory clients' non-public personal information with unaffiliated broker-dealers that have no advisory relationship with those clients). See also Form Letter D; letter from Scott Wallschlaeger, MPPL Financial, at 1–2 (dated Feb. 22, 2026), <https://www.sec.gov/comments/sr-finra-2026-001/srfinra2026001-710028-2232575.pdf> ("MPPL Financial") (stating that trust is fundamental to the fiduciary relationship between an advisor and client and that the confidentiality of the advisor-client relationship is protected under federal law, including Regulation S-P); CAI at 2; PKS at 1; Gutierrez at 1; Redwood at 1.

¹⁷⁴ See ACA at 2 (stating that the proposed rule change would eliminate the difficulty of registering prospective registered representatives who work for unaffiliated investment advisers that are unwilling to provide a broker-dealer with the information necessary for the member to supervise such activity as required under FINRA Rule 3280); IAA at 3 (acknowledging that members may have challenges fulfilling their regulatory obligations under the current rules because they lack access to information necessary to meaningfully supervise outside unaffiliated investment adviser activities); see also Gutierrez at 1–2; J. Mahmood.

¹⁷⁵ See letter from Scott Eichhorn and Melanie Cherdack, Director and Associate Director, University of Miami Investor Rights Clinic, at 2–3 (dated Feb. 24, 2026), <https://www.sec.gov/comments/sr-finra-2026-001/srfinra2026001-714428-2237215.pdf> ("Miami Clinic"); Cambridge I at 3; letter from Jeffrey R. Sonn, Esq., Sonn Law Group P.A., at 2–3 (dated Feb. 20, 2026), <https://www.sec.gov/comments/sr-finra-2026-001/srfinra2026001-706987-2225454.pdf> ("Sonn I"). See also letter from Seth A. Miller, General Counsel, President, Advocacy & Administration, Cambridge Investment Research, Inc., at 3 (dated May 27, 2026), <https://www.sec.gov/comments/SR-FINRA-2026-001/srfinra2026001-792039-2397586.pdf> ("Cambridge II") (stating that if the existence of regulatory oversight by the SEC or states and RIAs being subject to fiduciary duty was sufficient to ensure effective supervision of this activity then there would not be enforcement actions showing that misconduct "persists for years before detection").

¹⁶⁶ See Notice at 5006.

¹⁶⁷ See *supra* note 56; Notice at 5006.

¹⁶⁸ See Form Letters A, B, C and D; Cetera I at 1–2; letters from Mark Quinn, Director of Regulatory Affairs, Cetera Financial Group, at 1–2 (dated May 26, 2026), <https://www.sec.gov/comments/SR-FINRA-2026-001/srfinra2026001->

examinations of advisers.¹⁷⁶ One commenter also expressed concern about possible rule changes by the Commission that could lead to further reduced frequency of examinations and other regulatory obligations of some investment advisers, which the commenter believes would result in differing regulatory regimes based on adviser size.¹⁷⁷

Commenters also stated that broker-dealers have unique insights into the day-to-day activities of their associated persons and thus eliminating the member supervision and recordkeeping requirements associated with unaffiliated investment adviser activities would fundamentally weaken investor protections.¹⁷⁸ More specifically, commenters stated that the proposed rule change would remove one of the most effective mechanisms for detecting fraud, conflicts of interest, and undisclosed securities activity by associated persons,¹⁷⁹ and that reducing the reporting requirements would make it more likely that illicit conduct would go unreported and unsupervised.¹⁸⁰ One

commenter stated that the proposed rule change is inconsistent with the Commission's authority under Exchange Act Section 15(b)(4)(E) to impose sanctions on a firm for failing to reasonably supervise a person subject to the firm's supervision who commits a violation of the federal securities laws, including the Advisers Act.¹⁸¹ This commenter stated that there is no authority in the Exchange Act that permits a broker-dealer to delegate this supervisory responsibility to another body or that allows FINRA to exempt members from these requirements because another securities statute or regulatory body covers the same activity.¹⁸²

Other commenters opposing the proposed rule change stated that members do not lack sufficient information to meaningfully supervise unaffiliated RIA activities, contending that the securities regulatory framework has never required members to have complete visibility or direct control to meet their supervisory obligations;

rather, it requires broker-dealers to maintain reasonably designed risk-based supervisory systems.¹⁸³ Similarly, commenters stated that the privacy rationale underlying the proposed rule change are unjustified.¹⁸⁴ Specifically, one commenter stated that broker-dealers already handle extensive non-public personal information and are subject to robust safeguarding requirements.¹⁸⁵

Some commenters (including those who supported and those who opposed the proposed rule change) recommended modifications to the proposed rule change.¹⁸⁶ Similarly, one commenter recommended that, if the proposed rule change is approved by the Commission, FINRA provide guidance or supplementary material stating that a member may not ignore or discount evidence of suspicious activities or red flags arising from activities that they do not supervise and emphasizing that members must consider any red flags related to their associated persons' unaffiliated investment advisory activities as part of their core supervisory obligations.¹⁸⁷ Another commenter stated that practical and privacy challenges to having members supervise the unaffiliated RIA activity of their associated persons can be addressed through targeted safeguards, such as requiring written agreements providing the member access to necessary records, coupled with obtaining applicable client consents.¹⁸⁸

Additionally, a commenter stated that FINRA should tailor rather than eliminate broker-dealer responsibilities for these activities, stating that a reasonable alternative would be requiring notice and member approval of outside advisory activities, while limiting supervisory obligations under proposed FINRA Rule 3290 to activity involving the adviser's clients who are also customers of the member as well as advisory accounts for which the

¹⁷⁶ See Cambridge I at 3; *see also* letter from John S. Burke, Esq., JSB Law, at 2–3 (dated Feb. 20, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinra2026001-707867-2226717.pdf> ("Burke"); Miami Clinic at 2–3; Cambridge II at 3.

¹⁷⁷ See Cambridge I at 4; Cambridge II at 6–7 (raising concerns that approval of the proposed FINRA rule change, combined with the potential adoption of Commission rules that would increase the thresholds for RIAs being classified as a "small entity" under Commission rules and/or increase the asset threshold for investment advisers being required to register with the Commission, would further fragment oversight of RIAs and weaken consistency in investor protection).

¹⁷⁸ See NASAA at 6; *see also* PIABA I at 4–5, 8; PIABA II at 2; Cambridge I at 6; Sonn I at 2–3; Massachusetts at 2; letters from David Meyer, Founder and Managing Principal, Meyer Wilson Werning, at 2 (dated Feb. 22, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinra2026001-708147-2229414.pdf> ("Meyer"); Alex Rogers, Attorney at Law, (dated Feb. 24, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinra2026001-714647-2237394.html> ("Rogers"). *See also* Cambridge I at 5; Cambridge II at 4–5 (stating that removing supervisory obligations over unaffiliated RIA activity fails to reduce a member's litigation or arbitration risk and creates incentives for associated persons to affiliate with the member who imposes only the minimum requirements of the proposed rule change).

¹⁷⁹ See Sonn I at 2; *see also* letter from Glenn Mazer, Mazer Law Firm PC (dated Feb. 20, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinra2026001-707567-2226334.html> ("Mazer"); Burke at 3; letter from Nico Banks, co-chair of the PIABA Arbitration Committee, Banks Law Office (dated Feb. 19, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinra2026001-706447-2224014.pdf> ("Banks").

¹⁸⁰ See Mougey at 1; Cornish at 1; Bingham at 1; Pearce at 1–2; Vannoy at 1; Schwartz at 2; Wojciechowski at 1; Muzaurieta at 1; Ciaccio at 1; Rosenfield at 1; Iorio at 1; Spray at 1; Brewer at 1; Saxon at 1; Evans at 1; Peiffer at 1; Simms at 1; Varnavides at 1–2; Rapaport at 1; letter from Thomas D. Mauriello, Esq., Mauriello Law Firm, at 1 (dated Feb. 24, 2026), <https://www.sec.gov/>

[comments/sr-finja-2026-001/srfinra2026001-714467-2237275.pdf](https://www.sec.gov/comments/sr-finja-2026-001/srfinra2026001-714467-2237275.pdf) ("Mauriello"); Kane at 1; Cosgrove Letter at 1; and letter from Adolfo Anzola, Esq., Sonn Law Group P.A., at 1 (dated Feb. 24, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinra2026001-714047-2236935.pdf> ("Sonn II"). *See also* letters from Mark Pugsley, The Anti-Fraud Coalition (dated Feb. 20, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinra2026001-707627-2226454.html> ("Pugsley"); Reema Mahmood, Individual (dated Jun. 12, 2026), <https://www.sec.gov/comments/SR-FINRA-2026-001/srfinra2026001-2488330.htm> ("R. Mahmood").

A commenter also stated that FINRA did not adequately quantify in its economic analysis the costs of unsupervised outside activity on investors, both in terms of existing gaps in supervision and the additional gaps the proposed rule would create. *See* Burke at 5. In response, FINRA stated that unaffiliated RIA activity is subject to supervision by the unaffiliated RIA and overseen by other regulators, and that any additional investor protections arising from member supervision of these activities may be limited because of the difficulty the member may have in obtaining complete information from the unaffiliated RIA. *See* FINRA I at 14. Additionally, FINRA believes that the assessment it conducted was appropriate to capture the economic impact associated with the proposed rule change and in order to directly address any potential loss in investor protections would require more granular data to quantify the effectiveness of other regulatory regimes and then the marginal impact of additional supervision by broker-dealer firms. *See* FINRA I at 14. FINRA's assessment appropriately captures the economic impacts associated with the proposed rule change.

¹⁸¹ *See* PIABA I at 1–3, 10. *See also* Robert Scott Dreher, Dreher Law Firm, at 2 (dated Feb. 20, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinra2026001-707727-2226594.pdf> ("Dreher"); Adam J. Gana, Esq. and Adam J. Weinstein, Gana Weinstein LLP, at 2 (dated Feb. 20, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinra2026001-706927-2225375.pdf> ("Gana Weinstein"); William Paul Nolan, Esq., The Nolan Law Firm, at 2 (dated Feb. 21, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinra2026001-719187-2251614.pdf> ("Nolan"); Sonn II.

¹⁸² *See* PIABA I at 2–3.

¹⁸³ *See* Cambridge I at 6; *see also* PIABA I at 8–9.

¹⁸⁴ *See, e.g.,* PIABA I at 8–9; Cambridge I at 7; Cambridge II at 5–6; Form Letter D.

¹⁸⁵ *See* Cambridge I at 7 (stating that Federal privacy regimes applicable to RIAs (including Regulation S–P) are expressly designed to permit information sharing with service providers and affiliated parties where there is a legitimate business purpose, subject to notice, consent, and safeguards); Cambridge II at 5–6.

¹⁸⁶ *See* FSI I at 3–4; ASA II at 6; NASAA at 7; St. John's Law at 2; Miami Clinic at 3; letter from Jason Albin, Chapman Albin, at 2 (dated Feb. 20, 2026), <https://www.sec.gov/comments/sr-finja-2026-001/srfinra2026001-707507-2226238.pdf> ("Albin").

¹⁸⁷ *See* NASAA at 7 n.24.

¹⁸⁸ *See* Albin at 2.

member is the custodian.¹⁸⁹ The commenter stated that such an approach would align supervision with the interests of the member and responsibilities to investors, while helping to mitigate concerns about access to information, privacy, jurisdiction, and overall compliance burden.¹⁹⁰ In the alternative, the commenter suggested the proposed rule change should be revised to “more directly encourage [members] to impose conditions or limitations on outside investment advisory activities when the [member] makes certain findings in the required assessment.”¹⁹¹

In contrast, a supportive commenter recommended that FINRA clarify that a member approving an associated person’s activities at an unaffiliated investment adviser is not required to oversee compliance with any conditions or limitations imposed on those activities, unlike as required by proposed FINRA Rule 3290.06 for conditions and limitations imposed pursuant to proposed Rule FINRA 3290.¹⁹² Lastly, one commenter, expressing concern that the proposed rule change would disadvantage members that exercise prudent supervision and incentivize members to “offload supervisory risk,” suggested that if the Commission approved proposed FINRA Rule 3290.03, the Commission should provide a safe harbor to members from regulatory enforcement and civil liability if an unaffiliated investment adviser violates regulatory or legal standards or harms clients.¹⁹³

In response, FINRA stated that activities at unaffiliated RIAs are fundamentally different from other situations involving private securities transactions because activities at registered investment advisers are already subject to established regulatory structures, and the proposed rule change respects this allocation of

regulatory responsibility.¹⁹⁴ The proposed rule change would thus eliminate duplicative obligations (e.g., broker-dealer supervision) without diminishing the comprehensive oversight framework already in place.¹⁹⁵ FINRA further stated that the effectiveness of investment adviser regulation cannot be judged solely by examination frequency but rather by “the full spectrum of regulatory requirements, ongoing oversight mechanisms, internal compliance obligations, and the fiduciary duty framework applicable to [investment advisers],” and that the Commission and state regulators are in the best position to determine proper supervision of investment advisers based on market conditions, risk assessments, and available resources.¹⁹⁶

In addition, FINRA stated that members would continue to receive notice of any outside activities at unaffiliated RIAs and retain discretion to prohibit or condition or limit such activities based on the member’s evaluation of the associated risk.¹⁹⁷ FINRA further stated that pursuant to FINRA Rule 3110, members are required to investigate any red flags that suggest that misconduct may be occurring and to act upon the results of such investigation; this would include “red flags suggesting that an associated person is involved in an undisclosed outside activity or that a disclosed outside activity involves undisclosed securities transactions, compensation not previously disclosed, or other misconduct.”¹⁹⁸ Finally, FINRA also stated that although it is not aware of any interpretation of Section 15(b)(4)(E) of the Exchange Act that imposes a general obligation on broker-dealers to supervise investment advisory activity, members are free to impose supervisory obligations on their associated persons as a condition to participating in unaffiliated investment advisory activity.¹⁹⁹

FINRA also declined to modify the proposed rule change to create a tailored approach for unaffiliated RIA activities, such as creating a subcategory of outside securities transaction for unaffiliated RIA activity, or limiting supervision to only the approved activity involving

advisory clients who are also customers of the member and to advisory accounts custodied by the member.²⁰⁰ FINRA stated that the suggested approaches disregard the comprehensive regulatory regime for RIAs.²⁰¹ Further, FINRA stated that creating a tailored regime for customers who have an advisory account custodied by the member, as suggested by commenters, would be inconsistent with FINRA’s longstanding policy of creating rules that are business-model neutral where possible, and could create unintended consequences depending on whether or not a particular member requires its associated persons to execute and custody their outside securities transactions at the member.²⁰²

With respect to the comments regarding privacy concerns and suggestions for targeted safeguards, such as requiring written agreements between members and associated persons engaging in unaffiliated RIA activity, FINRA stated that based on its examination experience it has found that privacy protection is a legitimate concern that raises practical hurdles for members to obtain information regarding unaffiliated RIA activities that cannot be dismissed as a mere “operational inconvenience” and thus managed through disclosure, information-sharing and/or consent agreements.²⁰³ Additionally, FINRA stated that it has observed in examinations that members have faced practical hurdles to obtaining information regarding unaffiliated RIA activity.²⁰⁴ For these reasons, FINRA declined to modify the proposed rule change.

The proposed rule change reasonably treats activity performed by associated persons at an unaffiliated RIA as an outside activity subject to the notice and member assessment requirements in proposed FINRA Rule 3290(a) and (c), rather than an outside securities transaction subject to the notice, assessment, and applicable approval, supervision, and recordkeeping requirements in proposed FINRA Rule 3290(b) and (d). The proposed rule change reasonably tailors the applicable framework to address the level of risk presented by the activity, by recognizing existing oversight of the activity by the Commission or state regulators, and in so doing, addresses privacy and practical challenges noted by commenters and observed by FINRA

¹⁸⁹ See NASAA at 7. See also St. John’s Law at 2 (stating that because unaffiliated RIA activity frequently involves an outside securities transaction and may involve the customer of the registered person, that such activity should either be treated as a subcategory of outside securities transactions or as a separate third category with additional obligations closer to those proposed for outside securities transactions to ensure adequate supervision and investor protection); Miami Clinic at 3 (recommending that FINRA consider retaining risk-based obligations (e.g., reasonable supervision) where associated persons provide any type of investment advice, including through a registered investment adviser).

¹⁹⁰ See NASAA at 7.

¹⁹¹ *Id.*

¹⁹² See ASA II at 6.

¹⁹³ See Cambridge II at 4–5.

¹⁹⁴ See FINRA I at 14 (noting that unaffiliated RIAs are subject to a fiduciary duty as well as oversight from the Commission or state regulators, as applicable).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 12; FINRA II at 6.

¹⁹⁸ FINRA I at 13; see also *In re Ronald Pellegrino*, Exchange Act Release No. 59125, 2008 SEC LEXIS 2843 (Dec. 19, 2008); FINRA II at 6.

¹⁹⁹ See FINRA I at 14.

²⁰⁰ See *supra* discussions and note 189.

²⁰¹ See FINRA I at 16.

²⁰² *Id.* at 16; FINRA II at 5–6.

²⁰³ See FINRA I at 15; FINRA II at 7.

²⁰⁴ *Id.*

regarding members' ability to obtain data necessary to discharge their obligations under existing Rules 3270 and 3280, while also providing important investor protections.

With respect to the commenter's concern that proposed or potential future rule changes by the Commission could further reduce the frequency of investment adviser examinations or reduce investment advisers' regulatory obligations, FINRA's proposed rule change must be assessed on whether it meets the standards set forth in the Exchange Act, including whether it is designed to protect investors and the public interest;²⁰⁵ any concerns about the impacts of a Commission rulemaking on investor protection would be appropriately addressed in the context of any proposed Commission rulemaking.²⁰⁶

Requiring members to supervise and maintain records of unaffiliated investment adviser activities impose additional compliance costs and liability and causes significant operational and practical challenges for members, which are more appropriately borne by the entity with responsibility for the activity. The proposed rule change eliminates these costs and challenges while preserving reasonable investor protection measures through the obligations imposed by treating these activities as an outside activity.²⁰⁷ Specifically, the proposed rule change would still require an associated person to provide prior written notice to his or her member detailing the activity so that a member can make an informed decision about whether to limit, condition, or prohibit the activity. For example, members could impose restrictions on their associated persons as a condition to participation in the unaffiliated RIA activity, and proposed FINRA Rule 3290.06 would require the member to supervise compliance with such conditions or limitations.

Similarly, while the proposed rule change forgoes imposing the per se

supervisory obligations attendant with treating unaffiliated RIA activity as an outside securities transaction, in favor of a risk-based approach, the proposed rule change does not allow members to turn a blind eye to the risk presented by permitting such activity. Members cannot ignore evidence of suspicious activities, as the proposed rule does not alter members' overarching supervisory responsibilities under applicable federal laws and FINRA rules to investigate and act upon red flags indicating potential misconduct. Furthermore, the proposed rule change establishes a minimum standard under FINRA rules for reasonable supervision of associated persons, including registered persons, for compliance with relevant obligations; the proposed rule change does not alter or supersede a member's obligation to comply with other applicable statutory or regulatory requirements.²⁰⁸ In recognition of the regulatory framework that governs activity at registered investment advisers, the proposed rule change imposes targeted, risk-based regulatory safeguards reasonably designed to protect investors and the public interest. In doing so, the proposed rule change should reduce compliance burdens while facilitating investor protection. For these reasons, the proposed rule change is reasonably 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.

3. Associated Person Outside Securities Activity Subject to GLBA or Exchange Act Regulation R

As stated above, proposed FINRA Rule 3290.05 states that an associated person's securities activity that is not subject to a contractual arrangement under proposed FINRA Rule 3290.04 but that qualifies under the GLBA or Regulation R exceptions to broker or dealer²⁰⁹ registration requirements would be considered an outside activity of a registered person and not an outside securities transaction for purposes of the proposed rule. This activity would be subject to the notice and assessment requirements in proposed FINRA Rule 3290(a) and (c), but the member would not be required to supervise or keep records on this activity. The Commission received no comment on this aspect of the proposed rule change.

The proposed rule change is reasonably designed to treat an

associated person's outside securities transactions that qualify under the GLBA or Regulation R exceptions to broker or dealer registration as an outside activity. The proposed rule change tailors the outside activity framework to address the level of risk presented by the activity by recognizing existing oversight of the activity by the banking regulators.²¹⁰

Under the proposed rule change, the member would continue to receive prior written notice of the associated person's activity, be required to conduct an upfront assessment, and retain discretion to condition or limit proposed activity (or prohibit the activity) based on its assessment. Moreover, proposed FINRA Rule 3290.06 would require the member to supervise compliance with any conditions or limitations a member elects to impose. In this way, the proposed rule change reasonably imposes targeted, risk-based regulatory safeguards designed to protect investors and the public interest. For these reasons, the proposed rule change is reasonably 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.

D. Exclusions From Proposed FINRA Rule 3290

1. Associated Person Activity on Behalf of a Member or an Affiliate

As stated above, proposed FINRA Rule 3290(g)(1) would exclude from proposed FINRA Rule 3290 an associated person's activity on behalf of a member or its affiliate.²¹¹ Proposed FINRA Rule 3290(f)(1) would define "affiliate" as any entity that controls, is controlled by, or is under common control with a member. FINRA stated that the exclusion for activity conducted on behalf of an affiliate recognizes members' and their control persons' ability to implement meaningful controls across business lines.²¹² According to FINRA, activity conducted on behalf of an affiliate occurs within the scope of the person's relationship with the broader corporate organization and therefore does not pose the same risks as other outside activities targeted

²⁰⁵ See Exchange Act Section 15A(b)(6).

²⁰⁶ Further, the commenter appears to misunderstand the proposal identified, which, if adopted, would not alter the direct obligations of investment advisers registered with the Commission or create any regulatory gap that would weaken investor protection. See "Small Business" and "Small Organization" Definitions for Investment Companies and Investment Advisers for Purposes of the Regulatory Flexibility Act, Release Nos. IA-6935 and IC-35864, 91 FR 1107 (Jan. 12, 2026).

²⁰⁷ This approach is consistent with the way outside securities transactions that qualify under the GLBA or Regulation R exceptions to broker or dealer registration are treated as an outside activity of a registered person. See *infra* Section III.C.3 (Associated Person Outside Securities Activity Subject to GLBA or Exchange Act Regulation R).

²⁰⁸ See, e.g., Exchange Act Sections 15(b)(4)(E) and 15(b)(6)(A).

²⁰⁹ See *supra* note 60.

²¹⁰ FINRA also stated that the proposed rule change codifies FINRA staff's existing position with respect to this activity. See Notice at 5006.

²¹¹ Proposed FINRA Rule 3290(g)(1). FINRA stated that the exclusion would include activity such as investment advisory activity at a member that is registered as both a broker-dealer and an investment adviser, as well as investment advisory, insurance, or banking activity conducted at an affiliate. See Notice at 5005.

²¹² See Notice at 5006.

by the proposed rule change.²¹³ Specifically, FINRA stated that the rule's notice process is designed to bring external activities to the member's attention so that risks that may not otherwise be apparent can be evaluated by the member.²¹⁴ FINRA stated that this process is unnecessary where the activity is conducted within the corporate family, where the member can access information about such activities through corporate governance structures, shared compliance systems, or other internal coordination mechanisms.²¹⁵

Many commenters supported the proposed rule change, generally stating that the affiliate exclusion would create a "more targeted framework" that helps members focus their compliance resources on outside activities that are "more likely to intersect with their supervisory responsibilities and customer facing business."²¹⁶ More specifically, one of these commenters stated that excluding activities at affiliated entities, where shared compliance systems already provide oversight, would eliminate a layer of regulatory duplication that adds cost without adding protection.²¹⁷ Other commenters stated that the Advisers Act already requires investment advisers to establish a "robust" compliance program; thus, by excluding an associated person's advisory activity on behalf of a member or its affiliate from proposed FINRA Rule 3290, the proposed rule change would relieve dual registrants from "regulatory overlap" that added complexity without improving investor protection.²¹⁸

Other commenters opposed the proposed rule change.²¹⁹ For example, one commenter stated that reducing a member's regulatory oversight of the activity of their registered and associated persons at affiliated advisers would be a "dramatic step backward" and may eliminate recourse for investors seeking redress for harm caused by an affiliated adviser.²²⁰

Another commenter stated that the Exchange Act requires members to supervise all investment-related activities of their registered representatives regardless of where those activities occur, and does not exempt members based on their affiliates' ability to effectively control activities across business lines.²²¹

One commenter who supported the proposed rule change recommended that FINRA provide guidance on when the affiliate exclusion would apply in specific scenarios involving an associated person's work on behalf of a bank, credit union, or insurance company that controls, is controlled by, or is under common control with the member.²²² The commenter also requested that FINRA provide concrete examples of how the exclusion applies in common fact patterns, including when a registered person's day-to-day activity at an affiliate is covered by the exclusion and how the exclusion applies when the affiliate is the primary employer and association with the member is "part time or limited in scope."²²³

In response, FINRA stated that the exclusion is appropriate because activity conducted on behalf of an affiliate occurs within the scope of the person's relationship with the broader corporate organization and does not present the same risks that the rule is designed to address.²²⁴ Specifically, FINRA stated that the notice and assessment process, which is designed to bring external activities to the member's attention so that risks that may not otherwise be apparent can be evaluated, is not necessary for activity conducted within a corporate family, where the member can access information about such activities through corporate governance structures, shared compliance systems, or other internal coordination mechanisms.²²⁵ In addition, FINRA stated that rather than imposing a one-size-fits-all notice and assessment

process, the exclusion would provide a member with flexibility to determine how to manage affiliate activities and whether any controls are appropriate, based on its business model, organizational structure, and the specific activities involved.²²⁶ FINRA also stated that, while this exclusion is consistent with regulatory efficiency principles, it in no way lessens a member's general supervisory obligations under federal law or FINRA Rule 3110 nor does it limit a member's ability to implement additional safeguards it determines are appropriate.²²⁷

With respect to the commenter's request for additional guidance on the scope and application of the affiliate exclusion in particular factual scenarios, FINRA confirmed that the affiliate exclusion does not turn on whether the member or an affiliate is a registered person's primary employer.²²⁸ The proposed rule change would exclude from proposed FINRA Rule 3290 an associated person's activities either on behalf of a member (*e.g.*, investment adviser activity conducted for a dually-registered broker-dealer/investment adviser) or its affiliate (investment adviser, insurance or banking activity conducted at an affiliate of the member).²²⁹ Finally, FINRA stated that if the Commission approves the proposed rule change, it will consider providing additional guidance on this and other topics as appropriate.²³⁰

The proposed rule change excluding from proposed FINRA Rule 3290 an associated person's activities on behalf of a member or its affiliates is reasonable given the purpose of the rule: bringing to a member's attention external activities of which the member may not otherwise be aware. With respect to the associated person's activity on behalf of the member, the proposed rule change is reasonably designed to enhance regulatory efficiency by excluding from duplicative obligations activity that already falls within the member's supervisory and compliance responsibilities under other FINRA rules (*e.g.*, FINRA Rule 3110). With respect to activity performed on behalf of an affiliate, it is appropriate to exclude the activity from the proposed rule's mandatory notice and assessment process, as it is conducted within a corporate family, where the member should have visibility into the associated person's conduct through the

²¹³ See FINRA I at 9.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ ASA I at 2; CAI at 2; Benedetti; Shamberger at 2; A&P Services at 2; Form Letter B.

²¹⁷ See Benedetti.

²¹⁸ See, *e.g.*, Form Letter B; A&P Services at 2.

²¹⁹ See, *e.g.*, Banks at 1; letter from John E. Sutherland, Brickley/Sears, P.A. at 1–2, (Feb. 25, 2026) <https://www.sec.gov/comments/sr-fina-2026-001/sr-fina-2026001-715687-2239515.pdf> ("Brickley/Sears"); Massachusetts at 2; PIABA I at 10.

²²⁰ Brickley/Sears at 1–2 (stating that the way to prevent this is to have the members responsible for supervision over the activity). See also Massachusetts at 2 (stating that eliminating the supervisory requirements over both unaffiliated and

affiliated investment advisers is contrary to investor protection).

²²¹ See PIABA I at 10; see also Banks at 1.

²²² See ASA I at 5; ASA II at 5–6. Another commenter recommended that the proposed definition include contractual networking relationships between independent broker-dealers and third-party institutions, including banks, credit unions and insurance companies. See LPL I at 3. FINRA responded that proposed Supplementary Material .04 already excludes an associated person's activity that is pursuant to a contract between a member and another entity if such activity is conducted on behalf of the member as it is within the scope of the associated person's relationship with the member. See FINRA I at 9–10.

²²³ ASA I at 5; ASA II at 5–6.

²²⁴ See FINRA I at 9.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 9–10.

²²⁸ See FINRA II at 4.

²²⁹ *Id.*

²³⁰ *Id.*

corporate governance structure, shared compliance systems, or other internal coordination.

As such, the proposed rule change reasonably focuses a member's compliance function on activities where member oversight provides the greatest investor protection benefit. In addition, members retain the ability to impose additional measures on any such activity, including notice requirements and placing conditions or limitations on the activity, while also retaining their overarching supervisory obligations. Further, as noted above, the proposed rule change does not alter or supersede a member's obligation to comply with other applicable statutory or regulatory requirements, nor does it address an investor's ability to seek redress for harm.²³¹ As such, the exclusion reflects a reasonable approach that is designed to channel oversight resources toward activities where the member is less likely to have visibility or information, by permitting members to leverage internal structures to avoid unnecessarily duplicative requirements, and providing flexibility to determine how to manage affiliate activities in the context of those structures. For these reasons, the proposed rule change is reasonably 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.

2. Securities Transactions Among Immediate Family Members of an Associated Person

As stated above, proposed FINRA Rule 3290(g)(2) would exclude from proposed FINRA Rule 3290 an associated person's securities transactions among immediate family for which the associated person receives no selling compensation.²³² These transactions are also excluded from the current definition of PST, and therefore not subject to the notice and assessment requirements in existing FINRA Rule 3280.²³³ The Commission received no comment on this aspect of the proposed rule change.

The proposed rule change excluding uncompensated securities transactions among immediate family members from the obligations of proposed FINRA Rule 3290 is reasonably designed to focus

members' supervisory and compliance resources on activities that are more likely to raise investor protection concerns. Additionally, the exclusion from proposed FINRA Rule 3290 does not lessen a member's general supervisory obligations under federal law or FINRA Rule 3110 nor limit a member's ability to implement additional safeguards it determines are appropriate. For these reasons, the proposed rule change is reasonably 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.

3. Certain Personal Investments of an Associated Person

As stated above, proposed FINRA Rule 3290(g)(3) would exclude from proposed FINRA Rule 3290 the following personal investments of an associated person: (1) securities transactions subject to or delineated in FINRA Rule 3210 (Accounts at Other Broker-Dealers and Financial Institutions); (2) personal investments in non-securities; and (3) the purchase, sale, rental or lease of a main home and up to two secondary homes that are: (a) solely owned by the associated person or the associated person and immediate family; (b) owned by the associated person as a sole proprietorship; (c) owned by a corporation, LLC, partnership, limited partnership, or other entity that is solely owned by the associated person or the associated person and immediate family; or (d) owned by a trust with the associated person or the associated person and immediate family as the sole beneficiaries.²³⁴

Commenters supported the proposed rule change,²³⁵ stating that the treatment of these categories of personal investments is appropriately tailored, reflects a calibrated risk-based approach,²³⁶ and will help members concentrate on outside activities that are more likely to intersect with their supervisory responsibilities and customer-facing business.²³⁷ In particular, commenters supported the real estate exclusion, stating that such activities do not raise investor protection concerns and therefore should not be subject to reporting.²³⁸ No commenters objected to this proposed exclusion.

The proposed rule change to exclude certain personal investments from the obligations of proposed FINRA Rule 3290 is reasonably designed to help focus members' compliance oversight on activities that are more likely to raise investor protection concerns. Specifically, some of these transactions are covered by FINRA Rule 3210, which already requires a member to consent to an associated person's opening an account with another member or financial institution in which securities transactions can be effected and in which the associated person has a beneficial interest; in addition, the associated person's member can request data for any transaction in an account subject to the rule. Therefore, these transactions are already subject to existing controls under FINRA Rule 3210.²³⁹ In addition, an associated person's personal investments in non-securities, or, subject to specified conditions, the purchase, sale, rental or lease of a main home and up to two secondary homes is a targeted exclusion for real estate activities and non-securities that are otherwise included in the definition of investment-related activity in proposed Rule 3290(f). This limited exclusion reasonably recognizes the lower risks to investors and members presented by these activities by reducing the regulatory burdens associated with such activities. Moreover, the exclusion from proposed FINRA Rule 3290 does not lessen a member's general supervisory obligations under federal law or FINRA Rule 3110, nor limit a member's ability to implement additional safeguards it determines are appropriate. For these reasons, the proposed rule change is reasonably 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.

4. Treatment of Activity Subject to a Contractual Arrangement

As stated above, proposed FINRA Rule 3290.04 would exclude from proposed FINRA Rule 3290 an associated person's activity conducted on behalf of the member pursuant to a contract between the member and another entity (e.g., a banking or insurance networking arrangement) because the activity would be considered within the scope of the associated person's relationship with the member and therefore subject to the member's supervisory obligations under FINRA Rule 3110. The Commission

²³¹ See *supra* note 208.

²³² Proposed FINRA Rule 3290(g)(2). Proposed FINRA Rule 3290(f)(2) would define "immediate family" to have the same meaning as in FINRA Rule 3240(c).

²³³ See FINRA Rule 3280(e)(1) (excluding from the definition of "private securities transaction" transactions among immediate family members as defined in FINRA Rule 5130).

²³⁴ Proposed FINRA Rule 3290(g)(3)(A)–(C).

²³⁵ See ASA I at 2; Robinhood at 2.

²³⁶ See Robinhood at 2.

²³⁷ See ASA I at 2.

²³⁸ See Cambridge I at 2; *see also* CAI at 2; ASA I at 2; Robinhood at 2; FSI I at 1.

²³⁹ See *supra* note 51.

received no comment on this aspect of the proposed rule change.

The proposed rule change to exclude an associated person's activity conducted on behalf of a member pursuant to a contractual arrangement between the member and another entity is reasonably designed to enhance regulatory efficiency by excluding from duplicative obligations activity that already falls within the member's supervisory and compliance responsibilities under other FINRA rules (e.g., FINRA Rule 3110). For these reasons, the proposed rule change is reasonably 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.

E. Recordkeeping

As stated above, proposed FINRA Rule 3290(e) would require a member to keep a record of its compliance with the obligations under proposed FINRA Rule 3290 and preserve this record in accordance with the time and accessibility requirements of Exchange Act Rule 17a-4(e)(1). The Commission received no comments on this aspect of the proposed rule change.

The proposed rule change requiring members to keep and preserve a record of its compliance with the obligations under proposed FINRA Rule 3290 is reasonably designed to facilitate oversight of a member's compliance with the proposed rule change. A key component of regulatory oversight is a member's retention of its business records. By expressly requiring compliance with applicable Commission recordkeeping rules, the proposed rule change makes clear members' obligation to maintain and make available records related to proposed FINRA Rule 3290. As such, the proposed rule change will help ensure that regulators can properly oversee members' compliance with proposed FINRA Rule 3290. For these reasons, the proposed rule change is reasonably 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.

F. General Exemptive Authority

As stated above, proposed FINRA Rule 3290(h) would authorize FINRA staff, for good cause shown after taking into consideration all relevant factors, to conditionally or unconditionally grant an exemption pursuant to the FINRA Rule 9600 Series from any provision of proposed FINRA Rule 3290 to the extent that such exemption is consistent with

the purpose of the rule, the protection of investors, and the public interest. The proposal would also amend FINRA Rule 9610 to add Rule 3290 to the list of rules for which a member may seek exemptive relief. The Commission received no comment on this aspect of the proposed rule change.

The proposed rule change authorizing FINRA to grant exemptive relief from any provision of proposed FINRA Rule 3290 is reasonably designed to allow FINRA members to avail themselves of an existing procedural vehicle—FINRA's Rule 9600 Series—to apply for exemptive relief from any provision of the rule, on a case-by-case basis, to address unanticipated factual circumstances that may arise under the rule. Prior to granting an exemption, FINRA staff would be required to consider all relevant factors to determine if good cause is shown for the exemption, and that the exemption is consistent with the protection of investors and the public interest. For these reasons, the proposed rule change is reasonably 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.²⁴⁰

IV. Conclusion

For the reasons set forth above, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act, which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and, in general, protect investors and the public interest.²⁴¹

It is therefore ordered pursuant to Section 19(b)(2) of the Exchange Act²⁴² that the proposed rule change (SR-FINRA-2026-001) be, and hereby is, approved.

²⁴⁰ A commenter recommended that FINRA establish an effective date for the proposed rule change that is at least 12 months after Commission approval, in order to provide members sufficient time to update their compliance systems that are currently designed for FINRA Rules 3270 and 3280. See ASA I at 6; ASA II at 6-7. In response, FINRA stated that if the proposed rule change is approved it would determine an effective date balancing sufficient time for implementation with its objective of reducing unnecessary burdens in a timely manner. See FINRA I at 17; FINRA II at 9. FINRA reasonably declined to establish an effective date for the proposed rule change at this time.

²⁴¹ 15 U.S.C. 78o-3(b)(6).

²⁴² 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴³

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2026-19126 Filed 9-17-26; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-106380; File No. SR-NYSE-2026-43]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 7.12 Concerning the Resumption of Trading Following a Level 3 Market-Wide Circuit Breaker Halt in Connection With the Industry's Expansion of Trading Hours to 23 Hours per Day, 5 Days per Week

September 15, 2026.

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 September 4, 2026, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 7.12 ("Trading Halts Due to Extraordinary Market Volatility") concerning the resumption of trading following a Level 3 market-wide circuit breaker halt in connection with the industry's expansion of trading hours to 23 hours per day, 5 days per week. The proposed rule change is available on the Exchange's website at www.nyse.com and at the principal office of the Exchange.

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,

²⁴³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 Statutory Basis for, the Proposed Rule Change

1. Purpose

New York Stock Exchange LLC ("NYSE" or the "Exchange") proposes to amend Rule 7.12 ("Trading Halts Due to Extraordinary Market Volatility") concerning the resumption of trading following a Level 3 market-wide circuit breaker ("MWCB") halt ("Level 3 Market Decline") in connection with the industry's expansion of trading hours to 23 hours per day, 5 days per week ("23/5 Trading"). Some exchanges, including the Exchange's affiliate exchange, NYSE Arca, Inc. ("NYSE Arca"), are planning to offer overnight trading,³ and as a result, the uniform Level 3 Market Decline rules of each exchange are being modified, as explained further below.

Background

The MWCB mechanism under Rule 7.12 provides an important, automatic mechanism that is invoked to promote stability and investor confidence during a period of significant stress when U.S. securities markets experience extreme broad-based declines. All U.S. equity exchanges and FINRA (collectively, the self-regulatory organizations or "SROs") adopted uniform rules relating to the MWCB mechanism in 2012, which are designed to slow the effects of extreme price movement through coordinated trading halts across U.S. securities markets when severe price declines reach levels that may exhaust market liquidity.⁴ Such market-wide circuit breakers provide for trading halts in all U.S. cash equity and equities options markets during a severe market decline as measured by a single-day decline in

the S&P 500 Index during regular trading hours.

Pursuant to Rule 7.12, a market-wide trading halt will be triggered if the S&P 500 Index declines in price by specified percentages from the prior day's closing price of that index. Currently, the triggers are set at three circuit breaker thresholds: 7% (Level 1), 13% (Level 2), and 20% (Level 3). A market decline that triggers a Level 1 or Level 2 halt after 9:30 a.m. ET and before 3:25 p.m. ET would halt market-wide trading for 15 minutes, while a similar market decline at or after 3:25 p.m. ET would not halt market-wide trading. If a Level 3 Market Decline occurs at any time during the trading day, trading in all stocks will halt on the Exchange for the remainder of the trading day, and will resume the following trading day at 7:00 a.m. ET for UTP Securities and after 9:30 a.m. ET for Exchange-listed securities.⁵

Proposal

The Exchange now proposes to amend Rule 7.12 to reflect extended trading hours under 23/5 Trading. On December 6, 2026, several exchanges, including NYSE Arca, intend to offer new overnight trading sessions that would be available from 9:00 p.m. ET to 4:00 a.m. ET, significantly increasing their hours of operation in response to customer demand.

As discussed, consistent with the uniform rules in place across all SROs, current Rule 7.12(b)(ii) provides that if a Level 3 Market Decline occurs at any time during the trading day, the Exchange shall halt trading in all stocks on the Exchange for the remainder of the trading day. Currently, that means that the earliest that any exchange would re-open trading after a Level 3 Market Decline is 4:00 a.m. ET the following day, since no SROs are open for trading before 4:00 a.m. ET.

Unless amended, when 23/5 Trading is launched, the current rule's reference to halting "for the remainder of the trading day" would require SROs participating in 23/5 Trading to re-open trading at an earlier time, *i.e.*, 9:00 p.m. ET on the same calendar day, when those SROs' systems would generally become available for overnight trading. The Exchange does not believe that this is an expected or desired result and is therefore amending this rule in coordination with the other SROs such that trading on any SRO will not resume until 4:00 a.m. ET or later on the following trading day, consistent with current market practice. This proposed

rule change is therefore not intended to make any substantive changes to the MWCB mechanism. Rather, the proposed rule change would preserve the current resumption time following a Level 3 Market Decline.

To effect this change, the Exchange proposes to delete the language in Rule 7.12(b)(ii) that provides that trading in all stocks will halt on the Exchange "for the remainder of the trading day" if a Level 3 Market Decline occurs at any time during the trading day, and replace it with new language that explicitly provides that trading in all stocks would halt on the Exchange until 4:00 a.m. ET or later on the following trading day.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁷ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁸ in particular, 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.

The MWCB mechanism described in Rule 7.12 is an important, automatic mechanism that is invoked to promote stability and investor confidence during periods of significant stress when U.S. securities markets experience extreme broad-based declines. The proposed rule change, when applied uniformly by all SROs, would ensure that the current 4:00 a.m. ET resumption time following a Level 3 halt continues to apply under 23/5 Trading, notwithstanding current rule text implying that the resumption time would coincide with the start of overnight trading on SROs operating an overnight session.

Rather than leave the rule in place as is, which would result in an earlier resumption time than originally contemplated when the rule was adopted, the Exchange, the other U.S. equity exchanges, and FINRA met alongside industry representatives to determine the appropriate resumption time. Following those discussions, the collective decision was made to retain the 4:00 a.m. ET resumption time, notwithstanding the fact that an earlier resumption time would be possible with the introduction of 23/5 Trading. The proposed rule change codifies this decision into the Exchange's rules. The Exchange understands that the other SROs will also be filing similar proposed rule changes. As a result, the market as a whole, including on- and

³ See, *e.g.*, Securities Exchange Act Release No. 105532 (May 21, 2026), 91 FR 31509 (May 27, 2026) (SR-NYSEARCA-2026-53) ("NYSE Arca 23/5 Trading Notice"). The Exchange does not intend to implement 23/5 Trading at this time.

⁴ See Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR-BATS-2011-038; SR-BYX-2011-025; SR-BX-2011-068; SR-CBOE-2011-087; SR-C2-2011-024; SR-CHX-2011-30; SR-EDGA-2011-31; SR-EDGX-2011-30; SR-FINRA-2011-054; SR-ISE-2011-61; SR-NASDAQ-2011-131; SR-NSX-2011-11; SR-NYSE-2011-48; SR-NYSEAmex-2011-73; SR-NYSEArca-2011-68; SR-Phlx-2011-129) ("MWCB Approval Order").

⁵ See Rule 7.34(a) ("Trading Sessions").

⁶ See Rule 7.12(b)(ii).

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(5).

off-exchange, will continue to be subject to harmonized rules for the resumption of trading following a Level 3 Market Decline.

While the SROs had previously decided to tie the resumption time following a Level 3 halt to the earliest SRO opening time, the upcoming transition to 23/5 Trading raises various concerns that warrant a change from the current approach.

First, the Exchange notes that the MWCB mechanism was designed to provide a cooling-off period where market participants would be provided with additional time to evaluate the market events that led to the decline before determining how to position their trading activity for the next day. With the introduction of 23/5 Trading and the start of overnight trading on some SROs at 9:00 p.m. ET, however, this cooling-off period could be materially shortened, reducing one of the key benefits that the MWCB mechanism was designed to provide in the first place. Rather than shorten the cooling-off period and risk this benefit, the Exchange believes the market would be better served by a change to the length of the associated trading halt that mirrors current market practice. Under the proposed rule, as is the case today, after a Level 3 halt, all SROs would reopen trading at 4:00 a.m. ET or later, and no SRO would offer an overnight trading session starting on the day of a Level 3 halt.

Second, overnight trading may be subject to different liquidity and participation considerations than the current pre-market sessions that start at or after 4:00 a.m. ET. Notably, while retail investors have expressed interest in overnight trading, the Exchange expects that institutional investors will take more time to transition to a round-the-clock model. However, such institutional participation may be of heightened importance following a Level 3 halt, as these investors are likely to have views on the underlying market events that led to the Level 3 Market Decline in the first place. The Exchange is concerned that opening during hours that such participants do not normally trade may impact the quality of price discovery at a time of significant market volatility. Waiting until 4:00 a.m. ET to resume trading would facilitate broader participation and therefore price discovery.

Finally, the Exchange notes that the Commission recently approved an amendment to the Plan to Address Extraordinary Market Volatility ("LULD Plan") that would establish new price protections from 9:00 p.m. ET to 4:00

a.m. ET.⁹ While these price bands would help to assure a fair and orderly market during normal market conditions, it is possible that they would instead prevent normal price discovery following a Level 3 Market Decline. Rather than allowing trading to resume with such price bands in effect, which would represent a change from the current trading reopening following a Level 3 Market Decline, the Exchange believes that requiring SROs to wait until 4:00 a.m. ET or later to resume trading would ensure that price discovery can occur unimpeded during pre-market trading, as it does today, which may further inform prices going into the opening auction and regular market hours trading following a Level 3 halt.

Given the factors discussed above, the Exchange believes that trading in all securities on the Exchange should not resume before 4:00 a.m. ET on the trading day after a Level 3 halt. This decision, which the Exchange understands will also be reflected in the rules of the other SROs, would promote a fair and orderly market at a time of significant market volatility, and thereby protect investors and the public interest. In addition, while the actual Level 3 resumption time would not be changing in practice—as proposed, the current resumption time and future resumption time would both be 4:00 a.m. ET at the earliest—the Exchange believes that it is appropriate to amend its rules to ensure that its rules reflect the upcoming changes due to 23/5 Trading. Without this change, market participants may mistakenly believe that the Exchange intends for trading to reopen on overnight trading exchanges at 9:00 p.m. ET following a Level 3 halt. The proposed rule change would therefore facilitate operational transparency while providing for a fair and orderly market.

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 because the proposal would ensure the continued, uninterrupted operation of a consistent mechanism to halt trading across U.S. securities markets. Further, the Exchange understands that the other

SROs intend to file proposed rule changes to ensure a consistent resumption time at 4:00 a.m. or later ET across markets. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act¹⁰ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹¹

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NYSE-2026-43 on the subject line.

¹⁰ 15 U.S.C. 78s(b)(3)(A)(iii).

⁹ See Securities Exchange Act Release No. 106042 (August 5, 2026), 91 FR 51515 (August 10, 2026) (Order Granting Approval of the Twenty-Seventh Amendment to the National Market System Plan to Address Extraordinary Market Volatility to Establish Temporary Price Band Protections in Overnight Trading).

¹¹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–NYSE–2026–43. 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 (<https://www.sec.gov/rules/sro.shtml>). Copies of the filing will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection.

All submissions should refer to file number SR–NYSE–2026–43 and should be submitted on or before October 9, 2026.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2026–19125 Filed 9–17–26; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–106387; File No. SR–MRX–2026–35]

Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Options 2, Section 3, Appointment of Market Makers

September 15, 2026.

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 September 2, 2026, Nasdaq MRX, LLC (“MRX” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to

solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Options 2, Section 3, Appointment of Market Makers.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/mrx/rulefilings>, and at the principal office of the Exchange.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Options 2, Section 3, Appointment of Market Makers, at paragraph (b) to change the current requirement that a Primary Market Maker (“PMM”) ³ shall be appointed to each options class traded on the Exchange. The Exchange proposes instead to state that a PMM may be appointed to each options class traded on the Exchange. The proposed amendment would replace a mandatory requirement to appoint a PMM to every options class with a permissive standard, affording the Exchange the flexibility to determine, based on prevailing market conditions and the availability of qualified applicants, whether a PMM appointment is appropriate for a particular options class.

Today, there are a number of Competitive Market Makers (“CMMs”) ⁴ on MRX that would continue to provide liquidity in the absence of a PMM

³ The term “Primary Market Maker” means a Member that is approved to exercise trading privileges associated with PMM Rights. *See* Options 1, Section 1(b)(36).

⁴ The term “Competitive Market Maker” means a Member that is approved to exercise trading privileges associated with CMM Rights. *See* Options 1, Section 1(b)(13).

appointment under this proposal. CMMs are subject to continuous quoting and other market making obligations set forth in Options 2, Section 4 (Obligations of Market Makers), and are required to provide two-sided quotations in 60% of the series in each of the option classes to which they are appointed pursuant to the quoting requirements of Options 2, Section 5 (Market Maker Quotations). CMMs are also not capped in number and may actively quote in a broad range of option classes.

The proposed amendment aligns MRX's rule with Nasdaq Phlx LLC (“Phlx”) Options 2, Section 12(a) ⁵ which expressly permits, but does not require, Phlx to designate a Lead Market Maker for a particular options series. In addition, until July 2026, The Nasdaq Options Market LLC (“NOM”) did not adopt rules for a class of market maker similar to a PMM. NOM operated its markets for nearly twenty years without such a category of market maker. The Exchange believes that the current mandatory standard is not necessary to protect investors or to ensure a fair and orderly market on MRX. Options classes traded on the Exchange vary widely in their liquidity profiles, order flow, and level of market maker interest. Circumstances may arise in which no eligible Member seeks or is well-suited for a PMM appointment in a particular options class, or in which appointing a PMM is not economically viable for any prospective applicant. The Exchange will monitor instances in which a PMM is not fulfilling its obligations or is not in good standing and will seek to replace it with another qualified PMM. In those cases, the mandatory standard in the current rule provides no operable path forward. A permissive standard would enable the Exchange to determine, on a class-by-class basis, whether a PMM appointment serves the interests of the market and the investing public.

The proposed change is not intended to, and would not, alter the substantive obligations or privileges of a PMM once appointed. A PMM appointed to an options class would remain subject to the full set of obligations set forth in MRX Options 2, Sections 3, 4, and 5, including the Valid Width Quote requirement during the Options Opening Process in Options 3, Section 8, and the 90% two-sided quoting obligation on an intra-day basis. The Exchange further notes that CMMs are

⁵ Phlx Options 2, Section 12(a) provides that a Lead Market Maker is not required to be assigned to an options series. A Lead Market Maker on Phlx is analogous to a Primary Market Maker on MRX.

¹² 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

available to provide liquidity in options classes traded on the Exchange, and the appointment of a PMM is not a prerequisite for maintaining a fair and orderly market in any given class. In options classes for which no PMM is appointed, quoting and liquidity provision would proceed pursuant to the CMM framework in Options 2, Sections 4 (Obligations of Market Makers) and 5 (Market Maker Quotations).

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁶ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁷ in particular, 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.

The proposed amendment to Options 2, Section 3(b) protects investors and the public interest and promotes just and equitable principles of trade because CMMs will continue to provide liquidity on the Exchange. There are a number of CMMs on MRX that would continue to provide liquidity in the absence of a PMM appointment under this proposal. CMMs are subject to continuous quoting and other market making obligations set forth in Options 2, Section 4 (Obligations of Market Makers), and are required to provide two-sided quotations in 60% of the series in each of the option classes to which they are appointed pursuant to the quoting requirements of Options 2, Section 5 (Market Maker Quotations). CMMs are also not capped in number and may actively quote in a broad range of option classes. Further, the amendment affords the Exchange the flexibility to determine whether the appointment of a PMM is appropriate in a given options class, rather than requiring the Exchange to appoint a PMM in every class irrespective of market conditions or applicant availability.⁸

The proposed permissive standard is substantively identical to the framework already in place on Phlx, which provides at Options 2, Section 12(a) that a Lead Market Maker “is not required to be assigned to an options series.” Finally, the proposed change does not reduce or otherwise modify the obligations of a PMM. As a result, the proposal enhances the Exchange’s administrative flexibility with respect to PMM appointments while preserving all of the substantive market-quality protections that flow from a PMM’s obligations. For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change would apply uniformly to all Members that seek or hold PMM appointments on MRX. Further, the Exchange notes that there is competition among CMMs who are required to provide two-sided quotations in 60% of the series in each of the option classes to which they are appointed pursuant to the quoting requirements of Options 2, Section 5 (Market Maker Quotations).

Members currently appointed as PMMs will retain their appointments and will continue to be subject to the same obligations and eligible for the same entitlements. Members seeking new PMM appointments will continue to be evaluated under the same standards set forth in Options 2, Section 3. The proposal does not favor any Member or class of Members over another, and it does not modify the rights or obligations of CMMs.

The Exchange does not believe 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. The proposed change would harmonize

quoting obligations (90% versus 60%) as described in Options 2, Section 5.

MRX Options 2, Section 3(b) with the analogous framework on Phlx.⁹ In addition, affording the Exchange greater flexibility to administer its PMM program may allow the Exchange to compete more effectively for order flow with other options markets.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act¹⁰ and subparagraph (f)(6) of Rule 19b–4 thereunder.¹¹

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:

⁹ See Phlx Options 2, Section 12(a).

¹⁰ 15 U.S.C. 78s(b)(3)(A)(iii).

¹¹ 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

⁸ The Exchange notes that not every Market Maker is eligible to be a PMM. A Market Maker may not be in good standing or may not have superior technology to handle the demands of additional

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-MRX-2026-35 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.
- All submissions should refer to file number SR-MRX-2026-35. 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 (<https://www.sec.gov/rules/sro.shtml>). Copies of the filing will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-MRX-2026-35 and should be submitted on or before October 9, 2026.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2026-19130 Filed 9-17-26; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-106374; File No. SR-NASDAQ-2026-074]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Rules at Options 7, Sections 1 and 2

September 15, 2026.

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 September 1, 2026, The Nasdaq Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend The Nasdaq Options Market LLC ("NOM") Rules at Options 7, Section 1, General Provisions, and Options 7, Section 2, Nasdaq Options Market—Fees and Rebates.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rulefilings>, and at the principal office of the Exchange.

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 make several changes to NOM's Pricing Schedule at Options 7. Specifically, the Exchange proposes to make changes to Options 7, Section 2(1), and add a defined term to Options 7, Section 1(a).

Under Options 7, Section 2(1), the Exchange currently pays Customers,³ Professionals,⁴ Broker-Dealers,⁵ Firms,⁶ Non-NOM Market Makers,⁷ and NOM Market Makers⁸ a rebate to add liquidity in Penny Symbols, on a per contract basis. This rebate is paid according to the following schedule:

	Tier 1	Tier 2	Tier 3	Tier 4	Tier 5	Tier 6
Customer	(\$0.20)	(\$0.25)	(\$0.43)	(\$0.44)	(\$0.45)	(\$0.48)
Professional	(0.20)	(0.25)	(0.43)	(0.44)	(0.45)	(0.47)
Broker-Dealer	(0.10)	(0.10)	(0.10)	(0.10)	(0.10)	(0.10)
Firm	(0.10)	(0.10)	(0.10)	(0.10)	(0.10)	(0.10)
Non-NOM Market Maker	(0.10)	(0.10)	(0.10)	(0.10)	(0.10)	(0.10)
NOM Market Maker	(0.20)	(0.25)	(0.30)	(0.32)	(0.45)	(0.47)

¹² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The term "Customer" applies to any transaction that is identified by a Participant for clearing in the Customer range at The Options Clearing Corporation ("OCC") which is not for the account of broker or dealer or for the account of a "Professional" (as that term is defined in Options 1, Section 1(a)(48)). See Options 7, Section 1(a).

⁴ The term "Professional" means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s) pursuant to

Options 1, Section 1(a)(48). All Professional orders shall be appropriately marked by Participants. See Options 7, Section 1(a).

⁵ The term "Broker-Dealer" applies to any transaction which is not subject to any of the other transaction fees applicable within a particular category. See Options 7, Section 1(a).

⁶ The term "Firm" applies to any transaction that is identified by a Participant for clearing in the Firm range at OCC. See Options 7, Section 1(a).

⁷ The term "Non-NOM Market Maker" is a registered market maker on another options exchange that is not a NOM Market Maker. A Non-NOM Market Maker must append the proper Non-NOM Market Maker designation to orders routed to NOM. See Options 7, Section 1(a).

⁸ The term "NOM Market Maker" is a Participant that has registered as a Market Maker on NOM pursuant to Options 2, Section 1, and must also remain in good standing pursuant to Options 2, Section 9. In order to receive NOM Market Maker pricing in all securities, the Participant must be registered as a NOM Market Maker in at least one security. See Options 7, Section 1(a). The term "Options Participant" or "Participant" means a firm, or organization that is registered with the Exchange pursuant to Options 2A of the NOM Rules for purposes of participating in options trading on NOM as a "Nasdaq Options Order Entry Firm" or "Nasdaq Options Market Maker". See Options 1, Section 1(a)(40).

Currently, Participants are assessed certain fees and rebates to add liquidity in Non-Penny Symbols, on a per

contract basis, according to the following schedule:

Customer	(\$0.80)
Professional	(0.80)
Broker-Dealer	0.45
Firm	0.45
Non-NOM Market Maker	0.45
NOM Market Maker	0.35/0.00/(0.30)/(0.40)

Currently, Participants are charged fees to remove liquidity in both Penny and Non-Penny Symbols, on a per

contract basis, according to the following schedule:

	Penny symbols	Non-penny symbols
Customer	\$0.49	\$0.85
Professional	0.49	0.85
Broker-Dealer	0.50	1.25
Firm	0.50	1.25
Non-NOM Market Maker	0.50	1.25
NOM Market Maker	0.50	1.25

Currently, the Customer and Professional rebate to add liquidity in Penny Symbols is paid per the highest tier achieved below:

Tier 1: Participant adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols of up to 0.10% of total industry customer equity and ETF option average daily volume ("ADV") contracts per day in a month.

Tier 2: Participant adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols above 0.10% of total industry customer equity and ETF option ADV contracts per day in a month.

Tier 3: Participant: (a) adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols above 0.20% of total industry customer equity and ETF option ADV contracts per day in a month; or (b) adds Customer and/or Professional liquidity in Penny Symbols and/or Non-Penny Symbols above 0.05% of total industry customer equity and ETF option ADV contracts per day in a month and qualifies for MARS.⁹

Tier 4: Participant adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols above 0.30% of total industry

customer equity and ETF option ADV contracts per day in a month.

Tier 5: Participant adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols above 0.40% of total industry customer equity and ETF option ADV contracts per day in a month.

Tier 6: Participant adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols above 0.70% or more of total industry customer equity and ETF option ADV contracts per day in a month, or Participant : (1) adds Customer and/or Professional liquidity in Penny Symbols and/or Non-Penny Symbols of 0.10% or more of total industry customer equity and ETF option ADV contracts per day in a month, and (2) has added liquidity in all securities through one or more of its Nasdaq Market Center MPIDs that represent 1.00% or more of Consolidated Volume in a month or qualifies for MARS.

Currently, the fees to remove liquidity in Penny and Non-Penny Symbols for Non-NOM Market Makers and NOM Market Makers are modified according to note 2, which states as follows:

Participants that add 1.10% of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols of total industry customer equity and ETF option ADV contracts per day in a month will be subject to the following pricing applicable to executions: a \$0.48 per contract Penny Symbols Fee for Removing Liquidity when the Participant is (i) both the buyer and the seller or (ii) the Participant removes liquidity

from another Participant under Common Ownership.

Participants that add 1.55% of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols of total industry customer equity and ETF option ADV contracts per day in a month will be subject to the following pricing applicable to executions less than 10,000 contracts: a \$0.38 per contract Penny Symbols Fee for Removing Liquidity when the Participant is (i) both the buyer and seller or (ii) the Participant removes liquidity from another Participant under Common Ownership.

Currently, the Tier 6 rebate to add liquidity in Penny Symbols that is paid to Customers is modified according to note 7, which states as follows:

Participants that: (1) add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols of 1.15% or more of total industry customer equity and ETF option ADV contracts per day in a month will receive an additional \$0.02 per contract Penny Symbol Customer Rebate to Add Liquidity for each transaction which adds liquidity in Penny Symbol in that month; or (2) add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols of 1.30% or more of total industry customer equity and ETF option ADV contracts per day in a month will receive an additional \$0.05 per contract Penny Symbol Customer Rebate to Add Liquidity for each transaction which adds liquidity in Penny Symbols in that month; or (3) (a) add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols above 0.80% of total industry customer equity and ETF option ADV contracts per day in a month, (b) add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity

⁹ The Market Access and Routing Subsidy ("MARS") is a rebate program set out in Nasdaq Options 7, Section 2(4), under which NOM pays participating firms a per-contract subsidy for routing eligible options order flow to NOM through the participant's own order-routing system.

in Non-Penny Symbols above 0.12% of total industry customer equity and ETF option ADV contracts per day in a month, and (c) execute greater than 0.04% of Consolidated Volume ("CV") via Market-on-Close/Limit-on-Close ("MOC/LOC") volume within The Nasdaq Stock Market Closing Cross within a month will receive an additional \$0.05 per contract Penny Symbol Customer Rebate to Add Liquidity for each transaction which adds liquidity in Penny Symbols in a month. Consolidated Volume shall mean the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during a month in equity securities, excluding executed orders with a size of less than one round lot. For purposes of calculating Consolidated Volume and the extent of an equity member's trading activity, expressed as a percentage of or ratio to Consolidated Volume, the date of the annual reconstitution of the Russell Investments Indexes shall be excluded from both total

Consolidated Volume and the member's trading activity.

Currently, the Customer and Professional rebates to add liquidity in both Penny Symbols and Non-Penny Symbols are modified according to note 10, which states as follows:

NOM Participants that (a) add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols above 1.50% of total industry customer equity and ETF option ADV contracts per day in a month, (b) execute greater than 0.04% of Consolidated Volume ("CV") via Market-on-Close/Limit-on-Close ("MOC/LOC") volume within The Nasdaq Stock Market Closing Cross within a month, and (c) add greater than 1.5 million shares per day of non-displayed volume within The Nasdaq Stock Market within a month will receive a \$0.55 per contract Rebate to Add Liquidity in Penny Symbols as Customer, a \$0.48 per

contract Rebate to Add Liquidity in Penny Symbols as Professional, and a \$1.15 per contract Rebate to Add Liquidity in Non-Penny Symbols as Customer, and a \$0.90 per contract Rebate to Add Liquidity in Non-Penny Symbols as Professional. Participants that qualify for this rebate would not be eligible for any other rebates in Tiers 1–6 or other rebate incentives on NOM for Customer and Professional order flow in Options 7, Section 2(1).

The Exchange proposes to make seven changes to these provisions of the Exchange fee schedule:

First Change

The Exchange proposes to increase the Tier 6 Customer rebate to add liquidity in Penny Symbols from \$0.48 to \$0.49. Therefore, the new schedule of this rebate for Customers will be as follows:

	Tier 1	Tier 2	Tier 3	Tier 4	Tier 5	Tier 6
Customer	(\$0.20)	(\$0.25)	(\$0.43)	(\$0.44)	(\$0.45)	(\$0.49)

Second Change

The Exchange proposes to lower the Tier 6 NOM Market Maker rebate to add

liquidity in Penny Symbols from \$0.47 to \$0.45. Therefore, the new schedule of

this rebate for NOM Market Makers will be as follows:

	Tier 1	Tier 2	Tier 3	Tier 4	Tier 5	Tier 6
NOM Market Maker	(\$0.20)	(\$0.25)	(\$0.30)	(\$0.32)	(\$0.45)	(\$0.45)

Third Change

The Exchange proposes to modify the schedule of fees to remove liquidity in Penny and Non-Penny Symbols by eliminating and reserving note 2, which until now had modified the fees paid by Non-NOM Market Makers and NOM Market Makers to remove liquidity in Penny Symbols.

Fourth Change

The Exchange proposes to modify the Customer and Professional rebate to add liquidity in Penny Symbols by streamlining the criteria to qualify for Tier 6.¹⁰ Specifically, the Exchange would modify the second of the two

alternative paths to qualify for Tier 6.¹¹ This second alternative path, in turn, contains two separate requirements that must both be met. The second of these requirements, in turn, is composed of two alternatives.¹² The Exchange proposes to eliminate the first of these two alternatives.¹³ Therefore, the

¹¹ As seen in the immediately preceding footnote, the two conditions to satisfy this second path are currently as follows: "Participant: (1) adds Customer and/or Professional liquidity in Penny Symbols and/or Non-Penny Symbols of 0.10% or more of total industry customer equity and ETF option ADV contracts per day in a month, and (2) has added liquidity in all securities through one or more of its Nasdaq Market Center MPIDs that represent 1.00% or more of Consolidated Volume in a month or qualifies for MARS."

¹² As seen in the immediately preceding footnote, the two alternatives to satisfy this second requirement are currently that the Participant "(2) has added to liquidity in all securities through one or more of its Nasdaq Market Center MPIDs that represent 1.00% or more of Consolidated Volume in a month or qualifies for MARS."

¹³ As seen in the immediately preceding footnote, the first of these two current alternative requirements is that the Participant "has added to liquidity in all securities through one or more of its Nasdaq Market Center MPIDs that represent 1.00% or more of Consolidated Volume in a month." This is the provision of the Tier 6 criteria for the Customer and Professional rebate to add liquidity in Penny Symbols that the Exchange proposes to delete through this filing.

revised criteria to qualify for Tier 6 would be as follows:

Tier 6: Participant adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols above 0.70% or more of total industry customer equity and ETF option ADV contracts per day in a month, or Participant: (1) adds Customer and/or Professional liquidity in Penny Symbols and/or Non-Penny Symbols of 0.10% or more of total industry customer equity and ETF option ADV contracts per day in a month, and (2) qualifies for MARS.

Fifth Change

The Exchange proposes to modify the schedule of rebates to add liquidity in Penny Symbols by eliminating and reserving note 7, which until now had modified the Tier 6 rebate paid to Customers.

Sixth Change

The only definition of "*Consolidated Volume*" that is currently in Options 7 is contained in note 7, which is being deleted in this filing. The Exchange proposes to relocate this same definition, verbatim, to Options 7,

¹⁰ As mentioned above, the current criteria to qualify for Tier 6 are the following: "Participant adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols above 0.70% or more of total industry customer equity and ETF option ADV contracts per day in a month, or Participant: (1) adds Customer and/or Professional liquidity in Penny Symbols and/or Non-Penny Symbols of 0.10% or more of total industry customer equity and ETF option ADV contracts per day in a month, and (2) has added liquidity in all securities through one or more of its Nasdaq Market Center MPIDs that represent 1.00% or more of Consolidated Volume in a month or qualifies for MARS."

Section 1(a), which contains several other defined terms. The “Consolidated Volume” defined term in Options 7, Section 1(a) would read as follows:

The term “*Consolidated Volume*” shall mean the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during a month in equity securities, excluding executed orders with a size of less than one round lot. For purposes of calculating Consolidated Volume and the extent of an equity member’s trading activity, expressed as a percentage of or ratio to Consolidated Volume, the date of the annual reconstitution of the Russell Investments Indexes shall be excluded from both total Consolidated Volume and the member’s trading activity.

Seventh Change

The Exchange proposes to modify the rebates to add liquidity in Penny Symbols and the schedule of fees and rebates to add liquidity in Non-Penny Symbols by eliminating and reserving note 10, which until now had modified the rebates paid to Customers and Professionals to add liquidity in Penny Symbols, as well as the rebates paid to Customers and Professionals to add liquidity in Non-Penny Symbols.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁴ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁵ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹⁶

Likewise, in *NetCoalition v. Securities and Exchange Commission*¹⁷

(“*NetCoalition*”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.¹⁸ As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”¹⁹

Further, “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”²⁰ Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange’s proposed changes to Options 7 are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options transaction services that constrain its pricing determinations in that market. Within this environment, the Exchange must continually adjust the fees and rebates set forth in its Pricing Schedule to remain competitive with the other national securities exchanges to which market participants may direct their options order flow. Each of the seven proposed changes is discussed in turn below.

First Change

The proposed amendment to the Tier 6 Customer rebate to add liquidity in Penny Symbols from \$0.48 per contract to \$0.49 per contract is reasonable because it modestly increases the top-tier Customer Penny Symbol rebate paid on NOM, which is designed to attract additional Customer order flow to the Exchange. As the Exchange has previously observed, Customer liquidity offers benefits to the market that ultimately benefit all Participants: it provides more trading opportunities, which attracts market makers, and an increase in the activity of these market

participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow. The proposed higher Tier 6 rebate is therefore intended to improve overall market quality on the Exchange by incentivizing Participants to bring additional Customer order flow to NOM and, in turn, provide more trading opportunities to the benefit of all market participants. The amendment is part of an overall effort to appropriately calibrate rebates in a manner that helps attract order flow to NOM, from which all Participants benefit through increased trading opportunities and greater interaction with liquidity.

The proposed amendment is equitable and not unfairly discriminatory because the Exchange would uniformly apply the revised Tier 6 rebate to every Participant that satisfies the qualifying criteria for that Tier through Customer liquidity-adding order flow. Continuing to provide more favorable pricing on Customer liquidity than on liquidity from other categories of market participants is consistent with the Exchange’s long-standing practice throughout its Pricing Schedule and is justified because Customer liquidity offers benefits that ultimately flow through to all market participants, as described above. Similar upward adjustments to individual Customer and NOM Market Maker Penny Symbol and Non-Penny Symbol liquidity-adding rebates have previously been effected by the Exchange on the same basis.²¹

Second Change

The proposed amendment to the Tier 6 NOM Market Maker rebate to add liquidity in Penny Symbols from \$0.47 per contract to \$0.45 per contract is reasonable because NOM Market Makers would continue to receive substantial rebates for adding Penny Symbol liquidity across all six volume tiers, and the Tier 6 rebate would remain among the highest of those tiers, tied with the Tier 5 rebate at \$0.45 per contract. The amendment is part of an overall effort to appropriately calibrate rebates in a manner that helps attract order flow to NOM, from which all Participants benefit through increased trading

²¹ See, e.g., Securities Exchange Act Release No. 103339 (June 27, 2025), 90 FR 29082 (July 2, 2025) (File No. SR-NASDAQ-2025-045) (increasing the Tier 5 NOM Market Maker Rebate to Add Liquidity in Penny Symbols from \$0.44 to \$0.46 per contract); Securities Exchange Act Release No. 98934 (Nov. 15, 2023), 88 FR 81166 (Nov. 21, 2023) (File No. SR-NASDAQ-2023-044) (increasing the note 9 Customer Rebate to Add Liquidity in Non-Penny Symbols from \$1.00 to \$1.10 per contract, and increasing the note 10 Customer Rebate to Add Liquidity in Non-Penny Symbols from \$1.05 to \$1.15 per contract).

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(4) and (5).

¹⁶ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

¹⁷ *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010).

¹⁸ See *NetCoalition*, at 534–535.

¹⁹ *Id.* at 537.

²⁰ *Id.* at 539 (quoting Securities Exchange Act Release No. 59039 (Dec. 2, 2008), 73 FR 74770, 74782–83 (Dec. 9, 2008) (File No. SR-NYSEArca-2006-21)).

opportunities and greater interaction with liquidity.

The proposed amendment is equitable and not unfairly discriminatory because the Exchange would uniformly apply the revised Tier 6 rebate to every NOM Market Maker that satisfies the qualifying criteria for that Tier. Similar downward adjustments to individual NOM Market Maker Penny Symbol rebate tiers have previously been effected by the Exchange on the same basis.²²

Third Change

The proposed elimination and reservation of note 2 in Options 7, Section 2(1) is reasonable. Note 2 currently offers Non-NOM Market Makers and NOM Market Makers reduced fees for removing liquidity in Penny Symbols of \$0.48 and \$0.38 per contract in narrowly defined transactions in which the Participant is (i) both the buyer and the seller or (ii) removes liquidity from another Participant under Common Ownership, and only where the Participant has separately added 1.10% or 1.55% of total industry customer equity and ETF option ADV. Following the proposed elimination, Non-NOM Market Makers and NOM Market Makers would be assessed the same standard \$0.50 per contract Penny Symbols fee for removing liquidity that is applicable to Broker-Dealers and Firms. The Exchange believes that eliminating this narrow incentive, which today applies only where the Participant is on both sides of the trade or removes liquidity from an affiliate under Common Ownership, produces a more uniform Penny Symbols removal fee structure across Non-NOM Market Makers, NOM Market Makers, Broker-Dealers and Firms and simplifies the Pricing Schedule.

The proposed elimination is equitable and not unfairly discriminatory because, upon its effectiveness, no Participant would be able to qualify for the eliminated note 2 incentives, and the Exchange would uniformly apply the standard fees to remove liquidity in Penny Symbols to all Non-NOM Market Makers and NOM Market Makers.

Fourth Change

The proposed modification to the Tier 6 criteria for the Customer and

Professional rebate to add liquidity in Penny Symbols is reasonable. Tier 6 is presently available under two alternative qualification paths, and the proposal streamlines only the second of those paths. Following the proposed change, that second path will continue to require the Participant to add at least 0.10% of total industry customer equity and ETF option ADV in Customer and/or Professional volume, and to qualify for MARS. The primary qualification path (adding at least 0.70% of total industry customer equity and ETF option ADV in Penny Symbol and/or Non-Penny Symbol liquidity) is not affected by the proposal, and neither is the requirement that the Participant reach 0.10% of total industry customer equity and ETF option ADV in Customer and/or Professional volume under the second path. The Exchange has previously observed, in adding an alternative MARS-tied route to Tier 3 of the Customer and Professional rebate program,²³ that tying rebate qualification to MARS is designed to incentivize Participants to increase their liquidity adding activity on NOM and thereby improve the quality of the market for all Participants. The Exchange believes that the same reasoning supports focusing the second Tier 6 qualification path on the MARS-tied requirement alone.

The proposed modification is equitable and not unfairly discriminatory because the Exchange would uniformly apply the streamlined Tier 6 criteria to every Participant that seeks to earn the Customer and Professional rebate to add liquidity in Penny Symbols at Tier 6. Participants that previously could have qualified for Tier 6 through the deleted alternative (adding liquidity in all securities through one or more of their Nasdaq Market Center MPIDs representing 1.00% or more of Consolidated Volume in a month) may still qualify for Tier 6 either by satisfying the unmodified primary volume threshold or by satisfying the retained MARS-tied requirement of the second path, on the same terms as every other Participant. The Exchange acknowledges that a Participant whose Tier 6 eligibility currently rests solely on the deleted MPID/Consolidated Volume alternative—that is, a Participant that does not meet either the unmodified primary volume threshold or the retained MARS-tied requirement of the

second path—would no longer qualify for Tier 6 following the proposed change. The Exchange believes this outcome is appropriate because it aligns Tier 6 eligibility with volume-based and MARS-linked criteria that more directly incentivize the addition of Customer and Professional order flow to NOM.

Fifth Change

The proposed elimination and reservation of note 7 in Options 7, Section 2(1) is reasonable. Note 7 currently modifies the Tier 6 Customer rebate to add liquidity in Penny Symbols by providing additional \$0.02, \$0.05, or \$0.05 per contract enhancements upon satisfaction of substantial volume and cross-market conditions. The Exchange has observed that these layered volume-based and cross-market enhancements have not attracted incremental Customer order flow at levels commensurate with the complexity that they add to the Pricing Schedule. Following the proposed elimination, Participants that qualify for the Tier 6 Customer rebate to add liquidity in Penny Symbols would continue to receive that rebate at its established level. The Exchange believes that consolidating the Tier 6 Customer rebate at its established, uniform level, without the additional volume-based and cross-market enhancements currently in note 7, produces a simpler and more transparent Tier 6 Customer rebate structure.

The proposed elimination is equitable and not unfairly discriminatory because, upon its effectiveness, no Participant would be able to qualify for the eliminated note 7 enhancements, and the Exchange would uniformly apply the standard Tier 6 Customer rebate to every Participant that qualifies for that Tier.

Sixth Change

The proposed relocation of the “Consolidated Volume” defined term from note 7 of Options 7, Section 2(1) to Options 7, Section 1(a), which houses the defined terms applicable throughout the Pricing Schedule, is reasonable. The proposed relocation is a non-substantive change that reproduces the “Consolidated Volume” definition verbatim in a new location and, in itself, does not modify any fee, rebate, threshold, or qualification criterion under Options 7. Because notes 3, 4, 9 and the note designated by “##” within Options 7, Section 2(1) each use the term “Consolidated Volume” without themselves defining it, and because the concurrent elimination of note 7 (the sole current location of the defined term) would otherwise leave

²² See Securities Exchange Act Release No. 104818 (Feb. 11, 2026), 91 FR 7336 (Feb. 17, 2026) (File No. SR-NASDAQ-2026-006) (reducing the Tier 5 NOM Market Maker Rebate to Add Liquidity in Penny Symbols from \$0.46 to \$0.45 per contract and the Tier 6 NOM Market Maker Rebate to Add Liquidity in Penny Symbols from \$0.48 to \$0.47 per contract).

²³ See Securities Exchange Act Release No. 92974 (Sept. 14, 2021), 86 FR 52273 (Sept. 20, 2021) (File No. SR-NASDAQ-2021-069) (adding an alternative MARS-tied route to qualify for the Tier 3 Customer and Professional Rebate to Add Liquidity in Penny Symbols).

“Consolidated Volume” undefined within Options 7, the proposed relocation preserves an accurate and clearly identifiable definition of “Consolidated Volume” for all remaining references to that term within Options 7. Placing the “Consolidated Volume” defined term alongside the other defined terms in Section 1(a) also makes the Pricing Schedule easier to read and more accessible to Participants and other market participants that consult it.

The proposed relocation is equitable and not unfairly discriminatory because it applies uniformly across all Participants. The definition of “Consolidated Volume” proposed for Options 7, Section 1(a) is identical to the definition that currently appears in note 7, and its relocation does not alter how “Consolidated Volume,” or activity for any fee or rebate tier that references “Consolidated Volume,” is calculated. The Exchange will therefore continue to apply the same measure of “Consolidated Volume,” in the same manner, to every Participant that seeks to qualify under any fee or rebate provision of Options 7 that references that term.

Seventh Change

The proposed elimination and reservation of note 10 in Options 7, Section 2(1) is reasonable. Note 10 currently provides an alternative, exclusive rebate schedule to Participants that satisfy a demanding combination of NOM add-liquidity volume above 1.50% of total industry customer equity and ETF option ADV, MOC/LOC Consolidated Volume greater than 0.04% executed within The Nasdaq Stock Market Closing Cross, and non-displayed volume within The Nasdaq Stock Market greater than 1.5 million shares per day. Participants that qualified for the note 10 rebate schedule were excluded from receiving any of the six tiered Customer and Professional rebates to add liquidity, and from any other Customer and Professional rebate incentive on NOM. With the proposed elimination, all Participants, including any Participant that previously qualified for the note 10 rebate schedule, would be eligible to earn the tiered Customer and Professional rebates to add liquidity in Penny Symbols and Non-Penny Symbols on the same basis as every other Participant.

The proposed elimination is equitable and not unfairly discriminatory because, upon its effectiveness, no Participant would be able to qualify for the eliminated note 10 rebate schedule, and the Exchange would uniformly apply to

all Participants the tiered Customer and Professional rebates to add liquidity.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Inter-Market Competition

The proposal does not impose an undue burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes its proposal remains competitive with other options markets and will offer market participants with another choice of where to transact options. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

Intra-Market Competition

The Exchange does not believe that its proposal would impose an undue burden on intra-market competition. Each of the seven proposed changes would apply uniformly across all Participants, or uniformly within an identifiable class of Participants to which the corresponding pricing provision applies.

First Change

The proposed increase of the Tier 6 Customer rebate to add liquidity in Penny Symbols from \$0.48 per contract to \$0.49 per contract does not impose an undue burden on intra-market competition, because the revised Tier 6 rebate would apply uniformly to every Participant that satisfies the Tier 6 qualification criteria through Customer liquidity-adding order flow. The Exchange's long-standing practice of providing more favorable pricing on Customer liquidity than on liquidity from other categories of market participants does not impose an undue burden on intra-market competition because, as described above, Customer

liquidity offers benefits that ultimately flow through to all Participants.

Second Change

The proposed reduction of the Tier 6 NOM Market Maker rebate to add liquidity in Penny Symbols from \$0.47 per contract to \$0.45 per contract does not impose an undue burden on intra-market competition, because the revised rebate would apply uniformly to every NOM Market Maker that satisfies the Tier 6 qualification criteria, and NOM Market Makers would continue to receive substantial rebates for adding Penny Symbol liquidity across all six volume tiers.

Third Change

The proposed elimination and reservation of note 2 in Options 7, Section 2(1) does not impose an undue burden on intra-market competition, because, upon its effectiveness, no Participant would be able to qualify for the eliminated note 2 incentives, and Non-NOM Market Makers and NOM Market Makers would be assessed the same \$0.50 per contract Penny Symbol fee for removing liquidity as Broker-Dealers and Firms.

Fourth Change

The proposed modification of the Tier 6 criteria for the Customer and Professional rebate to add liquidity in Penny Symbols does not impose an undue burden on intra-market competition, because the streamlined Tier 6 criteria would apply uniformly to every Participant that seeks the Tier 6 rebate. The primary qualification path (adding at least 0.70% of total industry customer equity and ETF option ADV in Penny Symbol and/or Non-Penny Symbol liquidity) is unchanged by the proposal, and the MARS-tied requirement of the second qualification path is retained without modification. The proposal narrows only one of two alternative requirements within the second qualification path, and it does so on terms that apply identically to every Participant.

Fifth Change

The proposed elimination and reservation of note 7 in Options 7, Section 2(1) does not impose an undue burden on intra-market competition, because, upon its effectiveness, no Participant would be able to qualify for the eliminated note 7 enhancements, and the Tier 6 Customer rebate to add liquidity in Penny Symbols would continue to be paid at its established level to every Participant that satisfies the Tier 6 criteria.

Sixth Change

The proposed relocation of the “Consolidated Volume” defined term from note 7 of Options 7, Section 2(1) to Options 7, Section 1(a) does not impose an undue burden on intra-market competition. The relocation is a non-substantive change that reproduces the definition verbatim in a new location, does not modify any fee, rebate, threshold or qualification criterion, and does not alter how “Consolidated Volume” is calculated or applied to any Participant. The same measure of “Consolidated Volume” will continue to apply to all Participants that seek to qualify under any fee or rebate provision of Options 7 that references the term and, accordingly, the proposed relocation applies uniformly across all Participants.

Seventh Change

The proposed elimination and reservation of note 10 in Options 7, Section 2(1) does not impose an undue burden on intra-market competition. Upon its effectiveness, no Participant would be able to qualify for the eliminated note 10 rebate schedule, and, importantly, Participants that previously would have been excluded from the tiered Customer and Professional rebates to add liquidity by virtue of qualifying for note 10 would once again be eligible to earn those tiered rebates on the same basis as every other Participant. The Exchange therefore believes that this change furthers intra-market competition by allowing all Participants, including any Participants that previously qualified for the note 10 rebate schedule, to be eligible to qualify and earn the tiered Customer and Professional rebates to add liquidity in Penny Symbols and Non-Penny Symbols on the same basis as every other Participant.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.²⁴

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such

action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission’s internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR–NASDAQ–2026–074 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–NASDAQ–2026–074. 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 (<https://www.sec.gov/rules/sro.shtml>). Copies of the filing will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–NASDAQ–2026–074 and should be submitted on or before October 9, 2026.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁵

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2026–19119 Filed 9–17–26; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–106379; File No. SR–NYSEAMER–2026–83]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 7.12E Concerning the Resumption of Trading Following a Level 3 Market-Wide Circuit Breaker Halt in Connection With the Industry’s Expansion of Trading Hours to 23 Hours per Day, 5 Days per Week

September 15, 2026.

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 September 4, 2026, 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 and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 7.12E (“Trading Halts Due to Extraordinary Market Volatility”) concerning the resumption of trading following a Level 3 market-wide circuit breaker halt in connection with the industry’s expansion of trading hours to 23 hours per day, 5 days per week. The proposed rule change is available on the Exchange’s website at www.nyse.com and at the principal office of the Exchange.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

²⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁵ 17 CFR 200.30–3(a)(12).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE American LLC ("NYSE American" or the "Exchange") proposes to amend Rule 7.12E ("Trading Halts Due to Extraordinary Market Volatility") concerning the resumption of trading following a Level 3 market-wide circuit breaker ("MWCB") halt ("Level 3 Market Decline") in connection with the industry's expansion of trading hours to 23 hours per day, 5 days per week ("23/5 Trading"). Some exchanges, including the Exchange's affiliate exchange, NYSE Arca, Inc. ("NYSE Arca"), are planning to offer overnight trading,³ and as a result, the uniform Level 3 Market Decline rules of each exchange are being modified, as explained further below.

Background

The MWCB mechanism under Rule 7.12E provides an important, automatic mechanism that is invoked to promote stability and investor confidence during a period of significant stress when U.S. securities markets experience extreme broad-based declines. All U.S. equity exchanges and FINRA (collectively, the self-regulatory organizations or "SROs") adopted uniform rules relating to the MWCB mechanism in 2012, which are designed to slow the effects of extreme price movement through coordinated trading halts across U.S. securities markets when severe price declines reach levels that may exhaust market liquidity.⁴ Such market-wide circuit breakers provide for trading halts in all U.S. cash equity and equities options markets during a severe market decline as measured by a single-day decline in the S&P 500 Index during regular trading hours.

Pursuant to Rule 7.12E, a market-wide trading halt will be triggered if the S&P 500 Index declines in price by specified percentages from the prior day's closing price of that index. Currently, the triggers are set at three circuit breaker thresholds: 7% (Level 1), 13% (Level 2), and 20% (Level 3). A market decline

that triggers a Level 1 or Level 2 halt after 9:30 a.m. ET and before 3:25 p.m. ET would halt market-wide trading for 15 minutes, while a similar market decline at or after 3:25 p.m. ET would not halt market-wide trading. If a Level 3 Market Decline occurs at any time during the trading day, trading in all stocks will halt on the Exchange for the remainder of the trading day, and will resume the following trading day at 7:00 a.m. ET.

Proposal

The Exchange now proposes to amend Rule 7.12E to reflect extended trading hours under 23/5 Trading. On December 6, 2026, several exchanges, including NYSE Arca, intend to offer new overnight trading sessions that would be available from 9:00 p.m. ET to 4:00 a.m. ET, significantly increasing their hours of operation in response to customer demand.

As discussed, consistent with the uniform rules in place across all SROs, current Rule 7.12E(b)(ii) provides that if a Level 3 Market Decline occurs at any time during the trading day, the Exchange shall halt trading in all stocks on the Exchange for the remainder of the trading day. Currently, that means that the earliest that any exchange would re-open trading after a Level 3 Market Decline is 4:00 a.m. ET the following day, since no SROs are open for trading before 4:00 a.m. ET.

Unless amended, when 23/5 Trading is launched, the current rule's reference to halting "for the remainder of the trading day"⁵ would require SROs participating in 23/5 Trading to re-open trading at an earlier time, *i.e.*, 9:00 p.m. ET on the same calendar day, when those SROs' systems would generally become available for overnight trading. The Exchange does not believe that this is an expected or desired result and is therefore amending this rule in coordination with the other SROs such that trading on any SRO will not resume until 4:00 a.m. ET or later on the following trading day, consistent with current market practice. This proposed rule change is therefore not intended to make any substantive changes to the MWCB mechanism. Rather, the proposed rule change would preserve the current resumption time following a Level 3 Market Decline.

To effect this change, the Exchange proposes to delete the language in Rule 7.12E(b)(ii) that provides that trading in all stocks will halt on the Exchange "for the remainder of the trading day" if a Level 3 Market Decline occurs at any time during the trading day, and replace

it with new language that explicitly provides that trading in all stocks would halt on the Exchange until 4:00 a.m. ET or later on the following trading day.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁶ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁷ in particular, 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.

The MWCB mechanism described in Rule 7.12E is an important, automatic mechanism that is invoked to promote stability and investor confidence during periods of significant stress when U.S. securities markets experience extreme broad-based declines. The proposed rule change, when applied uniformly by all SROs, would ensure that the current 4:00 a.m. ET resumption time following a Level 3 halt continues to apply under 23/5 Trading, notwithstanding current rule text implying that the resumption time would coincide with the start of overnight trading on SROs operating an overnight session.

Rather than leave the rule in place as is, which would result in an earlier resumption time than originally contemplated when the rule was adopted, the Exchange, the other U.S. equity exchanges, and FINRA met alongside industry representatives to determine the appropriate resumption time. Following those discussions, the collective decision was made to retain the 4:00 a.m. ET resumption time, notwithstanding the fact that an earlier resumption time would be possible with the introduction of 23/5 Trading. The proposed rule change codifies this decision into the Exchange's rules. The Exchange understands that the other SROs will also be filing similar proposed rule changes. As a result, the market as a whole, including on- and off-exchange, will continue to be subject to harmonized rules for the resumption of trading following a Level 3 Market Decline.

While the SROs had previously decided to tie the resumption time following a Level 3 halt to the earliest SRO opening time, the upcoming transition to 23/5 Trading raises various concerns that warrant a change from the current approach.

First, the Exchange notes that the MWCB mechanism was designed to

³ See, e.g., Securities Exchange Act Release No. 105532 (May 21, 2026), 91 FR 31509 (May 27, 2026) (SR-NYSEARCA-2026-53) ("NYSE Arca 23/5 Trading Notice"). The Exchange does not intend to implement 23/5 Trading at this time.

⁴ See Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR-BATS-2011-038; SR-BYX-2011-025; SR-BX-2011-068; SR-CBOE-2011-087; SR-C2-2011-024; SR-CHX-2011-30; SR-EDGA-2011-31; SR-EDGX-2011-30; SR-FINRA-2011-054; SR-ISE-2011-61; SR-NASDAQ-2011-131; SR-NSX-2011-11; SR-NYSE-2011-48; SR-NYSEAmex-2011-73; SR-NYSEArca-2011-68; SR-Phlx-2011-129) ("MWCB Approval Order").

⁵ See Rule 7.12E(b)(ii).

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

provide a cooling-off period where market participants would be provided with additional time to evaluate the market events that led to the decline before determining how to position their trading activity for the next day. With the introduction of 23/5 Trading and the start of overnight trading on some SROs at 9:00 p.m. ET, however, this cooling-off period could be materially shortened, reducing one of the key benefits that the MWCB mechanism was designed to provide in the first place. Rather than shorten the cooling-off period and risk this benefit, the Exchange believes the market would be better served by a change to the length of the associated trading halt that mirrors current market practice. Under the proposed rule, as is the case today, after a Level 3 halt, all SROs would reopen trading at 4:00 a.m. ET or later, and no SRO would offer an overnight trading session starting on the day of a Level 3 halt.

Second, overnight trading may be subject to different liquidity and participation considerations than the current pre-market sessions that start at or after 4:00 a.m. ET. Notably, while retail investors have expressed interest in overnight trading, the Exchange expects that institutional investors will take more time to transition to a round-the-clock model. However, such institutional participation may be of heightened importance following a Level 3 halt, as these investors are likely to have views on the underlying market events that led to the Level 3 Market Decline in the first place. The Exchange is concerned that opening during hours that such participants do not normally trade may impact the quality of price discovery at a time of significant market volatility. Waiting until 4:00 a.m. ET to resume trading would facilitate broader participation and therefore price discovery.

Finally, the Exchange notes that the Commission recently approved an amendment to the Plan to Address Extraordinary Market Volatility (“LULD Plan”) that would establish new price protections from 9:00 p.m. ET to 4:00 a.m. ET.⁸ While these price bands would help to assure a fair and orderly market during normal market conditions, it is possible that they would instead prevent normal price discovery following a Level 3 Market Decline. Rather than allowing trading to

resume with such price bands in effect, which would represent a change from the current trading reopening following a Level 3 Market Decline, the Exchange believes that requiring SROs to wait until 4:00 a.m. ET or later to resume trading would ensure that price discovery can occur unimpeded during pre-market trading, as it does today, which may further inform prices going into the opening auction and regular market hours trading following a Level 3 halt.

Given the factors discussed above, the Exchange believes that trading in all securities on the Exchange should not resume before 4:00 a.m. ET on the trading day after a Level 3 halt. This decision, which the Exchange understands will also be reflected in the rules of the other SROs, would promote a fair and orderly market at a time of significant market volatility, and thereby protect investors and the public interest. In addition, while the actual Level 3 resumption time would not be changing in practice—as proposed, the current resumption time and future resumption time would both be 4:00 a.m. ET at the earliest—the Exchange believes that it is appropriate to amend its rules to ensure that its rules reflect the upcoming changes due to 23/5 Trading. Without this change, market participants may mistakenly believe that the Exchange intends for trading to reopen on overnight trading exchanges at 9:00 p.m. ET following a Level 3 halt. The proposed rule change would therefore facilitate operational transparency while providing for a fair and orderly market.

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 because the proposal would ensure the continued, uninterrupted operation of a consistent mechanism to halt trading across U.S. securities markets. Further, the Exchange understands that the other SROs intend to file proposed rule changes to ensure a consistent resumption time at 4:00 a.m. or later ET across markets. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act⁹ and subparagraph (f)(6) of Rule 19b–4 thereunder.¹⁰

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR–NYSEAMER–2026–83 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.

⁹ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁰ 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

⁸ See Securities Exchange Act Release No. 106042 (August 5, 2026), 91 FR 51515 (August 10, 2026) (Order Granting Approval of the Twenty-Seventh Amendment to the National Market System Plan to Address Extraordinary Market Volatility to Establish Temporary Price Band Protections in Overnight Trading).

All submissions should refer to file number SR-NYSEAMER-2026-83. 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 (<https://www.sec.gov/rules/sro.shtml>). Copies of the filing will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NYSEAMER-2026-83 and should be submitted on or before October 9, 2026.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2026-19124 Filed 9-17-26; 8:45 am]

BILLING CODE 8011-01-P

DEPARTMENT OF STATE

[Public Notice 13122]

60-Day Notice of Proposed Information Collection: DS-864E, Request for Exemption From Immigrant Visa Applicant's Affidavit of Support

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 November 17, 2026.

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-2026-0960" in the Search field. Then click the

"Comment Now" button and complete the comment form.

- **Email:** PRA_BurdenComments@state.gov.

- **Regular Mail:** Send written comments to: Senior Regulatory Coordinator, Visa Services, Department of State, 600 19th St. NW, Washington, DC 20006.

Please contact the Department via email if you are unable to access the supporting documentation through regulations.gov. You must include the DS form number (if applicable), information collection title, and the OMB control number in any correspondence.

SUPPLEMENTARY INFORMATION:

- **Title of Information Collection:** Request for Exemption from Immigrant Visa Applicant's Affidavit of Support.
- **OMB Control Number:** 1405-XXXX.
- **Type of Request:** New Collection.
- **Originating Office:** CA/VO.
- **Form Number:** DS-864E.
- **Respondents:** Immigrant Visa Applicants.

- **Estimated Number of Respondents:** 24,000.

- **Estimated Number of Responses:** 24,000.

- **Average Time Per Response:** 1 hour.

- **Total Estimated Burden Time:** 24,000.

- **Frequency:** Once per respondent's application.

- **Obligation to Respond:** Required to Obtain or Retain a Benefit.

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

Section 213A of the Immigration and Nationality Act (INA) (8 U.S.C. 1183a) sets forth the requirements for an

Affidavit of Support. In most cases, a family-sponsored and certain employment-based immigrant must have a sponsor execute an Affidavit of Support on his or her behalf. The Affidavit of Support is intended to demonstrate the immigrant will have adequate means of financial support and is not likely to rely on governmental financial assistance. The Affidavit of Support is a legally binding contract which may be enforced in federal or state court if the sponsored immigrant receives any means-tested public benefits and the sponsor does not repay the cost of those benefits to the agency that provided them.

The Department of State uses the Department of Homeland Security's (DHS) Form I-864, Affidavit of Support Under Section 213A of the Act—or Form I-864EZ, Affidavit of Support of Support Under Section 213A of the Act, if the applicant qualifies to use it—to determine whether the sponsor meets the minimum income requirements. The Department previously used DHS Form I-864W, Request for Exemption for Intending Immigrant's Affidavit of Support, to determine whether an applicant was eligible for an exemption from filing these forms. However, OIRA approved discontinuation of Form I-864W on October 17, 2024.

The Department developed Form DS-864E to facilitate the Department's continued ability to assess sponsor information in accordance with INA 213A (8 U.S.C. 1183a), INA 212(a)(4) (8 U.S.C. 1182(a)(4)), and 22 CFR 40.41. The Department will use Form DS-864E to determine whether the applicant meets the criteria for exemption from the requirement to submit Form I-864 (or Form I-864EZ). This form will collect the immigrant's basic information, such as name and address, the reason for the exemption, and accompanying documentation in support of the immigrant's claim that he or she is not required to submit Form I-864 (or Form I-864EZ) and serve as his or her affirmative request for an exemption as required under 8 CFR 213a.2(a)(1)(i)(B).

Methodology

Form DS-864E will be available electronically at <https://travel.state.gov>. The form can be completed online and must be submitted as directed by the National Visa Center (NVC) or by a consular officer abroad.

John L. Armstrong,

Principal Deputy Assistant Secretary, Bureau of Consular Affairs, Department of State.

[FR Doc. 2026-19142 Filed 9-17-26; 8:45 am]

BILLING CODE 4710-06-P

¹¹ 17 CFR 200.30-3(a)(12).

SURFACE TRANSPORTATION BOARD**[Docket No. EP 290 (Sub-No. 5) (2026–4)]****Quarterly Rail Cost Adjustment Factor****AGENCY:** Surface Transportation Board.**ACTION:** Approval of rail cost adjustment factor.

SUMMARY: The Surface Transportation Board has adopted the fourth quarter 2026 Rail Cost Adjustment Factor and cost index filed by the Association of American Railroads.

DATES: *Applicability Date:* October 1, 2026.

FOR FURTHER INFORMATION CONTACT:

Dylan Richmond, (202) 915–0962. If you require an accommodation under the Americans with Disabilities Act, please call (202) 245–0245.

SUPPLEMENTARY INFORMATION: The rail cost adjustment factor (RCAF) is an index formulated to represent changes in railroad costs incurred by the nation's largest railroads over a specified period of time. The Surface Transportation Board (Board) is required by law to publish the RCAF on at least a quarterly basis. Each quarter, the Association of American Railroads computes three types of RCAF figures and submits those figures to the Board for approval. The Board has reviewed the submission and adopts the RCAF figures for the fourth quarter of 2026. The fourth quarter 2026 RCAF (Unadjusted) is 1.193. The fourth quarter 2026 RCAF (Adjusted) is 0.453. The fourth quarter 2026 RCAF–5 is 0.429. Additional information is contained in the Board's decision, which is available at www.stb.gov.

By the Board, Board Members Fuchs, Hedlund, Kloster, and Schultz.

Decided: September 16, 2026.

Stefan Rice,

Clearance Clerk.

[FR Doc. 2026–19184 Filed 9–17–26; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD**[Docket No. FD 36937]****Ventura County Railroad Company—Operation Exemption—Ventura County Railway Company, LLC**

Ventura County Railroad Company (VCRR), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to enter into an amendment to extend the term of an operating and maintenance agreement with Ventura County Railway Company, LLC (VCRC, LLC), for approximately 12.19-miles of rail line (the Line). The

Line consists of a mainline from milepost 0.0 (at the interchange with Union Pacific Railroad Company) to approximately milepost 5.8 on the docks at Port Hueneme, and three branches: the 1.05-mile Diamond Branch; the 1.71-mile Edison Branch, and the 3.63-mile Patterson Branch in the Port of Hueneme and Oxnard, Cal.

According to the verified notice, in 2022, VCRR entered into an agreement with VCRC, LLC to operate the Line. *Ventura Cnty. R.R.—Operation Exemption—Ventura Cnty. Ry.*, FD 36651 (STB served Dec. 16, 2022). The verified notice states that the amended agreement allows VCRR to continue operating over the Line by extending the term of the agreement for five years with an option to extend the agreement another five years thereafter.

VCRR certifies that its projected annual revenue resulting from the proposed transaction will not exceed \$5 million and will not exceed those that would qualify it as a Class III rail carrier. VCRR also certifies that the amended agreement does not include an interchange commitment.

The transaction may be consummated on or after October 4, 2026, the effective date of the exemption (30 days after the verified notice was filed).

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than September 25, 2026 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36937, must be filed with the Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423–0001. In addition, a copy of each pleading must be served on VCRR's representative, Justin J. Marks, Clark Hill PLC, 601 13th Street NW, Suite 600, Washington, DC 20005.

According to VCRR, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic preservation reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at www.stb.gov.

Decided: September 15, 2026.

By the Board, Anika S. Cooper, Chief Counsel, Office of Chief Counsel.

Kenyatta Clay,
Clearance Clerk.

[FR Doc. 2026–19099 Filed 9–17–26; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD**[Docket No. FD 36950]****The Great Walton Railroad Company, Inc.—Continuance in Control Exemption—The Athens Line, LLC**

The Great Walton Railroad Company, Inc. (GWRC), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1180.2(d)(2) to obtain after-the-fact authority to continue in control of The Athens Line, LLC (The Athens Line).¹ GWRC controls two rail carriers: The Athens Line and the Hartwell Railroad Company (Hartwell). GWRC states that it obtained authority to control Hartwell,² but mistakenly did not obtain authority for its continuance in control of The Athens Line.

GWRC represents that its after-the-fact continuance in control of The Athens Line: (1) is not a transaction where The Athens Line would connect with any other GWRC railroads; (2) is not part of a series of anticipated transactions that would result in any such connection; and (3) does not involve a Class I carrier. Therefore, the transaction is exempt from the prior approval requirements of 49 U.S.C. 11323. *See* 49 CFR 1180.2(d)(2).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. However, 49 U.S.C. 11326(c) does not provide for labor protection for transactions under 49 U.S.C. 11324 and 11325 that involve only Class III rail carriers. Accordingly, because this transaction involves Class III rail carriers only, the Board may not impose labor protective conditions here.

The earliest this transaction may be consummated is October 4, 2026, the effective date of the exemption. If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the

¹ The Athens Line is a wholly owned subsidiary of GWRC. The Athens Line became a rail carrier when it originally leased, and eventually acquired, a line of railroad from Central of Georgia Railroad Company. *See Athens Line, LLC—Lease & Operation Exemption—Norfolk S. Ry.*, FD 34118 (STB served Dec. 27, 2001); *Athens Line, LLC—Acquis. & Operation Exemption—Rail Line of Norfolk S. Ry.*, FD 36122 (STB served June 16, 2017).

² *See Great Walton R.R.—Acquis. Exemption—Hartwell R.R.*, FD 36599 (STB served May 23, 2022).

exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed by September 25, 2026 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36950, must be filed with the Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423-0001. In addition, a copy of each pleading must be served on GWRC's representative, Richard H. Streeter, Law Office of Richard H. Streeter, 5255 Partridge Lane NW, Washington, DC 20016.

According to GWRC, this action is excluded from environmental review under 49 CFR 1105.6(c) and from historic preservation reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at www.stb.gov.

Decided: September 15, 2026.

By the Board, Anika S. Cooper, Chief Counsel, Office of Chief Counsel.

Zantori Dickerson,

Clearance Clerk.

[FR Doc. 2026-19105 Filed 9-17-26; 8:45 am]

BILLING CODE 4915-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA-2026-10264]

Notice of Availability, Notice of Public Comment Period, and Request for Comment on the Draft Programmatic Environmental Assessment for Reentry Vehicle Operations in the Marine Environment

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

ACTION: Notice of availability and request for comment.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended (NEPA), DOT Order 5610.1D, *DOT's Procedures for Considering Environmental Impacts*, and FAA Order 1050.1G, *FAA National Environmental Policy Act Implementing Procedures*, FAA is announcing the availability of and requesting comment on the Draft Programmatic Environmental Assessment for Reentry Vehicle Operations in the Marine Environment (Draft PEA). FAA is also requesting comment on proposed new categorical exclusions (CATEXs) as

described in and substantiated by the Draft PEA.

DATES: The public comment period for the Draft PEA will close on October 19, 2026.

ADDRESSES: The Draft PEA is available for public review at https://www.faa.gov/space/environmental/nepa_docs. Public comments can be submitted electronically to www.regulations.gov under Docket No. FAA-2026-10264, or by postal mail to Nicholas Baker, FAA Environmental Protection Specialist, c/o ICF, 1902 Reston Metro Plaza, Reston, VA 20190. The Unique ID for this document is PEAX-012-12-000-1774526578.

FOR FURTHER INFORMATION CONTACT: For more information, visit https://www.faa.gov/space/environmental/nepa_docs or send an email to ReentryCapsulePEA@icf.com.

SUPPLEMENTARY INFORMATION: FAA is the lead federal agency, and the National Aeronautics and Space Administration and U.S. Coast Guard are cooperating agencies. FAA has prepared this Draft PEA to evaluate the potential environmental impacts associated with issuing vehicle operator licenses or experimental permits to commercial reentry vehicle operators, which would authorize reentry operations of vehicles in the marine environment. In addition to issuing a license or permit, FAA's federal actions include issuing airspace closures to ensure reentry operations are conducted safely. FAA intends to use this PEA to comply with its National Environmental Policy Act requirements for subsequent reviews of license or permit applications involving reentry operations in the marine environment, as well as to establish three new CATEXs, as described in the Draft PEA. The new CATEXs would be added to FAA Order 1050.1G, Appendix B-2.2 (Categorical Exclusions for Certification Actions). Concurrent with this public review period, FAA is consulting with the Council on Environmental Quality on its PEA and proposed CATEXs, in accordance with Section 1.4(b)(2) of FAA Order 1050.1G.

Proposed Categorical Exclusions

The first proposed CATEX is for issuing FAA vehicle operator licenses or experimental permits for reentry operations that are within the scope of operations described in Chapter 2, *Description of Proposed Action and Alternatives*, of the PEA. All FAA-licensed or -permitted reentry operations would occur within the study area analyzed in the PEA and the applicant's annual frequency of reentry operations would not exceed the

cumulative number of annual FAA-licensed and -permitted reentries described in the PEA.

The second proposed CATEX is for *renewing* FAA vehicle operator licenses or experimental permits for reentry operations that are within the scope of operations described in Chapter 2, *Description of Proposed Action and Alternatives*, of the PEA. All FAA-licensed or -permitted reentry operations would occur within the study area analyzed in the PEA and the applicant's annual frequency of reentry operations would not exceed the cumulative number of annual FAA-licensed and -permitted reentries described in the PEA.

The third proposed CATEX is for *modifying* FAA vehicle operator licenses or experimental permits for reentry operations that are within the scope of operations described in Chapter 2, *Description of Proposed Action and Alternatives*, of the PEA. Such modifications might include new splashdown locations within the study area analyzed in the PEA or new expended or reused components within the type and frequency described in Chapter 2 of the PEA.

Basis for Establishing the Categorical Exclusions

FAA Order 1050.1G states FAA may establish a CATEX through a decision document supported by a programmatic environmental document that substantiates the FAA's conclusion that the category of actions analyzed in the programmatic environmental document does not have significant effects, individually or in the aggregate.

As described in the PEA and consistent with CEQ's guidance memorandum, *Establishing, Revising, Adopting, and Applying Categorical Exclusions under the National Environmental Policy Act* (April 9, 2026), FAA has analyzed previously implemented reentry operations in multiple environmental documents prepared in accordance with NEPA and determined there would not be significant impacts on the human environment. Each EA resulted in a Finding of No Significant Impact (refer to Appendix B of the PEA for a list of these EAs).

Public Disclosure Statement

Before including your address, phone number, email address, or other personal identifying information in your comment, be advised that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask the FAA in your comment

to withhold from public review your personal identifying information, FAA cannot guarantee that we will be able to do so.

Issued in Washington, DC, on September 16, 2026.

Stacey Molinich Zee,

Manager, Operations Support Branch.

[FR Doc. 2026–19178 Filed 9–17–26; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2025–1218]

Notice of Availability of Revision E to FAA Order 8000.95, Regarding Individual Designee Management Policy

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of availability.

SUMMARY: Revision E to FAA Order 8000.95, Individual Designee Management Policy, incorporates new FAA policy to address transition from the Designee Registration System to the Designee Management System (DMS) and aligns the Order with the DMS tool workflows. The revision updates several procedural descriptions to better match DMS workflows, including updates to automation for registering, enrolling, tracking, and recording designee training completions. The revision also changes the algorithm for the frequency of direct observation oversight intervals required of Flight Standards Service (FS) managing specialists, and updates email addresses and website links.

FOR FURTHER INFORMATION CONTACT: Mr. Scott Geddie, Policy and Oversight Integration Section, AVS–64, AVS ODA Office, Federal Aviation Administration, by telephone at 405–954–6897 or by email at Scott.Geddie@faa.gov.

SUPPLEMENTARY INFORMATION:

Background

A proposed version of FAA Order 8000.95D, Change 1 published in the **Federal Register** and was available for public comment from November 24, 2025 through January 23, 2026 (90 FR 53045, November 24, 2025). The FAA received 234 public comments. The comments were from various stakeholders, including educational institutions, industry associations, air carriers and commercial operators, and individuals. Organizations submitting comments included Aircraft Owners & Pilots Association, Angel City Flyers/Aero City Flyers, Aviation Services LLC,

Aviation Suppliers Association, Beech Training, Chickasha Wings Inc., Experimental Aircraft Association, Gulfstream Aerospace Corporation, Magnolia Aviation, Minnesota Pilots Association, National Association of Flight Instructors, National Flight Training Alliance, Palouse Pilot Training LLC, Society of Aviation & Flight Educators Inc., SoCo Flight Ops, T/Two Inc., Texas Turbine Conversions Inc., The Boeing Company, Three Rivers Aero, United Airlines, Utah State University, and Vapor Global Aviation LLC. Though FAA submitted a proposed version of FAA Order 8000.95D, Change 1, for public comment, the agency subsequently determined that the number and scope of changes required a comprehensive revision of the Order.

The proposed changes to FAA Order 8000.95D attracted a significant number of public comments. The comments addressed multiple key topics, including requirements for designee qualifications, examiner fee policies, oversight procedures, and the operational realities of flight training and certification. FAA has considered each comment and provides the following summary and responses in accordance with the rulemaking process.

Supportive Comments. While most comments included suggestions or critiques, stakeholders such as Aircraft Owners & Pilots Association and National Association of Flight Instructors expressed support for the FAA's general intent to update, clarify, and improve designee management policy, even as they recommended focused revisions or voiced concerns regarding specific proposed changes.

Five-Hour Pilot-in-Command (PIC) Make and Model Requirement for Designated Pilot Examiners (DPE). Multiple commenters, including flight instructor and examiner associations, flight schools, and individual DPEs, expressed concern regarding the proposed requirement that DPEs log at least five hours of PIC flight time in each make and model prior to administering practical tests in Airplane Single Engine Land (ASEL) or Airplane Single Engine Sea (ASES). Examiner associations that commented include Aircraft Owners & Pilots Association, Experimental Aircraft Association, Minnesota Pilots Association, National Association of Flight Instructors, National Flight Training Alliance, Utah State University. Flight schools that commented include Angel City Flyers/Aero City Flyers, Beech Training, Chickasha Wings Inc, Magnolia Aviation, Palouse Pilot Training, LLC, SoCo Flight Ops, Three Rivers Aero, and

Vapor Global Aviation. Commenters stated the requirement is operationally burdensome, would further constrain examiner availability, and exacerbate checkride delays, particularly for experimental and less common aircraft types. Some commenters pointed out existing regulatory framework already ensures examiner proficiency through category and class experience requirements, recent flight experience, and FAA oversight. Commenters reasoned that no safety data was presented to justify the necessity of a five-hour make and model requirement, and such a threshold is not a standard measure of proficiency elsewhere in FAA policy.

FAA partially accepted these recommendations. The final language has been revised as follows: prior to administering a practical test in a single-engine airplane that is turbine-powered or having Simplified Flight Controls, the designee must have logged at least five hours of PIC flight time in that single-engine make and model. This make-and-model requirement thus applies only to these higher-complexity aircraft. Broader make-and-model requirements for all single-engine airplanes were not adopted.

Fee Collection and “Reasonable Fee” Definition. Stakeholders, including Aircraft Owners & Pilots Association and National Association of Flight Instructors, commented on proposed fee collection provisions, expressing concern over the prohibition on collecting any fee prior to determination of applicant eligibility, which could leave examiners uncompensated for preparation or travel should the applicant be found ineligible. In addition, they commented that the lack of a clear definition for “reasonable fee,” could lead to inconsistent application, complaints, and possible examiner termination for subjective determinations of unreasonableness.

FAA partially accepted these concerns. The restriction on collecting fees prior to eligibility determination is removed from FAA Order 8000.95E.¹ The policy regarding fee collection is addressed in FAA Order 8900.1, Flight Standards Information Management System, Volume 5, Chapter 2, Section 1, paragraph 5–222, which remains in effect. Regarding the definition of “reasonable fee,” FAA has determined that providing a specific definition is outside the scope of this policy revision.

¹ The original language regarding fee collection can be found in draft FAA Order 8000.95D, Change 1, Volume 3, Chapter 5, paragraph f.(8).

FAA acknowledges this as an area for future consideration and discussion.

Limitation on Initial Certified Flight Instructor (CFI) Practical Tests Per Day. Several commenters objected to limits restricting examiners to accepting only one initial CFI application per day, to include retests or continuations of previously discontinued or unsuccessful exams. Commenters contended retests and continuations often require less time and effort than standard initial CFI exams. Also, the commenters stated that the limitation would further reduce examiner availability and increase certification delays.

FAA accepts the recommendation to limit only complete initial CFI practical tests to one per day. FAA removed the restriction on conducting retests or continuations on the same day as a full exam.

Authority and Oversight of Ministerial Functions. Aviation Suppliers Association commented that FAA should streamline oversight by allowing automatic pre-approval for ministerial designee functions such as the issuance of FAA Form 8130-3, Authorized Release Certificate, Airworthiness Approval Tag. The commenter stated that these functions posed a lower risk and required less oversight.

FAA rejected this proposal. The policy intentionally provides Managing Specialists (MS) discretion to evaluate designees and individual situations based on risk. This risk-based approach supports safety and compliance, and remains unchanged.

Elimination of the Designee System. A single commenter advocated for the elimination of designated representatives for flight testing, arguing this function should be inherently governmental.

FAA rejected this proposal. Designated Engineering Representatives (DERs) and other designees are a critical component of the FAA's certification system, enabling efficiency and maintaining high safety standards. There are no plans to discontinue the use of DERs or other designees.

Editorial changes. The FAA evaluated and incorporated multiple suggestions where commenters requested editorial changes and corrections, such as typographical errors and inaccurate references to other paragraphs, regulations, and other FAA policy.

This Order is available to the public at http://www.faa.gov/regulations_policies/orders_notices, on the Dynamic

Regulatory System website at <https://drs.faa.gov>, and in the docket.

Scott A. Geddie,

Manager, AVS-64, Policy and Oversight Integration Section, AVS ODA Office.

[FR Doc. 2026-19106 Filed 9-17-26; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in Georgia

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice of limitation on claims for judicial review of actions by FHWA.

SUMMARY: This notice announces actions taken by FHWA that are final. The actions relate to a proposed highway project, Interstate 75 (I-75), from I-475 to State Route (SR) 155 in Butts, Henry, Lamar, Monroe, and Spalding Counties in Georgia, and includes auxiliary lanes from SR 155 up to the I-75/SR 20 interchange in Butts, Henry, Lamar, Monroe, and Spalding Counties, Georgia, for a total project length of approximately 41 miles. Those actions grant licenses, permits, and approvals for the project. The FHWA's Finding of No Significant Impact (FONSI) provides details on the Selected Alternative for the proposed improvements.

DATES: By this notice, FHWA is advising the public of the final agency actions subject to 23 U.S.C. 139(j)(1). A claim seeking judicial review of the Federal agency actions on the listed highway project will be barred unless the claim is filed on or before February 16, 2027. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: For FHWA: Ms. Sabrina David, Division Administrator, FHWA, Georgia Division Office; 75 Ted Turner Drive, Suite 1000, Atlanta, Georgia 30303; (404) 562-3630; Sabrina.David@dot.gov. The FHWA Georgia Division's normal business hours are 7:30 a.m. to 4:00 p.m. (eastern time) Monday through Friday. For the Georgia Department of Transportation (GDOT): Mr. Russell McMurry, Commissioner, GDOT; 600 West Peachtree Street, 22nd Floor, Atlanta, Georgia 30308; (404) 631-1990; RMcMurry@dot.ga.gov. The GDOT normal business hours are 8:00 a.m. to 5:00 p.m. (eastern time) Monday through Friday.

SUPPLEMENTARY INFORMATION: Notice is hereby given that FHWA has taken final agency actions subject to 23 U.S.C. 139(j)(1) by issuing licenses, permits, and approvals for the following highway project in the State of Georgia: I-75 Commercial Vehicle Lanes Project, Project Identification Number 0014203. GDOT is proposing improvements to approximately 41 miles of I-75 between I-475 and SR 155 in Butts, Henry, Lamar, Monroe, and Spalding Counties, Georgia. The project will construct two barrier-separated northbound CVLs beginning at the I-75/I-475 interchange in Monroe County and extend northward on the east side of the I-75 northbound corridor for approximately 38 miles, which then transitions to a single auxiliary lane for an additional two miles up to the I-75/SR 155 interchange. A single auxiliary lane will also be added to the I-75 general purpose lanes to accommodate merging trucks beginning at SR 155 and extending up to the I-75/SR 20 interchange. The purpose of the proposed project is to improve travel time reliability, reduce the above average crash rate, and improve freight movement on the I-75 northbound corridor.

The FHWA's actions and the laws under which such actions were taken, are described in the Environmental Assessment (EA) for the project, approved on March 31, 2026, and the FONSI issued on September 15, 2026, and in other documents in the project file. The EA, FONSI, and other project records are available by contacting FHWA or GDOT at the addresses provided above. The EA and FONSI can be viewed and downloaded from the project website at: <https://0014203-gdot.hub.arcgis.com/>.

This notice applies to all Federal agency decisions that are final as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321 *et seq.*]; Federal-Aid Highway Act (FAHA) [23 U.S.C. 109, 139, and 128].
2. *Air:* Clean Air Act (CAA) [42 U.S.C. 7401-7671(q)].
3. *Noise:* Noise Control Act of 1972 [42 U.S.C. 4901-4918]; 23 CFR part 772.
4. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303 and 23 U.S.C. 138].
5. *Wildlife:* Endangered Species Act (ESA) [16 U.S.C. 1531-1544 and Section 1536]; Fish and Wildlife Coordination Act [16 U.S.C. 661-667(d)]; Migratory Bird Treaty Act (MBTA) [16 U.S.C. 703-712].

6. *Historic and Cultural Resources*: Section 106 of the National Historic Preservation Act of 1966, as amended [54 U.S.C. 306108 *et seq.*]; Archeological Resources Protection Act of 1979 (ARPA) [16 U.S.C. 470(aa)–470(mm)]; Archaeological and Historic Preservation Act [54 U.S.C. 312501–312508]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

7. *Social and Economic*: American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

8. *Wetlands and Water Resources*: Clean Water Act (Section 404, Section 401, Section 319) [33 U.S.C. 1251–1387]; Coastal Zone Management Act of 1972 (CZMA) [16 U.S.C. 1451–1466]; Land and Water Conservation Fund (LWCF) [16 U.S.C. 4601–4604]; Safe Drinking Water Act (SDWA) [42 U.S.C. 300(f)—300(j)–26]; Wild and Scenic Rivers Act [16 U.S.C. 1271–1287]; Flood Disaster Protection Act [42 U.S.C. 4012(a), 4106]; Rivers and Harbors Act of 1899 [33 U.S.C. 401–406]; Emergency Wetlands Resources Act [16 U.S.C. 3901, 3921]; Wetlands Mitigation [23 U.S.C. 119(g) and 133(b)(14)].

9. *Hazardous Materials*: Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) [42 U.S.C. 9601 *et seq.*]; Resource Conservation and Recovery Act (RCRA) [42 U.S.C. 6901–6992(k)].

10. *Executive Orders*: E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 11593 Protection and Enhancement of the Cultural Environment; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 13112 Invasive Species, as amended by E.O. 13751. (Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(l)(1).

Sabrina S. David,

Division Administrator, Georgia Division, Federal Highway Administration.

[FR Doc. 2026–19140 Filed 9–17–26; 8:45 am]

BILLING CODE 4910-RY-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in Georgia

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of limitation on claims for judicial review of actions by FHWA.

SUMMARY: This notice announces actions taken by FHWA that are final. The actions relate to a proposed roadway project, the Lee Road Extension—Phase 1, from State Route (SR) 92 to County Road (CR) 141/Bomar Road in Douglas County, Georgia, and includes widening, intersection reconstruction, and new location project on Bomar Road at Pope Road to the State Route (SR) 92 at Lee Road intersection in Douglas County, Georgia, for approximately 1.7 miles. Those actions grant licenses, permits, and approvals for the project. The FHWA's Finding of No Significant Impact (FONSI) provides details on the Selected Alternative for the proposed improvements.

DATES: By this notice, FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of the Federal agency actions on the listed roadway project will be barred unless the claim is filed on or before February 16, 2027. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: *For FHWA:* Ms. Sabrina S. David, Division Administrator; FHWA, Georgia Division; 75 Ted Turner Drive, Suite 1000, Atlanta, Georgia 30303; 404–562–3630; email: Sabrina.David@dot.gov. The FHWA Georgia Division's normal business hours are 7:30 a.m. to 4:00 p.m. (Eastern time) Monday through Friday. *For the Georgia Department of Transportation (GDOT):* Mr. Russell McMurtry, Commissioner, GDOT; 600 West Peachtree Street, 22nd Floor, Atlanta, Georgia 30308; (404) 631–1990; RMcMurtry@dot.ga.gov. The GDOT normal business hours are 8:00 a.m. to 5:00 p.m. (Eastern time) Monday through Friday.

SUPPLEMENTARY INFORMATION: Notice is hereby given that FHWA has taken final agency actions by issuing a FONSI for the following roadway project in the State of Georgia: The Lee Road Extension from SR 92 to CR 141/Bomar Road—Phase I in Douglas County, Georgia—Project Identification (PI) Number 0019889. The project will

reconstruct the Bomar Road at Pope Road intersection into a multi-lane roundabout. Additionally, Bomar Road will be widened to the north of the Pope Road intersection approximately 1,550 feet. From this point along Bomar Road, the project will continue on new location for 1.13 miles to the spur south of the SR 92 at Lee Road intersection. The purpose of the proposed project is to improve connectivity and access within the central portion of Douglas County, providing an important county-wide east-west connector with greater access to I–20.

The FHWA's actions and the laws under which such actions were taken, are described in the Environmental Assessment (EA) for the project, approved on April 30, 2026, the FONSI approved on August 17, 2026, and other documents in the project file. The EA and FONSI are available by contacting FHWA or GDOT at the addresses provided above. In addition, these documents can also be viewed and downloaded from the project website at <https://douglascountygga.gov/894/0019889-Lee-Road-Extension-from-SR-92-to>.

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General*: National Environmental Policy Act (NEPA) [42 U.S.C. 4321 *et seq.*]; Federal-Aid Highway Act [23 U.S.C. 109, 128, and 139].

2. *Air*: Clean Air Act [42 U.S.C. 7401–7671(q)].

3. *Noise*: Federal-Aid Highway Act of 1970 [Public Law 91–605 [84 Stat. 1713]; 23 U.S.C. 109(h) and (i)].

4. *Land*: Section 4(f) of the Department of Transportation Act of 1966 [23 U.S.C. 138 and 49 U.S.C. 303].

5. *Wildlife*: Endangered Species Act (ESA) [16 U.S.C. 1531–1544 and Section 1536]; Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)]; Migratory Bird Treaty Act [16 U.S.C. 703–712].

6. *Historic and Cultural Resources*: Section 106 of the National Historic Preservation Act of 1966, as amended [54 U.S.C. 306108 *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–470(mm)]; Archeological and Historic Preservation Act [54 U.S.C. 312501–3125–8]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

7. *Social and Economic*: American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

8. *Wetlands and Water Resources*: Clean Water Act (Section 319, Section 401, Section 404) [33 U.S.C. 1251–

1387]; Safe Drinking Water Act [42 U.S.C. 300f–300j–26]; TEA–21 Wetlands Mitigation [23 U.S.C. 103(b)(6)(m), 133(b)(11)]; Flood Disaster Protection Act [42 U.S.C. 4001–4128]; Wild and Scenic Rivers Act [16 U.S.C. 1271–1287]; Emergency Wetlands Resources Act [16 U.S.C. 3921, 3931]; Rivers and Harbors Act of 1899 [33 U.S.C. 401–406].

9. *Hazardous Materials: Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)*, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) [42 U.S.C. 9601 *et seq.*]; Resource Conservation and Recovery Act (RCRA) [42 U.S.C. 6901–6992(k)].

10. *Executive Orders*: E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(l)(1).

Sabrina S. David,

Division Administrator, Georgia Division, Federal Highway Administration.

[FR Doc. 2026–19098 Filed 9–17–26; 8:45 am]

BILLING CODE 4910-RY-P

DEPARTMENT OF THE TREASURY

Commission on Social Impact Partnerships; Public Meeting

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, this notice announces an upcoming meeting of the Commission on Social Impact Partnerships (“Commission”).

DATES: The meeting will be held on Tuesday, September 22, 2026, from 1:00 p.m.–6:00 p.m. Eastern Time.

ADDRESSES: The meeting will be held at the U.S. Department of the Treasury, 1500 Pennsylvania Avenue NW, Washington, DC 20020. The meeting will be open to the public, and the site is accessible to individuals with disabilities.

Because the meeting will be held in a secured facility, members of the public who would like to attend the meeting must register by September 18, 2026, using the following registration link: <https://events.treasury.gov/s/event-template/a2mSJ000000QmvRYAS>. When registering for the public meeting, you will be asked to provide your name, title, and organizational affiliation. Use of ID.me is required to register for the meeting.

The meeting will also be livestreamed via Treasury’s webcast: <https://events.treasury.gov/s/event-template/a2mSJ000000QmvRYAS> for those who are unable to attend in person. The webcast is for viewing only; participants will not be able to ask questions. The meeting will not be recorded, but meeting minutes will be posted on the SIPRA website: <https://home.treasury.gov/services/social-impact-partnerships/sippra-pay-for-results>.

FOR FURTHER INFORMATION CONTACT: Matthew Cook, Designated Federal Officer, by emailing SIPRA@treasury.gov (preferred) or calling (202)–821–5030 (not a toll-free number).

SUPPLEMENTARY INFORMATION: On February 9, 2018, the President signed the Bipartisan Budget Act of 2018, establishing the Commission under the Social Impact Partnerships to Pay for Results Act (“SIPRA”). The Commission’s duties include making recommendations to Treasury on whether to fund social impact partnership grant applications. The Commission consists of nine members. Eight members are appointed by congressional leadership, and the ninth member is appointed by the President. The President’s appointee serves as the Chair of the Commission. Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. 1001 *et seq.*). During this meeting, the Commission will receive a briefing from Treasury staff on (1) SIPRA’s program structure; (2) update on forthcoming Notice of Funding Opportunity (NOFO); and (3) update on current SIPRA awardees.

Submission of Written Statements: Those wishing to make public comments at the public meeting should register no later than three business days before the public meeting. Written comments must be received one calendar day before the public meeting in order to be considered during the public meeting. Written comments can be emailed to SIPRA@treasury.gov.

Exceptional Circumstances: Pursuant to 41 CFR 102–3.150(b), the Department has determined that exceptional

circumstances warrant providing less than seven calendar days’ notice of this meeting in the **Federal Register**. The meeting date was announced to Committee members, program stakeholders, and the public through other channels well in advance, and Committee members and members of the public have made plans, including travel arrangements, in reliance on that schedule. Postponing the meeting at this stage would impose unnecessary costs and disruption on participants and could reduce public participation. In addition, the meeting will primarily provide the Committee and the public with an update from the Department on the status of the program; the Committee is not scheduled to deliberate or make recommendations at this meeting. Under these circumstances, the Department has determined that proceeding on the previously announced date is in the public interest.

Spencer W. Clark,

Treasury Committee Management Officer.

[FR Doc. 2026–19190 Filed 9–17–26; 8:45 am]

BILLING CODE 4810–25-P

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of submission to Congress of amendment to the sentencing guidelines effective March 15, 2027.

SUMMARY: The United States Sentencing Commission hereby gives notice that the Commission has promulgated an amendment to the *Guidelines Manual*. This notice sets forth the text of the amendment and the reason for the amendment.

DATES: The Commission has specified an effective date of March 15, 2027, for the amendment set forth in this notice.

FOR FURTHER INFORMATION CONTACT: Jennifer Dukes, Senior Public Affairs Specialist, (202) 502–4597.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to

the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p). Absent action of the Congress to the contrary, submitted amendments become effective by operation of law on the date specified by the Commission (generally November 1 of the year in which the amendments are submitted to Congress).

Pursuant to its authority under 28 U.S.C. 994(p) and its emergency authority under section 5017 of the Consolidated Appropriations Act, 2026 (Pub. L. 119–75), the Commission has promulgated an amendment to the *Guidelines Manual*. Notice of the proposed amendment was published in the **Federal Register** on April 24, 2026 (see 91 FR 22228). On September 14, 2026, the Commission submitted this amendment to the Congress and specified an effective date of March 15, 2027.

The text of the amendment, and the reason for the amendment, is set forth below. Additional information pertaining to the amendment described in this notice may be accessed through the Commission's website at www.ussc.gov.

Authority: 28 U.S.C. 994(a), (o), (p), and (u); Section 5017 of the Consolidated Appropriations Act, 2026 (Public Law 119–75); USSC Rules of Practice and Procedure 2.2 and 4.1.

Carlton W. Reeves,
Chair.

Amendment to the Sentencing Guidelines, Policy Statements, and Official Commentary

1. *Amendment:* The Commentary to § 2A5.2 captioned “Statutory Provisions” is amended by striking “49 U.S.C. 46308, 46503, 46504 (formerly 49 U.S.C. 1472(c), (j))” and inserting “49 U.S.C. 46307, 46308, 46503, 46504 (formerly 49 U.S.C. 1472(c), (j))”.

The Commentary to § 2X5.2 captioned “Statutory Provisions” is amended by striking “49 U.S.C. 31310” and inserting “49 U.S.C. 31310, 46307”.

Chapter Three, Part B, is amended by inserting at the end the following new guideline:

“§ 3B1.6. Use of Unmanned Aircraft

(a) (Apply the greater):

(1) If (A) the defendant is convicted of an offense to which the statutory enhancement under 6 U.S.C. 124n–1(c) applies; or (B) the parties stipulate (i) to such an offense for purposes of calculating the guideline range under § 1B1.2 (Applicable Guidelines); or (ii) that the adjustment in this subsection applies, increase by 6 levels.

(2) If the offense otherwise involved the use of an unmanned aircraft, increase by 4 levels.

(b) For purposes of this guideline:

(1) ‘Unmanned aircraft’ has the meaning given that term in 49 U.S.C. 44801.

(2) ‘Use’ does not include mere possession.

(c) Special Instruction

(1) If the use of an unmanned aircraft that forms the basis for an adjustment under this guideline is the only conduct that forms the basis for an enhancement in Chapter Two or another adjustment in Chapter Three, apply the provision that results in the greater offense level.

Commentary

Background: This guideline implements the directive in the SAFER SKIES Act (section 8605(e) of the National Defense Authorization Act for Fiscal Year 2026, Pub. L. 119–60).’.

Appendix A (Statutory Index) is amended by inserting before the line referenced to 49 U.S.C. 46308 the following new line reference:

“49 U.S.C. 46307 2A5.2 (for felony offenses), 2X5.2 (for misdemeanor offenses)”.

Reason for Amendment: This amendment responds to the SAFER SKIES Act (title LXXXVI of the National Defense Authorization Act for Fiscal Year 2026, Pub. L. 119–60) (the “Act”), which contains several provisions relating to criminal penalties for offenses involving aircraft and sets forth a congressional directive to the Commission for offenses involving unmanned aircraft. See Public Law 119–60, 8605 (2025). Emergency amendment authority requires the Commission to promulgate an amendment implementing the directive “as soon as possible” and “not later than December 31, 2026.” Consolidated Appropriations Act, 2026, Public Law 119–75, 5017(a).

Increased Statutory Penalties for Offenses Associated With Unmanned Aircraft and Related Directive to the Commission

The Act amended the statutory penalties for providing contraband to imprisoned individuals, in violation of 18 U.S.C. 1791. Section 1791 sets out statutory maximum terms of imprisonment ranging from six months to twenty years depending on the type of contraband provided to the imprisoned individual. The Act increased the maximum penalty by five years “[i]f a defendant who is convicted under section 1791 . . . knowingly used an unmanned aircraft to provide a prohibited object to an inmate of a prison.” 6 U.S.C. 124n–1(d).

In addition to this specific statutory increase, the Act provided more generally that “[i]f a person who is convicted of a felony offense (other than an offense based solely on the operation of an unmanned aircraft) knowingly operated an unmanned aircraft during, in relation to, or in furtherance of such offense,” the maximum penalty for that offense is doubled or increased by five years, whichever is less. *Id.* § 124n–1(c).

Related to these changes, the Act directed the Commission to “promulgate guidelines, or amendments to guidelines, that substantially increase the sentencing range for all offenses involving the use of an unmanned aircraft.” *Id.* § 124n–1(e)(1)(A). Specifically, for offenses in which the enhanced penalties under 6 U.S.C. 124n–1(c) apply—that is, where the individual knowingly operated an unmanned aircraft during, in relation to, or in furtherance of a felony offense (other than an offense based solely on the operation of an unmanned aircraft)—the guidelines “shall call for an increase of at least 6 levels in the base offense level,” and “in all other cases, the base offense level shall be increased by at least 4 levels.” *Id.* § 124n–1(e)(2).

The amendment implements these provisions of the Act by creating a new guideline at § 3B1.6 (Use of Unmanned Aircraft) providing a tiered adjustment of either 6 or 4 levels for offenses involving the use of an unmanned aircraft. Section 3B1.6 provides a 6-level increase if the defendant is convicted of an offense to which the statutory sentencing enhancement under 6 U.S.C. 124n–1(c) applies, or if the parties stipulate to such an offense for purposes of calculating the guideline range or that the adjustment applies to the offense of conviction. Section 3B1.6 provides a 4-level increase if the offense otherwise involved the use of an unmanned aircraft.

Under the new provision, “unmanned aircraft” has the meaning given to that term in 49 U.S.C. 44801. Further, the amendment includes a provision expressly stating that “use” does not include mere possession. This definition of “use” is consistent with the definition in § 3B1.5 (Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence). See USSG App. C, amend. 659 (effective Nov. 1, 2003) (implementing the directive in section 11009 of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107–273).

To avoid unwarranted double counting, a special instruction directs that if the use of an unmanned aircraft that forms the basis for an adjustment

under this provision is the only conduct that forms the basis for a Chapter Two enhancement or another Chapter Three adjustment, then the court should apply the provision that results in the greater offense level.

New Felony Offense for Repeated Violations of 49 U.S.C. 46307

The Act created a felony offense for repeated convictions for violating national defense airspace under 49 U.S.C. 46307. Section 46307 establishes a criminal offense when an individual knowingly and willfully violates an order issued pursuant to 49 U.S.C. 40103(b)(3) that restricts or prohibits civil aircraft in certain navigable airspace “in the interest of national defense.” An offense under section 46307 constitutes a Class A misdemeanor, punishable by up to one year in prison. The Act added a maximum five-year penalty for a person convicted of a second or subsequent offense under section 46307. In response to this new statutory provision, the amendment revises Appendix A to reference 49 U.S.C. 46307 to § 2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle; Unsafe Operation of Unmanned Aircraft) for felony offenses and § 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)) for misdemeanor offenses.

[FR Doc. 2026–19192 Filed 9–17–26; 8:45 am]

BILLING CODE 2210–40–P

UNITED STATES SENTENCING COMMISSION

Request for Applications; Victims’ Rights Advisory Group

AGENCY: United States Sentencing Commission.

ACTION: Notice.

SUMMARY: In view of an upcoming vacancy in the membership of the Victims’ Rights Advisory Group, the United States Sentencing Commission hereby invites any individual who has knowledge, expertise, or experience in federal crime victimization to apply to be appointed to the advisory group. An applicant for membership of the Victims’ Rights Advisory Group should apply by sending a letter of interest and resume to the Commission as indicated in the **ADDRESSES** section below.

DATES: Application materials for membership in the Victims’ Rights

Advisory Group should be received not later than November 16, 2026.

ADDRESSES: An applicant for membership of the Victims’ Rights Advisory Group should apply by sending a letter of interest and resume to the Commission by electronic mail or regular mail. The email address is pubaffairs@ussc.gov. The regular mail address is United States Sentencing Commission, One Columbus Circle NE, Suite 2–500, South Lobby, Washington, DC 20002–8002, Attention: Public Affairs—VRAG Membership.

FOR FURTHER INFORMATION CONTACT: Jennifer Dukes, Senior Public Affairs Specialist, (202) 502–4597. More information about the Victims’ Rights Advisory Group is available on the Commission’s website at www.ussc.gov/advisory-groups.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p).

The Victims’ Rights Advisory Group is a standing advisory group of the United States Sentencing Commission established pursuant to 28 U.S.C. 995 and Rule 5.4 of the Commission’s Rules of Practice and Procedure. Under the charter for the Victims’ Rights Advisory Group, the purpose of the advisory group is (1) to assist the Commission in carrying out its statutory responsibilities under 28 U.S.C. 994(o); (2) to provide to the Commission its views on the Commission’s activities and work, including proposed priorities and amendments, as they relate to victims of crime; (3) to disseminate information regarding sentencing issues to organizations represented by the Victims’ Rights Advisory Group and to other victims of crime and victims advocacy groups, as appropriate; and (4) to perform any other functions related to victims of crime as the Commission requests. The advisory group consists of not more than nine members, each of whom may serve not more than two consecutive three-year terms. Each member is appointed by the Commission.

In view of an upcoming vacancy in the membership of the Victims’ Rights Advisory Group, the Commission

invites any individual who has knowledge, expertise, or experience in federal crime victimization to apply to be appointed to the Victims’ Rights Advisory Group by sending a letter of interest and a resume to the Commission as indicated in the **ADDRESSES** section above.

Authority: 28 U.S.C. 994(a), (o), (p), 995; USSC Rules of Practice and Procedure 2.2(c), 5.4.

Carlton W. Reeves,
Chair.

[FR Doc. 2026–19193 Filed 9–17–26; 8:45 am]

BILLING CODE 2210–40–P

DEPARTMENT OF VETERANS AFFAIRS

Research Advisory Committee on Gulf War Veterans’ Illnesses, Subcommittee on Veteran Engagement, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. Ch. 10, that the Research Advisory Committee on Gulf War Veterans’ Illnesses Subcommittee on Veteran Engagement will hold a Veteran Engagement Session (VES) on October 23, 2026 at the Fairmont Washington, DC, Georgetown, 2401 M Street NW, Washington, DC, 20037 in the Longmont room. The formal VES will begin at 1:00 p.m. and end at 4:00 p.m. (ET) followed by informal conversations with interested Gulf War Veterans until 8:00 p.m. (ET). This session will be open to the public.

The purpose of the Veteran Engagement subcommittee is to hear directly from Gulf War Veterans about past and current health and quality of life issues to better understand the Veteran’s experience of living with Gulf War Illness. It is also an opportunity to share the importance of participating in research and the role of VA research in informing Veteran healthcare and policy. Information obtained from the session will be carried to the parent committee to support the RACGWVI mission to provide advice and make recommendations to the Secretary of Veterans Affairs on proposed research studies, research plans, and research strategies relating to the health consequences of military service in the Southwest Asia theater of operations during the 1990–91 Gulf War.

Individuals wishing to seek additional Block, Designated Federal Officer, at
information should contact Dr. Karen *Karen.Block@va.gov*.

Dated: September 16, 2026.

LaTonya L. Small,
*Federal Advisory Committee Management
Officer.*

[FR Doc. 2026–19186 Filed 9–17–26; 8:45 am]

BILLING CODE 8320–01–P



FEDERAL REGISTER

Vol. 91

Friday,

No. 180

September 18, 2026

Part II

Department of Justice

Antitrust Division

United States of America, et al. v. RealPage, Inc., et al.; Proposed Final Judgment and Competitive Impact Statement; Notice

DEPARTMENT OF JUSTICE

Antitrust Division

United States of America, et al. v. RealPage, Inc., et al.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the Middle District of North Carolina in *United States of America, et al. v. RealPage, Inc., et al.*, Civil Action No. 1:24-cv-00710. On January 7, 2025, the United States filed a Complaint alleging that Pinnacle Property Management Services, LLC's agreements with RealPage, Inc. and other landlords to share information and align pricing violate Section 1 of the Sherman Act, 15 U.S.C. 1. The proposed Final Judgment, filed on September 4, 2026, bars Pinnacle from licensing or using a revenue management software that relies on competitively sensitive data and prohibits Pinnacle from sharing competitively sensitive information with other landlords. Pinnacle must also establish an antitrust compliance policy and cooperate with the United States in this litigation.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection on the Antitrust Division's website at <http://www.justice.gov/atr> and at the Office of the Clerk of the United States District Court for the Middle District of North Carolina. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's website, filed with the Court, and, under certain circumstances, published in the **Federal Register**. Comments should be submitted in English and directed to Danielle Hauck, Acting Chief, Technology and Digital Platforms Section, Antitrust Division, Department of Justice, 450 Fifth Street NW, Suite 7100, Washington, DC 20530 (email address: ATR.Public-Comments-Tunney-Act-MB@usdoj.gov).

Suzanne Morris,

Deputy Director Civil Enforcement Operations,

Antitrust Division.

In the United States District Court for the Middle District of North Carolina

United States of America, U.S. Department of Justice, Antitrust Division, 950 Pennsylvania Avenue NW, Washington, DC 20530, State of North Carolina, 114 W. Edenton Street, Raleigh, NC 27603, State of California, 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, State of Colorado, 1300 Broadway, 7th Floor, Denver, CO 80203, State of Connecticut, 165 Capitol Avenue, Hartford, CT 06106, State of Illinois, 115 S. LaSalle St., Floor 23, Chicago, IL 60603, Commonwealth of Massachusetts, One Ashburton Place, 18th Floor, Boston, MA 02108, State of Minnesota, 445 Minnesota Street, St. Paul, MN 55101, State of Oregon, 100 SW Market St, Portland, OR 97201, State of Tennessee, P.O. Box 20207, Nashville, TN 37202, and, State of Washington, 800 Fifth Avenue, Suite 2000, Seattle, WA 98104–3188, Plaintiffs, v. REALPAGE, Inc., 2201 Lakeside Blvd., Richardson, TX 75082, Camden Property Trust, 11 Greenway Plaza, Ste. 2400, Houston, TX 77046, Cortland Management, LLC, 3424 Peachtree Rd., Ste. 300, Atlanta, GA 30326, Cushman & Wakefield, Inc., 225 W. Wacker Dr., Ste. 3000, Chicago, IL 60606, Greystar Real Estate Partners, LLC, 465 Meeting St., Ste. 500, Charleston, SC 29403, Livcor, LLC, 233 South Wacker Dr., Ste. 4700, Chicago, IL 60606, Pinnacle Property Management Services, LLC, 2401 Internet Blvd., Ste. 110, Frisco, TX 75034, and, Willow Bridge Property Company, LLC, 2000 McKinney Ave., Ste. 1100, Dallas, TX 75201, Defendants.

AMENDED COMPLAINT

Case No. 1:24-cv-00710-LCB-JLW

JURY TRIAL DEMANDED

Table of Contents

I. Introduction

II. RealPage's Revenue Management Software Is Fueled by Nonpublic, Competitively Sensitive Information Shared By Landlords

A. Landlords Agree To Share Nonpublic, Competitively Sensitive Transactional Data With RealPage for Use in Generating Competitors' Pricing Recommendations

B. AIRM and YieldStar Users Agree With RealPage To Use the Software To Align Pricing

C. RealPage's Transactional Data Is Fundamentally Different From Other Data Available to Landlords

D. RealPage Revenue Management Software Uses Nonpublic, Competitively Sensitive Data To Recommend Prices

1. AIRM and YieldStar Leverage Competitively Sensitive Data To Generate Price Recommendations

(a) AIRM Model Training Relies on Competitively Sensitive Data To Generate Learned Parameters.

(b) AIRM and Yieldstar Incorporate Competitors' Nonpublic Data To Generate Floor Plan Price Recommendations.

(c) AIRM and Yieldstar Use Competitors' Nonpublic Data—including Data On Future Occupancy—to Determine Unit-Level Prices.

2. LRO Relies Primarily on Landlords To Input Data on Competitors

E. RealPage Uses Multiple Mechanisms To Increase Compliance With Price Recommendations

1. AIRM and YieldStar Make it Easy To Accept Recommendations and More Difficult and Time-Consuming To Decline

2. RealPage Pushes Clients To Adopt Auto-Accept Settings That Automatically Approve Recommendations

3. RealPage Pricing Advisors Provide a "Check and Balance" on Property Managers To Increase Acceptance of Recommendations

4. Pricing Recommendations Heavily Influence Landlords' Behavior

III. Coordination Among Competing Landlords Is a Feature of This Industry

A. Rental Housing Is a Necessity for Millions of Americans

B. The Multifamily Property Industry Is Rife With Cooperation Among Ostensible Competitors

1. At the Local Level, the Multifamily Property Industry Comprises a Small Number of Large Landlords Managing Buildings With Different Owners

2. Landlords Regularly Discuss Competitively Sensitive Topics With Their Competitors and Swap Information

3. At RealPage User Group Meetings, Landlords Discuss Competitively Sensitive Topics

C. RealPage Uses Nonpublic Information To Allow Landlords To More Easily Compare Units on an Apples-to-Apples Basis

IV. RealPage Harms the Competitive Process and Renters By Entering Into Unlawful Agreements With Landlords To Share and Exploit Competitively Sensitive Data

A. AIRM and YieldStar Have the Purpose and Effect of Distorting the Competitive Pricing of Apartments

B. AIRM and YieldStar Impose Multiple Guardrails Intended to Artificially Keep Prices High or Minimize Price Decreases

C. AIRM and YieldStar Harm the Competitive Process by Discouraging the Use of Discounts and Price Negotiations

D. AIRM and YieldStar Increase and Maintain Landlords' Pricing Power by Using Competitors' Data To Manage Lease Expirations

E. No Procompetitive Benefit Justifies, Much Less Outweighs, RealPage's Use of Competitively Sensitive Data To Align Competing Landlords

V. RealPage Uses Landlords' Competitively Sensitive Data To Maintain Its Monopoly And Exclude Commercial Revenue Management Software Competitors

A. Landlords Are Drawn to RealPage Because of Access to Nonpublic Transactional Data That Is Used To Increase Landlords' Revenue

B. RealPage's Collection and Use of Competitively Sensitive Data Excludes Competition in Commercial Revenue Management Software

VI. Relevant Markets

A. Conventional Multifamily Rental Housing Markets

1. Product Markets

- (a) Conventional Multifamily Rentals Are Distinct From Other Types of Multifamily Housing
- (b) Single-Family Housing Is Not a Reasonable Substitute to Multifamily Rentals
- (c) Conventional Multifamily Rental Units With Different Bedroom Counts Are Relevant Product Markets
- 2. Geographic Markets
 - (a) RealPage-Defined Submarkets Identify Relevant Geographic Markets
 - (b) Core-Based Statistical Areas (CBSAs) Are Relevant Geographic Markets
- B. Commercial Revenue Management Software Market
 - 1. Product Market
 - 2. Geographic Market
- VII. Jurisdiction, Venue, and Commerce
- VIII. Violations Alleged
- IX. Request for Relief
- X. Demand for a Jury Trial
 - Appendix A: Submarkets
 - Appendix B: Submarkets By Bedroom Count

I. Introduction

1. Renters are entitled to the benefits of vigorous competition among landlords. In prosperous times, that competition should limit rent hikes; in harder times, competition should bring down rent, making housing more affordable. RealPage has built a business out of frustrating the natural forces of competition. In its own words, “a rising tide raises all ships.” This is more than a marketing mantra. RealPage sells software to landlords that collects nonpublic information from competing landlords and uses that combined information to make pricing recommendations. In its own words, RealPage “*helps curb [landlords’] instincts to respond to down-market conditions by either dramatically lowering price or by holding price when they are losing velocity and/or occupancy. . . . Our tool [] ensures that [landlords] are driving every possible opportunity to increase price even in the most downward trending or unexpected conditions*” (emphases added).

2. In fact, as RealPage’s Vice President of Revenue Management Advisory Services described, “*there is greater good in everybody succeeding versus essentially trying to compete against one another in a way that actually keeps the entire industry down*” (emphasis added). As he put it, if enough landlords used RealPage’s software, they would “*likely move in unison versus against each other*” (emphasis added). To RealPage, the “greater good” is served by ensuring that otherwise competing landlords rob Americans of the fruits of competition—lower rental prices, better leasing terms, more concessions. At the same time, the landlords enjoy the

benefits of coordinated pricing among competitors.

3. RealPage replaces competition with coordination. It substitutes unity for rivalry. It subverts competition and the competitive process. It does so openly and directly—and American renters are left paying the price.

* * * * *

4. Americans spend more money on housing than any other expense. On average, American households allocate more than one-third of their monthly income to housing. Some purchase a home, while others choose to, or must, rent. A family’s selection of an apartment reflects a complex set of values and criteria including comfort, safety, access to schools, convenience, and critically, affordability. To ensure they secure the greatest value for their needs, renters rely on robust and fierce competition between landlords.

5. RealPage distorts that competition. Across America, RealPage sells landlords commercial revenue management software. RealPage develops, markets, and sells this software to enable landlords to sidestep vigorous competition to win renters’ business. Many of the largest landlords in the United States, including Greystar, Camden, Cortland, Cushman & Wakefield and Pinnacle, LivCor, and Willow Bridge (collectively, Defendant Landlords), which would otherwise be competing with each other, submit or have submitted on a daily basis their competitively sensitive information to RealPage.¹ This nonpublic, material, and granular rental data includes, among other information, a landlord’s rental prices from executed leases, lease terms, and future occupancy. RealPage collects a broad swath of such data from competing landlords, combines it, and feeds it to an algorithm.

6. Based on this process and algorithm, RealPage provides daily, near real-time pricing “recommendations” back to competing landlords. These recommendations are based on the sensitive information of their rivals. But these are more than just “recommendations.” Because, in its own words, a “rising tide raises all ships,” RealPage monitors compliance by landlords to its recommendations. RealPage also reviews and weighs in on landlords’ other policies, including trying to—and often succeeding in—ending renter-friendly concessions (like a free month’s rent or waived fees) to

¹ As used in this Complaint, the term “landlord” refers to a variety of entities that are responsible for setting rents and other lease terms at multifamily properties, including owners, operators, and managers.

attract or retain renters. A significant number of landlords then effectively agree to outsource their pricing function to RealPage with auto acceptance or other settings such that RealPage as a middleman, and not the free market, determines the price that a renter will pay. Competing landlords choose to share their information with RealPage to “eliminate the guessing game” about what their competitors are doing and ultimately take instructions from RealPage on how to make business decisions to “optimize”—or in reality, maximize—rents.

7. Each landlord pays steep fees to license RealPage’s software. RealPage’s stated goals and value proposition are not a secret. Its executives are blunt: They want landlords to “avoid the race to the bottom in down markets.” Sometimes RealPage is even more direct, acknowledging that its software is aimed at “driving every possible opportunity to increase price” or observing that among landlords, “there is a greater good in everybody succeeding versus essentially trying to compete against one another in a way that actually keeps the entire industry down.”

8. But that is not how the free market works. A free market requires that landlords compete on the merits, not coordinate pricing. Landlords should win renters by offering whatever combination of price and quality they think is most attractive. For example, landlords could lower rents or provide other financial concessions, like free months of rent, or with investments in amenities like gyms, grilling areas, or pools. Put differently, the fear of losing a renter to a competitor should motivate rival landlords to compete vigorously.

9. RealPage’s revenue management software ingests on a daily basis nonpublic rental rates, future apartment availability, and changes in competitors’ rates and occupancy. As competitor-landlords increase their rents, RealPage’s software nudges other competing landlords to increase their rents as well. RealPage calls this “maximiz[ing] opportunity[.]” As RealPage explained to one landlord, by using competitors’ data, they can identify situations where “we may have a \$50 increase instead of a \$10 increase for that day.” This is what RealPage encourages as “stretch and pull pricing.”

10. RealPage allows landlords to manipulate, distort, and subvert market forces. One landlord observed that RealPage’s software “can eliminate the guessing game” for landlords’ pricing decisions. Discussing a different RealPage product, another landlord

said: “I always liked this product because your algorithm uses proprietary data from other subscribers to suggest rents and term. That’s classic price fixing” A third landlord explained, “Our very first goal we came out with immediately out of the gate is that we will not be the reason any particular sub-market takes a rate dive. So for us our strategy was to hold steady and to keep an eye on the communities around us and our competitors.”

11. RealPage’s scheme not only distorts competition to the detriment of renters, but also allows it to reinforce its dominant position in the market for commercial revenue management software. By its own account, RealPage controls at least 80 percent of that market. Its dominant position is protected by substantial data advantages due to its massive reservoir of ill-gotten competitively sensitive information from competing landlords. No other revenue management company can match RealPage’s access to landlords’ nonpublic, competitively sensitive rental data. This is why RealPage acknowledges that it “does not have any true competitors, mainly because our data is based on real lease transaction data.” RealPage’s conduct is predatory and exclusionary, which has allowed it to distort the market opportunities for honest providers of revenue management software.

12. At bottom, RealPage is an algorithmic intermediary that collects, combines, and exploits landlords’ competitively sensitive information. And in so doing, it enriches itself and compliant landlords, including Defendant Landlords, at the expense of renters who pay inflated prices and honest businesses that would otherwise compete.

13. The United States, and the States of North Carolina, California, Colorado, Connecticut, Illinois, Minnesota, Oregon, Tennessee, and Washington, and the Commonwealth of Massachusetts, acting by and through their respective Attorneys General, bring this action pursuant to Sections 1 and 2 of the Sherman Act to rid markets of (i) RealPage’s and Defendant Landlords’ unlawful information-sharing and pricing alignment schemes, and (ii) RealPage’s illegal monopoly in commercial revenue management software. In so doing, Plaintiffs seek to restore the free market to deserving individuals, families, and honest businesses.

II. Realpages’s Revenue Management Software Is Fueled by Nonpublic, Competitively Sensitive Information Shared by Landlords

14. RealPage dominates the market for commercial revenue management software that landlords use to price apartments, controlling at least 80 percent of that market, according to its own estimates. RealPage currently offers three revenue management systems to landlords: YieldStar, AI Revenue Management (AIRM), and Lease Rent Options (LRO). The company’s main legacy software, YieldStar, is the product of three acquisitions and subsequent internal development. Its successor, AIRM, uses much of the same codebase as YieldStar, but RealPage claims that AIRM’s refined models and forecasting are more precise. RealPage acquired its other revenue management software, LRO, in 2017. RealPage has made plans to sunset both YieldStar and LRO by the end of 2024.

15. Competitively sensitive data collected from competing landlords is a critical input to RealPage’s revenue management software. AIRM and YieldStar collect this data, such as rental applications, executed new leases, renewal offers and acceptances, and forward-looking occupancy, and use it to generate price recommendations for the competing landlords. This information is among the most competitively sensitive data a landlord maintains.

16. The exploitation of sensitive data from competing landlords is central to RealPage’s approach. As part of pitching its software to landlords, RealPage highlights that its pricing algorithms use their competitors’ data sourced directly from “lease transaction data.” RealPage describes this nonpublic data from competitors as one of three “building blocks of price” in AIRM and YieldStar. Landlords thus share their competitively sensitive information with RealPage with the understanding that RealPage’s software will use the data to generate recommendations for rivals (and vice versa).

A. Landlords Agree To Share Nonpublic, Competitively Sensitive Transactional Data With RealPage for Use in Generating Competitors’ Pricing Recommendations

17. RealPage amasses nonpublic, competitively sensitive data from competing landlords through use of its pricing algorithms, other rental property software, and thousands of monthly phone calls. The combined troves of nonpublic, competitively sensitive data are much more granular, sensitive,

timely, and comprehensive than alternatives—and far more detailed than any data publicly available to potential renters. RealPage then uses this data in generating competitors’ pricing recommendations.

18. *Data shared through YieldStar and AIRM.* Each AIRM and YieldStar client agrees to share detailed data with RealPage that are private, updated nightly, and granular. The data includes lease-level information on each unit’s effective rent (rent net of discounts), rent discounts, rent term, and lease status, as well as unit characteristics such as layout and amenities. It also includes the number of potential future renters who have visited a property or submitted a rental application.

19. Landlords understand that AIRM and YieldStar use their data to recommend prices not just for their own units, but also for competitors. For example, a revenue management director at Greystar testified that she understood that Greystar, and other competing landlords who used AIRM or YieldStar, agreed with RealPage to share their data, which was combined in a single data pool for use by YieldStar and AIRM. An executive at Willow Bridge noted the advantages to using YieldStar at a property if others in the property’s submarket—the small geographic area around the property—also used YieldStar because “the shared data between the models at different communities can be a benefit in getting accurate transactional data on a timely basis.”

20. Landlords agree to provide this information for use by their competitors because they understand they will be able to leverage the sensitive information of their rivals in turn. In its pitch to prospective clients, RealPage describes AIRM’s and YieldStar’s access to competitors’ granular, transactional data as a meaningful tool that it claims enables landlords to outperform their properties’ competitors by 2–7%. RealPage clients receive training that highlights the role of competitors’ transactional data in the price recommendation process.

21. *Data Shared Through Other RealPage Products.* AIRM and YieldStar are not the only ways that RealPage shares nonpublic, competitively sensitive information among landlords. RealPage obtains the same confidential transactional data from landlords that license at least three other programs: OneSite, Performance Analytics with Benchmarking, and Business Intelligence.

22. *OneSite* is RealPage’s property management software, which operates as the central source of data for

landlords' leasing activity. *Performance Analytics with Benchmarking* allows landlords to compare the performance of their properties and floor plans (e.g., a one-bedroom, one-bathroom unit) to their competitors. *Business Intelligence* is a data analytics tool that pulls data from a landlord's property management software and other products.

23. Each landlord using RealPage's OneSite, Business Intelligence, and Performance Analytics with Benchmarking products agrees to share its proprietary data with RealPage and agrees that RealPage's revenue management software can use the data to generate pricing recommendations. The license agreements for these products specifically identify the shared data, such as pricing information, as confidential, nonpublic information. RealPage takes this deeply confidential information and uses it to provide rent recommendations to competitors of these clients.

24. These agreements grant RealPage access to confidential information from over 16 million units across the country, including many that do not use its revenue management products. With respect to Performance Analytics with Benchmarking alone, a RealPage sales representative told a prospective client that "we have over 16 million units of data coming from various source operating systems (PMS) [property management software] into the PAB platform," making RealPage the top choice for "transactional data benchmarking." With properties containing approximately 3 million units using AIRM and YieldStar, these additional agreements meaningfully multiply the scale of the transactional data used by AIRM and YieldStar. This gives RealPage greater visibility, including into markets with less penetration by AIRM and YieldStar, granting even initial AIRM and YieldStar adopters in a new market the benefit of access to a significant amount of nonpublic, competitively sensitive information.

25. Landlords understand that AIRM and YieldStar will use data from these products. A revenue management director at Greystar explained that RealPage ingests transactional data from several RealPage products, besides AIRM and YieldStar, for use in revenue management. A property owner requested information from Greystar on which competing properties used revenue management software. In an internal response, the Greystar director noted that RealPage has "access to more transactional history than anyone and [is] pulling data from anyone using RealPage products which includes

companies who manually price or use other revenue management firms but leveraging their BI [Business Intelligence] products."

26. A revenue management executive at Willow Bridge asked RealPage if other specific landlords were using RealPage's non-revenue management products. The landlord's owner client was concerned about the data available to YieldStar because competing properties were unsophisticated and did not use revenue management. This executive wanted to confirm that "YieldStar will be able to leverage actual transactional data behind the scenes and not just look at offered rents for their comps." RealPage reminded the Willow Bridge executive that RealPage collected transactional data for *all* users of OneSite, Business Intelligence, and Performance Analytics with Benchmarking, and reassured the executive that YieldStar had ample transactional and survey data for that area.

27. *Calling Landlords.* RealPage has an additional, complementary product called Market Analytics. Market Analytics compiles data from over 50,000 monthly phone calls that RealPage makes to landlords across the country. On these calls RealPage collects nonpublic, competitively sensitive information by floor plan on occupancy rates, effective rents, and concessions, as well as information on the owner, management company, and any revenue management software used at the property. These market surveys cover over 11 million units and approximately 52,000 properties. Landlords, including but not limited to those that use AIRM, YieldStar, or other RealPage products, knowingly share this nonpublic information with RealPage.

B. AIRM and YieldStar Users Agree With RealPage To Use the Software To Align Pricing

28. In addition to agreeing to share nonpublic, competitively sensitive data with RealPage, each AIRM and YieldStar licensee agrees with RealPage to use the AIRM or YieldStar pricing software as RealPage designed it.² Landlords are expected to review daily AIRM or YieldStar floor plan price recommendations and use the programs to set scheduled floor plan rents or even unit-level prices.

29. While landlords may not accept every price recommendation, they use AIRM or YieldStar as their pricing

software, regularly review AIRM or YieldStar floor plan recommendations, use AIRM or YieldStar to set a scheduled floor plan rent, and use AIRM or YieldStar to set unit-level prices.

30. Landlords who use AIRM and YieldStar know that others are using the same software. Some landlords track which revenue management software their competitors use, including by contacting competing properties directly and exchanging nonpublic information. Other landlords, including prospective AIRM and YieldStar users, ask RealPage whether there are existing AIRM and YieldStar users nearby before they themselves license the products.

31. An executive at Willow Bridge, for example, explained to her team how she would learn from RealPage data or from a property's website whether a property used revenue management. This information is important because properties that use revenue management tend to update prices much more frequently, and so a landlord will react differently to those price changes if it knows the competitor is using revenue management.

32. RealPage frequently tells prospective and current clients that a "rising tide raises all ships." A RealPage revenue management vice president explained that this phrase means that "there is greater good in everybody succeeding versus essentially trying to compete against one another in a way that actually keeps the industry down." This rising tide lifts all landlords, including but not limited to AIRM and YieldStar users.

33. In using AIRM and YieldStar, landlords expect this pricing alignment and use RealPage software in part for this reason. One landlord echoed the RealPage executive, using the phrase "a rising tide rises [sic] all ships" to explain that AIRM would move prices in a "similar manner" to how the top and bottom of the market move. Elsewhere that same landlord noted that "if everyone in the market is doing well and everyone in the market has [sic] is having the rates go up, so should ours, right?" An employee at Willow Bridge referenced RealPage's use of the phrase "a rising tide raises all ships" to explain how AIRM would provide price recommendations that amplify market trends. Multiple landlords have expressed their preference that their competitors use YieldStar and AIRM because widespread use would benefit them all. An executive of one landlord (which itself uses YieldStar and AIRM) said in a 2021 earnings call that more sophisticated, "high-quality competition" was better for that

² Defendants Camden, Cushman & Wakefield and Pinnacle, Greystar, LivCor, and Willow Bridge were active beta testers for AIRM and provided feedback to RealPage during the AIRM design process.

landlord when “they all use revenue management. They are all smart. They raised rents when they should.” RealPage highlighted in promotional materials the sentiments of another landlord who noted, “It actually gives me chills to think about what a disadvantage we’d be at if we hadn’t adopted YieldStar, knowing others are using it.”

C. RealPage’s Transactional Data Is Fundamentally Different From Other Data Available to Landlords

34. The data that RealPage uses and supplies is unique relative to public data available to landlords on listing or property websites. As compared to public data, RealPage data is much more granular, covers a broader array of business information, and includes competitively sensitive data across several dimensions. For example:

- *Information on Actual Transactions.* RealPage’s data include, for each lease, the unit, floor plan, listed rent, final transacted lease price (including any discounts), and lease term.

- *Renewals.* RealPage’s data include the same information for lease renewals. Information on renewals is not listed publicly—not even asking rents—leaving a significant blind spot for landlords not using RealPage.

- *Time Span.* AIRM and YieldStar have access to current and historical lease data, from the previous day and going back two to three years.

- *Future Demand.* The shared data further includes information on tenant demand, including detailed information on inquiries and applications by potential future tenants.

- *Accuracy.* Landlords have greater assurance of the accuracy of the data because it comes directly from the landlords’ own databases.

- *Coverage.* The RealPage data covers millions of units from users of its revenue management software and other products.

35. RealPage touts how its data is different. As one RealPage pitch deck put it, “we have [the] most data and the best data.” And the “[q]uality of data is best in class given that it is ‘lease transaction data’—this provides insight into performance data from actual

signed leases, both new and renewal, net effective of concessions.” Another noted that without YieldStar “you’ll be pricing your renewals in the dark without insight into actual lease transaction data that YS uses to help you make pricing decisions. This is critical to price renewals right[,] especially in a downturn.”

36. Access to this data proves important in winning over revenue management clients, including skeptical ones. One RealPage senior manager noted that a “highly suspicious CFO” was won over in part by YieldStar’s “lease transaction data” that allowed his company to “achieve what his people couldn’t achieve on their own.”

37. One landlord explained the benefits of YieldStar to its owner clients by calling the use of competitors’ transactional data a “game changer! We have 100% truth on [competitors’] activity powering YieldStar recommendations.”

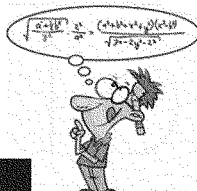
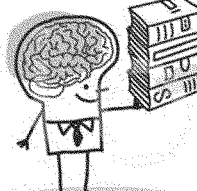
38. Another landlord’s internal training presentation on YieldStar highlighted the importance of having access to competitors’ transactional data:

How Does it Work?

Calculates Price using complex algorithms:

- Historical data
- Current OneSite data
- Transactional Competitive Market Data

**Used to generate a price recommendation
EVERY day for EVERY unit!**

D. RealPage Revenue Management Software Uses Nonpublic, Competitively Sensitive Data To Recommend Prices

39. AIRM and YieldStar are built upon similar code and leverage

competitive data in similar ways. LRO, on the other hand, was originally developed outside of RealPage and takes a different approach.

1. AIRM and YieldStar Leverage Competitively Sensitive Data to Generate Price Recommendations

40. AIRM uses competitors’ nonpublic, transactional data in three

separate stages of the pricing process: (1) model training, (2) floor plan price recommendations, and (3) unit-level prices. YieldStar uses competitors' nonpublic, transactional data in stages two and three of its process.

(a) AIRM Model Training Relies on Competitively Sensitive Data To Generate Learned Parameters

41. In the first stage, RealPage trains its AIRM models using nonpublic data from OneSite and other property management software, totaling millions of executed lease transactions, new lead applications, renewal applications, and guest cards filled out by visiting potential tenants. This data is run through a machine learning model to generate learned parameters for supply and demand models that are then used for all AIRM clients across the country. Like the coefficients in a regression model, the learned parameters are applied to the data of a landlord's specific property, and to the data of its competitors, when AIRM makes pricing recommendations. RealPage generally retrains the models three to four times per year using updated nonpublic data.

(b) AIRM and YieldStar Incorporate Competitors' Nonpublic Data To Generate Floor Plan Price Recommendations

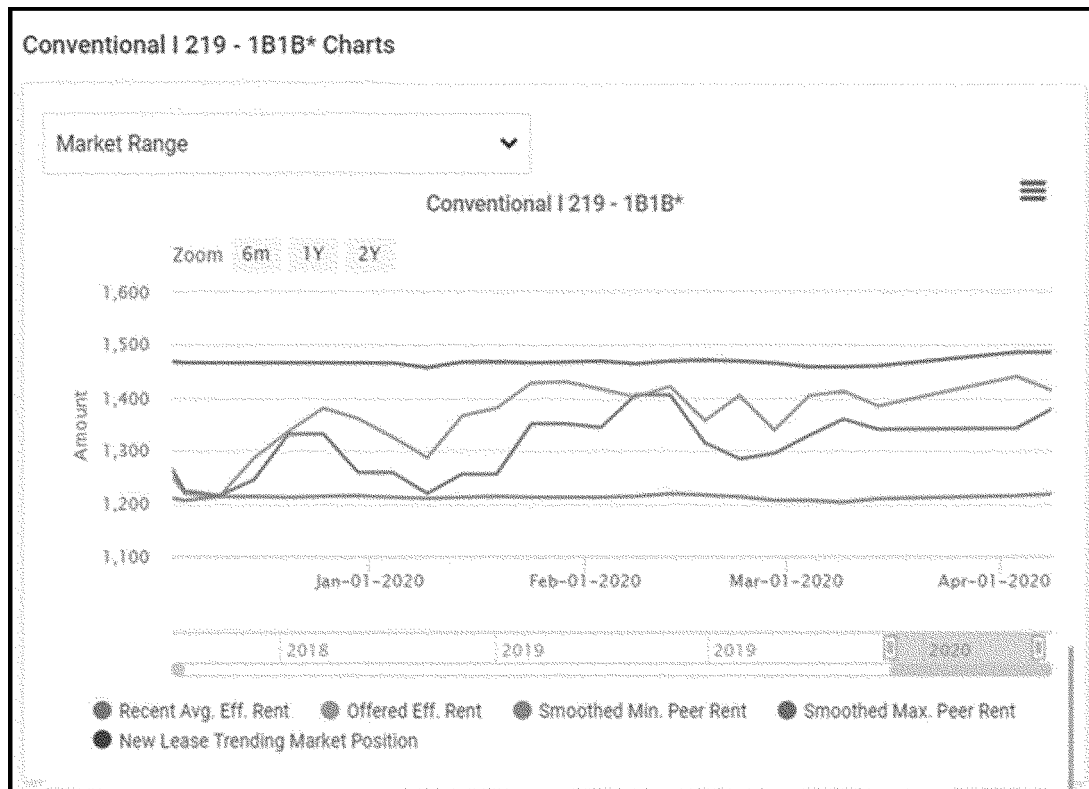
42. In the second stage AIRM or YieldStar provides a price recommendation for every floor plan of a given property. A floor plan is a grouping of units that share similar characteristics, such as the number of bedrooms and bathrooms and square footage. Landlords define the floor plans in their buildings—for example, a large apartment building might have separate sets of floor plans for studios, one-bedroom, and two-bedroom apartments. As discussed below, AIRM and YieldStar use competitors' nonpublic, transactional data in nearly every step of setting a recommended floor plan price, including identifying peer properties, forecasting occupancy and leasing, increasing rents to match competitors' changes, and determining the magnitude of price changes.

43. *Identifying Peers.* First, AIRM and YieldStar use confidential transaction data to identify a property's peer properties, which include close competitors. In selecting peer

properties, RealPage's algorithm generally looks for properties with similar floor plans, within close geographic proximity, and with similar effective rents over time. AIRM or YieldStar clients may review the list of peer properties and request that RealPage add or remove specific properties.

44. AIRM or YieldStar then uses the nonpublic data from competitors' executed leases to generate a market range chart for each floor plan. This chart identifies a "smoothed" market minimum effective rent and market maximum effective rent. The market minimum is a hard floor. AIRM and YieldStar will not recommend a rent below the market minimum. On the other hand, the market maximum is a "soft ceiling," and the programs will recommend prices above the ceiling.

45. The client has access to the market range chart within the AIRM and YieldStar interfaces. As shown below, for each floor plan the client can see the smoothed market minimum and market maximum and where the client's own floor plan sits within the market range.



46. *Forecasting Occupancy and Leasing.* Every night, for each participating property, AIRM applies the model's learned parameters to that

property's internal transactional data to forecast the number of expected vacancies and expected lease applications for a certain period into the

future. AIRM may also use competitors' data to adjust the projected supply.

47. AIRM or YieldStar then determines whether actual leasing for a floor plan is on track to meet predicted

leasing. To do so, it creates a forecast of the number of leases over time, using nonpublic lease and application data from the subject property, and potentially from so-called surrogate properties (similar properties in the surrounding area).³ When there is an imbalance between a property's actual and forecasted leasing, it recommends a price change.

48. *Changing Rents to Match Competitors.* Even when a property's supply and demand are balanced, RealPage's software will still recommend a price change, based on competitors' nonpublic data, when it determines that the market is moving. For example, if the minimum and maximum of the competing floor plans' effective rents increase, it will recommend a price increase to maintain the floor plan's market position (its price position relative to its competitors).

49. *Determining Magnitude of Price Changes.* Once AIRM or YieldStar has determined that it will recommend a price increase or a price decrease, it again uses competitors' transactional data to determine *how much* the price should move and provide a floor plan price recommendation. It uses nonpublic transactional data from peer properties, in addition to data from the subject property and surrogate properties, to generate a market response curve—analogueous to a market demand curve—for every floor plan. This demand curve provides an estimate of how demand for particular apartments would change in response to changes in rents, a measure that RealPage calls elasticity. In other words, it uses competitors' nonpublic transactional data to calculate how many leases the property will likely gain or lose for a particular floor plan, for every price point along the curve. Using this data, AIRM or YieldStar can determine how much the price can increase and still achieve the target number of leases, or by how little price can decrease to maintain a target occupancy.

50. RealPage describes elasticity as a pivotal input into balancing supply and demand and, therefore, price.

51. The use of surrogate properties in this pricing process has the potential to push convergence on price even further. As two properties' surrogate sets become closer—and therefore their respective demand curves become more

similar—AIRM and YieldStar will generate increasingly similar prices for the two properties. And the use of surrogates is common. One of the largest landlords in the country, for example, uses surrogates at over 80% of its properties.

52. This process repeats for every floor plan in the client's property, every night. A new floor plan price recommendation is generated daily.

(c) AIRM and YieldStar Use Competitors' Nonpublic Data—Including Data on Future Occupancy—To Determine Unit-Level Prices.

53. A property manager at the landlord reviews each floor plan recommendation daily and enters the floor plan price. AIRM and YieldStar then use the floor plan price to generate prices for every unit within the floor plan. The unit price is shown in a pricing matrix, which provides the price for each combination of start date and lease term. To generate the price for an individual unit, the floor plan price is adjusted to account for unit-specific factors such as amenities (*e.g.*, a desirable view, the floor level, or an in-unit washer and dryer), staleness (*i.e.*, how long that specific unit has been vacant), and the timing of lease expirations. AIRM and YieldStar again use competitors' nonpublic data during this step in at least two ways.

54. First, AIRM and YieldStar use data on competitors' supply of multifamily housing to adjust recommendations to limit “exposure” with a feature called lease expiration management. Exposure refers to the number of units that are available for lease. Managing lease expirations is an important element of revenue management software. If too many leases expire and the corresponding units become available at the same time, supply increases and rents for those units will tend to drop. This process will also tend to repeat itself as the same units will become available at the same time a year later for leases with a standard twelve-month term.

55. The objective of expiration management is to smooth out this exposure so that landlords, as explained by one RealPage employee, “remain in a position of pricing power.” For example, if AIRM or YieldStar sees that a large number of units will likely be available in twelve months, it will increase the price recommendation for a twelve-month lease relative to price recommendations for leases of other terms, such as 11 months or 13 months, in order to nudge potential renters to accept those terms. Expiration management can only raise prices—AIRM does not lower a unit's price if

the lease term would fall in an underexposed period.

56. This calculation does not rely *only* on the predicted future supply for the client's property. For any landlord who uses a “market seasonality” setting, AIRM and YieldStar *also* rely on competitors' transactional data and the supply for those competitors—including the supply of competitors' existing leases that expire in the future. AIRM and YieldStar thus work to manage lease expirations for the client's units based on how competitors' supply will change. RealPage strongly recommends to landlords that they use market seasonality.

57. The use of competitors' nonpublic data in expiration management to fill out the pricing matrix occurs regardless of whether the landlord accepts the AIRM or YieldStar recommendation. Thus, even if a landlord were to override every price recommendation, its rental prices would still be influenced by nonpublic information about its competitors' supply.

58. Second, AIRM and YieldStar include an amenity optimization feature. By pricing specific amenities within units, landlords can avoid making wholesale pricing changes to a floor plan if a specific unit fails to lease. Within the amenity analysis, AIRM and YieldStar provide market values for specific amenities to landlords, allowing them to compare their perceived value of an amenity with the nonpublic valuation of their competitors. The peer data include the market minimum and maximum value for specific amenities.

2. LRO Relies Primarily on Landlords To Input Data on Competitors

59. RealPage's LRO also provides pricing recommendations to users. Each week, LRO users manually input competitor information into the system that they have obtained from public websites or more questionable means, such as communicating directly with their competitors.

60. A small number of LRO users subscribe to a feature called AutoComp. With this feature, RealPage provides information on competitors' rents, traffic, and occupancy. This information comes from market surveys that RealPage compiles using call centers to call competitor properties. Landlords may use LRO without using AutoComp.

E. RealPage Uses Multiple Mechanisms To Increase Compliance With Price Recommendations

61. AIRM and YieldStar provide daily price recommendations. RealPage has taken multiple steps to increase compliance with AIRM and YieldStar

³ If there is insufficient historical data for a particular building, or floor plan within that building, RealPage will use data from what it calls a “surrogate property,” which is the confidential transactional data from another property with characteristics similar to the subject property.

price recommendations. It designed AIRM and YieldStar to make it much easier to accept recommendations than to decline them. It built an auto-accept function and pushes clients to adopt it and increase its role. And its pricing advisors encourage landlords to follow AIRM and YieldStar pricing recommendations. Among their duties, pricing advisors review any request to override a price recommendation.

1. AIRM and YieldStar Make it Easy To Accept Recommendations and More Difficult and Time-Consuming To Decline

62. Every morning, the landlord's property manager chooses whether to accept the floor plan price recommendation, keep the previous day's rent, or override the recommendation. These options are the same for new leases and renewal leases. RealPage makes it easier and faster for a client to accept a recommendation than to decline it. When accepting recommendations, the manager can choose to do a bulk acceptance—she can accept all or multiple floor plan recommendations at once. But she cannot do the same when overriding, or rejecting, the recommendation.

63. Instead, for every recommendation that she does not accept—whether overriding or keeping the previous day's rent—the property manager must provide “specific business commentary” for diverging from the recommendation. This justification, RealPage instructs, should not be a mere preference for another price but must be based on a factor that the model cannot account for, such as local construction or renovations occurring in the building. It must be a “strong sound business minded approach.”

64. The property manager knows that these recommendation rejections and accompanying justifications will be sent to a RealPage pricing advisor.⁴ If the pricing advisor disagrees with the rejection or justification, the disagreement is escalated for resolution to a landlord's regional manager, who typically supervises the property manager.

65. As one client who complained to RealPage explained, RealPage's design is “trying to persuade [clients] to take the recommendations (almost like we made it hard to do anything but).”

⁴ Some clients have internal revenue managers that are certified by RealPage. For those clients who have internalized the revenue management function, recommendation rejections may be routed to the internal revenue manager rather than a RealPage pricing advisor.

2. RealPage Pushes Clients To Adopt Auto-Accept Settings That Automatically Approve Recommendations

66. AIRM and YieldStar each include auto-accept functions. This functionality automatically accepts price recommendations falling within certain parameters. By default, AIRM and YieldStar set auto-accept parameters of a 3% daily change and an 8% weekly change. The landlord can change these parameters, disable or enable auto-accept, and even enable partial auto-accept. With partial auto-accept, if the recommendation exceeds the auto-accept parameters, the recommendation is accepted as far as the parameter permits. For example, if the auto-accept daily change limit is 4% and the price recommendation is 5%, using partial auto-accept will result in an increase of 4%. By enabling auto-accept, a landlord functionally delegates pricing authority to RealPage (within the bounds of the daily and weekly limits).

67. As part of the onboarding process, internal RealPage guidance states, “AUTO ACCEPT should be confirmed as ‘on’ with parameters in place.” Internal AIRM training explained that RealPage wanted to “widen auto accept parameters” by introducing the feature and then “creating enough trust so that over time we have client[s] that are willing to let auto accept run with very wide parameters . . . AKA—accept all recommendations.” RealPage trains pricing advisors to have an “accountability conversation” or a “refresher on short term vs. long term goals” for clients that show less tolerance for increasing auto-accept parameters.

68. Even if a landlord does not want to use auto-accept, RealPage trains its advisors to convince the landlord to turn it on with 0% limits—a setting whereby auto-accept will never accept price changes. The reason? So that it is no longer a question of whether the client turns on auto-accept, but only a matter of convincing them to widen the parameters and further delegate pricing decisions. RealPage instructs its advisors on best practices: “[I]f a partner is not ready to use auto acceptance, are they ready to use revenue management?”

3. RealPage Pricing Advisors Provide a “Check and Balance” on Property Managers To Increase Acceptance of Recommendations

69. RealPage offers landlords pricing advisory services. Landlords typically have an assigned pricing advisor, unless

the client has internal revenue managers that were certified by RealPage. Pricing advisors play an important role in the daily review of pricing recommendations. Landlords' property managers are asked to review recommendations every morning by 9:30 a.m. After their review, a pricing advisor accepts agreed-upon pricing within an hour and escalates any disputes to the landlord's regional manager.

70. If a property manager disagrees with the direction of a recommended price change—e.g., the manager wants to implement a price decrease when the model recommends a price increase—the RealPage pricing advisor escalates the dispute to the manager's superior. As a pricing advisor manager explained in a client training, the advisor would “stop the process and reach out to our partners”—the property manager's supervisors—to “talk about this further.” The advisors, the manager elaborated, are part of a system of “checks and balances.” The client confirmed the value of this system to stop property managers from acting on emotions, which could limit RealPage's influence on their pricing.

71. Beyond the daily interactions between pricing advisors and their own property managers, clients agree to make meaningful changes when they use RealPage's pricing advisory services. Under the specifications for this service, clients agree to use AIRM or YieldStar exclusively to give quotes to potential renters, further tying landlords' pricing decisions to RealPage's software. Clients also agree to change their commission programs for leasing agents to “ensure these programs motivate sales behavior that is consistent with the objectives of revenue growth.” And clients further agree to revenue growth as the official metric to evaluate AIRM and YieldStar, as opposed to occupancy rates.

72. RealPage imposes additional requirements on landlords who want to use internal or in-house revenue management advisors with YieldStar or AIRM (rather than use RealPage pricing advisors). RealPage requires these landlords' employees go through RealPage certification. Certification is a multiday course in which landlords are trained—at times in the same session—on AIRM and YieldStar use and best practices, according to RealPage. Certification includes observing and leading pricing calls with property managers and passing a written exam. This certification program facilitates the landlords' agreements with RealPage to align pricing by ensuring that landlords' internal revenue managers are trained

and tested to use AIRM and YieldStar in the same way.

4. Pricing Recommendations Heavily Influence Landlords' Behavior

73. RealPage defines an acceptance as where the final floor plan price is within 1% of the recommended floor plan price. According to that definition, the average acceptance rate across all landlords nationally for new leases between January 2017 and June 2023 is between 40–50%. But RealPage itself recognizes that acceptance rates are not necessarily the best measure of its influence; one employee explained that the spread between a floor plan recommendation and the final scheduled floor plan price is more useful for measuring model adoption—and therefore influence—than the binary accept/reject decision that the RealPage-defined acceptance rate reflects. Widening the definition of acceptance even slightly to account for partial acceptances illustrates the influence of recommendations: nearly 60% of final floor plan prices are within 2.5% of RealPage's recommendation, and more than 85% are within 5% of RealPage's recommendation.

74. RealPage's preferred measure of acceptance understates the influence of RealPage's price recommendations and the effect of competitors' data. AIRM and YieldStar use competitors' nonpublic transactional data to adjust unit-level pricing, after a floor plan recommendation has been accepted or rejected. RealPage's metric does not capture the cumulative effect of rate acceptances over time. Nor do they capture when a client is influenced by and partially accepts a recommendation.

III. Coordination Among Competing Landlords Is a Feature of this Industry

75. Several characteristics of apartment-rental markets make it easier for landlords to coordinate with, or accommodate, each other. Rental housing is a necessity for many Americans, meaning that demand is inelastic—that is, changes in rent produce relatively small changes in the number of renters. There is significant concentration among landlords in local markets, and these landlords engage in widespread, regular communications with one another. And RealPage makes rental units more comparable to each other in AIRM and YieldStar, allowing landlords to track one another more easily. These industry characteristics exacerbate the harm to the competitive process—and ultimately to renters—from the exchange of nonpublic, competitively sensitive data through

RealPage and the use of the AIRM and YieldStar models.

A. Rental Housing Is a Necessity for Millions of Americans

76. Shelter is a basic, foundational necessity of life. And for tens of millions of Americans, conventional multifamily apartment buildings are the only reasonable option for much of their lives. Many renters cannot afford the significant down payment needed to purchase a single-family home, among other requirements.

77. Demand for apartments is relatively inelastic. Rising rents have disproportionately affected low-income residents: The percentage of income spent on rent for Americans without a college degree increased from 30% in 2000 to 42% in 2017. In 2021, the proportion of severely burdened households—households spending more than half of their income on gross rent—was 25%, or approximately 10.4 million households, an increase in approximately 1 million households since 2019. By 2022, this number increased to 12.1 million households. For college graduates, the percentage of income spent on rent increased from 26% to 34% from 2000 to 2017.

B. The Multifamily Property Industry Is Rife With Cooperation Among Ostensible Competitors

78. Within particular metropolitan areas and neighborhoods, the multifamily property industry is concentrated and replete with competitively sensitive discussions among ostensible competitors. Landlords have agreed with one another to share nonpublic, sensitive information, both indirectly through RealPage software and directly outside of RealPage's software. RealPage facilitates some of these discussions, while others are made directly between competing landlords. These discussions supplement and reinforce the indirect information sharing among landlords that occurs through AIRM and YieldStar. As a result of this coordination, RealPage's pricing algorithms are even more likely to restrain, rather than promote, competition.

1. At the Local Level, the Multifamily Property Industry Comprises a Small Number of Large Landlords Managing Buildings With Different Owners

79. In 595 zip codes with at least 1,000 total multifamily units across 125 core-based statistical areas, five or fewer landlords manage more than 50% of the multifamily units. Within the submarkets alleged in this complaint,

there are at least 214 zip codes, each with at least 1,000 total multifamily units, in which five or fewer landlords manage more than half of those units. Similarly, within the ten core-based statistical areas alleged in the complaint, there are 144 zip codes, each with at least 1,000 total multifamily units, in which five or fewer landlords manage more than half of those units.

80. The same landlord often oversees nearby properties with different owners. In at least 502 zip codes, at least one landlord using AIRM or YieldStar oversees properties with different owners.

81. There is also overlap among RealPage pricing advisor assignments. In at least 683 zip codes, within 96 core-based statistical areas, a RealPage pricing advisor has responsibility for properties managed by different landlords. RealPage takes no steps to avoid assigning the same pricing advisor to properties with different owners, even if those properties compete with each other or are RealPage-mapped competitors.

2. Landlords Regularly Discuss Competitively Sensitive Topics With Their Competitors and Swap Information

82. Landlords regularly solicit and obtain nonpublic information about inquiries by prospective renters, occupancy, and rents from their direct competitors. Although this information is not as accurate or thorough as the transactional-level data shared with AIRM and YieldStar, it is nonetheless sensitive competitive information.

83. Landlords collect this information through a variety of means, including weekly phone calls, emails, and in-person visits. Some landlords also share information on their local geographic markets through shared Google Drive documents. One RealPage employee explained to his colleagues, reflecting on his former time working at a landlord, that these weekly inquiries “required cooperation among the competitor[s] but wasn't hard to get that.” In June 2023, a senior director at Cushman & Wakefield admitted that “this practice has been prevalent in our industry for a long time.”

84. Landlords not only knew of these so-called “market surveys,” but expected their property managers to participate. As a manager of Cushman & Wakefield's revenue management department explained, “we have always expected our properties to continue doing a traditional market survey[.]” which “gives us insight into the very specific handful of competitors closest to the subject property.”

85. At a February 2020 industry event, representatives from Cushman & Wakefield and two other landlords shared tips on collecting information on concessions and net effective rents from competitors. The suggestions included bi-weekly and monthly meetings with competitors, sponsored “cocktail hours for regional competitors to share info and build relationships and rapport,” and using Google Drive documents to share information on a weekly basis. Building relationships with competitors to get accurate data was “critical.” The representatives cautioned that the collected data was used to make “major decisions about pricing,” so the landlord employees collecting data should be trained accordingly to ask such questions as “are you seeing a slow down?” and “are you adjusting pricing?”

86. Some landlords engage in even more sensitive communications about price, demand, and market conditions. These communications are not isolated instances at a specific property. Rather, they are conversations at the corporate revenue management level about strategies and approaches to market conditions that apply to the landlords’ business across all markets.

87. For example, in January 2018, Willow Bridge’s director of revenue management reached out to Greystar’s director of revenue management and asked about Greystar’s use of auto accept in YieldStar. In response, Greystar’s director provided Greystar’s standard auto-accept settings, including daily and weekly limits and for which days of the week auto accept was used. The Greystar director, explaining why she provided this information, testified that the Willow Bridge director was a “colleague,” even though Willow Bridge was a competitor to Greystar.

88. In March 2020, Cushman & Wakefield’s director of revenue management reached out to Willow Bridge’s director of revenue management. The Cushman & Wakefield director wanted to hold a call among revenue management executives at multiple landlords to discuss market conditions, use of YieldStar, and strategy plans. The Willow Bridge director agreed and suggested a small number of landlords to invite to keep the group “tight.” The directors agreed to reach out to Greystar, as well as several other landlords.

89. Also in March 2020, a senior executive at Greystar obtained a copy of Willow Bridge’s sensitive strategic plans regarding the COVID-19 pandemic. The plans included Willow Bridge’s corporate protocols for concessions, rent increases, and lease terms. The plans

recommended that property managers work closely with YieldStar and LRO to preserve rent integrity. The Greystar executive forwarded Willow Bridge’s plans to executives at Cushman & Wakefield and another landlord. All four landlords compete with one another.

90. In September 2020, Camden’s director of revenue management reached out to Greystar’s director of its internal revenue management team. Camden asked Greystar—a direct competitor—what increases on renewal pricing Greystar had seen in August and offered what it had seen. Greystar’s director replied with information not only on August renewals, but also on how Greystar planned to approach pricing in the upcoming quarter. Greystar’s director further disclosed its practices on accepting YieldStar rates and use of concessions. As the conversation continued, the two competitors shared additional highly-sensitive information on occupancy—including in specific markets—demand, and the strategic use of concessions.

91. At the same time, Camden’s director emailed a revenue management executive at LivCor and asked how LivCor was faring on raising renewal rates. He explained his request by noting that Performance Analytics provided some good data, but it was “hard to see what our competitors are signing today.” The two executives shared information about their respective renewal increases. After the Camden executive passed this information along internally, he continued his outreach with several other landlords and with the LivCor executive—who in the meantime had reached out to three other landlords about their renewal rates. Camden’s internal team decided to raise a renewal cap to get to the same renewal gains as LivCor.

92. Camden’s director received competitively sensitive information from at least four competitors. Another senior executive at Camden asked him to compile the information so it could be shared internally. That executive noted the usefulness of the competitors’ information and the need to take advantage of the shared information while it was fresh.

93. In June 2021, Willow Bridge’s head of revenue management emailed Greystar’s revenue management director. She proposed collaborating with Greystar to convince a client to move all of its properties, including those managed by Willow Bridge and those managed by Greystar, to AIRM. But she also noted that, in thinking about “the larger picture as well,” it

could be useful to “coordinate with the other companies that we often share business with” to prepare to move their clients to AIRM as well. Greystar responded favorably to transitioning the joint client to AIRM.

94. In November 2021, a revenue management executive at LivCor emailed an executive at Camden to propose a call to discuss Camden’s “renewal philosophy,” for the purpose of informing how LivCor calculated renewal increases. The two spoke that day. The following day, another LivCor executive—who was included on the call—thanked the Camden executive for the opportunity to “connect on industry best practices” and asked another “operational question” about implementing “larger renewal increases.” The executives exchanged emails over the next few months, including discussing their respective strategies on maximum increases to lease renewal prices. They shared not only their increase limits in specific markets but also what price increases they were able to achieve. For example, in April 2022, the executive at LivCor reached out to Camden to share that “my current thinking (not sure it’s right, just where my mind is at) is . . . prices for almost everything are up 20%.” Therefore, unless there is a good reason not to, should we be increasing rates on rentable items by 20%?” The Camden executive responded, “I like your thinking.” He continued, “Typically, we lean into the demand signals to inspire a price increase . . . I’m divided on whether the default increase should be 20% or closer to the 10% . . . Curious what your thoughts are!?”

95. In September 2021, a property manager at Cortland explained to a colleague that the manager had called two competitors and received from them pricing information on two-bedroom and three-bedroom units. The property manager asked for the information to decide how to act on YieldStar’s price recommendations.

96. Landlords also engage in group discussions with local and national competitors about sensitive topics. For example, for a number of months in 2020, dozens of “high-level participants” from competing landlords participated in weekly “multifamily leadership huddle” videoconferences. The organizer informed participants that “the goal of the call is to share information about what our companies are doing, share some collateral and resources,” and then—perhaps recognizing the problematic nature of these calls—he claimed that “then we hang up and make our own decisions.”

97. In one such call in April 2020 with over 100 attendees, participants discussed a number of topics, including “pricing and renewal strategies.” Several senior landlord executives, including a Greystar senior managing director and a CEO of another landlord, participated and shared their practices on new leases and renewals, use of renter payment plans, and use of YieldStar and other revenue management software. On a similar call in October 2020, participants discussed current and forecast rent prices, renewal strategies, and use of concessions. A Willow Bridge employee forwarded a colleague notes from the call, and he specifically highlighted information about a competitor’s use of concessions.

98. These conversations among competing landlords have extended from the national level to local markets across the country. For example, in Minnesota, property managers from Cushman & Wakefield, Greystar, and other landlords regularly discussed competitively sensitive topics, including their future pricing. When a property manager from Greystar remarked that another property manager had declined to fully participate due to “price fixing laws,” the Cushman & Wakefield property manager replied to Greystar, “Hmm . . . Price fixing laws huh? That’s a new one! Well, I’m happy to keep sharing so ask away. Hoping we can kick these concessions soon or at least only have you guys be the only ones with big concessions! It’s so frustrating to have to offer so much.” The property managers from Greystar and Cushman & Wakefield continued to discuss competitively sensitive topics. For example, in response to Greystar’s tipoff that it had reduced concessions and “hop[ed] the Spring/Summer market allow us to pull further back on concessions,” the Cushman & Wakefield property manager replied, “That’s great news and I love hearing about the concessions being pulled back. We have done the same and hoping the rest of the market follows suit.” These communications between RealPage users that are ostensibly competitors are examples of the industry-wide coordination that magnifies the anticompetitive effects of RealPage’s software.

99. In addition to contacting each other directly, many landlords also exchange information through other intermediaries. One vendor offers a tool for landlords to exchange with one another nonpublic information on concessions, net effective rents, inquiries and visits by prospective renters, and occupancy that is pulled from each landlord’s property

management software. Over 150 landlords nationally have used this service, including Greystar, LivCor, and some of the other largest landlords across the country. The vendor’s CEO described this as a “quid pro quo or give to get” arrangement among landlords where “if you share this data with me, I’ll share the same data.” A RealPage employee noted that this vendor makes it “quicker and easier to get your market surveys.”

100. Some landlords use this direct exchange of competitively sensitive information to update competitor rents within LRO—a practice that RealPage is aware of and accepts.

101. Recently, under the scrutiny of antitrust lawsuits, some landlords have adopted internal policies prohibiting “call arounds” and other direct sharing of competitively sensitive information with direct competitors. But even assuming that their property managers fully comply with these legally unenforceable internal policies, these landlords continue to use RealPage’s revenue management software.

3. At RealPage User Group Meetings, Landlords Discuss Competitively Sensitive Topics

102. RealPage holds monthly “user group” meetings attended by competing landlords that use RealPage’s software. There are separate user group meetings for LRO and for YieldStar and AIRM.⁵ One of RealPage’s stated purposes for the user groups is to “to promote communications between users.” Attendees include a wide mix of competing landlords. For example, the June 2022 YieldStar user group included representatives from five of the largest property management companies in the country, among a larger group.

103. Recurring topics at the user group meetings include product enhancements and an “idea exchange” on potential changes to the products. The user group participants often vote on the proposals discussed in the idea exchange. But discussions have covered competitively sensitive topics, including managing lease expirations, pricing amenities, the use of concessions, pricing strategies, and how to manage properties during the COVID–19 pandemic. RealPage encouraged landlords to use the user group meetings to discuss such topics in their industry and set agendas for these meetings to aid them in doing just that, remarking that “[t]he user group is meant to be self-governed to a degree and the clients should be leading it.”

⁵ RealPage previously held separate AIRM and YieldStar user groups but combined them in 2023.

These RealPage-fostered discussions among competitors enhance and facilitate the landlords’ agreement with RealPage to use AIRM and YieldStar to align pricing.

104. At an April 2020 YieldStar user group meeting, the participants discussed strategies for handling the COVID–19 pandemic. In the presentation, two RealPage employees and a landlord led a group discussion of trends in rent payments and collections and provided five strategic tips. One tip encouraged landlords to “push for occupancy but don’t give away the farm (pricing).” Another counseled landlords to “balance internal and external dynamics” and, referring to the nonpublic information used by YieldStar, to “use transactional market data for decision support and to know when you can be more aggressive” in pushing higher rents. Invited attendees included representatives from at least twelve landlords. At this meeting, Greystar and another landlord shared information on their usage of payment plans with tenants.

105. In May 2020, RealPage started a YieldStar user group meeting by surveying them on concessions. RealPage asked landlords how many of their properties offered concessions, whether concessions applied to new leases or renewals, and the types of concessions offered (such as discounts, gift cards, or other benefits). Invited attendees included representatives of thirteen landlords.

106. In March 2021, the user group meeting included a discussion on possible adjustments to how YieldStar calculated lease expiration premiums. A RealPage executive shared that she liked the idea of adding weekend premiums to incentivize prospective renters to move in during the week, and commented that “the rev[enue] potential would then scale up.” The LivCor representative responded in favor of weekend premiums, and another user group member suggested adding the proposal to the user group idea exchange. RealPage agreed to do so.

107. RealPage began its agenda for an April 2021 YieldStar user group meeting with “strategic insights” from a RealPage economist. This employee shared “21 key strategic insights,” including “focus on renewals,” “be cautious with concessions,” and “drive up revenues—not just base rent.” Specifically, he urged the group to “push up new and renewal pricing where demand [is] solid” and warned against over-relying on concessions. They were instead to “trust the science” of YieldStar.

108. In May 2021, RealPage included a “Back to Basics” discussion in a YieldStar user group meeting. This discussion covered “returning to renewal increases post-COVID” and “declining concessions,” as well as eviction moratoria and areas where acceptance rates were “seeing significant uptick in past 6 months.” The meeting group chat is even more revealing. Over a period of approximately fifteen minutes, representatives from fifteen landlords shared their plans for renewal increases and their use of concessions. The questions were posed, “At what point do we go back to normal? If we go back to normal[,] is it now? Is anyone seeing that the model is raising rent and are you doing it?” In response, these representatives made statements on renewal increases such as “increasing, back to normal,” “major rent growth on the west coast,” “increasing the renewals,” “almost all markets we are raising rents,” “actually raising more than before covid at some,” “raising,” and “we are pushing to get back to normal. Sending increases.” A representative from LivCor stated, “increasing renewals and pushing new lease rents.”

109. The user group members were similarly open about their disinterest in concessions, signaling to each other that they do not intend to offer them or would offer them less frequently. Their pronouncements included “no concessions [sic],” “no concessions,” “considerably less concessions,” “less frequent and less aggressive,” “no concessions except in markets with a lot of lease-ups,” and “almost no concessions currently.” A representative from Willow Bridge noted concessions had “gone away a LOT. People asking for a free month on renewals and being denied, but still signing the renewal.”

110. When the discussion turned to acceptance rates, a RealPage employee stated that rates had “pretty much gone back to pre-COVID. Rate Acceptance has grown 11% over the past 6 months.” A landlord responded that they had “seen our acceptance rate increase tremendously.” Another user group member explained to the group, for “about 1/3 of the communities I manage the [YieldStar] model was too slow to respond, and we are pushing rates above market and above YS rec[ommendation].” A representative from Willow Bridge concluded, “Are we deciding as a group to remove hesitation? :).”

111. The LivCor representative who attended this May 2021 meeting testified that similar discussions happened numerous times during the

COVID-19 pandemic—specifically, the beginning of 2020 through the middle of 2022. In these meetings, user group members discussed new and renewal rent increases, concessions, and renewal strategies, as well as other sensitive topics.

112. RealPage claims that this and other user group meetings were not recorded.

113. The July 2021 YieldStar user group meeting, held at RealWorld (a RealPage-hosted industry event), included a roundtable discussion among competitors. One of the discussion topics? “What is the one thing you consistently consider outside of the model when accepting or changing price and why?”

114. At the October 2021 YieldStar user group meeting, a RealPage economist gave a presentation regarding the 2022 market outlook. RealPage presented analyses on current occupancy and pricing, and on expected occupancy and rent growth in 2022 by geographic regions.

115. At the July 2022 RealWorld YieldStar user group meeting, RealPage hosted a “roundtable discussion” on market volatility and its impact on how to use revenue management, unit amenities and their impact on tenant rents, and best practices for conducting lease ups.⁶

116. RealPage recognized the sensitive nature of the information shared at these meetings. Beginning in late 2022, after public reporting about AIRM and YieldStar, RealPage added an antitrust compliance statement in the user group presentations. Among other directions, the statement instructed participants not to discuss “confidential or competitively sensitive information,” and then noted that this included “you or your competitors’ prices or anything that may affect prices, such as current or future pricing strategies, costs, discounts, concessions or profit margins.” But these were the very topics of previous user group meetings, as described above, that RealPage encouraged its users to discuss. And these are the very types of nonpublic information that AIRM and YieldStar use to recommend and determine prices.

117. Landlords frequently take advantage of RealPage user group meeting invites to email each other directly. In August 2020, for example, an employee of Cortland emailed a user group invitee list and asked them to

⁶ A lease up is typically a pre-leasing period (such as with a newly constructed property) where a landlord is seeking to reach a certain, initial occupancy threshold.

support a change to how YieldStar calculated the number of leases needed. In response, an employee of a different landlord agreed, adding that “I also rely on comparing available units to adj[usted] leases needed, to forecast leases, to gut check the pricing recs. These data points are always a factor in my pricing decisions.”

C. RealPage Uses Nonpublic Information To Allow Landlords To More Easily Compare Units on an Apples-to-Apples Basis

118. Renters typically search for a rental unit using certain key criteria, including the number of bedrooms and the location. Recognizing this market reality, RealPage enables landlords to more easily compare unit prices. When picking a property’s “peer set,” RealPage matches floorplans with the same number of bedrooms that are geographically proximate. This makes it easier for landlords, through AIRM and YieldStar, to track and respond to competitors’ movements at the floor plan level.

119. To account for amenities, RealPage instructs landlords to identify amenities using standardized naming conventions so that RealPage can use machine learning to group amenities together. RealPage then provides the market value for specific amenities, allowing landlords to more accurately identify and track how their competitors value these amenities and adjust their own pricing accordingly. The peer data include the market minimum and maximum value, as well as market quartile values, for specific amenities.

IV. RealPage Harms the Competitive Process and Renters by Entering Into Unlawful Agreements With Landlords To Share and Exploit Competitively Sensitive Data

120. AIRM’s and YieldStar’s use of nonpublic, competitively sensitive data is likely to harm, and has harmed, the competitive process and renters. AIRM and YieldStar distort the competitive process by using nonpublic data to maximize pricing increases and minimize pricing decreases. AIRM and YieldStar incorporate special rules, called “guardrails,” that override the ordinary functioning of the algorithms in ways that tend to push rival landlords’ rental prices higher than would occur in a competitive market. RealPage presses landlords to curtail “concessions” to renters. And AIRM and YieldStar’s “lease expiration management” features aim to sequence vacancies to maximize landlords’ pricing power.

A. AIRM and YieldStar Have the Purpose and Effect of Distorting the Competitive Pricing of Apartments

121. As RealPage frequently trumpets to landlords, “a rising tide raises all ships.” AIRM and YieldStar ensure that the ‘tide’ flows primarily one way—higher rental prices. In a hot market, AIRM and YieldStar will recommend price increases to test what the market will bear, while in a down market AIRM and YieldStar will, to the extent possible, still increase or hold prices and minimize price decreases to reach the target occupancy rate.

122. AIRM and YieldStar are designed to help landlords press pricing beyond what they could otherwise achieve while reducing the risk that other landlords would undercut them. A revenue manager at Willow Bridge explained it succinctly: YieldStar is “designed to always test the top of the market whenever it feels it’s safe to.” By using competitors’ sensitive nonpublic data to generate elasticity estimates, among other things, AIRM and YieldStar can recommend higher price increases to extract more money from renters without losing an additional lease. As RealPage explained to a YieldStar client in training, this pricing elasticity measurement informs “how far do we stretch and pull pricing within the market.” That, in turn, means that “we may have a \$50 increase instead of a \$10 increase for that day.”

123. That insight, gleaned from competitors sharing sensitive, transactional data with RealPage, which is in turn shared with landlords through pricing recommendations, removes uncertainty and competitive pressure that benefits renters. As one landlord put it, these products “eliminate the guessing game” on rent.

124. As RealPage explains to its clients, AIRM and YieldStar reveal “hidden yield.” This extra yield or

revenue is hidden in a competitive market—a market in which competitors do not share sensitive information with each other—because landlords “can’t see the opportunity” and “fail to capture [the] full opportunity.”

125. AIRM and YieldStar disrupt the normal competitive bargaining process between landlords and renters. They place landlords in a better negotiating position vis-à-vis renters. Landlords using AIRM and YieldStar know that these models recommend floor plan prices and price units incorporating nonpublic data of their competitors, including effective rents and occupancy rates, all of which allow landlords to raise price with more certainty.

126. As landlords appreciate, AIRM and YieldStar use competitors’ nonpublic data to predict with more certainty the highest price that the market will bear for a particular unit. A landlord is therefore less likely to negotiate on price. Any potential negotiation instead turns on lease term and move-in date, which AIRM and YieldStar adjust the pricing for to avoid overexposure for the landlord in the future.

127. AIRM and YieldStar also encourage landlords to follow each other in raising rents. When transactional data reveal that peers are raising effective rents—particularly the highest and lowest competitors for a given floor plan—AIRM and YieldStar follow with recommendations to increase rental prices. This movement with the market is ingrained in the AIRM and YieldStar models; AIRM and YieldStar will not recommend a floor plan price that falls below the market minimum.

128. Accordingly, as adoption of AIRM and YieldStar increases among peer competitors, the use of AIRM and YieldStar can push prices up through a feedback effect. As peers move up, other AIRM or YieldStar users may move up

accordingly. This phenomenon, where participating landlords “likely move in unison versus against each other,” a RealPage executive testified, explains “the rising tide.” The same executive saw evidence of this “rising tide” in 2020: When looking at multiple peer sites using YieldStar, “we started to see the trajectory of performance and trends be eerily similar when comparing subject sites and comp sets, thus showing that we are in fact ‘r[aising] the entire tide.’” He acknowledged that YieldStar contributed to market prices rising as a tide.

129. Landlords rely on competitors’ data within AIRM and YieldStar to determine their prices and how hard they need to try to be competitive. A revenue management director at Greystar noted in an internal AIRM deck that competitors’ data is “like the boundaries of the street you are driving on.” The director elaborated that “the competitive market range are [sic] the edges of the road, staying in those boundaries are [sic] necessary to get you to the destination.”

130. Another landlord that used YieldStar told RealPage that within a week of adopting YieldStar they started increasing their rents, and within eleven months had raised rents more than 25% and eliminated concessions. The landlord added that they were now pricing at the top of their peers and, importantly, had “brought the rest of the Comps rents up with us.” A RealPage executive responded internally that this was a “great case study that highlights performance before, during, and a result of YS [YieldStar].”

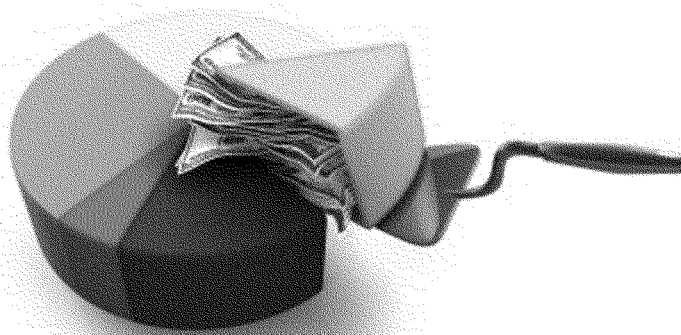
131. A landlord explained in an internal presentation that because YieldStar recommends floor plan pricing that moves with the market—a market position—YieldStar would use competitors’ data to inform “how competitive we need to be [e]ach [d]ay.”

Competing for the Pie

Demand is fixed, but our piece of the pie is variable

YieldStar recommends a Market Position every day, not a price

Previous achievement vs. Peers and Current need will determine *how competitive we need to be Each Day*



4

132. AIRM uses machine learning to train models on competing landlords' sensitive data. The parameters learned in this training are then applied to each AIRM client.⁷ As a result, the model uses the same method and learned parameters to generate price recommendations from the relevant data for each landlord.

133. This aligns and stabilizes prices in at least two ways. First, it reduces volatility in *how* prices change, compared to a situation in which each client sets prices independently. No longer do competitors react in distinctive ways to changing market conditions as they would in a market without access to competitors' transactional data. Instead, AIRM price recommendations tend to standardize those reactions. This leads to the second result: pricing recommendations, and consequently pricing decisions, become more predictable and aligned among competitors as each is using the same set of learned model parameters.

134. RealPage has even manipulated competitor mappings to increase the likelihood that AIRM or YieldStar

would recommend price increases. For example, a prominent client asked why a subject property had mapped peers located more than 100 miles away, in a different metropolitan area, when there were satisfactory mapped competitors within five miles. RealPage's response was that if these distant properties were not mapped, the client's property would be at the top of the market and it would be more difficult for AIRM to recommend price increases. RealPage had originally mapped these distant properties to give the model more room to recommend price increases for the client's property.

135. This dynamic exists not only in markets with growing demand, but also so-called "down markets," where demand is decreasing. In a competitive market with a fixed supply (at least in the short run) of housing units, a demand decrease would result in prices falling. But AIRM and YieldStar resist price decreases in down markets as much as possible while achieving targeted occupancy rates. RealPage told one prospective AIRM client that the combination of "AI and the robust data in the RealPage ecosystem" would allow the landlord to "avoid the race to the bottom in down markets."

136. Using competitors' transactional data to calibrate and set the bounds of its model enables YieldStar and AIRM

to decrease prices as little as possible in a down market. As one example, in 2023 a landlord reached out to RealPage with concerns about price recommendations at a property. Despite the property having too many vacancies and peer properties decreasing in price, AIRM was recommending price increases, frustrating the property owner. A senior RealPage executive responded that the model was not lowering prices because "there isn't much elasticity between the recommended position and the current one" and "the model would recommend the highest possible position [*i.e.*, price] without affecting demand."

137. RealPage succinctly summarized for landlords the effect of using AIRM and YieldStar in down markets: it "curbs [clients'] instincts to respond to down-market conditions by either dramatically lowering price or by holding price when they are losing velocity and/or occupancy." These tools instill pricing discipline in landlords, curbing normal fully independent competitive reactions by substituting them with interdependent decision-making (*i.e.*, through the use of pricing recommendations based on shared, competitively sensitive information). These products ensure that clients are "driving every possible opportunity to increase price even in the most

⁷ There are separate AI Supply models, and therefore potentially different learned model parameters, for clients using Yardi's property management software and clients using other property management software. But within these two categories the learned model parameters for the AI Supply models are the same.

downward trending or unexpected conditions.”

138. When one client wanted to cancel YieldStar, a RealPage executive noted to colleagues that with cancelation the client would lose “our helping them mitigate damage during rent control and covid.” In particular, the client would lose “us helping them rise with the tide given their strategy.”

139. Landlords understand the sensitivity of the information being shared and the likely anticompetitive effects. One potential client put it succinctly to RealPage: “I always liked this product [AIRM] because your algorithm uses proprietary data from other subscribers to suggest rents and term. That’s classic price fixing”

140. Cushman & Wakefield recognized the anticompetitive potential of sharing this level of detailed competitor data. When a property owner asked for information on specific competitors, Cushman & Wakefield’s director of revenue management replied that the requested tool, RealPage’s Performance Analytics with Benchmarking, did not provide information on specific competitors. The reason? Performance Analytics with Benchmarking “tracks transactional information therefore due [to] the potential pricing collusion, it’s anonymize[d] by RealPage.” Performance Analytics with Benchmarking draws from the same transactional database as AIRM and YieldStar. And while AIRM and YieldStar do not display the granular transactional data to the user, AIRM and YieldStar see and use that data. The price recommendations are based upon the very data that this client recognized could lead to collusion.

141. Even RealPage employees selling LRO recognized the anticompetitive harm from using competitors’ transactional data to recommend prices. In a 2018 training deck provided to clients, RealPage explained, “we often times get the question about if comps are on LRO, can we just update the rents for you? Unfortunately, no, we can’t. That could be considered price collusion, and it’s illegal.” But this is precisely what AIRM and YieldStar do.

B. AIRM and YieldStar Impose Multiple Guardrails Intended to Artificially Keep Prices High or Minimize Price Decreases

142. Unsatisfied with relying merely on competitively sensitive data to advantage landlords, RealPage created “guardrails” within AIRM and YieldStar to force adjustments to the price recommendation. But these guardrails serve as one-way ratchets that help landlords, not renters, by increasing

price recommendations or limiting a recommended decrease. And each of these guardrails makes use of competitively sensitive data that landlords agree to share with RealPage. These guardrails have even spurred multiple landlords to tell RealPage that AIRM and YieldStar are not dropping recommended rents as much as their individual conditions, or even market conditions, would warrant.

143. *Hard Floor.* AIRM and YieldStar will not recommend a floor plan price that falls below the smoothed market minimum effective rent. The market minimum is a hard floor. AIRM and YieldStar thus explicitly constrain floor plan price recommendations based on the prices of competitors, using shared nonpublic information.

144. *Revenue Protection Mode.* RealPage created a “revenue protection” mode that effectively lowers output to increase revenues. Revenue protection activates when AIRM or YieldStar predict—using calculations incorporating competitors’ data—that demand is too low for a landlord to meet its target occupancy. Rather than lowering the price to stimulate demand, the algorithm reduces the target number of leases. AIRM and YieldStar then maximizes revenue for the *reduced* occupancy level, which tends to reduce price decreases or increase rental prices.

145. RealPage acknowledges that revenue protection “may seem counterintuitive to leasing needs.” In June 2023, a landlord complained to RealPage that “something in your model is broken” because “the pricing model is not lowering rents dramatically” despite the client’s high exposure during a busy summer leasing season. RealPage explained that, with revenue protection, “the model still sees the way to make more revenue is to lease fewer units at higher prices.” In other words, the model seeks to “raise rates to get the highest dollar value possible for the leases we can statistically achieve” and ignore those leases that the client wants but the model predicts, using competitors’ data, the client will not get.

146. The model’s hard price floor can trigger revenue protection mode. In May 2022, for example, a landlord complained that AIRM was recommending price increases despite a projected shortfall in leases. Because revenue protection mode cannot be turned off, the RealPage pricing advisor recommended that the client reduce sustainable capacity. Sustainable capacity is a client-set parameter that imposes an inventory constraint and determines the number of leases AIRM and YieldStar will try to achieve. This is, of course, what revenue protection

mode functionally does on its own: increase inventory constraints to reduce output.

147. This phenomenon, a RealPage employee explained internally, was “true revenue protection mode.” The client’s floor plan was priced toward the bottom of its competitors. AIRM did not see any price decrease that would achieve the original target number of leases without dropping below the market floor (determined using competitors’ data). Because AIRM never recommends prices below the market floor, AIRM instead reduced the number of leases and optimized against that new, lower occupancy rate.

148. Revenue protection mode interrupts AIRM’s and YieldStar’s normal revenue maximization process. As a RealPage data scientist explained, “the model really wants to reduce rent but is prevented from doing so by the revenue protection restriction.” Revenue protection leads to higher prices and lower occupancy.

149. *Sold-Out Mode.* Once a landlord reaches its targeted capacity for a particular floor plan, the model considers that floor plan “sold out” even though units may still be physically available. In that situation, AIRM and YieldStar recommends the maximum rent charged by a property’s competitors, even if the floor plan’s previous price was far lower.

150. RealPage intentionally designed sold-out mode to use competitively sensitive data to lift rents. In an earlier version of the software, sold-out mode pushed rents to 95% of that floor plan’s highest recently achieved rent. But RealPage modified the algorithm in 2022 to go “straight to 100% of comps,” deliberately aligning rents with competitors’ highest rents, rather than the property’s own historical performance.⁸

151. *The Governor.* AIRM and YieldStar favor recommended price increases over price decreases. When the model calculates that the current day’s “optimal” price will result in greater revenue than the previous day, a feature called the “governor” causes the model to recommend the current day’s optimal price.⁹ But when AIRM or YieldStar calculates that the current

⁸ RealPage has at least considered changing this model logic because it introduced meaningful pricing volatility and significant price increases. Even if RealPage has implemented this proposed logic change, the new model logic still incorporates competitors’ confidential rents because AIRM and YieldStar recommend a market position that is tied to the bottom and top of the market, as defined by mapped competitors.

⁹ In some circumstances AIRM will cap the floor plan recommended price increase at a five percent increase.

day's optimal price will result in less revenue than the previous day, the governor recommends the recent average price *even though it is not optimal for the current day*. In other words, when market conditions weaken and the model calculates that a price decrease is warranted, this guardrail kicks in and recommends keeping the recent rent even though it is suboptimal. This asymmetry favors price increases over price decreases.

152. The effect of these guardrails is intentionally asymmetric. AIRM and YieldStar recommend price increases generated by the model. But the guardrails reduce or eliminate certain proposed price decreases even though the model has determined such deviations may contravene the landlord's individual economic interest.

C. AIRM and YieldStar Harm the Competitive Process by Discouraging the Use of Discounts and Price Negotiations

153. RealPage discourages landlords using AIRM and YieldStar from discounting rents. In the multifamily property industry, discounts typically consist of "concessions," which are financial allowances (such as a free month's rent or waived fees) offered to incentivize renters. Concessions may be offered generally or negotiated individually with a potential tenant.

154. In a competitive marketplace, each landlord may independently decide to offer concessions so that it can better compete in enticing lessors. But, again, RealPage seeks to replace fully independent, competitive decision-making with collective action by ending concessions. AIRM and YieldStar do not work as well when landlords use one-off or lumpy concessions. In its "best practices" for revenue management to landlords, RealPage's guidance is simple: "Eliminate concessions." Detailed "best practices" documents for both YieldStar and AIRM users explain that "concessions will no longer be used in conjunction with" YieldStar and AIRM.

155. When onboarding a new property, RealPage emphasizes the importance of accepting price recommendations without offering discounts, including "no concessions." Concessions cause landlords to deviate from what RealPage determines is the maximum revenue-generating price.

156. Landlords have worked to implement RealPage's requests. In one YieldStar training, Greystar explained that "Concessions are gone!" In a client-facing FAQ document about its revenue management products, RealPage explained that "the vast majority of our clients have discontinued the use of

concessions." A 2023 RealPage client presentation showed that the number of units offering concessions generally trended downward from approximately 30% of units in 2013 to under 15% in 2023. A client's refusal to offer concessions is bolstered by its awareness of competing landlords receiving the same advice from RealPage. In addition to discouraging discounts, RealPage discourages negotiating prices with renters. RealPage trains landlords that "YieldStar [or AIRM] is managing your Price," so the landlord's staff can focus on other things. The YieldStar or AIRM rent matrix is to be the source of prices that are given to a prospective renter. RealPage instructs leasing staff to provide prospective renters the specific price from the matrix that corresponds to the prospect's desired move-in date, unit, and lease term. RealPage cautions landlords not to show renters the matrix itself.

D. AIRM and YieldStar Increase and Maintain Landlords' Pricing Power by Using Competitors' Data To Manage Lease Expirations

157. Supply is a basic component of pricing. For this reason, information on a company's supply is highly sensitive, and its disclosure to competitors is particularly concerning. Yet AIRM and YieldStar use competitors' supply data precisely for the purpose of adjusting unit-level pricing, regardless of whether the landlord accepts the floor plan price recommendation. The goal of this "lease expiration management" is clear: As a RealPage senior manager explained for a client, using this data means that the client's property "will remain in a position of pricing power."

158. The purpose of lease expiration management is to avoid too many units becoming available in the market at the same time. Expiration management only increases unit-level prices. It never reduces the price.

159. Every landlord can choose to use "market seasonality" to inform its lease expiration management. As the name suggests, market seasonality adjusts the landlord's prices based on how many of its competitors' units will be vacant—that is, *future supply*. This feature is popular among landlords. For example, one of the largest landlords in the United States uses it in 98% of its properties. Every single property that uses market seasonality is leveraging RealPage's access to this highly sensitive, nonpublic data about its competitors' supply to inform pricing. RealPage trains landlords to turn on market seasonality as a best practice.

160. When activated, the market seasonality function changes unit-level prices across the different possible lease terms *regardless* of whether the landlord accepts the AIRM or YieldStar floor plan price recommendation.

161. RealPage determines for landlords an important input into lease expiration management: the expirations threshold. This threshold influences the point at which expiration premiums are added. The threshold calculation relies on nonpublic lease transaction data for the property's submarket and pulls from numerous RealPage products, including YieldStar, AIRM, OneSite, Business Intelligence, and Performance Analytics with Benchmarking. Landlords cannot adjust the expirations threshold.

162. Fueled by competitor data, expiration management results in "increased stability" and "pricing power." Using competitors' data reduces the risk of overexposure that "could erode rent roll growth." By adjusting price recommendations based on how much total supply is forecast in the market for a given time period, AIRM empowers landlords to charge higher prices than they could without access to competitors' nonpublic data.

E. No Procompetitive Benefit Justifies, Much Less Outweighs, RealPage's Use of Competitively Sensitive Data To Align Competing Landlords

163. AIRM and YieldStar do not benefit the competitive process or renters. Any legitimate benefits of revenue management software can be achieved through less anticompetitive means, and any theoretical additional benefits of AIRM and YieldStar are not cognizable and outweighed by harm to the competitive process and to renters.

V. RealPage Uses Landlords' Competitively Sensitive Data To Maintain Its Monopoly and Exclude Commercial Revenue Management Software Competitors

164. Landlords are not the only ones that benefit from RealPage's rental pricing practices. RealPage benefits too through maintaining its monopoly over commercial revenue management software for conventional multifamily housing rentals. In that market, RealPage's internal documents reflect that it commands an 80% share.

165. RealPage's core value proposition creates a self-reinforcing feedback loop of data and scale advantages. The sharing of competitively sensitive information among rivals attracts more landlords that seek to maximize revenues and extract more money from renters. As a result of its exclusionary conduct, RealPage has been able to

obstruct rival software providers from competing on the merits via revenue management products that do not harm the competitive process.

166. Over time, RealPage has become more entrenched and has stymied alternatives unless they too enter into similar unlawful agreements with landlords to obtain and use nonpublic transactional data to price units. Even then, RealPage's unparalleled troves of competitively sensitive data provide an ill-gotten advantage.

A. Landlords Are Drawn to RealPage Because of Access to Nonpublic Transactional Data That Is Used To Increase Landlords' Revenue

167. Landlords prize RealPage's accumulation of nonpublic transactional data from competing landlords. For example, Greystar noted that "RealPage supplies the best set of transactional data available via their millions of units of data—this becomes a valuable source of truth to our competitive landscape." In a training document for its employees, the same landlord explained that "better data = better outcomes" and that AIRM has "over 15 million units of data available." From the perspective of Greystar, "pricing decisions start with data" and that precision in pricing "comes from data driven decisions." Importantly, the landlord believed that AIRM's ability to "examine data quality . . . each night" via its property management software integrations, including guest card entry, "plays an important role" in pricing.

168. As another example, Cushman & Wakefield identified this data as especially helpful in a dense market because of insights into competitors' actions in the market. The same landlord also concluded that the more data points, the better confidence a landlord has in RealPage's rental recommendations. According to Cushman & Wakefield, more data—especially data about concessions—enabled the landlord to make better decisions because it showed the landlord where the market stood. Cushman & Wakefield's director of revenue management explained to a colleague that YieldStar "collects about 14 MILLION transactional lease data across the US and has over 20 years of historical records." The director acknowledged that "[t]his is huge! Essentially, this is a window into the market and the shifts we are going to experience . . . Having insight into this data, allows [landlords] to make changes with the dynamic changes in the market."

169. Willow Bridge, who compared AIRM to another commercial revenue

management software product, noted that the competing product "is about half of the cost and does a good job in reviewing rents and making recommendations but does it without the additional reporting capabilities and market data that AIRM uses." Ultimately, this landlord decided to push their owner clients towards AIRM. The landlord's decision to use AIRM was in part based on receiving "more accurate and time sensitive data" and noted that, although revenue management is not changing, "the amount of data and how that information is used to grow revenue is bigger and better than ever" with AIRM.

170. Landlords want access to RealPage's transactional data because RealPage advertises, and landlords believe, that the use of this data will increase a landlord's revenue. "Due to the amount of data RealPage possesses," Greystar explained, RealPage developed AIRM "to leverage machine learning to improve both the supply and demand modeling and provide a tool to further customize to each asset's needs." The materials sent to the landlord's clients also included a flyer explaining that AIRM will "outperform the market 2–7% year over year" and that it provides "[a]ctionable intelligence derived from the industry's largest lease transaction database of 13M+ units."

171. Landlords view the lack of access to transactional data as a significant shortcoming in other commercial revenue management software. One landlord received a request from a property owner client for information on YieldStar and how it compared to another commercial revenue management product. A landlord executive explained that YieldStar was backed by robust data and "millions of units of transactional data to support not only their demand and forecast modeling but also their market/competitive set information." She concluded that the other revenue management software was "in a completely different class" than YieldStar. More than two years later, the same executive again concluded that this company's new revenue management product was inferior to AIRM because AIRM had far more transactional data, supported by RealPage's Market Analytics survey data. In another example, a different landlord compared multiple commercial revenue management products to RealPage's YieldStar. He concluded that a major weakness of these alternatives was that they lacked access to transactional data on competitors' rents.

B. RealPage's Collection and Use of Competitively Sensitive Data Excludes Competition in Commercial Revenue Management Software

172. RealPage recognizes the barriers to competition on the merits that its data, scale, and business model provide. RealPage understands that "pricing decisions start with data." RealPage explains to its clients that "[t]he data entered into your [property management software] and collected each night, along with current market data (and lead data if OneSite) provides insight into advantageous demand drivers, identifies revenue risk and opportunity, and captures this competitive landscape for informed pricing."

173. This data and scale advantage is significant and creates a feedback loop that further increases barriers to competition for commercial revenue management software. RealPage touts its access to an "unmatched database." In one case from 2023, a RealPage sales representative noted that RealPage's "revenue management is the most widely adopted solution in the industry" and RealPage had "approximately 4.8M units on revenue management." In a 2023 presentation for AIRM, RealPage advertised that the "[a]mount of data we have (~17mm units) is unique to RealPage" and that the "[q]uality of data is best in class given that it is 'Lease Transaction Data.'" RealPage claimed this "supports that fact that the industry views RealPage as the source of truth for performance data."

174. RealPage has used this competitively sensitive data to develop an AI-driven revenue management solution that leverages the scale and scope of its data. RealPage's plan to use this database as fuel for its AI pricing model is spelled out in a Go-To-Market summary from 2019. In that document, RealPage describes that:

RealPage can achieve \$10 Million in organic ACV growth through delivery of the next generation of revenue management. Failure to do so reduces the opportunity to harvest gains from our \$300M investment in LRO and places a portion of current \$100M revenue management revenue at risk to emerging competitors, including Yardi and low-cost alternatives that say 'all revenue management is the same.' Over time we can sunset YieldStar and LRO reducing expense, and leverage LRO capabilities as a revenue management lite offering.

175. This plan came to fruition with the introduction of AIRM. In a RealPage training presentation from February 2020—right before the launch of AIRM—RealPage discusses a new optimization solution that is built on the "RealPage Foundation" which is

defined as “13.5m units of lease transactional data informing our models with real actionable intelligence in near real time.” As described earlier in the deck, RealPage’s competitors “lack the foundational capabilities on which to build upon” leaving RealPage with the possibility “to tie together each capability . . . in a single view.”

176. RealPage knows that its rivals do not have access to similar data sets. In one presentation from 2022, RealPage discussed competing revenue management products from Yardi and Entrata. Yardi and Entrata have fewer than 250,000 units, RealPage concluded, while RealPage had at least 4 million. Unlike RealPage, Yardi had a limited data set that used data only from Yardi’s property management software. RealPage likewise explained that Entrata lacked much data outside of student housing and Entrata’s revenue management software worked only with its own property management software, meaning Entrata could not pull data from RealPage’s OneSite or other property management software products. RealPage further criticized manual in-house pricing options for having biased data, introducing errors through manual pricing, and being inefficient.

177. RealPage pitches prospective clients on its unique access to and use of nonpublic transactional data that is competitively sensitive. In 2021, RealPage discussed internally how to pitch AIRM to a prospective client who was considering an alternative revenue management solution. A RealPage employee pointed to the competitor’s lack of “AI driven competitor information derived from lease transaction data.” Another employee added that the salesperson should amplify the prospective client’s concerns about the competitor’s lack of nonpublic transactional data, comparing it to buying a “Ferrari without an engine.” RealPage’s chief economist concurred.

178. RealPage’s use of competitors’ nonpublic transactional data provides it an important advantage on pricing renewals. Information on renewals is not available publicly. Competing revenue management vendors who do not use nonpublic, competitively sensitive data are left partially blind to this important part of the rental market. In 2022, a RealPage salesperson stressed this advantage to a prospective client who was also considering a competing commercial revenue management solution. The salesperson noted the lease transaction data RealPage collected on a nightly basis and declared that RealPage had an

“unequaled ability to stress test renewals *nightly* and drive amenity optimization.”

179. RealPage recognizes that its use of competitively sensitive data minimizes any competitive pressure it faces. A RealPage senior vice president explained in a strategy document that RealPage’s unique nonpublic data on leasing decisions was a “data moat,” protecting RealPage from competitors. In 2020 RealPage’s chief economist noted that RealPage’s access to this data was a “major competitive advantage” and a “major reason we can do what we do.” In 2021 a prospective client asked RealPage why AIRM cost three times the amount of a competing revenue management product. Internally, a RealPage employee pointed to AIRM leveraging daily transactional data of over 13 million units to collect competitors’ rents and forecast demand. He noted that multiple large landlords had refused to adopt the competing revenue management product rather than AIRM even when the competitor offered it for free. The same RealPage employee explained to another client that RealPage’s leveraging of lease transaction data—with access to confidential data for over 14 million units—was a key advantage over a competing commercial revenue management provider.

180. In June 2023 a landlord emailed RealPage and asked, “who are your competitors?” A RealPage sales executive responded, “Our revenue management solution does not have any true competitors, mainly because our data is based on real lease transaction data from all kinds of third-party property management systems”

181. In addition, when discussing a potential entrant, a RealPage executive noted that the entrant needed “to get the data to enable [revenue management].” He further noted that [g]etting the data (and more modern methods) . . . will be hurdles for [the entrant].” Another RealPage senior executive explained that shifting clients from LRO, which is less reliant on competitively sensitive information of rivals, to AIRM, which is very reliant on such information, reduced the threat from new entry when she noted that migrating LRO clients to AIRM was “critical to reducing the risk that may come from this new [entrant’s] offering.”

182. RealPage’s power and conduct in connection with commercial revenue management software serves to exclude rivals and maintain its monopoly power. RealPage has ensured rivals cannot compete on the merits unless they enter into similar agreements with landlords, offer to share competitively

sensitive information among rival landlords, and engage in actions to increase compliance. As a result of its exclusionary conduct, RealPage has been able to obstruct rival software providers from competing via revenue management products that do not harm the competitive process in addition to cementing its massive data and scale advantage that keeps increasing due to feedback effects.

VI. Relevant Markets

A. Conventional Multifamily Rental Housing Markets

1. Product Markets

183. Conventional multifamily rental housing is a relevant product market. Conventional multifamily rental housing includes apartments available to the general public in properties that have five or more living units. Conventional rental housing does not include student housing, affordable housing, age-restricted or senior housing, or military housing. This product market reflects consumer preferences, industry practice, and governmental policy.

184. In 2023, RealPage estimated the conventional multifamily rental market to cover approximately 14 million units. The 2021 American Housing Survey estimated a total of 21.1 million multifamily apartments—not limited to conventional—in the United States.

(a) Conventional Multifamily Rentals Are Distinct From Other Types of Multifamily Housing

185. Other types of multifamily apartment buildings are not good substitutes for conventional multifamily rentals. Some kinds of multifamily buildings are restricted to specific types of renters, such as student housing units, affordable housing units (*i.e.*, income-restricted housing), senior (*i.e.*, age-restricted) housing, and military housing. These housing units focused on different classes of renters are not reasonable substitutes for conventional multifamily rentals. RealPage distinguishes conventional multifamily as being in a different market segment from senior, affordable, and student housing in the ordinary course of business.

186. Non-conventional units are not widely available to all renters and can exhibit different buying patterns. For example, student housing serves individuals enrolled in higher education and is typically located on or near universities. Student housing is typically leased by the bed instead of by unit, and faces a significantly different leasing cycle and different patterns in

renewals and leasing practices. Recognizing these differences, RealPage will assign to student properties surrogates that are distant student assets rather than nearby conventional assets. RealPage in fact offers a different version of both AIRM and OneSite, its property management software, for the “student market.”

187. Affordable housing units are available only to individuals or households whose income falls below certain thresholds. Multiple federal affordable housing regulations, for example, require participants in affordable housing programs to have incomes lower than a set percentage, such as 30%, of the median family income in the local area. Affordable housing units are also relatively scarce, with families seeking such housing often waiting years on a waitlist. These legal and practical restrictions prevent affordable housing from being a reasonable substitute to conventional multifamily housing for the typical renter.

188. Senior housing is typically restricted to individuals aged 55 and older. RealPage separates senior housing into four categories: independent living, assisted living, memory care, and nursing care. Independent living offers senior-focused amenities—such as transportation, meals, and social gatherings among community members—that materially increase housing costs and are less desirable to younger households. The other three categories of senior housing provide professional or special care to assist renters with basic tasks like eating, bathing, and dressing, and they are not reasonable substitutes for conventional multifamily rentals.

189. Military housing is also not a reasonable substitute to conventional multifamily rentals. It is typically geographically proximate to military installations, with roughly 95% of military housing found on-base. Although civilians may in some cases be able to live in military housing properties experiencing low occupancy rates, military regulations place them below five higher-priority categories of potential renters, including active and retired military personnel.

(b) Single-Family Housing Is Not A Reasonable Substitute to Multifamily Rentals

190. The multifamily industry, government regulators, and policy documents distinguish between

properties with at least five units, which are classified as “multifamily housing” and those with fewer units, which are classified as “single-family rentals.”

191. The purchase of single-family or other types of homes is not a reasonable substitute for conventional multifamily housing rentals. A former RealPage economist explained that “the choice between renting and owning is first and foremost a life stage and lifestyle choice over a financial one.” Single-family homes also generally require a substantial down payment. In March 2023, a RealPage economist estimated an “entry premium” of \$800 per month to home ownership over rentals. According to a 2021 RealPage strategic planning guide, the “myth” that people were abandoning multifamily properties for single-family homes is false, stating that “rising home sales do not hurt apartment demand.” Single-family home sales are not reasonable substitutes for conventional multifamily housing.

192. More broadly, renters living in conventional multifamily apartments will not switch to single-family homes—purchases or rentals—because of a small increase in rent. The decision to move from an apartment building to a single-family home is primarily a life-stage and lifestyle choice. For example, the decision by a household to have children may spur a move to a single-family home. In many areas, relatively few children live in conventional multifamily apartments. Multifamily apartments typically offer community amenities and a different lifestyle, such as high walkability in an urban area, whereas single-family homes generally do not offer the same amenities and offer instead increased privacy, including private yards. A RealPage analyst explained in 2022 that because a move to a single-family home is a “lifestyle choice,” single-family home rentals were not direct competitors to multifamily rental housing. A 2022 RealPage deck, shared with a landlord, stated that multifamily rentals and single-family rentals were “complementary, not competitive,” and targeted different renters, with different floor plans, in different locations. Another RealPage analyst explained to a multifamily property owner that single-family rentals offer a different renter profile than multifamily rentals.

193. Industry participants agree that single-family rentals attract a different pool of renters from multifamily rentals. A managing director of a single-family

rental property management company explained in 2021 that a renter’s journey from multifamily apartment living to single-family rentals came as life stages evolved. The CEO of a single-family rental developer similarly explained that these single-family rental homes are for renters who age out of multifamily apartments.

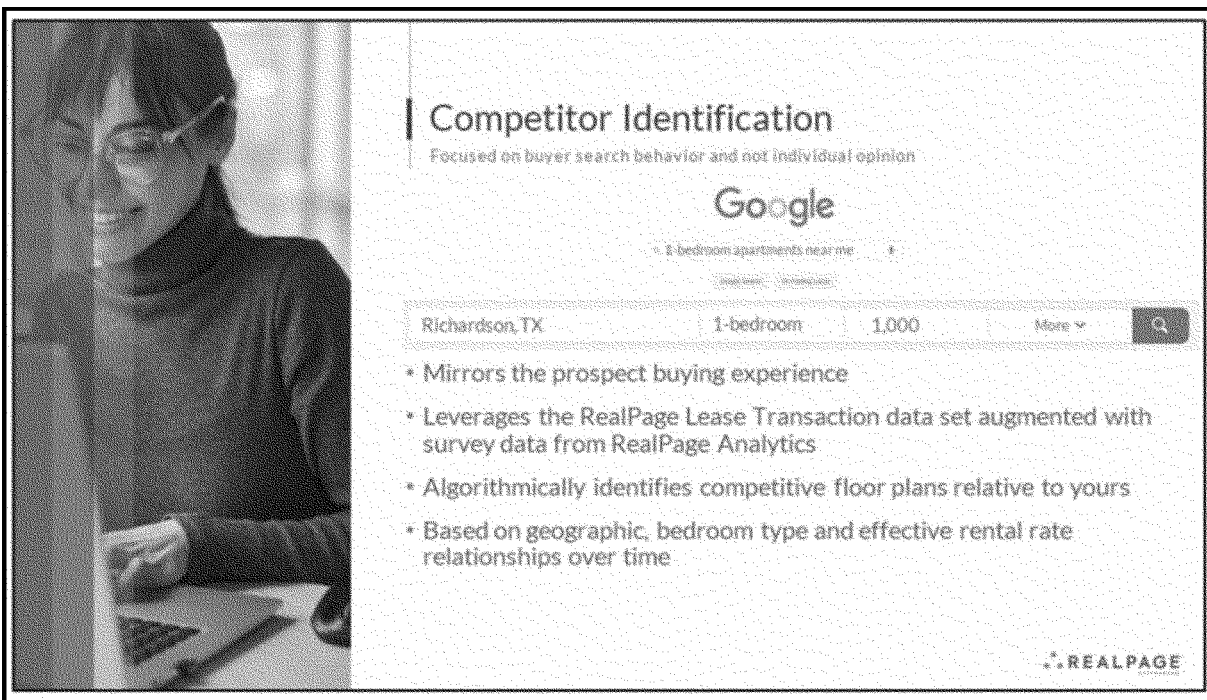
194. Single-family rentals are also typically priced higher than multifamily apartments, further reducing potential substitution between them. The chairman of one institutional multifamily property owner explained in a 2022 earnings call that multifamily housing was relatively affordable compared to single-family rentals. An industry price index showed that, in March 2024, single-family rent was approximately 18% higher than multifamily rent.

(c) Conventional Multifamily Rental Units With Different Bedroom Counts Are Relevant Product Markets

195. Different bedroom floor plans also constitute relevant product markets. A key criterion by which a current or prospective renter searches for a rental unit is the number of bedrooms. One-bedroom units are substitutes for other one-bedroom units, two-bedroom units are substitutes for other two-bedroom units, and so forth. Individual renters may change their desired numbers of bedrooms, but this is typically tied to changes in circumstance independent from price. For example, the birth of a new child may require a family to shift from a one-bedroom unit to a two-bedroom unit.

196. RealPage adopts this practical reality in the ordinary course of business. For every property using AIRM or YieldStar, RealPage maps peer floor plans. These mapped floor plans capture reasonable substitutes for the subject property floor plan and reflect the perceived market by a prospective renter.

197. To be selected as a peer, a floor plan must have the same number of bedrooms. A RealPage employee explained the mapping process to a client: “we are looking specifically at the bedroom level. The tool will only map 2b[edroom] with 2b[edroom] or 1b[edroom] with 1b[edroom].” The object of mapping peers is to mirror the prospect buying experience by identifying properties that a potential tenant will see in online searches when searching for a particular floor plan and price range.



198. AIRM and YieldStar price the different floor plans, which consist of different numbers of bedrooms, independently. RealPage testified that the model considers no cross-price elasticity between different floor plans: “when you set up the different floor plans, a one bedroom, a two bedroom, or three bedroom, those are completely independent. . . . [T]here’s no influence in what the pricing is for the two bedrooms, for example. . . . has no influence on what the pricing is for the one bedrooms.” Landlords also take steps to maintain a pricing spread between one- and two-bedroom units and avoid pricing one-bedrooms at a higher rate than two-bedroom units.

199. Landlords recognize that units with different bedroom counts face different demand from renters. For example, Greystar explained internally in 2022 that demand for studio apartments differs from demand for three-bedroom units. A separate 2023 training by Greystar reiterated that demand trends, and therefore pricing trends, differ by bedroom counts and that staff should not react to a downward trend in one category, such as two bedrooms, with discounts in one- or three-bedroom units. At another time, Greystar emphasized the benefit of RealPage’s lease expiration management feature because it is managed at the bedroom level—not at the property level—so it could match seasonal demand for units with that specific number of bedrooms. A revenue manager at Willow Bridge similarly

explained to colleagues that one-bedroom units have drastically different demand patterns from two-bedroom units and from three-bedroom units.

2. Geographic Markets

200. Defining relevant geographic markets help courts assess the potential anticompetitive impact of the agreements challenged. Here, the relevant geographic markets for the purposes of analyzing the anticompetitive effects of RealPage’s agreements with landlords are the areas in which the sellers (the landlords) sell and in which the purchasers (potential renters) can practicably turn for alternatives. RealPage’s agreements are alleged to have suppressed price competition in the markets for conventional multifamily housing. The relevant geographic markets to assess those agreements are those property locations close enough for their apartments to be considered reasonable substitutes. In delineating a geographic market for conventional multifamily housing, the focus is inherently local. Renters are typically tied to a particular location for work, family, or other needs.

201. RealPage recognizes the local nature of geographic markets. One RealPage former employee explained that under “Real Estate 101 rules, real estate is local, local, local.” Another RealPage former chief economist noted that an effective evaluation of a property’s performance must be done in comparison to similar properties in the

property’s neighborhood because competitive conditions in the neighborhood could differ widely from the city at large. When training landlords on lease expiration management, two RealPage executives explained that market seasonality was based on the most accurate geographic level, such as zip code, neighborhood, or submarket. They further explained that renters typically move locally. Similarly, a former property manager explained that potential tenants will look at a small number of properties in the same neighborhood, and it is on that neighborhood level where competition occurs among multifamily properties. This individual testified, “location really does matter in real estate.”

202. RealPage has created a tool called True Comps. Used in performance benchmarking products that provide decisional support to AIRM and YieldStar, True Comps provides a more accurate mapping of competitor properties. It uses an algorithm to find the properties most comparable to the subject property, as measured by characteristics including distance, effective rent, age, property height, and unit count and mix. By default, True Comps picks competitors within a 15-mile radius. In scoring distance, True Comps applies a “highly-punitive model”—the distance score drops from 99% for a distance of 0.05 miles, to 56% for a distance of 2 miles, and to 10% for a distance of 8 miles. Thus, RealPage acknowledges and incorporates small geographic areas as the appropriate

location in which to find true competitive alternatives.

203. During a property's implementation process, AIRM and YieldStar require the mapping of peer properties, including competitors. RealPage starts by looking for competitors within a half-mile radius from the subject property and then expands as necessary. Geographic proximity is in fact so important that YieldStar has a default radius that limits its search for competing properties to no more than 5 miles in urban settings, and to no more than 10 miles in suburban settings. RealPage has an internal process for escalating any proposed peer property that is more than 15 miles away.

(a) RealPage-Defined Submarkets Identify Relevant Geographic Markets

204. RealPage defines geographic submarkets in the ordinary course of business. Each submarket reflects the geographic area, defined by a set of zip codes, that features similar properties that compete for the same pool of potential renters. In constructing submarkets, which are generally larger than its neighborhoods, RealPage considers major roads, city and county boundaries, and school districts. RealPage also considers socioeconomic factors and apartment market characteristics, such as the age of properties and rental rates.

205. Even within a city, apartment demand varies significantly based on factors such as employment. Supply may also vary widely as existing properties and new construction may be located in different parts of a city. A former RealPage chief economist explained that because "real estate is very local . . . you typically want to take a . . . more narrow view if you can on what's going on in any given submarket."¹⁰

206. The multifamily industry recognizes submarkets as an important geographic area for analyzing competition and pools of renters. Multiple industry analysts offer data by submarkets. A revenue management director at Greystar testified about a submarket that "everybody in our industry uses this term." She further stated that submarkets are a standard

categorization system, used by RealPage and others, including to benchmark a subject property's performance with comparable properties. A revenue manager at Cushman & Wakefield circulated a scorecard comparing performance to the submarket, and exclaimed that "we're perfectly aligned with the submarket" on rent roll.

207. A revenue management executive at Willow Bridge testified that submarkets identify specific, smaller areas of a city where renters look to live to be close to schools or work. This executive testified that submarkets typically identify the area within which a renter is comparing apartment options. This landlord tracks other properties' rents in a subject property's submarket to make sure the subject property remains competitive, and if rents in a submarket increased, then the landlord expected that its property in that submarket would also raise its rents.

208. Appendix A lists RealPage-defined submarkets that identify relevant local markets in which the agreements among RealPage and landlords to share nonpublic, competitively sensitive information for use in pricing conventional multifamily rentals have harmed, or are likely to harm, competition and thus renters.

209. The RealPage-defined submarkets identified in Appendix A are relevant markets in which the agreements between RealPage and AIRM and YieldStar users to align pricing has harmed, or is likely to harm, competition and thus renters. In each of these markets, the penetration rate for AIRM and YieldStar ranges from at least around 26% to 69%, and for AIRM, YieldStar, and OneSite ranges from at least around 30% to 78%.¹¹ In each of these markets, the landlords using AIRM or YieldStar and/or sharing competitively sensitive information collectively have market power.

210. Appendix B identifies submarkets by bedroom count that are relevant markets in which the agreements between RealPage and

landlords, and agreements among landlords, to share nonpublic, competitively sensitive information for use in pricing conventional multifamily rentals have harmed, or are likely to harm, competition and thus renters.

211. The markets identified in Appendix B are relevant markets in which the agreements between RealPage and AIRM and YieldStar users to align pricing collectively have harmed, or are likely to harm, competition and thus renters. In each of these markets, the penetration rate for AIRM and YieldStar ranges from at least around 26% to 79%, and for AIRM, YieldStar, and OneSite ranges from at least around 30% to over 80%. In each of these markets, the landlords using AIRM or YieldStar and/or sharing competitively sensitive information collectively have market power.

(b) Core-Based Statistical Areas (CBSAs) Are Relevant Geographic Markets

212. A core-based statistical area (CBSA) is also a relevant geographic market. A CBSA is a geographic area based on a county or group of counties. A CBSA has at least one core of at least 10,000 individuals. A CBSA includes adjacent counties that have a high degree of social and economic integration with the core, as measured by commuting ties. A CBSA includes both metropolitan statistical areas and micropolitan statistical areas. A CBSA includes the set of reasonable conventional multifamily rental alternatives to which a renter would turn in response to a small but significant, nontransitory price increase.

213. RealPage itself tracks CBSAs in the ordinary course of business and refers to them as "markets."

214. Table 1 identifies relevant markets in which the agreements between RealPage and landlords, and agreements among landlords, to share nonpublic, competitively sensitive information for use in pricing conventional multifamily rentals collectively have harmed, or are likely to harm, competition and/or consumers. In each of these markets, the penetration rate for AIRM and YieldStar ranges from at least around 26% to 37%, and for AIRM, YieldStar, and OneSite ranges from at least around 35% to 45%. Three of these markets are located in North Carolina.

¹¹ Including penetration rates for RealPage's Business Intelligence and Performance Analytics with Benchmarking products, which landlord users agree to share nonpublic data with RealPage that RealPage then uses in AIRM and YieldStar, would increase the data penetration rates subject to unlawful agreements for these and all other relevant conventional multifamily rental housing markets identified in the Complaint.

¹⁰ RealPage also tracks data at a more granular level than a submarket, called a neighborhood.

TABLE 1—CORE-BASED STATISTICAL AREA (CBSA) MARKETS

Core-based statistical area (CBSA) markets	YS/ AIRM 30% or more	YS/AIRM/ OneSite 30% or more
Atlanta-Sandy Springs-Roswell, GA	Yes	Yes.
Austin-Round Rock, TX	Yes	Yes.
Charleston-North Charleston, SC	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	Yes	Yes.
Dallas-Fort Worth-Arlington, TX	Yes	Yes.
Denver-Aurora-Lakewood, CO	Yes	Yes.
Durham-Chapel Hill, NC	Yes	Yes.
Nashville-Davidson—Murfreesboro—Franklin, TN	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	Yes	Yes.
Raleigh, NC	Yes	Yes.

215. The markets identified in Table 1 are relevant markets in which the agreements between RealPage and AIRM and YieldStar users to align pricing collectively have harmed, or are likely to harm, competition and thus renters.

216. Table 2 identifies relevant CBSAs by bedroom counts that are relevant

markets in which the agreements between RealPage and landlords, and agreements among landlords, to share nonpublic, competitively sensitive information for use in pricing conventional multifamily rentals collectively have harmed, or are likely

to harm, competition and/or consumers. In each of these markets, the penetration rate for AIRM and YieldStar ranges from at least around 27% to 42%, and for AIRM, YieldStar, and OneSite ranges from at least around 33% to 45%.

TABLE 2—CORE-BASED STATISTICAL AREA (CBSA) MARKETS BY BEDROOM COUNT

Core-based statistical area (CBSA) markets	Number of Beds	YS/AIRM 30% or more	YS/AIRM/ OneSite 30% or more
Atlanta-Sandy Springs-Roswell, GA	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	2	Yes	Yes.
Austin-Round Rock, TX	1	Yes	Yes.
Austin-Round Rock, TX	2	Yes	Yes.
Charleston-North Charleston, SC	1	Yes	Yes.
Charleston-North Charleston, SC	2	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	1	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	2	Yes	Yes.
Dallas-Fort Worth-Arlington, TX	1	Yes	Yes.
Dallas-Fort Worth-Arlington, TX	2	Yes	Yes.
Denver-Aurora-Lakewood, CO	1	Yes	Yes.
Denver-Aurora-Lakewood, CO	2	Yes	Yes.
Durham-Chapel Hill, NC	1	Yes	Yes.
Durham-Chapel Hill, NC	2	Yes	Yes.
Nashville-Davidson—Murfreesboro—Franklin, TN	1	Yes	Yes.
Nashville-Davidson—Murfreesboro—Franklin, TN	2	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	1	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	2	Yes	Yes.
Raleigh, NC	1	Yes	Yes.
Raleigh, NC	2	Yes	Yes.

217. The markets identified in Table 2 are relevant markets in which the agreements between RealPage and AIRM and YieldStar users to align pricing collectively have harmed, or are likely to harm, competition and thus renters.

218. Even assuming available land and no regulatory constrictions, local markets for conventional multifamily rental housing feature substantial barriers to entry. Landlords seeking to respond to rising rental prices by expanding supply, rather than simply acquiring an existing property, typically face substantial lead times to construct a new multifamily property.

Additionally, there are significant upfront capital costs, including to fund expenditures on building material and labor, that are recuperated over time, which may require landlords to secure financing.

B. Commercial Revenue Management Software Market

219. RealPage has monopoly power in the market for commercial revenue management software for conventional multifamily housing rentals in the United States, with a durable market share over 80%, according to internal documents and other information.

1. Product Market

220. Commercial revenue management software for conventional multifamily housing rentals is a relevant antitrust product market.

221. Other methods for pricing conventional multifamily housing units are not reasonable substitutes for commercial revenue management software. RealPage and others in the industry recognize that revenue management software companies for multifamily housing units compete primarily against each other and not manual or do-it-yourself pricing methods.

222. Internal documents from RealPage refer specifically to commercial revenue management for multifamily housing and recognize RealPage's substantial market share. For example, a 2021 strategy presentation described RealPage as "the market leader in commercial revenue management for multifamily [housing] with 45 of the 50 Top NMHC Owner and Operators" all using RealPage's revenue management products.

223. A presentation to RealPage's board in 2022 noted that "[RealPage] has gained [the] pole position in Revenue Management largely through the success of AI Revenue Management, which has become RealPage's leading differentiating product." Additionally, the presentation described how "Revenue Management is experiencing strong growth driven by AIRM" due to its "PMS agnostic approach" which gives RealPage the ability to aggregate data from its clients resulting in "revenue management [that] has achieved a market share of 95% of the top 50 owners and operators."

224. RealPage acknowledges its market power and durable market position. A 2023 RealPage presentation reviewing the use of artificial intelligence in property technology noted that "RealPage is already the de facto market leader in certain key areas at leveraging AI for multifamily proptech" and shows "revenue management" as the area where it is the furthest ahead." Later, the same presentation noted that RealPage's current offer for revenue management is "best-in-class" and that "[n]o other company is cross-pollinating their pricing tools with data in a way similar to [RealPage]." As early as 2019, a RealPage presentation for clients stated that RealPage "has around 80% of the Revenue Management market share." That share has proved durable over time. In 2023, during a sales pitch to a property owner, a RealPage representative noted that "[RealPage] has 80% to 85% of the market share with the closest competitor around 12% (<750K units)."

225. In late 2021, a RealPage employee preparing competitor intelligence explained to RealPage's chief economist that RealPage "dominate[d]" revenue management. He added that RealPage "dominate[d]" Yardi and Entrata, which are the next two largest commercial revenue management competitors.

226. RealPage's monopoly power is protected by barriers to entry, including the unlawful collection and use of competitors' nonpublic transactional data on millions of multifamily units.

227. Landlords also recognize RealPage's substantial market share and market power over commercial revenue management software. In 2024, a landlord revenue management executive testified that manual pricing does not compete with AIRM. The same landlord pitched YieldStar to its owner clients by explaining that "it's evident manual pricing cannot solve at the level a revenue management tool can."

228. In a 2023 pricing dispute with a large landlord, RealPage refused to lower the price for its AIRM software. In response, an employee employed by the landlord noted that it was no surprise they would not decrease their price, remarking that "[h]ere is the joy of a monopoly on a product category." In 2021, a different landlord commented that "the entire industry is feeling the monopolizing effects of RealPage right now and everyone is hungry for a new product." A third landlord noted during AIRM renewal negotiations in 2022 that it had no options besides RealPage, with a senior executive stating about RealPage, "too bad they have a monopoly going here!" Also in 2022, a fourth landlord, in the face of RealPage pushing a 400% increase in annual revenue management costs over a five-year period, bemoaned the "limited competition in the market around revenue management tools" and how "the industry desperately needs a solid competitor," and then discussed a plan to "incubate a viable alternative to AIRM in the future." In 2024, that alternative had less than one half of one percent market share.

2. Geographic Market

229. The United States is a relevant geographic market for commercial revenue management software. RealPage sells its commercial revenue management software in the United States and tracks its business in the United States in the ordinary course of business. RealPage sets its subscription prices on a nationwide basis. Further, RealPage can deploy its commercial revenue management software, which may use inputs from properties located throughout the country, in any U.S. state. Landlords in the United States purchase commercial revenue management software from RealPage to set rental prices for renters in the United States. Many landlords have centralized revenue management teams that set nationwide revenue management policies and conduct revenue management trainings for their employees across the United States.

VII. Jurisdiction, Venue, and Commerce

230. The United States brings this action pursuant to Section 4 of the Sherman Act, 15 U.S.C. 4, to prevent and restrain RealPage's violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2.

231. The Attorneys General assert these claims based on their independent authority to bring this action pursuant to Section 16 of the Clayton Act, 15 U.S.C. 26, and common law, to obtain injunctive and other equitable relief based on RealPage's anticompetitive practices in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2.

232. The Attorneys General are the chief legal officers of their respective States. They have authority to bring actions to protect the economic well-being of their States and their residents, and to seek injunctive relief to remedy and protect against harm resulting from violations of the antitrust laws.

233. This Court has subject matter jurisdiction over this action under Section 4 of the Sherman Act, 15 U.S.C. 4, and 28 U.S.C. 1331, 1337(a), and 1345.

234. The Court has personal jurisdiction over RealPage, Inc. ("RealPage"); venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. 22, and under 28 U.S.C. 1391 because RealPage transacts business and resides within this District.

235. RealPage is a privately-owned company organized and existing under the laws of the State of Delaware and is headquartered in Richardson, Texas. It is registered to do business in the State of North Carolina as a foreign corporation offering software solutions for the multifamily housing industry and software as a service.

236. RealPage engages in, and its activities substantially affect, interstate trade and commerce. RealPage provides a range of products and services that are marketed, distributed, and offered to consumers throughout the United States and across state lines.

237. The Court has personal jurisdiction over Camden Property Trust ("Camden"); venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. 22, and under 28 U.S.C. 1391 because Camden transacts business and resides within this District.

238. Camden is a publicly-traded multifamily company organized under the laws of the State of Delaware and is headquartered in Houston, Texas. Camden is registered to do business in the State of North Carolina. Camden owns or manages at least one

multifamily rental property using AIRM within this District.

239. Camden engages in, and its activities substantially affect, interstate trade and commerce. Camden owns or manages multifamily rental units across the United States, including within this District. Camden's rental properties are marketed and offered to consumers throughout the United States and across state lines.

240. The Court has personal jurisdiction over Cortland Management, LLC ("Cortland"); venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. 22, and under 28 U.S.C. 1391 because Cortland transacts business and resides within this District.

241. Cortland is a privately-owned company organized under the laws of the State of Delaware and is headquartered in Atlanta, Georgia. Cortland is responsible for the management of multifamily rental housing properties, either directly owned by an affiliated entity or other third-party owners of multifamily housing properties. Cortland is registered to do business in the State of North Carolina. Cortland owns or manages multiple multifamily rental properties within this District, which use (or recently used) AIRM. Cortland has a registered agent for service of process in this District.

242. Cortland engages in, and its activities substantially affect, interstate trade and commerce. Cortland owns or manages multifamily rental units across the United States, including within this District. Cortland's rental properties are marketed and offered to consumers throughout the United States and across state lines.

243. The Court has personal jurisdiction over Cushman & Wakefield, Inc. ("Cushman & Wakefield") and Pinnacle Property Management Services, LLC ("Pinnacle"); venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. 22, and under 28 U.S.C. 1391 because Cushman & Wakefield, including its subsidiary Pinnacle, transacts business and resides within this District.

244. Cushman & Wakefield is organized under the laws of the State of New York and is headquartered in Chicago, Illinois. Cushman & Wakefield's multifamily rental property business is operated through its subsidiary Pinnacle, and also under the Cushman & Wakefield name since acquiring Pinnacle in March 2020. Pinnacle is organized under the laws of the State of Delaware and is headquartered in Frisco, Texas. Pinnacle is registered to do business in

the State of North Carolina. Cushman & Wakefield U.S., Inc. is also registered to do business in the State of North Carolina. Pinnacle owns or manages multiple multifamily rental properties using YieldStar within this District.

245. Cushman & Wakefield engages in, and its activities substantially affect, interstate trade and commerce. Through Pinnacle, Cushman & Wakefield owns or manages multifamily rental units across the United States, including within this District. Cushman & Wakefield provides a range of multifamily property and revenue management services that are marketed and offered to consumers throughout the United States and across state lines.

246. The Court has personal jurisdiction over Greystar Real Estate Partners, LLC ("Greystar"); venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. 22, and under 28 U.S.C. 1391 because Greystar transacts business and resides within the District.

247. Greystar is a privately-owned company organized under the laws of the State of Delaware and is headquartered in Charleston, South Carolina. A Greystar management services entity is registered to do business in the State of North Carolina. Greystar owns or manages multiple multifamily rental properties using AIRM within this District.

248. Greystar engages in, and its activities substantially affect, interstate trade and commerce. Through its subsidiaries, including Greystar Management Services, LLC, Greystar North America Holdings, LLC, and GREP Washington, LLC, Greystar owns or manages multifamily rental units across the United States, including within this District. Greystar provides a range of products and services that are marketed and offered to consumers throughout the United States and across state lines.

249. The Court has personal jurisdiction over LivCor, LLC ("LivCor"); venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. 22, and under 28 U.S.C. 1391 because LivCor transacts business and resides within this District.

250. LivCor is a privately-owned company organized under the laws of the State of Delaware and is headquartered in Chicago, Illinois. It is registered to do business in the State of North Carolina as a foreign corporation engaging in ownership and investment in real property and related services. LivCor owns or provides asset management services at least one multifamily rental property using AIRM within this District.

251. LivCor engages in, and its activities substantially affect, interstate trade and commerce. LivCor owns or provides asset management services for multifamily rental units across the United States, including within this District. LivCor provides multifamily asset management services that are marketed and offered to consumers throughout the United States and across state lines.

252. The Court has personal jurisdiction over Willow Bridge Property Company LLC ("Willow Bridge"); venue is proper in this District under 28 U.S.C. 1391 and Section 12 of the Clayton Act, 15 U.S.C. 22 because Willow Bridge transacts business and resides within this District.

253. Willow Bridge is a privately-owned company organized under the laws of the State of Texas and is headquartered in Dallas, Texas. Willow Bridge is registered to do business in the State of North Carolina as a foreign corporation offering services for the multifamily real estate industry. Willow Bridge owns or manages multiple multifamily rental properties using AIRM within this District.

254. Willow Bridge engages in, and its activities substantially affect, interstate trade and commerce. Willow Bridge owns or manages multifamily rental units across the United States, including within this District. Willow Bridge's rental properties are marketed and offered to consumers throughout the United States and across state lines.

255. The Durham-Chapel Hill CBSA is partially or entirely within the Middle District of North Carolina.

256. RealPage tracks the number of rental housing units that use its commercial revenue management software products, including AIRM and YieldStar, by market (*i.e.*, a CBSA) and submarket, and several of these markets and submarkets are entirely or partially within North Carolina. These RealPage-defined markets include Raleigh/Durham, NC; Charlotte-Concord-Gastonia, NC-SC; Greensboro/Winston-Salem, NC; Wilmington, NC; Fayetteville, NC; and Asheville, NC. The submarkets include Southwest Durham, Northwest Durham/Downtown, East Durham, and Chapel Hill/Carrboro, all of which are located entirely or partially within this District.

257. Defendant Landlords each own or manage one or more properties in one or more relevant markets within the Middle District of North Carolina for which they, along with other landlords and RealPage, currently agree (or have in the past agreed) to share information and align pricing by using AIRM or YieldStar to generate rental pricing

using pooled, competitively sensitive information.

258. A substantial part of the activities and conduct giving rise to the claims asserted in this Complaint occurred within this District. As alleged in paragraphs 208–211 above and Appendices A and B below, relevant local geographic markets in which competition and renters have been harmed by RealPage’s anticompetitive conduct include the RealPage-defined submarkets in Raleigh/Durham. As alleged in paragraphs 214–217 above, relevant geographic markets in which competition and renters have been harmed by RealPage’s anticompetitive conduct include the Durham–Chapel Hill CBSA.

VIII. Violations Alleged

First Claim for Relief: Violation of Section 1 of the Sherman Act by Unlawfully Sharing Information for Use in Competitors’ Pricing

(By All Plaintiffs Against RealPage, Cushman & Wakefield, Greystar, LivCor, and Pinnacle; By All Plaintiffs Except Washington Against Camden and Willow Bridge; By the United States, Colorado, and North Carolina Against Cortland)

259. Plaintiffs incorporate the allegations of paragraphs 1 through 258 above.

260. Each landlord using AIRM and YieldStar, including each Defendant Landlord, has agreed with RealPage to provide RealPage daily nonpublic, competitively sensitive data. RealPage invites each landlord to share this information so that it can be pooled to generate pricing recommendations for the landlord and its competitors. Each of these landlords, including Defendant Landlords, uses (or has used) RealPage software, knowing or learning that RealPage will use this data to train its models and provide floor plan price recommendations and unit-level pricing not only for the landlord, but for the landlord’s competitors (and vice versa). Landlords are therefore joining together in a way that deprives the market of fully independent centers of decision-making on pricing.

261. Each landlord using OneSite, Business Intelligence, or Performance Analytics with Benchmarking has agreed with RealPage to provide RealPage daily nonpublic, competitively sensitive data. RealPage invites each landlord to share this information, and each of these landlords understands that RealPage will use this data in RealPage’s other products, including revenue management products that provide

pricing recommendations and prices to competing landlords.

262. The transactional data these landlords agree to provide to RealPage, and indirectly to each other, includes current, forward-looking, granular, and highly competitively sensitive information. It includes information on effective rents, rent discounts, occupancy rates, availability, lease dates, lease terms, unit amenities, and unit layouts. Landlords also shared information on guest cards and lease applications.

263. Landlords, including Defendant Landlords and other landlords that compete with each other in the relevant markets alleged, have agreed with one another, through RealPage and directly, to exchange nonpublic, competitively sensitive data, both through RealPage’s revenue management software and by other means. The other means include RealPage user groups, direct communications, market surveys, and other intermediaries. The information exchanged includes future pricing plans, current pricing and occupancy rates, pricing discounts, and guest traffic.

264. RealPage uses this nonpublic, competitively sensitive data to train its AIRM models and provide floor plan price recommendations and unit-level pricing to AIRM- and YieldStar-using landlords. AIRM and YieldStar are designed to increase prices as much as possible and minimize price decreases.

265. RealPage engages in a variety of conduct to increase compliance with the output of its products and the objectives it touts.

266. The sharing of nonpublic, competitively sensitive data with RealPage, and its use in AIRM and YieldStar, is anticompetitive. It harms or is likely to harm the competitive process and results, or is likely to result, in harm to renters and prospective renters in at least the relevant antitrust markets identified in this complaint.

267. In each relevant market, RealPage and participating landlords collectively have sufficient market power, including market and data penetration, to harm the competitive process and renters.

268. AIRM and YieldStar do not benefit the competitive process or renters. Any theoretical benefits are outweighed by harm to the competitive process and to renters.

269. Less restrictive alternatives are available to RealPage and the market. RealPage has recently altered AIRM or YieldStar for some clients to remove those clients’ access to competitors’ nonpublic data in at least certain portions of the software. RealPage has the ability to make changes to remove

broader access to competitors’ nonpublic data in AIRM and YieldStar. RealPage has the capability to modify its software products to eliminate competitive defects. LRO does not require the same type and quantity of nonpublic, transactional data pulled from competitors’ property management software.¹² RealPage has stopped offering LRO to new clients and made plans to discontinue LRO for legacy clients by the end of 2024.

Second Claim for Relief: Violation of Section 1 of the Sherman Act Through Agreements to Align Pricing

(By All Plaintiffs Against RealPage, Cushman & Wakefield, Greystar, LivCor, and Pinnacle; By All Plaintiffs Except Washington Against Camden and Willow Bridge; By the United States, Colorado, and North Carolina Against Cortland)

270. Plaintiffs incorporate the allegations of paragraphs 1 through 268 above.

271. Each landlord, including Defendant Landlords, that licenses AIRM or YieldStar has agreed with RealPage to use the software as it has been designed. This includes providing nonpublic, competitively sensitive transactional data to RealPage, but more broadly is an agreement to use AIRM or YieldStar as the means to price the landlord’s rental units. The landlord agrees to review AIRM or YieldStar floor plan price recommendations, use AIRM or YieldStar to set a scheduled floor plan rent, and use the AIRM or YieldStar pricing matrix to price units to renters.

272. AIRM and YieldStar are designed to “raise the tide” for all landlords, including AIRM- and YieldStar-using landlords. AIRM and YieldStar have the likely effect of aligning users’ pricing processes, strategies, and pricing responses.

273. These landlords understand this effect, and it is a reason why they sign up for and use AIRM or YieldStar and discuss their usage with one another in user group meetings and other settings.

274. RealPage engages in a variety of conduct to increase compliance with the output of its products and the objectives it touts.

275. RealPage’s user group meetings and its revenue management certification program facilitate landlords’ agreements with RealPage to align pricing.

276. Taken together, the agreements between each AIRM or YieldStar

¹² Landlords may nevertheless use LRO in ways that may likely harm competition, as illustrated in paragraphs 59–60 and 100 above.

landlord and RealPage to use AIRM or YieldStar, respectively, harm or are likely to harm the competitive process and renters.

277. The agreement by a landlord to use AIRM or YieldStar is an agreement to align users' pricing processes, strategies, and pricing responses. Collectively, these agreements between landlords using AIRM or YieldStar and RealPage are harmful to the competitive process and to renters.

278. In each relevant submarket and CBSA, RealPage and participating AIRM or YieldStar landlords collectively have sufficient market power, including market and data penetration, to harm the competitive process and renters.

279. AIRM and YieldStar do not benefit the competitive process or renters. Any theoretical benefits are outweighed by harm to the competitive process and to renters, and less restrictive alternatives are available to RealPage and these landlords.

Third Claim for Relief: Violation of Section 2 of the Sherman Act Through Monopolization of the Commercial Revenue Management Software Market

(By All Plaintiffs Against RealPage)

280. Plaintiffs incorporate the allegations of paragraphs 1 through 279 above.

281. Commercial revenue management software for conventional multifamily housing rentals in the United States is a relevant antitrust market, and RealPage has monopoly power in that market.

282. RealPage has unlawfully monopolized the commercial revenue management market through unlawful exclusionary conduct. RealPage has amassed a massive reservoir of competitively sensitive data from competing landlords and used that data to sell AIRM and YieldStar. RealPage has ensured that rivals cannot compete on the merits unless they enter into similar agreements with landlords, offer to share competitively sensitive information among rival landlords, and engage in actions to increase compliance. As a result of its exclusionary conduct, RealPage has been able to obstruct rival software providers from competing via revenue management products that do not harm the competitive process in addition to cementing its massive data and scale advantage that keeps increasing due to self-reinforcing feedback effects.

283. RealPage's anticompetitive acts have harmed the competitive process and reduced feasible and less restrictive alternatives for landlords, which

alternatives thereby pose less risk of competitive harm to renters.

284. RealPage's exclusionary conduct lacks a procompetitive justification that offsets the harm caused by RealPage's anticompetitive and unlawful conduct.

Fourth Claim for Relief, in the Alternative: Violation of Section 2 of the Sherman Act Through Attempted Monopolization of the Commercial Revenue Management Software Market

(By All Plaintiffs Against RealPage)

285. Plaintiffs incorporate the allegations of paragraphs 1 through 284 above.

286. Commercial revenue management software for conventional multifamily housing rentals in the United States is a relevant antitrust market.

287. RealPage has attempted to monopolize that market through unlawful exclusionary conduct enhanced by its self-reinforcing data and scale advantages. By amassing its massive reservoir of competitively sensitive data from competing landlords and the follow-on benefits that scale and its feedback effects provide in terms of blunting competition among landlords, RealPage's conduct excludes commercial revenue management rivals from competing on the merits in a lawful manner. As such, it has increased, maintained, or protected RealPage's power.

288. RealPage's anticompetitive acts have harmed the competitive process and reduced feasible and less restrictive alternatives for landlords, which alternatives thereby pose less risk of competitive harm to renters.

289. As inferred from the anticompetitive conduct described in Sections IV and V, *supra*, RealPage has acted with a specific intent to monopolize, and to eliminate effective competition in, the commercial revenue management software market in the United States. There is a dangerous probability that, unless restrained, RealPage will succeed in monopolizing the commercial revenue management software market in violation of Section 2 of the Sherman Act.

Fifth Claim for Relief: Violation of North Carolina Law

290. Plaintiff State of North Carolina incorporates the allegations of Paragraphs 1 through 289 above.

291. Defendants engaged in the conduct alleged above while operating their businesses in North Carolina markets, including, but not limited to, the markets alleged in paragraphs 214, 216, 256, and Appendices A and B.

Defendants' anticompetitive conduct has affected commerce in North Carolina to a substantial degree by harming the competitive process and renters across the State including, but not limited to, in the North Carolina markets identified in paragraphs 214, 216, 256, and Appendices A and B.

292. Defendants' acts as alleged in the First and Second claims for reliefs stated in paragraphs 259–279 above, violate the North Carolina Unfair or Deceptive Trade Practices Act in that they constitute contracts in restraint of trade or commerce in North Carolina, and/or acts and contracts in restraint of trade or commerce which violate the principles of the common law. N.C.G.S. §§ 75–1, 75–2.

293. Defendant Real Page's acts as alleged in the Third and Fourth claims for relief stated in paragraphs 280–289, above, violate the North Carolina Unfair or Deceptive Trade Practices Act, N.C.G.S. § 75–1 *et seq.*, in that they constitute unlawful monopolization of a part of trade or commerce in North Carolina. N.C.G.S. § 75–2.1. Plaintiff State of North Carolina seeks the following remedies available for claims under federal law and claims under N.C.G.S. §§ 75–1, 75–2, and 75–2.1, without limitation:

a. Injunctive and other equitable relief pursuant to Section 16 of the Clayton Act, 15 U.S.C. 26, N.C.G.S. § 75–14, and the common law of North Carolina;

b. Civil penalties pursuant to N.C.G.S. § 75–15.2, which provides a penalty of up to \$5,000 per violation;

c. Costs of suit, including expert witness fees, costs of investigation, and attorney's fees pursuant to Section 16 of the Clayton Act, 15 U.S.C. 26 and N.C.G.S. § 75–16.1; and

d. Other remedies as the court may deem appropriate under the facts and circumstances of the case.

Sixth Claim for Relief: Violation of California Law

295. The State of California incorporates the allegations of Paragraphs 1 through 289 above.

296. Defendants' practices, as alleged above, violate the Sherman Act sections 1 and 2 and therefore constitute unlawful business practices under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.*

297. Plaintiff State of California seeks the following:

a. injunctive relief and penalties pursuant to sections 17203 and 17206 of the UCL,

b. costs of suit, including expert witness fees, costs of investigation, and

attorney's fees pursuant to Section 16 of the Clayton Act, 15 U.S.C. 26, and

c. other remedies as the court may deem appropriate under the facts and circumstances of the case.

Seventh Claim for Relief: Violation of Colorado Law

298. Plaintiff State of Colorado repeats and re-alleges and incorporates by reference Paragraphs 1 through 289 in this Complaint as if fully set forth herein.

299. The acts alleged in the Complaint violate the Colorado Antitrust Act, § 6–4–101 et. seq., including C.R.S. § 6–4–104 and C.R.S. § 6–4–105. These violations substantially affect the people of Colorado and have impacts within the State of Colorado.

300. Each of the unlawful agreements, arrangements, or acts alleged herein constitute at least one distinct violation of the Colorado Antitrust Act within the meaning of C.R.S. § 6–4–113.

301. Defendants' acts alleged herein constitute a continuous pattern and practice of behavior within the meaning of C.R.S. § 6–4–113(2)(c).

302. Defendants' acts alleged herein were willful within the meaning of C.R.S. § 6–4–113(2)(d).

303. The State of Colorado seeks the following remedies under federal law and the Colorado Antitrust Act, including, without limitation:

a. Injunctive and other equitable relief pursuant to Section 16 of the Clayton Act, 15 U.S.C. 26 and C.R.S. § 6–4–112;

b. Civil penalties pursuant to C.R.S. § 6–4–113 for each violation of the Colorado Antitrust Act;

c. Costs and attorneys' fees, pursuant to Section 16 of the Clayton Act, 15 U.S.C. 26, and C.R.S. § 6–4–112(5); and

d. Other remedies as the Court may deem appropriate based on the facts properly alleged and proven.

Eighth Claim for Relief: Violation of Connecticut Law

304. Plaintiff State of Connecticut, acting by and through its Attorney General pursuant to Conn. Gen. Stat. § 35–44a, incorporates the allegations of paragraphs 1 through 289 above. The State of Connecticut brings its state and federal law claims for relief against all Defendants except Cortland.

305. The acts alleged in the Complaint also constitute violations of the Connecticut Antitrust Act, Conn. Gen. Stat. § 35–24 et seq. These violations had impacts within the State of Connecticut and substantially affected the citizens of Connecticut.

306. Plaintiff State of Connecticut seeks all remedies available under federal law and the Connecticut

Antitrust Act, including, without limitation, the following:

a. Civil penalties pursuant to Conn. Gen. Stat. § 35–38, which provides that in any action instituted by the Attorney General, any person who has been held to have violated any of the provisions of the Connecticut Antitrust Act shall forfeit and pay to the state a civil penalty of not more than one million dollars for each violation;

b. Injunctive and other equitable relief pursuant to Section 16 of the Clayton Act, 15 U.S.C. 26, Conn. Gen. Stat. §§ 35–34, 35–44a;

c. Costs and fees including, without limitation, costs of investigation, litigation, expert witness fees, and attorney's fees pursuant to Section 16 of the Clayton Act, 15 U.S.C. 26, Conn. Gen. Stat. §§ 35–34, 35–44a; and

d. Other remedies as the Court may deem appropriate under the facts and circumstances of the case.

Ninth Claim for Relief: Violation of Illinois Law

307. Plaintiff State of Illinois, acting by and through its Attorney General, incorporates the allegations of paragraphs 1 through 289 above. The State of Illinois brings its state and federal law claims for relief against all Defendants except Cortland.

308. The acts alleged in the Complaint violate the Illinois Antitrust Act, 740 ILCS 10/1 et seq, including 740 ILCS 10/3(1), 740 ILCS 10/3(2), and 740 ILCS 10/3(3). These violations substantially affect the people of Illinois and have impacts within the State of Illinois.

309. The State of Illinois seeks all available remedies under federal law and the Illinois Antitrust Act, including, without limitation:

a. Injunctive and other equitable relief pursuant to Section 16 of the Clayton Act, 15 U.S.C. 26; and 740 ILCS 10/7;

b. Civil penalties pursuant to 740 ILCS 10/7(4) for each violation of the Illinois Antitrust Act;

c. Disgorgement, damages, and/or other equitable or monetary relief pursuant to federal law including Section 4 of the Sherman Act, 15 U.S.C. 4, Section 4c of the Clayton Act, 15 U.S.C. 15c and state law including 740 ILCS 10/7, and treble damages for injuries sustained, directly or indirectly, by individuals residing in Illinois to their property, pursuant to the State of Illinois' parens patriae authority under 740 ILCS 10/7(2);

d. Costs and attorneys' fees, pursuant to Section 4c of the Clayton Act, 15 U.S.C. 15c, Section 16 of the Clayton Act, 15 U.S.C. 26, 740 ILCS 10/7(2); and

e. Other remedies as the Court may deem appropriate on the basis of the facts properly alleged and proven.

Tenth Claim for Relief: Violation of Massachusetts Law

310. Plaintiff Commonwealth of Massachusetts repeats, realleges, and incorporates the allegations of paragraphs 1 through 289 above as if fully set forth herein. The Commonwealth of Massachusetts brings its state and federal law claims for relief against all Defendants except Cortland.

311. The acts alleged in the aforementioned paragraphs of this Complaint, including but not limited to unlawful agreements in restraint of trade and unlawful monopolization, constitute unfair methods of competition and/or unfair or deceptive acts or practices in trade or commerce in violation of the Massachusetts Consumer Protection Act, M.G.L. c. 93A § 2 et seq.

312. Defendants knew or should have known that their conduct violated the Massachusetts Consumer Protection Act, M.G.L. c. 93A § 2 et seq.

313. Plaintiff Commonwealth of Massachusetts is entitled to and seeks the following relief under M.G.L. c. 93A § 4:

a. Injunctive and other equitable relief pursuant to M.G.L. c. 93A § 4;

b. Civil penalties of up to \$5,000 per each violation committed by the Defendants pursuant to M.G.L. c. 93A § 4;

c. Costs and fees including, without limitation, costs of investigation, litigation, and attorneys' fees pursuant to M.G.L. c. 93A § 4; and

d. Other remedies as the court may deem appropriate under the facts and circumstances of the case.

314. The Commonwealth of Massachusetts notified the Defendants of this intended action at least five days prior to the commencement of this action and gave the Defendants an opportunity to confer in accordance with M.G.L. c. 93A § 4.

Eleventh Claim for Relief: Violation of Oregon Law

315. Plaintiff State of Oregon, acting by and through its Attorney General, incorporates the allegations of paragraphs 1 through 289 above. The State of Oregon brings its state and federal law claims for relief against all Defendants except Cortland.

316. The acts alleged in the Complaint also constitute violations of the Oregon Antitrust Law, Oregon Revised Statutes ("ORS") 646.705 to ORS 646.836. These violations had impacts within the State

of Oregon and substantially affected the people of Oregon.

317. The State of Oregon appears in its sovereign or quasi-sovereign capacities and under its statutory, common law, and equitable powers, and as *parens patriae* on behalf of natural persons residing in the State of Oregon pursuant to ORS 646.775(1). The State of Oregon seeks all remedies available under federal law and the Oregon Antitrust Law, including, without limitation, the following:

- a. Disgorgement and/or other equitable relief pursuant to federal law including Section 4 of the Sherman Act, 15 U.S.C. 4, and state law pursuant to ORS 646.770, and ORS 646.775;
- b. Injunctive and other equitable relief pursuant to Section 16 of the Clayton Act, 15 U.S.C. 26, ORS 646.760, ORS 646.770, and ORS 646.775;
- c. Civil penalties pursuant to ORS 646.760(1) which provides that a court may assess for the benefit of the state a civil penalty of not more than \$1,000,000 for each violation of the Oregon Antitrust Law,
- d. Costs of suit, including expert witness fees, costs of investigation, and attorney's fees pursuant to Section 16 of the Clayton Act, 15 U.S.C. 26, ORS 646.760, ORS 646.770, ORS 646.775; and
- e. Other remedies as the court may deem appropriate under the facts and circumstances of the case.

Twelfth Claim for Relief: Violation of Tennessee Law

318. Plaintiff State of Tennessee incorporates the allegations of paragraphs 1 through 289 above. The State of Tennessee brings its state and federal law claims for relief against all Defendants except Cortland.

319. Defendants engaged in the conduct described above, individually and collectively, to thwart competition for multifamily housing in Tennessee. This anticompetitive conduct in Tennessee harmed thousands of multifamily renters across the state.

320. Defendants' business practices have caused a reduction in competition in relevant Tennessee markets, including, but not limited to, in the markets identified in paragraphs 214 and 216 and Appendices A and B, and, as a result, Tennesseans have suffered anticompetitive harms.

321. Accordingly, Defendants' actions violate the Tennessee Trade Practices Act, Tenn. Code Ann. § 47–25–101, as amended.

322. Defendant RealPage engaged in the conduct described above to maintain its monopoly and exclude competing

commercial revenue management software competitors.

323. Accordingly, Defendant RealPage's actions violate the Tennessee Trade Practices Act, Tenn. Code Ann. § 47–25–102, as amended.

324. This conduct has affected Tennessee trade and commerce to a substantial degree.

325. To remedy this anticompetitive conduct, the Tennessee Attorney General and Reporter seeks all remedies available to which it is entitled under federal law and claims under Tenn. Code Ann. §§ 47–25–101, 102, and 106, as amended, including, without limitation, the following:

- a. injunctive or other equitable relief; reasonable attorney fees, costs, and expenses, pursuant to Section 16 of the Clayton Act, 15 U.S.C. 26, Tenn. Code Ann. § 47–25–106(b), and the common law of Tennessee;
- b. civil penalties pursuant to Tenn. Code Ann. § 47–25–106(g);
- c. costs of suit, including expert witness fees, costs of investigation, and attorney's fees pursuant to Section 16 of the Clayton Act, 15 U.S.C. 26 and Tenn. Code Ann. § 47–25–106(b); and
- d. other legal and equitable remedies as the court may deem appropriate and the interest of justice may require under the facts and circumstances of the case.

Thirteenth Claim for Relief: Violation of Washington Law

326. The State of Washington incorporates the allegations in Paragraphs 1 through 289, except for the portions of paragraphs 95, 96, 97, 117, 131, 171, and 228 that Washington was unable to review due to confidentiality redactions. Washington reserves the right to adopt the portions of those paragraphs which are later disclosed.

327. Washington brings its federal and state law claims for relief against Defendants RealPage, Cushman & Wakefield, Pinnacle, Greystar, and LivCor ("Washington Defendants").

328. Washington Defendants engaged in the conduct alleged above while operating their businesses in Washington. This anticompetitive conduct in Washington harmed the competitive process and renters across the State including in, but not limited to, the markets identified in Appendices A and B.

329. The acts alleged in the paragraphs incorporated by the State of Washington also constitute antitrust violations of the Washington Consumer Protection Act under Wash. Rev. Code § 19.86.030, which declares unlawful every contract, combination, or conspiracy in restraint of trade or commerce.

330. The acts alleged in the paragraphs incorporated by the State of Washington also constitute antitrust violations of the Washington Consumer Protection Act under Wash. Rev. Code § 19.86.040, which declares monopolization or attempts to monopolize unlawful.

331. Washington seeks the following remedies available under the Washington Consumer Protection Act and federal law including, without limitation, the following:

- a. That the Court adjudge and decree that conduct alleged in the complaint to be unlawful and in violation of the Washington Consumer Protection Act, Wash. Rev. Code § 19.86.030 and § 19.86.040;
- b. Injunctive and other equitable relief pursuant to Wash. Rev. Code § 19.86.080;
- c. Damages including treble damages; disgorgement; and/or restitution and any appropriate interest pursuant to federal law including Sherman Act, 15 U.S.C. 4, 15c and pursuant to state law including Wash. Rev. Code § 19.86.080;
- d. Civil penalties pursuant to Wash. Rev. Code § 19.86.140;
- e. Costs and attorney's fees and any appropriate interest on those fees and costs pursuant to Sherman Act, 15 U.S.C. 15c and/or pursuant to Wash. Rev. Code § 19.86.080; and
- f. Other remedies, including pre-judgement interest, as the court may deem appropriate under the facts and circumstances of the case.

IX. Request for Relief

332. To remedy these illegal acts, Plaintiffs request that the Court:

- a. Adjudge and decree that Defendants have acted unlawfully to restrain trade in conventional multifamily rental housing markets across the United States in violation of Section 1 of the Sherman Act, 15 U.S.C. 1;
- b. Adjust and decree that RealPage has acted unlawfully to monopolize, or attempt to monopolize, the commercial revenue management software market in the United States in violation of Section 2 of the Sherman Act, 15 U.S.C. 2;
- c. Enjoin Defendants from continuing to engage in the anticompetitive practices described herein and from engaging in any other practices with the same purpose and effect as the challenged practices;
- d. Enter any other preliminary or permanent relief necessary and appropriate to restore competitive conditions in the markets affected by Defendants' unlawful conduct;
- e. Enter any additional relief the Court finds just and proper; and

f. Award Plaintiffs an amount equal to their costs, including reasonable attorneys' fees, incurred in bringing this action.

X. Demand for a Jury Trial

333. Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs demand a trial by jury of all issues properly triable to a jury in this case.

Dated this 7th day of January, 2025.

Respectfully submitted,

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Appendix A: Submarkets

Area	Submarket	YS/AIRM 30% or more	YS/AIRM/OneSite 30% or more
Anaheim-Santa Ana-Irvine, CA	South Orange County	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Alpharetta/Cumming	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Briarcliff	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Buckhead	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Chamblee/Brookhaven	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Decatur	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Downtown Atlanta	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Duluth	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Dunwoody	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Kennesaw/Acworth	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Midtown Atlanta	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Norcross	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Northeast Atlanta	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Northeast Cobb/Woodstock	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Northeast Gwinnett County	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Roswell	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Sandy Springs	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Smyrna	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	South Cobb County/Douglasville	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Southeast Gwinnett County	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Southeast Marietta	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Southwest Atlanta	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Vinings	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	West Atlanta	Yes	Yes.
Austin-Round Rock, TX	Arboretum	Yes	Yes.
Austin-Round Rock, TX	Cedar Park	Yes	Yes.
Austin-Round Rock, TX	Downtown/University	Yes	Yes.
Austin-Round Rock, TX	East Austin	Yes	Yes.
Austin-Round Rock, TX	Far South Austin	Yes	Yes.
Austin-Round Rock, TX	Far West Austin	Yes	Yes.
Austin-Round Rock, TX	Near North Austin	Yes	Yes.
Austin-Round Rock, TX	North Central Austin	Yes	Yes.
Austin-Round Rock, TX	Northwest Austin	Yes	Yes.
Austin-Round Rock, TX	Pflugerville/Wells Branch	Yes	Yes.
Austin-Round Rock, TX	Round Rock/Georgetown	Yes	Yes.
Austin-Round Rock, TX	South Austin	Yes	Yes.
Austin-Round Rock, TX	Southwest Austin	Yes	Yes.
Baltimore-Columbia-Towson, MD	Columbia/North Laurel	Yes	Yes.
Birmingham-Hoover, AL	Southeast Birmingham	Yes	Yes.
Boston-Cambridge-Newton, MA-NH	Chelsea/Revere/Charlestown		Yes.
Boston-Cambridge-Newton, MA-NH	East Middlesex County		Yes.
Boston-Cambridge-Newton, MA-NH	Quincy		Yes.
Boston-Cambridge-Newton, MA-NH	West Norfolk County		Yes.
Charleston-North Charleston, SC	Downtown/Mount Pleasant/Islands	Yes	Yes.
Charleston-North Charleston, SC	West Ashley	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	Ballantyne	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	Huntersville/Cornelius	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	Matthews/Southeast Charlotte		Yes.
Charlotte-Concord-Gastonia, NC-SC	Myers Park	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	North Charlotte	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	South Charlotte	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	Southwest Charlotte	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	UNC Charlotte	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	Uptown/South End	Yes	Yes.
Chicago-Naperville-Elgin, IL-IN-WI	The Loop	Yes	Yes.
Colorado Springs, CO	North Colorado Springs	Yes	Yes.
Dallas-Plano-Irving, TX	Addison/Bent Tree	Yes	Yes.
Dallas-Plano-Irving, TX	Allen/McKinney	Yes	Yes.
Dallas-Plano-Irving, TX	Carrollton/Farmers Branch	Yes	Yes.
Dallas-Plano-Irving, TX	Central/East Plano	Yes	Yes.
Dallas-Plano-Irving, TX	East Dallas	Yes	Yes.
Dallas-Plano-Irving, TX	Frisco	Yes	Yes.
Dallas-Plano-Irving, TX	Grand Prairie	Yes	Yes.
Dallas-Plano-Irving, TX	Intown Dallas	Yes	Yes.
Dallas-Plano-Irving, TX	Las Colinas/Coppell	Yes	Yes.
Dallas-Plano-Irving, TX	Lewisville/Flower Mound	Yes	Yes.
Dallas-Plano-Irving, TX	North Irving	Yes	Yes.
Dallas-Plano-Irving, TX	North Oak Cliff/West Dallas	Yes	Yes.
Dallas-Plano-Irving, TX	Oak Lawn/Park Cities	Yes	Yes.
Dallas-Plano-Irving, TX	Richardson	Yes	Yes.
Dallas-Plano-Irving, TX	Rockwall/Rowlett/Wylie	Yes	Yes.
Dallas-Plano-Irving, TX	The Colony/Far North Carrollton	Yes	Yes.
Dallas-Plano-Irving, TX	West Plano	Yes	Yes.

Area	Submarket	YS/AIRM 30% or more	YS/AIRM/OneSite 30% or more
Denver-Aurora-Lakewood, CO	Broomfield	Yes	Yes.
Denver-Aurora-Lakewood, CO	Downtown/Highlands/Lincoln Park	Yes	Yes.
Denver-Aurora-Lakewood, CO	Highlands Ranch	Yes	Yes.
Denver-Aurora-Lakewood, CO	Littleton	Yes	Yes.
Denver-Aurora-Lakewood, CO	Northeast Denver	Yes	Yes.
Denver-Aurora-Lakewood, CO	Parker/Castle Rock	Yes	Yes.
Denver-Aurora-Lakewood, CO	South Lakewood	Yes	Yes.
Denver-Aurora-Lakewood, CO	Southeast Aurora/East Arapahoe County	Yes	Yes.
Denver-Aurora-Lakewood, CO	Southeast Denver	Yes	Yes.
Denver-Aurora-Lakewood, CO	Tech Center	Yes	Yes.
Denver-Aurora-Lakewood, CO	Thornton/Northglenn	Yes	Yes.
Denver-Aurora-Lakewood, CO	Westminster	Yes	Yes.
Fort Lauderdale-Pompano Beach-Deerfield Beach, FL	Plantation/Davie/Weston	Yes	Yes.
Fort Worth-Arlington, TX	Grapevine/Southlake	Yes	Yes.
Fort Worth-Arlington, TX	Northeast Fort Worth/North Richland Hills	Yes	Yes.
Hartford-West Hartford-East Hartford, CT	Southeast Hartford/Middlesex County	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX	Bear Creek	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX	Downtown/Montrose/River Oaks	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX	Far West Houston	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX	Friendswood/Pearland	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX	Galleria/Uptown	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX	Greater Heights/Washington Avenue	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX	Greenway/Upper Kirby	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX	Katy	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX	Memorial	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX	Sugar Land/Stafford	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX	The Woodlands	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX	West University/Medical Center/Third Ward	Yes	Yes.
Jacksonville, FL	Baymeadows	Yes	Yes.
Jacksonville, FL	Upper Southside	Yes	Yes.
Kansas City, MO-KS	Lee's Summit/Blue Springs/Raytown	Yes	Yes.
Las Vegas-Henderson-Paradise, NV	Henderson	Yes	Yes.
Las Vegas-Henderson-Paradise, NV	Northwest Las Vegas	Yes	Yes.
Las Vegas-Henderson-Paradise, NV	Summerlin/The Lakes	Yes	Yes.
Los Angeles-Long Beach-Glendale, CA	Downtown Los Angeles	Yes	Yes.
Memphis, TN-MS-AR	Cordova/Bartlett	Yes	Yes.
Memphis, TN-MS-AR	Germantown/Collierville	Yes	Yes.
Mobile/Daphne, AL	North Mobile	Yes	Yes.
Nashville-Davidson—Murfreesboro—Franklin, TN ..	Central Nashville	Yes	Yes.
Nashville-Davidson—Murfreesboro—Franklin, TN ..	East Nashville	Yes	Yes.
Nashville-Davidson—Murfreesboro—Franklin, TN ..	Franklin/Brentwood	Yes	Yes.
Nashville-Davidson—Murfreesboro—Franklin, TN ..	South Nashville	Yes	Yes.
Nashville-Davidson—Murfreesboro—Franklin, TN ..	Southeast Nashville	Yes	Yes.
Nashville-Davidson—Murfreesboro—Franklin, TN ..	West Nashville	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	Altamonte Springs/Apopka	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	Casselberry/Winter Springs/Oviedo	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	Central Orlando	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	East Orange County	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	East Orlando	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	Kissimmee/Osceola County	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	Sanford/Lake Mary	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	South Orange County	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	Southwest Orlando	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	Winter Park/Maitland	Yes	Yes.
Phoenix-Mesa-Scottsdale, AZ	Chandler	Yes	Yes.
Phoenix-Mesa-Scottsdale, AZ	Deer Valley	Yes	Yes.
Phoenix-Mesa-Scottsdale, AZ	North Glendale	Yes	Yes.
Phoenix-Mesa-Scottsdale, AZ	South Phoenix	Yes	Yes.
Portland-Vancouver-Hillsboro, OR-WA	Aloha/West Beaverton	Yes	Yes.
Portland-Vancouver-Hillsboro, OR-WA	Central Portland	Yes	Yes.
Portland-Vancouver-Hillsboro, OR-WA	Hillsboro	Yes	Yes.
Portland-Vancouver-Hillsboro, OR-WA	Lake Oswego/Tualatin/Wilsonville	Yes	Yes.
Raleigh/Durham, NC	Central Raleigh	Yes	Yes.
Raleigh/Durham, NC	Chapel Hill/Carrboro	Yes	Yes.
Raleigh/Durham, NC	East Durham	Yes	Yes.
Raleigh/Durham, NC	Far North Raleigh	Yes	Yes.
Raleigh/Durham, NC	Near North Raleigh	Yes	Yes.
Raleigh/Durham, NC	North Cary/Morrisville	Yes	Yes.
Raleigh/Durham, NC	Northeast Raleigh	Yes	Yes.
Raleigh/Durham, NC	Northwest Durham/Downtown	Yes	Yes.
Raleigh/Durham, NC	Northwest Raleigh	Yes	Yes.
Raleigh/Durham, NC	South Cary/Apex	Yes	Yes.

Area	Submarket	YS/AIRM 30% or more	YS/AIRM/OneSite 30% or more
Raleigh/Durham, NC	Southwest Durham	Yes	Yes.
Reno, NV	South Reno	Yes	Yes.
Richmond, VA	Northwest Richmond	Yes	Yes.
Richmond, VA	Tuckahoe/Westhampton	Yes	Yes.
Riverside-San Bernardino-Ontario, CA	Corona	Yes	Yes.
Riverside-San Bernardino-Ontario, CA	Rancho Cucamonga/Upland	Yes	Yes.
Riverside-San Bernardino-Ontario, CA	Temecula/Murrieta	Yes	Yes.
Salt Lake City/Ogden/Clearfield, UT	Midvale/Sandy/Draper	Yes	Yes.
Salt Lake City/Ogden/Clearfield, UT	Southwest Salt Lake City	Yes	Yes.
San Antonio-New Braunfels, TX	Far North Central San Antonio	Yes	Yes.
San Antonio-New Braunfels, TX	Far Northwest San Antonio	Yes	Yes.
San Antonio-New Braunfels, TX	North Central San Antonio	Yes	Yes.
San Antonio-New Braunfels, TX	Northwest San Antonio	Yes	Yes.
San Diego-Carlsbad, CA	Downtown San Diego/Coronado	Yes	Yes.
San Diego-Carlsbad, CA	Northeast San Diego	Yes	Yes.
Seattle-Bellevue-Everett, WA	Downtown Seattle	Yes	Yes.
Seattle-Bellevue-Everett, WA	Federal Way/Des Moines	Yes	Yes.
Seattle-Bellevue-Everett, WA	Redmond	Yes	Yes.
Seattle-Bellevue-Everett, WA	Renton	Yes	Yes.
Tampa-St. Petersburg-Clearwater, FL	Carrollwood/Citrus Park	Yes	Yes.
Tampa-St. Petersburg-Clearwater, FL	Central Tampa	Yes	Yes.
Tampa-St. Petersburg-Clearwater, FL	Town and Country/Westchase	Yes	Yes.
Tucson, AZ	Casas Adobes/Oro Valley	Yes	Yes.
Tucson, AZ	Catalina Foothills	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV	Germantown	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV	Loudoun County	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV	Manassas/Far Southwest Suburbs	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV	Navy Yard/Capitol South	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV	Northeast DC	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV	Reston/Herndon	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV	Tysons Corner/Falls Church/Merrifield	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV	West Alexandria	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV	West Fairfax County	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV	Woodbridge/Dale City	Yes	Yes.

Appendix B: Submarkets by Bedroom Count

Area	Submarket	Number of beds	YS/AIRM 30% or more	YS/AIRM/OneSite 30% or more
Anaheim-Santa Ana-Irvine, CA	South Orange County	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Alpharetta/Cumming	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Briarcliff	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Buckhead	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Chamblee/Brookhaven	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Decatur	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Downtown Atlanta	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Duluth	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Dunwoody	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Kennesaw/Acworth	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Midtown Atlanta	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Norcross	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Northeast Atlanta	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Northeast Cobb/Woodstock	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Northeast Gwinnett County	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Roswell	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Sandy Springs	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Smyrna	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	South Cobb County/Douglasville	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Southeast Gwinnett County	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Southeast Marietta	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Southwest Atlanta	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Vinings	1	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	West Atlanta	1	Yes	Yes.
Austin-Round Rock, TX	Arboretum	1	Yes	Yes.
Austin-Round Rock, TX	Cedar Park	1	Yes	Yes.
Austin-Round Rock, TX	Downtown/University	1	Yes	Yes.
Austin-Round Rock, TX	East Austin	1	Yes	Yes.
Austin-Round Rock, TX	Far South Austin	1	Yes	Yes.
Austin-Round Rock, TX	Far West Austin	1	Yes	Yes.

Area	Submarket	Number of beds	YS/AIRM 30% or more	YS/AIRM/OneSite 30% or more
Austin-Round Rock, TX	Near North Austin	1	Yes	Yes.
Austin-Round Rock, TX	North Central Austin	1	Yes	Yes.
Austin-Round Rock, TX	Northwest Austin	1	Yes	Yes.
Austin-Round Rock, TX	Pflugerville/Wells Branch	1	Yes	Yes.
Austin-Round Rock, TX	Round Rock/Georgetown	1	Yes	Yes.
Austin-Round Rock, TX	South Austin	1	Yes	Yes.
Austin-Round Rock, TX	Southwest Austin	1	Yes	Yes.
Baltimore-Columbia-Towson, MD	Columbia/North Laurel	1	Yes	Yes.
Birmingham-Hoover, AL	Southeast Birmingham	1	Yes	Yes.
Boston-Cambridge-Newton, MA-NH	Chelsea/Revere/Charlestown	1		Yes.
Boston-Cambridge-Newton, MA-NH	East Middlesex County	1	Yes	Yes.
Boston-Cambridge-Newton, MA-NH	Quincy	1	Yes	Yes.
Boston-Cambridge-Newton, MA-NH	West Norfolk County	1		Yes.
Charleston-North Charleston, SC	Downtown/Mount Pleasant/Islands	1	Yes	Yes.
Charleston-North Charleston, SC	West Ashley	1	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	Ballantyne	1	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	Huntersville/Cornelius	1	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	Matthews/Southeast Charlotte	1	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	Myers Park	1	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	North Charlotte	1	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	South Charlotte	1	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	Southwest Charlotte	1	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	UNC Charlotte	1	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	Uptown/South End	1	Yes	Yes.
Chicago-Naperville-Elgin, IL-IN-WI	The Loop	1	Yes	Yes.
Colorado Springs, CO	North Colorado Springs	1	Yes	Yes.
Dallas-Plano-Irving, TX	Addison/Bent Tree	1	Yes	Yes.
Dallas-Plano-Irving, TX	Allen/McKinney	1	Yes	Yes.
Dallas-Plano-Irving, TX	Carrollton/Farmers Branch	1	Yes	Yes.
Dallas-Plano-Irving, TX	Central/East Plano	1	Yes	Yes.
Dallas-Plano-Irving, TX	East Dallas	1	Yes	Yes.
Dallas-Plano-Irving, TX	Frisco	1	Yes	Yes.
Dallas-Plano-Irving, TX	Grand Prairie	1	Yes	Yes.
Dallas-Plano-Irving, TX	Intown Dallas	1	Yes	Yes.
Dallas-Plano-Irving, TX	Las Colinas/Coppell	1	Yes	Yes.
Dallas-Plano-Irving, TX	Lewisville/Flower Mound	1	Yes	Yes.
Dallas-Plano-Irving, TX	North Irving	1	Yes	Yes.
Dallas-Plano-Irving, TX	North Oak Cliff/West Dallas	1	Yes	Yes.
Dallas-Plano-Irving, TX	Oak Lawn/Park Cities	1	Yes	Yes.
Dallas-Plano-Irving, TX	Richardson	1	Yes	Yes.
Dallas-Plano-Irving, TX	Rockwall/Rowlett/Wylie	1	Yes	Yes.
Dallas-Plano-Irving, TX	The Colony/Far North Carrollton	1	Yes	Yes.
Dallas-Plano-Irving, TX	West Plano	1	Yes	Yes.
Denver-Aurora-Lakewood, CO	Broomfield	1	Yes	Yes.
Denver-Aurora-Lakewood, CO	Downtown/Highlands/Lincoln Park	1	Yes	Yes.
Denver-Aurora-Lakewood, CO	Highlands Ranch	1	Yes	Yes.
Denver-Aurora-Lakewood, CO	Littleton	1	Yes	Yes.
Denver-Aurora-Lakewood, CO	Northeast Denver	1	Yes	Yes.
Denver-Aurora-Lakewood, CO	Parker/Castle Rock	1	Yes	Yes.
Denver-Aurora-Lakewood, CO	South Lakewood	1	Yes	Yes.
Denver-Aurora-Lakewood, CO	Southeast Aurora/East Arapahoe County	1	Yes	Yes.
Denver-Aurora-Lakewood, CO	Southeast Denver	1	Yes	Yes.
Denver-Aurora-Lakewood, CO	Tech Center	1	Yes	Yes.
Denver-Aurora-Lakewood, CO	Thornton/Northglenn	1	Yes	Yes.
Denver-Aurora-Lakewood, CO	Westminster	1	Yes	Yes.
Fort Lauderdale-Pompano Beach-Deerfield Beach, FL	Plantation/Davie/Weston	1	Yes	Yes.
Fort Worth-Arlington, TX	Grapevine/Southlake	1	Yes	Yes.
Fort Worth-Arlington, TX	Northeast Fort Worth/North Richland Hills	1	Yes	Yes.
Hartford-West Hartford-East Hartford, CT	Southeast Hartford/Middlesex County	1		Yes.
Houston-The Woodlands-Sugar Land, TX	Bear Creek	1	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX	Downtown/Montrose/River Oaks	1	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX	Far West Houston	1	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX	Friendswood/Pearland	1		Yes.
Houston-The Woodlands-Sugar Land, TX	Galleria/Uptown	1	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX	Greater Heights/Washington Avenue	1	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX	Greenway/Upper Kirby	1	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX	Katy	1	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX	Memorial	1	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX	Sugar Land/Stafford	1	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX	The Woodlands	1	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX	West University/Medical Center/Third Ward	1	Yes	Yes.
Jacksonville, FL	Baymeadows	1	Yes	Yes.

Area	Submarket	Number of beds	YS/AIRM 30% or more	YS/AIRM/OneSite 30% or more
Jacksonville, FL	Upper Southside	1	Yes	Yes.
Kansas City, MO-KS	Lee's Summit/Blue Springs/Raytown	1	Yes	Yes.
Las Vegas-Henderson-Paradise, NV	Henderson	1	Yes	Yes.
Las Vegas-Henderson-Paradise, NV	Northwest Las Vegas	1	Yes	Yes.
Las Vegas-Henderson-Paradise, NV	Summerlin/The Lakes	1	Yes	Yes.
Los Angeles-Long Beach-Glendale, CA	Downtown Los Angeles	1	Yes	Yes.
Memphis, TN-MS-AR	Cordova/Bartlett	1	Yes	Yes.
Memphis, TN-MS-AR	Germantown/Collierville	1	Yes	Yes.
Mobile/Daphne, AL	North Mobile	1	Yes	Yes.
Nashville-Davidson—Murfreesboro—Franklin, TN.	Central Nashville	1	Yes	Yes.
Nashville-Davidson—Murfreesboro—Franklin, TN.	East Nashville	1	Yes	Yes.
Nashville-Davidson—Murfreesboro—Franklin, TN.	Franklin/Brentwood	1	Yes	Yes.
Nashville-Davidson—Murfreesboro—Franklin, TN.	South Nashville	1	Yes	Yes.
Nashville-Davidson—Murfreesboro—Franklin, TN.	Southeast Nashville	1	Yes	Yes.
Nashville-Davidson—Murfreesboro—Franklin, TN.	West Nashville	1	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	Altamonte Springs/Apopka	1	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	Casselberry/Winter Springs/Oviedo	1	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	Central Orlando	1	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	East Orange County	1	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	East Orlando	1	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	Kissimmee/Osceola County	1	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	Sanford/Lake Mary	1	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	South Orange County	1	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	Southwest Orlando	1	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	Winter Park/Maitland	1	Yes	Yes.
Phoenix-Mesa-Scottsdale, AZ	Chandler	1	Yes	Yes.
Phoenix-Mesa-Scottsdale, AZ	Deer Valley	1	Yes	Yes.
Phoenix-Mesa-Scottsdale, AZ	North Glendale	1	Yes	Yes.
Phoenix-Mesa-Scottsdale, AZ	South Phoenix	1	Yes	Yes.
Portland-Vancouver-Hillsboro, OR-WA	Aloha/West Beaverton	1	Yes	Yes.
Portland-Vancouver-Hillsboro, OR-WA	Central Portland	1	Yes	Yes.
Portland-Vancouver-Hillsboro, OR-WA	Hillsboro	1	Yes	Yes.
Portland-Vancouver-Hillsboro, OR-WA	Lake Oswego/Tualatin/Wilsonville	1	Yes	Yes.
Raleigh/Durham, NC	Central Raleigh	1	Yes	Yes.
Raleigh/Durham, NC	Chapel Hill/Carrboro	1	Yes	Yes.
Raleigh/Durham, NC	East Durham	1	Yes	Yes.
Raleigh/Durham, NC	Far North Raleigh	1	Yes	Yes.
Raleigh/Durham, NC	Near North Raleigh	1	Yes	Yes.
Raleigh/Durham, NC	North Cary/Morrisville	1	Yes	Yes.
Raleigh/Durham, NC	Northeast Raleigh	1	Yes	Yes.
Raleigh/Durham, NC	Northwest Durham/Downtown	1	Yes	Yes.
Raleigh/Durham, NC	Northwest Raleigh	1	Yes	Yes.
Raleigh/Durham, NC	South Cary/Apex	1	Yes	Yes.
Raleigh/Durham, NC	Southwest Durham	1	Yes	Yes.
Reno, NV	South Reno	1	Yes	Yes.
Richmond, VA	Northwest Richmond	1	Yes	Yes.
Richmond, VA	Tuckahoe/Westhampton	1	Yes	Yes.
Riverside-San Bernardino-Ontario, CA	Corona	1	Yes	Yes.
Riverside-San Bernardino-Ontario, CA	Rancho Cucamonga/Upland	1	Yes	Yes.
Riverside-San Bernardino-Ontario, CA	Temecula/Murrieta	1	Yes	Yes.
Salt Lake City/Ogden/Clearfield, UT	Midvale/Sandy/Draper	1	Yes	Yes.
Salt Lake City/Ogden/Clearfield, UT	Southwest Salt Lake City	1	Yes	Yes.
San Antonio-New Braunfels, TX	Far North Central San Antonio	1	Yes	Yes.
San Antonio-New Braunfels, TX	Far Northwest San Antonio	1	Yes	Yes.
San Antonio-New Braunfels, TX	North Central San Antonio	1	Yes	Yes.
San Antonio-New Braunfels, TX	Northwest San Antonio	1	Yes	Yes.
San Diego-Carlsbad, CA	Downtown San Diego/Coronado	1	Yes	Yes.
San Diego-Carlsbad, CA	Northeast San Diego	1	Yes	Yes.
Seattle-Bellevue-Everett, WA	Downtown Seattle	1	Yes	Yes.
Seattle-Bellevue-Everett, WA	Federal Way/Des Moines	1	Yes	Yes.
Seattle-Bellevue-Everett, WA	Redmond	1	Yes	Yes.
Seattle-Bellevue-Everett, WA	Renton	1	Yes	Yes.
Tampa-St. Petersburg-Clearwater, FL	Carrollwood/Citrus Park	1	Yes	Yes.
Tampa-St. Petersburg-Clearwater, FL	Central Tampa	1	Yes	Yes.
Tampa-St. Petersburg-Clearwater, FL	Town and Country/Westchase	1	Yes	Yes.
Tucson, AZ	Casas Adobes/Oro Valley	1	Yes	Yes.
Tucson, AZ	Catalina Foothills	1	Yes	Yes.

Area	Submarket	Number of beds	YS/AIRM 30% or more	YS/AIRM/OneSite 30% or more
Washington-Arlington-Alexandria, DC-VA-MD-WV.	Germantown	1	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV.	Loudoun County	1	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV.	Manassas/Far Southwest Suburbs	1	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV.	Navy Yard/Capitol South	1	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV.	Northeast DC	1	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV.	Reston/Herndon	1	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV.	Tysons Corner/Falls Church/Merrifield	1	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV.	West Alexandria	1	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV.	West Fairfax County	1	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV.	Woodbridge/Dale City	1	Yes	Yes.
Anaheim-Santa Ana-Irvine, CA	South Orange County	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Alpharetta/Cumming	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Briarcliff	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Buckhead	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Chamblee/Brookhaven	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Decatur	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Downtown Atlanta	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Duluth	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Dunwoody	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Kennesaw/Acworth	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Midtown Atlanta	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Norcross	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Northeast Atlanta	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Northeast Cobb/Woodstock	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Northeast Gwinnett County	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Roswell	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Sandy Springs	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Smyrna	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	South Cobb County/Douglasville	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Southeast Gwinnett County	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Southeast Marietta	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Southwest Atlanta	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	Vinings	2	Yes	Yes.
Atlanta-Sandy Springs-Roswell, GA	West Atlanta	2	Yes	Yes.
Austin-Round Rock, TX	Arboretum	2	Yes	Yes.
Austin-Round Rock, TX	Cedar Park	2	Yes	Yes.
Austin-Round Rock, TX	Downtown/University	2	Yes	Yes.
Austin-Round Rock, TX	East Austin	2	Yes	Yes.
Austin-Round Rock, TX	Far South Austin	2	Yes	Yes.
Austin-Round Rock, TX	Far West Austin	2	Yes	Yes.
Austin-Round Rock, TX	Near North Austin	2	Yes	Yes.
Austin-Round Rock, TX	North Central Austin	2	Yes	Yes.
Austin-Round Rock, TX	Northwest Austin	2	Yes	Yes.
Austin-Round Rock, TX	Pflugerville/Wells Branch	2	Yes	Yes.
Austin-Round Rock, TX	Round Rock/Georgetown	2	Yes	Yes.
Austin-Round Rock, TX	South Austin	2	Yes	Yes.
Austin-Round Rock, TX	Southwest Austin	2	Yes	Yes.
Baltimore-Columbia-Towson, MD	Columbia/North Laurel	2	Yes	Yes.
Birmingham-Hoover, AL	Southeast Birmingham	2	Yes	Yes.
Boston-Cambridge-Newton, MA-NH	East Middlesex County	2	Yes	Yes.
Charleston-North Charleston, SC	Downtown/Mount Pleasant/Islands	2	Yes	Yes.
Charleston-North Charleston, SC	West Ashley	2	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	Ballantyne	2	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	Huntersville/Cornelius	2	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	Myers Park	2	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	North Charlotte	2	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	South Charlotte	2	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	Southwest Charlotte	2	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	UNC Charlotte	2	Yes	Yes.
Charlotte-Concord-Gastonia, NC-SC	Uptown/South End	2	Yes	Yes.
Chicago-Naperville-Elgin, IL-IN-WI	The Loop	2	Yes	Yes.
Colorado Springs, CO	North Colorado Springs	2	Yes	Yes.
Dallas-Plano-Irving, TX	Addison/Bent Tree	2	Yes	Yes.

Area	Submarket	Number of beds	YS/AIRM 30% or more	YS/AIRM/OneSite 30% or more
Dallas-Plano-Irving, TX	Allen/McKinney	2	Yes	Yes.
Dallas-Plano-Irving, TX	Carrollton/Farmers Branch	2	.....	Yes.
Dallas-Plano-Irving, TX	Central/East Plano	2	Yes	Yes.
Dallas-Plano-Irving, TX	East Dallas	2	Yes	Yes.
Dallas-Plano-Irving, TX	Frisco	2	Yes	Yes.
Dallas-Plano-Irving, TX	Grand Prairie	2	Yes	Yes.
Dallas-Plano-Irving, TX	Intown Dallas	2	Yes	Yes.
Dallas-Plano-Irving, TX	Las Colinas/Coppell	2	Yes	Yes.
Dallas-Plano-Irving, TX	Lewisville/Flower Mound	2	Yes	Yes.
Dallas-Plano-Irving, TX	North Irving	2	.....	Yes.
Dallas-Plano-Irving, TX	North Oak Cliff/West Dallas	2	Yes	Yes.
Dallas-Plano-Irving, TX	Oak Lawn/Park Cities	2	Yes	Yes.
Dallas-Plano-Irving, TX	Richardson	2	Yes	Yes.
Dallas-Plano-Irving, TX	Rockwall/Rowlett/Wylie	2	Yes	Yes.
Dallas-Plano-Irving, TX	The Colony/Far North Carrollton	2	Yes	Yes.
Dallas-Plano-Irving, TX	West Plano	2	Yes	Yes.
Denver-Aurora-Lakewood, CO	Broomfield	2	Yes	Yes.
Denver-Aurora-Lakewood, CO	Downtown/Highlands/Lincoln Park	2	Yes	Yes.
Denver-Aurora-Lakewood, CO	Highlands Ranch	2	Yes	Yes.
Denver-Aurora-Lakewood, CO	Littleton	2	Yes	Yes.
Denver-Aurora-Lakewood, CO	Northeast Denver	2	Yes	Yes.
Denver-Aurora-Lakewood, CO	Parker/Castle Rock	2	Yes	Yes.
Denver-Aurora-Lakewood, CO	South Lakewood	2	Yes	Yes.
Denver-Aurora-Lakewood, CO	Southeast Aurora/East Arapahoe County ...	2	Yes	Yes.
Denver-Aurora-Lakewood, CO	Southeast Denver	2	Yes	Yes.
Denver-Aurora-Lakewood, CO	Tech Center	2	Yes	Yes.
Denver-Aurora-Lakewood, CO	Thornton/Northglenn	2	Yes	Yes.
Denver-Aurora-Lakewood, CO	Westminster	2	Yes	Yes.
Fort Lauderdale-Pompano Beach-Deerfield Beach, FL	Plantation/Davie/Weston	2	Yes	Yes.
Fort Worth-Arlington, TX	Grapevine/Southlake	2	Yes	Yes.
Fort Worth-Arlington, TX	Northeast Fort Worth/North Richland Hills ..	2	.....	Yes.
Hartford-West Hartford-East Hartford, CT ...	Southeast Hartford/Middlesex County	2	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX ...	Bear Creek	2	.....	Yes.
Houston-The Woodlands-Sugar Land, TX ...	Downtown/Montrose/River Oaks	2	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX ...	Far West Houston	2	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX ...	Friendswood/Pearland	2	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX ...	Galleria/Uptown	2	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX ...	Greater Heights/Washington Avenue	2	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX ...	Greenway/Upper Kirby	2	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX ...	Memorial	2	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX ...	Sugar Land/Stafford	2	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX ...	The Woodlands	2	Yes	Yes.
Houston-The Woodlands-Sugar Land, TX ...	West University/Medical Center/Third Ward	2	Yes	Yes.
Jacksonville, FL	Baymeadows	2	Yes	Yes.
Jacksonville, FL	Upper Southside	2	Yes	Yes.
Kansas City, MO-KS	Lee's Summit/Blue Springs/Raytown	2	Yes	Yes.
Las Vegas-Henderson-Paradise, NV	Henderson	2	Yes	Yes.
Las Vegas-Henderson-Paradise, NV	Northwest Las Vegas	2	Yes	Yes.
Las Vegas-Henderson-Paradise, NV	Summerlin/The Lakes	2	Yes	Yes.
Los Angeles-Long Beach-Glendale, CA	Downtown Los Angeles	2	Yes	Yes.
Memphis, TN-MS-AR	Cordova/Bartlett	2	Yes	Yes.
Memphis, TN-MS-AR	Germantown/Collierville	2	Yes	Yes.
Mobile/Daphne, AL	North Mobile	2	Yes	Yes.
Nashville-Davidson—Murfreesboro—Franklin, TN.	Central Nashville	2	Yes	Yes.
Nashville-Davidson—Murfreesboro—Franklin, TN.	East Nashville	2	Yes	Yes.
Nashville-Davidson—Murfreesboro—Franklin, TN.	Franklin/Brentwood	2	Yes	Yes.
Nashville-Davidson—Murfreesboro—Franklin, TN.	South Nashville	2	Yes	Yes.
Nashville-Davidson—Murfreesboro—Franklin, TN.	Southeast Nashville	2	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	Altamonte Springs/Apopka	2	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	Casselberry/Winter Springs/Oviedo	2	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	Central Orlando	2	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	East Orange County	2	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	East Orlando	2	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	Kissimmee/Osceola County	2	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	Sanford/Lake Mary	2	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	South Orange County	2	Yes	Yes.
Orlando-Kissimmee-Sanford, FL	Southwest Orlando	2	Yes	Yes.

Area	Submarket	Number of beds	YS/AIRM 30% or more	YS/AIRM/OneSite 30% or more
Orlando-Kissimmee-Sanford, FL	Winter Park/Maitland	2	Yes	Yes.
Phoenix-Mesa-Scottsdale, AZ	Chandler	2	Yes	Yes.
Phoenix-Mesa-Scottsdale, AZ	Deer Valley	2	Yes	Yes.
Phoenix-Mesa-Scottsdale, AZ	North Glendale	2	Yes	Yes.
Phoenix-Mesa-Scottsdale, AZ	South Phoenix	2	Yes	Yes.
Portland-Vancouver-Hillsboro, OR-WA	Aloha/West Beaverton	2	Yes	Yes.
Portland-Vancouver-Hillsboro, OR-WA	Central Portland	2	Yes	Yes.
Portland-Vancouver-Hillsboro, OR-WA	Hillsboro	2	Yes	Yes.
Portland-Vancouver-Hillsboro, OR-WA	Lake Oswego/Tualatin/Wilsonville	2	Yes	Yes.
Raleigh/Durham, NC	Central Raleigh	2	Yes	Yes.
Raleigh/Durham, NC	Chapel Hill/Carrboro	2	Yes	Yes.
Raleigh/Durham, NC	East Durham	2	Yes	Yes.
Raleigh/Durham, NC	Far North Raleigh	2	Yes	Yes.
Raleigh/Durham, NC	Near North Raleigh	2	Yes	Yes.
Raleigh/Durham, NC	North Cary/Morrisville	2	Yes	Yes.
Raleigh/Durham, NC	Northeast Raleigh	2	Yes	Yes.
Raleigh/Durham, NC	Northwest Raleigh	2	Yes	Yes.
Raleigh/Durham, NC	South Cary/Apex	2	Yes	Yes.
Raleigh/Durham, NC	Southwest Durham	2	Yes	Yes.
Reno, NV	South Reno	2	Yes	Yes.
Richmond, VA	Northwest Richmond	2	Yes	Yes.
Richmond, VA	Tuckahoe/Westhampton	2	Yes	Yes.
Riverside-San Bernardino-Ontario, CA	Corona	2	Yes	Yes.
Riverside-San Bernardino-Ontario, CA	Rancho Cucamonga/Upland	2	Yes	Yes.
Riverside-San Bernardino-Ontario, CA	Temecula/Murrieta	2	Yes	Yes.
Salt Lake City/Ogden/Clearfield, UT	Midvale/Sandy/Draper	2	Yes	Yes.
Salt Lake City/Ogden/Clearfield, UT	Southwest Salt Lake City	2	Yes	Yes.
San Antonio-New Braunfels, TX	Far North Central San Antonio	2	Yes	Yes.
San Antonio-New Braunfels, TX	Far Northwest San Antonio	2	Yes	Yes.
San Antonio-New Braunfels, TX	North Central San Antonio	2	.....	Yes.
San Antonio-New Braunfels, TX	Northwest San Antonio	2	.....	Yes.
San Diego-Carlsbad, CA	Downtown San Diego/Coronado	2	Yes	Yes.
San Diego-Carlsbad, CA	Northeast San Diego	2	Yes	Yes.
Seattle-Bellevue-Everett, WA	Downtown Seattle	2	Yes	Yes.
Seattle-Bellevue-Everett, WA	Federal Way/Des Moines	2	.....	Yes.
Seattle-Bellevue-Everett, WA	Renton	2	Yes	Yes.
Tampa-St. Petersburg-Clearwater, FL	Carrollwood/Citrus Park	2	Yes	Yes.
Tampa-St. Petersburg-Clearwater, FL	Central Tampa	2	Yes	Yes.
Tampa-St. Petersburg-Clearwater, FL	Town and Country/Westchase	2	Yes	Yes.
Tucson, AZ	Casas Adobes/Oro Valley	2	Yes	Yes.
Tucson, AZ	Catalina Foothills	2	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV.	Germantown	2	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV.	Loudoun County	2	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV.	Manassas/Far Southwest Suburbs	2	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV.	Navy Yard/Capitol South	2	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV.	Northeast DC	2	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV.	Reston/Herndon	2	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV.	Tysons Corner/Falls Church/Merrifield	2	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV.	West Alexandria	2	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV.	West Fairfax County	2	Yes	Yes.
Washington-Arlington-Alexandria, DC-VA-MD-WV.	Woodbridge/Dale City	2	Yes	Yes.

United States District Court for the Middle District of North Carolina

United States of America, Plaintiff, v.
Pinnacle Property Management Services, LLC, Defendant.

No. 1:24-cv-00710-WLO-JGM

Proposed Final Judgment

Whereas, Plaintiff, United States of America, filed its Complaint on January 7, 2025;

And whereas, the United States and Defendant, Pinnacle Property Management Services, LLC, have

consented to entry of this Final Judgment without the taking of testimony, without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party relating to any issue of fact or law;

And whereas, Defendant agrees to undertake certain actions and refrain from certain conduct to remedy the loss of competition alleged in the Complaint;

And whereas, Defendant represents that the relief required by this Final Judgment can and will be made and that Defendant will not later raise a claim of hardship or difficulty as grounds for asking the Court to modify any provision of this Final Judgment;

Now therefore, it is ordered, adjudged, and decreed:

I. Jurisdiction

The Court has jurisdiction over the subject matter of, and each of the parties to, this action. The Complaint states a claim upon which relief may be granted against Defendant under Section 1 of the Sherman Act, 15 U.S.C. 1.

II. Definitions

As used in this Final Judgment:

A. “Defendant” means Defendant Pinnacle Property Management Services, LLC, a Delaware corporation with its headquarters in Dallas, Texas, its successors and assigns, and all of its subsidiaries, divisions, groups, affiliates, parents, partnerships, and joint ventures engaged in the management or ownership of multifamily rental properties in the United States and its territories, and their directors, officers, managers, agents, and employees.

B. “Competitively Sensitive Information” means, in this Final Judgment, property-specific data or information (whether past, present, or prospective) which, individually or when aggregated with such data or information from other properties, (1) could be reasonably used to determine current or future rental supply, demand, or pricing at a property or of any property’s units, including but not limited to executed rents, rental price concessions or discounts, guest traffic, guest applications, occupancy or vacancy, lease terms, or lease expirations; (2) relates to the Property Owner’s or Property Manager’s use of settings or user-specified parameters within Revenue Management Products with respect to such property or properties; or (3) relates to the Property Owner’s or Property Manager’s rental pricing amount, formula, or strategy, including rental price concessions or discounts with respect to such property or properties.

C. “Cooperation Subject Matter” means the claims alleged in *United States et al. v. RealPage et al.* (currently docketed as No. 1:24-cv-00710 in the Middle District of North Carolina), and

includes conduct as well as the effects of conduct.

D. “External Nonpublic Data” means all Nonpublic Data from any Third-Party. It does not include data for a Defendant Property.

E. “Including” means including, but not limited to.

F. “Model Training” means the process of analyzing data, including by machine learning or regression analysis, to create or adjust the parameters of a model or algorithm to improve the accuracy of the model’s or algorithm’s predictions.

G. “Nonpublic Data” means any Competitively Sensitive Information that is not Public Data.

H. “Person” means any natural person, corporate entity, partnership, association, joint venture, limited liability company, fund, investment vehicle, or any other legal entity or trust.

I. “Property Manager(s)” means any Person, or the Person’s agent, who manages a multifamily rental property.

J. “Property Owner(s)” means any Person who (directly or indirectly) owns or controls a multifamily rental property or that Person’s agent; multifamily rental properties have the same Property Owner if they are (directly or indirectly) owned or controlled by the same Person.

K. “Public Data” means information on a rental property or unit’s asking rental price (including publicly offered concessions), amenities, availability, and other information that is readily accessible to the general public, including but not limited to, on the property’s website, at a physical building, in brochures, or on an internet listing service. Public Data also includes information on a rental property or unit’s asking price, concessions, amenities, and availability provided by a Property Manager or a Property Owner to any natural person who reasonably presents himself as a prospective renter. Public Data does not include any Competitively Sensitive Information obtained through communications between competitors, unless such information is also readily accessible to the general public.

L. “RealPage” means RealPage, Inc., a Delaware corporation with its headquarters in Richardson, Texas.

M. “RealPage Final Judgment” means the Final Judgment between the United States and RealPage entered in *United States et al. v. RealPage et al.* (currently docketed as No. 1:24-cv-00710 in the Middle District of North Carolina).

N. “RealPage Meeting(s)” means RealPage steering committees, RealPage subcommittees, RealPage user groups,

RealPage Idea Exchange, or any variation of these meetings. For avoidance of doubt, a RealPage Meeting does not include any communications between Defendant and the Property Owner of a Defendant Property or any other Person providing services to that Defendant Property, or any software feedback provided solely to RealPage that is not otherwise shared by Defendant with other Property Managers or Property Owners.

O. “Revenue Management Product(s)” means any software or service, including software as a service, that generates rental prices or rental pricing recommendations for multifamily housing rentals. For avoidance of doubt, a Revenue Management Product does not include general purpose spreadsheet software like Microsoft Excel.

P. “Runtime Operation” means any action taken by a Revenue Management Product while it runs, including generating rental prices or pricing recommendations for any unit or set of units at a property. Runtime Operation does not mean Model Training.

Q. “Settled Civil Claims” means any civil federal antitrust claim by the United States arising from Defendant’s conduct accruing before the filing of the complaint in this action relating to (1) Revenue Management Products, including RealPage Revenue Management Products that use competitors’ Competitively Sensitive Information, as well as (2) communications described by Paragraph V.A.

R. “Third-Party” means any Person other than Defendant or a Defendant affiliate.

S. “Defendant Property” means a multifamily rental property, located within the United States or its territories, for which Defendant provides revenue management or related reporting or consulting services (collectively referred to as “Defendant Properties”). Defendant Property does not include student housing, affordable housing, age-restricted or senior housing, or military housing.

III. Applicability

This Final Judgment applies to Defendant, as defined above, and all other Persons in active concert or participation with Defendant who receive actual notice of this Final Judgment.

IV. Restrictions Concerning Use of Revenue Management Product(s)

A. Beginning 180 days after entry of the Stipulation and Order Defendant must not, within the United States and its territories:

1. license or use, for any Defendant Property, any Revenue Management Product that: (1) uses External Nonpublic Data (other than Nonpublic Data of the Property Owner of the subject Defendant Property) in its Runtime Operation to generate rental prices or rental pricing recommendations for a Defendant Property; (2) uses Nonpublic Data from a Defendant Property in its Runtime Operation to generate rental prices or rental pricing recommendations for any other Property Manager or Property Owner (unless the Property Owner of the non-Defendant Property is the same as the Property Owner of the Defendant Property from which the data arises or to which it relates); (3) discloses in any way Nonpublic Data from a Defendant Property to any Third-Party Property Manager or Third-Party Property Owner (other than a Third-Party Property Owner of the Defendant Property from which the data arises or to which it relates, or to a Third-Party Property Manager that provides services to Defendant Properties); (4) pools or combines Nonpublic Data from Defendant Properties that have different Property Owners; or (5) contains or uses a pricing model or algorithm that has been trained using Nonpublic Data (other than Nonpublic Data of the Property Owner of the subject Defendant Property); or

2. license or use any Revenue Management Product that: (1) incorporates a rental price floor or a limit on rental price recommendation decreases (excluding a rental price floor, or limit on rental price decreases, that Defendant or the Property Owner manually selects and is not based on Nonpublic Data other than Nonpublic Data of the Property Owner of the subject Defendant Property); or (2) requires Defendant to accept, or provides any financial rewards for Defendant to accept, any recommended rental prices.

3. agree (expressly or tacitly) with any Property Owner or Non-Defendant Property Manager to use a particular Revenue Management Product (or the utilities or functionalities thereof) or require any other Person to use a particular Revenue Management Product (or the utilities or functionalities thereof). Defendant is not prohibited by the preceding sentence from using a particular Revenue Management Product at a particular property pursuant to an agreement with another Person who is the Property Owner or who, along with Defendant, provides services to that particular property on behalf of the Property Owner, provided that the Revenue

Management Product complies with Paragraphs IV.A.1–2.

B. If management responsibilities or ownership of a property within the United States or its territories is transferred from another Property Manager or Property Owner to Defendant, then Defendant will have 90 days from the date of transfer to comply with the requirements of Paragraph IV.A. for the transferred property.

C. Within 180 days after entry of the Stipulation and Order, Defendant must first notify the United States, in writing, of its intention to license or use a Revenue Management Product 30 calendar days prior to using a Revenue Management Product. Thereafter, if Defendant intends to license or use any other Revenue Management Product at any Defendant Property, Defendant must first notify the United States, in writing, of its intention to license or use such a Revenue Management Product 30 calendar days prior to licensing or using the Revenue Management Product.

D. Notwithstanding Paragraph IV.A, Defendant may license or use a Revenue Management Product that complies with the terms of the RealPage Final Judgment.

E. Beginning 180 days after entry of the Stipulation and Order, if Defendant elects to license or use a Revenue Management Product:

1. After entry by the Court of a RealPage Final Judgment, Defendant may license or use a RealPage Revenue Management Product at any Defendant Property without the need to obtain certification as required in this Paragraph IV.E.

2. If Defendant licenses or uses a Revenue Management Product from a Person other than RealPage or a reseller of a RealPage Revenue Management Product at any Defendant Property, Defendant must secure and submit to the United States a certification from the vendor of the Revenue Management Product that the Revenue Management Product complies with the requirements in Paragraph IV.A or complies with the requirements for Revenue Management Products established in a RealPage Final Judgment.

V. Other Prohibited Conduct

A. Defendant must not, directly or indirectly, as part of setting rental prices or generating rental pricing recommendations for any Defendant Property (1) disclose Nonpublic Data to any Third-Party Property Manager or Third-Party Property Owner (except to a Third-Party Property Owner of the particular Defendant Property from which the data arises or to which it relates, or a Third-Party Property

Manager that provides services to Defendant Properties); (2) solicit External Nonpublic Data from any Third-Party Property Manager or Third-Party Property Owner (except from a Third-Party Property Owner of the particular Defendant Property from which the data arises or to which it relates, or from a Third-Party Property Manager that provides services to Defendant Properties); or (3) use External Nonpublic Data obtained from any Third-Party Property Manager or Third-Party Property Owner (except from a Third-Party Property Owner of the particular Defendant Property from which the data arises or to which it relates, or from a Third-Party Property Manager that provides services to Defendant Properties). For the avoidance of doubt, the restrictions set forth in this Paragraph include Nonpublic Data obtained through any means, whether directly or through an intermediary, including call rounds or market surveys, in-person meetings, calls, text messages, chat communications, emails, surveys, spreadsheets, shared documents (e.g., Google documents and SharePoint documents), industry meetings (e.g., user groups), online fora, private meetings, Revenue Management Products, or information-exchange services.

B. Notwithstanding Paragraph V.A, a Defendant employee may (1) disclose or solicit Nonpublic Data about a particular property for the purpose of evaluating or effectuating a bona fide sale or purchase of the property, as long as any Nonpublic Data received is not used to set rental prices or generate rental pricing recommendations, or (2) disclose Nonpublic Data about a particular Defendant Property between a departing Property Manager and replacement Property Manager as part of a bona fide transfer of management responsibilities for that property.

C. Defendant must not, within the United States or its territories, use or access, as part of setting rental prices or generating rental pricing recommendations for any Defendant Property, any External Nonpublic Data (other than Nonpublic Data of the Property Owner of the subject Defendant Property), including such data derived from any RealPage Revenue Management Product, in Defendant's possession, custody, or control as of the Court's entry of the Stipulation and Order in this matter, acquired through any means. Within 180 days of entry of the Stipulation and Order, Defendant must identify to the United States in writing the existence and location of any structured data set

containing such External Nonpublic Data. For the avoidance of doubt, the proscriptions in this Paragraph do not apply to data for Defendant Properties maintained in OneSite or other property management software.

D. Defendant will not attend or participate in any RealPage Meetings. If Defendant attends or participates in a RealPage Meeting it will report such meeting within 30 days to the United States. Defendant must identify the date, time, and location of the meeting, identify all participants in that meeting, provide a description of the content of the meeting, provide a description of any document shown during the meeting, produce all documents received or provided by Defendant during the meeting, and produce any chats, recordings, or documents associated with the meeting.

VI. Antitrust Compliance

A. Within 30 days of entry of the Stipulation and Order, Defendant must adopt a written antitrust compliance policy, to be approved by the United States in its sole discretion, that complies with the obligations set forth in this Final Judgment. Defendant must annually train all employees on this written policy. As part of that policy, Defendant must designate a chief antitrust compliance officer, who will be responsible for implementing and enforcing Defendant's antitrust compliance policy and annual training. Defendant must identify to the United States the chief antitrust compliance officer's name, business address, telephone number, and email address. Within forty-five (45) days of a vacancy in Defendant's chief antitrust compliance officer position, Defendant must appoint a replacement and must identify to the United States the replacement's name, business address, telephone number, and email address. Defendant's initial and replacement appointment of a chief antitrust compliance officer is subject to the approval of the United States in its sole discretion. Defendant is responsible for all costs and expenses related to the chief antitrust compliance officer. The chief antitrust compliance officer will conduct an annual antitrust compliance audit. The annual audits must, at a minimum, cover: (1) employees (including supervisors) engaged in or overseeing Defendant's revenue management of multifamily rental properties in the United States and its territories; and (2) randomly selected, local, regional, or supervisory employees who manage property operations (at least 8 each year). The chief antitrust compliance officer will

provide the United States with an annual report identifying all individuals audited.

B. On an annual basis beginning 180 calendar days after entry of the Stipulation and Order during the term of this Final Judgment, Defendant must:

1. submit to the Antitrust Division a certification from the General Counsel of Defendant attesting under penalty of perjury that (1) Defendant has established and maintained the annual antitrust compliance policy and training required by Paragraph VI.A; (2) Defendant has complied with the attestation requirements in Paragraph VI.C.2; (3) Defendant has provided the Antitrust Division with an annual report identifying the individuals audited pursuant to Paragraph VI.A; (4) if required under this Final Judgment, the vendors of any Revenue Management Products licensed or used by Defendant have provided the certification(s) required by Paragraph IV.E; and (5) Defendant has complied with Paragraph V.D.

2. require all of Defendant's employees (a) engaged in or overseeing Defendant's revenue management of multifamily rental properties in the United States and its territories, and/or (b) having director-level and above responsibility for overseeing property management for multiple of Defendant's multifamily rental properties in the United States and its territories to attest under penalty of perjury that they have complied with Paragraphs IV.A, and IV.B;

3. if required under this Final Judgment, including Paragraph IV.E, obtain and submit to the Antitrust Division a certification, as described in Paragraph IV.E, that each Revenue Management Product that Defendant licenses or uses complies with Paragraph IV.A or complies with the requirements for Revenue Management Products established in a proposed RealPage Final Judgment; and

4. if applicable, provide the Antitrust Division a report that identifies for each Defendant Property for which Defendant uses a Revenue Management Product: (1) the name of the Property Owner(s) and (2) any Revenue Management Product used within the preceding twelve months for that Defendant Property.

VII. Cooperation

A. Subject to reaching a settlement with all States that, as of the entry of the Stipulation and Order, are plaintiffs in *United States et al. v. RealPage et al.* (currently docketed as No. 1:24-cv-00710 in the Middle District of North Carolina), Defendant must cooperate

fully and truthfully with the United States relating to the Cooperation Subject Matter in any civil investigation or civil litigation the United States brings or has brought. Defendant must use its best efforts to ensure that all current and former officers, directors, agents, and employees also fully and promptly cooperate with the United States relating to the Cooperation Subject Matter in any civil investigation or civil litigation the United States brings or has brought. Defendant's cooperation must include:

1. as requested on reasonable notice by the Antitrust Division, making up to 15 employees available for voluntary interviews for up to 40 hours total regarding the Cooperation Subject Matter;

2. providing full and truthful written or oral testimony in any deposition, trial, or other proceeding relating to the Cooperation Subject Matter and making witnesses available to the United States upon reasonable notice before any such testimony;

3. providing proffers, which may be made by counsel for Defendant, describing Defendant's knowledge of and evidence relating to the Cooperation Subject Matter;

4. within 30 days of receiving a written request (whether formal process or informal request) from the United States for documents, information, or other material relating to the Cooperation Subject Matter (or whatever additional time the Antitrust Division grants in its sole discretion), producing to the United States all responsive documents, information, and other materials, wherever located, not protected under the attorney-client privilege or the work-product doctrine, in the possession, custody, or control of Defendant, as well as a log of any responsive documents, information, or other materials that were not provided, including an explanation of the basis for withholding such materials;

5. authenticating or otherwise assisting with establishing the evidentiary foundation of any documents Defendant produced or produces to the United States; and

6. taking all necessary steps to preserve all documents, information, and other materials relating to the Cooperation Subject Matter until the United States provides written notice to Defendant that its obligation to do so has expired.

B. Subject to Defendant's full, truthful, and continuing cooperation, as required under Paragraph VII.A, Defendant is fully and finally discharged and released from Settled Civil Claims.

C. Nothing in this Section VII affects Defendant's obligation to respond to any formal discovery requests in litigation or a civil investigative demand issued by the United States.

VIII. Appointment of Monitor

A. Defendant will not be subject to a Monitor if all Revenue Management Products that Defendant licenses or uses at Defendant Properties have been certified pursuant to, or are otherwise compliant with, Paragraph IV.E.

B. However, if Defendant elects to license or use a Revenue Management Product that has not been certified pursuant to, or is not otherwise compliant with, Paragraph IV.E, at any Defendant Property, or if a Court finds that Defendant has violated any other term of the Final Judgment, upon application of the United States, which Defendant may not oppose, the Court will appoint an independent Third-Party antitrust monitor (the "Monitor") selected by the United States and approved by the Court.

C. Defendant may propose to the United States a pool of three candidates to serve as the Monitor, and the United States may consider Defendant's perspectives on the proposed candidates or any other candidates identified and considered by the United States. The United States will retain the ultimate right, in its sole discretion, either to select the Monitor from among the three candidates proposed by Defendant or to select a different candidate. Once approved, the Monitor should be considered by the United States and Defendant to be an arm and representative of the Court.

D. The Monitor will have the power and authority to monitor Defendant's compliance with Paragraphs IV.A, V.A, V.D, VI.A, and VI.B of this Final Judgment, including by determining whether employees (including supervisors) in Defendant's residential-property revenue management group have complied with their obligations set forth in those Sections. As part of its monitoring duties, the Monitor may also choose, in consultation with the United States, a yearly selection of other local, regional, or supervisory employees of Defendant who manage property operations (not to exceed 15 annually) and investigate whether those individuals have complied with the obligations set forth in Paragraphs IV.B and V.A. The Monitor will have other powers as the Court deems appropriate. The Monitor will have no responsibility for the operation of the Defendant's business. No attorney-client relationship will be formed between Defendant and the Monitor.

E. The Monitor will have the authority to take such steps as, in the Monitor's discretion and the United States' view, may be necessary to accomplish the Monitor's responsibilities. The Monitor may seek information from Defendant's personnel, including in-house counsel, compliance personnel, and internal auditors. Defendant will annually communicate to all employees that employees may disclose any information to the Monitor without reprisal for such disclosure. Defendant must not retaliate against any employee or Third-Party for disclosing information to the Monitor.

F. Defendant may not object to actions taken by the Monitor in fulfillment of the Monitor's responsibilities under any Order of the Court on any ground other than malfeasance by the Monitor. Disagreements between the Monitor and Defendant related to the scope of the Monitor's responsibilities do not constitute malfeasance. Objections by Defendant must be conveyed in writing to the United States and the Monitor within 10 calendar days of the Monitor's action that gives rise to Defendant's objection, or else Defendant will have waived any such objections.

G. The Monitor will serve at the cost and expense of Defendant pursuant to a written agreement, on terms and conditions, including confidentiality requirements and conflict of interest certifications, approved by the United States in its sole discretion. If the Monitor and Defendant are unable to reach such a written agreement within 14 calendar days of the Court's appointment of the monitor, or if the United States, in its sole discretion, declines to approve the proposed written agreement, the United States, in its sole discretion, may take appropriate action, including making a recommendation as to the Monitor's costs and expenses to the Court, which may set the terms and conditions for the Monitor's costs and expenses.

H. The Monitor may hire, at the cost and expense of Defendant, any agents and consultants, including investment bankers, attorneys, and accountants, that are reasonably necessary in the Monitor's judgment to assist with the Monitor's duties. These agents or consultants will be directed by and solely accountable to the Monitor and will serve on terms and conditions, including confidentiality requirements and conflict-of-interest certifications, approved by the United States in its sole discretion. Within three business days of hiring any agents or consultants, the Monitor must provide written notice of

the hiring and the rate of compensation to Defendant and the United States.

I. The Monitor must provide yearly reports to the United States, with the first report due six months after the Monitor is appointed and subsequent reports due yearly thereafter, setting forth Defendant's efforts to comply with its obligations under this Final Judgment. If the Monitor learns of any potential violation of the Final Judgment by Defendant's officers, agents, or employees, the Monitor must promptly disclose to the Antitrust Division the nature and extent of any such potential violation and the Antitrust Division may require, in its sole discretion and without prejudice to any other remedy available for any violation of the Final Judgment, that the Monitor conduct additional investigation of compliance with this Final Judgment beyond any limits set forth in Paragraph VIII.D.

J. The Monitor must account for all costs and expenses incurred.

K. The compensation of the Monitor and agents or consultants retained by the Monitor must be on reasonable and customary terms commensurate with the individuals' experience and responsibilities.

L. Defendant's failure to promptly pay the Monitor's accounted-for costs and expenses, including for agents and consultants, will constitute a violation of this Final Judgment and may result in sanctions imposed by the Court. If Defendant disputes any part of the Monitor's accounted-for costs and expenses, Defendant must establish an escrow account into which Defendant must pay the disputed costs and expenses until the dispute is resolved.

M. Defendants must use best efforts to cooperate fully with the Monitor and to assist the Monitor to monitor Defendant's compliance with its obligations under this Final Judgment. Subject to reasonable protection for trade secrets, other confidential research, development, or commercial information, or any applicable privileges, Defendant must provide the Monitor and agents or consultants retained by the Monitor with full and complete access to all personnel (current and former), agents, consultants, books, records, and facilities. Defendant may not take any action to interfere with or to impede accomplishment of the Monitor's responsibilities.

N. If the United States determines that the Monitor is not acting diligently or in a reasonably cost-effective manner, or if the Monitor becomes unable to continue in its role for any reason, the United

States may recommend that the Court appoint a substitute.

O. Once appointed by the Court, the Monitor will serve until (1) the expiration of the Final Judgment; or (2) if a Monitor has been appointed pursuant to Paragraph VIII.B, the United States will move the Court to terminate the monitorship upon the United States' determination that Defendant complies with the requirements in Paragraph IV.E.

IX. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment or of related orders such as the Stipulation and Order entered in this matter or of determining whether this Final Judgment should be modified or vacated, upon written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, and reasonable notice to Defendant, Defendant must permit, from time to time and subject to legally recognized privileges, authorized representatives, including agents retained by the United States:

1. to have access during Defendant's office hours to inspect and copy, or at the option of the United States, to require Defendant to provide, no later than 30 days after receiving a written request (whether formal or informal) from the United States, electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendant relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, Defendant's officers, agents, or employees, who may have their individual counsel present, relating to any matters contained in this Final Judgment. The interviews must be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendant.

B. For the purposes of determining or securing compliance with this Final Judgment or related orders or determining whether this Final Judgment should be modified or vacated, upon the written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, Defendant must submit written reports or respond to written interrogatories, under oath if requested, relating to any matters contained in this Final Judgment.

X. Public Disclosure

A. No information or documents obtained pursuant to any provision of this Final Judgment, including reports the Monitor provides to the United

States pursuant to Paragraph VIII.I, may be divulged by the United States or the Monitor to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party, including grand-jury proceedings, or as otherwise required by law.

B. In the event that the Monitor should receive a subpoena, court order, or other court process seeking production of information or documents obtained pursuant to any provision in this Final Judgment, including reports the Monitor provides to the United States pursuant to Paragraph VIII.I, the Monitor must notify Defendant immediately and prior to any disclosure, so that Defendant may address such potential disclosure and, if necessary, pursue alternative legal remedies, including intervention in the relevant proceedings.

C. In the event of a request by a Third-Party, pursuant to the Freedom of Information Act, 5 U.S.C. 552, for disclosure of information obtained pursuant to any provision of this Final Judgment, the Antitrust Division will act in accordance with that statute, and the Department of Justice regulations at 28 CFR part 16, including the provision on confidential commercial information, at 28 CFR 16.7. Defendant, when submitting information to the Antitrust Division, should designate the confidential commercial information portions of all applicable documents and information under 28 CFR 16.7. Designations of confidentiality expire 10 years after submission, "unless the submitter requests and provides justification for a longer designation period." See 28 CFR 16.7(b).

D. If at the time that Defendant furnishes information or documents to the United States pursuant to any provision of this Final Judgment, Defendant represents and identifies in writing information or documents for which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and the Defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," the United States must give Defendant 10 calendar days' notice before divulging the material in any legal proceeding (other than a grand-jury proceeding).

XI. Retention of Jurisdiction

The Court retains jurisdiction to enable any party to this Final Judgment to apply to the Court at any time for further orders and directions as may be

necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XII. Enforcement of Final Judgment

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. Defendant agrees that in a civil contempt action, a motion to show cause, or a similar action brought by the United States relating to an alleged violation of this Final Judgment, the United States may establish a violation of this Final Judgment and the appropriateness of a remedy therefor by a preponderance of the evidence, and Defendant waives any argument that a different standard of proof should apply.

B. This Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws and to restore the competition the United States alleges was harmed by the challenged conduct. Defendant agrees that it may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In an enforcement proceeding in which the Court finds that Defendant has violated this Final Judgment, the United States may apply to the Court for an extension of this Final Judgment, together with other relief that may be appropriate. In connection with a successful effort by the United States to enforce this Final Judgment against Defendant, whether litigated or resolved before litigation, Defendant agrees to reimburse the United States for the fees and expenses of its attorneys, as well as all other costs including experts' fees, incurred in connection with that effort to enforce this Final Judgment, including in the investigation of the potential violation.

D. For a period of four years following the expiration of this Final Judgment, if the United States has evidence that Defendant violated this Final Judgment before it expired, the United States may file an action against Defendant in this Court requesting that the Court order: (1) Defendant to comply with the terms of this Final Judgment for an additional term of at least four years following the

filing of the enforcement action; (2) all appropriate contempt remedies; (3) additional relief needed to ensure Defendant complies with the terms of this Final Judgment; and (4) fees or expenses as called for by this Section.

XIII. Expiration of Final Judgment

Unless the Court grants an extension, this Final Judgment will expire five years from the date of its entry, except that after three years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and Defendant that the continuation of this Final Judgment is no longer necessary or in the public interest.

XIV. Reservation of Rights

The Final Judgment relates only to the resolution of the Settled Civil Claims. The United States reserves all rights for any other claims against Defendant that may be brought in the future. The entry of the Final Judgment does not limit the ability of any non-settling attorney general of any State to bring or maintain any action under federal or state law against Defendant.

XV. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b–h), including by making available to the public copies of this Final Judgment and the Competitive Impact Statement, public comments thereon, and any response to comments by the United States. Based upon the record before the Court, which includes the Competitive Impact Statement and, if applicable, any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date:

[Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16]

United States District Judge

United States District Court for the Middle District of North Carolina

United States of America, Plaintiff, v.
Pinnacle Property Management Services, LLC, Defendant.

No. 1:24-cv-00710-WLO-JGM

Competitive Impact Statement

In accordance with the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) (the “APPA” or “Tunney Act”), the United States of America files this Competitive Impact Statement related to the proposed Final Judgment

against Defendant Pinnacle Property Management Services, LLC, which has been filed in this civil antitrust proceeding (Doc. 213–1).

I. Nature and Purpose of the Proceeding

On August 23, 2024, the United States, along with co-plaintiff States, filed a civil antitrust Complaint (the “Complaint”) against RealPage, Inc. (“RealPage”). On January 7, 2025, the United States and its co-plaintiff States amended the Complaint to add Pinnacle Property Management Services, LLC (“Pinnacle”) and five other property management companies (“property managers”) as Defendants. Pinnacle licenses revenue management products called AI Revenue Management (“AIRM”) and YieldStar from RealPage. RealPage also licenses AIRM and YieldStar to Pinnacle’s competitors, including the other property managers or property owners (collectively, “landlords”) named as Defendants in the Complaint. Pinnacle and other landlords use RealPage’s revenue management products to determine how to price floor plans and units for the conventional multifamily rental housing that they each manage and lease, in competition with each other in numerous local rental housing markets around the country.

The Complaint alleges that Pinnacle violated Section 1 of the Sherman Act, 15 U.S.C. 1, by unlawfully sharing its confidential and competitively sensitive information with RealPage for use in its and competing landlords’ pricing. Under their licensing agreements with RealPage, Pinnacle and competing landlords have provided RealPage with daily, competitively sensitive, nonpublic information relating to their leasing businesses, including details like how many leases have been renewed, on what terms, and at what price. The transactional data that Pinnacle and other landlords have agreed to provide to RealPage includes current, forward-looking, granular, and highly competitively sensitive information. As reflected in the design, development, and operation of its revenue management products, RealPage has used Pinnacle’s competitively sensitive, nonpublic information to influence rental prices and other leasing recommendations across conventional multifamily rental housing managed by competing landlords. Through RealPage’s revenue management products, Pinnacle’s rental prices and related recommendations for conventional multifamily housing rentals were likewise influenced by its competitors’ competitively sensitive, nonpublic information. In each relevant

market, RealPage and participating landlords, including Pinnacle, collectively have sufficient market power, as indicated by market and data penetration, to harm renters and the competitive process through their unlawful sharing of confidential and competitively sensitive information with each other.

The Complaint also alleges that Pinnacle and other landlords, by adopting and using RealPage’s revenue management products, have agreed with RealPage to align their pricing, thereby violating Section 1 of the Sherman Act, 15 U.S.C. 1. RealPage has entered into agreements with Pinnacle and its competing landlords relating to how to price floor plans and rental units by licensing its revenue management products, AIRM and YieldStar, to landlords, and by training and running its revenue management products using competitively sensitive, nonpublic transactional data shared by landlords. Adoption and use of RealPage’s revenue management products by Pinnacle and other landlords has the likely effect of aligning their pricing processes, strategies, and pricing responses, and Pinnacle and other landlord users understand this likely effect.

On September 4, 2026, the United States filed a proposed Final Judgment and a Stipulation and Order (“Stipulation and Order”), which are designed to remedy the loss of competition alleged in the Complaint due to Pinnacle’s conduct.

The proposed Final Judgment, which is explained more fully below, imposes several requirements and restrictions on Pinnacle that address the United States’ concerns regarding Pinnacle’s anticompetitive conduct alleged in the Complaint. Specifically:

- i. Pinnacle cannot license or use any third-party revenue management product that uses third-party nonpublic data to recommend or set prices;
- ii. Pinnacle cannot license or use any third-party revenue management product that pools information across Pinnacle properties with different owners;
- iii. Pinnacle cannot disclose, solicit, or use competitively sensitive information from competitors that can be used to set rental prices or generate pricing;
- iv. Pinnacle must cooperate in this civil antitrust proceeding (*United States et al. v. RealPage et al.*) with respect to the claims against other defendants;
- v. Pinnacle must adopt a written antitrust compliance policy and designate a chief antitrust compliance officer who will train Pinnacle employees on the policy, enforce the

policy, and perform annual audits for compliance with the policy;

vi. Pinnacle must allow the United States to inspect its documents and to interview its employees to ensure compliance with the Final Judgment;

vii. Pinnacle must allow the United States to inspect documents regarding its proprietary revenue management product and review the relevant code and pseudocode;

viii. If Pinnacle uses a third-party revenue management product, Pinnacle will be subject to the appointment of a monitor unless Pinnacle obtains a certification that meets certain requirements, including affirming, among other things, that the product complies with all required limitations regarding use of competitors' competitively sensitive data in its runtime operation or model training; and

ix. Pinnacle will also be subject to the appointment of a monitor if the Court finds that Pinnacle has violated the terms of the proposed Final Judgment.

Under the terms of the Stipulation and Order, Pinnacle must abide by and comply with the provisions of the proposed Final Judgment until it is entered by the Court or until the time for all appeals of any Court ruling declining entry of the proposed Final Judgment has expired.

The United States and Pinnacle have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the APPA. Entry of the proposed Final Judgment will terminate this action with respect to the United States and Pinnacle, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof by Pinnacle.

II. Description of Events Giving Rise to the Alleged Sherman Act Violations

Pinnacle has been a user of commercial revenue management and property management products that RealPage licenses to landlords, and it has used RealPage's revenue management product to help set rental prices for the properties it manages and/or owns. RealPage currently licenses three revenue management products, including AIRM, to landlords. AIRM, which Pinnacle has been using, leverages confidential, competitively sensitive data collected from competing landlords as a critical input to generate pricing recommendations for competing landlords. This data includes rental applications, executed new leases, renewal offers and acceptances, and occupancy estimates and projections.

The data is pulled from property management software, such as RealPage's OneSite product or Yardi's Voyager, that Pinnacle and other landlords use to collect and track rental payments, manage leases, property maintenance, accounting, and other property management functions.

When deciding where to live, renters often visit numerous properties that are owned or managed by competing landlords so that they can compare rental offerings and select their best housing option considering price and other terms. When competing landlords do not have access to each other's nonpublic data, or when their recommendations are not informed by competitors' nonpublic data, they are more likely to act independently and compete more vigorously on price and better leasing terms to secure new leases and renewals from renters. RealPage, however, provides landlords who use its revenue management products with pricing recommendations and pricing based on competitors' competitively sensitive data. Widespread adoption and use of RealPage's revenue management products leads to pricing decisions by competing landlords such as Pinnacle that are based on recommendations coming from a common pricing model and powered by competitively sensitive, nonpublic data, harming the ability of renters to obtain a competitive price for their housing. The use of competitors' competitively sensitive data in this manner thus harms renters as well as the competitive process itself.

Pinnacle, headquartered in Frisco, Texas, is one of the largest apartment managers in the United States. As an apartment manager, Pinnacle makes strategic and competitive decisions for the apartments it manages, including determination of new lease and renewal terms, such as rental price. As of the date of the Complaint, Pinnacle licensed AIRM and YieldStar from RealPage. Per the licensing agreement, Pinnacle relied on AIRM and YieldStar to recommend rental prices for its units, which is informed by competitively sensitive data provided by Pinnacle's competitors. Pinnacle also provided its competitively sensitive data to RealPage, to be used to inform the rental prices that RealPage's software recommends to Pinnacle's competitors. Further, Pinnacle has agreed with RealPage to use AIRM and YieldStar as RealPage designed them. It reviews AIRM and YieldStar floor plan price recommendations daily and uses these revenue management products to set scheduled floor plan rents and even unit-level prices.

In summary, the Complaint alleges that Pinnacle unlawfully shared its competitively sensitive information for use in pricing by competing landlords that also license RealPage's revenue management products, that Pinnacle benefited from using competitors' sensitive information for its own pricing, and that Pinnacle agreed to align its pricing with that of its competitors by using RealPage's revenue management products in the way the products were designed and with the data it uses. Pinnacle uses RealPage's revenue management products to inform its setting of rental prices and discounts—such as concessions of a free month of rent—and to make other competitive and strategic decisions relating to rental prices and terms.

III. Explanation of the Proposed Final Judgment

The relief required by the proposed Final Judgment will remedy the loss of competition in the conventional multifamily rental housing market¹³ alleged in the Complaint by precluding Pinnacle from sharing competitively sensitive, nonpublic information, directly or indirectly, with competing landlords and from forming agreements, directly or indirectly, to align prices with its competitors. The terms described below are designed to ensure that Pinnacle ends its anticompetitive conduct and to prevent Pinnacle from engaging in the same or similar conduct in the future.

A. Restrictions Concerning Use of Third-Party Revenue Management Products

The decree prohibits Pinnacle from using third-party revenue management products unless certain conditions are met. If Pinnacle decides to use a third-party revenue management product, Paragraph IV.A requires Pinnacle to select a product that does not (1) use competitively sensitive data from other landlords to set rental prices or generate rental pricing recommendations, (2) use data from different Pinnacle owners to set rental prices or generate rental pricing recommendations, (3) disclose data from a Pinnacle property to a rival property management company or property owner, (4) pool or combine data from different owners, or (5) contain or use a pricing algorithm that has been trained using non-Pinnacle data. Paragraph IV.A also prohibits

¹³ As stated in the Complaint, the conventional multifamily rental housing market includes apartments available to the general public in properties that have five or more living units. It does not include student housing, affordable housing, age-restricted or senior housing, or military housing. (Am. Compl. ¶ 183).

Pinnacle from selecting and using a third-party revenue management product that has rental floors or limits rental pricing recommendation decreases based on competing properties' rental prices.

The proposed Final Judgment includes an additional restriction on Pinnacle's ability to make agreements with non-clients regarding revenue management products. Specifically, Paragraph IV.A.3 prohibits Pinnacle from agreeing with a non-client property owner or a competing property management company to use a particular revenue management product. This provision reduces the risk of competitors agreeing with each other to use the same revenue management product across their clients.

If Pinnacle chooses to use a third-party revenue management product in the future, Paragraph IV.C requires Pinnacle to notify the United States 30 days prior to switching to that product. Paragraph IV.E requires Pinnacle to submit to the United States a certification from the third-party revenue management product vendor that the product complies with the requirements in Paragraph IV.A of the proposed Final Judgment.

B. Other Prohibited Conduct

In addition to restrictions and conditions on Pinnacle's use of revenue management products, the proposed Final Judgment also limits Pinnacle's ability to communicate with competitors regarding certain competitively sensitive information for the purpose of setting prices. Paragraph V.A prohibits Pinnacle from disclosing, soliciting, or using any competitively sensitive data from competitors as part of setting rental prices or generating rental price recommendations, except for the property owner of that particular property. Paragraph V.A clarifies that the restrictions include any data obtained through any form of communication, including call rounds or market surveys, meetings, calls, text messages, emails, or shared documents.

Paragraph V.C prevents Pinnacle from using any competitively sensitive data belonging to other landlords, whether Pinnacle derived that non-Pinnacle data from a revenue management product or obtained it from direct communications with other landlords. Pinnacle must also identify to the United States the existence and location of any such data. This does not apply to any data for Pinnacle properties maintained in OneSite.

In addition, the proposed Final Judgment prohibits Pinnacle from attending or participating in RealPage

Meetings, which include steering committees, RealPage subcommittees, RealPage user groups, and RealPage Idea Exchange. Paragraph V.D. provides that if Pinnacle attends a RealPage Meeting, it must notify the United States within 30 days and provide a description of the content and any documents shown during the meeting. Additionally, Pinnacle must produce to the United States any chats or documents associated with the meeting.

C. Cooperation

Under the terms of the proposed Final Judgment, and subject to reaching settlement with certain States, Pinnacle must cooperate with the United States relating to the United States' claims against the remaining defendants included in the Complaint. This required cooperation includes voluntary interviews with up to 15 Pinnacle employees for up to 60 hours. In addition, Pinnacle must provide cooperation to the United States by making witnesses available before trial, providing testimony, proffering evidence, and producing documents and other information.

D. Compliance Terms

Pursuant to Paragraph IX.A, Pinnacle must provide the United States with access to Pinnacle's books, records, data, and documents, including communications with other property managers, to enable the United States to assess Pinnacle's compliance with the terms of the Final Judgment. Pinnacle must also permit the United States to interview Pinnacle's officers, employees, or agents relating to any matters contained in this Final Judgment. Pinnacle must also provide the United States with documents describing how Pinnacle's proprietary revenue management product is trained and how it determines prices for properties it manages, as well as changes to these processes. Pinnacle must also allow the United States to inspect Pinnacle's software code and pseudocode of that software for independent verification.

Additionally, Paragraph VI.A requires Pinnacle's chief antitrust compliance officer to audit Pinnacle's operations. The annual audits must, at a minimum, include employees in Pinnacle's revenue management group and a randomly selected group of employees who manage property operations. Paragraph VI.B requires Pinnacle to submit an annual certification from its General Counsel that Pinnacle has established and maintained the annual antitrust compliance policy and training, that Pinnacle identified the

audited individuals to the United States, and that any revenue management product used by Pinnacle continues to satisfy the requirements in the proposed Final Judgment.

Finally, VI.B.2 requires Pinnacle employees engaged in or overseeing Defendant's revenue management of multifamily rental properties or employees having director-level and above responsibility for overseeing multiple multifamily rental properties to attest, under penalty of perjury, that they have not (i) agreed with any non-Pinnacle landlord to use a particular revenue management product; (ii) disclosed, solicited or used non-Pinnacle competitively sensitive data as part of setting or generating pricing information; or (iii) attended RealPage meetings.

E. Compliance Monitor

The proposal Final Judgment requires that Pinnacle be subject to an appointed compliance monitor in certain circumstances.

First, Paragraph VIII.B requires that a monitor be appointed if the Court determines that Pinnacle has violated the proposed Final Judgment.

Second, Paragraph VIII.B requires that Pinnacle be subject to a monitor unless Pinnacle obtains a certification, as required by Paragraph IV.E, for a non-RealPage revenue management product. The product's vendor must certify that the product does not use competitors' competitively sensitive data to determine rental prices and satisfies other software requirements.

In the event a monitor is appointed, which selection shall be in the United States' sole discretion, the monitor will assess Pinnacle's compliance with the Final Judgment, in particular, its use of a revenue management product and its communications with other landlords. Paragraph VIII.D provides the monitor with authority to investigate Pinnacle's compliance with the Final Judgment, including by selecting up to 15 Pinnacle employees to interview and giving the monitor access to review those employees' files. Further, per Paragraph VIII.E, the monitor will have the authority to take steps necessary to ensure compliance with the Final Judgment. These steps may include interviewing Pinnacle employees and collecting Pinnacle documents. The monitor will also provide an annual report to the United States setting forth Pinnacle's efforts to comply with its obligations under the Final Judgment.

If appointed, the monitor will serve at Pinnacle's expense, on such terms and conditions as the United States approves in its sole discretion. Pinnacle

will be required to assist the monitor in fulfilling his or her obligations. The monitor will serve for the remainder of the term of the Final Judgment or until Pinnacle obtains the certification required by the proposed Final Judgment, as described above.

F. Other Provisions

The proposed Final Judgment also contains provisions designed to promote compliance with and make enforcement of the Final Judgment as effective as possible. Paragraph XII.A provides that the United States retains and reserves all rights to enforce the Final Judgment, including the right to seek an order of contempt from the Court. Under the terms of this paragraph, Pinnacle has agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that Pinnacle has waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance with the Final Judgment with the standard of proof that applies to the underlying offense addressed by the Final Judgment.

Paragraph XII.B provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. Pursuant to Paragraph XII.B of the proposed Final Judgment, Pinnacle agrees that it will abide by the proposed Final Judgment and that it may be held in contempt of the Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of its procompetitive purpose.

Paragraph XII.C provides that if the Court finds in an enforcement proceeding that Pinnacle has violated the Final Judgment, the United States may apply to the Court for an extension of the Final Judgment, together with such other relief as may be appropriate. In addition, to compensate American taxpayers for any costs associated with investigating and enforcing violations of the Final Judgment, Paragraph XII.C provides that in any successful effort by the United States to enforce the Final Judgment against Pinnacle, whether litigated or resolved before litigation, Pinnacle must reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with that effort to enforce this Final Judgment, including the investigation of the potential violation.

Paragraph XII.D of the proposed Final Judgment states that the United States may file an action against Pinnacle for violating the Final Judgment for up to four years after the Final Judgment has expired or been terminated. This provision is meant to address circumstances such as when evidence that a violation of the Final Judgment occurred during the term of the Final Judgment is not discovered until after the Final Judgment has expired or been terminated, or when there is not sufficient time for the United States to complete an investigation of an alleged violation until after the Final Judgment has expired or been terminated. This provision therefore makes clear that, for four years after the Final Judgment has expired or been terminated, the United States may still challenge a violation that occurred during the term of the Final Judgment.

Finally, Section XIII of the proposed Final Judgment provides that the Final Judgment will expire five years from the date of its entry, except that after three years from that date, the Final Judgment may be terminated upon notice by the United States to the Court and to Pinnacle that continuation of the Final Judgment is no longer necessary or in the public interest.

IV. Remedies Available to Potential Private Plaintiffs

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment neither impairs nor assists the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Pinnacle.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and Pinnacle have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to

the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or within 60 days of the first date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the responses of the United States will be filed with the Court. In addition, the comments and the United States' responses will be published in the **Federal Register** unless the Court agrees that the United States instead may publish them on the U.S. Department of Justice, Antitrust Division's internet website.

Written comments should be submitted in English to: Danielle Hauck, Acting Chief, Technology and Digital Platforms Section, Antitrust Division, United States Department of Justice, 450 Fifth St. NW, Suite 7100, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against Pinnacle. The United States could have continued its litigation against Pinnacle and brought the case to trial, seeking relief including an injunction against Pinnacle's sharing of its competitively sensitive, nonpublic data with RealPage and other landlords, an injunction against Pinnacle using AIRM, YieldStar, or similar revenue management products that use competing properties' nonpublic data to recommend prices, and an injunction preventing any communication with competitors that leads to alignment of prices. Under the circumstances present here, however, the United States concludes that entry of the proposed Final Judgment is in the public interest insofar as it avoids the time, expense, and uncertainty of a full trial on the merits.

VII. Standard of Review Under the APPA for the Proposed Final Judgment

Under the Clayton Act and APPA, proposed Final Judgments, or “consent decrees,” in antitrust cases brought by the United States are subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment “is in the public interest.” 15 U.S.C. 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the Court’s inquiry is necessarily a limited one as the government is entitled to “broad discretion to settle with the defendant within the reaches of the public interest.” *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *United States v. Hewlett Packard Enterprise Co.*, No. 25–CV–00951–PCP, 2026 WL 2349970, at *16 (N.D. Cal. Aug. 12, 2026); *United States v. US Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the “court’s inquiry is limited” in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08–1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court’s review of a proposed Final Judgment is limited and only inquires “into whether the government’s determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable”); *United States v. Charleston Area Med. Ctr., Inc.*, No. CV 2:16–3664, 2016 WL 6156172, at *2 (S.D.W. Va. Oct. 21, 2016) (explaining that in evaluating whether the proposed final judgment is

in the public interest, the inquiry is “a narrow one”); *United States v. Mountain Health Care*, 1:02–CV–288–T, 2003 WL 22359598, at *7 (W.D.N.C. 2003) (“[W]ith respect to the adequacy of the relief secured by the decree, a court may not ‘engage in an unrestricted evaluation of what relief would best serve the public.’”) citing *United States v. BNS Inc.*, 858 F.2d 456, 462–63 (9th Cir. 1988)).

As the U.S. Court of Appeals for the D.C. Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government’s Complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. See *Microsoft*, 56 F.3d at 1458–62; *United States v. Math Works*, No. 02–888–A, 2003 WL 1922140, *17 (E.D. Va. 2003). With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not “make de novo determination of facts and issues.” *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); see also *Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Instead, “[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General.” *W. Elec. Co.*, 993 F.2d at 1577 (quotation marks omitted). “The court should also bear in mind the flexibility of the public interest inquiry: the court’s function is not to determine whether the resulting array of rights and liabilities is the one that will best serve society, but only to confirm that the resulting settlement is within the reaches of the public interest.” *Microsoft*, 56 F.3d at 1460 (quotation marks omitted); see also *United States v. Deutsche Telekom AG*, No. 19–2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020); *Math Works*, 2003 WL 1922140 at *18; *Mountain Health Care*, 2003 WL 22359598, at *7. More demanding requirements would “have enormous practical consequences for the government’s ability to negotiate future settlements,” contrary to congressional intent. *Microsoft*, 56 F.3d at 1456. “The Tunney Act was not intended to create a disincentive to the use of the consent decree.” *Id.*

The United States’ predictions about the efficacy of the remedy are to be afforded deference by the Court. See,

e.g., *Microsoft*, 56 F.3d at 1461 (recognizing courts should give “due respect to the Justice Department’s . . . view of the nature of its case”); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) (“In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[:] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.” (internal citations omitted)); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting “the deferential review to which the government’s proposed remedy is accorded”); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (“A district court must accord due respect to the government’s prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case.”). The ultimate question is whether “the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the ‘reaches of the public interest.’” *Microsoft*, 56 F.3d at 1461 (quoting *W. Elec. Co.*, 900 F.2d at 309).

Moreover, the Court’s role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to “construct [its] own hypothetical case and then evaluate the decree against that case.” *Microsoft*, 56 F.3d at 1459; see also *US Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government’s decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 (“[T]he ‘public interest’ is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged”); *Math Works*, 2003 WL 1922140 at *18; *Mountain Health Care*, 2003 WL 22359598, at *8. Because the “court’s authority to review the decree depends entirely on the government’s exercising its prosecutorial discretion by bringing a case in the first place,” it follows that “the court is only authorized to review the decree itself,” and not to “effectively redraft the complaint” to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using judgments proposed by the United States in antitrust enforcement, Pub. L. 108–237 § 221, and added the unambiguous instruction that “[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.” 15 U.S.C. 16(e)(2); *see also US Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: “[t]he court is nowhere compelled to go to trial or

to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.” 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). “A court can make its public interest determination based on the competitive impact statement and response to public comments alone.” *US Airways*, 38 F. Supp. 3d at 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: September 4, 2026
Respectfully submitted,
For Plaintiff United States of America:

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[FR Doc. 2026–19100 Filed 9–17–26; 8:45 am]

BILLING CODE 4410–11–P



FEDERAL REGISTER

Vol. 91

Friday,

No. 180

September 18, 2026

Part III

Securities and Exchange Commission

Public Company Accounting Oversight Board; Notice of Filing of Proposed Rules on Amendments to QC 1000, A Firm's System of Quality Control, and Related Rule and Forms; Notice

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–106372; File No. PCAOB–2026–01]

Public Company Accounting Oversight Board; Notice of Filing of Proposed Rules on Amendments to QC 1000, A Firm's System of Quality Control, and Related Rule and Forms

September 15, 2026.

Pursuant to section 107(b) of the Sarbanes-Oxley Act of 2002 (the “Act”), notice is hereby given that on September 10, 2026, the Public Company Accounting Oversight Board (the “Board” or the “PCAOB”) filed with the Securities and Exchange Commission (the “Commission” or the “SEC”) the proposed rules described in items I and II below, which items have been prepared by the Board. On September 14, 2026, the Board filed with the Commission a technical correction to one of the proposed rules. The Commission is publishing this notice to solicit comments on the proposed rules from interested persons.

I. Board's Statement of the Terms of Substance of the Proposed Rules

On September 9, 2026, the Board adopted proposed rule amendments to QC 1000, *A Firm's System of Quality Control*, related amendments to PCAOB Rule 2203A, PCAOB forms, and technical amendments to AS 2101, *Audit Planning*. (collectively, the “proposed rules”). On September 11, 2026, the Board adopted a technical correction to the proposed rule amendments to QC 1000. The text of the proposed rules appears in Exhibit A to the SEC Filing Form 19b–4 and is available on the Board's website at <https://pcaobus.org/about/rules-rulemaking/rulemaking-dockets/docket-057>.

II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

In its filing with the Commission, the Board included statements concerning the purpose of and basis for the proposed rules and discussed any comments it received on the proposed rules. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements. In addition, to the extent necessary, the Board is requesting that the Commission approve the proposed rules pursuant to section 103(a)(3)(C) of the Act for application to audits of emerging growth companies

(“EGCs”), as that term is defined in section 3(a)(80) of the Securities Exchange Act of 1934 (“Exchange Act”). The Board's request is set forth in section D.

A. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

(a) Purpose

The Board adopted QC 1000, *A Firm's System of Quality Control* (“QC 1000”), on May 13, 2024,¹ to lead registered public accounting firms (“firms”) to significantly improve their quality control (“QC”) systems. The Board believes that, as firms prepare for the effective date of QC 1000, many such improvements have been and will continue to be implemented as firms develop more rigorous QC systems. The Board's experience during the implementation period led us, however, to consider whether the new standard imposes costs that may not be necessary for us to achieve the Board's regulatory goals and, relatedly, whether there were certain aspects of QC 1000 that could be brought into closer alignment with other audit firm quality management standards.²

The Board adopted amendments to QC 1000 that it believes address concerns regarding the implementation challenges identified by firms and better align certain provisions with other quality management standards. These amendments are designed to reduce compliance costs while maintaining the investor protection benefits of QC 1000.

The principal amendments the Board adopted:

- Rescind the “design-only” requirement so that QC 1000 imposes requirements only on firms that are required to comply with applicable professional and legal requirements with respect to any “engagement” as defined in QC 1000 (QC 1000.06 and .07d);
- Provide increased flexibility in filling certain specified roles in the QC system by permitting roles to be assigned to non-firm personnel and

divided among multiple individuals (QC 1000.12);

- Rescind the requirement to have an External QC Function (“EQCF”) (QC 1000.28);

- Narrow and simplify communication requirements relating to metrics that the firm communicates to external parties about its audit practice, firm personnel, or engagements (QC 1000.53e);

- With respect to identified engagement deficiencies, require evaluation of whether similar engagement deficiencies exist on other engagements only if the identified deficiency resulted or could result in (i) a failure to obtain sufficient appropriate evidence to support the conclusion reached on an engagement or (ii) an inappropriate overall conclusion on the subject matter of an engagement (QC 1000.68d);

- Revise the definition of QC deficiency to make clear that, when firms have implemented more than one quality response to address the same quality risk, they can take those other quality responses (e.g., compensating responses) into account when determining whether a QC deficiency exists (QC 1000.A8);

- Allow firms to select the date as of which they annually evaluate the effectiveness of their QC system, rather than requiring firms to evaluate as of September 30 (QC 1000.77);

- Revise the QC system evaluation conclusions to align more closely with the conclusions in other quality management standards, while retaining a structured process, including specified factors for consideration, to guide the evaluation (QC 1000.77 and .78); and
- Simplify the requirements for retention of QC system documentation and abbreviate the retention period from seven to five years (QC 1000.84 and .86).

Additional amendments the Board adopted, including conforming amendments, are discussed below.

Several of the amendments the Board adopted bring QC 1000 into closer alignment with other quality management standards, both internationally and in the United States. However, differences remain in areas where the Board continues to believe that alternative or incremental provisions of QC 1000 better address its legal and regulatory environment, the needs and priorities of the Board's stakeholders, and the Board's statutory mandate of protecting investors and the public interest.

QC 1000 and the related amendments to PCAOB standards, rules, and forms adopted in 2024 will take effect on December 15, 2026. If approved by the

¹ A Firm's System of Quality Control and Other Amendments to PCAOB Standards, Rules, and Forms, PCAOB Rel. No. 2024–005 (May 13, 2024) (“QC 1000 2024 adopting release”).

² See International Standard on Quality Management (“ISQM”) 1, *Quality Management for Firms that Perform Audits or Reviews of Financial Statements, or Other Assurance or Related Services Engagements* (“ISQM 1”), issued by the International Auditing and Assurance Standards Board; Statement on Quality Management Standards (“SQMS”) No. 1, *A Firm's System of Quality Management* (“SQMS 1”), issued by the Auditing Standards Board of the American Institute of CPAs.

SEC, the amendments to QC 1000 that the Board adopted and the related amendments to a PCAOB rule and PCAOB forms will also take effect on December 15, 2026.

The proposed rules also include technical amendments to AS 2101, *Audit Planning*, to remove references to an auditing standard that was rescinded by another rulemaking.³ The Board adopted these amendments as final due to their technical nature, and the Board did not seek public comment on these amendments. These amendments will be effective upon SEC approval.

(b) Statutory Basis

The statutory basis for the proposed rules is Title I of the Act.

B. Board's Statement on Burden on Competition

Not applicable. The Board's consideration of the economic impacts of the proposed rules is discussed in section D below.

C. Board's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Board released proposed rule amendments for public comment on June 9, 2026, in its release titled *Supplemental Request for Comment: Proposed Amendments to QC 1000, A Firm's System of Quality Control, and Related Rule and Forms*, PCAOB Release No. 2026–002. The Board received 25 comment letters in response to that supplemental request for comment. See Comment Letters for Docket 057, <https://pcaobus.org/about/rules-rulemaking/rulemaking-dockets/docket-057/comment-letters>. The Board also received 26 comment letters in response to a request for public comment on the PCAOB strategic priorities, identified at footnote 12 below, and 4 comment letters in response to a request for public comment on PCAOB standard setting, identified at footnote 289 below, and 1 comment letter in response to a request for public comment on the Draft 2026–2030 Strategic Plan Goals and Objective, identified at footnote 300 below, which all raised comments specifically to QC 1000, among other things. See Comment Letters on the PCAOB website available at <https://pcaobus.org/about/strategic-plan-budget/public-comments-on-pcaob-strategic-priorities>, <https://pcaobus.org/oversight/standards/standard-setting-research-projects/>

³ See General Responsibilities of the Auditor in Conducting an Audit and Amendments to PCAOB Standards, PCAOB Rel. No. 2024–004 (May 13, 2024) (rescinding AS 1015, Due Professional Care in the Performance of Work).

agenda-consultation--request-for-public-comment-on-pcaob-standard-setting, and <https://pcaobus.org/about/strategic-plan-budget/public-comments-on-goals-and-objectives-for-pcaob-strategic-plan-2026-2030>, respectively. The Board has carefully considered all comments received. The Board's responses to the comments received, including revisions to the proposed rule amendments, are discussed below.

Background

This section presents background information on this rulemaking, including recent rulemaking history and staff implementation support efforts since SEC approval of QC 1000 in September 2024.

Recent Rulemaking History
On May 13, 2024, the Board adopted QC 1000 and related amendments. They were approved by the SEC on September 9, 2024, with an effective date of December 15, 2025.⁴

On August 28, 2025, to provide firms with additional time for implementation, the Board proposed to delay the effective date of QC 1000 and the related amendments to December 15, 2026, and that postponement became immediately effective.⁵ The SEC received 15 comment letters in response to its notice regarding the postponement.⁶ Commenters generally supported providing additional implementation time but raised concerns regarding certain provisions of QC 1000 that they viewed as more prescriptive than other quality management standards and as creating unnecessary operational complexity and cost.

On July 23, 2025, and March 20, 2026, the PCAOB received letters from a firm-related group regarding implementation of QC 1000 and related implementation challenges.⁷

⁴ For more details regarding the rulemaking history of QC 1000, see Rulemaking Docket No. 046 on the Board's website, available at <https://pcaobus.org/about/rules-rulemaking/rulemaking-dockets/docket-046-quality-control>; see also *Public Company Accounting Oversight Board; Order Granting Approval of QC 1000, A Firm's System of Quality Control and Related Amendments to PCAOB Standards, Rules, and Forms*, SEC Rel. No. 34–100968 (Sept. 9, 2024).

⁵ See Public Company Accounting Oversight Board; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Postponing the Effective Date of Amendments to Board Standards, Rules, and Forms Adopted on May 13, 2024, SEC Rel. No. 34–103803 (Aug. 28, 2025).

⁶ The comment letters received are available on the SEC's web page, available at <https://www.sec.gov/comments/pcaob-2025-01/pcaob202501.htm>.

⁷ See letter from the Center for Audit Quality dated July 23, 2025, available at <https://www.thecaq.org/comment-letter-pcaob-requesting-deferral-qc-1000>; and letter from the Center for

On March 31, 2026, the Board issued a request for public comment on the PCAOB's strategic priorities, including future standard-setting activity.⁸ Several commenters provided observations regarding QC 1000.⁹ The comments relating to QC 1000 were generally consistent with themes raised in comment letters submitted to the PCAOB and SEC in connection with the extension of the effective date of QC 1000. Most commenters urged the Board to adopt or align more closely with ISQM 1, suggesting it may better support global implementation, while emphasizing that differences in structure, terminology, and prescriptive requirements in QC 1000 create operational challenges, limit firm judgment, and increase complexity for global firms.

After considering feedback and information obtained through implementation support efforts,¹⁰ on June 9, 2026, the Board issued a supplemental request for comment on potential targeted amendments to certain provisions of QC 1000 and related amendments to the QC reporting rule and PCAOB forms.¹¹ The Board received 26 comment letters.¹²

Audit Quality dated March 20, 2026, available at <https://www.thecaq.org/letter-to-the-pcaob-on-qc1000-implementation-experience-and-costs>.

⁸ See Request for Public Comment, PCAOB Strategic Priorities, PCAOB Rel. No. 2026–001 (Mar. 31, 2026).

⁹ The comment letters received are on the Board's website, available at <https://pcaobus.org/about/strategic-plan-budget/public-comments-on-pcaob-strategic-priorities>.

¹⁰ See discussion below regarding PCAOB staff's implementation support efforts, including implementation guidance, workshops, stakeholder outreach, and feedback received from firms and other stakeholders regarding QC 1000 implementation.

¹¹ See Supplemental Request for Comment: Proposed Amendments to QC 1000, A Firm's System of Quality Control, and Related Rule and Forms, PCAOB Rel. No. 2026–002 (June 9, 2026) (proposing amendments to QC 1000, PCAOB Rule 2203A, and PCAOB Forms 1, 2, and QC).

¹² See comment letters on the *Supplemental Request for Comment* from the Auditing Standards Committee, Auditing Section—American Accounting Association (July 3, 2026) (“AAA”); Baker Tilly US, LLP (July 9, 2026) (“Baker Tilly”); BDO USA, P.C. (July 9, 2026) (“BDO”); CBIZ CPAs P.C. (July 9, 2026) (“CBIZ”); Center for Audit Quality (July 9, 2026) (“CAQ”); CFA Institute (Aug. 31, 2026) (“CFA”); Council of Institutional Investors (July 9, 2026) (“CII”); Crowe LLP (July 9, 2026) (“Crowe”); Deloitte & Touche LLP (July 9, 2026) (“Deloitte”); Ernst & Young LLP (July 9, 2026) (“EY”); Forvis Mazars, LLP (July 9, 2026) (“Forvis”); George R. Kramer (July 6, 2026) (“Kramer”); Grant Thornton LLP (July 9, 2026) (“GT”); International Corporate Governance Network (July 9, 2026) (“ICGN”); James Grosvenor (July 9, 2026) (“Grosvenor”); KPMG LLP (July 9, 2026) (“KPMG”); MaloneBailey, LLP (June 26, 2026) (“Malone Bailey”); Members of the Investor Advisory Group (July 9, 2026) (“MIAG”); Pennsylvania Institute of CPAs (July 9, 2026)

Continued

Commenters included firms and firm-related groups, investor-related groups, and others. Firms, firm-related groups, and most other commenters generally supported the Board's objective of making targeted amendments to QC 1000 and most of the proposed amendments, particularly those intended to increase flexibility, improve operability, reduce unnecessary compliance burdens, and better align QC 1000 with other quality management standards.¹³ One investor-related group did not support the proposed amendments overall because of the proposed rescission of the EQCF requirement.¹⁴ Other investor-related groups generally supported the proposed amendments that reduce compliance costs without reducing audit quality, but opposed the removal of the EQCF requirement, emphasizing the importance of independent oversight and investor protection, and other amendments they viewed as weakening investor-protection-focused provisions of QC 1000.¹⁵ Many commenters, particularly firms and firm-related groups, also requested implementation guidance and clarification in certain areas discussed below.¹⁶

The Board considered all comments received on the supplemental request for comment. As discussed below, the Board is adopting the proposed amendments to QC 1000, with certain modifications.

Implementation Support Efforts

Since SEC approval of QC 1000, PCAOB staff have supported implementation through guidance, workshops, outreach activities, and engagement with stakeholders, which provided insight into implementation progress, challenges, and questions and informed the Board's consideration of the proposed amendments.¹⁷

(“PICPA”); Plante & Moran, PLLC (July 10, 2026) (“Plante & Moran”); PricewaterhouseCoopers LLP (July 9, 2026) (“PwC”); RSM US LLP (July 9, 2026) (“RSM”); St. Charles Consulting Group (June 12, 2026) (“SCCG”); Thomas H. Spitters (July 6, 2026) (“Spitters”); and Virginia Society of CPAs (July 9, 2026) (“VSCPA”). One additional comment letter was withdrawn.

¹³ See, e.g., comment letters from AAA, Baker Tilly, BDO, CAQ, CBIZ, Crowe, Deloitte, EY, Forvis, Grosvenor, GT, KPMG, Kramer, Malone Bailey, PICPA, Plante & Moran, PwC, RSM, SCCG, Spitters, and VSCPA.

¹⁴ See comment letter from CII.

¹⁵ See comment letters from CFA, ICGN, and MIAG.

¹⁶ See, e.g., comment letters from Baker Tilly, BDO, CAQ, CBIZ, Crowe, Deloitte, EY, Forvis, GT, KPMG, Kramer, Plante & Moran, RSM, SCCG, and VSCPA.

¹⁷ See PCAOB, *Quality Control—Implementation Resources*, available at <https://pcaobus.org/oversight/standards/implementation-resources->

Additionally, as part of inspection outreach activities, the Board obtained feedback on the progress made by firms in implementing QC 1000 in their QC systems.¹⁸

As part of staff implementation support efforts, the PCAOB staff released *QC 1000 Questions and Answers* (“QC 1000 Q&As”) in August 2026.¹⁹ The QC 1000 Q&As provide technical guidance on various aspects of QC 1000, including roles and responsibilities, evaluation and reporting, documentation, and other areas of designing, implementing, operating, and evaluating a firm's QC system. The QC 1000 Q&As were developed in response to questions and requests for clarification received from firms through staff implementation support efforts and are intended to reduce uncertainty and support firms' implementation of the standard.

The QC 1000 Q&As do not address the specific topics that are the subject of the amendments to QC 1000 that the Board adopted, but they do address some questions and clarification requests on other topics that were included in comment letters submitted in response to the supplemental request for comment. As implementation continues, additional guidance, including updates to the QC 1000 Q&As, may be issued to help address other areas identified by commenters or through staff implementation support efforts.

Amendments to QC 1000, PCAOB Rule 2203A, and PCAOB Form QC

This section describes the requirements of QC 1000, Rule 2203A, and Form QC that the Board amended.

Requirement To Design, Implement, and Operate a QC System

As originally adopted, QC 1000.06 requires all firms to design a QC system that complies with the standard, regardless of whether the firm is subject to applicable professional and legal requirements with respect to an engagement as defined in QC 1000. As explained in the supplemental request for comment, the Board understands that this “design-only” requirement would impose costs on firms that do not

PCAOB-standards-rules/quality-control, which includes staff guidance and other materials issued to support implementation of QC1000 and the related amendments.

¹⁸ See section titled “Need” under “Economic Considerations” below for additional information on data received through these inspection outreach activities.

¹⁹ See *QC 1000 Questions and Answers*, available at <https://pcaobus.org/oversight/setting-research-projects/quality-control/qc-1000-questions-and-answers>.

perform engagements requiring registration under the Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley”) ²⁰ or PCAOB rules ²¹ without commensurate benefits for investors and the public. Therefore, the Board proposed to eliminate the requirement and sought comment on potential alternatives, as well as any circumstances that potentially could trigger a design requirement. As proposed in the supplemental request for comment, paragraphs .05 through .07 of QC 1000 would be revised to eliminate the separate obligation to design a QC system and would maintain unchanged the obligation to design, implement, and operate a QC system in compliance with QC 1000 when a firm is subject to applicable professional and legal requirements with respect to any of the firm's engagements.

Many commenters supported the proposal to rescind the design-only requirement.²² One commenter stated that they did not object to rescinding the design-only requirement when a firm neither performs nor intends to perform PCAOB engagements.²³ One of the commenters supporting rescission stated that it did not believe registered firms should be required to comply with PCAOB standards until the firm undertakes an engagement requiring compliance with those standards and that the design-only requirement was inconsistent with the text of Sarbanes-Oxley.²⁴ Commenters that addressed the question of whether the Board should adopt an alternative design-only requirement generally did not support such a requirement.²⁵

However, one commenter stated support for a QC design requirement that included effective operation of a system of quality management under relevant standards for the jurisdiction in which the firm operates, such as ISQM 1 or SQMS 1.²⁶ This commenter noted that, in practice, registered firms would already maintain some form of a system of quality management to support their

²⁰ See section 102(a) of Sarbanes-Oxley, 15 U.S.C. 7212(a).

²¹ See PCAOB Rule 2100, Registration Requirements for Public Accounting Firms.

²² See comment letters from AAA, Baker Tilly, BDO, CAQ, Crowe, Deloitte, GT, KPMG, Kramer, MIAG, PICPA, PwC, and RSM. *But see* comment letters from ICGN and Spitters. One commenter expressed support for eliminating the “design-only reporting requirement,” described as the “requirement for firms to report once a quality control system has merely been designed.” *See* comment letter from VSCPA.

²³ See comment letter from CFA.

²⁴ See comment letter from RSM.

²⁵ See comment letters from AAA, BDO, GT, KPMG, Kramer, and PICPA.

²⁶ See comment letter from RSM.

PCAOB registration.²⁷ The Board does not believe QC 1000 should explicitly require compliance with rules of local jurisdictions, as PCAOB standards generally do not impose such requirements. Another commenter noted that, although some registered firms do not conduct audits, that fact does not necessarily signify the need for an exemption from standard best practices or audit quality requirements; such firms should be subject to QC 1000 on the level of preparedness or some QC regime that parallels QC 1000 in its design, implementation, and operation.²⁸ The Board does not believe that the suggestion to base a design-only requirement on a level of preparedness or a system paralleling QC 1000 is workable because it is too vague as to the requirements that would apply to firms not performing PCAOB engagements.

Commenters raised concerns over the costs of the design-only requirement in relation to the benefits.²⁹ One commenter stated that the requirement would have resulted in unnecessary costs of compliance without commensurate benefits.³⁰ Another commenter similarly stated that requiring firms not performing PCAOB engagements to comply with the design-only requirement did not provide a commensurate benefit to investor protection, as such firms do not present risk to U.S. capital markets.³¹ Another commenter stated that requiring firms to build compliance infrastructure for work they may never undertake imposes cost without a corresponding investor benefit.³² Another commenter observed that, because firms performing engagements would be fully subject to the requirement to design, implement, and operate a QC 1000-compliant system, rescinding the requirement for firms not performing such work would preserve the Board's objective of promoting high-quality audits, while reducing unnecessary burdens for those firms.³³ Another commenter stated that, while the value to the public of the design-only requirement was unclear, the costs would be real in the form of training costs, consulting costs, and professional time.³⁴ Other commenters noted the limited benefits of the requirement for investors, stating that rescission would not diminish investor

protection³⁵ or introduce any risk to investors,³⁶ or that retaining the requirement would not help ensure improved audit quality.³⁷

Two commenters also raised concerns about requiring firms to address hypothetical situations. One of these commenters stated that it would be difficult for a firm not subject to applicable professional and legal requirements with respect to any engagement to design a QC system based on hypothetical circumstances.³⁸ The second commenter stated that such a firm's QC system "would be hypothetical at best and would likely become obsolete over time as practice conditions change, leading to the false pretense that [the firm is] in a position to immediately implement these standards."³⁹

The Board is rescinding the design-only requirement and adopting paragraphs .05 through .07 as proposed.⁴⁰ The Board believes rescinding the design-only requirement will reduce costs for firms without any significant detriment to audit quality.

As confirmed by commenter feedback, implementing the design-only requirement has proven more difficult and costly than originally anticipated. The requirement may compel some firms that have no intention of performing PCAOB engagements in the foreseeable future to design a QC 1000-compliant system, perhaps based on hypothetical circumstances. As described in the supplemental request for comment, the Board believes that the design-only requirement may have contributed to an increase in withdrawals from registration by firms that are not performing engagements. Although the impact of such activity on the marketplace (discussed below in the economic analysis) may be limited, the Board believes investors and the public interest are better served by incentivizing firms to register and

consider seeking PCAOB engagements, thereby promoting competition.⁴¹

In the Board's view, rescission of the design-only requirement would entail foregoing the benefits associated with greater preparedness of firms to take on a PCAOB engagement for the first time. The Board believes this benefit to be modest, as any firm that actually takes on such an engagement will have become subject to the requirement to design, implement, and operate a QC 1000 system.⁴² In any event, and as noted by one commenter, registered firms that do not perform PCAOB engagements are generally well-positioned to implement QC 1000 if or when required to do so.⁴³ This is so because most such firms, as some commenters observed, are generally either non-U.S. firms subject to international auditing standards or U.S.-based firms that conduct private company audits under the standards of the Auditing Standards Board of the American Institute of CPAs ("AICPA"); as such, those firms would be subject to ISQM 1 or SQMS 1, which both share a common basic structure with QC 1000.⁴⁴ Finally, as stated in the supplemental request for comment, the investor protection concerns encompassed by the Board's statutory mandate are reduced where a firm is not performing PCAOB engagements.

Based on the above considerations, the Board decided not to adopt any of the design-only alternatives discussed in the supplemental request for comment.

The Board also considered whether to include provisions in QC 1000 specifying an earlier trigger for the requirement to design, implement, and operate a QC 1000-compliant system under QC 1000.06-.07. In this regard, one commenter encouraged the Board to consider whether compliance with QC 1000 after its December 15, 2026 effective date could be tied to an

⁴¹ As noted in the supplemental request for comment, some firms may register with the Board to perform activities not subject to the PCAOB's jurisdiction. *See, e.g.,* Guiding and Establishing National Innovation for U.S. Stablecoins Act, Pub. L. 119-27 (July 18, 2025), section 4(a)(3)(A), 12 U.S.C. 5903(a)(3)(A) (requiring month-end reports of permitted payment stablecoin issuers to be examined by a PCAOB-registered firm).

⁴² Firms could still choose to design (and for that matter, implement and operate) a QC system that complies with QC 1000. Firms may choose to do so if, for example, they are planning to bid for a PCAOB engagement, are taking on work on other firms' engagements that could potentially constitute a substantial role, or otherwise want to put themselves in a position to implement and operate a QC 1000-compliant system on short notice.

⁴³ *See* comment letter from KPMG.

⁴⁴ *See* comment letters from AAA, CAQ, KPMG, and PwC.

²⁷ *See id.*

²⁸ *See* comment letter from Spitters.

²⁹ *See, e.g.,* comment letters from KPMG, PICPA, and PwC.

³⁰ *See* comment letter from PwC.

³¹ *See* comment letter from KPMG.

³² *See* comment letter from CFA.

³³ *See* comment letter from GT.

³⁴ *See* comment letter from PICPA.

³⁵ *See* comment letter from GT.

³⁶ *See* comment letter from Baker Tilly.

³⁷ *See* comment letter from PICPA.

³⁸ *See* comment letter from AAA.

³⁹ *See* comment letter from PICPA.

⁴⁰ As noted in the supplemental request for comment, the Board does not believe that this action would violate the mandate in section 103(a)(2)(B) of Sarbanes-Oxley, 15 U.S.C. 7213(a)(2)(B), to adopt requirements "for every registered public accounting firm" that address certain enumerated areas in "the quality control standards that [the PCAOB] adopts with respect to the issuance of audit reports." Under the Board's approach, QC 1000 will apply to every firm with respect to the issuance of "audit reports" (which are limited under Sarbanes-Oxley to those relating to audits of issuers and broker-dealers).

established evaluation period and measurement date rather than a specific triggering event.⁴⁵ The same commenter suggested that under such an approach, a firm would determine at the beginning of its selected evaluation cycle whether it is required to comply with QC 1000 during that period.⁴⁶ Another commenter stated that a firm must have “an appropriately designed and operational QC system before accepting or commencing PCAOB audit work.”⁴⁷ Another commenter suggested that “a QC system must be in place prior to a firm tendering an offer for a public company audit and/or getting registered.”⁴⁸ Another commenter requested that the Board specify an earlier trigger—for example, when a firm bids for or is appointed to issuer or broker-dealer work—by which time a compliant QC system must be designed and operating, well in advance of the firm commencing that work.⁴⁹

While an earlier trigger may promote readiness by firms to commence PCAOB engagements, the Board expects that the effort required to design, implement, and operate a QC 1000-compliant system may vary significantly across firms. That variation could arise from several different factors, including the status of their existing QC systems, the nature of their assurance practice (if any), the experience of their personnel, and the nature of their governance systems, operating processes, and technology, among other things. The Board also understands that some firms may pursue engagements for issuers and broker-dealers months, or even years, before these firms are awarded and commence such work. In light of these considerations, it may not be necessary in all circumstances for a firm to have a QC system that fully complies with QC 1000 before it pursues an issuer or broker-dealer engagement that might not be awarded to it or that might not commence for a significant period of time. Therefore, the Board believes that requiring firms to design, implement, and operate a QC 1000-compliant system when a firm becomes subject to applicable professional and legal requirements with respect to any engagement is appropriate, and an earlier trigger is not warranted.

Roles and Responsibilities

1. Assignment of Roles and Responsibilities

As originally adopted, QC 1000 requires that the operational roles and responsibilities specified in paragraph .12 be assigned only to “firm personnel.”⁵⁰ The note to paragraph .12 provides that responsibility for the roles in subparagraphs a–c cannot be shared and is required to be assigned to only one individual, to reinforce that the individual assigned to a specified role would be responsible and accountable for the role.

The Board proposed amendments to paragraph .12 to allow flexibility in assigning the specified roles and responsibilities to any individual (whether firm personnel or an “other participant”⁵¹), rather than limiting those roles and responsibilities to firm personnel. In connection with that change, the Board proposed a new footnote 5A to paragraph .12 to clarify that such individuals would be “associated persons” of the firm. As the Board explained in the supplemental request for comment, any individual who was not already an associated person would become an associated person by virtue of that assignment.⁵² The proposed amendments would align with ISQM 1 and SQMS 1 by permitting any qualified individual to fill the specified QC system roles.

To preserve the accountability and responsibility objectives of paragraph .12, the Board also proposed an amendment to emphasize that the individuals assigned specific roles understand and be accountable for their roles and responsibilities. The Board also proposed an amendment to the note to paragraph .12 to allow firms to divide the responsibilities of a role specified in paragraph .12 among multiple individuals. The proposed amendments align with ISQM 1 and SQMS 1.

Commenters generally supported allowing the specified roles to be assigned to other participants and divided among multiple individuals.⁵³ Many commenters indicated the amendments would promote audit quality, for example, by enabling the firm to place the most experienced and qualified individuals in those roles.⁵⁴ Several commenters also supported

allowing firms the flexibility to assign roles and responsibilities to multiple individuals based on their specialized expertise and capacity, including within their existing structures, while maintaining accountability.⁵⁵ Several commenters stated that the proposed amendments to paragraph .12 were sufficiently clear and appropriate.⁵⁶

A commenter stated that the proposed amendments would be especially helpful to firms that issued audit reports with respect to less than 100 issuers.⁵⁷ Another commenter supported the addition of footnote 5A, which clarifies that an individual assigned operational responsibility for any of the roles in paragraph .12 would become an associated person of the firm by virtue of that assignment.⁵⁸ One commenter recommended retaining clear firm-level accountability and documentation requirements to avoid diffusion of responsibility.⁵⁹ Another commenter recommended the final standard require clear identification of those ultimately responsible for the QC system and key QC areas; this commenter further suggested that the PCAOB encourage firms to consider the firms’ retirees for QC system roles, as such individuals would provide valuable experience.⁶⁰

One commenter did not support assigning roles to individuals outside the firm because individuals outside the firm may have conflicting interests, and they cannot provide the day-to-day ownership the roles require.⁶¹ The same commenter stated that there remains a need for an ultimate point of accountability and there needs to be assurance that accountability is not diffused when responsibilities are divided.⁶² Further, the commenter requested that whenever a QC role is divided among multiple individuals, the firm’s reporting to the PCAOB identify (1) who holds ultimate responsibility and accountability for the QC system as a whole; (2) who is accountable for each function, such as ethics, independence, monitoring, and remediation; and (3) the scope of each individual’s assigned responsibilities, so that no part of any role is left unassigned.⁶³

As to the question of whether the flexibility afforded by the proposed amendments should be available only

⁵⁵ See comment letters from AAA, Baker Tilly, CAQ, CFA, EY, GT, KPMG, and SCCG.

⁵⁶ See comment letters from GT, KPMG, MIAG, RSM, and Spitters.

⁵⁷ See comment letter from Kramer.

⁵⁸ See comment letter from PICPA.

⁵⁹ See comment letter from SCCG.

⁶⁰ See comment letter from MIAG.

⁶¹ See comment letter from CFA.

⁶² See *id.*

⁶³ See *id.*

⁴⁵ See comment letter from BDO.

⁴⁶ See *id.*

⁴⁷ See comment letter from MIAG.

⁴⁸ See comment letter from ICGN.

⁴⁹ See comment letter from CFA.

⁵⁰ See QC 1000.A5.

⁵¹ See QC 1000.A7.

⁵² See PCAOB Rule 1001(p)(i).

⁵³ See comment letters from AAA, Baker Tilly, BDO, CAQ, CBIZ, Crowe, Deloitte, EY, Forvis, GT, ICGN, KPMG, Kramer, MIAG, PICPA, PwC, RSM, SCCG, and Spitters.

⁵⁴ See comment letters from CAQ, Deloitte, GT, KPMG, MIAG, PICPA, RSM, SCCG, and Spitters.

on a scaled basis to certain firms, many commenters generally favored applying the amendments to all firms.⁶⁴ Several of these commenters emphasized that the flexibility the proposed amendments would offer is important for firms of all sizes, although for reasons that may differ between larger and smaller firms.⁶⁵ One commenter said such flexibility appears appropriate regardless of firm size, while noting that larger firms may be better equipped to operate under a more restrictive and specialized set of requirements.⁶⁶ Another commenter stated they would not be opposed to a limited degree of scaling these requirements to address cost considerations for small and large firms.⁶⁷

After consideration of the comments received, the Board is adopting these amendments as proposed. The Board believes the flexibility afforded by the amendments should be available to all firms rather than on a scaled basis, because audit quality is enhanced when firms can assign the specified roles and responsibilities to the most qualified individuals, whether or not they are firm personnel. In the Board's view, the amendments will expand the pool of individuals with the requisite experience, competence, authority, and time to serve in specified roles. For example, a firm may improve its QC system and overall audit quality by assigning to one individual operational responsibility for ethics and to another individual operational responsibility for independence, where each individual has specific expertise in their respective area.

In response to commenters that recommended clear firm-level accountability and documentation when roles are divided, paragraph .27 requires a firm to establish and maintain clear lines of responsibility and supervision within the QC system, including defining authorities, responsibilities, accountabilities, and supervisory and reporting lines for roles within the firm up to and including the principal executive officer(s). Additionally, paragraph .82a requires the firm to document the lines of responsibility and supervision required by paragraph .27. In response to a commenter's call for specific reporting to the PCAOB about divided roles, the Board notes that Item 3.1 of Form QC requires firms to disclose (1) who holds ultimate

responsibility and accountability for the QC system as a whole and (2) which individual or individuals have operational responsibility for ethics and independence and for monitoring and remediation. Although the specific scope of each individual's assigned responsibilities would not be reported, that information must be documented under paragraph .82a and would be available to the PCAOB in connection with its oversight activities, including inspections.⁶⁸

2. Responsibilities for Roles With Operational Responsibility

To align with the amendments to QC 1000.12, the Board proposed conforming amendments to paragraphs .15–.17 that would acknowledge the possibility that multiple individuals could share the specified roles and clarify that such individuals' obligations would be limited to the scope of their assigned responsibilities.

In addition, the Board proposed amendments to paragraph .17b(2) through (3) to delete the communication requirements related to major QC deficiencies to align with the amendments to the evaluation requirement in paragraph .77 discussed below.

Commenters who addressed these amendments supported the proposed changes to paragraphs .15–.17 and stated they are sufficiently clear.⁶⁹ Two commenters acknowledged that the conforming amendments are appropriately aligned with the revisions to paragraph .12.⁷⁰ One commenter stated the conforming amendments reinforce a more principles-based approach⁷¹ and another commenter stated the conforming amendments increase flexibility.⁷² After consideration of the comments received, the Board is adopting these conforming amendments as proposed.

External QC Function

As originally adopted, paragraph .28 of QC 1000 includes a specified quality response that requires firms with a larger PCAOB audit practice⁷³ to incorporate into their governance structure an EQCF for the QC system composed of one or more persons who:

- Are not partners, shareholders, members, other principals, or employees of the firm;
- Do not otherwise have a commercial, familial, or other relationship with the firm that would interfere with the exercise of independent judgment with regard to matters related to the QC system; and
- Have the experience, competence, authority, and time necessary to enable them to carry out the responsibilities assigned to the EQCF by the firm.

The EQCF's responsibilities include, at a minimum, evaluating the significant judgments made and the related conclusions reached by the firm when evaluating and reporting on the effectiveness of its QC system.

The Board proposed rescinding the EQCF requirement based on information obtained in connection with staff implementation support efforts and outreach discussions, which revealed that implementing this requirement had proven more difficult and more costly than originally anticipated. The Board was concerned that the potential benefits may not justify the potential costs of the EQCF requirement, except potentially for the largest U.S. global network firms.

Many commenters expressed support for rescinding the EQCF requirement.⁷⁴ Some of these commenters said rescission would allow firms the flexibility to utilize existing external governance structures to promote audit quality in a manner tailored to their specific circumstances.⁷⁵ Some commenters stated that removing the EQCF requirement would not diminish the focus on quality because QC 1000 advances the objectives of strengthening trust in governance, reinforcing accountability, and supporting a commitment to quality through other provisions in the standard.⁷⁶ Other commenters offered support for the proposed rescission by asserting that existing governance structures, leadership accountability, monitoring activities, reporting processes, and PCAOB inspections already provide meaningful oversight or help promote the effective operation of the QC system.⁷⁷

In addition, many commenters observed that the costs associated with

⁶⁴ See comment letters from AAA, BDO, CAQ, CBIZ, GT, KPMG, PICPA, PwC, RSM, and Spitters.

⁶⁵ See comment letters from AAA, BDO, CAQ, CBIZ, GT, KPMG, PwC, and RSM.

⁶⁶ See comment letter from Kramer.

⁶⁷ See comment letter from ICGN.

⁶⁸ See PCAOB Rule 4000(b), *General*.

⁶⁹ See comment letters from CAQ, GT, KPMG, PICPA, RSM, and Spitters.

⁷⁰ See comment letters from GT and RSM.

⁷¹ See comment letter from GT.

⁷² See comment letter from KPMG.

⁷³ Firms with a larger PCAOB audit practice are considered those firms that issued audit reports for more than 100 issuers in the prior calendar year.

⁷⁴ See comment letters from AAA (majority of AAA committee members), Baker Tilly, BDO, CAQ, CBIZ, Crowe, Deloitte, EY, Forvis, GT, KPMG, PICPA, Plante & Moran, PwC, RSM, and VSCPA.

⁷⁵ See comment letters from BDO, CBIZ, Deloitte, EY, GT, KPMG, Plante & Moran, PwC, RSM, and VSCPA.

⁷⁶ See comment letters from BDO, CBIZ, Crowe, KPMG, and PwC.

⁷⁷ See comment letters from CAQ, EY, PICPA, and VSCPA.

the EQCF requirement, as well as any incremental benefits to audit quality, remain uncertain.⁷⁸ Some commenters who supported removing the requirement cited significant implementation challenges and costs associated with identifying, recruiting, and onboarding individuals with the necessary expertise, independence, and availability to serve in the role.⁷⁹ Other commenters pointed to additional costs, including obtaining liability insurance and making governance-related structural changes, as further reasons to support the proposed rescission.⁸⁰ One commenter cautioned that rescission of the EQCF requirement would remove a level of assurance with respect to internal processes and audit quality in firms but described the requirement as expensive, redundant, overreaching, and unnecessary.⁸¹ Two commenters acknowledged the narrow responsibilities of an individual serving in an EQCF role, but asserted that the Board may have overstated the potential costs of the EQCF requirement by using particular benchmarks involving compensation of non-employee company directors to estimate potential costs.⁸² These commenters also suggested that the Board may have understated the potential benefits of the EQCF requirement by failing to consider the ongoing trend of private equity investing in accounting firms.⁸³ Another commenter stated that many of the firms most likely to be affected already use external advisers and that the incremental burden of establishing the mandated function may be less substantial than the proposal implies.⁸⁴ This commenter also stated that the Board did not have direct evidence on the cost of the EQCF to firms.⁸⁵

One commenter raised concerns that the size and complexity of a large firm's QC system would create practical constraints on the depth of engagement individuals serving in the EQCF role can achieve, thereby limiting the EQCF's overall effectiveness and value beyond the oversight already available through existing channels.⁸⁶ Another commenter supported rescission of the EQCF requirement because its current form is not scalable for firms only

moderately above the 100-issuer threshold.⁸⁷

Some commenters opposed the proposed rescission of the EQCF requirement.⁸⁸ Two commenters disagreed with the PCAOB's reasoning "that the benefits of the requirement may not justify the costs, except potentially for the largest U.S. global network firms."⁸⁹ The same commenters, while acknowledging concerns related to potential costs, liability, and implementation, stated that some form of independent challenge remains a critical component of an effective QC system.⁹⁰ Another commenter viewed the EQCF as essential to audit quality.⁹¹ One commenter expressed concern that rescinding the EQCF requirement would leave judgments about the firms' QC systems entirely to the firms themselves.⁹² This commenter stated the EQCF is the clearest structural safeguard against the commercial and network pressures and interests that can affect a firm's judgments regarding its QC system.⁹³ This commenter further asserted that, as the PCAOB moves the focus of its audit inspections to the firm rather than the engagement level, and as private-equity ownership and other commercial pressures within the auditing profession continue to grow, retaining such a safeguard is particularly important.⁹⁴

Two commenters also asserted that the requirement for larger PCAOB audit practices to have an EQCF would be applicable to only five firms.⁹⁵ However, absent rescission of the EQCF requirement, 13 firms, based on 2025 data, would become subject to that requirement.⁹⁶

In responding to the question regarding an alternative threshold for the EQCF requirement, many commenters stated it was not necessary to impose the EQCF requirement on any firm, regardless of size or number of issuers audited.⁹⁷ Some commenters did not support an alternative threshold (e.g., restricting the requirement only to firms auditing more than 500 issuers) because retaining the requirement in

any form would not resolve the underlying concerns about operability, costs, availability of qualified individuals, and uncertain incremental benefit.⁹⁸ Some commenters said that firms should have the flexibility to create governance structures that align with the nature and extent of their existing structure and risks of the firm.⁹⁹

One commenter stated that if the Board concludes that some relief is necessary, it is better to retain the EQCF requirement as adopted for firms auditing more than 500 issuers because it would apply to the five firms where nearly all U.S. public market capitalization sits.¹⁰⁰ One commenter stated that if the current 100-issuer threshold were not retained, they would not oppose amending the threshold to firms that issued audit reports for more than 200 issuers during the prior calendar year, because they believe that the large revenue base received from those firms' issuer audit clients could support the incremental costs associated with the EQCF requirement.¹⁰¹ One commenter suggested retaining the EQCF requirement for firms that have accepted any form of outside investment, other than traditional debt financing, and operate through an alternative practice structure.¹⁰² In addition, one commenter who opposed removing the EQCF requirement expressed the view that smaller firms (under 100 audits per year) should not be exempted from robust and functioning alternative EQCF requirements if the PCAOB were to scale the provisions.¹⁰³ Another commenter noted that, given the unchanged effective date of QC 1000, adopting alternative oversight frameworks could present implementation challenges and leave firms with limited time to thoughtfully design and integrate new requirements into their governance structures.¹⁰⁴

In the supplemental request for comment, the Board sought input on the alternative of reverting the requirement for an independent oversight function to that contained in the 2022 proposal. Several commenters did not support such an alternative.¹⁰⁵ One commenter stated that the 2022 proposed requirement lacked sufficient clarity

⁷⁸ See comment letters from CAQ, Deloitte, GT, KPMG, PICPA, Plante & Moran, and RSM.

⁷⁹ See comment letters from BDO, CAQ, Crowe, EY, GT, PICPA, and VSCPA.

⁸⁰ See comment letters from BDO, Deloitte, KPMG, PICPA, and RSM.

⁸¹ See comment letter from Spitters.

⁸² See comment letters from CII and MIAG.

⁸³ See *id.*

⁸⁴ See comment letter from CFA.

⁸⁵ See *id.*

⁸⁶ See comment letter from Deloitte.

⁸⁷ See comment letter from Baker Tilly.

⁸⁸ See comment letters from AAA (minority of AAA committee members), CFA, CII, ICGN, and MIAG.

⁸⁹ See comment letters from CII and MIAG.

⁹⁰ See *id.*

⁹¹ See comment letter from ICGN.

⁹² See comment letter from CFA.

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ See comment letters from CII and MIAG.

⁹⁶ See footnote 401 for a list of the 13 firms.

⁹⁷ See comment letters from Baker Tilly, BDO, Crowe, GT, PICPA, PwC, and RSM.

⁹⁸ See comment letters from BDO, CAQ, GT, KPMG, PICPA, and RSM.

⁹⁹ See comment letters from BDO, CAQ, Crowe, and KPMG.

¹⁰⁰ See comment letter from CFA.

¹⁰¹ See comment letter from MIAG.

¹⁰² See comment letter from AAA.

¹⁰³ See comment letter from ICGN.

¹⁰⁴ See comment letter from KPMG.

¹⁰⁵ See comment letters from CAQ, CFA, GT, KPMG, PICPA, PwC, and RSM.

and could create uncertainty regarding whether existing firm governance and oversight arrangements would satisfy such a requirement.¹⁰⁶ Another commenter indicated that the effect or impact of adopting the requirement as initially proposed in 2022 could not be determined.¹⁰⁷ One commenter did not support reverting back to the 2022 proposed requirement because it carried no defined duty to evaluate the firm's QC conclusions—the very check the EQCF was adopted to provide.¹⁰⁸

After consideration of the comments received, the Board is rescinding the EQCF requirement. Based on staff implementation support efforts, the Board understands that implementation of this requirement may have proven more difficult and costly than originally anticipated. The Board also acknowledges the concerns raised by commenters about the costs, operability, and potential limited benefit of the EQCF requirement, including the availability of qualified individuals to serve in an EQCF role, for firms of any size. In the Board's view, rescinding the EQCF requirement means giving up the benefits of an external second look. That external second look would have focused on the significant judgments made and related conclusions reached when evaluating and reporting on the effectiveness of firms' QC systems. The Board believes those incremental benefits are difficult to quantify and potentially limited. They would come from the fresh perspectives of an individual serving in an EQCF role, beyond the benefits already provided by other aspects of QC 1000. See below for further discussion on economic impacts.

The Board believes that the implementation concerns apply equally to all firms, including those operating under alternative practice structures or accepting private equity investments, regardless of the number of issuers they audit.

One commenter opposed the rescission, asserting that firm leadership should be held accountable through independent oversight.¹⁰⁹ Further, the commenter suggested that firms might lack the ability to “convince investors they can do the right thing when left to their own judgment.”¹¹⁰ As designed, though, the EQCF lacks a mechanism or the authority to hold firm leadership accountable; the EQCF is not required to provide concurring approval of the

firm's evaluation or reporting.¹¹¹ Nor would the EQCF supplant the firm's judgment.

Furthermore, the Board notes that the QC 1000 quality objectives for the governance and leadership component continue to call for (i) firm leadership to communicate and promote the firm's commitment to quality; (ii) the firm to clearly define leadership's responsibility for quality and hold them accountable; (iii) firm leadership to demonstrate a commitment to quality through actions and behaviors; (iv) the firm's strategic decisions and actions to be consistent with and support the firm's commitment to quality; and (v) resources to be obtained, developed, allocated, and assigned in a manner that enables an effective QC system and the performance of engagements in accordance with applicable professional and legal requirements.¹¹² To achieve these quality objectives, firms are required to design and implement quality responses that are based on the related quality risks and on the reasons for the assessments given to the quality risks and to reduce to an appropriately low level the risk that quality objectives will not be achieved. The Board has also observed that several firms already incorporate external advisors into their organizational and governance structures and they may continue to do so as part of their response to the quality risks associated with these quality objectives. The Board has long considered firm governance and leadership to be an important aspect of firms' QC systems that will continue to be subject to oversight by the PCAOB, including as part of PCAOB inspections.

Information and Communication

QC 1000 requires a firm to establish a quality objective that, if the firm communicates firm-level or engagement-level information with respect to the firm's audit practice, firm personnel, or engagements, such as firm or engagement metrics, to external parties, such information is accurate and not misleading and, with respect to any such metrics that are communicated in writing, the communication explains in reasonable detail how the metrics were determined and, if applicable, how the method of determining them changed since the metrics were last communicated.

As discussed in the QC 1000 2024 adopting release, the information that this requirement applies to includes public communications about firm-level or engagement-level information, such

as firm metrics and financial data.¹¹³ For example, some firms publish transparency or audit quality reports, either voluntarily or in response to the requirements of other jurisdictions, that contain data such as:

- Revenue breakdown by service line, by year, or by geographic segment;
- Professional staff ratios;
- Staff turnover ratios;
- Average training hours per professional; and
- Partner workload.

Firms may also communicate such data via web pages or other media, such as promotional publications, social media, interviews, or presentations via webcast or video.¹¹⁴

In the supplemental request for comment, the Board proposed to narrow the requirements of QC 1000.53e regarding the need for an explanation of written metrics to those metrics that the firm makes publicly available. This was consistent with the initial focus of the requirement on public communications.¹¹⁵ The Board believes that recipients of nonpublic communications regarding metrics, such as regulators, company management, and audit committees, are generally in a position to request additional information about the metrics if they desire it. Further, some nonpublic metrics may already be calculated in accordance with a method prescribed by the recipient (for example, in response to a regulatory requirement or an audit committee request for proposal). In contrast, where metrics are publicly available, such as in firm transparency reports or promotional publications, these are usually one-way communications in which the external parties do not have the ability to ask questions or request clarification from the firm.

Several commenters supported the proposed amendments to paragraph .53e.¹¹⁶ One commenter said they did not object to confining the explanation requirement to metrics the firm makes publicly available.¹¹⁷ One of these commenters stated that the proposed amendments were generally clear and seem appropriate but suggested that the term “metric” be defined or explained in the rule text.¹¹⁸ Another commenter stated that the PCAOB must clearly communicate to firms that the intent of the provision is that firms ensure that

¹¹³ See PCAOB Rel. No. 2024–005, at 186.

¹¹⁴ See PCAOB Rel. No. 2024–005, at 186–187.

¹¹⁵ See id.

¹¹⁶ See comment letters from AAA, BDO, CAQ, Deloitte, EY, GT, KPMG, Kramer, MIAG, PICPA, RSM, SCCG, and Spitters.

¹¹⁷ See comment letter from CFA.

¹¹⁸ See comment letter from Kramer.

¹⁰⁶ See comment letter from KPMG.

¹⁰⁷ See comment letter from Spitters.

¹⁰⁸ See comment letter from CFA.

¹⁰⁹ See id.

¹¹⁰ See id.

¹¹¹ See PCAOB Rel. No. 2024–005, at 121.

¹¹² See QC 1000.25.

the explanation remains accurate and publicly available.¹¹⁹ Another commenter encouraged the Board to make explicit that simplification of communication requirements does not alter the firm's monitoring obligations.¹²⁰ One commenter stated that it would be helpful to further clarify whether the requirement applies only to those communications required under applicable professional and legal requirements or to all such metrics publicly disclosed.¹²¹ The commenter further requested clarification of whether all changes to the calculation of disclosed metrics to which this requirement applies must be explained or whether this requirement applies only to material changes in the calculation of the disclosed metrics.¹²²

One commenter stated that the operability of the requirement could be further enhanced by restructuring the requirement into two distinct quality objectives—one that addresses whether the information is accurate and not misleading, and a second, conditional objective requiring an explanation for publicly communicated metrics.¹²³

The Board is adopting the proposed amendments to QC 1000.53e with modifications. Specifically, the Board is revising paragraph .53e by adding subparagraphs .e(1) and .e(2) to more clearly distinguish firm responsibilities when communicating firm-level or engagement-level information to external parties and in written public communications. The Board agrees with the commenter that this change will improve the operability of paragraph .53e without changing a firm's responsibilities. In addition, the Board believes that the change will help to address a commenter's concern regarding the clarity of the provision's intent with respect to metrics communicated in writing and made publicly available by the firm.

The requirement in paragraph .53e(2) applies to any metrics that are communicated in writing and made publicly available by the firm—it is not limited in application to metrics that are required to be communicated under applicable professional and legal requirements. Paragraph .53e(2) also requires a firm to communicate how the method of determining any metrics changed since previously communicated, if applicable, and that requirement applies to any such change in methodology, without regard to the

firm's assessment of its materiality. The Board does not believe that it is necessary to define the term "metric" for purposes of applying paragraph .53e(2). The Board believes the term is reasonably understood in practice, and the Board previously clarified, in the supplemental request for comment, that the Board intends for the requirement to apply only to calculated measures, not to underlying data.¹²⁴ As illustrated in the supplemental request for comment, if a firm publicly discloses its auditor-employee headcount for a region or office, the firm will not need to describe how it counted the employees.¹²⁵ The requirement will apply, however, to any calculated figures derived using that data, such as the average years of experience for audit personnel (*i.e.*, total years of audit experience divided by auditor-employee headcount).

The Board also does not believe it is necessary to clarify that the proposed amendment would not alter a firm's monitoring obligations. As stated by the commenter who suggested doing so, the amendments simplify communication requirements but do not affect QC 1000 monitoring obligations.

The Board believes that the amendments will carry out its initial intent for public communications and avoid unnecessary costs associated with making additional disclosures to recipients who can request more information if they need it, while still ensuring that recipients of written public communications have access to an explanation of any metric provided.

In addition, the Board proposed adding a note to paragraph .53e stating that the explanation of the method for determining metrics can be provided either within the public written communication that includes the metrics or by referring in the communication to a publicly available explanation presented elsewhere, such as the firm's website.

Several commenters supported allowing firms to provide explanations of metrics in a publicly available location, such as the firm's website.¹²⁶ One commenter stated that they supported the proposed amendment provided that those explanations are clear, balanced, accessible, and sufficiently specific to help users of the metrics.¹²⁷ Another commenter stated that they favored public disclosures in one place for ease of use and that placement on the relevant website

seems appropriate as long as there are clear instructions on how to access the explanation.¹²⁸ The commenter further stated that, while disclosures on websites are useful, investors would want to make sure that any restatements, changes in definitions, or metrics are clearly noted, communicated in writing, and updated on a timely basis.¹²⁹ While one commenter agreed that publishing an explanation of metrics on a website would not adversely affect the utility of metrics made public, this commenter questioned whether public information about firm metrics should be subject to certification or verification before publication.¹³⁰ Another commenter said that an explanation that was accurate on the day it was published is of little use to an investor comparing metrics two or three years later, and that simplification of the requirement should not come at the expense of transparency or comparability over time within a single firm.¹³¹ This commenter requested that the Board require that any report containing a publicly disclosed metric include, in the report itself, a hyperlink to the explanation of how that metric is calculated, maintained on the firm's own website, and stated that the hyperlink must remain stable, archived, and year specific.¹³² This commenter also said that when a metric or its methodology changes from one year to the next, the change must be prominently identified in the base report itself—not only in the linked explanation—together with a description of the change and a presentation of the comparable prior year metric.¹³³

After consideration of the comments received,¹³⁴ the Board is adopting the note to paragraph .53e as proposed but relocating it under new paragraph .53e(2).

The Board believes that allowing firms to explain metrics either in the same communication as the metric itself or by reference to another publicly available explanation would streamline firms' communications about their audit practices without adversely affecting the quality of information received by

¹²⁸ See comment letter from ICGN.

¹²⁹ See *id.*

¹³⁰ See comment letter from Spitters.

¹³¹ See comment letter from CFA.

¹³² See *id.*

¹³³ See *id.*

¹³⁴ One commenter stated that the PCAOB should use existing artificial intelligence technology to aggregate metrics and related information from firms' websites or other public sources and make that information available in a centralized location on the PCAOB's website. See comment letter from MIAG. This suggestion is beyond the scope of this rulemaking.

¹¹⁹ See comment letter from MIAG.

¹²⁰ See comment letter from SCCG.

¹²¹ See comment letter from RSM.

¹²² See *id.*

¹²³ See comment letter from KPMG.

¹²⁴ See PCAOB Rel. No. 2026-002, at 25-26.

¹²⁵ See *id.*

¹²⁶ See comment letters from BDO, CFA, GT, KPMG, MIAG, PICPA, and RSM.

¹²⁷ See comment letter from CAQ.

external parties. The Board does not believe that permitting firms this flexibility will create confusion for stakeholders. Given the volume of information that a firm might communicate about itself, and the possibility that the same information may be repeated through various communication platforms, the Board believes that permitting a firm to make reference to a single publicly available explanation could reduce unnecessary duplication of disclosures and provide additional clarity to stakeholders. Also for this reason, the Board believes it is not necessary to require a change made to a metric or its methodology be identified in the written communication. The Board is not requiring firms to provide hyperlinks for the metrics because the Board seeks to preserve the principles-based nature of the requirement and avoid prescribing a specific method that may become less effective as technology changes over time.

To satisfy paragraph .53e(2), any publicly available explanation, including one provided through a website, would need to be clear, accessible, and sufficiently specific to explain how the metric was determined and any changes in the method used to determine the metric since it was last communicated. In addition, the Board does not believe that requiring certification or verification of such explanations is necessary to achieve the objectives of paragraph .53e(2). Firms would need to ensure that their explanations remained specific as to the public metric to which they relate and are publicly available for as long as they continue to make available the written public communication that refers to the location of the metrics. Firms may update the publicly available explanation as necessary to maintain its accuracy; however, such updates do not require the issuance of a new written public communication identifying or describing those updates.

Monitoring and Remediation Process

1. Responding to Engagement Deficiencies

Engagement monitoring activities are designed to provide information on whether engagement or QC system-level areas may require additional attention. These activities may identify pervasive issues where a number of engagements have similar problems, possibly highlighting the need to revise methodologies, provide additional training, or take other actions at the QC-system level. QC 1000 requires monitoring activities to include

determining, on a timely basis, whether engagement deficiencies exist and, if so, taking certain actions in response to the identified engagement deficiencies.

QC 1000 defines an engagement deficiency as an instance of noncompliance with applicable professional and legal requirements by the firm, firm personnel, or other participants with respect to an engagement of the firm, or by the firm or firm personnel with respect to an engagement of another firm. Under QC 1000.68, a firm is required to take certain action when an engagement deficiency exists, with the required action depending on circumstances such as whether the engagement is completed or still in-process or is related to work performed on other firms' engagements.

i. Engagement Deficiency Related to an In-Process Engagement (QC 1000.68a)

As originally adopted, QC 1000 requires firms, for engagement deficiencies relating to in-process engagements, to take action to address the deficiency in accordance with applicable professional and legal requirements (to the extent necessary, before the issuance of the engagement report(s)), such that the engagement report(s) are appropriate in the circumstances.

The Board proposed to amend paragraph .68a to (i) replace the language "the engagement report(s) are appropriate in the circumstances" with "the engagement is free of significant engagement deficiencies" and (ii) add a footnote describing what significant engagement deficiencies are. The concept of a significant engagement deficiency is derived from AS 1220, and the description used in the proposed footnote in paragraph .68a aligns with that in AS 1220. The footnote to QC 1000.68a also clarifies that the concept applies to all engagements as that term is defined in QC 1000 (which includes, for example, engagements performed pursuant to PCAOB interim attestation standards), not only those engagements described in AS 1220.

Many commenters supported the proposed amendments to paragraph .68a.¹³⁵ However, one commenter stated that the proposed threshold for a "significant engagement deficiency" remained overly broad and could be interpreted to encompass any instance in which an engagement team failed to perform a procedure required by PCAOB standards, regardless of whether the omission affected the sufficiency or

appropriateness of audit evidence supporting a material assertion or the engagement conclusions.¹³⁶ This commenter suggested that the definition should incorporate the concepts of materiality, relevant assertions, and the significance of the deficiency to the overall audit.¹³⁷

The proposed description for when a significant engagement deficiency exists is consistent with concepts in AS 1220. Under AS 1220, an engagement quality reviewer ("EQR") may provide concurring approval of issuance only if, after performing with due professional care the review required by the standard, the EQR is not aware of a significant engagement deficiency.¹³⁸ The description of significant engagement deficiency in the proposed amendments to paragraph .68a appropriately focuses firms on matters that must be corrected before an audit report is issued or before an engagement conclusion is communicated to the company.¹³⁹ Therefore, the Board does not agree that the description is overly broad; a significant engagement deficiency would not be any instance in which an engagement team failed to perform a procedure required by PCAOB standards but rather is specifically related to the circumstances described in footnote 40A. Further, the Board believes the concept is well understood by the profession and does not require any revision.

The Board is adopting the amendments to paragraph .68a as proposed.

ii. Evaluating Whether Similar Engagement Deficiencies Exist on Other Engagements (QC 1000.68d)

As originally adopted, QC 1000 requires that, when the firm determines that an engagement deficiency exists, the firm should evaluate whether similar engagement deficiencies exist in other in-process engagements, completed engagements (unless it is probable that the engagement report is not being relied upon), and work performed on other firms' engagements, and if so, take actions as required by paragraphs .68a–c, as applicable.

The Board proposed to limit the requirement to evaluate whether similar engagement deficiencies exist so it would apply only with respect to a

¹³⁶ See comment letter from PICPA.

¹³⁷ See id.

¹³⁸ See Notes to AS 1220.12, .17, .18B.

¹³⁹ See Proposed Auditing Standard—Engagement Quality Review and Conforming Amendment to the Board's Interim Quality Control Standards, PCAOB Rel. No. 2008–002 (Feb. 26, 2008), at 16 (describing significant engagement deficiencies).

¹³⁵ See comment letters from Baker Tilly, CAQ, Deloitte, GT, KPMG, Plante & Moran, and Spitters.

subset of engagement deficiencies, specifically those that resulted or could result (i) a failure to obtain sufficient appropriate evidence to support the conclusion reached on an engagement¹⁴⁰ or (ii) an inappropriate overall conclusion on the subject matter of an engagement.

Most commenters generally supported the proposed amendments to paragraph .68d.¹⁴¹ The Board is adopting the amendments to paragraph .68d as proposed, along with a new note discussed further below.

The discussion below addresses specific commenter feedback related to the proposed amendments.

a. “Resulted or Could Result in”

Several commenters raised concern regarding the proposed language “resulted or could result in.”¹⁴² Commenters stated that the language would introduce new complexity¹⁴³ and interpretation challenges,¹⁴⁴ or would involve substantial implementation effort with limited incremental investor protection.¹⁴⁵ One commenter stated that without further context, the term “could” effectively sets a threshold closer to a remote possibility, which, in practice, would require firms to evaluate an unbounded population of engagements.¹⁴⁶ This commenter suggested that the Board consider revising the language to specify that the requirement applies “where there is a reasonable possibility” that an engagement deficiency could result in either a failure to obtain sufficient appropriate audit evidence or an inappropriate overall conclusion, to distinguish from those that represent more remote possibilities.¹⁴⁷ Another commenter recommended changing the proposed language to “reasonably could result.”¹⁴⁸ Another commenter stated that it was not clear whether “could” should be assessed at the individual engagement level or at a broader thematic level, such as when a theme or trend of similar engagement deficiencies emerges.¹⁴⁹ Another commenter stated

that a deficiency that appears immaterial on the engagement where it was first identified can still be a symptom of a firm-wide QC weakness and a narrower trigger reduces the number of opportunities a firm has to find that pattern before it results in an audit failure.¹⁵⁰ One commenter highlighted that the intended benefits of the proposed amendment could be offset by concerns regarding specific provisions (*i.e.*, the “could result in” language).¹⁵¹ Another commenter stated that it was difficult to determine whether the proposed amendment will meaningfully reduce complexity, subjectivity, or implementation costs.¹⁵² The Board is concerned that some commenters may have misinterpreted the intent of the phrase “could result in.” As adopted, QC 1000 requires the firm to evaluate all engagement deficiencies under paragraph .68d. The goal of the amendment is to narrow the types of engagement deficiencies subject to the evaluation to only those that relate to obtaining sufficient appropriate evidence or the overall conclusion of an engagement.¹⁵³ Other engagement deficiencies would not need to be evaluated under paragraph .68d, as amended. Such other engagement deficiencies include, for example, engagement deficiencies related to communications to the audit committee; the filing of Form AP, *Auditor Reporting of Certain Audit Participants*; or the registration status of an other auditor that performed substantial role work.¹⁵⁴ In other words, this “could result in” language is not intended to introduce an assessment of the likelihood that the engagement deficiency could result in, for example, a failure to obtain sufficient appropriate evidence to support the conclusion on another engagement. This language is instead intended to help firms assess whether a particular engagement deficiency falls within either of the two types of engagement deficiencies subject to the

evaluation under the revised paragraph .68d.

For example, if the engagement deficiency related to not making a required communication to the audit committee, this type of engagement deficiency does not affect the auditor’s ability to obtain sufficient appropriate audit evidence or reach the appropriate overall conclusion of the engagement and, therefore, would not be within the scope of the revised paragraph .68d. In contrast, if the engagement deficiency related to the auditor not making or observing a physical inventory count in accordance with AS 2510, *Auditing Inventories*, this type of an engagement deficiency would be within the scope of paragraph .68d, because it relates to obtaining sufficient appropriate evidence.

Some commenters requested clarification of an example the Board provided in the supplemental request for comment.¹⁵⁵ To clarify and illustrate the application of the “resulted or could result in” language in paragraph .68d, consider the following scenario: During internal monitoring activities for the current year, a firm selected one of its completed engagements for inspection and identified that the engagement team failed to evaluate cash confirmation exceptions pursuant to AS 2310.20. As a result, the engagement team violated PCAOB requirements (*i.e.*, applicable professional and legal requirements) and the firm determined that an engagement deficiency exists. Because noncompliance with the requirement of AS 2310.20 (that is, the failure to evaluate confirmation exceptions) relates to obtaining sufficient appropriate evidence (*i.e.*, it could result in a failure to obtain such evidence), this engagement deficiency meets the requirement for evaluation under the revised language of paragraph .68d.¹⁵⁶

The Board believes that the amendment appropriately focuses a firm’s attention and efforts on the types of engagement deficiencies that represent the greatest risk to audit quality. It also reduces compliance costs by narrowing the population of engagement deficiencies that a firm is required to evaluate.

b. “Evaluate Whether Similar Engagement Deficiencies Exist”

A commenter stated that the nature and extent of the procedures required to evaluate whether similar engagement

¹⁴⁰ Because QC 1000 covers not only audit engagements but also review engagements and attestation engagements, reference to “sufficient appropriate evidence” is necessary as this concept aligns with the audit, review, and attestation standards.

¹⁴¹ See comment letters from Baker Tilly, BDO, CAQ, CBIZ, Deloitte, EY, GT, ICGN, KPMG, PICPA, Plante & Moran, RSM, SCCG, and Spitters.

¹⁴² See comment letters from BDO, GT, KPMG, PICPA, and RSM.

¹⁴³ See comment letter from KPMG.

¹⁴⁴ See comment letters from GT and KPMG.

¹⁴⁵ See comment letter from PICPA.

¹⁴⁶ See comment letter from KPMG.

¹⁴⁷ See *id.*

¹⁴⁸ See comment letter from BDO.

¹⁴⁹ See comment letter from RSM.

¹⁵⁰ See comment letter from CFA.

¹⁵¹ See comment letter from KPMG.

¹⁵² See comment letter from GT.

¹⁵³ With respect to examples of the type of engagement deficiencies that relate to reaching an inappropriate overall conclusion on the subject matter of an engagement, see PCAOB Rel. No. 2008–002, at 16 n.29, which states that “[i]nappropriate conclusions on the subject matter of the engagement would include, for example, a failure to appropriately modify the engagement conclusion in response to: (1) a material departure from generally accepted accounting principles or (2) a material weakness in internal control over financial reporting.”

¹⁵⁴ These types of engagement deficiencies would still be required to be addressed in accordance with paragraphs .68a–c and to be evaluated to determine whether QC deficiencies exist in accordance with paragraph .72.

¹⁵⁵ See comment letters from Baker Tilly, BDO, CAQ, Deloitte, EY, GT, PICPA, and RSM.

¹⁵⁶ The Board has provided a continuation of this example below.

deficiencies exist should be more explicitly grounded in the root cause of the engagement deficiency identified and an assessment of whether that root cause suggests a potential QC deficiency.¹⁵⁷ This commenter suggested that an evaluation anchored to root cause would provide a more meaningful and risk-based framework for determining the scope of further procedures.¹⁵⁸ As it relates to the evaluation required under paragraph .68d, another commenter requested scenarios to help firms distinguish between engagement deficiencies and identified root causes that are (i) indicative of systemic issues and (ii) isolated incidents.¹⁵⁹

As described in the QC 1000 2024 adopting release, understanding the nature of the engagement deficiency will assist the firm in determining the extent of the necessary evaluation.¹⁶⁰ The intent of the requirement to evaluate whether similar engagement deficiencies exist was not to require an unbounded look at every engagement the firm has. The Board believes understanding the circumstances that led to the engagement deficiency (*e.g.*, the underlying cause) would help the firm identify other engagements to evaluate for similar engagement deficiencies. The Board acknowledges, as commenters suggested, that this was not clear in the proposed amendments. Therefore, the Board is adding a new note to paragraph .68d to indicate that understanding the circumstances that led to the engagement deficiency may assist the firm in identifying other engagements (or work performed by the firm on other firms' engagements) to

evaluate for similar engagement deficiencies.

The procedures performed can be scalable and practical in the circumstances and may be developed based on the nature of the engagement deficiency. However, it would not be appropriate for a firm's evaluation to be based on narrower criteria than those underlying the cause(s) for the engagement deficiency, nor would it be appropriate to include only a subset of the engagements that are identified based on the understanding of the circumstances that led to the engagement deficiency.

To continue with the example provided above regarding cash confirmations, the firm then gained an understanding of the circumstances that led to the engagement deficiency (*e.g.*, the underlying cause) to identify which other engagements to evaluate for similar engagement deficiencies. In this example, the firm might determine that the engagement deficiency was caused by an error in the firm's cash confirmations methodology, which is required to be used on all engagements that use cash confirmations. To identify whether other engagements used the same methodology (or, in the case of in-process engagements, are currently using the same methodology), the firm sends an inquiry email to each engagement partner. Based on the responses received to the emails and any follow-up with non-respondents, the firm identifies the engagements (and work performed on other firms' engagements) that followed the same methodology. It is these engagements and work performed on another firm's engagements that followed the same methodology that the firm will evaluate for similar engagement deficiencies.

If the firm identifies, for example, twenty engagements that followed the same cash confirmations methodology, the firm evaluates whether a similar engagement deficiency exists on each of the twenty engagements, *i.e.*, a failure to evaluate confirmation exceptions pursuant to AS 2310.20. Out of the twenty engagements, if the firm identifies four engagements in which the engagement team did not perform procedures to evaluate confirmation exceptions pursuant to AS 2310.20, then the firm would need to take appropriate actions pursuant to subparagraphs a–c of paragraph .68 on each of those four engagements.

Importantly, paragraph .68d does not prescribe the manner in which the firm would identify engagements to evaluate. In the above example, the firm decided to send an email to each engagement partner to identify engagements that followed the same methodology. However, the firm could use other approaches, such as a data analysis tool or performing a search of engagement files, to identify engagements that followed the same methodology. The evaluation approach a firm takes may differ depending on the nature of the engagement deficiency, the circumstances that led to the engagement deficiency, and a firm's specific facts and circumstances. As discussed above, once the firm identifies the population of engagements subject to the evaluation of whether similar engagement deficiencies exist, it would not be appropriate for a firm's evaluation to be based on narrower criteria nor would it be appropriate to evaluate only a subset of the engagements that were identified.

The following graphic illustrates the process for evaluating whether similar engagement deficiencies exist:

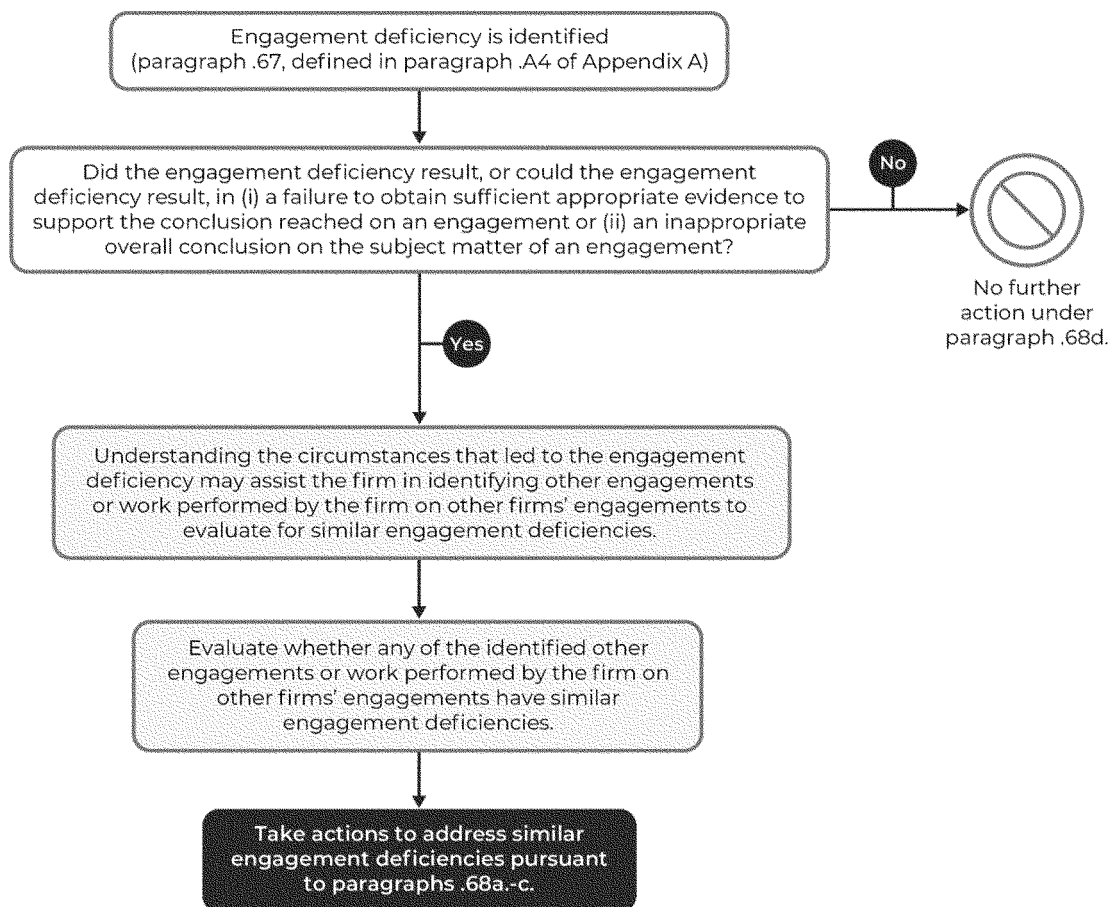
¹⁵⁷ See comment letter from Deloitte.

¹⁵⁸ See *id.*

¹⁵⁹ See comment letter from GT.

¹⁶⁰ See PCAOB Rel. No. 2024–005, at 225.

Evaluating Whether Similar Engagement Deficiencies Exist on Other Engagements



c. Response to Other Commenter Feedback

One commenter did not support a requirement that would require the firm, after finding an engagement deficiency in one engagement, to evaluate whether similar deficiencies exist in all other completed engagements.¹⁶¹ This commenter stated that the cost of the requirement could be extremely high and it is unclear whether the benefit would outweigh the cost.¹⁶² This commenter suggested that the Board instead change the requirement so that examining a completed engagement would be required only when, based on the information available at the time, the firm believed that it was probable the financial statements were materially misstated and the likelihood was more than remote that the audit report was still being relied upon.¹⁶³ The Board does not agree with the commenter who stated that the amendment would require that the firm evaluate whether similar deficiencies exist in all other

completed engagements, as the note to paragraph .68d indicates understanding the circumstances that led to the engagement deficiency may assist the firm in identifying other engagements to evaluate for similar engagement deficiencies.

A commenter stated that a deficiency found in one engagement should prompt the firm to ask whether the same problem exists in other engagements and why it occurred, with the answers feeding back into the firm's risk assessment.¹⁶⁴ The Board agrees that an engagement deficiency identified in one engagement may provide information that is relevant to the firm's broader monitoring and remediation and risk assessment processes. All engagement deficiencies are subject to action as required under paragraph .68a–c (in that particular engagement), and certain engagement deficiencies will require evaluation under paragraph .68d. Furthermore, all engagement deficiencies are treated as QC observations under paragraph .72 and must be evaluated to determine whether

they are QC deficiencies. Additionally, under paragraph .20a(3), the firm obtains an understanding of information from the firm's monitoring and remediation activities, including its identification of engagement deficiencies, in identifying and assessing quality risks. In this way, the evaluation of engagement deficiencies represents one part of the broader monitoring and remediation feedback loop: information identified through that process informs the firm's evaluation of QC observations and feeds back into the firm's identification and assessment of quality risks.

This commenter also stated that deficiency rates are not materially better than in the early years of the inspection program more than twenty years ago and suggested this is not the moment to narrow the lens through which firms look for systemic problems.¹⁶⁵ The Board believes that the amendments to paragraph .68d appropriately focus firms' evaluations on engagement deficiencies related to obtaining sufficient appropriate evidence to

¹⁶¹ See comment letter from AAA.

¹⁶² See id.

¹⁶³ See id.

¹⁶⁴ See comment letter from CFA.

¹⁶⁵ See id.

support the conclusion reached on an engagement or the overall conclusion on the subject matter of an engagement that may indicate systemic issues on the firm's engagements.

A commenter suggested that the Board could further enhance the proposed amendment by aligning more closely with ISQM 1, which permits firms to use their judgment to determine the nature and extent of any investigation of identified engagement deficiencies and whether those deficiencies might indicate a deficiency in the system of quality management.¹⁶⁶ The Board believes the requirement in paragraph .68d is fundamental to achieving the objective of the QC system that each engagement report issued by the firm is in accordance with applicable professional and legal requirements.¹⁶⁷

A commenter questioned why only items (1) and (2) from footnote 40A to proposed paragraph .68a were included in proposed paragraph .68d, while items (3) and (4) (the engagement report is not appropriate in the circumstances and the firm is not independent of its client, respectively) were not.¹⁶⁸ With regard to paragraph .68d, the amendment focuses on those types of engagement deficiencies that most directly affect the sufficiency and appropriateness of procedures performed on the engagement as well as the ultimate opinion expressed by the firm.

2. Definition of QC Deficiency

As originally adopted, the note to paragraph .A8(1) of the definition of QC deficiency states that the likelihood of not achieving the reasonable assurance objective or one or more quality objectives would be above an acceptably low level if, for example, a quality objective is not established, a quality risk is not properly identified or assessed, or a quality response is not properly designed or implemented or is not operating effectively.

The Board proposed to amend this note to clarify that a failure of a quality response would be regarded as evidencing a QC deficiency only if other quality responses do not achieve the relevant objective(s). As stated in the QC 1000 2024 adopting release, the relationship across quality objectives, quality risks, and quality responses is generally not one-to-one.¹⁶⁹ Most quality objectives are likely to have multiple quality risks. Some quality risks may affect one or more quality

objectives, either within a single component or across several components, and may require multiple quality responses. Some quality responses may address multiple quality risks.

Many commenters supported the proposed amendment to the definition of QC deficiency,¹⁷⁰ noting, for example, that allowing firms to take compensating quality responses into account when determining whether a QC deficiency exists better reflects how a risk-based system of quality control operates in practice and also aligns more closely with the principles-based framework of other quality management standards, such as ISQM 1.

Two commenters suggested revisions to the proposed amendment.¹⁷¹ One commenter stated that the rule text could clarify that multiple other quality responses are not necessarily required by adding the words "one or more" before "other quality responses" in the Note to paragraph .A8(1) for situations where there is just one other quality response.¹⁷² The Board believes the rule text is sufficiently clear that the clause "and other quality responses do not achieve the relevant objective(s)" applies only if the firm has designed and implemented at least one other quality response relative to the objective(s). Another commenter suggested amending the definition as follows: "(other quality responses have been implemented to address the same risk, and) 'other quality responses do not achieve the relevant objectives.'"¹⁷³ The Board does not believe it is necessary for the rule text to specify that "other quality responses" must have been designed and implemented to address the particular quality risk. As stated in the supplemental request for comment and reiterated here, when firms have implemented more than one quality response to address the same quality risk, they can take those other quality responses into account when determining whether a QC deficiency exists.

One commenter expressed concern that without a documented, inspectable basis for concluding that a "compensating response" actually operated effectively, this amendment risks becoming a way to explain away deficiencies rather than a genuine test of whether investors remain protected.¹⁷⁴

¹⁷⁰ See comment letters from AAA, Baker Tilly, BDO, CAQ, Crowe, Deloitte, EY, GT, KPMG, Kramer, PICPA, Plante & Moran, PwC, RSM, and SCCG.

¹⁷¹ See comment letters from Kramer and Spitters.

¹⁷² See comment letter from Kramer.

¹⁷³ See comment letter from Spitters.

¹⁷⁴ See comment letter from CFA.

Another commenter expressed concern that the proposed amendment would give firms/networks additional temptation to identify compensating responses when the linkage is tenuous.¹⁷⁵ The Board believes the revised note makes clear that, when a quality response is not properly designed or implemented or is not operating effectively, the other quality responses would need to achieve the relevant objective(s), that is, they would need to be properly designed, implemented, tested, and found to operate effectively. And, as one commenter observed, paragraph .82 requires firms to document their evaluation of QC observations to determine whether QC deficiencies exist and the basis for each determination.¹⁷⁶

Another commenter stated that it is unclear how allowing the evaluation of compensating controls will work in practice.¹⁷⁷ For example, where a quality risk has a single response that fails, the commenter stated it was unclear whether firms may consider other responses that mitigate other identified risks to support achievement of the overall objective.¹⁷⁸ This commenter suggested that there may be responses where a precision level is too high to singularly address a specific risk on their own, but when considered collectively, may reduce the risk of failing to achieve the objective to an acceptable level.¹⁷⁹

As explained in the QC 1000 2024 adopting release, the purpose of this note is to provide examples of circumstances where the likelihood of the firm not achieving the reasonable assurance objective or one or more quality objectives would not be reduced to an acceptably low level.¹⁸⁰ The amendments to this note further emphasize that, when a quality response is not properly designed or implemented or is not operating effectively and other quality responses do not achieve the relevant objective(s), the likelihood of the firm not achieving the reasonable assurance objective or one or more quality objectives has not been reduced to an acceptably low level. Under QC 1000, quality risks are defined as "[r]isks (whether or not related to intentional acts by firm personnel or other participants to deceive or to violate applicable professional and legal requirements) that, individually or in combination

¹⁷⁵ See comment letter from Grosvenor.

¹⁷⁶ See comment letter from CFA.

¹⁷⁷ See comment letter from RSM.

¹⁷⁸ See id.

¹⁷⁹ See id.

¹⁸⁰ See PCAOB Rel. No. 2024-005, at 231.

¹⁶⁶ See comment letter from PICPA.

¹⁶⁷ See QC 1000.05.

¹⁶⁸ See comment letter from Grosvenor.

¹⁶⁹ See PCAOB Rel. No. 2024-005, at 42.

with other risks, have a reasonable possibility of occurring and, if they were to occur, a reasonable possibility of adversely affecting the firm's achievement of one or more *quality objectives*." The amendment clarifies that, when firms have implemented more than one quality response to address the same quality risk, they can take those other quality responses into account when determining whether a QC deficiency exists; if the other quality responses were effective in achieving the relevant objective(s), no QC deficiency would exist.

After consideration of the comments received, the Board is adopting the amendment to the definition of QC deficiency as proposed.

Evaluation of and Reporting on the QC System

1. Annual Evaluation of the QC System i. Evaluation Date

As originally adopted, QC 1000 requires that the firm perform an evaluation of the effectiveness of its QC system annually as of September 30.

The Board proposed to amend QC 1000 to permit firms to select their own annual evaluation date for their QC system by adding a new defined term, "evaluation date," defined as the date selected by the firm as of which to evaluate its QC system under paragraph .77, and making conforming changes to paragraph .77.

The Board also proposed to include language in a new footnote to guide the firm's selection of its evaluation date by recognizing that the firm's choice may be influenced by the nature and circumstances of the firm and its engagements, including, for example, the firm's fiscal year-end or the timing of monitoring activities.

All commenters who commented on this aspect of the proposed amendments expressed support.¹⁸¹ One commenter, who did not object to this aspect of the proposed amendments, expressed concern that timing should not become a tool for managing findings and a firm should not be able to use its initial selection, or a later change of date, to defer capturing known or anticipated inspection findings within an evaluation period.¹⁸² This commenter, however, acknowledged that under the amendments, no period of time escapes evaluation altogether and any change of evaluation date must be reported to the Board together with the firm's rationale

for the change.¹⁸³ The Board agrees with the commenter that these are useful guardrails.¹⁸⁴

The choice of evaluation date is an aspect of QC system design and, as such, has to be made and documented by the time the firm becomes subject to the QC 1000.06 requirement to design, implement, and operate an effective QC system. The firm has to have the information needed to identify unremediated QC deficiencies and to reach a conclusion about the effectiveness of its QC system as of the evaluation date, and for the individuals with ultimate responsibility and accountability and operational responsibility and accountability for the QC system as a whole, acting with due professional care, to certify the firm's report to the PCAOB on its annual evaluation of the QC system. This suggests that the evaluation date and the firm's monitoring and remediation cycle ought to be coordinated so that sufficient, timely information is available when needed about the implementation and operation of the QC system (including the status of remediation efforts) and the compliance of the firm's engagements with applicable professional and legal requirements. Because of the relationship between the evaluation date and the firm's monitoring and remediation activities, The Board does not anticipate that firms will change their selected evaluation date without a specific reason (*e.g.*, regulatory requirements, business combination transactions, or changes in fiscal year or business cycles).

The Board is adopting these amendments as proposed.

The Board believes allowing each firm to select its evaluation date based on the firm's particular facts and circumstances responds to the implementation challenges experienced by some firms and, in particular, could reduce the burden and costs of multiple annual evaluations that some firms could have experienced due to differences in required evaluation dates under QC 1000 versus other regulations to which they are subject. This change better aligns with the flexibility provided by other quality management standards, which permit firms to choose their own evaluation date. Additionally, the Board does not believe that allowing firms to select their own evaluation date impairs the Board's ability to carry out its inspection program.

ii. Five-Month Threshold for the Initial Evaluation of the Firm's QC System

The Board proposed to add language to paragraph .77 that would require a minimum period of operation before a firm is first required to evaluate its QC system. Under the proposed amendment, a firm would be required to evaluate its QC system once the firm has been subject to the requirement to design, implement, and operate a QC system under paragraph .06 for at least five consecutive months (whether due to the effectiveness of QC 1000 on December 15, 2026, or to the firm's later becoming subject to the requirements of QC 1000.06).

Most commenters who commented on this topic supported the proposed amendment.¹⁸⁵

However, one commenter stated that the proposed approach may create practical challenges for firms seeking to align their QC 1000 evaluation process with evaluations performed under other quality management standards, which contemplate annual evaluation periods that generally do not exceed twelve months.¹⁸⁶ This commenter observed that a firm that has chosen, for example, March 31 as its evaluation date would likely be required to perform an evaluation under ISQM 1 or SQMS 1 as of March 31, 2027, while the corresponding QC 1000 evaluation would not occur until March 31, 2028, and would encompass a 15-month evaluation period.¹⁸⁷ This commenter suggested that the Board could permit firms to perform their initial evaluation of their QC system as of their selected evaluation date, consistent with their normal quality control processes, but require the first Form QC filing only for the first 12-month evaluation period ending after September 30, 2027.¹⁸⁸ This commenter believes that the Board could obtain information regarding that firm's initial evaluation, implementation progress, significant findings, and remediation activities through its oversight activities (*e.g.*, inspections, implementation outreach, annual data requests, and other regulatory interactions) prior to the firm's first Form QC filing.¹⁸⁹ Another commenter stated that, combined with a free choice of evaluation date, the proposed five-month threshold could defer some firms' first evaluation well into 2028.¹⁹⁰ This commenter stated

¹⁸⁵ See comment letters from Baker Tilly, CAQ, ICGN, KPMG, PICPA, RSM, and Spitters.

¹⁸⁶ See comment letter from BDO.

¹⁸⁷ See id.

¹⁸⁸ See id.

¹⁸⁹ See id.

¹⁹⁰ See comment letter from CFA.

¹⁸¹ See comment letters from AAA, Baker Tilly, BDO, CAQ, CBIZ, Crowe, Deloitte, EY, Forvis, GT, ICGN, KPMG, MIAG, PICPA, Plante & Moran, PwC, RSM, and Spitters.

¹⁸² See comment letter from CFA.

¹⁸³ See id.

¹⁸⁴ See id.

that the Board should set an outer limit so that every firm completes its first evaluation within a reasonable period of becoming subject to the standard.¹⁹¹

The Board acknowledges that, depending on the evaluation date chosen by the firm, the first evaluation period may encompass more than 12 months, but observes that subsequent periods would proceed on a 12-month cycle (absent a change of the evaluation date). The Board believes that this approach sets a reasonable outer limit for a firm's first evaluation. The Board also believes that the five-month minimum duration of the initial evaluation period ensures that firms have sufficient information to evaluate the effectiveness of their QC system. A firm can elect to voluntarily perform its initial evaluation covering a less-than-five-month period, but that evaluation would not be a required evaluation under QC 1000. Consequently, under General Instruction 4(a) to Form QC, the firm's first Form QC filing would be required to cover the period beginning on the date the firm first incurred an obligation to implement and operate a QC system under QC 1000.06 and ending on the firm's evaluation date.

Another commenter suggested that the five-month period should commence on the first day of the month immediately following the event that triggers the firm's obligation to design, implement, and operate its QC system, which would allow firms a full five-month operating period on which to base their evaluation.¹⁹² This commenter also requested that the Board clarify that the five-month period applies solely to the initial operation of the broader QC system and does not establish a mandatory minimum operating period for concluding that a specific remedial action is effective.¹⁹³ To clarify, as noted above, a firm becomes subject to the requirements of QC 1000 on (1) December 15, 2026 (the effective date of QC 1000), or (2) the day the firm becomes subject to the requirement to design, implement, and operate a QC system under paragraph .06. Therefore, in all circumstances, a firm's QC system will have operated for a full five months or longer before the firm is required to evaluate the effectiveness of its QC system. Additionally, because the five-month threshold refers to the evaluation of the effectiveness of the firm's QC system as a whole, it does not impose any minimum time requirement for any

other purpose other than for QC 1000.77.

Another commenter also suggested that the Board clarify whether engagements should be included in a firm's evaluation based on the financial statement year-end or the date the auditor's report is issued.¹⁹⁴ This commenter encouraged the Board to clarify how firms should approach the initial evaluation when the completion of a firm's engagements falls outside this five-month timeframe and when the initial evaluation has little or no engagement activity within the evaluation period.¹⁹⁵

QC 1000 requires that the firm design, implement, and operate a monitoring and remediation process to provide relevant, reliable, and timely information about the design, implementation, and operation of the QC system and to provide a reasonable basis for timely detection of engagement deficiencies and QC deficiencies.¹⁹⁶ Firms are required to monitor completed engagements.¹⁹⁷ A completed engagement is one for which the firm has issued an engagement report. Firms also are required, depending on the size of their PCAOB audit practice, to either perform in-process engagement monitoring¹⁹⁸ or consider doing so.¹⁹⁹ If the firm has no completed engagements during the firm's initial evaluation of its QC system, in-process monitoring could provide relevant, reliable, and timely information about the performance of the firm's engagements.

Finally, one commenter questioned the rationale behind the Board's decision to use five months as opposed to, for example, six months.²⁰⁰ In developing the minimum time period for the initial QC system evaluation, the Board determined and continues to believe that the five-month threshold strikes the right balance such that the QC system has ample time to operate while also ensuring the PCAOB's timely receipt of information related to firms' QC systems.

Accordingly, the Board is adopting this amendment as proposed.

To illustrate how the five-month threshold for the initial evaluation of the firm's QC system would operate, if a firm that is subject to the requirements of QC 1000.06 when the standard becomes effective (on December 15,

2026) selects June 30 as its evaluation date, the firm would first evaluate the effectiveness of its QC system in accordance with QC 1000 as of June 30, 2027, because the firm would have been required to operate a QC 1000-compliant system for at least five months (specifically, from December 15 to June 30) as of June 30, 2027. Alternatively, if such a firm selects March 31 as its evaluation date, the firm would be required to first evaluate the effectiveness of its QC system as of March 31, 2028, because the firm would not have been required to operate a QC 1000-compliant system for at least five months as of March 31, 2027. As another example, if a firm first became subject to the requirements of QC 1000.06 on June 1, 2027 (because the firm became subject to applicable professional and legal requirements with respect to an engagement at that time), and the firm selects July 31 as its evaluation date, the firm would be required to first evaluate the effectiveness of its QC system as of July 31, 2028, because the firm would not have been required to operate a QC 1000-compliant system for at least five months as of July 31, 2027.

iii. Evaluation Conclusions

As originally adopted, QC 1000 requires the firm to evaluate its QC system annually and conclude that the QC system is effective, is effective except for one or more unremediated QC deficiencies that are not major QC deficiencies, or is not effective (*i.e.*, one or more major QC deficiencies exist).

The Board proposed to amend the above three conclusions to align QC 1000 more closely with other quality management frameworks. Under proposed paragraph .77, the firm would be required to conclude, as of the evaluation date, that its QC system:

- Is effective in achieving the reasonable assurance objective; or
- Is effective in achieving the reasonable assurance objective except for unremediated QC deficiencies that have a severe but not pervasive effect on the design, implementation, and operation of the QC system (and do not render the QC system not effective); or
- Is not effective in achieving the reasonable assurance objective.

To clarify when a firm may conclude that its QC system is effective in achieving the reasonable assurance objective under paragraph .77a, the Board proposed to include a note explaining that such a conclusion would be appropriate when, as of the evaluation date, there are no unremediated QC deficiencies other than those that, individually or in

¹⁹¹ See *id.*

¹⁹² See comment letter from KPMG.

¹⁹³ See *id.*

¹⁹⁴ See comment letter from PICPA.

¹⁹⁵ See *id.*

¹⁹⁶ QC 1000.59a and b.

¹⁹⁷ QC 1000.62a.

¹⁹⁸ QC 1000.63a.

¹⁹⁹ QC 1000.63b.

²⁰⁰ See comment letter from Spitters.

combination, are not severe. This clarification was intended to emphasize that the presence of unremediated QC deficiencies did not, in all cases, preclude a conclusion under paragraph .77a that the QC system is effective. Rather, the determination would depend on the severity of those deficiencies and their effect on the firm's ability to achieve the reasonable assurance objective. Under the proposed approach, QC deficiencies that are not severe, whether considered individually or in combination, would not indicate that the QC system is failing to operate effectively, which would be consistent with the ISQM 1 evaluation framework and the reasonable assurance objective of QC 1000.

Under proposed paragraph .77b, a firm would conclude that its QC system was effective in achieving the reasonable assurance objective except for unremediated QC deficiencies that have a severe but not pervasive effect on the design, implementation, and operation of the QC system (and do not render the QC system not effective). To clarify, when evaluating the effect of unremediated QC deficiencies on the QC system, a firm would evaluate whether the QC deficiencies have a severe but not pervasive effect on each of the following: (1) the design of the QC system, (2) the implementation of the QC system, and (3) the operation of the QC system. Therefore, with respect to the conclusion under paragraph .77b, QC deficiencies may have a severe but not pervasive effect on the design, implementation, or operation of the QC system; they need not have such an effect on all three aspects of the QC system for a firm to reach the conclusion under proposed paragraph .77b. The parenthetical statement is intended to clarify that if QC deficiencies are so severe as to prevent the firm from achieving the reasonable assurance objective, the appropriate conclusion would be under proposed paragraph .77c. A firm would reach the conclusion set forth in paragraph .77c if its QC system was not effective in achieving the reasonable assurance objective.

QC 1000 specifies that an unremediated QC deficiency is one for which remedial actions that completely address the QC deficiency have not been fully implemented, tested, and found effective. The Board proposed to modify the existing note to paragraph .77 to explain that, while remedial actions must be fully implemented as of the evaluation date, they can be tested and found effective no later than the date Form QC is due under paragraph .79 (or, if earlier, the date Form QC is filed). The

note distinguishes between the implementation of remedial actions and the demonstration of their effectiveness. For purposes of determining whether a QC deficiency is remediated, firms are expected to have fully implemented remedial actions as of the evaluation date, but the assessment of whether those actions are operating effectively may be supported by testing their operating effectiveness after the evaluation date but before the Form QC filing date.

Commenters supported the proposed amendments to the evaluation framework and evaluation conclusions, particularly the effort to align more closely with other quality management standards.²⁰¹ Several commenters noted that this alignment would reduce the complexity of managing evaluations under multiple frameworks and help avoid potential confusion among stakeholders.²⁰² Two commenters observed that the three-tiered conclusions framework better supports informed decision-making and meaningful communication with stakeholders, and reflects a more accurate representation of how QC systems operate in practice.²⁰³ Two other commenters noted that the proposed evaluation framework would enhance transparency by allowing firms to distinguish among varying degrees of effectiveness, including through the use of the "except for" conclusion.²⁰⁴ One commenter further stated that the proposed evaluation framework better aligns with the reasonable assurance objective because it clarifies that a QC system may provide reasonable assurance even when unremediated QC deficiencies exist.²⁰⁵ In addition, some commenters indicated that the proposed conclusions in paragraph .77 were sufficiently clear and appropriate.²⁰⁶ One commenter stated the evaluation framework in proposed paragraphs .77-.78 is generally clear but requested clarification on the latitude of firms to change their conclusions as of the evaluation date if, before the date that Form QC is filed, a firm identifies shortcomings when further testing its remedial actions.²⁰⁷

While commenters generally supported the proposed framework, one

commenter recommended expanding the "except for" category to include both "severe but not pervasive" and "pervasive but not severe" unremediated QC deficiencies to minimize potential blurring among the conclusion categories.²⁰⁸ This commenter expressed concern that a conclusion under paragraph .77a could be confusing because a firm may arrive at a favorable conclusion despite having experienced significant quality control issues during the evaluation period that were subsequently remediated.²⁰⁹ The same commenter also noted that deficiencies may take time to become apparent and suggested requiring statements or certifications indicating that firms considered previously unidentified deficiencies relating to prior years in their evaluations.²¹⁰ Another commenter urged the Board to retain the "effective, with no unremediated QC deficiencies" conclusion as originally adopted.²¹¹ The commenter expressed concern that allowing firms to reach an unqualified "effective" conclusion despite the existence of unremediated QC deficiencies would broaden the circumstances in which firms may reach a favorable conclusion.²¹²

One commenter supported the proposed modification to the existing note to paragraph .77 because it provides helpful guidance and better reflects how remediation occurs in practice.²¹³ Another commenter questioned whether the phrase "completely address" in the first sentence of the note, which is not part of the proposed modification, establishes an unnecessarily stringent standard and suggested replacing it with "sufficiently address."²¹⁴ Another commenter requested clarification on the description in the release for determining whether a QC deficiency is remediated, specifically whether the phrase "may be supported by evidence obtained from testing after the evaluation date" refers to testing of instances that occurred before the evaluation date or the related response activities after the evaluation date.²¹⁵ One commenter requested clarification on how firms should assess the effect of remediation efforts when frequency constraints preclude testing enough instances of the remedial actions in

²⁰¹ See comment letters from AAA, Baker Tilly, BDO, CAQ, CBIZ, Deloitte, EY, Forvis, GT, ICGN, KPMG, PICPA, Plante & Moran, PwC, and RSM.

²⁰² See comment letters from Baker Tilly, Deloitte, EY, Forvis, and KPMG.

²⁰³ See comment letters from BDO and CBIZ.

²⁰⁴ See comment letters from Baker Tilly and GT.

²⁰⁵ See comment letter from KPMG.

²⁰⁶ See comment letters from GT, KPMG, and Spitters.

²⁰⁷ See comment letter from Kramer.

²⁰⁸ See comment letter from Grosvenor.

²⁰⁹ See id.

²¹⁰ See id.

²¹¹ See comment letter from CFA.

²¹² See id.

²¹³ See comment letter from KPMG.

²¹⁴ See comment letter from Grosvenor.

²¹⁵ See comment letter from RSM.

evaluating remaining QC deficiencies.²¹⁶

In developing the proposed amendments to paragraph .77, the Board also considered an alternative evaluation framework under which a firm would be required to reach a binary conclusion (*i.e.*, that its QC system is either effective or not effective in achieving the reasonable assurance objective).

One commenter stated that a binary conclusion may be particularly appropriate for many triennial firms and suggested that a binary framework would simplify the evaluation process.²¹⁷ Another commenter stated that whether the alternative evaluation framework with a binary conclusion is more appropriate is undefined, and it would be appropriate and constructive to retain the factors included in paragraph .78 (which are discussed further below) under this alternative framework.²¹⁸

Many commenters did not support the binary approach for the evaluation framework.²¹⁹ Some commenters were concerned that it would limit firms' ability to communicate the nature and severity of identified deficiencies and would decrease alignment with other quality management frameworks.²²⁰ In addition, some commenters stated that a binary framework could provide insufficient information regarding significant deficiencies that are not pervasive enough to warrant a conclusion that the QC system is ineffective.²²¹ Two commenters noted that a binary framework would be less informative.²²² Another commenter expressed concern that the binary approach could reduce the rigor of the evaluation process.²²³ Another commenter stated that the existing three-tiered conclusion structure provides more meaningful information by distinguishing QC systems with severe but not yet pervasive QC deficiencies and serves as an important early-warning mechanism.²²⁴ This commenter also stated that the middle category allows severe but not yet pervasive unremediated QC deficiencies to be identified, escalated, and

remediated before the QC system fails.²²⁵

After considering the comments received, the Board is adopting the amendments to paragraph .77 as proposed.

The Board believes that unremediated QC deficiencies that are pervasive but not severe may nevertheless allow the QC system to achieve its reasonable assurance objective and therefore support a conclusion under paragraph .77a. The Board also believes the evaluation framework appropriately focuses on the condition of the QC system as of the evaluation date and provides firms with the incentive to timely and effectively remediate identified QC deficiencies as of the evaluation date to reach a conclusion under paragraph .77a.

The Board notes that, despite increased alignment between the evaluation conclusions under QC 1000 and other quality management standards, the possibility remains that firms may reach different conclusions regarding the effectiveness of their QC systems under QC 1000 and ISQM 1 or SQMS 1. For example, there are differences in the professional and legal requirements that apply to a firm's audit practice under PCAOB standards compared to other standards, including variations between applicable auditing standards and independence requirements. The relevant populations of engagements are different. There could also be differences relating to the individuals who perform such engagements or perform activities within the QC system, including with regard to training and supervision. In addition, QC 1000 would continue to require a more structured approach to the evaluation process than other standards, including through the application of specific defined terms and factors that are required to be considered. The Board believes this more structured approach is important both in supporting consistent and appropriate evaluation of the QC system by firms and in providing a foundation for PCAOB oversight in the future.

The Board does not believe that an additional certification requirement, as suggested by one commenter, is necessary because QC 1000 already requires firms to consider the results of prior monitoring activities and remedial actions when determining the nature, timing, and extent of the firm's monitoring activities. The Board is also retaining the phrase "completely address" in the first sentence of the note to paragraph .77 describing the meaning

of an unremediated QC deficiency. The commenter's suggested phrase "sufficiently address" could introduce subjectivity regarding whether a QC deficiency has been adequately remediated. The Board believes the phrase "completely address" conveys the expected level of remediation necessary before concluding that a QC deficiency is fully remediated.

With respect to requests for clarifications of (i) the phrase "may be supported by evidence obtained from testing after the evaluation date" and (ii) frequency constraints on testing remedial actions, the note to paragraph .77 distinguishes between the implementation of remedial actions and the demonstration of their effectiveness. For purposes of determining whether a QC deficiency is remediated, firms are expected to have fully implemented remedial actions as of the evaluation date, but the assessment of whether those actions are operating effectively may be supported by testing their operating effectiveness after the evaluation date but before the Form QC filing date. For example, when a remedial action has been implemented prior to the evaluation date but evidence from multiple instances of operation is needed to conclude that the remediation is effective, the firm may test one or more instances of operation of the remedial action that took place after the evaluation date but before the filing of Form QC to demonstrate effectiveness of the remedial action. However, if multiple instances of operation are needed to conclude that a remedial action is effective and, due to frequency constraints, only one instance of operation can be tested before the filing of Form QC, then the QC deficiency would be considered an unremediated QC deficiency.

Regarding the requested clarification of a firm's ability to change its conclusion on QC effectiveness between the evaluation date and the date Form QC is filed, the Board notes that the firm's final conclusion about the effectiveness of its QC system is the conclusion reported on Form QC. When additional information related to the QC system as of the evaluation date becomes available before Form QC is filed, the firm is expected to evaluate that information and make appropriate determinations regarding the information in a timely manner and report any relevant conclusions it reaches.

²¹⁶ See comment letter from CBIZ.

²¹⁷ See comment letter from Kramer.

²¹⁸ See comment letter from Spitters.

²¹⁹ See comment letters from AAA, Baker Tilly, BDO, CAQ, CBIZ, CFA, GT, ICGN, KPMG, MIAG, PICPA, PwC, and RSM.

²²⁰ See comment letters from BDO, CBIZ, and GT.

²²¹ See comment letters from CAQ, KPMG, and PICPA.

²²² See comment letters from AAA and MIAG.

²²³ See comment letter from MIAG.

²²⁴ See comment letter from CFA.

²²⁵ See *id.*

iv. Evaluating the Severity and Pervasiveness of Unremediated QC Deficiencies

As originally adopted, QC 1000.78 includes the concept of a “major QC deficiency” and provides presumptions and factors to determine whether a major QC deficiency exists and, therefore, the QC system is not effective. The Board proposed to eliminate the concept of a “major QC deficiency,” including the associated presumptions. The Board proposed to retain, in modified form, the factors to consider in evaluating the severity and pervasiveness of unremediated QC deficiencies.

Specifically, the Board proposed to amend paragraph .78 to require firms to evaluate the severity and pervasiveness of unremediated QC deficiencies in reaching the evaluation conclusion under paragraph .77. Proposed paragraph .78 clarifies that the firm’s evaluation would consider all unremediated QC deficiencies individually and in combination, considering both quantitative and qualitative implications. The proposed paragraph .78 also describes severity and pervasiveness for purposes of this evaluation. Severity reflects the seriousness of a QC deficiency or combination of QC deficiencies, including the potential impact on the firm’s ability to achieve the reasonable assurance objective. Pervasiveness reflects the breadth of impact of the QC deficiency or combination of QC deficiencies on the QC system or across the firm’s portfolio of engagements.

Commenters generally supported removing the concept of a “major QC deficiency” from QC 1000.²²⁶ Some commenters noted that the concept constituted a fundamental departure from other quality management standards and reduced consistency across quality management frameworks.²²⁷ One commenter stated that the removal of the major QC deficiency concept and related presumptions could reduce the information value of the evaluation conclusions and lessen the prominence with which serious QC issues are escalated and communicated.²²⁸ The commenter urged the Board to preserve escalation presumptions in some form and clarify how serious QC issues that fall short of overall ineffectiveness will be escalated and communicated if the

“major QC deficiency” concept is removed.²²⁹

Some commenters supported the factors used to evaluate the severity and pervasiveness of unremediated QC deficiencies, stating that the factors promote consistency and rigor in the evaluation process.²³⁰ One commenter stated that the factors in proposed paragraph .78 appropriately address QC deficiencies individually and collectively and account for both qualitative and quantitative considerations.²³¹

One commenter stated that considering deficiencies “in combination” when assessing severity may blur the distinction between the concepts of severity and pervasiveness.²³² The same commenter also indicated that this distinction may be further blurred because the same factors are used to evaluate both severity and pervasiveness.²³³ Another commenter supported the objective of providing a structured framework for evaluating the severity and pervasiveness of unremediated QC deficiencies but viewed proposed paragraph .78 as overly complex and prescriptive.²³⁴ The same commenter suggested an alternative model for paragraph .78, incorporating concepts from the AICPA Peer Review Program guidance for evaluating deficiencies, that would focus on the nature, cause, and effect of the deficiency, including: (1) whether the deficiency is an isolated event or a systemic weakness; (2) the significance of the deficiency to the firm’s practice, including the likelihood to affect other engagements or components of the QC system; (3) the effect of the deficiency on the firm’s ability to achieve the reasonable assurance objective; and (4) the extent to which remedial actions have been implemented and demonstrated to be effective.²³⁵

The Board does not believe that removing the major QC deficiency concept removes the framework’s ability to identify and appropriately distinguish particularly severe QC deficiencies. Under the amended evaluation framework, firms would still be required to evaluate the severity and pervasiveness of all unremediated QC deficiencies, individually and in combination, and report information regarding unremediated QC deficiencies

in Form QC regardless of the evaluation conclusion reached. The evaluation conclusions in paragraph .77 and the factors in paragraph .78 would provide a structured framework for identifying and assessing unremediated QC deficiencies and for communicating unremediated QC deficiencies to the PCAOB. Further, the conclusion under paragraph .77b can only be selected when unremediated QC deficiencies have a severe but not pervasive effect on the QC system and also do not render the QC system not effective. As reflected in the parenthetical statement in paragraph .77b, if unremediated QC deficiencies are so severe as to prevent the firm from achieving the reasonable assurance objective, the firm would be required to conclude under paragraph .77c that its QC system is not effective in achieving the reasonable assurance objective.

The Board believes it is important to consider unremediated QC deficiencies both individually and in combination because doing so may reveal patterns of similar findings or indicate a broader issue that may not be evident from evaluating each deficiency in isolation. The Board also believes that allowing the same factors to inform assessments of both severity and pervasiveness provides firms with relevant information for their evaluations. In many cases, it may not be practicable to categorize a factor as relating exclusively to either severity or pervasiveness. Additionally, the Board believes the alternative factors for evaluating deficiencies, suggested by one commenter, are already reflected in paragraph .78 as proposed. The factors in paragraph .78 are intended to assist firms in performing the internal evaluation required to reach a conclusion under paragraph .77. The Board believes the approach in paragraph .78 provides clear direction to firms in evaluating the severity and pervasiveness of unremediated QC deficiencies.

One commenter noted that the term “component” in proposed paragraph .78a is undefined and could be unclear and recommended that the standard more explicitly link the term to the eight integrated components of a firm’s QC system described in QC 1000.03, either through a cross-reference or by using consistent terminology.²³⁶ To clarify the intended meaning of the term “component” in proposed paragraph .78a, the Board is revising the paragraph to refer to the “components of the firm’s QC system.”

²²⁹ See id.

²³⁰ See comment letters from BDO, CAQ, GT, and KPMG.

²³¹ See comment letter from Spitters.

²³² See comment letter from Grosvenor.

²³³ See id.

²³⁴ See comment letter from PICPA.

²³⁵ See id.

²³⁶ See comment letter from Kramer.

²²⁶ See comment letters from BDO, CAQ, GT, KPMG, PICPA, RSM, and Spitters.

²²⁷ See comment letters from GT, KPMG, PICPA, and RSM.

²²⁸ See comment letter from CFA.

Another commenter questioned if the factor of persistence in paragraph .78d affects the evaluation of severity and pervasiveness and provided an example of an issue that persists unchanged for three years.²³⁷ The Board continues to believe that the persistence of a deficiency may provide useful information in assessing its severity and pervasiveness. However, persistence alone may not determine the severity or pervasiveness of a QC deficiency, and those assessments depend on the particular facts and circumstances as well as other factors in paragraph .78.

Another commenter stated that the proposed amendments to paragraphs .78e–f introduce the phrase “or could result in” and expressed concern that the use of “could” may imply an evaluation threshold approaching absolute assurance because it encompasses even remote possibilities.²³⁸ This commenter suggested revising the language to refer instead to circumstances “where there is a reasonable possibility.”²³⁹ The factors to consider in evaluating the severity and pervasiveness of unremediated deficiencies do not relate to providing any level of assurance. They are intended to help the firm evaluate how severe or pervasive unremediated QC deficiencies are in performing the evaluation and reaching a conclusion regarding the effectiveness of the firm’s QC system. The use of “could” in these factors is intended for the firm to evaluate whether the unremediated QC deficiencies remaining as of the evaluation date have the potential to cause significant engagement deficiencies or revisions of engagement reports, or to be associated with financial statement restatements or reissuances of management reports on internal control over financial reporting or broker-dealer compliance or exemption reports that are the subject of the firm’s audit or attestation engagements.

One commenter expressed concern that the wording regarding the significance to the firm’s portfolio of engagements in paragraph .78g could unintentionally imply that some engagements are less important than others.²⁴⁰ While all unremediated QC deficiencies are required to be evaluated for severity and pervasiveness, the Board recognizes that there may be certain engagements where unremediated QC deficiencies are more likely to affect the firm’s overall practice

under PCAOB standards due to the engagement’s significance to the firm’s portfolio. For example, if an unremediated QC deficiency is likely to result in engagement deficiencies that occur across the primary industry that represents a substantial portion of the firm’s PCAOB engagements, the unremediated QC deficiency could be severe or pervasive because of its significance to the firm’s engagement portfolio.

Another commenter supported the factors if they continue to include consideration of whether remedial actions have been implemented, tested, and determined to be effective, consistent with paragraph .78h.²⁴¹

The Board is adopting the factors in paragraph .78 as proposed with the revision made to paragraph .78a discussed above. The Board believes these factors promote consistency by identifying circumstances that are particularly relevant in assessing the severity and pervasiveness of unremediated QC deficiencies. The final factors with general descriptions are:

a. *The number and nature of components of the firm’s QC system or quality objectives directly or indirectly affected.*

This factor focuses on how many components of the firm’s QC system or quality objectives are affected, what they are, and whether the impact is direct or spread through other components or quality objectives.

b. *The extent to which the unremediated QC deficiency or combination of unremediated QC deficiencies relates to a component, quality objective, or quality response that affects the design or operation of other aspects of the QC system.*

This factor focuses on how widespread the impact of the unremediated QC deficiency or combination of unremediated QC deficiencies is throughout the QC system.

c. *The number and pervasiveness of root causes.*

The factor focuses on what the firm’s root cause analysis reveals about why the QC deficiency occurred and how significantly or broadly it affects the QC system.

d. *The persistence of the unremediated QC deficiency or combination of unremediated QC deficiencies over time.*

This factor focuses on the existence of a QC deficiency or combination of QC deficiencies that recurs or continues unremediated year over year.

e. *Whether the unremediated QC deficiency or combination of unremediated QC deficiencies has resulted or could result in significant engagement deficiencies.*

This factor focuses on whether the unremediated QC deficiency or combination of unremediated QC deficiencies is leading to or likely to lead to significant engagement deficiencies.

f. *Whether the unremediated QC deficiency or combination of unremediated QC deficiencies has resulted or could result in the need for revisions to engagement reports, or is or could be associated with restatements of financial statements or reissuances of company-prepared reports that are the subject of audit or attestation engagements.*²⁴²

This factor focuses on whether the unremediated QC deficiency or combination of unremediated QC deficiencies has already led or could lead to revisions of engagement reports, or is or could be associated with financial statement restatements or reissuances of management reports on internal control over financial reporting or broker-dealer compliance or exemption reports.

g. *With respect to the factors in subparagraphs d–f, the number and significance (to the firm’s portfolio of engagements) of engagements that are affected by the unremediated QC deficiency or combination of unremediated QC deficiencies or are likely to be affected in the future in the absence of remediation, and the nature of the effect.*

This factor focuses on how important the affected engagements are compared to the firm’s overall practice under PCAOB standards. The number and significance of affected engagements to the firm’s portfolio of engagements depends on, for example, firm personnel affected or likely to be affected, the associated revenue or profit, the associated risks, and the relevant industry.

h. *The effects of any remedial actions that have been implemented, tested, and found to be effective.*

Before the annual evaluation date, a firm may implement remedial actions that may reduce the severity or pervasiveness of an unremediated QC deficiency while not completely addressing it. For a firm to take credit for the effects of these remedial actions, they would need to be implemented as

²³⁷ See comment letter from Grosvenor.

²³⁸ See comment letter from KPMG.

²³⁹ See *id.*

²⁴⁰ See comment letter from PICPA.

²⁴¹ See comment letter from ICGN.

²⁴² Company-prepared reports subject to audit or attestation engagements include the report on internal control over financial reporting and broker-dealer compliance and exemption reports.

of the evaluation date, and they would need to be tested and found to be effective before Form QC is due and filed. For example, in response to a QC deficiency related to a problem identified with a firm's audit software, the firm designs and implements five remedial actions as of the evaluation

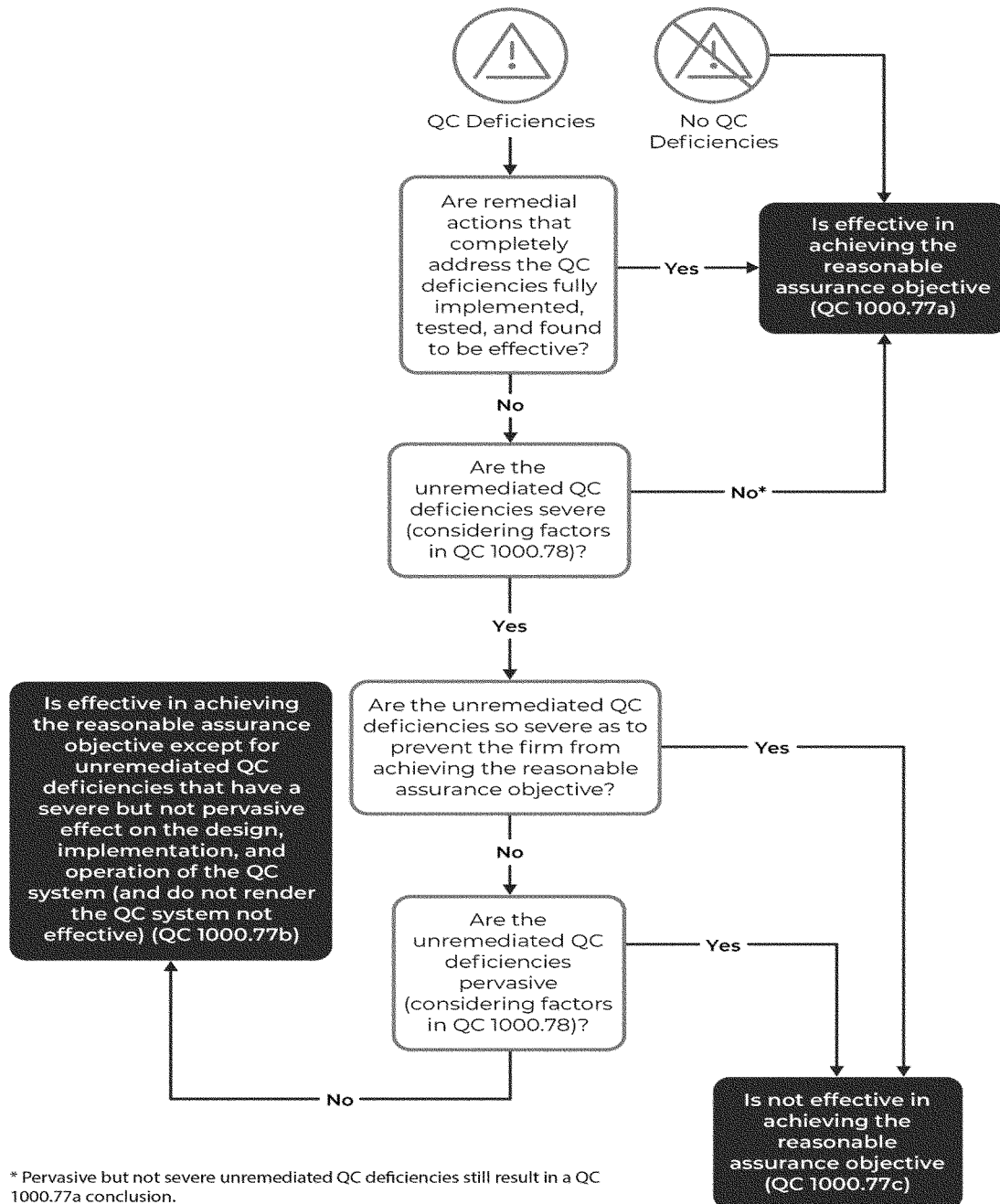
date. Of those five remedial actions, two remedial actions have been tested and found to be effective before Form QC is due and filed. When determining the severity and pervasiveness of the unremediated QC deficiency, the firm can consider the effects of the two

remedial actions that have been tested and found to be effective.

The process flow that follows illustrates how to apply the above considerations in reaching one of the three evaluation conclusions in paragraph .77.

BILLING CODE 8011-01-P

Annual Evaluation of the QC System



BILLING CODE 8011-01-C

2. Reporting to the PCAOB

i. Reporting on the Annual Evaluation of the Effectiveness of the QC System

As originally adopted, QC 1000 provides that firms have until November 30 each year to report to the PCAOB on Form QC the outcomes of their QC system evaluations, based on a fixed evaluation date of September 30. This provides firms with 61 days after the evaluation date of September 30 to file Form QC. Based on the proposed amendment to permit firms to select their own evaluation dates, the Board proposed to amend the due date of Form QC in paragraph .79 to 60 days after the firm's chosen evaluation date. The Board also proposed to amend the Form QC reporting rule, PCAOB Rule 2203A, *Report on the Evaluation of the Firm's System of Quality Control*, and General Instruction 3 to Form QC to reflect this proposed amendment (see below).

Commenters generally supported the proposed amendments to paragraph .79, Rule 2203A, and Form QC.²⁴³

One commenter expressed concern related to the 60-day reporting deadline for Form QC, stating that, for many smaller firms, completing the annual evaluation of the system of quality control, hiring and coordinating external resources, obtaining the necessary internal reviews and approvals, and preparing the required report within 60 days may not be practicable.²⁴⁴ This commenter recommended that the Board adopt a more scalable approach, for example, by permitting firms below an appropriate threshold to file Form QC within 180 days of their evaluation date.²⁴⁵ In allowing firms to select their own evaluation date, the Board believes it is appropriately providing firms with the ability to select a date that works best for their business cycles; however, the Board also believes that timely receipt by the PCAOB of information contained in Form QC to support the Board's oversight activities requires a shorter timeline than this commenter suggested. The Board continues to believe that the 60-day filing requirement provides firms with sufficient time from the evaluation date to the reporting date to complete their evaluation and report to the PCAOB.

The Board also proposed an amendment to General Instruction 4 to Form QC to clarify the reporting period covered by the firm's evaluation. As

proposed, the reporting period would be the period beginning the day after the most recent previous evaluation date and ending on the evaluation date, with the following exceptions as to the beginning of the reporting period:

- If a firm has not previously been required to evaluate its QC system under QC 1000, the reporting period is the period beginning on the date the firm first incurred an obligation to design, implement, and operate a QC system under QC 1000.06.
- If a firm was previously required to evaluate its QC system under QC 1000, but such obligation lapsed because the firm ceased having any obligations under applicable professional and legal requirements with respect to one or more engagements, the reporting period is the period beginning when the firm subsequently incurred an obligation to design, implement, and operate a QC system under QC 1000.06.

Under this proposed amendment, the reporting period would generally be twelve months long, but it would be longer or shorter if the obligation to design, implement, and operate the QC system arises mid-period (whether by virtue of the effective date of QC 1000 or the firm's otherwise becoming subject to the requirement to design, implement, and operate a QC system). For example, for a firm that selects March 31 as its evaluation date, upon the effective date of QC 1000 the firm's first evaluation would cover the reporting period from December 15, 2026, to March 31, 2028, resulting in a greater-than-15-month reporting period, with the first Form QC due to be filed no later than 60 days following March 31, 2028. This is because as of March 31, 2027, the firm would not have been subject to the requirement to design, implement, and operate a QC system for at least five consecutive months (under the five-month threshold in paragraph .77 discussed above). By contrast, for a firm that selects May 31 as its evaluation date and is subject to QC 1000 on the standard's effective date, this firm's first evaluation would cover approximately five and a half months beginning on December 15, 2026, and ending on May 31, 2027, with the first Form QC due to be filed no later than 60 days following May 31, 2027.

The proposed amendment to General Instruction 4 did not draw comment.

The Board is adopting as proposed the amendments to paragraph .79, PCAOB Rule 2203A, and Form QC described above.

One commenter stated that two important elements of Form QC reporting would be lost with the removal of the "major QC deficiency"

concept: (1) the requirement to flag whether each unremediated deficiency is major, and (2) the narrative required where a major deficiency is presumed but determined not to exist.²⁴⁶ This commenter requested that the Board preserve equivalent signals under the proposed evaluation framework and require that firms (1) indicate, for each unremediated QC deficiency, whether the firm assessed it as severe, and (2) explain the basis for any determination that severe deficiencies do not, individually or in combination, render the QC system not effective.²⁴⁷ QC 1000 continues to require that firms report all unremediated QC deficiencies as of the evaluation date on Form QC, regardless of the conclusion reported under paragraph .80a. Accordingly, a firm's Form QC reporting must include any unremediated QC deficiencies identified as of the evaluation date, including QC deficiencies that were determined not to be severe or pervasive. The Board continues to believe that reporting of all unremediated QC deficiencies will inform various aspects of the Board's oversight activities. Upon receipt of a Form QC, the PCAOB will have the ability to perform further inquiries of a firm regarding any of the information provided. Additionally, the firm is required to document under paragraph .82d the basis for the conclusion reached under paragraph .77, which would include the firm's evaluation of the severity and pervasiveness of unremediated QC deficiencies, and this information would be available to the PCAOB in connection with its oversight activities, including inspections.²⁴⁸

Based on the amendments described above, the Board is adopting additional conforming amendments to paragraph .80 and Form QC, substantially as proposed.²⁴⁹ The Board is also adopting amendments to paragraph .80 and Form QC to replace the language "the issuance of unsupported opinions" with "significant engagement deficiencies," consistent with the amendments to QC 1000.68a described above, as proposed.

ii. Reporting Changes to the Firm's Evaluation Date

Under the amendments to QC 1000.77, as discussed above, each firm selects its own evaluation date. The Board proposed that any change in the

²⁴⁶ See comment letter from CFA.

²⁴⁷ See id.

²⁴⁸ See PCAOB Rule 4000(b), *General*.

²⁴⁹ Note 1 to Item 3.2 within Form QC is amended to include a reference to the evaluation date. Also, language related to Exhibit 3.2.b in Part VII of Form QC is amended to refer to individuals "assigned" operational responsibility and accountability for the firm's QC system as a whole.

²⁴³ See comment letters from BDO, CFA, Crowe, EY, GT, KPMG, Spitters, and VSCPA.

²⁴⁴ See comment letter from PICPA.

²⁴⁵ See id.

evaluation date, together with a brief statement of the firm's rationale for making the change, be reported on Form QC within 30 days after the firm's decision. The Board believes this information would inform the timing of the Board's oversight efforts.

To codify this requirement, the Board proposed to recaption Rule 2203A as "*Reporting on the Evaluation of the Firm's System of Quality Control*," amend paragraph (a) of Rule 2203A to require notification of a change in the evaluation date on Form QC, and amend paragraph (b) of Rule 2203A to require such notification to be filed no later than 30 days after the firm's decision to change the evaluation date.

Relatedly, the Board proposed to amend Form QC to add a new Item 1.2, *Change to the Evaluation Date*, for providing notice of a change to the evaluation date, including the new evaluation date and a brief statement of the rationale for making the change. Additional language was also proposed to be added to General Instruction 3 to explain that Form QC is required to be filed no later than 30 days after the firm's decision to change the evaluation date and that a notification of change in the evaluation date need only include a completed Part I and the signed certification in Part V of Form QC.

Several commenters expressed support for the proposed reporting changes regarding the firm's evaluation date.²⁵⁰ Some commenters requested additional clarifications regarding (1) whether the firm should use business days or calendar days when calculating the deadline for submitting Form QC to notify the Board of a new evaluation date, (2) changes in the firm's evaluation date (for example, due to mergers or acquisitions), and (3) changing an evaluation date after the first year of implementation.²⁵¹ Because the deadline for submitting Form QC is greater than seven days, the 30-day submission deadline when providing notice of a new evaluation date is based on calendar days, taking into account the exception that applies if the last day of the 30-day period is a Saturday, Sunday, or Federal legal holiday.²⁵² Additionally, the standard does not limit when a firm can change its evaluation date, but a change to a firm's

evaluation date would likely involve significant changes to many aspects of the firm's QC processes, so a firm will need to consider the implications to its QC system of making such a change. As noted above, if the firm decides to change its evaluation date, the change must be reported on Form QC within 30 days after the firm's decision, together with a brief statement of the firm's rationale for the change.

The Board is adopting these amendments as proposed.

Documentation

As originally adopted, QC 1000 provides firms until December 14 following the firm's annual evaluation to assemble for retention a complete and final set of QC documentation.

The Board proposed amendments to QC 1000.84 to clarify that the QC documentation should be completed and retained "in a manner that permits timely retrieval," rather than "assembled for retention," by the QC documentation completion date. Documentation is considered timely retrievable when it is made available in a manner that does not hinder an experienced auditor's ability to understand the design, implementation, and operation of the QC system during a particular evaluation period in accordance with QC 1000.83b and the accompanying note. In addition, in conjunction with the amendments to paragraphs .77 and .79 of QC 1000, which permit firms to select their own evaluation date and require them to report on that evaluation no later than 60 days after that date, the Board proposed to amend the QC documentation completion date to be 14 days after Form QC is filed (or due to be filed, if earlier).

Many commenters supported the proposed amendments to paragraph .84²⁵³ but some stated they continue to have concerns regarding the scope of the documentation requirements, particularly the extent of documentation required to be retained.²⁵⁴ One of these commenters raised concerns regarding the clarity and practical application of "timely retrieval of documentation" that is not maintained in the quality monitoring tool and stated that firms would otherwise need to identify, monitor, and retain documentation across a broad range of decentralized locations.²⁵⁵ One commenter stated that, while they did not object to the

proposed amendments, the proposed amendments did not address a key issue related to real-time systems, namely, that such systems may not allow for the reconstruction of information back to a specific point in time unless versions are archived or captured otherwise.²⁵⁶ Another commenter did not object to the proposed amendments allowing firms to retain QC documentation within their original systems of record, provided it remains promptly retrievable.²⁵⁷

Two commenters expressed uncertainty as to the nature of the documentation required to be retained, for example, emails or other documentation that relate to QC processes.²⁵⁸ One of these commenters requested clarification that other evidence of the underlying documentation, such as system-generated reports or other reproducible outputs, would meet the documentation requirements.²⁵⁹ This commenter stated that the release text in the supplemental request for comment indicated that firms were expected to retrieve documentation from live systems "as it existed at the time that it was considered complete," which might not be feasible with continuously updating systems and would appear to reintroduce the same operational challenges the proposed amendment was intended to alleviate.²⁶⁰ The other commenter stated that it was unclear as to how to address documentation residing in systems or applications that have been replaced during the evaluation period.²⁶¹

Two commenters requested changes to documentation retention requirements, including limiting the retention requirement to evidence generated through the firm's own monitoring activities and reducing the volume of documentation required to be retained for five years.²⁶² Another commenter stated that the proposed amendments to paragraph .84 do not clarify whether firms are required to retain evidence of every instance of every response, or just those instances that were tested to support the firm's QC system evaluation.²⁶³

After consideration of the comments received, the Board is adopting the amendments to paragraph .84 as proposed.

²⁵⁰ See comment letters from CFA, GT, and KPMG.

²⁵¹ See comment letters from Baker Tilly, BDO, CAQ, and Plante & Moran.

²⁵² See PCAOB Rule 1002, *Time Computation*; see also PCAOB Rule 2203A, which states that pursuant to Rule 1002, in any year in which the filing deadline falls on a Saturday, Sunday, or Federal legal holiday, the deadline for filing Form QC shall be the next day that is not a Saturday, Sunday, or Federal legal holiday.

²⁵³ See comment letters from AAA, Baker Tilly, BDO, Forvis, GT, KPMG, MIAG, PICPA, PwC, and Spitters.

²⁵⁴ See comment letters from Baker Tilly, GT, PICPA, and PwC.

²⁵⁵ See comment letter from GT.

²⁵⁶ See comment letter from RSM.

²⁵⁷ See comment letter from CFA.

²⁵⁸ See comment letters from GT and KPMG.

²⁵⁹ See comment letter from KPMG.

²⁶⁰ See *id.*

²⁶¹ See comment letter from GT.

²⁶² See comment letters from EY and PICPA.

²⁶³ See comment letter from RSM.

The proposed amendments clarify that firms are afforded flexibility in determining the manner(s) in which they retain documentation. Specifically, the proposed amendment to this documentation requirement clarifies that firms are permitted to maintain their QC documentation in the original system(s) of record, or in any manner or combination of manners they deem appropriate, and do not have to undergo the potentially costly and time-consuming process of transferring and assembling documentation from various source systems into a single system for archiving and retention. In addition, the Board believes that the proposed amendments clarify that it is not necessary for the firm to implement new technology solutions for the purpose of meeting QC 1000's documentation requirements because the amendment makes clear that documentation can continue to exist within the systems in which it originated or is used as long as it remains available for retrieval, *e.g.*, for purposes of subsequent monitoring or inspection.

The Board believes the proposed amendments should provide operational relief for firms when maintaining documentation of their QC systems. If circumstances arise, such as when a firm decides to replace an existing system or determines that the decentralization of a firm's QC documentation is too broad, then a firm can maintain the required documentation of its QC system in the manner that is most appropriate for the firm—provided that the documentation is retained in a manner that permits timely retrieval. QC 1000 does not impose requirements on firms with respect to the specific systems in which QC documentation must be retained or the number of systems that retain a firm's QC documentation.

The Board acknowledges that a firm's QC system is continuously operating and the firm might not have the capability to take snapshots of system-based evidence at a point in time or for the systems to be locked down to allow for documentation to be archived. Therefore, the proposed amendment requires that the documentation be retained in a manner that permits timely retrieval, but does not specify a particular approach. Firms are not expected to continuously or periodically take snapshots of their system's data to meet this amended requirement. However, given that QC documentation may reside within live systems, the firm will need to be able to access and timely retrieve documentation sufficient to demonstrate compliance with paragraphs .81–.83 for the applicable

evaluation as of the time the documentation was considered complete. If certain information related to the operation of the firm's QC systems is relevant or needed for the firm to monitor and evaluate whether a quality response operated as intended, then the firm would need to retain that information.

In determining the nature of the QC documentation to be retained, a firm may identify aspects within the QC system for which the evidence required to demonstrate that the QC system was designed, implemented, or operating effectively may not entail retention of all information that the system produces in its daily operation. For example, rather than retaining printed copies or screenshots of the restricted entity list after each change, the firm may produce the current listing along with a system-generated report listing the changes after a specified date.

As noted in the QC 1000 2024 adopting release, in light of the scope of the Board's statutory mandate, the Board's inspection procedures cannot be limited to quality responses (and, to the extent applicable, samples of the operation of quality responses) that the firm chose to monitor in the period.²⁶⁴ On the contrary, firms will be expected to provide evidence of the operating effectiveness of any quality responses selected for inspection.

As originally adopted, QC 1000 includes a requirement that the firm retain QC documentation for seven years from the QC documentation completion date, unless a longer period is required by law.

The Board proposed to amend paragraph .86 to reduce the QC documentation retention period to five years from the QC documentation completion date.

Many commenters supported the proposed amendment to paragraph .86,²⁶⁵ but some of these commenters encouraged the Board to consider whether the retention period could be further reduced,²⁶⁶ with two of them suggesting that a three-year retention period may be sufficient.²⁶⁷ Another commenter stated that a single retention period applied to all QC documentation may not be necessary and encouraged consideration of an approach whereby documentation supporting the firm's evaluation of its system of quality

control be retained for a period of five years, while broader system documentation could be subject to a shorter retention period, such as three years.²⁶⁸ Another commenter suggested that the Board should clarify whether the same documentation expectations apply to both the firm's overall evaluation and conclusion on its QC system and the day-to-day execution of individual quality responses.²⁶⁹ The commenter added that documentation supporting the firm's evaluation and conclusion is generally more centralized and better suited to a five-year retention period, whereas execution-level documentation is often more detailed and may reside in several systems that change over time.²⁷⁰ One commenter cited specific concerns relating to the need to update systems and maintain system licenses for five years for the purpose of retaining records,²⁷¹ and another commenter stated that there are still significant costs associated with retaining the required data for five years.²⁷²

One commenter stated that an argument for requiring a seven-year retention period is that the retention period for QC documentation should be no shorter than that of the audit documentation requirements included in AS 1215, *Audit Documentation*.²⁷³ However, the commenter also stated that if that argument is not persuasive, then the minimum retention period should be as low as possible based on users' needs, including regulators', and in that context five years sounded excessive.²⁷⁴ Another commenter stated that a consideration for retaining the seven-year requirement could be that some U.S. Federal and state tax retention periods are a minimum of seven years.²⁷⁵ Another commenter questioned whether it would be preferable to use the term "applicable professional and legal requirements" instead of "law" in the phrase "unless a longer period of time is required by law."²⁷⁶

Another commenter asked the Board to reconsider the proposed reduction from seven years to five years, stating that, under a five-year QC documentation retention period, engagement workpapers would remain available to inspection and enforcement for up to two years after the QC records

²⁶⁸ See comment letter from BDO.

²⁶⁹ See comment letter from Forvis.

²⁷⁰ See *id.*

²⁷¹ See comment letter from CAQ.

²⁷² See comment letter from RSM.

²⁷³ See comment letter from Grosvenor.

²⁷⁴ See *id.*

²⁷⁵ See comment letter from ICGN.

²⁷⁶ See comment letter from Grosvenor.

²⁶⁴ See PCAOB Rel. No. 2024–005, at 283.

²⁶⁵ See comment letters from Baker Tilly, BDO, CAQ, Deloitte, EY, Forvis, GT, KPMG, MIAG, PICPA, Plante & Moran, PwC, RSM, and Spitters.

²⁶⁶ See comment letters from Baker Tilly, CAQ, Deloitte, GT, and PICPA.

²⁶⁷ See comment letters from Baker Tilly and CAQ.

that contextualize them—such as monitoring results, root cause analyses, and remediation evidence—could have been lawfully destroyed.²⁷⁷ The commenter said that, at a minimum, the retention period must remain long enough for the PCAOB to identify deficiency patterns that only become visible across more than one inspection cycle.²⁷⁸ The commenter further stated that QC documentation relevant to an identified deficiency, or to an open inspection or enforcement matter, should be retained until the matter is resolved.²⁷⁹

The Board has considered the costs and benefits of various retention periods, including both retaining a seven-year retention period to be consistent with audit documentation requirements under AS 1215 and adopting a retention period shorter than five years. The Board believes that a five-year retention period appropriately balances the objective of reducing unnecessary retention costs with the need to preserve documentation relevant to the PCAOB's oversight activities. In particular, the Board believes that a retention period shorter than five years could adversely affect the PCAOB's ability to carry out its oversight responsibilities and evaluate information relating to a firm's QC system over time—and carrying out our responsibilities may require access to information beyond that supporting the firm's evaluation and conclusion.

The Board also does not believe that adopting multiple retention periods for different categories of QC documentation would be appropriate. QC 1000 contemplates an integrated and interrelated system of quality control, and the documentation required by paragraphs .81–.83 is intended to support an understanding of the design, implementation, and operation of that system as a whole. Applying different retention periods to different categories of QC documentation could introduce unnecessary complexity and inconsistency and diminish the usefulness of documentation in understanding the operation of the firm's QC system over time.

Regarding commenter concerns relating to the need to update systems or maintain system licenses over time, as discussed above in connection with the proposed amendment to paragraph .84, QC 1000 does not prescribe the systems in which QC documentation should be retained or the number of systems that may be used to retain such

documentation. Firms may determine the most appropriate retention approaches based on their own facts and circumstances, provided that the documentation of the firm's QC system can be timely retrieved and is retained for five years from the QC documentation completion date unless a longer period of time is required by law.

QC 1000 acknowledges that firms may be subject to laws requiring retention of QC documentation for a longer period than what the standard requires. In such situations, firms would be required to retain documentation for that longer period. This approach is consistent with that used in AS 1215, which similarly recognizes that longer retention periods required “by law” may override the period specified in the standard. The Board acknowledges the comment suggesting use of a longer period whenever required by applicable professional and legal requirements, but the Board has determined to follow the approach of AS 1215 for consistency.

After consideration of the comments received, the Board is adopting this amendment as proposed.

Requests for Implementation Guidance and Additional Commenter Feedback

1. Requests for Implementation Guidance

Commenters requested additional guidance on QC 1000, including specific examples and general guidance related to the proposed amendments, noting that such guidance would help promote consistent and effective implementation of the standard.²⁸⁰ While some of these commenters acknowledged and appreciated the staff's ongoing engagement with firms,²⁸¹ a few commenters also requested that the Board memorialize the substance of those discussions into interpretive guidance available to all firms, suggesting that doing so would further enhance consistency and effectiveness in implementing QC 1000.²⁸²

Several commenters requested guidance on specific areas of QC 1000 and related changes to other PCAOB standards that are not subject to this rulemaking, including:

a. The definition of quality response, suggesting that it is not intended to require every quality response to consist of both a policy and a procedure;²⁸³

²⁸⁰ See comment letters from Baker Tilly, BDO, CAQ, CBIZ, Crowe, Deloitte, EY, Forvis, GT, KPMG, Kramer, PICPA, Plante & Moran, PwC, RSM, SCCG, and VSCPA.

²⁸¹ See comment letters from CAQ, Crowe, Deloitte, and GT.

²⁸² See comment letters from Baker Tilly, CAQ, and Deloitte.

²⁸³ See comment letter from EY.

b. The requirement in QC 1000.33e to monitor compliance by affiliates of the firm with applicable professional and legal requirements and related firm policies and procedures;²⁸⁴

c. The requirement in QC 1000.34b to update and communicate at least monthly additions to the restricted entities list;²⁸⁵

d. The scope of the requirement in QC 1000.53d regarding communications of information to external parties in accordance with applicable professional and legal requirements;²⁸⁶

e. Evaluating and responding to information that becomes known after the annual evaluation date but before the filing date on Form QC;²⁸⁷

f. The nature and extent of documentation required to be retained, including questions regarding reperformance and the level of documentation necessary to support monitoring conclusions;²⁸⁸

g. QC considerations related to technological resources, particularly due diligence on artificial intelligence tools, used on engagements or in the firm's system of quality control;²⁸⁹

h. Clarification of the meaning of specified terms used in AS 1310, *Notification of Termination of the Auditor-Issuer Relationship*;²⁹⁰

i. How to respond to engagement deficiencies on audits of internal control over financial reporting under AS 2901, *Responding to Engagement Deficiencies After Issuance of the Auditor's Report*;²⁹¹ and

j. How to report on Form AP the use of other quality reviewers given the rescission of SECPS section 1000.45, *Appendix K—SECPS Member Firms With Foreign Associated Firms That Audit SEC Registrants*.²⁹²

²⁸⁴ See comment letter from Deloitte.

²⁸⁵ See comment letters from CAQ and EY.

²⁸⁶ See *id.*

²⁸⁷ See comment letters from Baker Tilly, BDO, CAQ, CBIZ, GT, Kramer, and Plante & Moran.

²⁸⁸ See comment letters from Baker Tilly, BDO, CAQ, Deloitte, EY, Forvis, GT, KPMG, Plante & Moran, PwC, and RSM.

²⁸⁹ See comment letters on *Request for Comment on PCAOB Standard Setting*, PCAOB Rel. No. 2026–005 (Jun. 23, 2026), from CBIZ CPAs P.C. (Aug. 7, 2026), DNL Deep Neuron Lab GmbH (Aug. 7, 2026), Pennsylvania Institute of Certified Public Accountants (Aug. 5, 2026), and PricewaterhouseCoopers LLP (Aug. 5, 2026), available here: <https://pcaobus.org/standards/standard-setting-research-projects/agenda-consultation--request-for-public-comment-on-pcaob-standard-setting>.

²⁹⁰ See comment letter from KPMG.

²⁹¹ See *id.*

²⁹² See *id.*

²⁷⁷ See comment letter from CFA.

²⁷⁸ See *id.*

²⁷⁹ See *id.*

As discussed, in the Background section above, the staff recently issued QC 1000 Q&As.²⁹³ Those Q&As address the guidance requests discussed in bullets a.–f. above. The staff will continue to evaluate implementation questions and requests for clarification, including those received through the Firm Consultation Process,²⁹⁴ and may address additional matters through future updates to the QC 1000 Q&As or other implementation guidance.

2. Additional Commenter Feedback

Some commenters also provided feedback on aspects of QC 1000 that were outside the scope of the proposed amendments in the supplemental request for comment and that were not requests for additional implementation guidance.²⁹⁵ These comments recommended changes to various other provisions of the standard and expressed concerns regarding scalability and cost:

- Two commenters requested the Board revisit the 100-issuer threshold.²⁹⁶ One of these commenters expressed concern that the requirement for firms auditing more than 100 issuers to maintain an automated independence-monitoring process could impose significant implementation costs on firms that currently use spreadsheet-based processes.²⁹⁷

- One commenter requested clarification or modification of various provisions of QC 1000, including defined terms, risk assessment, governance and leadership, communication, monitoring and remediation, and documentation requirements.²⁹⁸

- Another commenter stated that they continued to have concerns regarding the confidentiality of information submitted through Form QC, particularly information relating to identified deficiencies, root causes, remediation strategies, governance matters, and other aspects of a firm's system of quality control, and suggested that additional clarity on certain matters would provide firms with greater certainty regarding the treatment of

highly sensitive quality management information.²⁹⁹

- One commenter recommended that Form QC should, at a minimum, be made public with the PCAOB-identified deficiencies redacted, because the information included in it would be beneficial to investors for investment or proxy voting decisions.³⁰⁰

- Another commenter recommended that the Board clarify that quality responses addressing personnel competence and capability—including structured programs to develop and assess professional judgment—are valid quality responses within this framework.³⁰¹

- Three commenters requested the PCAOB publish a consolidated adopting release that provides the entirety of the revised standard and relevant content from the original adopting release, and updated interpretive guidance.³⁰²

The Board has considered these comments but is not making additional changes to QC 1000 beyond the amendments in this release. As discussed above, these comments relate to aspects of QC 1000 that were outside the scope of the supplemental request for comment. The Board will continue to monitor implementation of QC 1000 and may consider whether further changes to the standard or related guidance are warranted based on experience gained from implementation.

Amendments to PCAOB Form 1 and Form 2

In conjunction with the Board's adoption of QC 1000, Form 1 and Form 2 were each amended to include an item directing firms to confirm whether they have designed a QC system in accordance with QC 1000. In light of the proposed amendments discussed above, the Board also proposed to rescind these amendments to Form 1 and Form 2.

All commenters who commented on this topic supported these proposed amendments to Form 1 and Form 2.³⁰³ As part of the supplemental request for comment, the Board sought comment on whether a firm applying for registration should be required to identify on Form

1 the quality management standard(s)—for example, QC 1000, ISQM 1, or SQMS 1—upon which its QC policies were based. Some commenters supported this concept,³⁰⁴ but two commenters questioned the Board's intended use of the information.³⁰⁵ The Board will consider this feedback and determine in the future whether any changes to its registration processes, including the content of Form 1, are necessary.

The Board is adopting as proposed the amendments to Form 1 and Form 2.

D. Economic Considerations and Application to Audits of Emerging Growth Companies

Economic Analysis

The Board is mindful of the economic impacts of its standard setting. When the Board adopted QC 1000, it included an economic analysis of the new standard in the QC 1000 2024 adopting release, including discussion of the benefits and costs of key provisions, some of which would be affected by the amendments.³⁰⁶ The Board also submitted a comment letter to the SEC ("Board Letter") that provided additional information regarding its economic analysis, including the benefits and costs of the EQCF requirement that the Board is rescinding.³⁰⁷ When the SEC approved QC 1000, it included additional discussion of the benefits and costs of certain of the provisions of QC 1000 and related amendments in its order granting approval.³⁰⁸ Finally, as discussed above, the Board issued a supplemental request for comment on the amendments to QC 1000 and a related PCAOB rule and forms. The Board considered the comments received in response to that request as part of this economic analysis.

This economic analysis describes the baseline for evaluating the economic impacts of the amendments, the need for the amendments, their expected economic impacts (including benefits, costs, and potential unintended consequences), and reasonable alternatives considered. There are limited data and research findings available to estimate quantitatively the economic impacts of the amendments. Therefore, the economic analysis is largely qualitative in nature. However,

²⁹³ See *QC 1000 Questions and Answers*, available at <https://pcaobus.org/oversight/standards/standard-setting-research-projects/quality-control/qc-1000-questions-and-answers>.

²⁹⁴ See the Firm Consultation Process available on the PCAOB website.

²⁹⁵ See comment letters from Baker Tilly, CBIZ, Grosvenor, KPMG, Malone Bailey, PICPA, and SCCG.

²⁹⁶ See comment letters from Malone Bailey and PICPA.

²⁹⁷ See comment letter from Malone Bailey.

²⁹⁸ See comment letter from Grosvenor.

²⁹⁹ See comment letter from BDO.

³⁰⁰ See comment letter on *Request for Public Comment on Draft 2026–2030 Strategic Plan Goals and Objectives*, PCAOB Rel. No. 2026–006 (July 20, 2026), from the Council of Institutional Investors (Aug. 26, 2026), available here: https://assets.pcaobus.org/pcaob-dev/docs/default-source/about/administration/strategic-plan-goals-and-objectives-comments-2026-2030/5_cii.pdf?sfvrsn=aba1e9e7_2.

³⁰¹ See comment letter from SCCG.

³⁰² See comment letters from Baker Tilly, CBIZ, and KPMG.

³⁰³ See comment letters from Baker Tilly, BDO, CAQ, GT, ICGN, KPMG, PICPA, and Spitters.

³⁰⁴ See comment letters from BDO, CAQ, KPMG, RSM, and Spitters.

³⁰⁵ See comment letters from GT and PICPA.

³⁰⁶ See PCAOB Rel. No. 2024–005, at 345–351, 355–360.

³⁰⁷ See PCAOB Board Letter to SEC Regarding Rule Filing 2024–02 (Aug. 16, 2024).

³⁰⁸ See generally SEC Rel. No. 34–100968.

certain parts of the economic analysis, where reasonable and feasible, incorporate newly available quantitative information (e.g., in the “Need” section when discussing challenges firms have encountered designing and implementing QC 1000).³⁰⁹ The economic analysis also considers information about firms’ implementation activities obtained through the PCAOB’s implementation support efforts and PCAOB oversight as well as information provided by commenters.

The supplemental request for comment sought public comment on the amendments, including the economic considerations.³¹⁰ Most commenters generally agreed that the amendments would reduce complexity and the overall cost burden, especially for smaller firms.³¹¹ Some commenters generally said that the amendments would not negatively impact audit quality.³¹² Some commenters raised concerns with the proposed rescission of the EQCF requirement.³¹³ The Board has considered all the comments received, including the quantitative perspectives and academic research the comments referenced.

Baseline

The economic analysis considers potential impacts relative to a regulatory baseline in which QC 1000, as originally adopted by the PCAOB and approved by the SEC, would become effective. Accordingly, the baseline reflects the regulatory framework that would exist absent the amendments. The Board has limited direct experience with the QC 1000 baseline, as it is not yet effective and will not go into effect until December 15, 2026. However, the data presented below indicate the number of firms that would have been impacted by QC 1000, including requirements that the Board is amending or rescinding.

As originally adopted, all firms are required to design a QC system that complies with QC 1000. However, certain of its provisions apply to only a subset of these firms.³¹⁴ Specifically:

- Firms are required to implement and operate a QC system that complies with QC 1000 when they lead an engagement under PCAOB standards, play a substantial role in the preparation or furnishing of an audit report (as defined in the Board’s rules), or have current responsibilities under applicable professional and legal requirements regarding any such engagement.³¹⁵ The Board refers to such firms as “full-implementation” firms. All other firms registered with the PCAOB are required to design (but not implement or operate) a QC system that complies with QC 1000; the Board refers to these herein as “design-only” firms. The Board is rescinding this design-only requirement.

- Firms that issued audit reports with respect to more than 100 issuers in the prior calendar year are required to implement several additional requirements, such as the requirement to have an EQCF.³¹⁶

Table 1 summarizes the number of registered firms, and whether they would likely be considered either design-only or full-implementation firms. It further breaks down the number of full-implementation firms by the number of audit reports the firm recently issued. Firms that reported any engagements on their Form 2 filings from the prior seven reporting years are classified as full-implementation firms because they are likely subject, at a minimum, to audit documentation requirements and therefore would likely

supplemental request for comment were inconsistent with the amendment to rescind the design-only requirement. See comment letter from Kramer. The Board does not believe so. To provide a baseline for considering the impact of the amendments, section V.A. of the supplemental request for comment provided information about how QC 1000, as originally adopted, would impact the audit market. Quantifying the subset of firms that would have been required to implement the design-only requirements under QC 1000 as originally adopted enabled an assessment of the impact of the proposed amendment to rescind the design-only requirement.

³¹⁵ An “engagement” is any audit, attestation, or other engagement performed under PCAOB standards (1) led by a firm; or (2) in which a firm “play[s] a substantial role in the preparation or furnishing of an audit report” as defined in PCAOB Rule 1001(p)(ii). See QC 1000.A3. Playing a substantial role in the preparation or furnishing of an audit report means (1) performing material services that a public accounting firm uses or relies on in issuing all or part of its audit report, or (2) performing the majority of the audit procedures with respect to a subsidiary or component of any issuer, broker, or dealer, the assets or revenues of which constitute 20% or more of the consolidated assets or revenues of such issuer, broker, or dealer necessary for the lead auditor to issue an audit report. See PCAOB Rule 1001(p)(ii).

³¹⁶ See PCAOB Rel. No. 2024–005, at 9. Staff note that broker-dealer audit reports are not counted for purposes of determining whether firms are required to implement these additional requirements.

have implementation obligations under QC 1000.³¹⁷ Table 1 is relevant to several of the analyses that appear below because it identifies the principal populations affected by the amendments and provides context for later discussion of the economic significance of those populations.³¹⁸

- Table 1 shows that 49% (734 ÷ 1,489) of the firms in the sample are design-only firms. Figure 1 below utilizes the same methodology to identify design-only firms. The Board discusses below the impacts of the amendment to rescind the design-only requirement, which primarily impacts these design-only firms.

- Table 1 also shows that 1% (12 ÷ 1,489) of the firms in the sample are subject to QC 1000’s requirements that apply to firms that audit more than 100 issuers. The Board discusses below the impacts of the amendment to rescind the EQCF requirement, which is one such requirement with a 100-issuer threshold. The Board also provides additional discussion on how the impacts of the amendments would vary by firm size.³¹⁹

Finally, Table 1 shows that 23% (336 ÷ 1,489) of the firms in the sample issued no audit reports for issuers during the 2025 reporting period yet still qualify as full-implementation firms based on (1) broker-dealer audit reports issued during the 2025 reporting period; (2) substantial roles played with respect to an issuer or broker-dealer audit report during the 2025 reporting period; or (3) issuer or broker-dealer audit reports issued or substantial roles

³¹⁷ See AS 1215.14 (establishing a seven-year retention period for audit documentation).

³¹⁸ Referring to the data presented in Table 1, one commenter said the economic analysis provides counts of firms by the number of issuers they audit and does not pair those counts with the market capitalization audited by each category or show where emerging growth company (“EGC”) audits actually sit across the categories. See comment letter from CFA. The economic analysis provides issuer market capitalization information for firms that issued more than 100 issuer audit reports during the 2025 calendar year. The economic analysis also provides issuer market capitalization information for firms that issued audit reports with respect to more than 500 issuers during the 2025 calendar year. The last section of the economic analysis provides the issuer market capitalization information of those EGCs audited by firms that issued audit reports with respect to more than 100 issuers.

³¹⁹ The number of firms subject to the QC 1000 requirements that apply to firms that issued audit reports for more than 100 issuers in the prior calendar year may differ from the figures in Table 1 because Table 1 presents counts of issuer audit reports issued during the 2025 reporting period, as reported by firms in their Form 2 filings, which is not a calendar year. Staff note that firms that have issued audit reports for more than 100 issuers during the prior calendar year are subject to annual inspection and, as of the time of this analysis, 13 firms are subject to annual inspection.

³⁰⁹ Staff gathered data and performed this analysis in the third quarter of 2026. The data include PCAOB filings by firms through August 10, 2026. Because the present staff analysis relies on more recent PCAOB filings, the results may differ from the results presented in the supplemental request for comment.

³¹⁰ See PCAOB Rel. No. 2026–002, at 82.

³¹¹ See, e.g., comment letters from Baker Tilly, CAQ, CBIZ, KPMG, and Kramer.

³¹² See, e.g., comment letters from BDO, CAQ, Deloitte, and PICPA.

³¹³ See comment letters from CFA, CII, ICGN, and MIAG.

³¹⁴ One commenter questioned whether statements made in section V.A. of the

played with respect to such audit reports during the six prior reporting periods.

TABLE 1—FULL-IMPLEMENTATION AND DESIGN-ONLY FIRMS, U.S. AND NON-U.S., AS OF MARCH 31, 2025

	Firms	U.S. firms	Non-U.S. firms
All firms	1,489	662	827
Full-implementation firms	755	393	362
By recent issuer audit report count:			
More than 100	12	12	0
1–100	407	192	215
0	336	189	147
Design-only firms	734	269	465

Source: PCAOB Form 2 filings.

Notes: (1) Table 1 shows the counts of firms registered with the PCAOB as of March 31, 2025, excluding firms with withdrawal pending or suspended status. U.S. and non-U.S. firms are defined based on firm headquarters locations as indicated in their required PCAOB filings. Staff considered firms registered as of March 31, 2025, because 2025 Form 2 filings cover the period from April 1, 2024, through March 31, 2025. Staff did not use 2026 Form 2 filings because, as of the date of this analysis, 19% of firms had not submitted their 2026 Form 2 filings. The number of firms has changed since March 31, 2025, due to registration approvals and withdrawals from registration.

(2) Staff identified full-implementation and design-only firms based on their annual Form 2 filings for the 2019 through 2025 reporting periods, which cover firm activity from April 1, 2018, to March 31, 2025. Staff classified a firm as full-implementation if the firm reported on any of its 2019 through 2025 Form 2 filings that it issued an audit report with respect to any issuer, broker, or dealer or that it played a substantial role with respect to any such audit report during the 2019 through 2025 reporting periods. On such engagements, the firms in the sample would likely have been subject at least to audit documentation requirements as of March 31, 2025. Staff classified all other firms as design-only firms. Staff assumed that a firm that did not file a Form 2 for a given reporting period did not lead or play a substantial role in any issuer or broker-dealer audit during the reporting period. The staff's methodology may misclassify firms to the extent firms incorrectly completed or failed to file their Form 2. A firm's classification as full-implementation or design-only as of March 31, 2025, is hypothetical since QC 1000 was not in effect at that time. A firm's actual classification on the effective date may be different than reflected above.

(3) For purposes of categorizing full-implementation firms by their recent issuer audit report counts, staff referred to the number of audit reports issued by the firm for issuers based on the firm's 2025 Form 2 filing.

Need

In 2024, the PCAOB adopted QC 1000 to strengthen firms' QC systems. Since adoption, however, the Board received new information—through comment letters, implementation support efforts, and data obtained during inspection outreach activities—suggesting that certain provisions of QC 1000 were unclear in their application, might impose higher costs than initially anticipated in relation to the potential benefits, or might be unnecessarily prescriptive.³²⁰

This new information is primarily qualitative and provides limited quantitative estimates of QC 1000 implementation costs, with the following exceptions. One commenter described an anonymous firm's experience implementing QC 1000, including an estimate that implementation had increased annual operating costs by approximately 1% to 1.5% of firm revenue.³²¹ Through

PCAOB inspection outreach activities, several firms provided quantitative information related to their implementation efforts.³²² Among a sample of 57 firms subject to inspection in 2026, three provided estimates of the total costs of implementing QC 1000, ranging from \$6,250 to \$10,000 per issuer audit.³²³ The March 20, 2026 CAQ comment letter ("CAQ 2026 Letter") reports that average estimated

monetizing the costs incurred by the firm. Staff also note that only a portion of this cost is attributable to the QC 1000 requirements the Board is rescinding or revising. The amendments can only reduce this portion of QC 1000 implementation costs

³²² As part of the PCAOB's inspection outreach activities, the Board obtained feedback on the progress made by firms towards implementing QC 1000 in their QC systems. This included feedback gathered during the first three quarters of 2026 from 57 firms, including 43 U.S. non-affiliated firms ("NAFs"), seven non-U.S. global network firms ("GNFs"), and seven non-U.S. NAFs. Accordingly, the sample may not be representative of all registered firms. While inspections staff solicited information on QC 1000 implementation costs, most of the firms in the sample stated that they could not quantify incurred or expected costs as they were still in the process or at an early stage of implementing QC 1000. The firms that provided cost estimates did not describe their methodology. The Board believes most firms are subject to ISQM 1 or SQMS 1. See footnote 383. Accordingly, the Board believes these firms may have already implemented requirements under ISQM 1 or SQMS 1 into their QC systems.

³²³ Each of these three firms provided a total cost estimate in response to the question. Staff calculated per-issuer expected costs by dividing each firm's total cost estimate by the number of issuers the firm reported on its most recent Form 2 filing. One of these three firms is annually inspected.

one-time and ongoing QC 1000 costs are \$18.9 million and \$12.1 million, respectively.³²⁴ One commenter said

³²⁴ See CAQ 2026 Letter. The CAQ 2026 Letter provides some evidence related to (1) the overall costs to operate firms' systems of quality control and (2) the one-time and ongoing costs of the QC 1000 requirements that are incremental to ISQM 1 and SQMS 1. The CAQ 2026 Letter indicates that the CAQ obtained estimated cost data from nine of its member firms. Based on the letter, the surveyed firms (1) generally have the largest issuer portfolios; (2) collectively audit 99.6% of U.S. market capitalization; and (3) utilized different methodologies and assumptions when preparing their responses. Regarding overall costs, the letter reports that for respondents that were unable to gather the necessary data to quantify the incremental costs of ISQM 1, the cost to operate their respective systems of quality control is over half a billion dollars annually. Based on the letter, it is unclear whether this cost estimate refers to costs incurred by individual respondents or to total costs incurred by all respondents. The Board recognizes that firms' systems of quality control require significant resources. Accordingly, as part of the QC 1000 2024 adopting release, PCAOB staff conducted a voluntary survey of the U.S. members of the six largest global networks ("U.S. GNFs") on the resources they employ to design, implement, and operate QC policies and procedures. See PCAOB Rel. No. 2024-005, at 318. However, the CAQ 2026 Letter does not describe the methodology for defining the scope of the system of quality control (e.g., whether it includes engagement-level work related to the system of quality control, and whether it includes spending on information technology). Regarding costs associated with QC 1000 requirements that are incremental to ISQM 1, the letter reports that, for respondents that were able to gather the necessary data, these costs are 224% of ongoing ISQM 1 costs. The Board notes that this calculation includes one-time costs in the numerator (incremental QC 1000 requirements) but not in the denominator (ISQM 1 requirements). This may increase the percentage because the Board believes much of the costs may be incurred in the

Continued

³²⁰ See below for discussion of challenges faced by firms implementing QC 1000.

³²¹ See comment letter from PICPA. Staff acknowledge the quantitative estimate of an anonymous firm's implementation costs as a share of its revenue. However, staff note several important limitations of the comment. First, the comment does not explain how the referenced firm was selected. As a result, it is unclear whether its experience is representative of the broader population of registered firms. Second, the comment does not describe the methodology used by the firm to quantify its implementation costs, making it difficult to assess the reliability of the estimate. Finally, the comment does not provide the firm's annual revenue, which prevents staff from

that the estimates provided in the CAQ 2026 Letter should be closely scrutinized and independently validated, particularly given the methodological limitations.³²⁵ The Board has assessed that methodology and acknowledged its limitations.³²⁶

Data received through inspection outreach activities also indicates the prevalence of certain implementation challenges. Of the 57 firms in the sample, 48 indicated that they were preparing for, assessing, or designing a system for the implementation of QC 1000, or had begun some form of implementation to comply with the standard. Among these 48 firms, five firms, including one annually inspected firm, reported experiencing significant implementation challenges that the amendments address. The annually inspected firm reported challenges related to the EQCF requirement, the determination of a QC deficiency, the QC system evaluation date, and the seven-year QC documentation retention period. Among the four triennially inspected firms, two reported challenges related to allocating and filling certain roles, one reported difficulty aligning two different QC system evaluation dates, and one reported uncertainty about the required level of documentation.

This new information has led the Board to re-evaluate the benefits and costs of alternative approaches to several QC 1000 requirements.³²⁷ While

one-time setup phase. Research on Sarbanes-Oxley implementation has found this to be the case in the context of public company ICFR systems. See, e.g., John C. Coates and Suraj Srinivasan, *SOX After Ten Years: A Multidisciplinary Review*, 28 Accounting Horizons 627 (2014). Further, the CAQ 2026 Letter reports that average estimated one-time and ongoing QC 1000 costs are \$18.9 million and \$12.1 million, respectively. Since firms have not completed their QC 1000 implementation, it is unclear whether the reported implementation cost estimate includes future spending. Staff note that, while the survey respondents were asked to report costs of the QC 1000 requirements that are incremental to ISQM 1 and SQMS 1, respondents' use of different and undisclosed methodologies and assumptions in their estimates makes it difficult to evaluate the reliability of these estimates. One commenter noted similar limitations of the methodology used in the CAQ 2026 Letter. See generally comment letter from CFA.

³²⁵ See comment letter from CFA.

³²⁶ See footnote 324.

³²⁷ Evaluating whether alternative approaches would be more cost-effective is consistent with the Office of Management and Budget's Circular A-4. By way of background, the PCAOB's Staff Guidance on Economic Analysis in PCAOB Standard Setting was prepared after considering, among other inputs, the Office of Management and Budget's Circular A-4. See Staff Guidance on Economic Analysis in PCAOB Standard-Setting (Feb. 14, 2014), available at https://pcaobus.org/t/standards/economic-analysis/05152014_guidance. Circular A-4 explains that one of the central motivations of regulatory analysis is to "discover which of various possible

QC 1000 as a whole remains necessary to enhance firms' QC systems and improve audit quality, this new information points to specific QC 1000 requirements whose costs may be disproportionate to their benefits. The need addressed here is the rescission or amendment of those specific requirements; it does not relate to other provisions of QC 1000 adopted in 2024. Accordingly, the amendments are intended to preserve QC 1000's core investor-protection objectives while reducing unnecessary complexity, duplication, and implementation costs. The amendments the Board is making to QC 1000 involve:

- *Rescinding Requirements:* The amendments rescind the requirement for "design-only" firms to design a QC system that complies with QC 1000. The amendments also rescind the EQCF requirement.

- *Reducing Scope:* The amendments narrow and simplify communication requirements relating to metrics that the firm communicates to external parties about its audit practice, firm personnel, or its engagements. With respect to identified engagement deficiencies, the amendments reduce the set of circumstances in which firms would be required to evaluate whether similar engagement deficiencies exist on other engagements. Furthermore, the amendments simplify the requirements for retention of QC system documentation and abbreviate the retention period from seven to five years.

- *Increasing Alignment and Flexibility:* The amendments increase alignment with other quality management standards, including ISQM 1, by providing flexibility in assigning roles and responsibilities, selecting the evaluation date, and generally aligning the QC system evaluation conclusions.

- *Improving Clarity:* The amendments revise the definition of a QC deficiency to make clear that, when firms have implemented more than one quality response to address the same quality risk, they can take those other quality responses (e.g., compensating responses) into account when determining whether a QC deficiency exists.

Economic Impacts

The economic analysis evaluates potential impacts of the amendments relative to a regulatory baseline in which QC 1000, as originally adopted

alternatives would be the most cost-effective." See Office of Management and Budget, Circular A-4 (Sept. 17, 2003), at 2, available at <https://www.whitehouse.gov/wp-content/uploads/2025/08/CircularA-4.pdf>.

by the PCAOB and approved by the SEC, will be effective. Since QC 1000 is not yet effective, the amendments could allow many firms to avoid some QC system design and implementation costs that would be incurred if QC 1000 were to take effect as originally adopted. Some firms, however, may already have incurred certain design and implementation costs to comply with the requirements the amendments rescind or revise, and some of those costs may not be recoverable. For example, one commenter said that many firms had already designed and implemented processes, monitoring activities, and documentation protocols around a September 30 evaluation date requirement under QC 1000 and that, as a result, modifying those processes before the initial effective date may present practical challenges, particularly for smaller firms.³²⁸ Another commenter said that their firm had incurred some paperwork preparation costs as well as internal costs related to reviewing literature related to QC 1000.³²⁹ One commenter said that many of the costs in establishing the EQCF or similar advisory functions have likely already been incurred.³³⁰ The Board recognizes that, to the extent incurred costs cannot be recovered, some of the cost savings discussed below would be attenuated.

In the QC 1000 2024 adopting release, the Board noted that QC 1000 would benefit investors by improving compliance with applicable professional and legal requirements, thereby improving audit quality and in turn improving investors' capital allocation decisions, increasing capital formation, and reducing cost of capital to audited companies.³³¹ Regarding costs, the Board noted that there would be direct costs to firms to design and, as applicable, implement and operate a QC system that complies with QC 1000, and that such costs would be largely fixed in nature and would decline over time.³³² The Board also noted there could be indirect costs to audited companies to the extent firms request more audit evidence from them.³³³ Finally, the Board also noted that firms may require greater fees.³³⁴

As in the supplemental request for comment, the Board analyzes the potential impacts of the amendments, each of which revises or rescinds certain

³²⁸ See comment letter from Plante & Moran.

³²⁹ See comment letter from Spitters.

³³⁰ See comment letter from CFA.

³³¹ See PCAOB Rel. No. 2024-005, at 341-345.

³³² See *id.* at 352-353.

³³³ See *id.* at 354-355.

³³⁴ See *id.* at 355.

requirements of QC 1000. Because QC 1000 establishes outcome-based quality objectives, any risk to audit quality that may arise from an amended requirement in QC 1000 may be mitigated by other QC 1000 requirements or other policies and procedures firms have established to achieve those quality objectives. As previously noted, the economic impacts of the amendments are measured against the baseline of QC 1000 as adopted. The supplemental request for comment was the first to analyze impacts against that baseline; although it did not formally define the baseline, the Board has done so above.

Commenters generally supported the Board's analysis of the economic impacts of the proposed amendments to QC 1000 in the supplemental request for comment;³³⁵ however, some commenters raised concerns about the Board's analysis of the economic impacts of rescinding the EQCF requirement.³³⁶ One commenter also said the economic analysis could be improved by addressing how the amendments would impact cost reductions, audit quality, firm capacity, inspection outcomes, investor confidence, and smaller issuers.³³⁷ The Board discusses the impacts on audit quality throughout the economic analysis. As discussed below, taking the entirety of QC 1000 into consideration, the Board believes any negative impact of the amendments on audit quality would likely be limited, so any downstream effect on the incidence of engagement deficiencies identified in PCAOB inspection reports, investor confidence, or the broader public would be correspondingly minor. As to firm capacity, the amendments would likely free some staff resources for redeployment to other activities, including those that may more directly support audit quality.

Regarding smaller issuers, the amendments would impact issuers primarily through lower audit fees relative to the baseline to the extent audit firms pass on the direct cost savings provided by the amendments. Reduced audit fees may have a relatively greater effect on smaller issuers' profitability compared to larger issuers since audit fees typically

represent a larger share of their revenue.³³⁸ One commenter noted that smaller issuers may rely especially heavily on the external audit given greater information asymmetry and less market coverage.³³⁹ Thus, to the extent the amendments negatively impact audit quality, this would imply smaller issuers could be disproportionately impacted. However, as discussed below, the Board believes any negative impacts on audit quality will be minimal. One commenter said cost savings retained by firms should not be assumed to constitute investor benefits.³⁴⁰ The Board agrees and does not make this assumption. The extent to which firms would choose to pass on any cost savings arising from the amendment to their clients is unclear. The commenter also said there is no quantification of whether the hypothetical cost savings the Board expects firms to realize will flow through to lower audit fees.³⁴¹ The Board is unaware of data or a methodology that would allow the Board to reliably quantify the pass through of cost savings to audited companies, including any impact on audit fees.

The same commenter expressed concern that the economic considerations discussion in the supplemental request for comment conflated smaller audit firms with smaller issuers and that the economic analysis must be segmented because the amendments affect each segment differently.³⁴² The economic considerations did not conflate smaller audit firms with smaller issuers. Where necessary and appropriate, the economic analysis segments the discussion of impacts (e.g., by reference to impacts on firms, issuers, smaller firms, smaller issuers, and EGCs).

This commenter also suggested that the Board disclose the methodology behind any cost estimates it relies on in the economic analysis.³⁴³ The economic analysis describes the methodology the Board used for the independent analyses. In cases where the economic analysis relies on external research, it provides sourcing. In cases where the economic analysis discusses cost estimates provided by commenters, it presents and assesses any information

provided by the commenter about the methodology used.

The same commenter expressed concern that the economic considerations discussion in the supplemental request for comment does not provide a quantitative assessment of the impact on audit quality and the costs for investors.³⁴⁴ The commenter suggested that the PCAOB perform and publish its own cost estimates that are comparable and methodologically transparent rather than relying solely on cost estimates provided by the auditing profession.³⁴⁵ The commenter also suggested that the PCAOB measure the tradeoff between reduced firm costs against the risk of weakened QC effectiveness and audit quality (or do so qualitatively) provision by provision.³⁴⁶ The Board is not aware of data or a methodology that would allow the Board to quantitatively assess all the impacts of the amendments or the tradeoff between benefits and costs on a provision-by-provision basis. While the commenter questioned reliance on data provided by audit firms, the commenter did not provide alternative data sources.³⁴⁷ The economic analysis discusses the potential economic impacts of the amendments grouped into key areas and, as stated above, is largely qualitative in nature. However, where reasonable and feasible, the economic analysis incorporates quantitative information.

One commenter made three further points about the economic impacts of the amendments. First, the commenter said some of the amendments weaken key requirements and risk undermining the overall importance of a firmwide approach to quality that investors value and are willing to pay for.³⁴⁸ As discussed in greater detail below, however, the Board believes any negative impacts on audit quality will be minimal. To the extent the amendments reduce firms' compliance costs, moreover, firms may not pass all of those savings—or any associated costs—through to their clients. Taken together, the Board believes the amendments will reduce unnecessary regulatory burden for firms while essentially achieving the same quality objectives that investors value.

Second, the commenter said that investors ultimately pay for investment in quality assurance services.³⁴⁹ The Board acknowledges that investors

³³⁵ See comment letters from CAQ, GT, PwC, RSM, and Spitters.

³³⁶ See comment letters from CFA, CIL, and MIAG.

³³⁷ See comment letter from MIAG. This commenter also said the economic analysis could be improved by addressing (1) the potential economic impacts of private equity investments in audit firms in determining the benefits of the EQCF; (2) the Board's use of benchmarks in determining the costs of the EQCF; and (3) the potential economic impacts of the amendments on EGCs. The Board addresses these comments below.

³³⁸ See, e.g., Ideagen Audit Analytics, *Audit Fee Trends: A 20-Year Review* (Sept. 2025), at 19, available at <https://go.ideagen.com/audit-fee-trends-sep25>.

³³⁹ See comment letter from MIAG. Below, the Board discusses the importance of external audit in the context of EGC audits.

³⁴⁰ See comment letter from CFA.

³⁴¹ See id.

³⁴² See id.

³⁴³ See id.

³⁴⁴ See id.

³⁴⁵ See id.

³⁴⁶ See id.

³⁴⁷ See id.

³⁴⁸ See comment letter from ICGN.

³⁴⁹ See id.

ultimately pay for audit services. However, specific investments by firms may not necessarily be passed on to investors in the form of higher audit fees. The commenter also asserted that investments in high-quality systems should pay off for firms over the longer term and drive down costs because the cost reductions to firms arising from the amendments will tend to occur mostly in the first year but would come down over time.³⁵⁰ The Board agrees that, as a general matter, the costs of quality management systems decrease over time.³⁵¹ The Board also acknowledges that some of the cost savings resulting from the amendments would be concentrated in largely fixed or one-time activities, such as designing a QC system. Many of the other cost savings discussed below, however, are associated with ongoing activities—such as eliminated EQCF compensation and fewer resources devoted to identifying similar engagement deficiencies on other engagements—rather than initial implementation activities. Therefore, the Board is not persuaded that, without the amendments, the benefits of the requirements the Board is amending would necessarily exceed their costs in the longer term.

Third, the commenter also noted that QC 1000 costs could be spread over the costs of all public audits and, therefore, seemed to be a reasonable price to pay.³⁵² In the QC 1000 2024 adopting release, the economic analysis acknowledged that larger firms would be able to spread the fixed costs over a larger number of issuers.³⁵³ As discussed in below, the same is true of the fixed costs that the amendments will allow firms to avoid (e.g., identifying an individual to serve in an EQCF role and adjusting firm governance). However, many registered firms have relatively few engagements over which to spread fixed costs and some QC 1000 costs scale with the number of engagements. As discussed below, the Board has also heard from larger firms that certain of the requirements are proving to be costly as compared to the expected benefits, notwithstanding their ability to spread fixed costs over a relatively large number of engagements.

1. Requirement To Design, Implement, and Operate a QC System

The amendments rescind the requirement for design-only firms to

design a QC system that complies with QC 1000.

In the QC 1000 2024 adopting release, the Board noted that requiring design-only firms to design a QC system that complies with QC 1000 would better position these firms to accept and perform engagements in compliance with applicable professional and legal requirements because design-only firms would have a PCAOB-compliant QC system ready for implementation and operation.³⁵⁴ The Board also noted that design-only firms would face design costs incremental to the requirements of complying with ISQM 1 or SQMS 1, including around ethics, independence, monitoring, and remediation, and that these costs could lead some firms to withdraw from PCAOB registration.³⁵⁵

Table 1 indicates that, based on the set of firms registered as of March 31, 2025, approximately 734 firms would be design-only under QC 1000 as originally adopted. Although design-only firms comprise 49% (734 ÷ 1,489) of registered firms, their role in the issuer and broker-dealer audit market is small: based on their Form 2 filings, they played no lead or substantial role on any engagements in the 2019 through 2025 reporting periods. Only 5% (35 ÷ 734) provided at least 5% of total audit hours on the audits of 51 issuers during the 2025 reporting period, with audit fees to the lead auditor and all participants on these engagements totaling approximately \$379 million.³⁵⁶

³⁵⁴ See *id.* at 346.

³⁵⁵ See *id.* at 355.

³⁵⁶ For three of these 51 issuer audits, multiple design-only firms (three on average) provided at least 5% of the total audit hours. The staff's analysis is based on Form AP filings for audit reports issued during the 2025 reporting period (*i.e.*, from April 1, 2024, through March 31, 2025). In cases where multiple audit reports were issued with respect to the same issuer during the reporting period, staff selected the Form AP associated with the most recent audit report. Firms are identified on Form AP as other accounting firms if they provided at least 5% of the total audit hours for the engagement. See Form AP instructions, available at <https://pcaobus.org/about/rules-rulemaking/rules/form-ap—auditor-reporting-of-certain-audit-participants>. Form AP filings are available for download from the Board's website, <https://pcaobus.org/resources/auditorsearch>. The staff's methodology searches for other accounting firm roles in Form AP filings using the firm's Firm ID. Accordingly, the staff's methodology may undercut other accounting firm roles to the extent lead auditor firms either never filed a Form AP or failed to report Firm IDs of other accounting firms providing at least 5% of the total audit hours for the engagement. Staff obtained audit fees data from Audit Analytics. Staff note that academic literature finds that audit fees are highly correlated with audit hours. See, e.g., Daniel Aobdia, *Do Practitioner Assessments Agree with Academic Proxies for Audit Quality? Evidence from PCAOB and Internal Inspections*, 67 *Journal of Accounting and Economics* 144 (2019), Table 4 (finding Spearman and Pearson correlations of 0.91 and 0.90, respectively, between audit hours and audit fees for PCAOB-inspected audit engagements).

The remaining 95% (699 ÷ 734) of design-only firms were not identified on any Form AP filings for audit reports issued during the 2025 reporting period.

The Board understands that most PCAOB-registered firms have implemented either ISQM 1 or SQMS 1, including design-only firms.³⁵⁷ In

Therefore, the level of participation by these design-only firms in these audits provides a proxy for their share of the total audit fees. The most common level of participation (63% of roles played) was 5% to less than 10% of total audit hours. Design-only firms should have played a less-than-substantial role and, therefore, their hours generally should not constitute more than 20% of the total engagement hours provided by the lead auditor. From April 1, 2025, through August 10, 2026, 39 design-only firms provided at least 5% of the total audit hours on the audits of 52 issuers. The total audit fees paid to the lead auditor and all participants on these engagements were approximately \$194 million. For three of these 52 issuer audits, multiple design-only firms (two on average) provided at least 5% of the total audit hours.

³⁵⁷ Staff performed several quantitative analyses to test its view that most design-only firms are subject to either ISQM 1 or SQMS 1. *First*, using the AICPA Peer Review public website, staff manually checked whether U.S.-headquartered design-only firms had been peer reviewed as part of the AICPA peer review program and are currently enrolled in the program. Staff found that 74% of these U.S. firms were peer reviewed and are currently enrolled in the program and thus would likely be subject to SQMS 1. *Second*, staff's review of firms' responses to Item 5.2 of their most recent Form 2 filings indicates that 62% of non-U.S.-headquartered design-only firms have an audit-related membership, affiliation, or similar arrangement (*i.e.*, firms that answered "Yes" for either Item 5.2a.1 or Item 5.2a.2). These firms likely obtain QC policies and procedures derived from ISQM 1 as part of these relationships. *Third*, 16% of non-U.S.-headquartered design-only firms are members of the six largest global networks (BDO International Ltd., Deloitte Touche Tohmatsu Ltd., Ernst & Young Global Ltd., Grant Thornton International Ltd., KPMG International Cooperative, and PricewaterhouseCoopers International Ltd.). The Board believes these firms have likely adopted policies and procedures derived from ISQM 1 because these six global networks generally encourage member firms to adopt their global quality management frameworks which largely encompass ISQM 1. See, e.g., PricewaterhouseCoopers U.S.'s 2025 Transparency Report (Oct. 31, 2025) at 4, available at <https://www.pwc.com/us/en/about-us/assets/pwc-us-2025-transparency-report.pdf>. Indeed, in its comment letter, PwC said that all registered firms in its network are already subject to ISQM 1. See comment letter from PwC. *Fourth*, based on information published by the International Federation of Accountants (IFAC), staff identified countries that indicate that they have adopted ISQM 1 or similar quality management standards (see, e.g., the "Quality Assurance" section of Switzerland's profile page on the IFAC web page, available at <https://www.ifac.org/about-ifac/membership/profile/switzerland>, indicating that Switzerland "has issued national quality management standards . . . which are based on the International Standards on Quality Management (ISQM) issued by the International Auditing and Assurance Standards Board (IAASB)"). Eighty-eight percent of non-U.S.-headquartered design-only firms are headquartered in these countries and may therefore have adopted or be adopting ISQM 1 or similar standards. The Board notes that the CAQ 2026 Letter indicated that, in most cases, design-only firms had already adopted ISQM 1, and the

³⁵⁰ See *id.*

³⁵¹ See PCAOB Rel. No. 2024–005, at 353; see also *id.* at 351 n.496.

³⁵² See comment letter from ICGN.

³⁵³ See PCAOB Rel. No. 2024–005, at 354.

addition, 11% ($82 \div 734$) of the 2025 design-only firms have failed to file a Form 2 and pay their annual fees to the PCAOB for at least two consecutive years; these firms might no longer be operational, and if their delinquencies persist, they would be eligible for withdrawal from PCAOB registration at the Board's discretion.³⁵⁸

Potential Benefits

The amendments will generate direct cost savings for many design-only firms, including firms that are already subject to ISQM 1 or SQMS 1. For such firms that remain registered following the effective date of QC 1000, the amendments would essentially eliminate the need to make any initial changes to their QC system design and to annually identify and assess quality risks to comply with QC 1000. One commenter estimated that, for its own firm, the costs to design a QC system that complies with QC 1000 might be close to \$1,000.³⁵⁹ Another commenter

said the design-only requirement would have entailed training costs, consulting costs, and professional time.³⁶⁰ For design-only firms that register (or re-register) in the future, the amendment would also eliminate the need to annually identify and assess risks after they register.³⁶¹ These cost savings would be largest for the subset of design-only firms that are not already subject to ISQM 1 or SQMS 1, since for them the savings reflect the avoided cost of designing a wholly new QC system rather than designing incremental changes to an existing one.

By reducing burdens to design-only firms, the amendments may also increase or help to maintain the number of registered firms. Several commenters

(median) number of accountants at design-only firms is 125 (30). Therefore, the Board believes that this commenter's cost estimate is likely lower than the cost most design-only firms might incur to design a QC system that complies with QC 1000.

³⁶⁰ See comment letter from PICPA.

³⁶¹ For design-only firms that register (or re-register) in the future, the amendments may also reduce costs associated with the registration process; however, the extent of any cost reduction will depend on how the Board evaluates registration applications after QC 1000 goes into effect. Under section 102(b)(2)(D) of Sarbanes-Oxley, applicant firms are required to provide a statement of the quality control policies of the firm for its accounting and auditing practices when applying to register with the PCAOB. See *Frequently Asked Questions Regarding Registration with the Board*, PCAOB Rel. No. 2003-011F, at Q.32 (Dec. 4, 2017), (providing guidance regarding PCAOB Form 1, *Application for Registration*, Item 4.1). In light of QC 1000, the Board may opt to revise its interpretation or implementation of this requirement or its criteria for evaluating these statements.

³⁶² See comment letters from AAA, Baker Tilly, PICPA, and RSM.

agreed that the design-only requirement could lead registered firms to withdraw from registration.³⁶²

To inform the Board's consideration of the potential impacts of the amendments on registration activity, Figure 1 shows trends in requests to withdraw from registration (Panels A and B, for full-implementation and design-only firms respectively) and in applications for registration (Panel C), for calendar years 2020 through 2025. The figure also shows the number of firms in each category as of March 31 of each year, using the Table 1 methodology. Overall, the Board observes an uptick in requests to withdraw from registration that appears to be related in some part to QC 1000. For example, 154 ($2 + 60 + 4 + 9 + 79$) withdrawal requests were filed in 2025, greater than any year since 2020, and 7% ($(2 + 9) \div 154$) of these cited QC 1000 as a reason. This trend appears to be more pronounced for design-only firms. Notably, 10% ($9 \div (9 + 79)$) of their withdrawal requests cited QC 1000, versus 3% ($2 \div (2 + 60 + 4)$) for full-implementation firms. It is important to note that Panels A and B of Figure 1 report on firms that requested to withdraw from registration and do not include firms that are considering requesting to withdraw from registration but have not yet filed the request. Similarly, Panel C of Figure 1 reports on firms that applied to register and does not include firms that are considering applying for registration but have not yet filed the application.

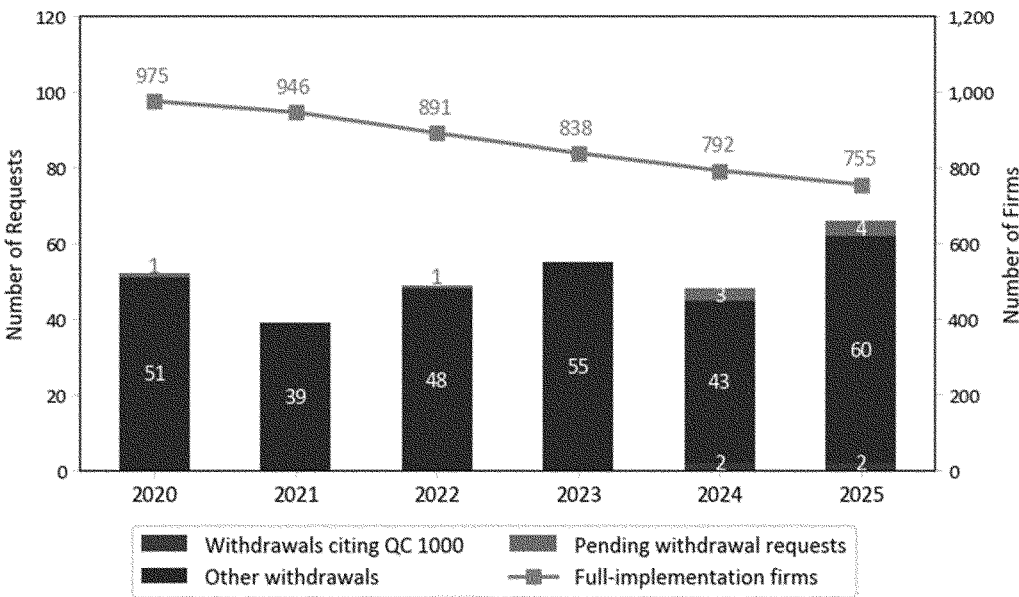
CAQ recently reiterated that nearly all design-only firms are subject to the recently adopted IAASB or AICPA QC standards. See comment letter from CAQ.

³⁵⁸ See PCAOB Rule 2107(h). For more information on this withdrawal process, see *Constructive Requests to Withdraw from Registration*, PCAOB Rel. No. 2024-011 (Nov. 14, 2024), and *Public Company Accounting Oversight Board; Order Granting Approval on Constructive Requests to Withdraw from Registration*, SEC Rel. No. 34-102074 (Jan. 2, 2025).

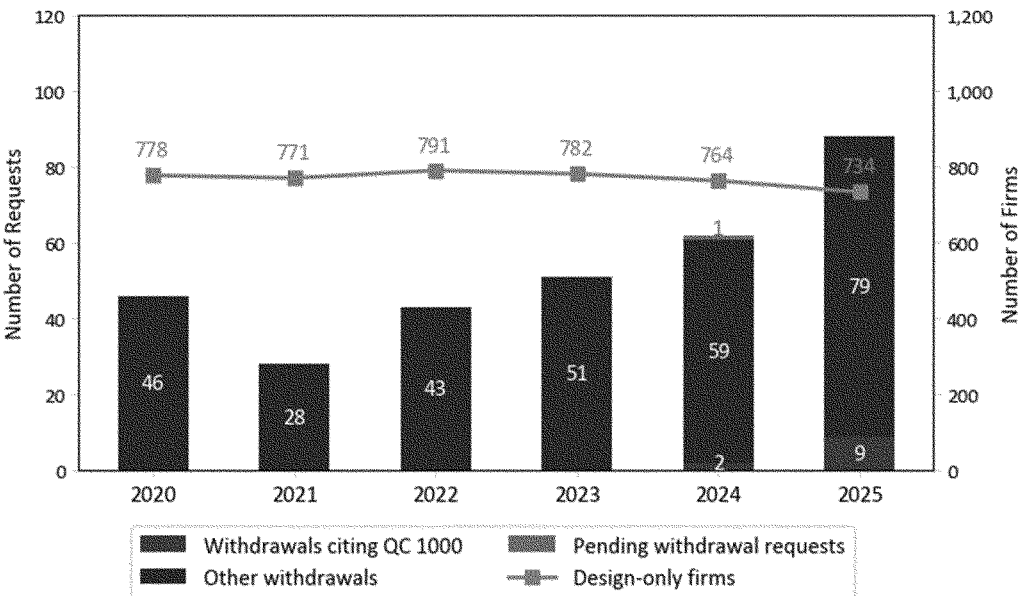
³⁵⁹ See comment letter from Spitters. The commenter, a design-only firm, did not indicate whether it had implemented ISQM 1 or SQMS 1. The commenter's 2026 Form 2 filing indicates that it has a single accountant. By contrast, based on their most recent Form 2 filings, the average

Figure 1. PCAOB Registration Activity

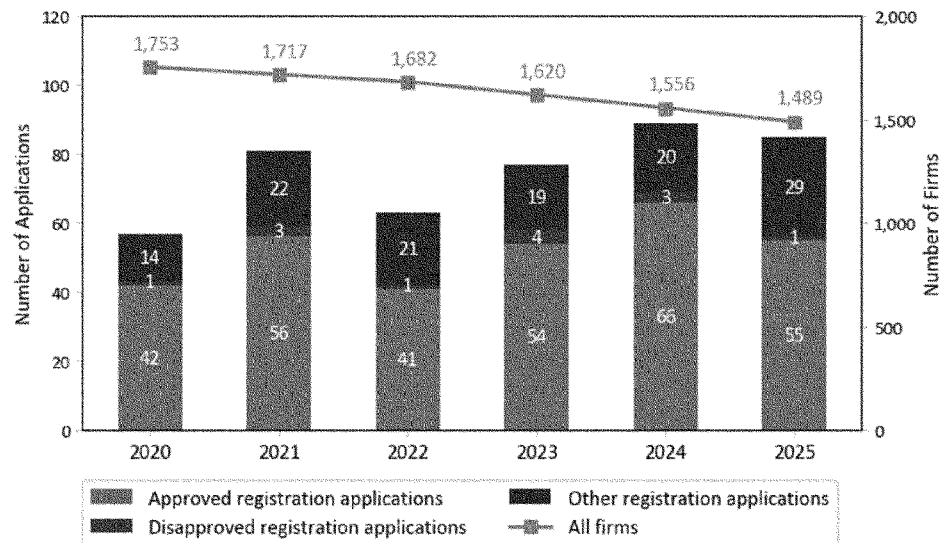
Panel A. Full-Implementation Firm Requests to Withdraw from Registration, Calendar Years 2020-2025



Panel B. Design-Only Firm Requests to Withdraw from Registration, Calendar Years 2020-2025



Panel C. Applications for Registration, Calendar Years 2020-2025



Sources: PCAOB Form 2 filings; Form 1-WD filings; Form 1 filings.

Notes: (1) The number of firms in each panel of Figure 1 represents the count of firms registered with the PCAOB as of March 31 of each calendar year, excluding firms with withdrawal pending or suspended status. These firms are identified as full-implementation or design-only firms based on the information contained in their Form 2 filings for the seven reporting periods leading up to and including the calendar year. For example, firms as of March 31, 2020, are classified based on their 2014 through 2020 Form 2 filings. Staff assumed that a firm that did not file a Form 2 for a given reporting period did not lead or play a substantial role in any issuer or broker-dealer audit during the reporting period.

(2) Panels A and B show the number of Form 1-WD requests to withdraw from registration, grouped by the calendar year in which each request was initially filed, from 2020 to 2025. Request status (i.e., withdrawal or pending withdrawal request) is as of August 10, 2026. Staff identified the firms that filed a Form 1-WD as full-implementation or design-only based on their Form 2 filings for the most recent seven reporting periods prior to their Form 1-WD filing.

(3) Form 1-WD asks firms to provide a reason for their withdrawal. When firms do not provide a reason for withdrawing, PCAOB staff solicit a reason. The analysis reported in Figure 1 reflects the reason stated on Form 1-WD when available and otherwise the solicited reason. Of the 627 firms that filed withdrawal requests between 2020 and 2025, 16% (103 ÷ 627) did not provide a withdrawal reason through either channel. Among those that provided a reason, staff determined whether a firm cited QC 1000 based on a programmatic search for keywords related to QC 1000 followed by a manual review. Staff note that firms citing QC 1000 may have requested withdrawal for other reasons as well. Staff also note that the staff's methodology may undercount the number of withdrawal requests related to QC 1000 to the extent firms did not explicitly mention QC 1000 as the reason for their withdrawal. For example, of the 123 firms that filed withdrawal requests in 2025 for which a withdrawal reason is available, four discussed overall compliance costs associated with PCAOB standards while not specifically citing

QC 1000. Further, it is possible that any of the 103 firms that filed a withdrawal request without providing a withdrawal reason through either channel could have withdrawn because of QC 1000.

(4) Figure 1 does not include the 2026 calendar year because it is a partial calendar year as of the time this analysis was performed and therefore is not directly comparable to earlier years. However, staff note that, as of August 10, 2026, there have been 67 withdrawal requests filed in 2026, and none cited QC 1000 as a reason for withdrawal.

(5) Panel C shows applications for PCAOB registration, grouped by the calendar year in which each application was initially filed, from 2020 to 2025. Application status (i.e., approved, disapproved, or other) is as of August 10, 2026. The “other registration applications” group includes applications under review and applications withdrawn by firms. Staff note that there are potentially fewer approved applications in 2025 because some applications filed in 2025 may still be under review.

For design-only firms that have withdrawn, or plan to withdraw, as a result of QC 1000, the amendments could incentivize some to re-apply or remain registered. The comments received are consistent with this potential benefit. One commenter said the amendment would alleviate concerns about smaller firms withdrawing their PCAOB registration and allow more flexibility for these firms to remain registered and apply the QC 1000 requirements only when they choose to accept engagements requiring registration with the PCAOB.³⁶³ Another commenter stated concern that some firms had withdrawn from registration in response to QC 1000 and that this unintended consequence of the design-only requirement could be detrimental to the quality of multinational company audits because firms may seek creative ways to complete the audits when a registered firm cannot be found in a particular jurisdiction.³⁶⁴ Another commenter said that the proposed rescission of the design-only requirement would make it more likely that firms would remain registered, where they would be able to pursue opportunities for PCAOB engagements if they appropriately planned for compliance with QC 1000.³⁶⁵ Another commenter stated that the design-only requirement incentivized firms to deregister and that, while they could later re-register, that process adds time and effort and restricts a firm’s ability to bid on work or quickly respond to the marketplace.³⁶⁶ The rescission of the design-only requirement could benefit

these firms by facilitating greater participation in the PCAOB audit market—for example, where lead auditors may prefer to use registered firms for less-than-substantial-role work—offset in part by the cost of re-registering (in the case of firms that have already withdrawn from registration).

An increase in the number of registered firms could also benefit audited companies by expanding the supply of firms able, after designing, implementing, and operating a QC 1000-compliant system, to serve as a lead auditor or play a substantial role.³⁶⁷ Staff analysis suggests that this is not uncommon: roughly 8% (62 ÷ 778) of firms classified as design-only as of March 31, 2020, later reported a lead or substantial role at least once over the

following five reporting periods.³⁶⁸ Although lead auditors may continue using design-only firms below a substantial role even after those firms withdraw from registration, some may prefer registered firms; if such firms remain registered, lead auditors with this preference can continue using their work and avoid the cost and risk of transitioning it elsewhere. Similarly, some audit committees may consider only already-registered firms as lead auditors. Accordingly, the increased supply of registered firms could support competition in the audit market.³⁶⁹

Additionally, by rescinding the design-only requirement, design-only firms that were planning to withdraw

³⁶⁸ As shown in Figure 1, 778 firms registered with the PCAOB as of March 31, 2020, are classified as design-only based on their 2014 through 2020 Form 2 filings. Staff used these firms’ 2021 through 2025 Form 2 filings to determine the proportion that subsequently served in a lead or substantial role on an engagement.

³⁶⁹ Academic research provides mixed findings regarding the impact PCAOB deregistration may have on audit quality. Staff note that recent unpublished research suggests that PCAOB deregistration is associated with an increase in audit fees for clients of deregistering firms. See Michael Ettredge, Juan Mao, and Mary S. Stone, *Small Audit Firms’ Public Market Exits, Business Model Changes, and Market Consequences*, SSRN Electronic Journal (2024) (finding that audit firm deregistration does not appear to affect the audit quality of these firms’ former issuer clients on average but it is associated with higher audit fees). Depending on the audit quality proxy, earlier research finds mixed results on the effect on audit quality from firms exiting the market after the passage of Sarbanes-Oxley. See Mark L. DeFond and Clive S. Lennox, *The Effect of SOX on Small Auditor Exits and Audit Quality*, 52 Journal of Accounting and Economics 21 (2011); Neil L. Fargher, Alicia Jiang, and Yangxin Yu, *Further Evidence on the Effect of Regulation on the Exit of Small Auditors from the Audit Market and Resulting Audit Quality*, 37 Auditing: A Journal of Practice & Theory 95 (2018). Staff note that, in these studies, PCAOB deregistration typically refers to withdrawal from PCAOB registration.

³⁶³ See comment letter from Baker Tilly.

³⁶⁴ See comment letter from AAA.

³⁶⁵ See comment letter from RSM.

³⁶⁶ See comment letter from PICPA.

³⁶⁷ Panel B of Figure 1 provides an indication of this population of design-only firms. It indicates that between 2020 and 2025, 11 design-only firms requested to withdraw from registration, citing QC 1000 as a reason. As discussed in greater detail above, staff analysis indicates that these firms played a relatively small role in the overall audit market. The Board recognizes that, absent the amendments, the number of registration withdrawals could increase in the future after QC 1000 goes into effect. The Board also notes that the impacts discussed in this paragraph apply similarly to future design-only firms that might choose to remain unregistered due to QC 1000. Consistent with the discussion in the QC 1000 2024 adopting release, an increase in the supply of design-only firms may lower audit fees but may also lead to audit quality risks. For example, there may be increased potential for opinion shopping since issuers and broker-dealers would have a larger set of potential lead auditors from which to select. See PCAOB Rel. No. 2024–005, at 361–365. However, recent literature suggests that audit quality may improve in the specific context of potential competition among smaller firms. See Devin Williams, *The Effect of Potential Entrants on Audit Market Competition*, 100 The Accounting Review 375 (2025) (finding that the potential competitive threat posed by firms that have no publicly traded clients lowers audit fees and increases audit quality for engagements performed by triennially inspected firms).

from registration may choose to remain registered, avoiding the time and costs associated with re-applying for registration if they decide to take on an engagement in the future. Staff analysis indicates that the registration process takes on average 133 days from filing a Form 1 to Board approval, plus a \$500 fee.³⁷⁰

Nevertheless, the effect of rescission of the design-only requirement on re-registration and withdrawals may be limited. Panel B of Figure 1 shows that just 7% $((9 + 2) \div (9 + 2 + 59 + 79 + 1))$ of design-only firms that requested withdrawal in 2024 and 2025 cited QC 1000, suggesting many recent withdrawals are for reasons unrelated to the amendments the Board is adopting.³⁷¹ These firms also had small market share, so their re-registration would be unlikely to significantly affect audit fees or audit quality. The 11 design-only firms that withdrew citing QC 1000 reported no lead or substantial roles since 2019; four were named on Form AP as other accounting firms on seven audits of four issuers, with total audit fees to the lead auditor and all participants of \$17 million.³⁷² The Board recognizes that withdrawal requests arising in part from QC 1000 could increase in the future if QC 1000 were to take effect as originally adopted.³⁷³

³⁷⁰ The length of the registration process has changed over time. This estimate is based on the 304 firms that had their registration applications approved by the Board between 2020 and 2025. Section 102(c)(1) of Sarbanes-Oxley requires the Board to approve a completed application for registration not later than 45 days after the date of receipt of the application, in accordance with the rules of the Board, unless the Board, prior to such date, issues a written notice of disapproval to, or requests more information from, the prospective registrant. See PCAOB Rel. No. 2003-011F, at Q.11, for additional information on the time it takes firms to register.

³⁷¹ Staff found no instances of a firm citing the new paragraph (h) ("Constructive Withdrawal Requests") of PCAOB Rule 2107, which went into effect in 2025, as a reason for withdrawal.

³⁷² The audit reports for these seven audits were issued during the 2019 through 2023 reporting periods. For each of the seven audits, only one of the four firms was named. The remaining seven firms were not named on a Form AP since the 2019 reporting period. The staff's analysis is based on Form AP filings for audit reports issued since the 2019 reporting period (*i.e.*, from April 1, 2018, through August 10, 2026). Staff obtained audit fees information from Audit Analytics. As noted above, audit fees are highly correlated with audit hours. The level of participation of these four firms on these seven audits was 5% to less than 10% of total audit hours.

³⁷³ Staff recognize that design-only firms that have not affirmatively withdrawn from registration may also have lost interest in remaining registered with the PCAOB, which is a requirement to serve as a lead auditor or play a substantial role in the issuer and broker-dealer audit market. To evaluate whether any design-only firms may have lost interest in remaining registered in response to QC

The amendments could also affect registration applications, but the Board sees no strong evidence of a significant impact. Almost all firms that applied to register in 2020–2025 had not performed an engagement in the prior seven years and would be classified, upon entry, as design-only.³⁷⁴ Panel C of Figure 1 shows that registration applications did not decline in anticipation of QC 1000; to the contrary, they peaked in 2024, the year QC 1000 was adopted.³⁷⁵ The Board recognizes applications may decrease in the future once QC 1000 takes effect.

Potential Costs

The amendments may also have some negative impacts. Design-only firms that choose not to voluntarily design a QC system compliant with QC 1000 may be less prepared to implement and operate such a system if they later take on an engagement. If such a firm implements its QC system within a compressed timeline and fails to account for a quality risk or otherwise fails to implement an effective QC system, the firm increases its risk that it may fail to comply with applicable professional and legal requirements when performing an engagement. As discussed above, roughly 8% $(62 \div 778)$ of design-only firms as of March 31, 2020, reported a lead or substantial role at least once over the subsequent five reporting periods. One commenter said that a QC system cannot be designed and made operational overnight, and the first investors served by a newly active firm should not bear the risk of a system still under construction.³⁷⁶

These impacts would be mitigated, however, to the extent firms most

1000, staff performed an analysis of trends in new design-only delinquent Form 2 filers and annual-fee payers. Staff identified by calendar year design-only firms that failed to file a Form 2 and pay their annual fees to the PCAOB for the two-year period ending in each calendar year, excluding firms that were already delinquent in prior years. The staff's analysis suggests that this form of disengagement (1) has been infrequent by comparison to the number of requests for withdrawal from registration and (2) was mostly flat between 2022 and 2025 (ranging from four to six per year). Overall, while this form of disengagement may be driven by many factors, the evidence suggests that this form of disengagement has not increased due to QC 1000.

³⁷⁴ Of the 452 firms that applied for registration between 2020 and 2025, 18 had been previously registered with the PCAOB at some point during the seven years before their current registration approval dates. Of these 18 firms, five had a lead or substantial role on engagements during the seven reporting periods prior to their return to PCAOB registration.

³⁷⁵ The Board acknowledges that trends in the number of applications for registration may be driven by multiple factors. For example, part of the increase the Board observes may be driven in part by pandemic-related disruptions that occurred during the earlier part of the period.

³⁷⁶ See comment letter from CFA.

interested in leading or performing a substantial role on an engagement have incentives to voluntarily design a QC 1000-compliant system to compete for engagements. One commenter observed that firms actively proposing on PCAOB engagements would be wise to do so.³⁷⁷ The impacts would also be mitigated to the extent these firms already have a QC system that complies with ISQM 1 or SQMS 1 or have already designed a QC system that complies with QC 1000.

Some commenters were generally skeptical that the design-only requirement was beneficial in relation to its costs.³⁷⁸ For example, one commenter said the benefits of the design-only requirement were unclear as these firms are not performing engagements subject to PCAOB requirements, and that the design would be hypothetical, likely to become obsolete, and could create a false impression of readiness.³⁷⁹ The Board notes that the annual reassessment of quality risks the requirement would have entailed mitigates this last concern. Others said that the amendment introduces no risk to investors because these firms neither perform nor serve in a substantial role on PCAOB engagements.³⁸⁰ The Board believes that the costs of rescinding the design-only requirement will likely be minimal, taking mitigating factors into account.

2. Roles and Responsibilities

The amendments provide increased flexibility in filling certain specified roles in the QC system by permitting roles to be assigned to non-firm personnel and divided among multiple individuals.

Potential Benefits

The amendments will help address the implementation challenges of the original requirement that commenters raised. Some commenters said that QC 1000 would have required some firms to change their existing structures and incur unnecessary operational challenges and disruptions without a commensurate benefit.³⁸¹ One of these commenters said it is challenging to identify a singular firm personnel member to assume operational responsibility for the entire scope of

³⁷⁷ See comment letter from AAA.

³⁷⁸ See comment letters from Baker Tilly, CAQ, GT, KPMG, and PICPA.

³⁷⁹ See comment letter from PICPA.

³⁸⁰ See comment letters from Baker Tilly, CFA, GT, and KPMG.

³⁸¹ See comment letters from Baker Tilly and CAQ.

requirements of paragraph .16, which relates to ethics and independence.³⁸²

The amendments will reduce restructuring costs for firms that currently assign roles to non-firm personnel or divide roles among multiple individuals when operating their QC systems. The reduced restructuring costs may be particularly significant for firms that are already implementing ISQM 1 or SQMS 1.³⁸³ One commenter said that the proposed amendment would provide welcome and needed flexibility, which is important for firms of varying sizes and structures, including for some non-U.S. firms with smaller PCAOB audit practices that have found that using

³⁸² See comment letter from Baker Tilly.

³⁸³ The Board believes most firms are subject to ISQM 1 or SQMS 1. Staff performed several quantitative analyses to test the Board's view that most firms are subject to either ISQM 1 or SQMS 1. Whereas the analyses presented in footnote 357 consider only the design-only firms, the analyses presented in this footnote consider full-implementation firms as well as design-only firms. *First*, using the AICPA Peer Review public website, staff manually checked whether U.S.-headquartered firms had been peer reviewed as part of the AICPA peer review program and are currently enrolled in the program. Staff found that 79% of these U.S. firms were peer reviewed and are currently enrolled in the program and thus would likely be subject to SQMS 1. *Second*, staff's review of firms' responses to Item 5.2 of their most recent Form 2 submissions indicates that 73% of non-U.S.-headquartered firms have an audit-related membership, affiliation, or similar arrangement (*i.e.*, firms that answered "Yes" for either Item 5.2a.1 or Item 5.2a.2). These firms likely obtain QC policies and procedures derived from ISQM 1 as part of these relationships. *Third*, 39% of non-U.S.-headquartered firms are members of the six largest global networks. The Board believes these firms have likely adopted policies and procedures derived from ISQM 1 because these six global networks generally encourage member firms to adopt their global quality management frameworks which largely encompass ISQM 1. *See, e.g.*, PricewaterhouseCoopers U.S.'s 2025 Transparency Report (Oct. 31, 2025) at 4, available at <https://www.pwc.com/us/en/about-us/assets/pwc-us-2025-transparency-report.pdf>. Indeed, in its commenter letter, PwC said that all registered firms in its network are already subject to ISQM 1. *See* comment letter from PwC. *Fourth*, based on information published by IFAC and a web search for official pronouncements from local jurisdictions, staff identified countries that indicate that they have adopted ISQM 1 or similar quality management standards (*see, e.g.*, the "Quality Assurance" section of Switzerland's profile page on the IFAC web page, available at <https://www.ifac.org/about-ifac/membership/profile/switzerland>, indicating that Switzerland "has issued national quality management standards . . . which are based on the International Standards on Quality Management (ISQM) issued by the International Auditing and Assurance Standards Board (IAASB)"). Eighty-nine percent of non-U.S.-headquartered firms are headquartered in these countries and may therefore have adopted or be adopting ISQM 1 or similar standards. *Fifth*, just 8% of full-implementation firms reported on their 2025 Form 2 filings in Item 3.2a that 100% of their total fees billed to all clients for services rendered during the reporting period were attributable to fees billed to issuer audit clients. This suggests that few full-implementation firms specialize only in audits of issuers under PCAOB standards.

others from outside the firm to perform certain functions specified in paragraph .12 of QC 1000, such as monitoring and remediation and ethics and independence roles, has had a positive impact on audit quality as it brings sufficiently competent and experienced individuals with relevant subject matter expertise to the firm.³⁸⁴

The amendments could also improve audit quality to the extent the responsibilities performed over firms' QC systems are carried out more effectively under the amendments. Firms with larger and more complex audit practices (*e.g.*, the U.S. GNFs) may find that some specific responsibilities required under QC 1000, such as the responsibility over ethics and independence compliance, require the expertise of multiple individuals. Firms may also find it excessively burdensome to identify a single individual willing to bear the entire responsibility for these areas. Firms with fewer staff that are part of a network may prefer to use individuals from other firms within their network (whether registered or unregistered) that have more expertise and capacity. For context, 4% (31 ÷ 755) of the full-implementation firms identified in Table 1 have just one accountant on staff and 12% (89 ÷ 755) have between two and 10 accountants. Among these firms, 19% (23 ÷ (31 + 89)) are a member of one of the six largest global networks or indicated on Item 5.2 of their most recent Form 2 filing that they are a member of or affiliated with some other audit-related network, arrangement, alliance, partnership, or association.³⁸⁵

Commenters provided examples to support the view that the amendments would improve audit quality.³⁸⁶ One commenter asserted that the amendments would allow a firm to assign subject matter experts inside their firm networks to specific compliance tasks, which is likely to yield higher quality results.³⁸⁷ Another commenter said that assigning roles and responsibilities to other individuals who are not firm personnel often enhances the experience, competence, and authority specific to functional areas, such as ethics and independence, or provides the individuals with the time needed to carry out their

responsibilities effectively.³⁸⁸ One commenter also said that the amendments would enhance audit quality outcomes by promoting the effective execution of quality control responsibilities, while maintaining accountability for results.³⁸⁹ Another commenter noted that certain functions in a quality management system draw on disciplines that firms do not uniformly maintain in-house and the amendment would allow firms to engage qualified external specialists for such roles, which should improve the quality of those functions.³⁹⁰ One commenter asserted that ethics and independence are disciplines that benefit from the dedicated focus of individuals with different skills and areas of expertise and confirmed these roles have been assigned to different individuals to drive the highest quality outcome.³⁹¹ This commenter believed the amendment would allow firms to designate individuals serving across registered firms within a network and enable firms to place the most experienced and qualified individuals in those positions, which is accretive to audit quality.³⁹² The Board agrees that the amendments could improve audit quality.

Potential Costs

The amendments could also have some negative consequences. If a firm's QC system responsibilities are split into subcomponents across multiple individuals, there could be a risk that subcomponents of the responsibilities are never assigned, leading to a less effective QC system. For example, if a firm's QC system responsibility over monitoring and remediation is split into responsibility over monitoring and responsibility over remediation, responsibilities that could reasonably be associated with either monitoring or remediation may inadvertently never be assigned. Absent an explicit assignment, individuals may not be motivated to pick up these responsibilities voluntarily. On the other hand, there could be a risk that certain subcomponents are assigned multiple times, leading to unnecessary costs for firms. However, these risks would be mitigated by paragraph .27 of QC 1000, which requires the firm to establish and maintain clear lines of responsibility and supervision—including defining authorities, responsibilities, accountabilities, and supervisory and

³⁸⁴ See comment letter from CAQ.

³⁸⁵ Staff determined that firms were members of or affiliated with some other audit-related network, arrangement, alliance, partnership, or association if they answered "Yes" for Item 5.2a.1, Item 5.2a.2, or Item 5.2a.3 in their most recent Form 2 filing.

³⁸⁶ See, *e.g.*, comment letters from EY, GT, and PICPA.

³⁸⁷ See comment letter from PICPA.

³⁸⁸ See comment letter from EY.

³⁸⁹ See comment letter from GT.

³⁹⁰ See comment letter from SCCG.

³⁹¹ See comment letter from Deloitte.

³⁹² See *id.*

reporting lines for roles within the firm, up to and including the principal executive officer(s) or equivalent—within the QC system. These risks would also be mitigated through the governance and leadership component of the QC system.³⁹³

The amended requirements could also require greater coordination and communication between individuals with responsibility over related subcomponents (e.g., monitoring and remediation) and between these individuals and the individual(s) with ultimate responsibility. If information is not shared effectively, individuals may be forced to make decisions with incomplete information. However, this risk would be mitigated by the firm's implementation of quality responses that reduce to an appropriately low level the risk that the quality objectives related to information and communication will not be achieved.³⁹⁴

If responsibility is assigned to an individual external to the firm, this external individual's incentives may not be aligned with the firm's incentives. For example, while firms may be able to align external individuals' incentives with the success of the firm's QC system to some extent through incentive contracting, such external individuals may remain more attentive to the reputation and commercial success of their home firms than to their QC responsibilities to another firm. One commenter said that individuals outside the firm may have conflicting interests, and because these responsibilities are not their full-time job, they cannot provide the day-to-day ownership the roles require.³⁹⁵ An external individual may also be less familiar with the firm and, as an "other participant" for purposes of QC 1000, would not be subject to the firm's QC system in the same way as "firm personnel." These factors could reduce the effectiveness of the QC system. However, this risk would be mitigated by the requirement that the individual(s) assigned roles and responsibilities with respect to the QC system understand and be accountable for their roles and responsibilities.³⁹⁶

A commenter said that investors would not be opposed to an amendment to enable a limited degree of scaling the roles and responsibilities requirements to address cost considerations for small and large firms, but would be concerned about any dilution of requirements due to costs alone that impact audit

quality.³⁹⁷ Another commenter acknowledged that some may question whether the flexibility provided by the amendments could dilute accountability or weaken the clarity of responsibilities within a firm's QC system.³⁹⁸ This commenter asserted that QC 1000 will continue to require that roles and responsibilities be clearly defined and understood and require firms to be accountable for allocating responsibilities in a way that supports effective oversight and execution, even where responsibilities are divided.³⁹⁹ The Board believes these potential negative consequences would be mitigated by other QC 1000 provisions.⁴⁰⁰

3. External QC Function

The amendments rescind paragraph .28 of QC 1000, which requires firms that issued audit reports for more than 100 issuers in the prior calendar year to incorporate into their governance structure an EQCF. In evaluating the economic impacts of rescinding the EQCF requirement, the Board considered the potential benefits of eliminating implementation and ongoing compliance costs and complexity, as well as the potential costs of foregoing an additional perspective on significant judgments made and the related conclusions reached by the firm when evaluating and reporting on the effectiveness of its QC system. As discussed below, limited data and information are available to quantify these benefits and costs. However, where reasonable and feasible, this discussion considers relevant indirect evidence, including commenter input, implementation experience, and academic research, to inform the Board's assessment of the potential impacts of rescission.

The Board estimates that the EQCF requirement would apply to 13 firms based on the threshold of more than 100 issuer audit reports during the 2025 calendar year.⁴⁰¹ Those firms

³⁹⁷ See comment letter from ICGN.

³⁹⁸ See comment letter from KPMG.

³⁹⁹ See *id.*

⁴⁰⁰ See, e.g., QC 1000.25e, .25f, .27, and .53a. See also the amendment to paragraph .12 of QC 1000, which will require that the individual(s) assigned roles and responsibilities with respect to the QC system understand and be accountable for those responsibilities and have the experience, competence, authority, and time needed to carry them out.

⁴⁰¹ These 13 firms are Baker Tilly US, LLP; BDO USA, P.C.; CBIZ CPAs P.C.; Cohen & Company, Ltd.; Crowe LLP; Deloitte & Touche LLP; Ernst & Young LLP; Forvis Mazars, LLP; Grant Thornton LLP; KPMG LLP; PricewaterhouseCoopers LLP; RSM US LLP; and WithumSmith+Brown, PC. The number of firms that issued audit reports for more than 100 issuers during the 2025 calendar year

collectively audited 8,085 issuers, representing approximately 70% of all issuer audits and approximately 82.3% of aggregate issuer market capitalization.⁴⁰²

Potential Benefits

Rescinding paragraph .28 of QC 1000 will eliminate the costs to firms of identifying, hiring, retaining, and compensating suitable individuals for the EQCF role, including the specific costs highlighted by commenters. Firms could redirect the funds and resources that otherwise would have been devoted to implementing the EQCF requirement to other activities, including activities that may support audit quality.

One commenter said that some of the costs in establishing the EQCF have likely already been incurred.⁴⁰³ The Board agrees that any cost savings could be attenuated to the extent that firms have already incurred costs to identify and contract with individuals to perform the EQCF role.⁴⁰⁴

As discussed above, commenters have stated that implementing the EQCF has proven more difficult and more costly than originally anticipated. Some commenters identified significant implementation challenges and costs associated with identifying, recruiting, and onboarding individuals with the necessary expertise, independence, and availability to serve in the role.⁴⁰⁵ One commenter confirmed some of its member firms found it challenging to identify candidates willing and able to perform the EQCF function.⁴⁰⁶ Another commenter noted that firms have experienced challenges identifying appropriate individuals that meet what this commenter characterized as "overly prescriptive guidelines" for the EQCF

differs from the figures in Table 1 because of different data sources and measurement periods. See footnote 319 for details.

⁴⁰² The issuer count includes issuers for which the firm signed an audit report within the 12 months ending December 31, 2025, excluding broker-dealers and benefit plans. It includes companies that filed an annual report or registration statement with the SEC but excludes the following filing types: "S-B," "DRS," "18-K," "DOS," "ANNLPR," "SUPPL," "1-A," "1-K," "1-U," "253G2," "C," "ARS," "C-AR," "CB/A," and "U-1." Issuer market capitalization is determined by Standard and Poor's. Issuer market capitalization is assigned to the firm that issued the most recent opinion as of December 31, 2025, based on data from Audit Analytics.

⁴⁰³ See comment letter from CFA.

⁴⁰⁴ During implementation support efforts, the Board learned that some firms had initiated recruitment for the EQCF role and that at least one firm had entered into a contractual arrangement with an individual to perform the EQCF role.

⁴⁰⁵ See comment letters from CAQ, Deloitte, GT, KPMG, PICPA, Plante & Moran, and RSM.

⁴⁰⁶ See comment letter from CAQ.

³⁹³ See, e.g., QC 1000.25e and .25f.

³⁹⁴ See, e.g., QC 1000.53a.

³⁹⁵ See comment letter from CFA.

³⁹⁶ See amendment to paragraph .12 of QC 1000.

requirement.⁴⁰⁷ The commenter also identified practical constraints that could make suitable candidates difficult to identify, including the need for sufficient experience and competence and compliance with applicable independence requirements.⁴⁰⁸ Another commenter said that their firm experienced practical challenges with the “ambiguity” of the EQCF requirement, particularly in defining the appropriate scope of activities and distinguishing advisory oversight from operational involvement.⁴⁰⁹

The Board is not aware of evidence that bears directly on the magnitude of the cost to firms that are required to incorporate an EQCF in their QC systems. In the QC 1000 2024 adopting release, the Board used the average compensation per non-employee director at S&P 500 public companies in 2023 as a potential benchmark to inform some of the costs to retain appropriate individuals from outside the firm to serve in an EQCF role.⁴¹⁰ The Board also used the range and average of total remuneration for individual independent non-executives (“INEs”) under the United Kingdom’s (“U.K.”) audit firm governance rules⁴¹¹ in 2023 as another potential benchmark for the potential costs of the EQCF.⁴¹²

In the supplemental request for comment, the Board used the same potential benchmarks with more recent data to inform the potential cost savings that could result from rescinding the EQCF requirement. First, the Board reported recent compensation for INEs disclosed by PCAOB-registered firms based in the U.K.: the total annual remuneration per INE ranges from \$25,935 to \$387,288 with an average of \$141,691; the total annual remuneration is on average \$180,850 for Big 4 firms⁴¹³ and \$110,364 for other firms that must comply with the EQCF requirement.⁴¹⁴

Second, the Board used the average compensation per non-employee board director at S&P 500 public companies, which was \$336,352 in 2025.⁴¹⁵

Two commenters asserted potential flaws in the PCAOB’s analysis of the potential benefits associated with rescinding the EQCF requirement in QC 1000.⁴¹⁶ Specifically, these commenters stated that using either the compensation of a non-employee director at S&P 500 public companies or the remuneration for INEs under the U.K.’s audit firm governance rules as benchmarks overstates the potential costs of the EQCF requirement.⁴¹⁷ Another commenter said that a non-executive director of a S&P 500 public company has a very different role than an external quality review professional; however, this commenter agreed that a U.K. INE who would serve on a firm’s board is a good model for considering the potential costs of the EQCF requirement.⁴¹⁸ Another commenter said that the supplemental request for comment provided no evidence with direct relevance to the cost savings from rescission and relied only on “a proxy-based cost case.”⁴¹⁹

While the total cost of the EQCF role could differ substantially from these benchmarks, the Board continues to believe that they provide illustrative reference points for considering the potential costs associated with retaining qualified individuals to perform the role. In the supplemental request for comment, the Board acknowledged the limitations of using the compensation of non-employee directors at S&P 500 public companies or the remuneration for INEs under the U.K.’s audit firm governance rules as benchmarks for estimating the potential cost savings from rescinding the EQCF requirement, including differences in the

transparency report (covering fiscal year 2024 or 2025) as of the date of the analysis. All dollar amounts are nominal. See PCAOB Rel. No. 2026–002, at 70–71.

⁴¹⁵ See 2025 U.S. Spencer Stuart Board Index (2025), at 21, available at <https://www.spencerstuart.com/-/media/2025/10/ssbi2025/2025-us-board-index.pdf> (analyzing 488 DEF–14A proxy statements filed by S&P 500 companies with the SEC from May 1, 2024, through April 30, 2025). Total average compensation per non-employee director includes “all board and committee retainers and meeting fees, supplemental lead/presiding director fees, the value of equity compensation and all other compensation paid in fiscal year 2024 to non-employee directors who served for the full year.”

⁴¹⁶ See comment letters from CII and MIAG. The commenters also raised concerns about the Board’s analysis of the potential costs of rescinding the EQCF requirement, which is addressed later in this section.

⁴¹⁷ See id.

⁴¹⁸ See comment letter from ICGN.

⁴¹⁹ See comment letter from CFA.

responsibilities of an oversight function and those of a non-employee director function, as well as differences in their litigation risk profiles.⁴²⁰ These differences limit the extent to which either benchmark can be used to estimate the actual costs of the EQCF role. The Board has not identified new data or research, or received new information through comments, that would allow the Board to quantify those costs more reliably.

In addition, the compensation cost for the EQCF role may be affected by factors such as qualification requirements, liability concerns, and the availability of candidates willing to serve. Through implementation support efforts, the Board learned that some firms experienced challenges in identifying individuals willing to take on the role, and one commenter cited liability concerns as a contributing factor.⁴²¹ It appears that these concerns may be limiting the effective supply of willing individuals and would require firms to offer compensation sufficient to attract them.

Furthermore, the EQCF requirement sets no ceiling on the level of involvement that the EQCF may undertake in performing its mandated role, which could increase the total cost of the role. Paragraph .28 of QC 1000 requires the EQCF to serve as “an external oversight function for the QC system” and, at a minimum, to evaluate the significant judgments made and the related conclusions reached by the firm when evaluating and reporting on the effectiveness of its QC system. This minimum responsibility is a focused, analytical task that could, depending on how a firm chooses to implement the requirement, involve substantial engagement with a complex QC system. Given the complexity of the QC systems at annually inspected firms, a firm may choose to have the EQCF devote substantial time and effort to understanding its QC system or have multiple individuals perform the role.⁴²² Indeed, through implementation

⁴²⁰ See PCAOB Rel. No. 2026–002, at 70–71.

⁴²¹ See PCAOB Rel. No. 2026–002, at 69, and comment letter from CAQ.

⁴²² Paragraph .28 of QC 1000 provides that the EQCF is composed of “one or more persons.” In addition, some firms may voluntarily choose to assign the EQCF additional responsibilities beyond the specified minimum as part of its broader external oversight function for the QC system. As described in the QC 1000 2024 adopting release, firms would have flexibility in establishing other responsibilities of the EQCF beyond the minimum responsibilities specified in paragraph .28. See PCAOB Rel. No. 2024–005, at 122. The Board Letter further clarified that the firm would have wide latitude to decide how best to design its EQCF, including how many people should comprise the EQCF, and whether to assign additional

⁴⁰⁷ See comment letter from PICPA.

⁴⁰⁸ See id.

⁴⁰⁹ See comment letter from CBIZ.

⁴¹⁰ See PCAOB Rel. No. 2024–005, at 356 n.499.

⁴¹¹ See U.K. Financial Reporting Council (FRC) Audit Firm Governance Code (Apr. 2022), available at <https://www.frc.org.uk/library/standards-codes-policy/audit-assurance-and-ethics/audit-firm-governance-code/>.

⁴¹² See Board Letter, at 20.

⁴¹³ Big 4 firms are member firms of the following global networks: Deloitte Touche Tohmatsu Ltd., Ernst & Young Global Ltd., KPMG International Cooperative, and PricewaterhouseCoopers International Ltd.

⁴¹⁴ The INE analysis reported in the supplemental request for comment expanded the sample and used more recent data than the analysis reported in the Board Letter. The analysis was based on the nine firms that the FRC lists as being subject to the Audit Firm Governance Code and that are registered with the PCAOB. Staff obtained the INE remuneration information from each firm’s most recent

support efforts, the Board learned that some firms were considering assigning multiple individuals to serve in an EQCF role. Therefore, depending on how firms choose to implement the EQCF requirement, the total cost of the role could vary substantially.

One commenter asked the Board to compute and publish, for each of the largest firms, the cost of the EQCF per audit performed, as such information would allow investors to weigh the claimed burden against the value of “independent oversight.”⁴²³ The commenter also stated that the cost savings from rescission, when spread across thousands of audits, would not meaningfully reduce audit fees.⁴²⁴ While such estimates could inform consideration of the potential impacts of rescinding the EQCF requirement, the Board has limited information to reliably estimate each large firm’s actual EQCF costs. As discussed above, these costs could vary substantially depending on how each firm chooses to implement the requirement. Although the Board cannot estimate the EQCF cost per audit for each firm, the Board acknowledges that the incremental costs may not impose a large per-audit burden on the largest firms, given the number of issuers and broker-dealers they audit and the associated audit revenue. The Board also agrees that the extent to which the corresponding cost savings from rescission would affect audit fees is unclear. Even so, the incremental costs should be evaluated together with the incremental benefits that the EQCF might provide. As discussed below, the magnitude of those benefits is uncertain and may be limited, particularly with respect to the EQCF’s ability to provide effective “independent oversight.”

One commenter said that a minority of its members opposed rescinding the EQCF requirement, noting that the largest firms have voluntarily established functions that could be upgraded to satisfy the EQCF requirement.⁴²⁵ Similarly, another commenter stated that many of the firms subject to the EQCF requirement already use external advisors and that the incremental burden of establishing the mandated function may be less substantial than the proposal

implied.⁴²⁶ The functions the commenters identified are external advisory bodies whose current responsibilities differ from those of the EQCF, and their members would not necessarily satisfy the roles and responsibilities described in the EQCF requirement unless the external advisory bodies are modified and these members are willing to assume these new roles and responsibilities. The Board also observed that one commenter acknowledged that its existing external advisory council structure does not satisfy the EQCF requirement.⁴²⁷ Another commenter said that identification and onboarding of the EQCF role would be a significant undertaking because, among other things, it has many existing governance and advisory structures in place.⁴²⁸ Another commenter opined that the EQCF responsibilities described in QC 1000 extend well beyond the responsibilities of the structures currently in place at the largest six firms.⁴²⁹ These comments are consistent with the observations in the QC 1000 2024 adopting release and the supplemental request for comment that firms with an existing external advisory function would still incur incremental costs to incorporate the EQCF requirement, including the costs of hiring new individuals, providing liability insurance, or committing additional time and resources.⁴³⁰ On the other hand, as discussed below, the EQCF could provide incremental benefits by bringing a fresh perspective to the firm’s evaluation of its QC system. That benefit may be smaller at firms that already obtain external perspectives through existing advisory structures.

Potential Costs

The potential costs of rescinding the EQCF requirement are the foregone benefits that the EQCF might provide if the requirement were to take effect and operate as intended. The Board believes the main value of the EQCF requirement would be the introduction of an external second look at the firm’s significant judgments made and related conclusions reached when evaluating and reporting on the effectiveness of its QC system. An individual from outside the firm could bring an additional perspective that may help identify issues or risks the firm may have missed when evaluating and reporting on the

effectiveness of its QC system. By providing an external evaluation of significant QC judgments, the EQCF could help improve the firm’s QC system and thereby benefit investors.

The magnitude of such benefits, however, is uncertain and difficult to quantify. Paragraph .28 of QC 1000 provides firms with flexibility regarding implementation and does not prescribe detailed procedures beyond the EQCF’s core responsibility to evaluate significant judgments and related conclusions concerning the effectiveness of the firm’s QC system. The implementation support efforts indicated that firms were considering a range of approaches to complying with the requirement; as a result, any resulting benefits would likely have varied across firms. The Board does not expect rescission to result in significant negative impacts on audit quality, particularly taking into account existing governance structures, monitoring, PCAOB oversight, and other QC 1000 requirements that will remain in place.

Most commenters supported the rescission of the EQCF requirement.⁴³¹ Some commenters said that removing the EQCF requirement would not diminish the focus on audit quality because QC 1000 advances the objectives of strengthening trust in governance, reinforcing accountability, and supporting a commitment to quality through other provisions in the standard.⁴³² Other commenters observed that existing governance structures, leadership accountability, monitoring activities, and PCAOB inspections already provide meaningful oversight.⁴³³ Some commenters also said that rescission would allow firms to leverage existing external governance structures or develop other mechanisms tailored to their circumstances to support audit quality.⁴³⁴ For example, based on information obtained through recent PCAOB oversight activities, 9 of the 13 firms that would likely have been subject to the EQCF requirement already have an independent individual serving in an advisory role for the firm.⁴³⁵

⁴³¹ See comment letters from AAA (majority of AAA committee members), Baker Tilly, BDO, CAQ, CBIZ, Crowe, Deloitte, EY, Forvis, GT, KPMG, PICPA, Plante & Moran, PwC, RSM, and VSCPA.

⁴³² See comment letters from BDO, CBIZ, Crowe, KPMG, and PwC.

⁴³³ See comment letters from CAQ, EY, PICPA, and VSCPA.

⁴³⁴ See comment letters from BDO, CBIZ, Deloitte, EY, GT, KPMG, Plante & Moran, PwC, RSM, and VSCPA.

⁴³⁵ One commenter, while supporting the rescission of the EQCF requirement, questioned the relevance of academic research cited in the QC 1000 2024 adopting release and the supplemental request

responsibilities to the EQCF, among other things. See Board Letter, at 8.

⁴²³ See comment letter from CFA.

⁴²⁴ See *id.*

⁴²⁵ See comment letter from AAA (pointing to the “Assurance Quality Advisory Committee” at PwC, the “Independent Audit Quality Committee” at EY, the “Independent Audit Quality Advisory Committee” at KPMG, and the “Audit Quality Advisory Council” at Deloitte).

⁴²⁶ See comment letter from CFA.

⁴²⁷ See comment letter from Deloitte.

⁴²⁸ See comment letter from EY.

⁴²⁹ See comment letter from PwC.

⁴³⁰ See PCAOB Rel. No. 2024–005, at 356; PCAOB Rel. No. 2026–002, at 21.

Some commenters opposed rescission of the EQCF requirement.⁴³⁶ One commenter said that some form of independent challenge is vital.⁴³⁷ This commenter said that the PCAOB may have understated the potential benefits of the EQCF requirement by failing to consider the impact of the ongoing trend of private equity investment in accounting firms.⁴³⁸ Another commenter echoed this point and identified three annually inspected firms that have received some form of private equity investment since 2024.⁴³⁹ These two commenters asserted that the consideration of the risks that private equity investments present to auditor independence, including the potential trade-offs between audit quality and commercial decisions, increases the benefits of the EQCF requirement.⁴⁴⁰ Another commenter said that the EQCF is essential to audit quality and that independent oversight is essential for investor protection, which is even more important given the changes in ownership structures and more complex transactions.⁴⁴¹ Another commenter said that the EQCF is the clearest structural safeguard against the commercial and network pressures and interests that can affect a firm's own judgments about its QC system.⁴⁴² This commenter expressed concern that the rescission would remove that safeguard, while evolving ownership structures and continuing commercial pressures heighten the importance of independent oversight.⁴⁴³ By reference to academic research, one commenter said that alternative practice structures embed pressures that reshape firm priorities,

for comment concerning the impacts of board member independence in public company governance. See comment letter from PICPA; PCAOB Rel. No. 2024-005, at 347; PCAOB Rel. No. 2026-002, at 71. The Board agrees that this research addresses a governance setting that differs in important respects from the operating environment of audit firms. This distinction, however, does not by itself resolve questions regarding the potential benefits of the EQCF.

⁴³⁶ See comment letters from AAA (noting that a majority of AAA committee members supported rescission while a minority supported retaining the EQCF requirement for annually inspected firms), CFA, CII, ICGN, and MIAG.

⁴³⁷ See comment letter from MIAG.

⁴³⁸ See id.

⁴³⁹ See comment letter from CII (identifying BDO USA, P.C., Crowe LLP, and Grant Thornton LLP). Staff are aware of two other annually inspected firms, Baker Tilly US and Cohen & Company, that reportedly have also received some form of private equity investment. See Tuan Doan, Steven Utke, Ying Zhou, and Youli Zou, *The Consequences of Private Equity Investment in Accounting Firms*, SSRN Electronic Journal, 59 (2026) (providing a list of private equity investments in accounting firms).

⁴⁴⁰ See comment letters from CII and MIAG.

⁴⁴¹ See comment letter from ICGN.

⁴⁴² See comment letter from CFA.

⁴⁴³ See id.

compensation systems, and strategic decision making.⁴⁴⁴ One commenter, while expressing the view that the EQCF may be costly and unnecessary, cautioned that rescission of the EQCF requirement would remove a level of assurance regarding firms' internal processes and audit quality.⁴⁴⁵

The QC 1000 2024 adopting release recognized that the EQCF could reduce negative impacts of commercial considerations on decision making by firms, which may occur in some circumstances when the EQCF's perspective causes the firm to reconsider significant QC judgments and related conclusions when evaluating and reporting on the effectiveness of its QC system.⁴⁴⁶ The commenters who opposed rescission, however, appear to view this potential benefit as much more certain than was reflected in the 2024 adopting release. In particular, the commenters appear to expect the EQCF's "independent oversight" to serve as a "safeguard" against firms' "commercial decisions" or "commercial and network pressures and interests" that may adversely affect audit quality.⁴⁴⁷

The commenters' expectations should be considered in light of the structure of the EQCF role. Audit firms have an obligation to serve the public interest. This obligation is bolstered by PCAOB oversight and professional obligations, as well as reputational and litigation risks, all of which create strong incentives for firms to fulfill their professional duty to produce high-quality audits. As a result, firms' interests in maintaining high audit quality are often aligned with investor interests. The concerns raised by the commenters, however, relate to circumstances in which those interests may diverge and to the expectation that the EQCF would prioritize investors' interests when such divergence occurs. Although the EQCF requirement is established in QC 1000, the EQCF would remain a private service obtained by the firm. The audit firm would be responsible for selecting, engaging, compensating, retaining, and removing the individual performing an EQCF role.⁴⁴⁸ As a private contractor operating in a commercial market in which future business opportunities depend on client

⁴⁴⁴ See comment letter from AAA.

⁴⁴⁵ See comment letter from Spitters.

⁴⁴⁶ See PCAOB Rel. No. 2024-005, at 347.

⁴⁴⁷ See comment letters from CFA, CII, ICGN, and MIAG.

⁴⁴⁸ Although QC 1000 does not require such measures, firms may choose to adopt arrangements relating to length of service, such as term limits and protections against removal. See PCAOB Rel. No. 2024-005, at 121.

relationships, the individual performing an EQCF role would also have his or her own commercial interests, which could create incentives to avoid challenging the judgments of the firm in circumstances where protecting investor interests would require such a challenge. Further, because QC 1000 does not prescribe how individuals serving in the EQCF role should perform the evaluation and because the evaluation necessarily involves subjective and discretionary assessments, the judgments they make in conducting the evaluation may be influenced by their own incentives. The structural features of the EQCF may limit the EQCF's ability to reliably meet commenters' expectations regarding the role.

Taking these considerations together, the Board believes the primary benefit the EQCF could reasonably provide is an additional, external perspective on the firm's significant judgments and conclusions made in connection with its QC system evaluation and reporting. Although this external-perspective benefit is real, its magnitude is uncertain and would depend on firm-specific implementation choices that QC 1000 does not standardize or require. The Board recognizes that rescission will forgo such potential benefits, while retaining the requirement would impose implementation and ongoing compliance costs.

4. Information and Communication

The amendments narrow and simplify communication requirements relating to metrics that the firm communicates to external parties about audit practice, firm personnel, or engagements.

Potential Benefits

The amendments should reduce costs for firms when disclosing written metrics to external parties on a nonpublic basis. The amendments may also incentivize firms to provide more disclosure of written metrics to external parties on a nonpublic basis because the costs of doing so would be less. One commenter said that paragraph .53e as originally adopted and approved would be impractical and may not meaningfully enhance audit quality.⁴⁴⁹ Some commenters noted that the amendments would focus on more relevant information, reduce the risk of over-collection and duplication, and enhance clarity and accessibility for investors and other users.⁴⁵⁰ The Board

⁴⁴⁹ See comment letter from CAQ.

⁴⁵⁰ See comment letters from BDO, GT, and KPMG.

agrees with these observations about potential benefits.

Potential Costs

The Board expects these amendments would have limited negative impacts. External parties receiving nonpublic written metrics should already understand these metrics and some may be able to request additional information directly from the firm on an as-needed basis. One commenter said that dialogue and follow-ups are readily available to these external parties.⁴⁵¹ The Board agrees with this observation.

5. Monitoring and Remediation Process

i. Evaluating Whether Similar Engagement Deficiencies Exist on Other Engagements

With respect to identified engagement deficiencies, the amendment requires evaluation of whether similar engagement deficiencies exist on other engagements only if the identified engagement deficiency resulted or could result in (1) a failure to obtain sufficient appropriate evidence to support the conclusion reached on an engagement or (2) an inappropriate overall conclusion on the subject matter of an engagement.

Potential Benefits

This amendment will reduce costs for firms to operate their QC systems because they will be required to evaluate whether similar engagement deficiencies exist in fewer cases. Some commenters said the amendment could reduce the complexity, subjectivity, and costs associated with evaluating engagement deficiencies across other engagements.⁴⁵²

Potential Costs

The Board believes it is unlikely the amendment would have a significant impact on audit quality because the amendment scopes out only engagement deficiencies that are less likely to impact audit quality. Furthermore, firms would still be required to address all types of engagement deficiencies on the engagements on which they have been identified in accordance with subparagraphs a-c of paragraph .68 and evaluate them to determine whether QC deficiencies exist in accordance with paragraph .72. To the extent firms are constrained by limited staff resources, focusing firms' attention on engagement deficiencies that are most likely to impact audit quality may improve audit quality overall.

One commenter suggested that the amendment could improve audit quality as it would allow firms to focus attention on those engagement deficiencies that are most relevant.⁴⁵³ Another commenter noted the amendment could allow firms to focus their efforts on matters that are likely to have an effect on audit quality.⁴⁵⁴ However, one commenter questioned why only items (1) and (2) from footnote 40A to proposed paragraph .68a were included in proposed paragraph .68d while items (3) and (4) (the engagement report is not appropriate in the circumstances and the firm is not independent of its client, respectively) were not.⁴⁵⁵ Another commenter stated that a deficiency that appears immaterial on the engagement where it was first identified can still be a symptom of a firm-wide QC weakness and a narrower trigger reduces the number of opportunities a firm has to find that pattern before it results in an audit failure.⁴⁵⁶ The commenter also said the economic analysis offers no data or analysis on which deficiencies would no longer require evaluation of whether similar engagement deficiencies exist on a firm's other engagements.⁴⁵⁷ See above for a discussion of the types of deficiencies that would require evaluation under the revised paragraph .68d. The amendment to this paragraph focuses on those engagement deficiencies that most directly affect the sufficiency and appropriateness of evidence obtained on the engagement as well as the ultimate opinion expressed by the firm.

ii. Definition of QC Deficiency

The amendments revise the definition of "QC deficiency" to make clear that, when firms have implemented more than one quality response to address the same quality risk, they can take those other quality responses (*e.g.*, compensating responses) into account when determining whether a QC deficiency exists; if the other quality responses were effective in achieving the relevant objective(s), no QC deficiency would exist.

Potential Benefits

By clarifying the scope of the definition, this amendment would reduce regulatory uncertainty about the existence of, and thus the need to remediate, QC deficiencies in firms' QC systems. One commenter explained that

QC systems often include multiple, interrelated quality responses to address the same quality risk and that evaluating one quality response in isolation could overstate the significance of an issue.⁴⁵⁸ Another commenter said that this amendment would improve the evaluation of QC observations and help focus monitoring and remediation efforts on issues that have the greatest potential impact on audit quality.⁴⁵⁹ The Board agrees with the commenters' assessments of these potential benefits.

Potential Costs

At the same time there would be limited risk to the overall functioning of the QC system because the amendment is only a clarification. One commenter expressed concern that the amendment would give firms or networks additional temptation to identify compensating responses when the linkage is tenuous.⁴⁶⁰ Another commenter said that without a documented, inspectable basis for concluding that a "compensating response" actually operated effectively, the amendment risks becoming a way to explain away deficiencies rather than a genuine test of whether investors remain protected.⁴⁶¹ The Board acknowledges these concerns. However, as described above, while firms are permitted to take other quality responses into account when determining whether a QC deficiency exists, they may do so only if the other quality responses are effective in achieving the relevant objective(s), that is, they would need to be properly designed, implemented, tested, and found to operate effectively.

6. Evaluation of and Reporting on the QC System

i. Evaluation Date

The amendments allow firms to select the date as of which they annually evaluate the effectiveness of their QC system, rather than requiring firms to evaluate as of September 30. In the QC 1000 2024 adopting release, the Board noted that a benefit of a fixed September 30 evaluation date is that the PCAOB would have relatively current information available when it selects firms and engagements for inspection.⁴⁶² However, the Board also noted that the evaluation requirement would be less costly to firms if they were able to choose the date because, for example, they could choose to use the

⁴⁵³ See comment letter from GT.

⁴⁵⁴ See comment letter from Baker Tilly.

⁴⁵⁵ See comment letter from Grosvenor.

⁴⁵⁶ See comment letter from CFA.

⁴⁵⁷ See *id.*

⁴⁵⁸ See comment letter from CAQ.

⁴⁵⁹ See comment letter from GT.

⁴⁶⁰ See comment letter from Grosvenor.

⁴⁶¹ See comment letter from CFA.

⁴⁶² See PCAOB Rel. No. 2024-005, at 371.

⁴⁵¹ See comment letter from BDO.

⁴⁵² See comment letters from CAQ, RSM, and Spitters.

same evaluation date under QC 1000 and ISQM 1.⁴⁶³

Commenters generally supported the proposed amendment to allow firms to select their own annual evaluation date for their QC systems because the prescribed September 30 evaluation date had led to significant challenges.⁴⁶⁴ For example, one commenter said that their network firms generally have a fiscal year end of May 31 and anchor their evaluation dates relative to that fiscal year-end for European Union (“EU”) transparency reporting purposes.⁴⁶⁵ This commenter also said the practical costs of duplicative evaluation dates are significant.⁴⁶⁶ One commenter asserted that many firms struggled with operationalizing a mandated September 30 evaluation date given their respective operations and other quality management processes.⁴⁶⁷ Another commenter said that it is appropriate to permit firms to select the evaluation date based on their individual facts and circumstances and noted that the fixed September 30 date could be detrimental to audit quality for some firms if it requires the diversion of resources away from other activities.⁴⁶⁸

Potential Benefits

The Board believes that the amendment would effectively address the concerns discussed above, generate cost savings, and enhance QC system evaluations. These cost savings would be particularly significant for the firms that have already implemented ISQM 1 or SQMS 1 and are using an evaluation

date under these standards that is different from September 30.⁴⁶⁹ Firms that would have performed two separate evaluations (*e.g.*, to address separate evaluation and reporting requirements) can avoid the recurring costs of doing so, while firms that would have chosen to align their existing QC system evaluation to September 30 can avoid the costs of doing so, to the extent they have not already implemented the September 30 evaluation date.

Commenters generally agreed the amendment would be beneficial.⁴⁷⁰ One commenter said the amendment would reduce costs and support a more integrated evaluation process.⁴⁷¹ Another commenter said the amendment would promote both efficiency and effectiveness.⁴⁷² However, one commenter noted that, even with the amendments, firms’ initial evaluation periods may not be 12 months and therefore may not align with their ISQM 1 evaluation periods.⁴⁷³ Another commenter said many firms have already designed and implemented processes and protocols around a September 30 evaluation date and, as a result, for a firm that chooses an earlier date (*e.g.*, May 31), modification of those processes before the initial effective date may present practical challenges, particularly for smaller firms.⁴⁷⁴ The Board recognizes that the potential benefits may be offset in part by these challenges. Firms that have already implemented a September 30 evaluation date would be free to

avoid costs related to modification of their processes and protocols by retaining the September 30 evaluation date.

To help inform the Board’s consideration of the potential magnitude of concerns about a fixed September 30 evaluation date, staff performed an analysis of firms’ QC system annual evaluation dates disclosed pursuant to EU transparency rules.⁴⁷⁵ Figure 2 shows the distribution of firms’ existing annual evaluation dates based on their recent transparency reports.⁴⁷⁶ Panel A shows the distribution by month while Panel B shows the distribution by month relative to the month of the firm’s fiscal year-end. Panel A shows that 79% (19 ÷ 24) of the firms in the sample use evaluation months other than September (86% (6 ÷ 7) of the annually inspected firms in the sample). Panel B shows that 78% (18 ÷ 23) of the firms in the sample set the month of their evaluation date to be the same as the month of their fiscal year-end (43% (3 ÷ 7) of the annually inspected firms in the sample). Allowing these firms to select the evaluation date that aligns with their individual circumstances (*e.g.*, fiscal year-end, other reporting date(s)) would thus appear to confer substantial, widespread benefits.

⁴⁷⁴ See comment letter from Plante & Moran.

⁴⁷⁵ Regulation (EU) 537/2014, Article 13, requires audit firms that carry out statutory audits of public-interest entities to make public an annual transparency report after the end of each financial year. The transparency report must include, among other information about the audit firm, an indication of when the last quality assurance review was carried out and a statement by the administrative or management body on the effectiveness of the functioning of the internal quality control system.

⁴⁶² See PCAOB Rel. No. 2024–005, at 371.

⁴⁶³ See *id.*

⁴⁶⁴ See, *e.g.*, comment letters from Baker Tilly, BDO, and Deloitte.

⁴⁶⁵ See comment letter from Deloitte.

⁴⁶⁶ See *id.*

⁴⁶⁷ See comment letter from Baker Tilly.

⁴⁶⁸ See comment letter from AAA.

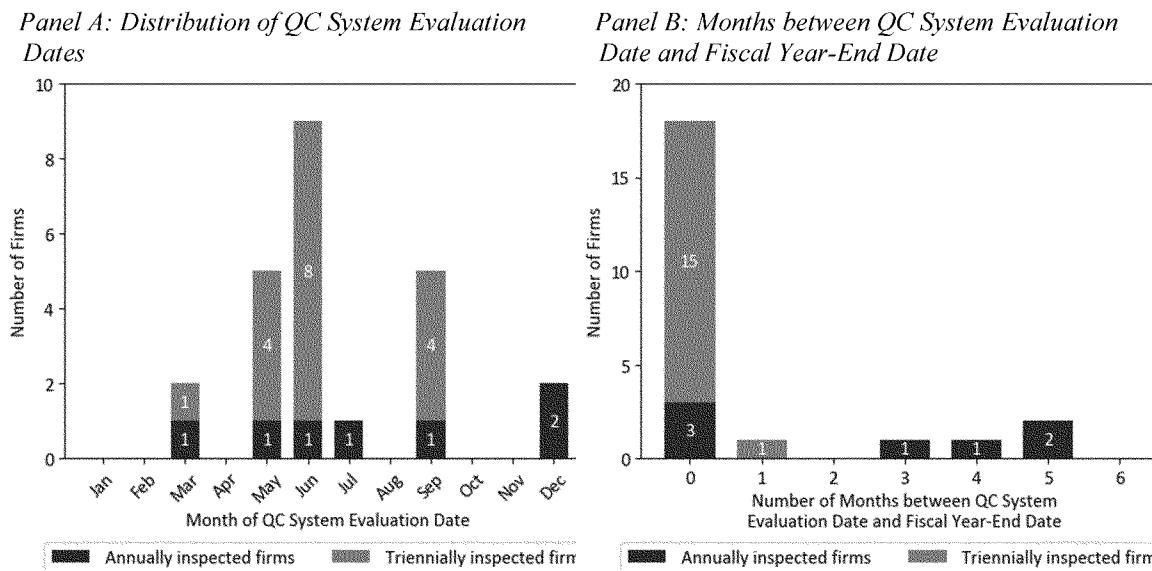
⁴⁶⁹ The Board believes most firms are subject to ISQM 1 or SQMS 1. See footnote 383.

⁴⁷⁰ See, *e.g.*, comment letters from CAQ, Deloitte, EY, and PICPA.

⁴⁷¹ See comment letter from Deloitte.

⁴⁷² See comment letter from KPMG.

⁴⁷³ See comment letter from BDO.

Figure 2. QC System Annual Evaluation Dates

Source: Firm EU transparency reports.

Note: The staff's analysis is based on 24 audit firms that disclosed their QC evaluation dates in their most recent EU transparency reports. Staff could not identify the fiscal year-end for one of these firms and therefore excluded it from Panel B. Registered firms that have issued audit reports for more than 100 issuers during the prior calendar year are subject to annual inspection. Registered firms that have issued audit reports for 100 or fewer issuers during the prior calendar year are required to be inspected at least once every three years. Staff assigned firms as annually or triennially inspected based on their designation as of the time of this analysis.

Potential Costs

The PCAOB could have relatively less current information available when making inspection planning decisions depending on the evaluation dates firms choose. However, the PCAOB may seek to minimize this cost in the future by adjusting its inspection program.

While the Board believes the amendment would generally reduce costs to firms, one commenter said that many firms have already designed and implemented processes, monitoring activities, and documentation protocols around a September 30 evaluation date.⁴⁷⁷ Accordingly, to the extent firms choose to switch their evaluation date, such firms may incur additional one-time costs to design and implement processes, monitoring activities, and documentation protocols around a new evaluation date. However, the Board

expects firms would only incur these costs if they conclude that the new evaluation date provided long-run efficiencies that justified the initial adjustment costs.

ii. Evaluation Conclusions

The amendments revise the QC system evaluation conclusions to align more closely with the conclusions in other quality management standards, while retaining a structured process, including specified factors for consideration, to guide the evaluation.

Several commenters highlighted challenges with the evaluation conclusions as originally adopted.⁴⁷⁸ For example, one commenter said that differences in conclusion types and definitions between QC 1000 and other quality management standards create challenges whereby different conclusions could be reached under the same set of circumstances.⁴⁷⁹ Another commenter said the amendments would appropriately address concerns raised regarding the downstream ramifications of communicating these conclusions to

other participants as well as transparency reporting inconsistencies.⁴⁸⁰

Potential Benefits

The amendments to evaluation conclusions would reduce potential confusion by reducing (but not eliminating) the likelihood that firms reach different conclusions about the effectiveness of their QC system under different QC standards.⁴⁸¹ Even if QC 1000 and ISQM 1 were identical in all respects, differences in firm QC systems would remain, including due to variations in applicable professional and legal requirements, the populations of engagements subject to the QC systems, and the individuals performing such engagements or performing activities within the QC system. As to the QC system evaluation conclusions in particular, conclusions may also differ based on QC 1000's more precisely defined and potentially broader concept of an unremediated QC deficiency (*i.e.*, one for which remedial actions that completely address the QC deficiency have not been fully

⁴⁷⁶ Staff searched for transparency reports or audit quality reports for the 100 largest PCAOB-registered firms by issuer count and identified information regarding QC system evaluations from the reports found. Among the 100 firms, 30 firms published an EU transparency report or audit quality report in recent years, including 24 firms that disclosed QC system evaluation dates. Among the 24 firms, staff identified fiscal year-ends for 23 firms from their transparency reports or other official documents published by the firms.

⁴⁷⁸ See above, for additional discussion of comments on the amendments to the evaluation conclusions.

⁴⁷⁹ See comment letter from Deloitte.

⁴⁸⁰ See comment letter from EY.

⁴⁸¹ The Board believes most firms are subject to ISQM 1 or SQMS 1. See footnote 383.

implemented, tested, and found effective). One commenter agreed that the amendments would address the risk that the disclosure of a firm's evaluation conclusion under other quality management standards and voluntary disclosure of its assessment under QC 1000 could be confusing to stakeholders to the extent the conclusions differed under the same set of circumstances.⁴⁸² Another commenter said the amendments provide more meaningful information to stakeholders regarding the effectiveness of a firm's QC system.⁴⁸³ Another commenter said that it would be uncommon for firms to come to different conclusions under QC 1000 and ISQM 1 under the amendments.⁴⁸⁴

The amendments may also reduce the cost of a QC system evaluation as firms may be able to draw on, to some extent, the evaluation process they perform under ISQM 1 or SQMS 1 (*e.g.*, when assessing the severity and pervasiveness of unremediated QC deficiencies) or perform both evaluations concurrently. One commenter said that removing the concept of a "major QC deficiency" would reduce unnecessary complexity and better align the evaluation conclusions with the reasonable assurance objective of the QC system.⁴⁸⁵ Similarly, other commenters expressed support for the removal of the "major QC deficiency" concept and believe doing so simplifies the evaluation framework and improves alignment with other quality management standards.⁴⁸⁶

Potential Costs

The amendments would likely broaden the conditions under which firms would be able to reach favorable conclusions about the effectiveness of their QC system. For example, firms could report that the system was effective, without an "except for" qualification, when there were unremediated QC deficiencies that, individually or in combination, are not severe. Under QC 1000 as originally adopted and approved, this reporting would have been permitted only if there were no unremediated QC deficiencies at all. The presumptions regarding the existence of a major QC deficiency would also be eliminated, affording firms greater latitude when determining whether the QC system failed to achieve the reasonable assurance objective. In

either of these cases, firms may have less incentive to remediate QC deficiencies because doing so would not impact the overall conclusion they report to the PCAOB.

However, the Board acknowledges that firms would still have significant incentives to remediate QC deficiencies for reasons independent of these amendments. For example, firms would still need to consider a variety of factors when assessing the severity of unremediated QC deficiencies, including the persistence of those QC deficiencies. In addition, allowing QC deficiencies to remain unremediated may lead to pervasive or severe QC deficiencies in the future. Firms would also have an incentive to remediate QC deficiencies because unremediated QC deficiencies would be disclosed to the PCAOB on Form QC. Furthermore, to the extent QC deficiencies are determined to be Part II deficiencies, firms would have an incentive to remediate them.⁴⁸⁷

7. Documentation

The amendments simplify the requirement for retention of QC system documentation and abbreviate the documentation retention period from seven to five years.

Potential Benefits

The amendment to simplify the documentation retention requirement will reduce costs to firms to design, implement, and operate their QC systems. For example, costs associated with developing IT systems and gathering, transferring, and retaining data should be reduced. One commenter said that the amendments would reduce operational complexity, administrative burden, and compliance costs.⁴⁸⁸

⁴⁸⁷ The Board includes deficiencies in Part II of an inspection report if an analysis of the inspection results, including the results of the reviews of individual audits, indicates that the firm's QC system does not provide reasonable assurance that firm personnel will comply with applicable professional standards and requirements. Generally, the report's description of quality control criticisms is based on observations from the Board's inspection procedures. As required under section 104(g)(2) of Sarbanes-Oxley, any criticisms of or potential defects in the QC system of the firm identified through a PCAOB inspection are not included in the public portion of the relevant inspection report when first issued. If a firm does not address to the Board's satisfaction criticisms of, and potential defects in, the firm's QC system within 12 months after the issuance of the PCAOB inspection report, Part II of the report will be issued publicly to include such deficiencies. Outcome-based management of the remediation and evaluation processes in a way that is not compliant with QC 1000 could itself form the basis for a Part II finding, which should provide another constraint on the extent to which judgment can be used to avoid reaching a negative conclusion.

⁴⁸⁸ See comment letter from BDO.

Another commenter said that the amendments would reduce the need for firms to build and maintain centralized archives solely for retention purposes.⁴⁸⁹

The amendment to the documentation retention period will also reduce the costs for firms to design, implement, and operate their QC systems. Many commenters who commented on the supplemental request for comment supported this amendment.⁴⁹⁰ For example, one commenter said the reduction of the document retention period to five years helps alleviate a portion of the cost burden.⁴⁹¹ Another commenter agreed that this amendment would reduce compliance costs for all firms.⁴⁹² The commenter also said that the extent of cost savings would vary by firm size, structure, existing quality management framework, PCAOB engagement profile, and progress toward implementation.⁴⁹³ The Board agrees that the extent of cost savings will likely vary based on these characteristics.

Potential Costs

As the amendment to simplify the documentation retention requirement is intended to address specific potential unintended negative consequences, the Board does not expect it would negatively impact the overall effectiveness of firms' QC systems or the Board's ability to carry out its oversight. For example, the Board believes permitting firms to maintain documentation of their QC system in the documentation's original system of record should not have any impact on the overall effectiveness of their QC systems.

The amendment to shorten the retention period would reduce the length of time information is available to firms and to the PCAOB. This could negatively affect firms' ability to analyze the performance of their QC system over time. However, the salience of QC system documentation likely decreases with time and shortening the period by two years should not have a significant negative impact on firms' ability to monitor their QC systems or impair PCAOB oversight.

⁴⁸⁹ See comment letter from KPMG.

⁴⁹⁰ See Amendments to QC 1000, PCAOB Rule 2203A, and PCAOB Form QC, Documentation, above, for additional discussion of comments related to the proposed amendments to the documentation requirements.

⁴⁹¹ See comment letter from Deloitte.

⁴⁹² See comment letter from CAQ.

⁴⁹³ See *id.*

⁴⁸² See comment letter from Deloitte.

⁴⁸³ See comment letter from BDO.

⁴⁸⁴ See comment letter from EY.

⁴⁸⁵ See comment letter from CAQ.

⁴⁸⁶ See comment letters from BDO, GT, KPMG, PICPA, RSM, and Spitters.

8. Differential Impacts for Firms of Different Sizes

The impact of the amendments on an individual firm will depend on the firm's unique facts and circumstances, including the size of the firm's issuer and broker-dealer assurance practice (e.g., the number of engagements and the amount of auditing required for those engagements, which may vary based on the size or complexity of those engagements). In the QC 1000 2024 adopting release, the Board noted that the direct costs of QC 1000 would likely depend on the size of the firm and the nature of the firm's audit practice.⁴⁹⁴ The Board noted that firms with larger PCAOB audit practices that already have extensive QC systems in place may benefit from economies of scale or scope when incorporating the new requirements into their existing systems, which would decrease the cost of QC 1000 per engagement.⁴⁹⁵ The Board further noted that firms with larger PCAOB audit practices would be able to distribute fixed implementation costs over a larger number of engagements, while firms with smaller practices would distribute fixed implementation costs over a smaller number of engagements.⁴⁹⁶ The Board also noted that, to the extent that QC 1000 improves compliance with applicable professional and legal requirements, the improvement might be greater with respect to broker-dealer engagements and issuer audits performed by firms other than U.S. GNFs because auditing deficiencies appeared to be more prevalent for these firms.⁴⁹⁷ The Board also noted that, under QC 1000, larger firms were subject to additional requirements meaningfully different from ISQM 1 or SQMS 1, which would increase the overall cost of QC 1000 to these firms.⁴⁹⁸

The amendment to rescind the EQCF requirement would result in cost savings only for firms with larger PCAOB audit practices because the EQCF requirement applies solely to those firms that issued audit reports for more than 100 issuers in the prior calendar year. By contrast, the rescission of the QC system design requirement would result in cost savings only for design-only firms. These firms, by definition, do not serve as lead auditors and do not play a substantial role in PCAOB engagements, although some may participate in a more limited capacity. Accordingly, the

two amendments affect different segments of the registered-firm population: the rescission of the EQCF requirement will reduce costs for a relatively small number of firms that audit a substantial portion of the issuer and broker-dealer audit market, while the rescission of the design-only requirement will reduce costs to a much larger population of firms with limited participation in the issuer and broker-dealer audit market.⁴⁹⁹

Other amendments would apply to all firms required to design, implement, and operate a QC 1000-compliant system. For example, the amendments would allow multiple individuals and non-firm personnel to serve in certain QC system governance roles, allow firms to choose their own QC system evaluation date, and narrow the scope of deficiencies for which firms would be required to evaluate whether similar engagement deficiencies exist on other engagements. These amendments would reduce the costs of designing, implementing, and operating a QC system in compliance with QC 1000 for all firms. However, the magnitude of these effects may differ between larger and smaller firms. For example, smaller firms may be more likely to share resources with other firms. The ability to use non-firm personnel to serve in certain QC system governance roles may therefore be more beneficial to these firms.

Some of these cost savings would largely be fixed in nature and would not scale with the firm's size (i.e., the number of engagements or the amount of auditing required for those engagements). For example, the flexibility to choose any QC system evaluation date is largely independent of the number of engagements a firm has. Because smaller firms have fewer engagements to distribute QC system cost savings across, these cost savings could have a more significant impact on smaller firms' profitability and competitiveness. On the other hand, some of the cost savings associated with the amendments would scale with the firm's size and therefore should benefit both smaller firms and larger firms proportionately. For example, the amendment to narrow the scope of deficiencies for which firms would be required to evaluate whether similar engagement deficiencies exist on other

engagements would provide greater cost savings to larger firms in absolute dollars, but because the cost savings would be proportional to the size of the issuer and broker-dealer audit practice, the impact is not expected to be disproportionate.

Some commenters provided perspectives on potential differential impacts for smaller firms.⁵⁰⁰ One commenter said that a firm with a limited pool of PCAOB audit engagements and limited resources would likely find it more challenging than larger firms to have to parse its monitoring and remediation activities for the nuanced distinctions made in paragraph .77(b).⁵⁰¹ The same commenter suggested that the amendments to paragraphs .12 and .15–.17 would be especially helpful to triennial firms.⁵⁰² Similarly, a commenter said the amendments to paragraphs .12 and .15–.17 provide flexibility to smaller firms that may rely on other participants to obtain specialized skills, expertise, and objectivity.⁵⁰³ Another commenter said that smaller firms and firms with limited PCAOB engagements may experience proportionately greater benefits from rescission of the design-only requirement and added flexibility in assigning roles.⁵⁰⁴ The commenter also said larger firms may benefit from the removal of prescriptive requirements that are difficult to operationalize at scale, such as the EQCF requirement, and from clarifications that reduce duplicative or low-value compliance activities.⁵⁰⁵

One commenter noted that the amendments collectively would improve the operability of QC 1000, which is particularly important for firms outside the six largest global networks.⁵⁰⁶ Another commenter said that the amendments would have a beneficial impact on smaller firms.⁵⁰⁷

⁵⁰⁰ See, e.g., comment letters from BDO, CAQ, and Kramer.

⁵⁰¹ See comment letter from Kramer. Paragraph .77(b) will require firms to conclude whether its QC system is effective in achieving the reasonable assurance objective except for unremediated QC deficiencies that have a severe but not pervasive effect on the design, implementation, and operation of the QC system (and do not render the QC system not effective). In evaluating the severity and pervasiveness of unremediated QC deficiencies, paragraph .78 provides eight factors that the firm should consider.

⁵⁰² See comment letter from Kramer.

⁵⁰³ See comment letter from BDO.

⁵⁰⁴ See comment letter from CAQ. Firms with limited (or "any") PCAOB engagements would be subject to QC 1000 in accordance with paragraph .06.

⁵⁰⁵ See comment letter from CAQ.

⁵⁰⁶ See comment letter from Forvis.

⁵⁰⁷ See comment letter from PICPA.

⁴⁹⁴ See PCAOB Rel. No. 2024–005, at 354.

⁴⁹⁵ See *id.* at 354.

⁴⁹⁶ See *id.* at 354.

⁴⁹⁷ See *id.* at 341.

⁴⁹⁸ See *id.* at 355–360.

⁴⁹⁹ In addition to having smaller PCAOB audit practices, design-only firms tend to have fewer accountants. Based on analysis of firms' most recent Form 2 filings and using the design-only and full-implementation firms identified above in Table 1, staff analysis finds that design-only firms have a median (mean) of 30 (125) accountants compared to 123 (783) for full-implementation firms.

The same commenter also explained that the vast majority of smaller firms operate with less complex organizational and governance structures, narrow service offerings and industry concentrations, and fewer personnel dedicated exclusively to quality control, monitoring, and remediation activities.⁵⁰⁸ Another commenter said that smaller firms will proportionally have integrated QC 1000 for much less economic and monetary costs than larger firms with a good-size subset of their operations devoted to compliance with QC 1000.⁵⁰⁹ The Board agrees that, as discussed above, some of the amendments could disproportionately benefit smaller firms.

Alternatives Considered

During the development of the amendments, the Board considered a number of alternative approaches to address the need described above, including those suggested by commenters. This section explains reasonable alternatives related to an earlier design requirement trigger, the EQCF requirement, the QC system evaluation framework, and the documentation requirements.

1. Earlier Design Requirement Trigger

In the supplemental request for comment, the Board considered whether the obligations to design a QC system should be triggered earlier than when a firm becomes subject to applicable professional and legal requirements with respect to an engagement. Commenters responding to possible earlier QC-system design requirement triggers generally did not support this alternative.⁵¹⁰ However, one commenter requested that the Board specify an earlier trigger—for example, when a firm bids for or is appointed to issuer or broker-dealer work—by which time a compliant QC system must be designed and operating, well in advance of the firm commencing that work.⁵¹¹

If an earlier trigger for the design requirement were adopted, registered firms that are not subject to any applicable professional and legal requirements would incur costs to monitor relevant facts and circumstances to determine whether the triggering event has occurred. If the triggering event were to occur, these firms would then incur costs to design their QC systems.⁵¹² To avoid incurring

these costs, some of these firms may choose to withdraw from registration, depriving these firms of the benefit of greater participation in the issuer and broker-dealer audit market (e.g., in cases where lead auditors prefer to use registered firms for less-than-substantial-role work) and reducing the supply of registered firms. A reduction in the supply of registered firms could in turn lead to a reduction in competition. As discussed above, we have observed that some design-only firms have already withdrawn from registration, citing QC 1000 as a reason. At the same time, since these firms are not subject to applicable professional and legal requirements, their design of a QC system under QC 1000 would not immediately benefit any engagements. To better prepare themselves for performing engagements, some of these firms may voluntarily design a QC 1000-compliant system.

These impacts would be offset to the extent firms have already implemented ISQM 1 or SQMS 1 when the event that requires them to design a QC system under QC 1000 occurs.⁵¹³ Furthermore, as a commenter noted, the requirements of QC 1000 related to client acceptance and continuance and AS 2101, *Audit Planning*, currently require a firm to assess its readiness and ability to comply with QC 1000 before undertaking a PCAOB engagement.⁵¹⁴ When a firm becomes subject to applicable professional and legal requirements with respect to an engagement, the firm will become subject to these QC 1000 and AS 2101 requirements, which, if properly implemented, should help firms prepare to perform the engagement. Accordingly, these requirements may offset any potential benefit of an earlier design requirement trigger.

2. EQCF for Largest Firms

The Board considered and solicited feedback on whether the alternative approach of retaining the EQCF requirement only for firms that issued audit reports with respect to more than 500 issuers during the prior calendar year would be appropriate. As discussed above, commenters responding to the question about the alternative approach generally did not support the 500-issuer threshold. However, one commenter expressed concern with rescinding the EQCF requirement and suggested instead retaining the requirement for

firms auditing more than 500 issuers.⁵¹⁵ The commenter asserted that, under this alternative, the defined, independent evaluation of the firm's self-assessment would survive at the five firms where “nearly all U.S. public market capitalization sits.”⁵¹⁶ Using 2025 data, the Board confirmed that the alternative 500-issuer EQCF requirement threshold would apply to five firms, which collectively audited 6,962 issuers, representing approximately 60% of all issuer audits and approximately 81.8% of aggregate issuer market capitalization.⁵¹⁷

If the EQCF requirement were retained and amended using a 500-issuer threshold, the five firms would incur implementation and compliance costs, including costs to identify, hire, retain, and compensate suitable individuals for the EQCF role. As discussed above, while we have limited information to reliably quantify the potential costs of compliance with the requirement, these costs could vary substantially depending on how each firm chooses to implement the requirement. The costs could be particularly high for these largest firms because they tend to have more complex QC systems. The incremental costs may be offset to the extent that these firms could modify their existing external advisory structures to satisfy the EQCF requirement. However, as discussed above, the firms would still incur incremental costs, including the costs of providing liability insurance and committing additional time and resources.

Retaining this requirement only for firms above the 500-issuer threshold would be unlikely to provide the independent evaluation the above commenter expected from the EQCF requirement.⁵¹⁸ As discussed above, the structural features of the EQCF may limit its ability to independently evaluate firms' self-assessment, as an individual serving in an EQCF role would still be selected, compensated and retained by the firm, regardless of firm size. Retaining the EQCF requirement for these five firms could nevertheless provide potential benefits by introducing an external second look

⁵¹⁵ See comment letter from CFA.

⁵¹⁶ See id.

⁵¹⁷ The supplemental request for comment stated that these five firms currently audit companies that make up approximately 98% of U.S. public market capitalization. See PCAOB Rel. No. 2026-002, at 22. That figure, however, encompassed the U.S. public market capitalization of companies audited by those firms' non-U.S. affiliates. This analysis reports the issuer count and market capitalization calculated using the same methodology described above. See footnote 402 for details.

⁵¹⁸ See comment letter from CFA.

⁵⁰⁸ See id.

⁵⁰⁹ See comment letter from Spitters.

⁵¹⁰ See comment letters from AAA, BDO, CAQ, GT, KPMG, and Kramer.

⁵¹¹ See comment letter from CFA.

⁵¹² These impacts may apply as well to firms that register in the future. However, this impact may

depend in part on the PCAOB registration process when these firms register. See above for additional discussion of this issue.

⁵¹³ See above for additional discussion on this point.

⁵¹⁴ See comment letter from CAQ.

at the significant judgments made and related conclusions reached by these firms when evaluating and reporting on the effectiveness of their QC systems. However, the benefits of such an external second look may be limited because the five firms already obtain, through existing advisory structures, some of the external perspectives that the EQCF's second-look review might otherwise provide.

3. QC System Evaluation Framework

In the supplemental request for comment, the Board considered an alternative evaluation framework under which a firm would be required to reach a binary conclusion (*i.e.*, that its QC system is either effective or not effective in achieving the reasonable assurance objective). Under this approach, the evaluation would not include a separate category for the conclusion that the firm's QC system is effective in achieving the reasonable assurance objective except for unremediated QC deficiencies that have a severe but not pervasive effect on the design, implementation, and operation of the QC system. Accordingly, the Board expects in these cases that firms would report that their QC system is effective because the reasonable assurance objective would still be met. One commenter suggested that a binary framework may be appropriate for many triennial firms as it would simplify their evaluations and provide the Board with more useful information.⁵¹⁹ However, many commenters opposed the binary approach for the evaluation framework.⁵²⁰ These commenters generally argued that a binary conclusion would be less informative.⁵²¹ One commenter said that the three-tiered structure conveys meaningfully more information than a binary conclusion would.⁵²²

This alternative could reduce costs to firms as it would likely simplify to some extent the evaluation process. The Board acknowledges that some triennial firms may experience some challenges applying the evaluation criteria. However, many of these triennial firms should have experience with the three-tiered evaluation framework of ISQM 1 or SQMS 1. Furthermore, under this alternative, the Board believes firms would still need a structure for

evaluating identified QC deficiencies and determining whether those deficiencies result in a conclusion that the QC system is not effective. For this reason, this alternative approach may not significantly reduce any potential challenges that may be faced by triennial firms. While unremediated QC deficiencies would still be reported to the Board under this alternative approach, the Board believes that a binary conclusion would result in less informative reporting to the Board. More specifically, if a firm's QC system is effective in achieving the reasonable assurance objective except for unremediated QC deficiencies that have a severe but not pervasive effect on the design, implementation, and operation of the QC system and do not render the QC system not effective, the firm would not be required to report this conclusion to the Board on Form QC. Furthermore, the binary conclusion framework may incentivize firms with severe but not pervasive unremediated QC deficiencies not to remediate their QC deficiencies since doing so would not change the conclusion they report to the PCAOB.

4. Documentation Requirements

Several commenters requested that the Board consider a shorter documentation retention period.⁵²³ Some commenters suggested that a shorter documentation retention period would reduce costs.⁵²⁴ Two commenters noted that a three-year retention period may suffice to accomplish the Board's oversight objectives.⁵²⁵ Another commenter said that the supplemental request for comment did not provide empirical evidence demonstrating that documentation older than several years is routinely relied upon in inspections or enforcement matters, nor did it explain why a five-year period, rather than a shorter period, is required to protect investors.⁵²⁶ Two commenters called for an approach that would scale the documentation retention period according to facts and circumstances.⁵²⁷ One commenter called for a more flexible approach to the documentation retention period.⁵²⁸ One commenter said that it could be argued that the documentation retention period should be either (1) no shorter than seven years so that any engagement deficiencies evidenced by the audit documentation

could be understood in the context of the QC system policies and procedures at that time or (2) the shortest time possible to meet regulator needs which is likely less than five years.⁵²⁹ Another commenter said that a five-year retention period could continue to pose significant challenges and unintended costs to firms.⁵³⁰

The Board recognizes that a shorter retention period or more flexible documentation requirements could reduce costs. However, the Board believes a five-year documentation period is necessary for PCAOB oversight. For example, enforcement staff may investigate misconduct occurring over several years, and the staff generally reviews relevant QC documentation as part of their investigation. Staff analysis of PCAOB enforcement orders published since 2020 indicates that 45% of the orders explicitly cite PCAOB QC standards.⁵³¹

Special Considerations for Audits of Emerging Growth Companies

Pursuant to section 104 of the Jumpstart Our Business Startups ("JOBS") Act, any additional rules adopted by the Board subsequent to April 5, 2012, generally do not apply to the audits of EGCs, as defined in section 3(a)(80) of the Exchange Act, unless the SEC "determines that the application of such additional requirements is necessary or appropriate in the public interest, after considering the protection of investors and whether the action will promote efficiency, competition, and capital formation."⁵³²

To inform consideration of the application of the amendments to audits of EGCs, staff performed an analysis of EGC audits as of November 15, 2024.⁵³³

⁵²⁹ See comment letter from Grosvenor.

⁵³⁰ See comment letter from Plante & Moran.

⁵³¹ Staff's analysis uses data from 210 PCAOB settled disciplinary orders published between January 1, 2020, and December 31, 2025. PCAOB enforcement actions are available for download from the Board's website, available at <https://pcaobus.org/oversight/enforcement/enforcement-actions>.

⁵³² See Pub. L. 112–106 (Apr. 5, 2012), Section 103(a)(3)(C) of Sarbanes-Oxley, 15 U.S.C. 7213(a)(3)(C), as added by section 104 of the JOBS Act, also provides that any rules of the Board requiring (1) mandatory audit firm rotation or (2) a supplement to the auditor's report in which the auditor would be required to provide additional information about the audit and the financial statements of the issuer (auditor discussion and analysis) shall not apply to an audit of an EGC. None of the rules and amendments would fall within either of these two categories.

⁵³³ The Board is providing this analysis of the impact on EGCs to assist the SEC in considering this issue to the extent necessary. The analysis reported in this section follows the same methodology used in the EGC white paper published May 23, 2025, which is available on the

⁵¹⁹ See comment letter from Kramer.

⁵²⁰ See comment letters from AAA, Baker Tilly, BDO, CAQ, CBIZ, GT, ICGN, KPMG, MIAG, PICPA, PwC, and RSM.

⁵²¹ See comment letters from BDO, CAQ, CBIZ, GT, KPMG, and PICPA. See, above for additional discussion of the comments related to this alternative.

⁵²² See comment letter from CFA.

⁵²³ See, *e.g.*, comment letters from Baker Tilly, CAQ, Deloitte, and GT.

⁵²⁴ See comment letters from Baker Tilly and Deloitte.

⁵²⁵ See comment letters from Baker Tilly and CAQ.

⁵²⁶ See comment letter from PICPA.

⁵²⁷ See comment letters from BDO and Forvis.

⁵²⁸ See comment letter from GT.

The data remain generally consistent with the data outlined in the EGC white paper published May 23, 2025, which analyzed data as of November 15, 2023. PCAOB staff identified 2,379 EGCs.⁵³⁴ Of those 2,379, the 1,252 EGCs with common equity securities listed on a U.S. national securities exchange had a total U.S. market capitalization of \$466 billion. These EGCs represented approximately 23% of all exchange-listed companies yet just 0.6% of U.S. total market capitalization. Forty-one percent of EGCs reported no revenue or self-identified as shell companies.

Of the 245 PCAOB-registered firms that audited EGCs:

- 203 firms (or 83%) performed audits for both EGC and non-EGC issuers. Approximately 97% of EGCs were audited by these 203 firms.
- 119 firms (or 49%) were headquartered in the U.S. Approximately 77% of EGCs were audited by these 119 firms.
- None were design-only firms, but design-only firms provided at least 5% of total audit hours on nine EGC audit engagements.⁵³⁵
- 16 firms (or 7%) have withdrawn from PCAOB registration since November 15, 2024. None of these firms referenced QC 1000 as a reason for withdrawal.
- 14 firms (or 6%) issued audit reports with respect to more than 100 issuers. Forty-two percent of EGCs were audited by these 14 firms.

Any reduction in audit quality arising from the amendments could reduce financial reporting quality, which could result in less efficient capital allocation, higher cost of capital, and less capital formation. This effect could be particularly pronounced for EGCs. EGCs tend to be smaller and have a shorter

PCAOB's website at <https://pcaobus.org/resources/other-research-projects>.

⁵³⁴ The methodology for capturing the EGC population covers only companies that self-identified as an EGC by selecting the applicable check box on an Exchange Act annual report or registration statement (Forms 10-K, 20-F, 40-F, 10-12B, 10-12G), or on a Securities Act registration statement (Forms F-1, F-4, S-1, S-4, S-11) filed with the SEC during the 18-month period ending November 15, 2024 (the measurement period). In instances where a company had more than one such filing during the measurement period, the most recent annual report was selected. If no annual report was filed during the measurement period, the most recent registration statement was selected. Staff removed companies whose annual reports or registration statements did not include an audit report signed by a registered firm in the measurement period (e.g., companies whose filings included unaudited financial statements or audit reports signed more than 18 months before the measurement date). Of the 2,379 EGCs the Board identified, 1,820 (1,721) filed an annual report during the 18-month (12-month) period ending November 15, 2025.

⁵³⁵ Source: Form AP filings.

SEC financial reporting history than the broader population of public companies. Academic research suggests that, for several reasons, smaller public companies tend to exhibit greater information asymmetry between management and investors.⁵³⁶ One commenter noted that EGCs “may rely especially heavily” on the external audit given greater information asymmetry and less market coverage.⁵³⁷ Accordingly, the Board believes that EGCs are likely to exhibit greater information asymmetry between management and investors and hence the importance of the external audit to investors in enhancing the credibility of EGC financial reporting may be more pronounced. However, as the Board believes the amendments would have minimal impact on audit quality, any impact on EGCs' financial reporting quality should also be minimal.

The amendments would also likely decrease costs incurred by firms to design, implement, and operate their QC systems. Firms could pass part of these cost savings down to their clients, including EGCs, in the form of lower audit fees. EGCs are disproportionately audited by smaller firms. Approximately 42% (993 ÷ 2,379) of EGCs were audited by firms that had over 100 issuer clients while approximately 12% (276 ÷ 2,379) were audited by firms that had 10 or fewer issuer clients. By contrast, approximately 73% (6,824 ÷ 9,294) of non-EGCs were audited by firms that had over 100 issuer clients while approximately 9% (797 ÷ 9,294) were audited by firms that had 10 or fewer issuer clients. However, because it is unclear whether the amendments would disproportionately impact smaller firms, it is also unclear whether EGCs would be disproportionately impacted by cost savings passthrough.

Reduced audit fees could increase capital formation by decreasing the overall regulatory burdens of being a public company (e.g., accounting fees paid during IPO and for annual SEC reporting).⁵³⁸ Reduced audit fees could also lessen a competitive disadvantage

⁵³⁶ See, e.g., Raymond Chiang and P. C. Venkatesh, *Insider Holdings and Perceptions of Information Asymmetry: A Note*, 43 *Journal of Finance* 1041 (1988); Ravi Bhushan, *Firm Characteristics and Analyst Following*, 11 *Journal of Accounting and Economics* 255 (1989).

⁵³⁷ See comment letter from MIAG.

⁵³⁸ One commenter said connecting the amendments to capital formation requires evidence that cost savings retained by firms equates to investor benefits. See comment letter from CFA. The Board acknowledges that the degree to which firms pass on cost reductions arising from the amendments to clients is unclear; the Board is not aware of information that would allow the Board to reliably estimate this.

for EGCs in their respective product markets to the extent EGCs compete with companies that are not audited by PCAOB-registered firms. This could increase competition in product markets where EGCs have a less than dominant market share, which is likely the case as EGCs tend to be newer companies. However, the Board believes any impacts on competition in EGC product markets would likely be modest because audit fees reflect a small percentage—0.6%—of exchange-listed EGCs' revenues.⁵³⁹

In general, any new PCAOB standards and amendments to existing standards determined not to apply to the audits of EGCs would require auditors to design and implement differing requirements within their methodologies or policies and procedures with respect to audits of EGCs and non-EGCs, which would create the potential for confusion. This may not be practical in the context of the amendments; while some of the amendments may enable different approaches for audits of EGCs compared to audits of other companies (e.g., evaluating whether similar engagement deficiencies exist), others are necessarily firm-wide and cannot easily be differentiated for different types of audits (rescinding the EQCF requirement and permitting selection of the evaluation date). Even where differentiation is possible, maintaining separate QC system components for EGC and non-EGC audits and separate methodologies may add cost or lead to confusion, and could run counter to the objectives of the QC system. These methodology and QC system differentiation costs would affect at least the 203 firms that audit both EGCs and non-EGCs and that, collectively, audit approximately 97% of EGCs.

The supplemental request for comment sought comment on the applicability of the proposed amendments to audits of EGCs. Commenters generally did not provide views on the impacts of the amendments to the audits of EGCs or whether the amendments should apply to the audits of EGCs.

Accordingly, and for the reasons explained above, the Board will request that the Commission determine that, to the extent necessary, it is necessary or appropriate in the public interest, after considering the protection of investors and whether the action will promote efficiency, competition, and capital formation, to apply the amendments to audits of EGCs.

⁵³⁹ By contrast, audit fees reflect 0.1% of exchange-listed non-EGCs' revenues.

III. Date of Effectiveness of the Proposed Rules 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 (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Board consents, the Commission will:

(A) By order approve or disapprove such proposed rules; or

(B) Institute proceedings to determine whether the proposed rules 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 rules are consistent with the requirements of

Title I of the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/pcaob>); or
- Send an email to rule-comments@sec.gov. Please include File Number PCAOB-2026-01 on the subject line.

Paper Comments

- Send paper comments in triplicate to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number PCAOB-2026-01. 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 of submission. The

Commission will post all comments on the Commission's website (<https://www.sec.gov/rules/pcaob>). Copies of such filing will also be available for inspection and copying at the principal office of the PCAOB. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. The Commission may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to File Number PCAOB-2026-01 and should be submitted on or before October 9, 2026.

For the Commission, by the Office of the Chief Accountant.

Vanessa A. Countryman,
Secretary.

[FR Doc. 2026-19148 Filed 9-17-26; 8:45 am]

BILLING CODE 8011-01-P



FEDERAL REGISTER

Vol. 91

Friday,

No. 180

September 18, 2026

Part IV

Office of Management and Budget

Office of Federal Procurement Policy

Department of Defense

General Services Administration

National Aeronautics and Space Administration

48 CFR Parts 8, 12, 13, et al.

Federal Acquisition Regulation: Revolutionary FAR Overhaul Parts 8, 12, 13, 15, 38, 44, and 51; Proposed Rule

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 8, 12, 13, 15, 38, 44, 51, and 52

[FAR Case 2026–003, Docket No. FAR–2026–0003, Sequence No. 1]

RIN 9000–AO88

Federal Acquisition Regulation: Revolutionary FAR Overhaul Parts 8, 12, 13, 15, 38, 44, and 51

AGENCY: Office of Federal Procurement Policy (OFPP), Office of Management and Budget (OMB); Department of Defense (DoD); General Services Administration (GSA); and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: OFPP, DoD, GSA, and NASA (collectively referred to as the Federal Acquisition Regulatory Council or FAR Council) are proposing to amend the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.) 14275, Restoring Common Sense to Federal Procurement. The E.O. directs the elimination of excessive acquisition regulations to stop the inefficient use of American taxpayer dollars. The FAR Council is issuing twelve proposed rules that collectively will streamline the FAR in its entirety. This rule proposes revisions to FAR parts 8, 12, 13, 15, 38, 44, 51, and 52.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before October 19, 2026, to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2026–003 to the Federal eRulemaking portal at <https://www.regulations.gov>. Follow the instructions for sending comments.

Instructions: Please submit comments only and cite “FAR Case 2026–003” in all correspondence related to this case. Include your name, company name (if any), and “FAR Case 2026–003” on any attached document. Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal and/or business

confidential information provided. Public comments may be submitted as an individual, as an organization, or anonymously (see frequently asked questions at <https://www.regulations.gov/faq>). To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

Docket: For access to the docket to read background documents or comments received, go to <https://www.regulations.gov/FAR-2026-0003>.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact FARpolicy@gsa.gov or call 202–969–4075 and cite “FAR Case 2026–003.” For information pertaining to status, publication schedules, or alternate instructions for submitting comments if <https://www.regulations.gov> cannot be used, contact the Regulatory Secretariat Division at 202–501–4755 or GSARegSec@gsa.gov. Please cite “FAR Case 2026–003.”

SUPPLEMENTARY INFORMATION:

I. Background

E.O. 14275, Restoring Common Sense to Federal Procurement (April 15, 2025), resets the foundation for Federal buying by requiring the FAR Council to produce a streamlined FAR that is simpler, clearer, and structured for speed. According to the E.O., the FAR has evolved from its original purpose (*i.e.*, to establish uniform procedures across executive departments and agencies), into an excessive and overcomplicated regulatory framework and bureaucracy. While meant to “deliver, on a timely basis, the best value product or service to the customer, while maintaining the public’s trust and fulfilling public policy objectives,” the FAR has become an expensive barrier to achieving those objectives. As a result, the E.O. directed the FAR Council and OMB to create an agile, effective, and efficient regulation that contains only provisions required by statute or essential to sound procurement.

To implement E.O. 14275, OMB issued Memorandum M–25–26, Overhauling the Federal Acquisition Regulation, which announced the “Revolutionary FAR Overhaul” (RFO) and created a roadmap for producing a simpler regulation aligned to statute, rewritten in plain language, and including only those nonstatutory requirements that are necessary to conducting sound procurement. The memorandum described a new streamlined vision for the FAR, to be maintained alongside nonregulatory

governmentwide guidance to provide a common-sense authoritative foundation for nimble response and delivery of mission capability.

This new vision represents a paradigm shift where over-engineered regulations designed for paperwork and compliance are replaced with streamlined regulations focused on core stewardship principles and nonregulatory guidance focused that will be used in concert with the streamlined FAR focused on proven buying strategies, critical thinking, market awareness (including to expand awareness of goods, products, and materials offered in the United States), and risk literacy to enhance workforce problem-solving. The significant reduction of unnecessary mandates is intended to clarify and reinforce the contracting officer’s discretion to determine the best way to apply policies and practices. The newly established, nonregulatory guidance, which has been inspired by acquisition innovation advocates, category managers, other experienced practitioners, and many years of feedback from the contractor community—is expected to facilitate contracting officers’ use of their discretion more efficiently and effectively to make smarter buying decisions.

OMB Memorandum M–25–26 also directed the FAR Council to complete the regulatory overhaul in two phases, each with robust public input. The FAR Council conducted its phase one effort in fiscal year 2025 by issuing model class deviations to replace each part in the FAR until such time as formal rulemaking occurred. This proposed rule is one of a series that constitute the FAR Council’s phase two effort to obtain public comment through formal rulemaking.

II. Discussion and Analysis

A summary of proposed changes to existing FAR parts 8, 12, 13, 15, 38, 44, and 51, and their corresponding provisions and clauses in part 52 follows:

A. General

1. General RFO Updates

This proposed rule generally reorganizes the FAR parts into phases of acquisition and simplifies the text into plain language, where possible. The plain language efforts include changes to active voice, edits to improve readability, and reorganization to present information more logically. None of the plain language edits are intended to change existing FAR requirements. The rewriting of the

entire FAR also required edits to harmonize the changes being proposed such as updating the cross-references. This aligns with the Federal plain language guidelines as directed by the Plain Writing Act of 2010 (Pub. L. 111–274; 5 U.S.C. 301 note).

2. *Standardization of prescriptions.*

This rule proposes revisions to standardize prescription language for provisions and clauses. These changes are intended to provide better clarity around the applicability of provisions and clauses such as whether they apply to commercial products and services.

3. *Use of “must” instead of “shall”.*

Additional revisions are being proposed throughout the FAR text and FAR provisions and clauses to replace the use of the term “shall” with “must” or “will,” as appropriate, to impose requirements.

4. *Non-statutory requirements.*

Section 4 of the E.O. required amendments to the FAR to ensure it contains only provisions that are required by statute or that are otherwise necessary to support simplicity and usability, strengthen the efficacy of the procurement system, or protect economic or national security. The FAR Council reviewed all non-statutory requirements to determine if they are still relevant and essential to sound procurement in today’s contracting environment based on the criteria from section 4 of the E.O. The proposed rule retains non-statutory requirements that further one or more of the elements of sound procurements, including those requirements that serve as guardrails to protecting taxpayer interests and promote taxpayer confidence in the procurement system. Non-statutory requirements that were beneficial but not essential were retained in the non-regulatory guidance documents. Other non-statutory requirements that did not meet these standards, were removed. The Council considered the extent to which regulation is the most efficient means for capturing the benefit of the policy. For example, most “how to” requirements were found to be more appropriately suited for non-regulatory coverage which better enables a contracting officer to use discretion in determining the application of a strategy to a given situation and limits the risk of overapplication, which can create wasteful burden on the contracting parties.

As part of the RFO, the FAR Council has created a number of non-regulatory resources, including the FAR Companion, which provides insight from experienced practitioners across the government on using more streamlined practices and processes.

The migration of significant coverage to non-regulatory guidance is intended to ensure that the benefits of the policy are not outweighed by the compliance burden of a more rigidly written regulation that is prone to application in an overly broad manner. This approach was explained to the public in a set of “frequently asked questions” that were posted on the Revolutionary FAR Overhaul homepage shortly after the initiative was launched.

B. *Summary of Changes to FAR Part 8*

Part 8 is being revised to simplify and streamline the policies and procedures used in the FAR to acquire supplies and services from required sources. The revisions would clarify the requirements for the use of required sources; simplify the process for using Government sources of products and services; reinforce the use of existing contracts to meet agency requirements, when possible; and broaden the policy permitting contractor use of Government supply sources. Specifically, the rule proposes to revise part 8, by:

1. *Clarifying the requirements for the use of required sources.*

The proposed rule would reorganize and simplify the existing text on required sources of supply and their priorities for use in acquisition. Specifically, the proposed rule would group the existing text into a more direct format that is easier to read and would allow contracting officers to quickly and easily identify the required sources for their specific acquisition, in the order of priority in which the sources must be considered to comply with statute.

2. *Simplifying the process for using Government sources.*

Currently, part 8 contains requirements, guidance, and procedures for acquiring and using excess property and ordering products and/or services from Federal Prison Industries (FPI), AbilityOne participating nonprofit agencies, the Federal Supply Schedule (FSS), and the Government Publishing Office. Each of these sources oversees its own program and develops the rules and procedures for ordering from them.

This proposed rule would remove duplicative guidance in the FAR and instead would have agencies rely on the rules and procedures of each source, instead. This change would simplify the acquisition process for agencies when ordering from these sources and provide those sources with the flexibility to manage how agencies use their programs.

3. *Reinforcing the use of existing contracts.*

Consistent with the goals of E.O. 14240, Eliminating Waste and Saving Taxpayer Dollars by Consolidating Procurement, the proposed rule would support agency efforts to leverage the Government’s buying power for better deals by requiring agencies to use and consider existing contracts or blanket purchase agreements (BPA) awarded for Governmentwide use before establishing a new contract for those products or services. Specifically, when a commercial product or commercial service meets an agency’s need and is available on a contract or BPA awarded for Governmentwide use:

- Agencies would use the existing vehicle if it is designated as a “required use” contract or BPA by the Office of Federal Procurement Policy (OFPP);
- If it isn’t a suitable “required use” vehicle, agencies would consider using the existing contract or BPA if it is designated as a “best in class” contract by OFPP; and
- If it isn’t a suitable “required use” or “best in class” vehicle, agencies would consider using the existing contract or BPA before soliciting for and awarding a new contract vehicle.

OFPP will establish the criteria for what constitutes a “required use” contract and identify those specific vehicles for agencies and industry. These changes would increase efficiency in the acquisition process by reducing the need to create new contract vehicles for common commercial products and services, while reducing administrative costs for agencies and industry.

4. *Broadening the policy on contractor use of Government supply sources and movement of FAR part 51 to part 8.*

Currently, FAR part 51, Use of Government Sources by Contractors, contains the requirements and policies for agencies to follow when authorizing or requiring contractors to use Government supply sources in the performance of a contract. Specifically, part 51:

- Requires agencies to authorize contractors purchasing supply items for Government use that are on the Procurement List maintained by the Committee to purchase those items from DLA, GSA, or VA (or from the appropriate central nonprofit agency, when not available from DLA, GSA, or VA);
- Permits agencies to authorize contractors to obtain supplies and services required in the performance of a Government contract from Government supply sources. However, in order to use these sources, the contractor must be performing under: a cost reimbursement contract; another

negotiated contract type when the agency determines that a substantial dollar portion of the contractor's Government contracts are cost-reimbursable in nature; or a contract awarded to an AbilityOne participating nonprofit agency meeting certain criteria; and

- Permits agencies to authorize contractors performing under cost-reimbursement contracts to obtain vehicles and related services through GSA Fleet.

The proposed rule would simplify and move these policies from part 51 to part 8 to consolidate requirements for the use of Government supply sources by contractors and the Government into a single part in the FAR. With the movement of the requirements and policies of part 51 to part 8, the rule proposes to eliminate part 51, in its entirety, from the FAR and renumber FAR clause 52.251–1, Government Supply Sources, and renumber and rename FAR clause 52.251–2, Interagency Fleet Management System Vehicles and Related Services.

The proposed rule would also broaden an agency's ability to authorize a contractor's use of Government supply sources to other than cost reimbursement-type contracts. The current text limits the use of Government supply sources to predominately cost-reimbursement contracts as a way to control cost and risk to the Government by making these lower cost sources, which would be used by the Government if performing the work on its own, available to contractors. The rule proposes to permit agencies to authorize contractors to use these sources under any contract awarded using other than sealed bidding procedures. This change would allow Government and industry to benefit from the standardized pricing of readily-available and contractually-compliant products from Government sources of supply under more contracts, which could facilitate a more simplified and streamlined acquisition process at a lower contract cost.

5. Other changes.

Subpart 8.11 currently provides policy and procedures for leasing non-tactical motor vehicles from commercial concerns to ensure those vehicles comply with Federal and State motor vehicle safety requirements. This text is no longer necessary in the FAR. The terms and conditions included in the subpart are addressed by GSA Fleet in its policies, procedures, and contract terms and conditions. As a result, subpart 8.11 would be no longer necessary and the proposed rule would

remove the subpart in its entirety from the FAR.

C. Summary of Changes to FAR Part 12

The FAR Council is proposing to fundamentally re-engineer the structure, scope, and mechanics of FAR part 12 to be user-centric and make Federal buying faster, simpler, and more aligned with commercial practices. The following is a summary of the proposed changes to FAR part 12:

1. Focus on statutory requirements and sound procurement.

In accordance with E.O. 14275, the proposed rule seeks to refocus the content of the part on statutory requirements for procuring commercial products, including commercially available off-the-shelf items, and commercial services in accordance with 41 U.S.C. 1906, 1907, and 3307 and 10 U.S.C. 3451–3453. The mandate to procure commercial products and commercial services has always existed in FAR part 12; however, the proposed revisions to the FAR part would refocus buyers on this primary purpose. FAR 12.101, for example, would be retitled “Requirements” and would phrase the statutory mandate as directives rather than just agency policy. In doing so, the contracting workforce would have a better understanding of their authority and responsibilities.

The majority of the general guidance, examples, and best practices would be removed from this part of the FAR, because this content can be better addressed in nonregulatory sources, such as the new FAR practitioner guides and workforce training. The non-statutory content that is retained is designed to ensure sound procurement, better align Federal commercial buying with customary commercial practice, and encourage agencies to innovate and find efficiencies when buying commercial products and commercial services. Examples of non-statutory content proposed to be retained include:

- FAR sections 12.106 and 12.107, which continue to require technical data rights and commercial computer software, to ensure agencies are acquiring only the technical data, data rights, and licenses customarily provided to the public.
- FAR 12.201–1(d), which encourages agencies to use additional innovative approaches to the maximum extent practicable when soliciting quotations and issuing purchase orders.
- FAR 12.203(a), which emphasizes that evaluation factors generally need not be more detailed than technical, price, and past performance.
- FAR 12.203(c)(1), which requires the contracting officers to exercise good

business judgment in deciding whether to accept late submissions from offerors.

- FAR 12.304, which continues to direct contracting officers to use the streamlined procedures for termination in FAR provision 52.212–4, Terms and Conditions-Commercial Products and Commercial Services, and not the more complex procedures in FAR part 49.

The cumulative result of these proposed changes to the scope of FAR part 12 will ensure agencies buy commercial to the maximum extent practicable, while enabling contracting officers to deliver on their missions more efficiently and effectively.

2. Process-oriented subparts.

First, the FAR part would be reorganized into process-oriented subparts by phase of the acquisition. FAR subpart 12.1, Presolicitation, addresses policies and procedures to be considered during acquisition planning and prior to soliciting offers. FAR subpart 12.2, Solicitation, Evaluation, and Award, addresses the procedures for preparing a solicitation, publicizing the requirement, evaluating offers, and preparing and documenting the award. FAR subpart 12.3, Postaward, addresses the policies for notifying offerors and the public of the award, as well as policies and procedures for handling purchase order cancellations and commercial contract terminations. There would also be a cross-reference to commercial subcontract requirements that should be considered during administration of the contract. This structural change will enable Federal buyers to easily access information relevant to the phase in which they are operating.

3. Procuring from required sources.

As discussed in section II.B. of this preamble, FAR part 8 would address requirements for agencies to procure from certain mandatory sources and to use and consider existing contracts or BPAs awarded for Governmentwide use before establishing a new contract for those products or services, in accordance with Executive Order 14275. The new section on applicability at FAR 12.200 reminds the contracting officer that they must first seek to procure commercial products and commercial services from the existing required sources identified in FAR part 8, before using the procedures in FAR subpart 12.2 for soliciting, evaluating, and awarding commercial contracts.

4. Simplified procedures and micro-purchases.

This proposed rule would consolidate procedures that are specific to or primarily utilized when procuring commercial products and commercial services, including procedures for:

publicizing procurements, simplified acquisition procedures, and procedures for micropurchases. This would replace the current FAR structure that forces commercial buyers to reconcile the procedures in FAR parts 5 and 13 with the procedures in FAR part 12.

Specifically, this proposed rule would:

- Transfer the requirements associated with publicizing commercial acquisitions from FAR part 5 to FAR subpart 12.2;
- Transfer from FAR part 13 and streamline at FAR 12.201–1 the procedures for acquiring supplies and services valued at or below the simplified acquisition threshold, and throughout FAR part 12, differentiate these procedures from the more burdensome procedures in FAR parts 14 and 15; and
- Transfer from FAR subpart 13.2 and streamline at FAR subpart 12.4 the procedures for micro-purchases.

By transferring these procedures to FAR part 12, the FAR Council is moving toward “one-stop shop” on commercial acquisitions for Federal buyers, particularly those contracting officers primarily focused on smaller dollar value procurements, the majority of which are for commercial products and commercial services.

5. Higher threshold for simplified procedures.

The proposed rule would also transfer the statutory authority to use simplified procedures for acquisitions of commercial products and commercial services valued up to \$9 million (or \$15 million when the supplies and services are to be used in certain specified emergencies or major disasters) from FAR subpart 13.5 to FAR part 12. In lieu of a standalone authority section, this proposed rule will embed the higher thresholds throughout the FAR part and direct contracting officers to use simplified procedures for acquisitions at or below these values (see proposed FAR 12.001(c), 12.102, 12.201–1). These proposed changes make clear to contracting officers that they should not be using the burdensome procedures associated with conducting negotiations or sealed bidding using the procedures in FAR parts 15 and 14, respectively, and ensure that commercial acquisitions in this dollar range are solicited, offered, evaluated, and awarded in a simplified manner that maximizes efficiency and economy and minimizes burden and administrative costs for both the Government and industry.

6. Solicitation and contract forms and formats.

Proposed section FAR 12.202, Publicizing, addresses the acceptable forms and format for solicitations for

commercial products and commercial services. FAR 12.202(a) would maintain the preference for use of the Standard Form (SF) 1449, Solicitation/Contract/Order for Commercial Products and Commercial Services. However, if the SF 1449 is inappropriate for a certain circumstance, the contracting officer may choose to use a form or format prescribed in parts 14, 15, and 36, as appropriate. This may be necessary, for instance, if the form and format in those parts would better outline and communicate the requirements of the solicitation to the public. Proposed FAR 12.204(c) again includes the preference for the SF 1449, but authorized use of the forms in other parts.

7. Publicizing the solicitation.

The requirements for publicizing presolicitation notices and solicitations for commercial acquisitions would be consolidated in FAR 12.202. In general, as proposed at FAR 12.202(b), contracting officers would be required to post a “Combined Synopsis/Solicitation” in the Governmentwide point of entry (GPE) at <https://www.sam.gov> that includes the following:

- Basic summary information about the acquisition, including the type of solicitation, a brief description of the requirement, small business set-aside information, and a statement about any Defense Priorities and Allocations System assigned ratings, if applicable.
- Either the solicitation document itself or access to the solicitation document (*e.g.*, to allow agencies to provide a link to a solicitation document posted on an external agency website).

Proposed FAR 12.202(c) provides exceptions to posting a combined synopsis/solicitation in the GPE, which include the following:

- For acquisitions valued at or below the SAT, the contracting officer may choose to post only a presolicitation notice, as described in 5.101(c), and solicit quotations from at least three sources, which should include two new sources, whenever practicable.
- Only a presolicitation notice would be required when conducting a sole source acquisition or obtaining other than full and open competition on the basis that there is only one responsible source or for national security reasons. However, posting a presolicitation notice is not required if doing so creates national security risks.
- Neither a combined synopsis/solicitation, nor a presolicitation notice would be required if the acquisition meets one of the other exemptions to posting a presolicitation notice in FAR part 5.

Proposed FAR 12.202(d) includes a table to illustrate the minimum publication timeframes for combined synopses/solicitations and presolicitation notices, which are derived from statute or trade agreements.

8. Solicitation provisions and contract clauses.

Requirements for solicitation provisions and contract clauses applicable to commercial acquisitions would be consolidated at proposed FAR section 12.205. This proposed rule would maintain three of the five existing provisions and clauses prescribed in FAR part 12 for the acquisition of commercial products and commercial services: FAR 52.212–1, Instructions to Offerors-Commercial Products and Commercial Services; FAR 52.212–2, Evaluation-Commercial Products and Commercial Services; and FAR 52.212–4, Contract Terms and Conditions-Commercial Products and Commercial Services. However, there are proposed edits to FAR 52.212–1 and 52.212–4 to streamline the existing instructions, remove unnecessary content, and make other plain language revisions. FAR 12.205 would also authorize certain tailoring of the provision and the clause to some extent.

The provision at FAR 52.212–3, Offeror Representations and Certifications—Commercial Products and Commercial Services, and clause at FAR 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Products and Commercial Services, commonly referred to as the “omnibus” provision or clause are proposed for removal. This provision and clause provide incomplete lists of provisions and clauses that could apply to commercial acquisitions. The contracting officer (or an agency clause logic system) would rely on these updated prescriptions when deciding which provisions and clauses may be included in an acquisition of commercial products or commercial services. This proposed change replaces the direction at FAR 12.301 for contracting officers to make their own determination regarding whether a provision or clause is necessary and consistent with customary commercial practice. FAR 12.301(d) currently gives the contracting officer broad discretion to incorporate provisions and clauses not listed in that section or the omnibus provision or clause. In contrast, if this proposed rule is finalized, it would require an agency to prepare an individual or class deviation in accordance with FAR part 1 to incorporate a provision or clause that is

not prescribed for commercial products or commercial services into a solicitation or contract for commercial products or commercial services. These proposed changes are expected to substantially reduce the number of provisions and clauses included in commercial acquisitions. These changes would also shift the burden of determining which provisions and clauses listed in 52.212–3 and 52.212–5 are applicable to a particular commercial acquisition from the offeror or contractor to the Government. However, while FAR 52.212–5 is proposed for removal, the statutory requirement at FAR 52.212–5(d), *Comptroller General Examination of Record*, would be transferred to 52.212–4(t). Block 27 of the SF 1449 (discussed in section II.C.6. of this preamble) would also be modified to remove references to FAR 52.212–3 and 52.212–5.

This proposed rule would also grant agencies the authority to issue a waiver or tailor provisions and clauses normally prescribed for commercial acquisitions as long as the provision or clause does not implement statutory or Executive order and is determined to be inconsistent with customary commercial practice. In addition, tailoring would not be required to be by addendum; however, agencies will be required to ensure that solicitations and contracts clearly indicate when a provision or clause has been tailored (see proposed FAR 12.205(c)(1)(ii)). All class waivers must be provided to the Chair of the Civilian Agency Acquisition Council (for civilian agencies) or the Director of the Defense Acquisition Regulations System (for defense departments and agencies) to determine whether regulatory changes are in order.

9. *Construction as a commercial service.*

The proposed rule published under FAR Case 2026–001 would amend paragraph (2) of the definition of “commercial services” in FAR part 2. This change would allow for construction to be considered a commercial service, thus allowing Federal buyers to leverage the procedures in FAR part 12 when buying construction. First, a contracting officer would need to determine that the construction services being procured are services “of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.” If the contracting officer

determines that the construction services meet this definition, then they would follow the procedures in Part 12 to structure the contract, solicit offers, and award the contract.

This proposed rule includes changes that, if finalized, would provide guidance to contracting officers that procure construction. The new applicability section proposed at FAR 12.200 makes clear that when a contracting officer is procuring construction as a commercial service, they must still comply with requirements in part 36 for construction. As noted in section II.C.8. of this preamble, RFO rulemakings will also clarify in each provision and clause prescription whether the provision or clause applies to acquisitions of commercial products and commercial services. To this end, other RFO proposed rules for FAR parts that prescribe provisions and clauses for use in solicitations and contracts for construction will include proposed revisions to indicate whether those provisions and clauses apply to construction that is a commercial service.

10. *Subcontracts.*

This proposed rule would continue to include the statutory requirement for the contracting officer to require the prime contractor and subcontractor at all tiers to incorporate, to the maximum extent practicable, commercial products, commercial services, or nondevelopmental items as components of items supplied to the agency (see proposed FAR 12.101(b)). However, proposed FAR subpart 12.3, Postaward, will include a cross-reference to FAR subpart 44.4 where instructions for subcontracts for commercial products and commercial services will be consolidated. See the section II.F. of this preamble for the discussion of changes to Part 44.

11. *Plain language.*

Finally, the content of FAR part 12 and the solicitation provisions and contract clause in part 52 are rewritten in plain language to make the content clearer and easier to follow. For example, the phrase “the contracting officer shall” would be replaced with clear directives to the contracting officer in simplified language wherever possible. The revised part would also use various drafting tools that better illustrate minimum compliance requirements, such as tables to present complex information in a clearer manner. The FAR part and associated provisions and clauses would no longer use the more formal term “shall,” but instead use “must” or “will.” These changes would ensure contracting

officers, offerors, and contractors have a clear understanding of the expectations for commercial buying.

D. *Summary of Changes to FAR Part 13*

The FAR Council is proposing to revise FAR part 13 to provide procedures for only noncommercial acquisitions valued at or below the SAT. To do so, this proposed rule will amend FAR part 13 in the following ways:

1. *Alignment with proposed changes in FAR part 12.*

The current FAR requires contracting officers to decipher which procedures in FAR part 13 apply to commercial acquisitions, including when the higher threshold authorized by statute applies (see II.C.5. of this preamble). This proposed rule seeks to establish the same process-oriented structure in FAR part 13 as is proposed in FAR part 12 (see section II.C.2. of this preamble) and to use cross-references to part 12, where appropriate, to avoid a significant amount of repetitive regulatory text in FAR part 13. For example:

- FAR 13.201(a) would direct the contracting officer to use the simplified procedures at FAR 12.201–1 to issue RFQs for noncommercial acquisitions valued at or below SAT;
- FAR 13.202 would direct the contracting officer to follow the procedures in 12.203 when establishing evaluation factors;
- FAR 13.302(a) would include a cross-reference to FAR 12.201–1(b) on the legal effect of quotations and acceptance; and
- FAR subpart 13.4 would direct the contracting officer to FAR subpart 12.4 on micropurchases.

In other cases, specific requirements would be spelled out in FAR part 13, such as requirements related to competition, small business, forms and formats, and price reasonableness (see proposed FAR 13.101, 13.102, 13.202(b), and FAR 13.203(a), respectively). Because noncommercial acquisitions valued at or below SAT do not benefit from the same streamlining opportunities as commercial acquisitions (*i.e.*, the option to post a combined synopsis/solicitation for a reasonable amount of time, subject to the Contracting Officer’s discretion), FAR 13.201(c) would provide the procedures necessary to comply with publicizing requirements in FAR Part 5.

2. *Focus on statutory requirements and sound procurement.*

Again, in accordance with E.O. 14275, the remaining retained content in the proposed FAR part 13 would be those requirements that either implement statute or are necessary for sound procurement. This proposed rule would

substantially streamline the content (similar to the proposed changes in FAR part 12) to more clearly communicate to the contracting officer and focus on minimum and simpler compliance requirements.

3. *Solicitation provisions and contract clauses.*

Proposed FAR section 13.204 would maintain the structure whereby contracting officers are expected to incorporate solicitation provisions and contract clauses in contracts valued at or below the SAT based on thresholds (or the absence of thresholds) included in prescriptions for provisions and clauses throughout the FAR. This section would also continue to prescribe FAR clause 52.213–4, Terms and Conditions—Simplified Acquisitions (Noncommercial), which provides a streamlined set of terms and conditions for inspection/acceptance, excusable delays, terminations, and warranties. However, the proposed text at FAR 13.204(b) would make clear that the content in the clause is used in lieu of similar clauses prescribed for these purposes. If the contracting officer would prefer to include a standalone clause instead, then they must tailor 52.213–4 to remove the associated content.

4. *FAST Pay procedures.*

FAR part 13 previously included procedures for FAST payment. Since these procedures are related to payments and apply to both FAR parts 12 and 13, as proposed in this rule, this content will be transferred to a standalone subpart in FAR part 32. The RFO rulemaking for FAR part 32 will address any changes to FAST payment procedures, which will apply to both commercial and noncommercial acquisitions valued at or below the SAT.

5. *Plain language.*

Finally, the content of FAR part 13 and the contract clause at FAR 52.213–4 would be rewritten in plain language to make the content clearer and easier to follow. Like the proposed revisions in FAR part 12, the phrase “the contracting officer shall” would be replaced with clear directives to the contracting officer in simplified language wherever possible. The clause at 52.213–4 would also use the terms “must” or “will” instead of the more formal term “shall.”

E. *Summary of Changes to FAR Part 15*

Part 15 would be revised to simplify and streamline the policies and procedures used in negotiated acquisitions. The revisions would simplify how the Government interacts with offerors by focusing on negotiation instead of discussions; reduce complexity around communicating with

offerors by revising the definition of “deficiency”, eliminating the procedures for exchanges with offerors before establishing a competitive range, and expanding on the use of clarifications; and enhance the acquisition process by formalizing another source selection approach. Specifically, the rule proposes to revise part 15, by:

1. *Focusing on negotiations, instead of discussions.*

In practice, the current discussion process is often limited to fixing problems in an offeror’s proposal, instead of truly negotiating to get the best possible deal to meet the Government’s requirement. When this happens, offerors focus their proposals on meeting the minimum requirements of the Government to avoid being removed from competition, and agencies forgo simple clarifications to avoid inadvertently crossing the boundary into a discussion and creating a protest risk. This practice limits innovation and both parties miss the opportunity for meaningful negotiations that can lead to a more advantageous contract award and a more competitive position in future proposal submissions.

The proposed rule still requires a meaningful negotiation with each offeror in the competitive range where, at a minimum, each offeror’s deficiencies and significant weaknesses must be addressed. However, it acknowledges that meaningful discussions do not look the same across every offeror in the competitive range. The proposed rule would clarify that, if necessary, contracting officers may have more than one negotiation with a particular offeror in the competitive range, without having to do so with all other offerors. This would simplify the process to encourage offerors to propose, and contracting officers to consider, solutions that exceed minimum requirements, while prompting contracting officers to proactively bargain on terms and conditions, such as intellectual property rights, licensing agreements, pricing, and other material aspects of the proposal, that would lead to a more advantageous contract award. The proposed rule would also add a basic definition of “negotiation” to support the simplification of this process.

2. *Clarifying the definition of “deficiency”.*

The FAR defines a “deficiency” as a material failure of a proposal to meet a Government requirement, or a combination of significant weaknesses that increase the risk of unsuccessful contract performance to an unacceptable level. If negotiations occur in

competitive acquisitions, contracting officers must address each offeror’s proposal deficiencies during the negotiation. In practice, this definition results in subjective interpretations of what a material failure of a proposal is, whether a weakness is truly significant, and/or whether a combination of significant weaknesses creates a deficiency that requires exclusion from the competition. This subjectivity results in protests and challenges that dispute the line between what could be fixed through clarifications and what is a deficiency that warrants exclusion.

The proposed rule would revise the definition to clarify that a deficiency is simply a part of a proposal that does not conform to a material term of the RFP. The definition would then explain that a material term is one that affects price, quantity, quality, or delivery, or a prerequisite that the RFP requires to be met at the time of proposal submission. Together, these two changes would reduce the subjective nature of the current definition and provide contracting officers with the leeway to address significant weaknesses directly with an offeror through negotiation, without the uncertainty of whether those weaknesses, when combined, increase the contract performance risk to an “unacceptable” level warranting exclusion from the competition.

3. *Simplifying exchanges with offerors after receipt of proposals.*

When conducting a competitive acquisition under part 15, the FAR currently prescribes several processes for interacting with offerors at different phases of the source selection process. Specifically, there is a process for clarifying certain aspects of a proposal without holding discussions with offerors, a process to help the Government better understand an offeror’s adverse past performance information before establishing the competitive range of proposals to be included in the discussion process, and a process for discussions with offerors whose proposals are in the competitive range.

When the Government intends to make a competitive award without discussions but needs an offeror to clarify certain aspects of their proposal or resolve minor or clerical errors, contracting officers currently rely on the clarification process to do so. However, what is “minor” or “clerical” is subjective and the line between what is a “minor” error that can be remedied through a clarification and a material error that requires a discussion is often unclear for contracting officers and offerors alike. This ambiguity can lead contracting officers to adhere to

cautious interpretations of what constitutes a “minor” error in an attempt to avoid protest and unfair treatment of offerors. However, this caution can also prevent an offeror from easily correcting a minor mistake and receiving an award as the result of an otherwise competitive proposal.

Further, when the Government is establishing a competitive range of proposals, and an offeror has past performance information that is the determining factor preventing them from being included in the competitive range, the existing process requires contracting officers to give the offeror an opportunity to address adverse past performance information to which the offeror has not previously had an opportunity to respond.

The proposed rule would simplify these two types of exchanges by eliminating the process for exchanging information with offerors before establishing the competitive range, expand the use of clarifications to also apply to competitive negotiated acquisitions, and revise the clarification process to also include addressing adverse past performance information to which the offeror has not previously had an opportunity to respond. The proposed rule would also expand the clarification process to situations in which the ambiguities of the proposal, or other concerns, such as perceived deficiencies or mistakes, needs to be explained. The proposed text would advise that clarifications are not required, may occur at the contracting officer’s discretion, and would not permit offerors to revise their proposal or use clarifications to change the material elements of the proposal or cure a material omission in the proposal. As a result, contracting officers could, but would no longer required as a matter of policy, to address adverse past performance information to which the offeror has not previously responded before establishing the competitive range. Instead, the rule would permit clarifications at any time up until contract award. As a result, contracting officers would retain the tools to review, interpret, and evaluate proposals through a clear and simple process. The proposed rule would also add a basic definition of “clarification” to support the simplification of this process.

4. Simplifying the acceptance of late proposals.

When a proposal is received after the date and time specified in the RFP for receipt of proposals, it is considered “late” and cannot be considered for award, unless certain conditions exist. If a late proposal is received prior to award, the

contracting officer may accept the proposal if doing so would not unduly delay the acquisition, and: (1) it was the only proposal received; or (2) it was submitted electronically and there is evidence to establish that it was received at the initial point of entry to the Government’s infrastructure by 5:00 p.m. one working day prior to the date and time specified in the RFP.

The proposed rule would simplify this policy by permitting contracting officers to accept late proposals when they determine that doing so is in the Government’s best interest and would not unduly delay the contract award. This change would provide contracting officers with greater leeway in deciding whether to accept a late proposal and offerors with a simpler policy to follow when submitting proposals to the Government.

5. Broadening the competitive range.

When contracting officers intend to conduct negotiations with offerors responding to a competitive RFP, statute requires agencies to conduct negotiations with all responsible offerors who submit proposals within the competitive range, unless the range is further reduced to the highest rated proposals for purposes of efficiency. The FAR then requires, as a matter of policy, the competitive range to be comprised of all of the most highly rated proposals.

The proposed rule would no longer require the competitive range to contain all of the most highly rated proposals and instead clarify that the range should include those proposals best suited for further negotiation. This change would acknowledge that, while not the highest rated proposal, offerors may propose solutions or terms that make a proposal otherwise well suited for negotiation. This change would allow contracting officers to consider those offers for inclusion in the competitive range, and focus their time and effort in negotiations on the offers that are most advantageous to the Government, while minimizing the time and effort offerors spend pursuing a contract award they are less likely to win.

Contracting officers would be able continue to reduce the competitive range to a number of proposals that will permit an efficient competition among the most highly evaluated proposals. The rule would exchange the terminology of “highest rated” proposals with “highest evaluated” proposals to be included in the competitive range, when reduced for efficient competition. This change would formally acknowledge that a rating system is not required when evaluating competitive proposals, and

instead, the intent of the statute is to ensure that, if a competitive range is narrowed for efficiency, only the most highly evaluated proposals remain in the competitive range. The proposed rule would also add a basic definition of “competitive range” to support the simplification of this process.

6. Formalizing additional source selection and evaluation approaches.

The proposed rule would formally recognize an additional way, highest technically rated with a fair and reasonable price, to evaluate the best value in the FAR. This approach would focus on getting the best technical solution at a fair and reasonable price. Specifically, the contracting officer would evaluate proposals based on the non-cost/price factors outlined in the RFP. Upon identifying the highest technically rated proposal, the contracting officer would evaluate the cost/price of the proposal to determine if it is fair and reasonable. A contracting officer would not make tradeoffs between cost/price and non-cost/price factors. If the cost/price is determined reasonable, the contracting officer would make an award to the offeror. If the cost/price is not found to be fair and reasonable, the next highest rated proposal would be identified and its price would be evaluated for fairness and reasonableness. This process would continue until award is made to the offeror with the highest technically rated proposal with a fair and reasonable price.

The proposed rule would also formally recognize phased evaluations, or a down-select process, as an efficient way to evaluate proposals, when necessary. Phased evaluations would apply evaluation factors in stages. Offerors would be asked to address certain, but not all, evaluation factors with their initial proposal and address remaining evaluation factors in subsequent proposal submissions.

7. Restriction on the use of LPTA for munitions response services.

Section 822 of the Servicemember Quality of Life Improvement and National Defense Authorization Act (NDAA) for fiscal year (FY) 2025 (Pub. L. 118–159) amends section 880(c)(1) of the John S. McCain NDAA for FY 2019 (41 U.S.C. 3701 note) to add munitions response services to the list of services that, to the maximum extent practicable, should not be obtained using a LPTA source selection approach. In response, the proposed rule would add munitions response services to the list of services that should avoid using a LPTA approach at FAR 15.102–2(c)(2)(i).

8. Other Changes.

In accordance with 41 U.S.C. 3905(b)(3), the rule would limit the six percent cap fee on contracts for architect-engineering services for public works or utilities to cost-type contracts.

The rule proposes to consolidate and move the text of FAR subpart 15.201 regarding exchanges with industry to part 7. Part 7 addresses different aspects of acquisition planning. The tools described at FAR subpart 15.201 are helpful during acquisition planning to better shape and communicate the Government's requirement. As such, the rule proposes to move the text to part 7 to make the tools more visible and accessible to agencies when conducting acquisition planning efforts.

F. Summary of Changes to FAR Part 38

Part 38 prescribes general policies for awarding contracts under the Federal Supply Schedule program. GSA oversees the FSS Program and prescribes the rules and procedures for establishing contracts under the FSS Program in subpart 538.2 of the General Services Administration Acquisition Regulation (GSAR). The text of FAR part 38 is duplicative of the text in the GSAR or is no longer necessary. As a result, the rule proposes to remove part 38, in its entirety, from the FAR.

G. Summary of Changes to FAR Part 44

The proposed rule would revise, reorganize, streamline, and clarify the existing policies and procedures of part 44, as described in paragraph II.A; however, the rule would not substantively change the policies and procedures of the part.

H. Summary of Changes to FAR Part 51

The rule proposes to move the policies of part 51 to part 8 and remove part 51, in its entirety, from the FAR (see discussion at paragraph II.B.4.).

III. Applicability to Contracts and Subcontracts Valued at or Below the Simplified Acquisition Threshold and for Commercial Products and Commercial Services

The following sections address the applicability of provisions and clauses prescribed in parts FAR 8, 12, 13, 15, and 44 to solicitations and contracts valued at or below the simplified acquisition threshold (SAT) and those for the acquisition of commercial products, commercially available off-the-shelf (COTS) items, and commercial services. Prescriptions for provisions and clauses in these parts have been updated to reflect applicability to commercial acquisitions.

A. Contracts and Subcontracts Valued at or Below the Simplified Acquisition Threshold

This proposed rule, if finalized, does not alter the prescriptions of provisions and clauses included in this proposed rule to change their applicability to contracts and subcontracts valued at or below the SAT. This rule, if finalized, would transfer the clauses(s) at 52.251–1 and 52.251–2 to new clauses at FAR 52.208–XX, Government Supply Sources, and FAR 52.208–YY, GSA Fleet Vehicles and Related Services. The clauses would continue to apply to contracts valued at or below the SAT.

B. Contracts and Subcontracts for Commercial Products, Commercially Available Off-the-Shelf Items, and Commercial Services

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial products and commercial services and gives the FAR Council the authority to determine to apply a law to contracts or subcontracts for the acquisition of commercial products and commercial services. 41 U.S.C. 1907 exempts contracts for commercially available off-the-shelf (COTS) items from certain provisions of law unless the Administrator for Federal Procurement Policy determines that

doing so would not be in the best interest of the Federal Government.

Section 839 of the John S. McCain NDAA for FY 2019 (Pub. L. 115–232) required the FAR Council and the Administrator of Federal Procurement Policy to review prior determinations under 41 U.S.C. 1906 and 41 U.S.C. 1907, as well as the applicability of provisions and clauses to contracts and subcontracts for commercial products, COTS items, and commercial services that do not implement statute or Executive order, and propose amendments to the FAR to eliminate or exempt such requirements from commercial acquisitions, unless there are specific reasons to retain particular requirements.

In accordance with section 839 of the NDAA for FY 2019 and their authorities under 41 U.S.C. 1906 and 1907, the FAR Council reviewed the applicability of the provisions and clauses associated with the FAR parts covered by this proposed rule.

The following table reflects the FAR Council and Administrator of Federal Procurement Policy's proposed determination regarding the applicability of the provisions and clauses to solicitations and contracts for commercial products, COTS items, and/or commercial services. In making proposed applicability determinations, the FAR Council considered factors such as whether the provision or clause advances national security or economic security, contributes to the resilience of contractors and subcontractors in the federal marketplace, or advances uniformity and clarity in the performance of basic functions that are essential to sound procurement.

Accordingly, this proposed rule, if finalized, would revise provision and clause prescriptions to clearly reflect applicability to commercial acquisitions as outlined in the table. An "X" in the following table indicates the provision or clause will apply to that category of commercial acquisition, as prescribed:

Provision/clause No.	Title	Commercial products	Commercial services	COTS items
52.208–9	Contractor Use of Mandatory Sources of Supply or Services	X	X	.....
52.208–XX	Government Supply Sources	X	X	.....
52.208–YY	GSA Fleet Vehicles and Related Services .....	.....	.....	.....
52.212–1	Instructions to Offerors—Commercial Products and Commercial Services ..	X	X	X
52.212–2	Evaluation—Commercial Products and Commercial Services	X	X	X
52.212–4	Terms and Conditions—Commercial Products and Commercial Services ...	X	X	X
52.212–4 Alt I	Terms and Conditions—Commercial Products and Commercial Services ...	X	X	.....
52.213–4	Terms and Conditions—Simplified Acquisitions (Noncommercial) .....	.....	.....	.....
52.215–1	Instructions to Offerors—Competitive Acquisition .....	.....	.....	.....
52.215–1 Alt I	Instructions to Offerors—Competitive Acquisition .....	.....	.....	.....
52.215–1 Alt II	Instructions to Offerors—Competitive Acquisition .....	.....	.....	.....
52.215–2	Audit and Records—Negotiation .....	.....	.....	.....
52.215–2 Alt II	Audit and Records—Negotiation .....	.....	.....	.....

Provision/clause No.	Title	Commercial products	Commercial services	COTS items
52.215-2 Alt III	Audit and Records—Negotiation .....	.....	.....	.....
52.215-6	Place of Performance .....	.....	.....	.....
52.215-8	Order of Precedence—Uniform Contract Format .....	.....	.....	.....
52.215-9	Changes or Additions to Make-or-Buy Program .....	.....	.....	.....
52.215-9 Alt I	Changes or Additions to Make-or-Buy Program .....	.....	.....	.....
52.215-9 Alt II	Changes or Additions to Make-or-Buy Program .....	.....	.....	.....
52.215-10	Price Reduction for Defective Certified Cost or Pricing Data	X	X	.....
52.215-11	Price Reduction for Defective Certified Cost or Pricing Data—Modifications	X	X	.....
52.215-12	Subcontractor Certified Cost or Pricing Data	X	X	.....
52.215-12 Alt II	Subcontractor Certified Cost or Pricing Data	X	X	.....
52.215-13	Subcontractor Certified Cost or Pricing Data—Modifications	X	X	.....
52.215-13 Alt I	Subcontractor Certified Cost or Pricing Data—Modifications	X	X	.....
52.215-14	Integrity of Unit Prices .....	.....	.....	.....
52.215-14 Alt I	Integrity of Unit Prices .....	.....	.....	.....
52.215-15	Pension Adjustments and Asset Reversions	X	X	.....
52.215-16	Facilities Capital Cost of Money .....	.....	.....	.....
52.215-17	Waiver of Facilities Capital Cost of Money .....	.....	.....	.....
52.215-18	Reversion or Adjustment of Plans for Postretirement Benefits (PRB) Other Than Pensions.	X	X	.....
52.215-19	Notification of Ownership Changes	X	X	.....
52.215-20	Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.	X	X	.....
52.215-20 Alt I	Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.	X	X	.....
52.215-20 Alt II	Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.	X	X	.....
52.215-20 Alt III	Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.	X	X	.....
52.215-20 Alt IV	Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.	X	X	.....
52.215-21	Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications.	X	X	.....
52.215-21 Alt I	Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications.	X	X	.....
52.215-21 Alt II	Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications.	X	X	.....
52.215-21 Alt III	Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications.	X	X	.....
52.215-21 Alt IV	Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications.	X	X	.....
52.215-22	Limitations on Pass-Through Charges—Identification of Subcontract Effort .....	.....	.....	.....
52.215-23	Limitations on Pass-Through Charges .....	.....	.....	.....
52.215-23 Alt I	Limitations on Pass-Through Charges .....	.....	.....	.....
52.244-2	Subcontracts .....	.....	.....	.....
52.244-4	Subcontractors and Outside Associates and Consultants (Architect-Engineer Services). ....	.....	.....	.....
52.244-5	Competition in Subcontracting .....	.....	.....	.....
52.244-6	Subcontracts for Commercial Products and Commercial Services	X	X	X

The FAR Council also reviewed subcontract flow down requirements in clauses associated with the FAR parts covered by this proposed rule. The following table reflects the FAR Council and Administrator of Federal Procurement Policy's proposal regarding

whether those clauses flow down to subcontracts for commercial products, COTS items, and/or commercial services. This proposed rule, if finalized, would revise the subcontract paragraphs in these clauses to clearly state whether the clause flows down to

commercial subcontracts, as outlined in the table. An “X” in the following table indicates the provision or clause will apply to subcontracts for that category of commercial subcontracts, as described in the clause:

Clause No.	Title	Commercial products	Commercial services	COTS items
52.215-2	Audit and Records—Negotiation .....	.....	.....	.....
52.215-2 Alt II	Audit and Records—Negotiation .....	.....	.....	.....
52.215-2 Alt III	Audit and Records—Negotiation .....	.....	.....	.....
52.215-12	Subcontractor Certified Cost or Pricing Data .....	.....	.....	.....
52.215-12 Alt II	Subcontractor Certified Cost or Pricing Data .....	.....	.....	.....
52.215-13	Subcontractor Certified Cost or Pricing Data—Modifications .....	.....	.....	.....
52.215-13 Alt I	Subcontractor Certified Cost or Pricing Data—Modifications .....	.....	.....	.....
52.215-15	Pension Adjustments and Asset Reversions .....	.....	.....	.....
52.215-18	Reversion or Adjustment of Plans for Postretirement Benefits (PRB) Other Than Pensions. ....	.....	.....	.....

Clause No.	Title	Commercial products	Commercial services	COTS items
52.215–19	Notification of Ownership Changes .....	.....	.....	.....
52.215–23	Limitations on Pass-Through Charges .....	.....	.....	.....
52.215–23 Alt I	Limitations on Pass-Through Charges .....	.....	.....	.....
52.244–6	Subcontracts for Commercial Products and Commercial Services	X	X	.....

IV. Expected Impact of the Rule

A. Overview

The intended impact of the RFO, as stated in E.O. 14275, is to restore the Government's ability to "deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives." Each of the RFO rulemakings is designed to contribute to this impact by emphasizing mission first, by aligning acquisition activities directly to achieving the agency's overarching objectives and serving the public interest and elevating the importance of fiscal responsibility. The proposed RFO rules focus on three goals in particular: (1) timely acquisition and delivery, (2) lower cost and accountability in all spending, and (3) increased competition.

Timeliness. Timely acquisition and delivery are essential for mission success. To this end, RFO rules propose to eliminate mandates that unnecessarily interfere with agency discretion to determine the best way to procure products and services. The proposed RFO rules highlight more clearly streamlined and simplified authorities that allow buyers to use their time more efficiently and are expected to reduce time between solicitation and award. The proposed RFO rules are expected to make it easier for contracting officers to leverage commercial practices that are familiar to the commercial marketplace. This is expected to make it easier for sellers to engage and respond to Government solicitations more rapidly.

Lower cost. E.O. 14271, Ensuring Commercial, Cost-Effective Solutions in Federal Contracts (April 15, 2025), directs the Government to utilize, to the maximum extent practicable, the commercial marketplace and the innovations of private enterprise to provide better, more cost-effective services to taxpayers, as envisioned by the Federal Acquisition Streamlining Act. The procurement of custom products and services where a suitable or superior commercial solution would have fulfilled the Government's needs has resulted in avoidable waste to the detriment of American taxpayers.

To address these concerns, consistent with associated responsibilities in section 839 of the John S. McCain NDAA for FY 2019 (Pub. L. 115–232), the FAR Council reviewed prescriptions for provisions and clauses to ensure all prescriptions are clear regarding their applicability to acquisitions for commercial products and services. Currently, many prescriptions leave this determination to contracting officer interpretation. By specifically stating when a provision or clause can be applied to commercial acquisitions, proposed RFO rules should decrease the likelihood of inclusion of provision and clauses in commercial acquisitions that are not required by law and drive greater consistency in the terms and conditions used in these contracts. In turn, these changes should both increase participation of commercial sellers, who are unwilling or unable to manage the cost of complying with noncommercial requirements, and improve taxpayer access to affordable commercial solutions.

Some RFO rules propose to delete requirements placed on commercial or noncommercial sellers that are not related to performance of the contract, drive up cost without attendant performance benefits, and may misdirect efforts away from innovation, investment and economic growth. Greater emphasis on timeliness should reduce bidders' carrying costs, enabling them to pass those savings on to customers through lower prices.

Increased competition. Since enactment of the Competition in Contracting Act of 1984 (Title VII of Pub. L. 98–369), competition has been the cornerstone of the Federal acquisition system. The benefits of competition are well established: competition saves money for the taxpayer, improves contractor performance, curbs fraud, and promotes accountability for results. Competition also drives contractor resilience and positions the U.S. market to develop a strategic advantage for the nation.

According to data in the SAM Contract Award Management, roughly 45 percent of contract dollars were awarded in FY 2025 either without competition or with competition that received only one offer. Of equal concern, the Federal marketplace has

seen a significant decline over the past 20 years in the number of businesses—especially small businesses—participating in the Federal supplier base. Studies suggest that high compliance costs lead to the misallocation of resources away from more profitable activities and discourage innovation, investment, and economic growth (Council of Economic Advisers, Executive Office of the President, June 2025. The Economic Benefits of Current Deregulatory Policies. <https://www.whitehouse.gov/wp-content/uploads/2025/03/The-Economic-Benefits-of-Current-Deregulatory-Efforts.pdf>). This may shelter incumbent contractors and stifle competition, reducing startup activity and job formation.

The RFO rules seek to increase participation in agency competitions and the resilience of the Federal supplier base, which includes commercial entities, small businesses, manufacturers, and nontraditional suppliers. The RFO will achieve this outcome by removing regulatory mandates that are not rooted in statute or essential to sound procurement, promoting greater reliance on practices that reduce transaction costs, and improving the quality of communications with offerors and potential offerors. Access to a broader range of solutions in a more dynamic marketplace will drive better return for each taxpayer dollar spent and increase taxpayer confidence in the Federal acquisition system.

B. Impact of Rule

The Government has conducted a regulatory impact analysis (RIA) for the RFO rulemaking inclusive of this proposed rule for FAR parts 8, 12, 13, 15, 38, 44, 51, and 52. The RIA includes a discussion of the anticipated benefits of the rulemakings as follows:

1. Part 8

The proposed rule aims to streamline and simplify acquisition processes and shorten acquisition timeframes for both the Government and industry.

- By clarifying the rules and priorities for the use of mandatory sources, the Government can benefit from clear guidance that ensures contracting officers comply with statutory and

regulatory requirements for using such sources.

- By simplifying the process for using Government sources of products and services, the Government can benefit from a simplified and more direct acquisition process that saves time and administrative cost when ordering from these sources. Mandatory sources can also benefit from the greater flexibility and speed in which they can affect change to their respective programs due to the simplification and reduction in duplication of these policies in the FAR.

- By reinforcing the use of existing contracts, when possible, both the Government and industry can benefit from a faster acquisition process that relies on contract vehicles with already established terms and conditions, in lieu of having to negotiate these items with each acquisition. Existing contracts also provide streamlined ordering procedures that are less time-consuming for both the Government and industry when placing orders under these vehicles, in lieu of soliciting, negotiating, and awarding a new contract.

- By consolidating its demand for certain products or services into existing contract vehicles, the Government can also benefit from lower pricing through volume discounts, as well as consistent and reliable products and services that are compliant with legal and regulatory requirements.

- By broadening the policy permitting contractor use of Government supply sources, both the Government and industry can benefit from reduced contract costs via the volume discounts associated with the Government's buying power, and consistent and reliable products and services that are compliant with legal and regulatory requirements.

These proposed changes do not create any new burden on the Government or industry. Instead, these changes simply and reduce the guidance needed to acquire products and services from Government supply sources, make the acquisition process faster, lower contract costs, and ensure reliable and compliant products and services are used in performing Government contracts.

The Government acknowledges that these changes are benefits that can result in savings of time and effort costs for both the Government and industry, but the amount time and effort saved will vary for each acquisition and is entirely dependent on the details and requirements of each individual acquisition, as well how agencies apply the procedures and leverage mandatory sources and existing contracts. The

saving associated with the rule are expected to be incremental and realized over time through individual acquisitions across various agencies, making a single, upfront estimate difficult to produce. The proposed rule impacts the internal procedures of the Government and does not require any new actions from external stakeholders.

2. Part 12

This proposed rule would substantially revise the structure, scope, and mechanics of FAR part 12 to be user-centric, faster, simpler, and more aligned with customary commercial practices resulting in the following benefits:

- *Improve efficiency and effectiveness:* Enables contracting officers to deliver on their missions more efficiently and effectively by ensuring agencies buy commercial to the maximum extent practicable, encouraging innovation, and finding efficiencies.

- *Greater clarity and understanding:* Refocuses the part on statutory requirements, providing the contracting workforce with a better understanding of their authority and responsibilities. The use of plain language makes the content more clear and easy to follow for contracting officers, offerors, and contractors.

- *Simplified access to information:* Reorganizes the FAR part into process-oriented subparts by acquisition phase, enabling Federal buyers to easily access relevant information.

- *"One-Stop Shop" for commercial acquisitions:* Consolidates procedures (publicizing, simplified acquisition, micro-purchases) into FAR part 12, creating a single source for commercial acquisitions, especially for smaller-dollar procurements.

- *Reduced administrative burden:* Minimizes burden and administrative costs for both the Government and industry by directing the use of simplified procedures for acquisitions up to \$9 million (or \$15 million in certain emergencies).

- *Streamlined contracting:* Substantially reduces the number of provisions and clauses in commercial acquisitions by removing the "omnibus" provisions (FAR 52.212–3 and 52.212–5) and shifting the burden of determining applicable clauses from the offeror/contractor to the Government.

Expanded use of commercial procedures: Allows construction to be considered a commercial service, permitting Federal buyers to leverage the streamlined, less burdensome procedures in FAR part 12 when buying construction. Overall, the proposed

changes aim to foster a more agile, risk-based, and efficient acquisition system that encourages greater commercial supplier participation in the Federal marketplace.

3. Part 13

This proposed rule, if finalized, would establish the same process-oriented structure as proposed in FAR part 12 and simplify the process for contracting officers handling noncommercial acquisitions valued at or below the SAT. The proposed changes would provide:

- *Clearer compliance requirements.* Substantially streamlines the content to focus on statutory requirements and communicate only those minimum compliance requirements necessary for sound procurement.

- *Enhanced clarity and usability.* Rewrites the content of FAR part 13 and the contract clause (52.213–4) in plain language to make them more clear and easy to follow. This includes replacing formal terms like "shall" with "must" or "will" where appropriate.

- *Reduced administrative hurdles:* Gives contracting officers more flexibility and promotes efficiency and economy for smaller purchases.

- *Improved opportunities:* Simplified procedures ensure industry understands how the Government conducts smaller purchases and improves opportunities for new entrants and small businesses.

4. Part 15

The proposed rule aims to streamline and simplify acquisition processes and shorten acquisition timeframes for both the Government and industry.

- By focusing on negotiation, instead of holding discussions (see paragraph II.E.1.), both the Government and industry can benefit from meaningful negotiations that lead to a more advantageous contract award for both parties.

- By simplifying the definition of "deficiency", both the Government and industry can benefit from a more consistent application of the term during proposal evaluation, as well as a greater opportunity to address significant weaknesses directly through negotiation.

- By simplifying exchanges with offerors after receipt of proposals, both the Government and industry can benefit from a simple and clear process that can enhance competition by permitting contracting officers to better understand an offeror's proposal and, in turn, consider more proposals for contract award.

- By clarifying what a competitive range is, both the Government and

industry and benefit from a process that enhances competition by allowing the Government to consider proposals that, while not the highest rated, are otherwise well suited for negotiation.

- By formalizing the highest technically rated with a fair and reasonable price source selection approach and phased evaluations, both the Government and industry can benefit from more efficient acquisitions that simplify the source selection process and reduce the time to award a contract.

- By simplifying the policies on late proposals, offerors benefit from simpler and clearer guidance, while contracting officers have greater discretion when deciding whether to accept a late proposal.

These proposed changes do not create any new burden on the Government or industry. Instead, these changes create opportunities for increased competition amongst offerors, more advantageous contract awards for both Government and industry, and quicker and simpler proposal evaluations and contract awards.

The Government acknowledges that these changes are benefits that can result in savings of time and effort costs for both the Government and industry, but the amount of time and effort saved will vary for each acquisition and is entirely dependent on the details and requirements of each individual acquisition, as well as the source selection approach used, the evaluation factors chosen, and the number of other offers received and the details, requirements, and solutions proposed for each of those offers. The proposed rule impacts the internal procedures of the Government and does not require any new actions from external stakeholders.

5. Part 38 and Part 44

The proposed rule aims to reorganize, streamline, and clarify the existing policies and procedures of the FAR. As a result, both the Government and industry can benefit from simpler and clearer guidance. The proposed changes do not change or create any new burden on the Government or industry.

6. Part 51

Due to the proposed movement of the policies in part 51 to part 8, the benefits of the policies in part 51 are included in the discussion at paragraph IV.B.1.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Executive Order 14192

This rule is subject to E.O. 14192, Unleashing Prosperity Through Deregulation. This proposed rule, if finalized as proposed, is anticipated to be an E.O. 14192 deregulatory action. See discussion in the “Expected Impact of the Rule” section of this preamble.

VII. Regulatory Flexibility Act

This proposed rule, if finalized, may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612.

However, an Initial Regulatory Flexibility Analysis (IRFA) is as follows:

1. Reasons for the action.

Executive Order (E.O.) 14275, Restoring Common Sense to Federal Procurement, directs the elimination of excessive acquisition regulations to stop the inefficient use of American taxpayer dollars. The E.O. directs the first comprehensive end-to-end overhaul of the FAR in its 40-year history. The E.O. establishes the policy that the FAR should “contain only provisions that are required by statute or that are otherwise necessary to support simplicity and usability, strengthen the efficacy of the procurement system, or protect economic or national security interests.” In response to E.O. 14275, the Office of Management and Budget issued memorandum M–25–26, Overhauling the Federal Acquisition Regulation. The Memo directed the FAR Council to complete a “revolutionary overhaul” of the FAR. Therefore, the FAR Council is issuing twelve proposed rules that collectively will streamline the entirety of FAR.

2. Objectives of, and legal basis for, the rule.

The revolutionary FAR overhaul (RFO) rewrite represents a paradigm shift in federal acquisition. It emphasizes streamlining, clarity, and accessibility, while ensuring that the regulation focuses only on statutory mandates and foundational procurement principles. The RFO is designed to simplify compliance for contracting professionals, improve acquisition speed and agility, and reinforce mission outcomes over process formalities.

The basis for the RFO is E.O. 14275, Restoring Common Sense to Federal Procurement. The authority for promulgation of the FAR is 41 U.S.C. 1121(b); 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

3. Description of and an estimate of the number of small entities to which the rule will apply.

All small business concerns who want to contract with the Federal Government will have to familiarize themselves with and be impacted by the reorganized, streamlined, and revised FAR, including the content of this rulemaking. As of January 2026, there are 401,196 entities registered in the System for Award Management (SAM) that were small for at least one NAICS code they had selected.

Subcontractors that are small entities do not need to register in SAM. Based on data for fiscal years 2022 through 2024 from the Federal Procurement Data System, the Government awarded an average of 96,000 contracts annually to which the consent to subcontract would apply. Thus, the number of small business firms impacted by this rule may be greater than the number of small entities registered in SAM.

The changes proposed by this rule do not impose any new requirements or burdens on small business concerns. The impact of the proposed movement of part 51 policies and procedures to part 8, and the removal of part 51 on small entities is addressed in paragraph 3.b. The changes proposed by this rule are not expected to have a significant economic impact on a substantial number of small entities.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the rule.

a. FAR Parts 8, 15, 38, 44, and 51.

The proposed rule does not impose any new reporting, recording keeping, or compliance requirements.

b. FAR Part 12.

The revisions to FAR part 12, if finalized, would remove the provision at FAR 52.212–3, Offeror Representations and Certifications—Commercial Products and Commercial Services, and clause at FAR 52.212–5, Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services, commonly referred to as the “omnibus” provision or clause are proposed for removal. Instead, FAR 12.205 would direct the contracting officer (or an agency clause logic system) to rely on the prescriptions for provisions and clauses, which are being amended under RFO rulemakings to explicitly state whether the provision or clause applies to acquisitions of commercial products and commercial services. Agencies would not be authorized to include provisions and clauses not on the list in commercial acquisitions unless they obtain a deviation in accordance with FAR part 1. This methodology will substantially reduce the number of compliance requirements included in commercial solicitations and contracts. This change also shifts the burden of determining which provisions and clauses are applicable to the commercial acquisitions from the offeror or contractor to the Government.

c. FAR Part 13.

There are no reporting or recordkeeping requirements imposed in FAR part 13 and there are no new compliance requirements for small businesses in FAR part 13. This proposed rule, if finalized, would substantially streamline the procedures for acquisitions valued at or below the SAT, having a positive economic impact on small businesses competing for such contracts.

5. Relevant Federal rules which may duplicate, overlap, or conflict with the rule.

The proposed rule, if finalized, would not duplicate, overlap, or conflict with other Federal rules.

6. Description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes, and which minimize any significant economic impact of the rule on small entities.

The FAR Council has not, at this stage, identified any significant alternatives that would minimize the impact of the rule on small entities while also implementing the requirements of E.O. 14275. The FAR Council will consider any significant alternatives identified by commenters for the final rule.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the

Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. The FAR Council invites comments from small business concerns and other interested parties on the expected impact of this proposed rule on small entities.

The FAR Council will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite “5 U.S.C. 610 (FAR Case 2026–003)” in correspondence.

VIII. Paperwork Reduction Act

This rule includes information collections under the Paperwork Reduction Act (44 U.S.C. 3501–3521). Following are the specific collections associated with each FAR part in this rule as previously approved by OMB followed by how each collection would be affected by the proposed rule. If a FAR part is not listed below, then there are no information collections associated with the part.

A. FAR Part 12

- OMB Control No. 9000–0034, Examination of Records by Comptroller General and Contract Audit. See details in section IX.B of this preamble.

- OMB Control No. 9000–0136, Commercial Acquisitions. The changes under this proposed rule, if finalized, would remove the information collection in its entirety. The collection would be discontinued.

- OMB Control No. 9000–0142, Past Performance Information; FAR Sections Affected: 15.305(a)(2)(ii), 42.1503(d), and 52.212–1(b)(10). The changes to this information collection under this proposed rule, if finalized, would be negligible and, therefore, would not change the paperwork burden previously approved by OMB. The collection would remain unchanged.

B. FAR Part 15

- OMB Control No. 9000–0013, Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—FAR Sections Affected: 52.214–28, 52.215–12, 52.215–13, 52.215–20, and 52.215–21. The changes to this information collection under this proposed rule, if finalized, would be negligible and, therefore, would not change the paperwork burden previously approved by OMB. The collection would remain unchanged.

- OMB Control No. 9000–0034, Examination of Records by Comptroller

General and Contract Audit: FAR Section(s) Affected: 52.212–5(d), 52.214–26, 52.215–2. The changes under this proposed rule, if finalized, would not affect the information collection or the paperwork burden previously approved by OMB. The collection would remain unchanged.

- OMB Control No. 9000–0037, Presolicitation Notice and Response—FAR Sections Affected: 14.205; 15.201(c); and 36.213–2. The changes to this information collection under this proposed rule, if finalized, would be negligible and, therefore, would not change the paperwork burden previously approved by OMB. The collection would remain unchanged.

- OMB Control No. 9000–0047, Place of Performance—FAR Sections Affected: 52.214–14, and 52.215–6. The changes to this information collection under this proposed rule, if finalized, would be negligible and, therefore, would not change the paperwork burden previously approved by OMB. The collection would remain unchanged.

- OMB Control No. 9000–0048, Certain Federal Acquisition Regulation Part 15 Requirements: FAR sections affected: 15.407–2(e), 52.215–1(c)(2)(iv), 52.215–9, 52.215–14, 52.215–19, 52.215–22, and 52.215–23. The changes to this information collection under this proposed rule, if finalized, would be negligible and, therefore, would not change the paperwork burden previously approved by OMB. The collection would remain unchanged.

- OMB Control No. 9000–0142, Past Performance Information; FAR Sections Affected: 15.305(a)(2)(ii), 42.1503(d), and 52.212–1(b)(10). See details in section IX.A of this preamble.

C. FAR Part 44

- OMB Control No. 9000–0149, Subcontract Consent and Contractors’ Purchasing System Review; FAR Section Affected: 52.244–2. The changes to this information collection under this proposed rule, if finalized, would be negligible and, therefore, would not change the paperwork burden previously approved by OMB. The collection would remain unchanged.

D. FAR Part 51

- OMB Control No. 9000–0032, Contractor Use of Interagency Fleet Management System Vehicles—FAR Sections Affected: 51.202 and 51.203. The changes under this proposed rule, if finalized, would remove the information collection in its entirety. The collection would be discontinued.

E. Comments Regarding Paperwork Burden

The FAR Council will publish a separate first notice in accordance with the Paperwork Reduction Act seeking comments on the changes to the collections of information affected by this proposed rule.

IX. Severability

If any portion (e.g., section, clause, sentence) of this rule is held to be invalid or unenforceable facially, or as applied to any entity or circumstance, it shall be severable from the remainder of this rule, and shall not affect the remainder thereof, or its application to entities not similarly situated or to other dissimilar circumstances. The various portions of this rule are independent and serve distinct purposes. Even if one aspect were rendered invalid, the other benefits of the rule would still be applicable.

List of Subjects in 48 CFR Parts 8, 12, 13, 15, 38, 44, 51, and 52

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, OFPP, DoD, GSA, and NASA propose amending 48 CFR parts 8, 12, 13, 15, 38, 44, 51, and 52 as set forth below:

- 1. Revise parts 8, 12, 13, and 15 to read as follows:

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

Sec.

8.000 Scope.

8.001 Definitions.

Subpart 8.1—Presolicitation

8.101 Mandatory sources for specific supplies and services.

8.102 Mandatory source for services.

8.103 Mandatory sources of supplies.

8.104 Use of existing contracts.

8.105 Contractor use of Government supply sources.

8.105–1 Contractor required use of Government supply sources.

8.105–2 Contractor permitted use of Government supply sources.

8.105–3 Contractor use of GSA Fleet.

Subpart 8.2—Acquisition From AbilityOne Participating Nonprofit Agencies

8.201 General.

8.202 Presolicitation.

8.203 Postaward.

Subpart 8.3—Acquisitions From Federal Prison Industries, Inc.

8.301 General.

8.302 Exclusion.

8.303 Presolicitation.

8.304 Solicitation.

8.305 Evaluation and award.

8.306 Postaward.

Subpart 8.4—Ordering Under the Federal Supply Schedule

8.401 General.

Subpart 8.5—Acquisitions of Government Printing and Related Supplies

8.501 General.

8.502 Requirement.

Authority: 41 U.S.C. 1121(b); 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

8.000 Scope.

This part addresses prioritizing sources of supplies and services for use by the Government.

8.001 Definitions.

As used in this part—

AbilityOne Commission is the operating name for the Committee for Purchase From People Who are Blind or Severely Disabled.

AbilityOne participating nonprofit agency means a qualified nonprofit agency employing people who are blind or have other severe disabilities approved by the Committee to furnish a commodity or a service to the Government under 41 U.S.C. chapter 85.

Committee means the Committee for Purchase From People Who Are Blind or Severely Disabled.

Central nonprofit agency means National Industries for the Blind, which has been designated to represent AbilityOne participating nonprofit agencies serving people who are blind; or SourceAmerica (formerly known as the National Industries for the Severely Handicapped), which has been designated to represent AbilityOne participating nonprofit agencies serving people with severe disabilities other than blindness.

Government printing means printing, binding, and blank-book work for the use of an executive department, independent agency, or establishment of the Government.

Procurement List means a list of supplies (including military resale commodities) and services that the Committee has determined are suitable for purchase by the Government under 41 U.S.C. chapter 85.

Subpart 8.1—Presolicitation

8.101 Mandatory sources for specific supplies and services.

Agencies must acquire the following supplies and services using the procedures listed below:

Requirement	Procedures
Public utility services	Part 41.
Government printing and related supplies	Subpart 8.5.
Motor vehicles leased for use within the United States and its outlying areas	Contact GSA Fleet.
Strategic and critical materials (e.g., metals and ores) from inventories exceeding Defense National Stockpile requirements.	DLA Strategic Materials https://www.dla.mil/Strategic-Materials/ .

8.102 Mandatory source for services.

Unless otherwise required by law or 8.101, agencies must procure services that are on the Procurement List maintained by the Committee, from AbilityOne participating nonprofit agencies in accordance with subpart 8.2.

8.103 Mandatory sources of supplies.

Unless otherwise required by law or subpart 8.101, agencies must procure supplies, in the following order—

(a) From inventories of the requiring agency, in accordance with agency procedures;

(b) From excess from other agencies, in accordance with 41 CFR 102–36;

(c) From Federal Prison Industries (FPI), Inc., in accordance with subpart 8.3; and

(d) When on the Procurement List maintained by the Committee, from AbilityOne participating nonprofit agencies, in accordance with subpart 8.2.

8.104 Use of existing contracts.

(a) When products or services are unavailable from the mandatory sources listed above, agencies should procure commercial products and commercial services, including those that can be modified to fill agencies' needs, to the maximum extent possible, in accordance with the policy of Executive Order 14271, Ensuring Commercial, Cost-Effective Solutions in Federal Contracts.

(b) When a commercial product or commercial service meets an agency's needs and is available on an existing contract or Blanket Purchase Agreement (BPA) awarded for Governmentwide use (such as the Federal Supply Schedule (FSS), governmentwide acquisition contracts, or other indefinite-delivery, indefinite-quantity contracts), the agency must—

(1) Use the existing contract or BPA to buy the product or service if it has been designated by the Office of Federal Procurement Policy (OFPP) as a “required use” contract or BPA, unless the Senior Procurement Executive provides an exception (e.g., because the contract's terms and conditions, scope, or performance period do not meet the agency's needs);

(2) If there is no suitable “required use” contract or BPA to meet the agency's needs, consider using the existing contract or BPA to buy the product or service if it has been designated by OFPP as a “best in class” contract or BPA; and

(3) If there is no suitable “required use” or “best in class” contract or BPA to meet the agency's needs, consider using the existing contract or BPA awarded for Governmentwide use before establishing a new contract for the commercial products and/or commercial services.

(c) Agencies should also consider the use of shared services to fulfill requirements. A shared service is a business or mission function provided by one agency for consumption by multiple other agencies, either within or between Federal agencies (e.g., the stock programs of the General Services Administration (GSA) (see 41 CFR 101–26.3), the Defense Logistics Agency (DLA) (see 41 CFR 101–26.6), and the Department of Veterans Affairs (VA) (see 41 CFR 101–26.704)).

8.105 Contractor use of Government supply sources.

When authorizing contractors to use Government supply sources, agencies must follow the requirements of sections 8.105–1 through 8.105–3.

8.105–1 Contractor required use of Government supply sources.

(a) *Policy.* Agencies must authorize contractors purchasing supply items for Government use that are on the Procurement List maintained by the Committee to purchase such items from DLA, GSA, and VA, if they are available from these agencies through their distribution facilities. When these items are not available from DLA, GSA, or VA, contractors must order them through the appropriate central nonprofit agency

which will determine how to fulfill the order.

(b) *Contract clause.* Insert the clause at 52.208–9, Contractor Use of Mandatory Sources of Supply and Services, in solicitations and contracts, including those for commercial products and commercial services, that require a contractor to provide supplies or services for Government use that are on the Procurement List maintained by the Committee.

8.105–2 Contractor permitted use of Government supply sources.

(a) *General.*

(1) Agencies may authorize contractors to use Government supply sources to obtain supplies or services required to perform a Government contract, when it is in the Government's interest and the supplies or services are available from Government supply sources. In this section, the terms “contractors” and “contracts” include “subcontractors” and “subcontracts.”

(2) Agencies may authorize the contractors to use these sources in performing—

(i) A contract awarded using other than sealed bidding procedures; or

(ii) A contract awarded to an AbilityOne participating nonprofit agency for supplies or services on Procurement List maintained by the Committee, if—

(A) The nonprofit agency requesting use of the supplies and services is providing a commodity or service to the Government; and

(B) The supplies or services received are directly used in making or providing a commodity or service on the Procurement List.

(3) Contractors with fixed-price Government contracts that require protection of security classified information may acquire security equipment through GSA sources in accordance with 41 CFR 101–26.507.

(b) *Exclusion.* Agencies must not require a contractor, or subcontractor at any tier, to use FPI as a subcontractor to perform a contract by any means, including means such as—

(1) A solicitation provision requiring a potential contractor to offer to use FPI supplies or services;

(2) A contract specification requiring the contractor to use specific supplies or services (or classes of supplies or services) offered by FPI; or

(3) Any contract modification directing the use of FPI supplies or services.

(c) *Contract clause.* Insert the clause at 52.208–XX, Government Supply Sources, in solicitations and contracts, including those for commercial

products and commercial services, when the contractor is authorized to acquire supplies or services from a Government supply source.

8.105–3 Contractor use of GSA Fleet.

(a) *General.* Agencies may authorize contractors performing under cost-reimbursement contracts to obtain vehicles and related services through GSA Fleet in accordance with 41 CFR 101–39.202 and 41 CFR 102–34. In this section, the terms “contractors” and “contracts” include “subcontractors” and “subcontracts.”

(b) *Requirement.* When providing the authorization in paragraph (a), agencies must ensure that contractors establish and enforce suitable penalties against employees who use, or authorize the use of, Government motor vehicles for unofficial purposes or for other than in the performance of the contract.

(c) *Contract clause.* Insert the clause at 52.208–YY, GSA Fleet Vehicles and Related Services, in solicitations and contracts, other than those for commercial products or commercial services, when a cost-reimbursement contract is contemplated and the contractor may be authorized to use GSA Fleet vehicles and related services.

Subpart 8.2—Acquisition From AbilityOne Participating Nonprofit Agencies

8.201 General.

(a) When buying supplies or services from AbilityOne Nonprofit Agencies, agencies must follow the requirements of this subpart and 41 CFR chapter 51.

(b) The AbilityOne Commission has sole authority to set the price and to authorize or deauthorize sources of supply. Agencies may propose price development through the Commission, or propose additions to the Procurement List at any time through the AbilityOne Commission.

8.202 Presolicitation.

(a) *Policy.* In accordance with 41 U.S.C. chapter 85 and as required by 8.102 and 8.103, agencies must buy supplies or services that are on the Procurement List maintained by the Committee from the central nonprofit agency or its designated AbilityOne participating nonprofit agencies, unless a purchase exception applies or the supplies are available from DLA, GSA, or VA supply distribution facilities.

(b) *Purchase exception.* Agencies may submit a request to the AbilityOne Commission, or the appropriate central non-profit agency, for a waiver to the Procurement List requirement. If the waiver is approved, agencies may fulfill

their requirement from a commercial source. Other provisions of the FAR must not be construed as permitting an exception to the mandatory purchase of supplies or services on the Procurement List.

(c) *Supply distribution facilities.* When supplies on the Procurement List are identified as available from DLA, GSA, or VA distribution facilities, agencies must obtain the supplies through DLA, GSA, or VA. Supply distribution facilities in DLA and GSA must obtain supplies on the Procurement List from the central nonprofit agency identified or its designated AbilityOne participating nonprofit agency.

8.203 Postaward.

If the ordering office cannot resolve performance issues with the nonprofit agency, the ordering office must refer the matter to the applicable central nonprofit agency and, if necessary, to the AbilityOne Commission for appropriate resolution.

Subpart 8.3—Acquisitions From Federal Prison Industries, Inc.

8.301 General.

When buying supplies or services from FPI (also known as UNICOR), agencies must follow the requirements of this subpart and FPI's ordering procedures.

8.302 Exclusion.

Agencies must not enter into any contract with FPI that allows an inmate worker access to any—

- (a) Classified data;
- (b) Geographic data regarding the location of—
 - (1) Surface and subsurface infrastructure providing communications or water or electrical power distribution;
 - (2) Pipelines that distribute natural gas, bulk petroleum products, or other commodities; or
 - (3) Other utilities; or
- (c) Personal or financial information about any individual private citizen, including information relating to such person's real property however described, without the prior consent of the individual.

8.303 Presolicitation.

In accordance with 10 U.S.C. 3905 and section 637 of Division H of the Consolidated Appropriations Act, 2005 (Pub. L. 108-447) (18 U.S.C. 4124 note), agencies must—

- (a) Before purchasing an item of supply listed in the FPI Schedule, conduct market research to determine whether the FPI item is comparable to

supplies available from the private sector that best meet the Government's needs in terms of price, quality, and time of delivery. This is a unilateral determination made at the discretion of the contracting officer. The arbitration provisions of 18 U.S.C. 4124(b) do not apply; and

- (b) Prepare a written determination that includes supporting rationale explaining the assessment of price, quality, and time of delivery, based on the results of market research comparing the FPI item to supplies available from the private sector.

8.304 Solicitation.

After making the determination in 8.303—

- (a) If the FPI item is comparable, agencies must purchase the item from FPI, unless a waiver is obtained in accordance with FPI's ordering procedures; and
- (b) If the FPI item is not comparable in one or more of the areas of price, quality, and time of delivery, agencies must—
 - (1) Acquire the item using—
 - (i) Competitive procedures; or
 - (ii) The fair opportunity procedures in part 16, if placing an order under a multiple award delivery-order contract; and
 - (2) Include FPI in the solicitation process and consider a timely offer from FPI for award in accordance with the item description or specifications, and evaluation factors in the solicitation.

(i) If the solicitation is available through the Governmentwide point of entry (Contract Opportunities at *SAM.gov*), agencies do not need to provide a separate copy of the solicitation to FPI;

(ii) If the solicitation is not available through Contract Opportunities at *SAM.gov*, agencies must provide a copy of the solicitation to FPI;

(iii) When using a multiple award schedule issued under the procedures in subpart 8.4 or when using the fair opportunity procedures in part 16—

(A) Establish and communicate to FPI the item description or specifications, and evaluation factors that will be used as the basis for selecting a source, so an offer from FPI can be evaluated on the same basis as the contract or schedule holder; and

(B) Consider a timely offer from FPI.

8.305 Evaluation and award.

Agencies must make award to the source offering the item determined by the agency to provide the best value to the Government. If the agency determines that the FPI item provides the best value to the Government as a

result of FPI's response to a competitive solicitation, follow FPI's ordering procedures.

8.306 Postaward.

Disputes regarding price, quality, character, or suitability of supplies produced by FPI, except for determinations under 8.303 of this section, are subject to arbitration as specified in 18 U.S.C. 4124(b).

Subpart 8.4—Ordering Under the Federal Supply Schedule

8.401 General.

(a) The FSS program is directed and managed by GSA and provides Federal agencies with a simplified process to obtain commercial products and commercial services at prices associated with volume buying. Agencies must use GSA's FSS, in accordance with 8.104.

(b) When placing an order under GSA's FSS, agencies must follow the ordering procedures established by GSA and found at 48 CFR 538.71, Federal Supply Schedule Ordering Procedures. GSA ordering procedures follow all statutory requirements, including the requirements of section 863 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, and have been coordinated with OFPP for consistency with governmentwide acquisition policy.

Subpart 8.5—Acquisitions of Government Printing and Related Supplies

8.501 General.

When acquiring Government printing and related supplies (*i.e.*, supplies and equipment that are used in printing and binding operations), agencies must follow the requirements of this subpart and Government Publishing Office's (GPO) ordering procedures.

8.502 Requirement.

Government printing must be done by or through the GPO (44 U.S.C. 501), unless—

(a) The GPO cannot provide the printing service (44 U.S.C. 504);

(b) The printing is done in field printing plants operated by an executive agency (44 U.S.C. 501(2));

(c) The printing is acquired by an executive agency from allotments for contract field printing (44 U.S.C. 501(2)); or

(d) The printing is specifically authorized by statute to be done other than by the GPO.

PART 12—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

Sec.

- 12.000 Scope.
- 12.001 Applicability.

Subpart 12.1—Presolicitation

- 12.101 Requirement.
- 12.102 Restricting competition.
- 12.103 Small business.
- 12.104 Contract type.
- 12.105 Quality requirements.
- 12.106 Technical data.
- 12.107 Computer software.
- 12.108 Contract financing.
- 12.109 Cost Accounting Standards.

Subpart 12.2—Solicitation, Evaluation, and Award

- 12.200 Applicability.
- 12.201 Solicitation procedures.
- 12.201–1 Simplified procedures.
- 12.201–2 Other procedures.
- 12.202 Publicizing.
- 12.203 Evaluation.
- 12.204 Award.
- 12.205 Solicitation provisions and contract clauses.

Subpart 12.3—Postaward

- 12.301 Notifications.
- 12.302 Subcontracts.
- 12.303 Cancellations.
- 12.304 Terminations.

Subpart 12.4—Micro-Purchases

- 12.401 General.
- 12.402 Purchase guidelines.
- 12.403 Methods.

Authority: 41 U.S.C. 1121(b); 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

12.000 Scope.

This part provides policies and procedures to streamline the acquisition of commercial products, including commercially available off-the-shelf (COTS) items (a subset of commercial products), and commercial services in accordance with 41 U.S.C. 1906, 1907, and 3307 and 10 U.S.C. 3451–3453. It also implements the simplified procedures authorized by 41 U.S.C. 1901–1903, 1905, and 3305.

12.001 Applicability.

(a) Acquisitions of commercial products or commercial services are subject to other parts of the FAR. This part takes precedence when there is an inconsistency.

(b) Agencies may treat any acquisition of supplies or services that, as determined by the head of the agency, are to be used to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack, as an acquisition of commercial products or commercial services.

However, if the contract is awarded on a sole-source basis for an amount greater than \$25 million, the contract is not exempt from Cost Accounting Standards (CAS) (see 48 CFR chapter 99) or certified cost or pricing data requirements (see part 15).

(c) The \$9 million ceiling for the use of simplified procedures (see 12.201–1) is increased to \$15 million if the head of the agency determines that the supplies or services are to be used to—

- (1) Support a contingency operation;
- (2) Facilitate the defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack (including acquisitions treated as commercial products or commercial services according to paragraph (b));

(3) Support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance; or

(4) Support response to an emergency or major disaster.

(d) Do not divide a requirement to avoid using procedures that are required over certain thresholds.

(e) Go to <https://www.acquisition.gov/inapplicablelaws> for the lists of laws that do not apply to contracts for the acquisition of commercial products or commercial services, acquisitions of COTS items, and acquisitions valued at or below the simplified acquisition threshold (SAT) (41 U.S.C. 1905 through 1907).

Subpart 12.1—Presolicitation

12.101 Requirement.

(a) Agencies must acquire commercial products or commercial services when the agency determines that they are available to meet the agency's needs (see Part 7).

(b) Require prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial products, commercial services, or nondevelopmental items as components of items supplied to the agency.

12.102 Competition.

(a) For acquisitions valued at or below the SAT, document the decision and the basis for the decision to conduct a sole-source acquisition or to require brand-name specifications without allowing for products with equivalent specifications (“brand name or equal”). Publicize brand-name justifications as required by 12.202.

(b) For acquisitions valued over the SAT, follow the procedures in part 6 when conducting a sole source

acquisition or requiring brand-name specifications without allowing for products with equivalent specifications.

12.103 Small business.

(a) See part 19 for small business set-aside requirements. When the acquisition is set aside under any of the small business programs, include the North American Industry Classification System (NAICS) code and small business size standard in the solicitation.

(b) Acquisitions of supplies or services that have an anticipated dollar value above the micro-purchase threshold must be set aside for small business concerns in accordance with 19.104–1).

12.104 Contract type.

(a) *Preference for fixed-price contracts.* To the maximum extent practicable, use firm-fixed-price or fixed-price with economic price adjustment contract types to procure commercial products or commercial services. Follow the procedures in part 16 to use these contract types.

(b) *Time-and-materials or labor-hour contracts.* A time-and-materials or labor-hour contract may be used for commercial services that are procured on a competitive basis, if the services are commonly sold to the general public using these types of contracts.

(1) To use this contract type, the contracting officer must—

- (i) Execute a determination and findings (D&F) that a firm-fixed-price or fixed-price with economic price adjustment contract type is not suitable; and

(ii) Include in the contract a ceiling price that the contractor exceeds at its own risk.

(2) Any increase to the ceiling price must be supported by a determination that doing so is in the best interest of the procuring agency.

(c) *Indefinite-delivery contracts.*

(1) Indefinite-delivery contracts may be used when—

(i) Prices are established based on a firm-fixed-price or fixed-price with economic price adjustment; or

(ii) Rates are established for commercial services acquired on a time-and-materials or labor-hour basis.

(2) If rates are established on a time-and-materials or labor-hour basis, then to the maximum extent practicable, structure the contract to allow issuance of orders on a firm-fixed-price or fixed-price with economic price adjustment basis.

(i) Orders placed on a time-and-materials or labor-hour basis are subject to the requirements in paragraph (b) of this section.

(ii) If the contract only allows for orders on a time-and-materials or labor-hour basis, the D&F described in paragraph (b)(1) of this section is required only for the basic contract. It must explain why providing for an alternative firm-fixed-price or fixed-price with economic price adjustment pricing structure for orders is not practicable, and an official at least one level above the contracting officer must approve it.

(d) *Prohibition on use of cost-reimbursement contracts.* Do not use any cost-reimbursement contract type to procure commercial products or commercial services. However, line items for incidental expenses, such as travel, may be included in the contract if they provide for reimbursement based on actual costs and include a not-to-exceed amount.

(e) *Executive Order 14402 justification.* Follow the procedures in 16.104 when using other than a firm-fixed-price or fixed-price with economic price adjustment contract type.

12.105 Quality requirements.

(a) *Quality assurance.* To the maximum extent practicable, allow a contractor under a commercial products acquisition to use its existing quality assurance system to inspect or test commercial products before the contractor presents the products to the Government for acceptance. Rely on the contractor to accomplish all inspection and testing needed to ensure that commercial services conform to contract requirements before the contractor presents the services to the Government.

(b) *Warranties.* To the maximum extent practicable, take advantage of commercial warranties, including extended warranties, and use those warranties for the repair and replacement of commercial products and commercial services.

12.106 Technical data.

Presume that technical data delivered under a contract for commercial products was developed exclusively at private expense. Acquire only the technical data and the rights in that data customarily provided to the public with a commercial product or process. When a contract for commercial products requires the delivery of technical data, see part 27 for provisions and clauses to delineate rights in the technical data.

12.107 Computer software.

(a) Commercial computer software or commercial computer software documentation must be acquired under licenses customarily provided to the public to the extent such licenses are

consistent with Federal law and otherwise satisfy the Government's needs. Generally, offerors and contractors must not be required to—

(1) Furnish technical information related to commercial computer software or commercial computer software documentation that is not customarily provided to the public except for information documenting the specific modifications made at Government expense to such software or documentation to meet the requirements of the solicitation; or

(2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose commercial computer software or commercial computer software documentation except as mutually agreed to by the parties.

(b) With regard to commercial computer software and commercial computer software documentation, the Government should have only those rights specified in the license incorporated into the contract. For additional guidance regarding the use and negotiation of license agreements for commercial computer software, see part 27.

12.108 Contract financing.

Government financing may be offered if buyer financing is a customary market practice for a commercial product or commercial service. See part 32 for contract financing policies and procedures.

12.109 Cost Accounting Standards.

CAS do not apply to contracts or subcontracts for the acquisition of commercial products or commercial services, except as provided in 12.001(b).

Subpart 12.2—Solicitation, Evaluation, and Award

12.200 Applicability.

(a) Acquire commercial products and commercial services from mandatory sources and existing contracts according to part 8. If not, use the streamlined procedures for solicitation, evaluation, and award in this subpart.

(b) When procuring construction as a commercial service, use the procedures in part 36 in conjunction with the procedures in this part.

12.201 Solicitation procedures.

12.201–1 Simplified procedures.

(a) *Requirement.* For acquisitions valued up to \$9 million (\$15 million for acquisitions described at 12.001(c)),

issue a request for quotations (RFQ) followed by a purchase order.

(b) *Legal effect of quotations.*

(1) Neither a quotation nor the purchase order issued by the Government in response to a quotation form a binding contract. The purchase order is the Government's offer to a supplier to buy certain products or services upon specified terms and conditions.

(2) A binding contract is formed when the supplier accepts the Government's offer, either by written acceptance of the purchase order or substantial performance of the purchase order. The contracting officer may request that the contractor provide written acceptance of the order.

(c) *Innovation.* In line with 1.102, Guiding principles for the System, agencies are encouraged to use additional innovative approaches to the maximum extent practicable when soliciting quotations and issuing purchase orders to—

(1) Reduce administrative costs and lead time;

(2) Improve opportunities for small business concerns;

(3) Promote efficiency and economy in contracting; and

(4) Avoid unnecessary burdens for agencies and contractors.

(d) *Other flexibilities.* The following are examples of flexibilities that may be leveraged when using simplified procedures:

(1) *Standing price quotation.* A contracting officer may rely upon standing price quotations, as long as the contracting officer validates before award that the pricing is current and reasonable.

(2) *Unpriced purchase order.* An unpriced purchase order is an order for supplies or services, the price of which is not established at the time of issuance of the order.

(i) An unpriced purchase order may be used only when it is impractical to obtain pricing in advance of issuance of the purchase order. Examples of such situations include:

(A) Repairs to equipment requiring disassembly to determine the nature and extent of repairs;

(B) Material available from only one source and for which cost cannot readily be established; or

(C) Supplies or services for which prices are known to be competitive, but exact prices are not known (e.g., miscellaneous repair parts, maintenance agreements).

(ii) When issuing an unpriced purchase order, include—

(A) A realistic monetary limitation (either for each line item or for the total

order) that is an obligation subject to adjustment once a firm price is established; and

(B) The following statement:

This is a firm order ONLY if your price does not exceed the maximum line item or total price in the Schedule. Submit invoices to the Contracting Officer. If you cannot perform in exact accordance with this order, do not begin performance, and notify the Contracting Officer immediately, giving your quotation.

(iii) Follow up on each order to ensure timely pricing. Review the invoice price and, if the price is reasonable (see 12.204(a)), process the invoice for payment.

(3) *Blanket purchase agreement.* A blanket purchase agreement (BPA) is a method of filling anticipated repetitive needs for supplies or services. A BPA is not a contract; the Government is only obligated to the extent that authorized orders are placed under a BPA.

(i) BPAs may be established with—

(A) More than one supplier for supplies or services of the same type to provide maximum practicable competition; or

(B) A single firm from which numerous individual purchases at or below the simplified acquisition threshold will likely be made in a given period.

(ii) If, for a particular purchase greater than the micro-purchase threshold, there is an insufficient number of BPAs to ensure maximum practicable competition—

(A) Solicit quotations from other sources and make the purchase as appropriate; and

(B) If practical, establish additional BPAs to facilitate future purchases if recurring requirements for the same or similar supplies or services seem likely and qualified sources are willing to accept BPAs.

(iii) The existence of a BPA does not justify soliciting from only one source or avoiding small business set-asides. The requirements in 12.102 and 12.103 apply to each order under the BPA.

(iv) The BPA must include—

(A) A statement that the supplier will furnish supplies or services, described in general terms, if and when requested by authorized individuals during a specified period and within a stipulated aggregate amount, if any.

(B) A statement that the Government is obligated only to the extent of authorized orders actually made under the BPA.

(C) The dollar limitation for each individual purchase under BPAs awarded to—

(1) A single firm, may not exceed the SAT; and

(2) More than one supplier, may not exceed the threshold for use of simplified procedures at 12.201–1(a).

(D) A list of individuals authorized to place orders or make purchases under the BPA.

(E) Information that must be included in delivery or shipment documentation.

(F) Instructions for proper invoicing under the BPA (e.g., process for periodic billings).

(G) Any clauses that may be applicable to purchases under the BPA (see 12.205(b)).

(v) Review BPAs at least annually to ensure that authorized procedures are being followed. Maintain awareness of changes in market conditions, sources of supply, and other pertinent factors that may warrant making new agreements with different suppliers or modifying existing agreements.

12.201–2 Other procedures.

(a) *General.* For acquisitions valued at greater than \$9 million (\$15 million for acquisitions described at 12.001(c)), use the procedures in this subpart in conjunction with the procedures in part 15 for requests for proposals (RFPs) or part 14 for invitations for bids (IFBs), as appropriate.

(b) *Preference.* Use of an RFP is the preferred method because it includes consideration of past performance when evaluating offers (see 12.203(a)(2)).

12.202 Publicizing.

(a) *Forms and formats.*

(1) Agencies should issue the solicitation using the Standard Form (SF) 1449, Solicitation/Contract/Order for Commercial Products and Commercial Services, and Optional Form (OF) 336, Continuation Sheet. The solicitation should be organized as follows:

(i) SF 1449 and, if necessary, the OF 336.

(ii) Applicable contract clauses.

(iii) Any contract documents, exhibits, or attachments.

(iv) Applicable solicitation provisions.

(2) Agencies may use the forms and formats prescribed in parts 14, 15, or 36, when using those procedures in conjunction with this subpart for more complex procurements or where that format would help industry better understand the solicitation.

(b) *General procedures.* Except as provided in paragraph (c), for acquisitions expected to exceed \$20,000, post a “Combined Synopsis/Solicitation” in the Governmentwide point of entry (GPE).

(1) Include the following statements in the body of the notice:

This is a combined synopsis/solicitation for commercial products or commercial services prepared in accordance with part 12. This announcement constitutes the only solicitation. *[Insert: Quotations, Proposals, or Offers]* are being requested and a separate written solicitation will not be issued.

Solicitation number *[insert: solicitation number]* is issued as a *[insert: request for quotation (RFQ), request for proposal (RFP), or invitation for bid (IFB)]* for *[insert: a brief description of the requirement]*.

This acquisition *[is/is not]* set-aside for small business concerns.

[If applicable, insert a statement regarding the Defense Priorities and Allocations System (DPAS) and assigned rating.]

(2) Include or provide access to the RFQ, RFP, or IFB, as applicable.

(3) Include approved brand name justifications, if applicable.

(c) *Exceptions.*

(1) *Simplified acquisition threshold.* For acquisitions valued at or below the SAT, the contracting officer has the option to solicit quotations directly from suppliers instead of posting a combined synopsis/solicitation. When soliciting directly—

(i) Post a presolicitation notice in the GPE that contains the minimum content at 5.101(c) and, if applicable, any approved brand name justification; and

(ii) To ensure maximum practicable competition, solicit quotations from at least three sources and, whenever practicable, ensure two were not included in the previous solicitation.

(2) *Noncompetitive acquisitions.* Post a presolicitation notice in the GPE instead of posting a combined synopsis/solicitation for the following types of noncompetitive actions:

(i) Sole-source acquisitions that do not exceed the SAT (see 12.101(a));

(ii) Acquisitions citing the authority at 6.103–1 (only one responsible source) other than brand-name justifications; and

(iii) Acquisitions citing the authority at 6.103–6 (national security), unless posting the notice would disclose the agency's needs in a way that compromises national security.

(3) *Other exceptions.* Neither a combined synopsis/solicitation, nor a presolicitation notice, is required to be posted if an acquisition meets an exemption to presolicitation notice requirements at 5.101(b).

(d) *Timing.* Comply with the minimum timeframes illustrated in Table 12–1.

(1) A combined synopsis/solicitation must remain open in the GPE for the minimum timeframe.

(2) A presolicitation notice must be posted for the minimum timeframe before soliciting quotations directly or awarding a noncompetitive acquisition,

as described at paragraph (c) of this section.

(3) See subpart 25.3 for information on the World Trade Organization

Government Procurement Agreement (WTO GPA) and Free Trade Agreements (FTA):

TABLE 12–1—MINIMUM TIMEFRAMES

Type of notice	Acquisition value	Not subject to the WTO GPA or FTA	Subject to the WTO GPA or FTA, but included in annual forecast	Subject to the WTO GPA or FTA, but not included in annual forecast
Combined synopsis/solicitation	>\$20,000	Contracting officer discretion (provide a reasonable opportunity to respond).	10 days	40 days.
Presolicitation notice only	>\$20,000 to ≤\$45,000	10 days	10 days	40 days.
	>\$45,000	15 days	15 days	40 days.

12.203 Evaluation.

(a) *Factors.* For most acquisitions of commercial products or commercial services, evaluation factors need not be more detailed than technical (capability of the products or services offered to meet the agency's needs), price, and past performance.

(1) *Technical.* Evaluate technical based on how well the proposed products or services meet the Government's requirement. Predetermined subfactors are not required.

(2) *Past performance.* Past performance should be an important evaluation factor for award. Consider past performance information from a wide variety of sources both inside and outside the Government. This may include reviewing performance information reported to the Contractor Performance Assessment Reporting System, as well as other sources of information. For some commercial products or services, such as emerging technology, this should include consideration of commercial market experience. Contracting officers may consider an offeror's experience as a subcontractor.

(3) *Price.* Evaluate prices inclusive of transportation charges from the shipping point of the supplier to the delivery destination. Obtain prompt payment discounts to the maximum extent practicable, but do not include such discounts when evaluating the prices of quotations or offers.

(b) *Basis for award.* In the solicitation, notify potential quoters or offerors of the basis on which the agency will make the award decision. See 12.205(a)(2) on use of the solicitation provision at 52.212–2 for this purpose.

(c) *Evaluation process.*

(1) *Timely quotations and offers.* Consider all quotations or offers that are timely received. Exercise good business judgment in deciding whether or not to accept a quotation or offer received after the due date or time (see 52.212–1(c)).

(2) *Methods.* Ensure that quotations and offers can be evaluated in an efficient and minimally burdensome fashion.

(i) *Quotations.* When using the simplified procedures at 12.201–1, the contracting officer has broad discretion in establishing how quotations will be evaluated. For example, the contracting officer may perform a comparative evaluation of quotations. The evaluation procedures are not subject to part 15 or 14. Contracting officers are not required to have evaluation plans, score quotations, or establish a competitive range before communicating with quoters or soliciting revised quotations.

(ii) *Offers.* When using other procedures as described at 12.201–2, follow the procedures in part 15 when evaluating proposals and the procedures in part 14 when opening bids. When using the procedures in part 15, do so in conjunction with the procedures in this section. Follow the procedures in part 36 when acquiring construction as a commercial service.

12.204 Award.

(a) *Price reasonableness.* The contracting officer must determine the price to be fair and reasonable. Whenever possible, base price reasonableness on competitive quotations or offers. For offers using the procedures in 12.201–2, see part 15 or 14, as applicable, for additional price documentation requirements.

(b) *Documentation.*

(1) When using simplified procedures (see 12.201–1), include in the contract file a written description of the procedures used in awarding the contract and the number of quotations received.

(2) When using other procedures (see 12.201–2), document the award as required by part 15 or 14, as applicable.

(c) *Forms and formats.*

(1) Agencies should use the SF 1449 and the OF 336, Continuation Sheet, to issue purchase orders (including orders against BPAs) or award contracts for

commercial products or commercial services. Follow the streamlined format at 12.202(a)(1) but exclude the solicitation provisions.

(2) Agencies may also use the forms and formats prescribed in parts 14, 15, or 36, as applicable, when awarding contracts using those procedures in conjunction with part 12.

12.205 Solicitation provisions and contract clauses.

(a) *Required provisions.*

(1) Include the provision at 52.212–1, Instructions to Offerors—Commercial Products and Commercial Services, in all solicitations for commercial products and commercial services. This provision may be tailored to reflect customary commercial practice, except the paragraph on debriefings, which is required by statute.

(2) Include the provision at 52.212–2, Evaluation—Commercial Products and Commercial Services, when using the procedures in 12.201–2. Paragraph (a) of this provision must be tailored for the acquisition and must include all evaluation factors and criteria for award. Do not tailor paragraphs (b) or (c).

(3) Include provisions prescribed in other parts of the FAR only if the provision is explicitly prescribed for commercial products and/or commercial services. Incorporate the provision as prescribed.

(b) *Required clauses.*

(1) Include the clause at 52.212–4, Terms and Conditions—Commercial Products and Commercial Services, in solicitations and contracts for commercial products and commercial services.

(i) Use the clause with its Alternate I in solicitations and contracts for commercial services when expecting to award a time-and-materials or labor-hour contract or when expecting that orders will include time-and-material line items.

(ii) This clause may be tailored to reflect customary commercial practice, with the exception of the following

paragraphs that implement statute: Assignments, Disputes, Payment, Invoice, Compliance with laws unique to Government contracts, Unauthorized obligations, and Comptroller General examination of records.

(iii) Remove the paragraph on Comptroller General examination of records if the agency head has waived this requirement according to the procedures for waivers of right to examination of records in part 25.

(2) Include clauses prescribed in other parts of the FAR in contracts only if the clause is explicitly prescribed for commercial products and/or commercial services. Incorporate the clause as prescribed.

(c) *Waivers and deviations.*

(1) *Waivers.*

(i) Agencies may waive or tailor provisions and clauses authorized for use in acquisitions for commercial products or commercial services if—

(A) The provision or clause does not implement statute or Executive order;

(B) The contracting officer determines the content to be inconsistent with customary commercial practice; and

(C)(1) For individual acquisitions, the head of the contracting activity approves the waiver or tailoring; or

(2) For a class of acquisitions, the senior procurement executive approves the waiver or tailoring.

(ii) Agencies must—

(A) Provide copies of class waivers for tailoring to the deviations to the Chair of the Civilian Agency Acquisition Council (for civilian agencies) or the Director of the Defense Acquisition Regulations System (for defense departments and agencies); and

(B) Ensure that solicitations and contracts clearly indicate when a provision or clause has been tailored.

(2) *Deviations.* Do not include provisions or clauses that are not explicitly prescribed for commercial products or commercial services, unless the agency issues an individual or class deviation according to part 1.

Subpart 12.3—Postaward

12.301 Notifications.

(a) *Posting requirements.*

(1) Comply with the award notice posting requirements in subpart 5.3.

(2) Make the justifications required by 12.102(b) for acquisitions valued over the SAT publicly available in accordance with 6.201.

(b) *Explanations for unsuccessful quoters.* When using the simplified procedures at 12.201–1, upon request, provide a brief explanation of the award decision that explains why the unsuccessful quoter was not selected. If

an award notice was not required to be posted to the GPE, also provide the information that would be included in an award notice (see 5.301(c)).

(c) *Notifications and debriefings of unsuccessful offerors.* When using the procedures in 12.201–2, follow the procedures in part 15 or 14 for notification of unsuccessful offerors and debriefings, as appropriate. When providing a debriefing, include the information listed at 52.212–1(e).

12.302 Subcontracts.

See requirements for subcontracts for commercial products and commercial services in subpart 44.4.

12.303 Cancellations.

(a) The Government may withdraw, amend, or cancel purchase orders by written notice to the supplier at any time before acceptance of the order occurs (see 12.201–1(b)).

(b) If the supplier did not accept the purchase order in writing, request that the supplier provide written acceptance of the cancellation.

(c) If the contractor does not accept the cancellation or claims that costs were incurred as a result of the contractor beginning performance under the purchase order, follow the procedures at 12.304 to terminate the purchase order.

12.304 Terminations.

(a) *General.* Follow the procedures in this section and the termination paragraphs of the clause at 52.212–4, when terminating contracts for commercial products or commercial services. Do not use the procedures in part 49.

(b) *Termination for cause.*

(1) Before terminating a contract for cause, send a cure notice to the contractor, unless the reason for the termination is late delivery.

(2) The Government's rights include any remedy available to any buyer in the commercial marketplace. The Government's preferred remedy is to acquire similar products or services from another contractor and charge the defaulted contractor for any excess procurement costs and any incidental or consequential damages incurred because of the termination.

(3) When a termination for cause is appropriate, send the contractor a written notification regarding the termination. At a minimum, this notification must include—

(i) A statement that the contract is terminated for cause;

(ii) The reasons for the termination;

(iii) Which remedies the Government intends to seek or date by which the

Government will inform the contractor of the remedy; and

(iv) A statement that the notice constitutes a final decision of the contracting officer, and that the contractor has the right to appeal under the Disputes clause.

(4) Follow the procedures in part 42 to report termination information to the Responsibility/Qualification Information in *SAM.gov*.

(c) *Termination for the Government's convenience.* When terminating for the Government's convenience, the contractor may be entitled to certain payments. The parties should mutually agree upon the requirements of the termination proposal. Balance the Government's need to obtain sufficient documentation to support payment to the contractor against the goal of having a simple and expeditious settlement.

Subpart 12.4—Micro-Purchases

12.401 General.

(a) Agency heads are encouraged to delegate micro-purchase authority (see part 1).

(b) Micro-purchases do not require written provisions or clauses. This paragraph takes precedence over any other FAR requirement to the contrary but does not prohibit the use of any clause.

(c) The security prohibitions and exclusions addressed at subpart 40.2 apply to micro-purchases, unless an exception applies or waiver is granted according to that subpart. However, the provisions and clauses in that subpart are not used for micro-purchases.

(d) Paragraph (s), Unauthorized Obligations, of the clause at 52.212–4, Terms and Conditions—Commercial Products and Commercial Services, automatically applies to any micro-purchase, including those made with the Governmentwide commercial purchase card. This clause prevents violations of the Anti-Deficiency Act (31 U.S.C. 1341).

12.402 Purchase guidelines.

(a) To the extent practicable, distribute micro-purchases equitably among qualified suppliers.

(b) Micro-purchases may be awarded without soliciting competitive quotations if the contracting officer or individual appointed in accordance with 1.403–2(b) considers the price to be reasonable.

(c) The administrative cost of verifying the reasonableness of the price for purchases may more than offset potential savings from detecting instances of overpricing. Therefore, action to verify price reasonableness need only be taken if there is—

(1) A lack of understanding of competitive pricing; or

(2) Reason to suspect that a price is not reasonable.

(d) If the contracting officer solicited competitive quotations and made award to a supplier that did not provide the lowest quote, documentation of the award must include identification of the suppliers solicited and a brief explanation of the award decision.

12.403 Methods.

(a) Use the following methods as the primary means of making micro-purchases:

(1) *The Governmentwide commercial purchase card.* The Governmentwide commercial purchase card is authorized for use in making purchases of supplies, services, or construction. Contracting officers and other individuals designated according to part 1 may use the Governmentwide commercial purchase card. The card may be used only for purchases authorized by law or regulation.

(2) *Purchase orders.* Purchase orders (including orders against blanket purchase agreements) may be used to make micro-purchases. See 12.201–1.

(b) The SF 44, Purchase Order-Invoice-Voucher, is a multipurpose pocket-size purchase order form designed primarily for on-the-spot, over-the-counter purchases of supplies and nonpersonal services while away from the purchasing office or at isolated activities. Contracting officers may use it in limited circumstances and only when advantageous to the Government if all of the following conditions are satisfied:

(1) An agency authorizes use of the SF 44.

(2) The amount of the purchase is at or below the micro-purchase threshold or higher dollar thresholds established by an agency for purchases made under unusual and compelling urgency or in support of contingency operations.

(3) The supplies or services are immediately available, and one delivery and one payment will be made.

(4) Its use is determined to be more economical and efficient than use of the Governmentwide commercial purchase card.

(c) Imprest funds and third-party drafts may be used to acquire supplies or services if an agency receives authorization from the Department of Treasury to use these methods and the purchases are made in accordance with Part IV of the Treasury Financial Manual for Guidance of Departments and Agencies. An imprest fund transaction must not exceed \$500 or such other limits as have been approved

by the agency head. A third-party draft transaction must not exceed \$2,500, unless authorized at a higher level in accordance with Treasury restrictions.

PART 13—SIMPLIFIED PROCEDURES FOR NONCOMMERCIAL ACQUISITIONS

Sec.

13.000 Scope of part.

13.001 Applicability.

Subpart 13.1—Presolicitation

13.101 Competition.

13.102 Small business.

13.103 Quality assurance.

Subpart 13.2—Solicitation, Evaluation, and Award

13.201 Solicitation.

13.202 Evaluation.

13.203 Award.

13.204 Solicitation provisions and contract clauses.

Subpart 13.3—Postaward

13.301 Notifications.

13.302 Cancellations and terminations.

13.303 Contract financing and payments.

Subpart 13.4—Micro-Purchases

13.401 General.

Authority: 41 U.S.C. 1121(b); 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

13.000 Scope of part.

This part implements simplified procedures for the acquisition of noncommercial products and services valued at or below the simplified acquisition threshold (SAT) in accordance with 41 U.S.C. 1901–1903, 1905, and 3305.

13.001 Applicability.

(a) The procedures in this part may be used only if—

(1) Unable to acquire products and services from mandatory sources and existing contracts according to part 8; and

(2) There are no commercial products or commercial services that can satisfy the agency's needs (see part 12).

(b) Follow the procedures in this part when procuring noncommercial products and services valued at greater than the micro-purchase threshold (MPT) but at or below the SAT, except—

(1) When procuring architect-engineering services, follow the short selection process at 36.202–4;

(2) When procuring construction as a noncommercial service, comply with the requirements in part 36 for construction contracts; and

(3) When procuring research and development, use the procedures in this part in conjunction with the procedures in part 35, as appropriate.

(c) Do not divide a requirement valued over the SAT merely to permit use of the procedures in this part.

(d) Go to <https://www.acquisition.gov/inapplicablelaws> for the lists of laws that do not apply to acquisitions valued at or below the SAT (41 U.S.C. 1905).

Subpart 13.1—Presolicitation

13.101 Competition.

(a) Agencies must promote competition to the maximum extent practicable when procuring noncommercial products and services valued at or below the SAT.

(b) Document the decision and the basis for the decision to conduct a sole source acquisition or to require brand name specifications without allowing for products with equivalent specifications (“brand name or equal”).

13.102 Small business.

Acquisitions of supplies or services that have an anticipated dollar value above the MPT, but at or below the SAT, must be set aside for small business concerns in accordance with 19.104–1. Include the North American Industry Classification System (NAICS) code and small business size standard in the solicitation.

13.103 Quality assurance.

Generally, inspection and acceptance should be at destination. Inspection at the contractor's location should be specified only if required by 46.404.

Subpart 13.2—Solicitation, Evaluation, and Award

13.201 Solicitation.

(a) *General.* The simplified procedures described at 12.201–1 for issuing requests for quotations (RFQs) also apply to noncommercial acquisitions. Agencies are encouraged to use additional innovative approaches and may leverage the other flexibilities identified in that section; however, if using blanket purchase agreements (BPAs), the maximum value of each individual purchase under a BPA may not exceed the SAT.

(b) *Forms and formats.*

(1) Use the Standard Form (SF) SF 18, Request for Quotations, and Optional Form (OF) 336, Continuation Sheet, to prepare the solicitation. The solicitation should be organized as follows:

(i) SF 18 and, if necessary, the OF 336.

(ii) Applicable contract clauses.

(iii) Any contract documents, exhibits, or attachments.

(iv) Applicable solicitation provisions.

(2) Agencies may use the form and format prescribed in part 36, when

using those procedures in conjunction with this subpart.

(c) *Procedures.* Comply with the requirements in part 5 for publicizing presolicitation notices and solicitations. Unless an exemption at 5.101(b) applies, publicize the acquisition as follows:

(2) Normally, post the solicitation in the Governmentwide Point of Entry (GPE) and, if applicable, include approved brand name justifications.

(3) The contracting officer may choose to solicit quotations directly from suppliers. When soliciting directly—

(i) Post a presolicitation notice in the GPE and, if applicable, include approved brand name justifications; and

(ii) To ensure maximum practicable competition, solicit quotations from at least three sources and, whenever practicable, ensure two were not included in the previous solicitation.

13.202 Evaluation.

Follow the procedures in 12.203 when establishing evaluation factors and a process to evaluate quotations. Notify potential quoters of the basis on which the agency will make the award decision. Exercise good business judgment in deciding whether to accept a quotation received after the due date or time.

13.203 Award.

(a) *Price reasonableness.* The contracting officer must determine the price to be fair and reasonable. Whenever possible, base price reasonableness on competitive quotations.

(b) *Documentation.* Include in the contract file a written description of the procedures used in awarding the purchase order and the number of quotations received.

(c) *Forms and format.* Use the Optional Form (OF) 347, Order for Supplies or Services; the OF 336, Continuation Sheet, or OF 348, Order for Supplies and Services Schedule—Continuation; or similar agency forms or automated formats to the maximum extent practicable.

13.204 Solicitation provisions and contract clauses.

(a) Insert provisions and clauses prescribed elsewhere in the FAR in purchase orders for noncommercial supplies or services valued at or below the SAT as required or applicable based on the clause prescriptions.

(b) Contracting officers may insert the clause at 52.213–4, Terms and Conditions—Simplified Acquisitions (Noncommercial), in noncommercial acquisitions valued at or below the SAT to provide a streamlined set of terms

and conditions for inspection/acceptance, excusable delays, terminations, and warranties. This clause is either used in lieu of similar clauses prescribed for these purposes or tailored to incorporate only some of the streamlined terms and conditions, as necessary.

(c) Do not use the part 12 provisions or clause (*i.e.*, 52.212–1, 52.212–2, or 52.212–4) in noncommercial acquisitions.

Subpart 13.3—Postaward

13.301 Notifications.

Comply with the award notice posting requirements in subpart 5.3. Upon request from an unsuccessful quoter, provide a brief explanation of the award decision that explains why the unsuccessful quoter was not selected. If an award notice was not required to be posted to the Government point of entry, also provide the information that would be included in an award notice (see 5.301(c)).

13.302 Cancellations and terminations.

(a) The Government may withdraw, amend, or cancel purchase orders by written notice to the supplier at any time before acceptance of the order occurs (see 12.201–1(b)).

(b) If the supplier did not accept the purchase order in writing, request that the supplier provide written acceptance of the cancellation.

(c) If the supplier does not accept the cancellation or claims that costs were incurred as a result of beginning performance under the purchase order, follow the procedures in the termination clause in the purchase order (*e.g.*, 52.213–4 or 52.249–8).

13.303 Contract financing and payments.

(a) Unless agency regulations permit otherwise, do not provide financing for purchases valued at or below the SAT.

(b) See part 32 for payment procedures, including the option to use fast payment procedures.

Subpart 13.4—Micro-Purchases

13.401 General.

(a) Follow the procedures in 12.4 when making purchases valued at or below the MPT.

(b) For noncommercial acquisitions, the clause at 52.232–39, Unenforceability of Unauthorized Obligations, automatically applies to any micro-purchase, including those made with the Governmentwide commercial purchase card. This clause prevents violations of the Anti-Deficiency Act (31 U.S.C. 1341).

PART 15—CONTRACTING BY NEGOTIATION

Sec.

15.000 Scope.

15.001 Definitions.

15.002 Types of negotiated acquisition.

Subpart 15.1—Presolicitation and Solicitation

15.100 Scope.

15.101 Structuring a request for proposals.

15.102 Developing a competitive source selection approach.

15.102–1 Tradeoff approach.

15.102–2 Lowest price technically acceptable approach.

15.102–3 Highest technically rated with a fair and reasonable price approach.

15.102–4 Phased evaluation.

15.103 Establishing competitive evaluation factors and significant subfactors.

15.104 Other considerations.

15.104–1 Oral presentations.

15.104–2 Negotiations disclosure.

15.104–3 Limitation on tiered evaluations for multiple award contracts.

15.104–4 Request for cost or pricing data.

15.104–5 Make-or-buy program.

15.104–6 Should-cost review.

15.104–7 Unit prices.

15.104–8 Advisory multistep process.

15.105 Amending a request for proposal.

15.106 Submission, modification, revision, and withdrawal of proposals.

15.107 Receiving proposals.

15.108 Uniform contract format.

15.108–1 Part I—The Schedule.

15.108–2 Part II—Contract Clauses.

15.108–3 Part III—List of Documents, Exhibits, and Other Attachments.

15.108–4 Part IV—Representations and Instructions.

15.109 Solicitation provisions and contract clauses.

Subpart 15.2—Evaluation and Award

15.200 Scope.

15.201 Source selection responsibilities.

15.202 Evaluating competitive proposals.

15.203 Competitive award without negotiation.

15.204 Competitive award with negotiation.

15.204–1 Establishing a competitive range.

15.204–2 Competitive negotiations.

15.205 Source selection decision.

15.206 Preaward notices and debriefings.

15.206–1 Preaward notices.

15.206–2 Preaward debriefing.

15.207 Award.

15.207–1 Award to successful offeror.

15.207–2 Award notice.

Subpart 15.3—Postaward

15.300 Scope.

15.301 Postaward debriefing of offerors.

15.302 Protests against award.

15.303 Discovery of mistakes.

15.304 Defective certified cost or pricing data after award.

15.305 Estimating systems.

Subpart 15.4—Contract Pricing

15.400 Scope.

15.401 Definitions.

15.402 General.

15.403 Obtaining cost or pricing data.

- 15.403–1 Data other than certified cost or pricing data.
- 15.403–2 Prohibitions on obtaining certified cost or pricing data.
- 15.403–3 Certified cost or pricing data.
- 15.403–4 Certificate of current cost or pricing data.
- 15.404 Proposal analysis.
- 15.404–1 Price analysis.
- 15.404–2 Cost analysis.
- 15.404–3 Cost realism analysis.
- 15.404–4 Technical cost or price analysis.
- 15.404–5 Unit prices.
- 15.404–6 Unbalanced pricing.
- 15.404–7 Review and justification of pass-through contracts.
- 15.404–8 Subcontract pricing considerations.
- 15.404–9 Profit.
- 15.405 Special cost or pricing areas.
- 15.405–1 Inaccurate, incomplete, or noncurrent cost or pricing data.
- 15.405–2 Make-or-buy programs.
- 15.405–3 Forward pricing rate agreements.
- 15.405–4 Should-cost review.
- 15.406 Data to support proposal analysis.
- 15.407 Price negotiation.
- 15.408 Documentation.
- 15.408–1 Prenegotiation objectives.
- 15.408–2 Documenting the negotiation.

Subpart 15.5—Unsolicited Proposals

- 15.500 Scope
- 15.501 Definitions.
- 15.502 General.
- 15.503 Preparing unsolicited proposals.
- 15.503–1 Scope of proposals.
- 15.503–2 Content of proposals.
- 15.503–3 Restricting use and disclosure of data.
- 15.504 Receipt and initial review of unsolicited proposals.
- 15.504–1 Initial Review.
- 15.504–2 Handling use and disclosure of data restrictions.
- 15.505 Evaluation of unsolicited proposals.
- 15.506 Criteria for acceptance and negotiation of an unsolicited proposal.

Authority: 41 U.S.C. 1121(b); 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

15.000 Scope.

This part addresses policies and procedures used in competitive and noncompetitive negotiated acquisitions. These acquisition procedures provide an opportunity for negotiation between the Government and an offeror(s) upon receipt of a proposal submitted in response to a request for proposals (RFP).

15.001 Definitions.

As used in this part—

Clarification means communication between the Government and an offeror where the offeror is given the opportunity to resolve minor or administrative errors or clarify certain aspects of their proposal, but does not result in an opportunity for offerors to submit a proposal revision.

Competitive range means the group of evaluated proposals that the contracting officer determines are best suited for negotiation.

Deficiency is any part of a proposal that does not conform to a material term of a RFP. A material term is one that affects price, quantity, quality, or delivery, or any prerequisites that the RFP requires to be met at the time of proposal submission.

Negotiation means communication between the Government and an offeror regarding an offeror's proposal that results in an opportunity for the offeror to submit a proposal revision. In noncompetitive negotiations, the proposal revision may occur verbally and be captured in the resultant contract.

Proposal modification is a change made to a proposal before the RFP closing date and time, or made in response to an amendment, or made to correct a mistake at any time before award.

Proposal revision is a change to an offeror's proposal made after the RFP closing date, at the request of or as allowed by a contracting officer, as the result of negotiations.

Weakness means a flaw in the proposal that increases the risk of unsuccessful contract performance. A "significant weakness" in the proposal is a flaw that appreciably increases the risk of unsuccessful contract performance.

15.002 Types of negotiated acquisition.

(a) *Noncompetitive acquisitions.* Noncompetitive, or sole source, acquisition is a process whereby an award is made to a single vendor without soliciting proposals from multiple sources. When using this acquisition strategy, remove unnecessary information and requirements from the RFP, including voluminous proposal preparation instructions and evaluation factors.

(b) *Competitive acquisitions.* Competitive acquisition is a process whereby an award is made after soliciting proposals from multiple sources. When using this acquisition strategy, tailor the complexity of the RFP, evaluation, and source selection decision to the circumstances of the acquisition, while maintaining a process that promotes an impartial and comprehensive evaluation of proposals, leading to selection of the proposal representing the best value to the Government.

Subpart 15.1—Presolicitation and Solicitation

15.100 Scope.

This subpart addresses policies and procedures for preparing RFPs and receiving proposals. RFPs are used in negotiated acquisitions to communicate Government requirements to prospective contractors and to request proposals.

15.101 Structuring a request for proposals.

(a) *Format.* Prepare written RFPs and resulting contracts using the uniform contract format (UCF) at 15.108.

(1) Streamlined RFPs may be used in non-competitive acquisitions and other acquisitions in which a standard RFP would be unnecessarily lengthy.

(2) Oral RFPs may be used when processing a written RFP would delay the acquisition of supplies or services to the detriment of the Government and an RFP is not required to be posted under part 5.

(b) *Exceptions.* Agencies do not need to use the UCF for:

(1) Construction and architect-engineer contracts.

(2) Subsistence contracts.

(3) Supplies or services contracts requiring special contract formats prescribed elsewhere in this part that are inconsistent with the UCF.

(4) Streamlined RFPs.

(5) Contracts exempted by the agency head or designee.

(c) *Minimum content when not using the uniform contract format.* When the UCF is not used, ensure—

(1) Competitive RFPs, at a minimum, describe the Government's requirement; any anticipated terms and conditions that will apply to the contract; the information required to be in the offeror's proposal; the factors and significant subfactors that will be used to evaluate the proposal and their relative importance; and one of the statements at 15.103(d).

(2) Streamlined RFPs are simplified to remove unnecessary information and requirements and, at a minimum, contain the following:

- (i) RFP number and date;
- (ii) Name, address, and telephone number of the contracting officer;
- (iii) Type of contract contemplated;
- (iv) Quantity, description, and required delivery dates for the item;
- (v) Applicable representations and certifications;
- (vi) Anticipated contract terms and conditions;
- (vii) Proposal due date and time;
- (viii) Other relevant information; *e.g.*, incentives, variations in delivery

schedule, cost proposal support, and data requirements; and

(ix) For competitive streamlined RFPs, instructions to offerors and evaluation factors and significant subfactors in accordance with 15.103.

15.102 Developing a competitive source selection approach.

The goal of source selection is to select the proposal that represents the best value to the Government. To obtain best value, agencies use a range of approaches for evaluating competitive proposals, where the importance of cost or price varies relative to other factors such as technical merit and past performance. Agencies can obtain best value in competitive negotiated acquisitions by using any one or a combination of source selection approaches, including but not limited to the approaches mentioned in this section.

15.102–1 Tradeoff approach.

The tradeoff approach to source selection is appropriate when it may be in the Government's best interest to consider award to other than the lowest priced offeror or other than the highest technically rated offeror. This process permits tradeoffs among cost or price and non-cost or non-price factors. The anticipated benefits of a higher priced proposal must merit the additional cost.

15.102–2 Lowest price technically acceptable approach.

(a) *General.* The lowest price technically acceptable (LPTA) approach to source selection is appropriate when it is in the Government's best interest to award to the offeror that submits a technically acceptable proposal with the lowest evaluated price. This process does not permit tradeoffs.

(b) *Required Information.* When using this process, the RFP must—

(1) Identify the evaluation factors that establish the minimum requirements for acceptability; and

(2) Specify that the award will be made based on the lowest evaluated price of proposals meeting or exceeding the requirements for acceptability.

(c) *Limitations.* Except for DoD, in accordance with section 880 of the John S. McCain NDAA for FY 2019 (Pub. L. 115–232, 41 U.S.C. 3701 Note)—

(1) The LPTA source selection approach must only be used when—

(i) The agency can comprehensively and clearly describe the minimum requirements in terms of performance objectives, measures, and standards that will be used to determine the acceptability of proposals;

(ii) The agency would realize no, or minimal, value from a proposal that

exceeds the minimum technical or performance requirements;

(iii) The agency believes the technical proposals will require no, or minimal, subjective judgment by the source selection authority (SSA) as to the desirability of one offeror's proposal versus a competing proposal;

(iv) The agency has a high degree of confidence that reviewing the technical proposals of all offerors would not result in the identification of characteristics that could provide value or benefit to the agency;

(v) The agency determined that the lowest price reflects the total cost, including operation and support, of the product(s) or service(s) being acquired; and

(vi) The contracting officer documents the contract file describing the circumstances that justify the use of the LPTA source selection process.

(2) Avoid, to the maximum extent practicable, using the LPTA source selection process in the case of a procurement that is predominantly for the acquisition of—

(i) Information technology services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, audit or audit readiness services, health care services and records, telecommunications devices and services, munitions response services, or other knowledge-based professional services;

(ii) Personal protective equipment; or

(iii) Knowledge-based training or logistics services in contingency operations or other operations outside the United States.

15.102–3 Highest technically rated with a fair and reasonable price approach.

(a) *General.* (1) The highest technically rated with a fair and reasonable price approach to source selection is appropriate when the Government determines in advance that it would not be advantageous to consider tradeoffs between cost or price and non-cost or non-price factors; rather, the acquisition warrants paying any fair and reasonable price for the highest technically rated proposal.

(2) In this process, all proposals are evaluated based on the non-price factors outlined in the RFP. The price of the highest technically rated proposal is evaluated to determine if it is fair and reasonable in accordance with subpart 15.4.

(3) If the highest technically rated proposal's price is fair and reasonable, the proposal is selected for award. If the price is not fair and reasonable, the next highest technically rated proposal is

evaluated to determine whether the price is fair and reasonable in accordance with subpart 15.4. This process continues until a contract is awarded to the highest technically rated responsible offeror with a fair and reasonable price.

(b) *Required information.* When using this process, the RFP must advise offerors that the Government will not consider tradeoffs between cost or price and non-cost or non-price factors, and that the highest technically rated proposal will be selected for award if it offers a fair and reasonable price.

15.102–4 Phased evaluation.

Phased evaluations, or a down-select process, may promote efficiency when evaluating proposals. An RFP can require phased submission of proposals, where offerors address specific evaluation factors with their initial proposal and address the remaining evaluation factors in subsequent proposals.

15.103 Establishing competitive evaluation factors and significant subfactors.

(a) *General.* A competitive award decision is based on evaluation factors and significant subfactors that are tailored to the acquisition. Evaluation factors and significant subfactors must represent the key areas of importance and emphasis to be considered in the source selection decision, and support meaningful differentiation between competing proposals. All factors and significant subfactors that will affect contract award and their relative importance must be stated clearly in the RFP (10 U.S.C. 3206(b)(1) and 41 U.S.C. 3306(b)(1)).

(b) *Required factors.* The evaluation factors and significant subfactors that apply to an acquisition and their relative importance are within the broad discretion of agency acquisition officials, subject to the following requirements:

(1) *Price or cost.*

(i) Price or cost to the Government must be evaluated in every competitive source selection (10 U.S.C. 3206(c)(1)(B) and 41 U.S.C. 3306(c)(1)(B)). Proposed price reductions under an offeror's other contracts cannot be used as an evaluation factor.

(ii) For DoD, NASA, and the Coast Guard, contracting officers may choose not to include price or cost as an evaluation factor for award in accordance with 16.601–2(b)(2).

(2) *Quality.* The quality of the product or service must be evaluated in every competitive source selection through consideration of one or more non-cost

evaluation factors such as technical excellence, management capability, personnel qualifications, prior experience, past performance, and compliance with RFP requirements (10 U.S.C. 3206(c)(1)(A) and 41 U.S.C. 3306(c)(1)(A)).

(3) *Past performance.*

(i) Past performance must be evaluated in every competitive source selection, unless the contracting officer documents the reason past performance is not an appropriate evaluation factor for the acquisition. This evaluation is separate from the responsibility determination required under part 9.

(ii) The RFP must—

(A) Describe the general approach for evaluating past performance information, including evaluating offerors with no relevant performance history; and

(B) Provide offerors an opportunity to: identify past or current contracts (including Federal, State, and local government, private sector, and other contracts) for efforts similar to the Government requirement, and provide information on problems encountered on the identified contracts and the offeror's corrective actions.

(c) *Situational factors.* For competitive RFPs that are not set aside for small business concerns, but involve consolidation or bundling, and offer a significant opportunity for subcontracting, include—

(1) A factor to evaluate past performance indicating the extent to which the offeror attained applicable goals for small business participation under contracts that required subcontracting plans (15 U.S.C. 637(d)(4)(G)(ii)); and

(2) A factor to evaluate the proposed small business subcontracting participation in the subcontracting plan (15 U.S.C. 637(d)(4)(G)(i)).

(d) *Factor importance.* In addition to stating the relative importance of each evaluation factor, and unless the exception at paragraph (b)(1)(ii) of this section applies, the RFP must also state, at a minimum, whether all evaluation factors other than cost or price, when combined, are—

(1) Significantly more important than cost or price;

(2) Approximately equal to cost or price; or

(3) Significantly less important than cost or price (10 U.S.C. 3206(c)(1)(C) and 41 U.S.C. 3306(c)(1)(C)).

15.104 Other considerations.

15.104-1 Oral presentations.

(a) Oral presentations may be used as a substitute for requesting portions of a

written proposal information from offerors. Information on an offeror's capability, past performance, work plans or approaches, staffing resources, transition plans, or sample tasks can be suitable for oral presentations.

(b) Oral presentations may occur at any time during the source selection process. When requesting oral presentations, the RFP must provide offerors with the necessary information to prepare and provide the presentation.

15.104-2 Negotiations disclosure.

Competitive RFPs must advise offerors whether the Government intends to evaluate proposals and award a contract with or without conducting negotiations with offerors whose proposals have been determined to be within the competitive range (10 U.S.C. 3206(b)(2)(B)(i) and 41 U.S.C. 3306(b)(2)(B)(i)). FAR provision 52.215-1, *Instructions to Offerors-Competitive Acquisition*, and its *Alternate I*, contain this disclosure.

15.104-3 Limitation on tiered evaluations for multiple award contracts.

When soliciting for a multiple award contract, agencies must not create a tiered or cascading evaluation of small business offers, as described in 13 CFR 125.2, unless the agency has statutory authority to do so.

15.104-4 Request for cost or pricing data.

(a) *Required information.* In accordance with 15.402(a), the RFP must state—

(1) Whether certified cost or pricing data are required;

(2) That, in lieu of submitting certified cost or pricing data, the offeror may submit a request for exception from the requirement to submit certified cost or pricing data;

(3) Any requirement for data other than certified cost or pricing data, including a description of the data needed, the format required for submission, and the access to records needed to permit an adequate evaluation of the proposed price in accordance with 15.403-1; and

(4) The requirement for necessary preaward or postaward access to offeror's records.

(b) *Format for submission of data.*

(1) *Certified cost or pricing data.*

Contracting officers may require submission of certified cost or pricing data in the format indicated in Table 15-1 at 15.408-2, specify an alternative format, or permit submission in the contractor's format, unless the data are required to be submitted on one of the termination forms specified in part 49.

(i) Offerors must describe any forward pricing rate agreements (FPRA) or other

advance agreements in each specific pricing proposal to which the rates apply and identify the latest cost or pricing data already submitted in accordance with the FPRA.

(ii) Data supporting FPRAs, other advanced agreements, or final indirect cost proposals must be submitted in a form acceptable to the contracting officer.

(2) *Data other than certified cost or pricing data.* Data may be submitted in the offeror's own format unless the contracting officer decides that use of a specific format is essential for evaluating and determining that the price is fair and reasonable and the format has been described in the RFP.

15.104-5 Make-or-buy program.

(a) *General.*

(1) A make-or-buy program is the part of a contractor's written plan for a contract that identifies those major items to be produced or work efforts to be performed in the prime contractor's facilities and those to be subcontracted.

(2) The Government may choose to review and agree on the offeror's make-or-buy program when necessary to ensure negotiation of reasonable contract prices, satisfactory performance, or implementation of socioeconomic policies.

(b) *Acquisitions requiring make-or-buy programs.*

(1) Contracting officers may require offerors to submit make-or-buy program plans for acquisitions requiring certified cost or pricing data whose estimated value is \$20 million or more, except when the proposed contract is for research or development and, if prototypes or hardware are involved, no significant follow-on production is anticipated.

(2) Only require offerors to submit make-or-buy programs for acquisitions whose estimated value is under \$20 million if—

(i) It is determined that the information is necessary; and

(ii) The reasons are documented in the contract file.

(c) *RFP requirements.* When offerors must submit proposed make-or-buy programs, the RFP must include—

(1) A statement that the program and required supporting information must accompany the proposal; and

(2) A description of factors to be used in evaluating the proposed program.

(d) *Required information from offerors.*

(1) To facilitate an evaluation in accordance with 15.405-2, the information required from an offeror about a make-or-buy program must—

(i) Be confined to those major items or work efforts that normally would

require company management review of the make-or-buy decision because they are complex, costly, needed in large quantities, or require additional equipment or real property to produce;

(ii) Not include raw materials, products, commercial services, and off-the-shelf items, unless their potential impact on contract cost or schedule is critical; and,

(iii) Not include items or work efforts estimated to cost less than 1 percent of the total estimated contract price or any minimum dollar amount set by the agency.

(2) To support a make-or-buy program, the following information must be provided by an offeror in its proposal:

(i) A description of each major item or work effort.

(ii) Categorization of each major item or work effort as “must make,” “must buy,” or “can either make or buy.”

(iii) For each item or work effort categorized as “can either make or buy,” a proposal either to “make” or to “buy.”

(iv) Reasons for categorizing items and work efforts as “must make” or “must buy,” and proposing to “make” or to “buy” those categorized as “can either make or buy.” The reasons must include the consideration given to the evaluation factors described in the RFP and must be in sufficient detail to permit the contracting officer to evaluate the categorization or proposal.

(v) Designation of the plant or division proposed to make each item or perform each work effort, and a statement as to whether the existing or proposed new facility is in or near a labor surplus area.

(vi) Identification of proposed subcontractors, if known, and their location and size status.

(vii) Any recommendations to defer make-or-buy decisions when categorization of some items or work efforts is impracticable at the time of submission.

(viii) Any other information the contracting officer requires in order to evaluate the program.

15.104-6 Should-cost review.

When a program should-cost review is planned in accordance with 15.405-4, state this fact in the acquisition plan and in the RFP.

15.104-7 Unit prices.

To facilitate the analysis at 15.404-5, require offerors to identify in their proposals those items of supply that they will not manufacture or to which they will not contribute significant value when adequate price competition is not anticipated. This requirement

does not apply to acquisitions for commercial products or commercial services.

15.104-8 Advisory multistep process.

(a) Prior to releasing an RFP, agencies may publish a notice that provides a general description of the scope or purpose of the acquisition and invites potential offerors to submit information that allows the Government to advise offerors about their potential to be viable competitors in the upcoming RFP.

(b) When using this process, agencies must—

(1) Evaluate all responses in accordance with the criteria stated in the notice;

(2) Advise each respondent in writing either that it is likely to be a viable competitor or, based on the information submitted, that it is unlikely to be a viable competitor for the upcoming RFP;

(3) Advise respondents considered not to be viable competitors of the general basis for that opinion; and

(4) Inform all respondents that, notwithstanding the advice provided by the Government in response to their submissions, they may participate in the upcoming RFP.

15.105 Amending a request for proposal.

(a) *General.* When the Government changes its requirements or terms and conditions, amend the RFP.

(1) Amendments issued before the established time and date for receipt of proposals must be issued to all parties receiving the RFP.

(2) Amendments issued after the established time and date for receipt of proposals must be issued to all offerors that have not been eliminated from the competition.

(b) *Content.* At a minimum, each amendment must include—

(1) The name and address of issuing activity;

(2) The RFP number and date;

(3) The amendment number and date;

(4) The number of pages in the amendment;

(5) A description of the change being made;

(6) The contracting officer's name and contact information; and

(7) The revised RFP closing date, if applicable.

(c) *Forms.* Prescribed forms are not required to amend RFPs described in this part. Agencies may use Standard Form (SF) 30, *Amendment of Solicitation/Modification of Contract*, and Optional Form (OF) 309, *Amendment of Solicitation*.

(d) *Oral notices.* Oral notices may be used when time is of the essence.

Document the contract file and formalize the notice with a written amendment.

(e) *Requirement changes.*

(1) Amend the RFP if the Government is interested in a proposal that involves a departure from the stated requirements. The amendment must not reveal the alternate solution proposed or any other information that is entitled to protection.

(2) Cancel the RFP and issue a new one, regardless of the stage of the acquisition if an amendment—

(i) Is proposed after proposals have been received, and

(ii) In the judgment of the contracting officer, based on market research or otherwise, has a requirement change that is so substantial it exceeds what prospective offerors reasonably could have anticipated as a change to the RFP, and additional sources likely would have submitted proposals had the change been in the RFP.

15.106 Submission, modification, revision, and withdrawal of proposals.

(a) *Submission.* Offerors are responsible for submitting proposals, and any revisions or modifications, so as to reach the Government office designated in the RFP by the time specified in the RFP.

(1) *Method.* Offerors may use any transmission method authorized in the RFP.

(2) *Time.* If no time is specified in the RFP, the time for receipt is 4:30 p.m., local time, for the designated Government office on the date that proposals are due.

(b) *Late submission.* (1) *General.* Any proposal, modification, or revision, that is received at the designated Government office after the exact time specified for receipt of proposals is “late” and will not be considered, unless it is received before award is made and the contracting officer determines that accepting the late proposal is in the Government's best interest and would not unduly delay the acquisition.

(2) *Proof of receipt.* Acceptable evidence to establish the time of receipt at the Government installation includes electronic timestamps, the time/date stamp of that installation on the proposal wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel.

(3) *Notification.* Promptly notify any offeror if its proposal, modification, or revision was received late, and inform the offeror whether its proposal will be considered, unless contract award is

imminent and the award notice at 15.207–2 will suffice.

(4) *Documentation.* (i) When available, the file for each late proposal, modification, revision, or withdrawal received must include the date and hour of receipt; a statement regarding whether the proposal was considered for award, with supporting rationale; and the envelope, wrapper, or other evidence of date of receipt.

(ii) Late proposals and modifications that are not considered must be held unopened, unless opened for identification, until after award and then retained with other unsuccessful proposals.

(c) *Interruption.* If an emergency or unanticipated event interrupts normal Government processes so that proposals cannot be received at the Government office designated for receipt of proposals by the exact time specified in the solicitation, and urgent Government requirements preclude amendment of the RFP closing date, the time specified for receipt of proposals will be deemed to be extended to the same time of day specified in the RFP on the first work day on which normal Government processes resume.

(d) *Withdrawal.* Proposals may be withdrawn by written notice at any time before award. A copy of withdrawn proposals should be retained in the contract file.

(1) Extra copies of the withdrawn proposals may be destroyed or returned to the offeror at the offeror's request. Extremely bulky proposals must only be returned at the offeror's request and expense.

(2) Oral proposals in response to oral RFPs may be withdrawn orally. Document the contract file when oral withdrawals are made.

15.107 Receiving proposals.

(a) *Marking.* When there is no electronic record, contracting officers must mark proposals with the date and time of receipt and provide them to the designated officials.

(b) *Handling.* Proposals should be safeguarded from unauthorized disclosure throughout the source selection process in accordance with 3.104–4.

(c) *Unreadable proposals.* If any portion of a proposal is unreadable, immediately notify the offeror and permit the offeror to resubmit the unreadable portion of the proposal. Establish the method and time for resubmission after consultation with the offeror and document the file. For the purpose of determining timeliness under 15.106, the resubmission is considered as if it were received at the

date and time of the original unreadable submission, provided the offeror complies with the time and format requirements established by the contracting officer for resubmission.

15.108 Uniform contract format.

RFPs using the UCF should include Parts I, II, III, and IV. Upon award, do not physically include Part IV in the resulting contract, but retain it in the contract file. The representations and certifications in Part IV are incorporated by reference in the contract through FAR clauses 52.204–19, *Incorporation by Reference of Representations and Certifications*, and 52.212–4, *Contract Terms and Conditions—Commercial Products and Commercial Services*.

15.108–1 Part I—The Schedule.

(a) *Section A, Solicitation/contract form.*

(1) Prescribed forms are not required to prepare RFPs described in this part. Agencies may use Optional Form (OF) 308, *Solicitation and Offer-Negotiated Acquisition*, or Standard Form (SF) 33, *Solicitation, Offer and Award*, to prepare RFPs.

(2) When other than OF 308 or SF 33 is used, include the following information on the first page of the RFP:

(i) Name, address, and location of issuing activity, including room and building where proposals or information must be submitted.

(ii) RFP number.

(iii) Date of issuance.

(iv) Closing date and time.

(v) Number of RFP pages.

(vi) Requisition or other purchase authority.

(vii) Brief description of item or service.

(viii) Requirement for the offeror to provide its name and complete address, including street, city, county, state, and zip code, and email address, if appropriate.

(ix) Proposal expiration date.

(b) *Section B, Supplies or services and prices/costs.* Include a brief description of the supplies or services, including any incidental deliverables.

(c) *Section C, Description/specifications/requirements.* Include any description or specifications needed in addition to Section B.

(d) *Section D, Packaging and marking.* Include packaging, packing, preservation, and marking requirements, if any.

(e) *Section E, Inspection and acceptance.* Include inspection, acceptance, quality assurance, and reliability requirements.

(f) *Section F, Deliveries or performance.* Include the requirements

for time, place, and method of delivery or performance.

(g) *Section G, Contract administration data.* Include any required accounting and appropriation data and any required contract administration information or instructions not included in other sections of the UCF. Include a statement that the offeror should include the payment address in the proposal, if it is different from that shown for the offeror.

(h) *Section H, Special contract requirements.* Include a clear statement of any special contract requirements that are not included in Section I or in other sections of the UCF.

15.108–2 Part II—Contract Clauses.

Section I, Contract clauses. Include the clauses required by law or by this part and any additional clauses expected to be included in any resulting contract, if these clauses are not required in any other section of the UCF. An index may be inserted if this section's format is particularly complex.

15.108–3 Part III—List of Documents, Exhibits, and Other Attachments.

Section J, List of attachments. Include a list of the title, date, and number of pages for each attached document, exhibit, and other attachment. Cross references to material in other sections may be inserted, as appropriate.

15.108–4 Part IV—Representations and Instructions.

(a) *Section K, Representations, certifications, and other statements of offerors.* Include RFP provisions that require representations, certifications, or the submission of other information by offerors.

(b) *Section L, Instructions, conditions, and notices to offerors or respondents.* Include solicitation provisions and other information and instructions not required elsewhere to guide offerors in preparing proposals.

(1) Include the method(s) offerors may use to submit a proposal.

(2) Offerors may be instructed to submit proposals or information in a specific format or severable parts to facilitate evaluation. Agencies may also require the proposal to be further organized into sections (e.g., administrative, management, technical, past performance, and certified cost and pricing data or data other than certified cost and pricing data).

(c) *Section M, Evaluation factors for award.* Identify all significant factors and any significant subfactors that will be considered in awarding the contract, their relative importance, and one of the phrases in 15.103(d), as required.

15.109 Solicitation provisions and contract clauses.

(a)(1) Insert the provision at 52.215–1, *Instructions to Offerors—Competitive Acquisition*, in competitive solicitations, other than those for commercial products or commercial services, where the Government intends to award a contract without negotiation with offerors.

(2) Use the provision with its *Alternate I* when the Government intends to award a contract after negotiation with offerors.

(3) Use the provision with its *Alternate II* when the Government will accept alternate proposals.

(b)(1) Insert the clause at 52.215–2, *Audit and Records-Negotiation* in solicitations and contracts except those for—

(i) Acquisitions valued at or below the SAT;

(ii) The acquisition of utility services at rates not exceeding those established to apply uniformly to the general public, plus any applicable reasonable connection charge; or

(iii) The acquisition of commercial products or commercial services exempted under 15.403–2.

(2) Reserved.

(3) Use the clause with its *Alternate II* when contemplating the award of a cost-reimbursement contract with State and local Governments, educational institutions, and other nonprofit organizations.

(4) Use the clause with its *Alternate III* when the head of the agency waives the examination of records by the Comptroller General in accordance with part 25.

(c) [Reserved]

(d) [Reserved]

(e) [Reserved]

(f) Insert the provision at 52.215–6, *Place of Performance*, in solicitations, other than those for commercial products or commercial services, when the place of performance is not specified by the Government.

(g) [Reserved]

(h) Insert the clause at 52.215–8, *Order of Precedence—Uniform Contract Format*, in solicitations and contracts, other than those for commercial products or commercial services, that use the UCF.

(i)(1) Insert the clause at 52.215–9, *Changes or Additions to Make-or-Buy Program*, in solicitations and contracts, other than those for commercial products or commercial services, when a make-or-buy program may be incorporated in the contract.

(2) When a less economical “make” or “buy” categorization is selected for one or more items of significant value, use the clause with—

(i) Its *Alternate I*, if a fixed-price incentive contract is contemplated; or

(ii) Its *Alternate II*, if a cost-plus-incentive-fee contract is contemplated.

(j) Insert the clause at 52.215–10, *Price Reduction for Defective Certified Cost or Pricing Data*, in solicitations and contracts when certified cost or pricing data will be required from the contractor or any subcontractor. Only include the clause in solicitations and contracts for commercial products (other than commercially available off-the-shelf (COTS) items) and/or commercial services—

(1) In noncompetitive acquisitions valued greater than \$25 million for supplies and services treated as commercial products and commercial services in accordance with 12.001(b); or

(2) For DoD, NASA, and the Coast Guard, when acquiring a commercial product as defined in paragraph (3)(ii) of the definition of commercial product in part 2, and the total price of all such modifications under a particular contract action exceeds the greater of—

(i) The threshold for obtaining certified cost or pricing data in 15.403–3(a); or

(ii) 5 percent of the total price of the contract at the time of contract award.

(k) Insert the clause at 52.215–11, *Price Reduction for Defective Certified Cost or Pricing Data—Modifications*, in solicitations and contracts when certified cost or pricing data will be required from the contractor or any subcontractor for the pricing of contract modifications, and the clause at 52.215–10 has not been included. Only include the clause in solicitations and contracts for commercial products (other than COTS items) and/or commercial services—

(1) In noncompetitive acquisitions valued greater than \$25 million for supplies and services treated as commercial products and commercial services in accordance with 12.001(b); or

(2) For DoD, NASA, and the Coast Guard, when acquiring a commercial product as defined in paragraph (3)(ii) of the definition of commercial product in part 2, and the total price of all such modifications under a particular contract action exceeds the greater of—

(i) The threshold for obtaining certified cost or pricing data in 15.403–3(a); or

(ii) 5 percent of the total price of the contract at the time of contract award.

(l)(1) Insert the clause at 52.215–12, *Subcontractor Certified Cost or Pricing Data*, in solicitations and contracts that include the clause at 52.215–10. Only

include the clause in solicitations and contracts for commercial products (other than COTS items) and/or commercial services—

(i) In noncompetitive acquisitions valued greater than \$25 million for supplies and services treated as commercial products and commercial services in accordance with 12.001(b); or

(ii) For DoD, NASA, and the Coast Guard, when acquiring a commercial product as defined in paragraph (3)(ii) of the definition of commercial product in part 2, and the total price of all such modifications under a particular contract action exceeds the greater of—

(A) The threshold for obtaining certified cost or pricing data in 15.403–3(a); or

(B) 5 percent of the total price of the contract at the time of contract award.

(2) Replace the clause with its *Alternate I*, without requiring consideration, upon the request of a contractor that was required to submit certified cost or pricing data in connection with a prime contract entered into before July 1, 2018.

(m)(1) Insert the clause at 52.215–13, *Subcontractor Certified Cost or Pricing Data—Modifications*, in solicitations and contracts that include the clause at 52.215–12. Only include the clause in solicitations and contracts for commercial products (other than COTS items) and commercial services—

(i) In noncompetitive acquisitions valued greater than \$25 million for supplies and services treated as commercial products and/or commercial services in accordance with 12.001(b); or

(ii) For DoD, NASA, and the Coast Guard, when acquiring a commercial product as defined in paragraph (3)(ii) of the definition of commercial product in part 2, and the total price of all such modifications under a particular contract action exceeds the greater of—

(A) The threshold for obtaining certified cost or pricing data in 15.403–3(a); or

(B) 5 percent of the total price of the contract at the time of contract award.

(2) Replace the clause with its *Alternate I*, without requiring consideration, upon the request of a contractor that was required to submit certified cost or pricing data in connection with a prime contract entered into before July 1, 2018.

(n)(1) Insert the clause at 52.215–14, *Integrity of Unit Prices*, in solicitations and contracts except for—

(i) Acquisitions valued at or below the SAT;

(ii) Construction or architect-engineer services under part 36;

(iii) Utility services under part 41;
(iv) Service contracts where supplies are not required;

(v) Acquisitions of commercial products and commercial services; and
(vi) Contracts for petroleum products.

(2) Use the clause with its *Alternate I* when contracting without adequate price competition or when prescribed by agency regulations.

(o) Insert the clause at 52.215–15, *Pension Adjustments and Asset Reversions*, in solicitations and contracts when certified cost or pricing data is required or any preaward or postaward cost determinations will be subject to part 31. Only include the clause in solicitations and contracts for commercial products (other than COTS items) and/or commercial services—

(1) In noncompetitive acquisitions valued greater than \$25 million for supplies and services treated as commercial products and commercial services in accordance with 12.001(b); or

(2) For DoD, NASA, and the Coast Guard, when acquiring a commercial product as defined in paragraph (3)(ii) of the definition of commercial product in part 2, and the total price of all such modifications under a particular contract action exceeds the greater of—

(i) The threshold for obtaining certified cost or pricing data in 15.403–3(a); or

(ii) 5 percent of the total price of the contract at the time of contract award.

(p) Insert the provision at 52.215–16, *Facilities Capital Cost of Money*, in solicitations, other than those for commercial products and commercial services, expected to result in contracts that are subject to the cost principles for contracts with commercial organizations.

(q) Insert the clause at 52.215–17, *Waiver of Facilities Capital Cost of Money*, in contracts, other than those for commercial products and commercial services, when the prospective contractor does not propose facilities capital cost of money in its proposal.

(r) Insert the clause at 52.215–18, *Reversion or Adjustment of Plans for Postretirement Benefits (PRB) Other Than Pensions*, in solicitations and contracts when certified cost or pricing data will be required or any preaward or postaward cost determinations will be subject to part 31. Only include the clause in solicitations and contracts for commercial products (other than COTS items) and/or commercial services—

(1) In noncompetitive acquisitions valued greater than \$25 million for supplies and services treated as commercial products and commercial

services in accordance with 12.001(b); or

(2) For DoD, NASA, and the Coast Guard, when acquiring a commercial product as defined in paragraph (3)(ii) of the definition of commercial product in part 2, and the total price of all such modifications under a particular contract action exceeds the greater of—

(i) The threshold for obtaining certified cost or pricing data in 15.403–3(a); or

(ii) 5 percent of the total price of the contract at the time of contract award.

(s) Insert the clause at 52.215–19, *Notification of Ownership Changes*, in solicitations and contracts when certified cost or pricing data is required or any preaward or postaward cost determination will be subject to subpart 31. Only include the clause in solicitations and contracts for commercial products (other than COTS items) and/or commercial services—

(1) In noncompetitive acquisitions valued greater than \$25 million for supplies and services treated as commercial products and commercial services in accordance with 12.001(b); or

(2) For DoD, NASA, and the Coast Guard, when acquiring a commercial product as defined in paragraph (3)(ii) of the definition of commercial product in part 2, and the total price of all such modifications under a particular contract action exceeds the greater of—

(i) The threshold for obtaining certified cost or pricing data in 15.403–3(a); or

(ii) 5 percent of the total price of the contract at the time of contract award.

(t)(1) Considering the hierarchy at 15.403–1(a), insert the provision at 52.215–20, *Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data*, in solicitations if it is anticipated that certified cost or pricing will be required. Only include the clause in solicitations and contracts for commercial products (other than COTS items) and/or commercial services—

(i) In noncompetitive acquisitions valued greater than \$25 million for supplies and services treated as commercial products and commercial services in accordance with 12.001(b); or

(ii) For DoD, NASA, and the Coast Guard, when acquiring a commercial product as defined in paragraph (3)(ii) of the definition of commercial product in part 2, and the total price of all such modifications under a particular contract action exceeds the greater of—

(A) The threshold for obtaining certified cost or pricing data in 15.403–3(a); or

(B) 5 percent of the total price of the contract at the time of contract award.

(2) Use the provision with its *Alternate I* to specify a format for certified cost or pricing data other than the format required by Table 15–1 at 15.408–2;

(3) Use the provision with its *Alternate II* if copies of the proposal are to be sent to the administrative contracting officer (ACO) and contract auditor;

(4) Use the provision with its *Alternate III* if submission via electronic media is required; and

(5) Replace the provision with its *Alternate IV* if it is anticipated that certified cost or pricing data will not be required

(u)(1) Considering the hierarchy at 15.403–1(a), insert the clause at 52.215–21, *Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—*

Modifications, in solicitations and contracts if it is anticipated that certified cost or pricing data will be required for modifications. This clause provides instructions to contractors on how to request an exception from the requirement to submit certified cost or pricing data. Only include the clause in solicitations and contracts for commercial products (other than COTS items) and commercial services—

(i) In noncompetitive acquisitions valued greater than \$25 million for supplies and services treated as commercial products and commercial services in accordance with 12.001(b); or

(ii) For DoD, NASA, and the Coast Guard, when acquiring a commercial product as defined in paragraph (3)(ii) of the definition of commercial product in part 2, and the total price of all such modifications under a particular contract action exceeds the greater of—

(A) The threshold for obtaining certified cost or pricing data in 15.403–3(a); or

(B) 5 percent of the total price of the contract at the time of contract award.

(2) Use the clause with its *Alternate I* to specify a format for certified cost or pricing data other than the format required by Table 15–1 at 15.408–2;

(3) Use the clause with its *Alternate II* if copies of the proposal are to be sent to the ACO and contract auditor;

(4) Use the clause with its *Alternate III* if submission via electronic media is required; and

(5) Replace the provision with its *Alternate IV* if it is anticipated that certified cost or pricing data will not be required.

(v) Insert the provision at 52.215–22, *Limitations on Pass-Through Charges—*

Identification of Subcontract Effort, in solicitations, other than those for commercial products and commercial services, containing the clause at 52.215–23.

(w)(1) Insert the clause 52.215–23, *Limitations on Pass-Through Charges*, in solicitations, contracts, and task or delivery orders, other than those for commercial products and commercial services—

(i) For civilian agencies, when contemplating the award of a cost-reimbursement type contract, and the value of the acquisition exceeds the SAT; or

(ii) For DoD, when value of the acquisition exceeds the threshold for obtaining cost or pricing data at 15.403–3(a) and contemplating the award of any contract type except—

(A) A firm-fixed-price contract awarded on the basis of adequate price competition;

(B) A fixed-price contract with economic price adjustment awarded on the basis of adequate price competition; or

(C) A fixed-price incentive contract awarded on the basis of adequate price competition.

(2) When it is appropriate, the clause may be used in solicitations and contracts for any contract type that is valued below the thresholds identified in 15.109(w)(1).

(3) Use the clause with its *Alternate I* when the prospective contractor has demonstrated that its functions provide added value to the contracting effort and there are no excessive pass-through charges.

Subpart 15.2—Evaluation and Award

15.200 Scope.

This subpart addresses policies and procedures for evaluating and negotiating competitive proposals and awarding contracts.

15.201 Source selection responsibilities.

(a) Agency heads are responsible for source selection. A contracting officer is designated as the SSA, unless the agency head appoints another individual for a particular acquisition or group of acquisitions.

(b) The SSA must—

(1) Establish an evaluation team tailored for the acquisition that includes appropriate contracting, legal, logistics, technical, and other expertise to ensure a comprehensive evaluation of proposals;

(2) Approve the source selection approach or acquisition plan, if applicable, before issuance of the request for proposal (RFP);

(3) Ensure consistency among the RFP requirements, notices to offerors, proposal preparation instructions, evaluation factors and subfactors, solicitation provisions or contract clauses, and data requirements;

(4) Ensure that proposals are evaluated based solely on the factors and subfactors contained in the RFP (10 U.S.C. 3303(c) and 41 U.S.C. 3703(c));

(5) Consider the recommendations of advisory boards or panels, when applicable; and

(6) Select the offeror or offerors whose proposal is the best value to the Government (10 U.S.C. 3303(c) and 41 U.S.C. 3703(c)). The SSA may reject all proposals received in response to a RFP, if doing so is in the best interest of the Government.

(c) Contracting officers must—

(1) After release of a RFP, serve as the focal point for inquiries from actual or prospective offerors;

(2) After receipt of proposals, control communications with offerors;

(3) When negotiating noncompetitive proposals, evaluate the proposal and document the reasonableness of the offered prices in accordance with subpart 15.4; and

(4) Award the contract(s).

(d) *Limitations.* Government personnel involved in the acquisition must not engage in conduct that—

(1) Favors one offeror over another;

(2) Reveals an offeror's technical solution, including—

(i) Unique technology;

(ii) Innovative and unique uses of commercial products or commercial services; or

(iii) Any information that would compromise an offeror's intellectual property to another offeror;

(3) Reveals an offeror's price without that offeror's permission.

(4) Reveals the names of individuals providing information about an offeror's past performance; or

(5) Knowingly furnishes source selection information in violation of the procurement integrity requirements of part 3 and 41 U.S.C. 2102 and 2107.

15.202 Evaluating competitive proposals.

(a) *General.* (1) Proposal evaluation is an assessment of the proposal and an offeror's ability to perform the prospective contract successfully. Agencies must evaluate each competitive proposal based solely on the factors and subfactors in the RFP and document the evaluation.

(2) *Clarifications.* (i) Clarifications can be used to enhance the Government's understanding of a proposal, allow reasonable interpretation of a proposal, or facilitate the Government's

evaluation process. Clarifications include, but are not limited to, addressing—

(A) Ambiguities of the proposal;

(B) Other concerns such as perceived deficiencies, weaknesses, errors, omissions, or mistakes;

(C) The relevance of an offeror's past performance information; and

(D) Adverse past performance information to which the offeror has not previously had an opportunity to respond.

(ii) Additional information or documentation may be requested provided it does not alter the cost/price or other material elements of the proposal or cure a material omission in the proposal.

(iii) Clarifications may occur, at the contracting officer's discretion, at any time after receipt of proposals through contract award. Contracting officers are not required to conduct clarifications with an offeror. If the contracting officer conducts clarifications with one or more offerors, it is not required to conduct clarifications with any other offeror.

(3) *Oral Presentations.* Maintain a record of oral presentations to document what the Government relied upon in making the source selection decision. The method and level of detail of the record (e.g., videotaping, audio tape recording, written record, Government notes, copies of offeror briefing slides or presentation notes) is at the discretion of the SSA. When an oral presentation includes information that the parties intend to include in the contract as material terms or conditions, the information must be put in writing and incorporated in the proposal and any resultant contract. Incorporation by reference of oral statements is not permitted.

(b) *Technical evaluation.*

(1) When using the lowest price technically acceptable (LPTA) approach, proposals are evaluated for technical acceptability only.

(2) When using the tradeoff approach, the evaluation must include—

(i) An assessment of each offeror's ability to accomplish the technical requirements; and

(ii) An evaluation of the relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation.

(3) If teleworking is not prohibited, agencies must not unfavorably evaluate a proposal that includes telework unless the contracting officer executes a written determination in accordance with part 7.

(c) *Past performance evaluation.*

(1) *No past performance information.* An offeror without a record of relevant

past performance or for whom information on past performance is not available may not be evaluated favorably or unfavorably on past performance.

(2) *LPTA source selection process.* If past performance is evaluated when using the LPTA source selection process, contracting officers must only determine if the performance is technically acceptable and not perform a comparative assessment of the information.

(3) *Considerations.* Evaluations must be consistent with the terms of the RFP and should consider the following:

(i) The information provided by the offeror, as well as information obtained from any other sources.

(ii) The currency and relevance of the information, source of the information, context of the data, and general trends in contractor's performance. The SSA determines the relevance of similar past performance information.

(iii) Any information regarding predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the instant acquisition.

(iv) The past performance of the joint venture, when evaluating a proposal from a joint venture. If the joint venture does not demonstrate past performance for award, the past performance of each party to the joint venture must be considered.

(4) *Small business.* When using the LPTA source selection approach and a small business would have been in contention for award, but their past performance is determined to be unacceptable, the matter must be referred to the SBA for a Certificate of Competency determination.

(d) *Cost or price evaluation.* Agencies must purchase supplies and services from responsible sources at fair and reasonable prices. Contracting officers are responsible for evaluating and documenting the reasonableness of the awarded price in accordance with subpart 15.4.

15.203 Competitive award without negotiation.

Competitive awards may be made without negotiations if the RFP states that the Government intends to evaluate proposals and make award without negotiation. If the RFP includes such a notice and the Government determines it is necessary to negotiate, the rationale for doing so must be documented in the contract file (10 U.S.C. 3303(a)(2) and 41 U.S.C. 3703(a)(2)).

15.204 Competitive award with negotiation.

15.204–1 Establishing a competitive range.

(a) *Competitive range.* A competitive range must be established if the RFP states that the Government intends to evaluate proposals and make award after negotiating with offerors whose proposals have been determined to be in the competitive range.

(b) *Narrowing the competitive range for efficiency.* When establishing the competitive range, it may be determined that the number of proposals that might otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. The number of proposals in the competitive range may be limited to the greatest number that will permit an efficient competition among the most highly evaluated proposals (10 U.S.C. 3303 and 41 U.S.C. 3703).

(c) *Notice.* Written notice must be provided to unsuccessful offerors in accordance with 15.206–1(a).

15.204–2 Competitive negotiations.

(a) *General.* The scope and extent of negotiations are a matter of contracting officer judgment.

(b) *Requirement.*

(1) Contracting officers must—

(i) Negotiate with each offeror within the competitive range; and

(ii) Tailor the negotiation to the offeror's proposal, but at a minimum, indicate to, or negotiate with, each offeror any deficiencies or significant weaknesses in the proposal.

(2) Contracting officers may further negotiate with an offeror, if necessary. Having further negotiation with a particular offeror does not obligate contracting officers to have further negotiations with any other offerors.

(3) Contracting officers may also negotiate other aspects of the offeror's proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. Contracting officers are not required to negotiate every area where the proposal could be improved.

(4) When an RFP states that evaluation credit will be given for technical solutions exceeding any mandatory minimums, contracting officers may negotiate with offerors for increased performance beyond any mandatory minimums, and suggest to offerors that have exceeded any mandatory minimums (in ways that are not integral to the design), that their proposals would be more competitive if the excesses were removed and the proposed price decreased.

(c) *Elimination from the competitive range.* A proposal must be eliminated from consideration for award when it is determined that a proposal should no longer be included in the competitive range. Written notice of this decision must be provided to unsuccessful offerors in accordance with 15.206–1(a).

(1) When a proposal is eliminated, no further revisions to the proposal can be accepted or considered.

(2) A proposal may be eliminated from the competitive range at any time upon concluding that the offeror is unlikely to receive an award. An additional negotiation with the offeror is not required prior to taking such action.

(d) *Proposal revision.*

(1) When negotiations with an offeror are finished, and that offeror has not been eliminated from the competitive range, provide the offeror with—

(i) An opportunity to submit a proposal revision; and

(ii) A notice requiring the proposal revision in writing and stating that the Government intends to make award without obtaining further revisions.

(2) Each offeror with a proposal still within the competitive range must be given a common cut off date or an equal amount of time to submit their proposal revision.

15.205 Source selection decision.

The source selection decision must represent the SSA's independent judgement and be based on a comparative assessment of proposals against all source selection criteria in the RFP. The source selection decision must be documented and include the rationale for any business judgments and tradeoffs made or relied on by the SSA, including benefits associated with additional costs. The documentation does not need to quantify the tradeoffs that led to the decision.

15.206 Preaward notices and debriefings.

(a) *Definition.* Day, as used in this section, has the meaning set forth at part 33.

(b) *Applicability.* Sections 15.206 through 15.206–2 apply to competitive proposals, except for those using the other competitive procedures described in subpart 6.1 for architect-engineer contracts and basic and applied research. The procedures for award notification, with reasonable modification, should be followed for contracts awarded using those other competitive procedures.

15.206–1 Preaward notices.

(a) *Notice of exclusion or elimination from competitive range.* Notify offerors promptly in writing when their

proposals are excluded from the competitive range or otherwise eliminated from the competition. The notice must state the basis for the determination and that proposal revisions will not be considered. These offerors may request a debriefing in accordance with 15.206–2 and 15.301.

(b) *Notice of small business set-aside award.*

(1) When using a set-aside for small business, HUBZone, the Service-Disabled Veteran-Owned Small Business (SDVOSB) Program, or the Women-Owned Small Business (WOSB) Program, notify each offeror, in writing, prior to award and upon completion of negotiations and determinations of responsibility—

(i) Of the name and address of the apparently successful offeror; and

(ii) That the Government will not consider subsequent revisions of the offeror's proposal.

(2) This notice is in addition to any notice of exclusion from competitive range.

(3) This notice is not required when the contracting officer determines in writing that the urgency of the requirement necessitates award without delay or when the contract is entered into under the 8(a) program.

15.206–2 Preaward debriefing.

Offerors excluded from the competitive range or otherwise excluded from the competition before award may request a debriefing before award (10 U.S.C. 3305 and 41 U.S.C. 3705). The contracting officer should chair any debriefing held. Individuals who conducted evaluations must provide support.

(a) *Request timeframe.*

(1) Offerors may request a preaward debriefing by submitting a written request for debriefing to the contracting officer within 3 days after receipt of the notice of exclusion from the competition.

(2) At the offeror's request, this debriefing may be delayed until after award. If the debriefing is delayed until after award, it must include all information normally provided in a postaward debriefing. Debriefings delayed pursuant to this paragraph could affect the timeliness of any protest filed subsequent to the debriefing.

(3) If the offeror does not submit a timely request, the offeror need not be given either a preaward or a postaward debriefing. Offerors are entitled to no more than one debriefing for each proposal.

(b) *Method.* Debriefings may be done by any method acceptable to the contracting officer.

(c) *Content.*

(1) At a minimum, preaward debriefings must include—

(i) The agency's evaluation of significant elements in the offeror's proposal;

(ii) A summary of the rationale for eliminating the offeror from the competition; and

(iii) Reasonable responses to relevant questions about whether source selection procedures contained in the RFP, applicable regulations, and other applicable authorities were followed by the agency.

(2) A summary of the debriefing must be included in the contract file.

(d) *Nondisclosure.* Preaward debriefings must not disclose—

(1) The number of offerors;

(2) The identity of other offerors;

(3) The content of other offerors' proposals;

(4) The ranking of other offerors;

(5) The evaluation of other offerors; or

(6) Any of the information prohibited in 15.301(f).

(e) *Delay until after award.*

Contracting officers must make every effort to debrief the unsuccessful offeror as soon as practicable, but may refuse the request for a debriefing if it is not in the best interests of the Government to conduct a debriefing at that time.

(1) The rationale for delaying the debriefing must be documented in the contract file.

(2) If the debriefing is delayed, it must be provided no later than the time postaward debriefings are provided under 15.301. In that event, the contracting officer must include the information at 15.301(e) in the debriefing.

15.207 Award.

15.207–1 Award to successful offeror.

(a) *General.* Award a contract to the successful offeror by furnishing the executed contract or other notice of the award to that offeror.

(b) *Award document.* (1) OF 307, *Contract Award*; SF 26, *Award/Contract*; or SF 33, *Solicitation, Offer and Award*, may be used to award negotiated contracts in which the signature of both parties on a single document is appropriate. Do not use Block 18 of SF 26.

(2) When not using the OF 307, SF 26, or SF 33 to award the contract:

(i) The first page of the award document must include—

(A) The Government's acceptance statement from Block 15 of the OF 307, exclusive of the Item 3 reference language; and

(B) The contracting officer's name, signature, and date.

(ii) If the award document includes information that is different than the signed proposal, as amended by the offeror's written correspondence, the first page of the award document must include—

(A) The contractor's agreement statement from Block 14 of the OF 307; and

(B) The signature of the contractor's authorized representative.

15.207–2 Award notice.

(a) *Definition.* Day, as used in this subsection, has the meaning set forth at part 33.

(b) *Requirement.* Within 3 days after the date of contract award, provide written notification to each offeror whose proposal was in the competitive range but was not selected for award (10 U.S.C. 3304 and 41 U.S.C. 3704) or had not previously received a notice in accordance with 15.206–1(a). The notice must include—

(1) The number of offerors solicited;

(2) The number of proposals received;

(3) The name and address of each offeror receiving an award;

(4) The items, quantities, and any stated unit prices of each award.

(i) If the number of items or other factors makes listing any stated unit prices impracticable at that time, only the total contract price need be furnished in the notice.

(ii) The items, quantities, and any stated unit prices of each award must be made publicly available, upon request; and

(5) In general terms, the reason(s) the offeror's proposal was not accepted, unless the price information in paragraph (b)(4) of this section readily reveals the reason. An offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information must not be disclosed to any other offeror.

(c) Upon request, provide the information in paragraph (a) of this section to unsuccessful offerors that received a preaward notice of exclusion from the competitive range.

Subpart 15.3—Postaward

15.300 Scope.

This subpart addresses postaward actions and considerations for negotiated contracts. The procedures for postaward debriefings, protests, and mistakes do not apply to contracts awarded using the other competitive procedures described in subpart 6.1 for architect-engineer contracts and basic and applied research. The procedures for postaward debriefings, protests, and

mistakes, with reasonable modification, should be followed for contracts awarded using those other competitive procedures.

15.301 Postaward debriefing of offerors.

(a) *Definition.* Day, as used in this section, has the meaning set forth at part 33.

(b) *Request for a postaward debriefing.* The awardee and offerors that received the award notice at 15.207–2 may request a postaward debriefing after receiving a notice of contract award. Contracting officers must chair any debriefing held and individuals who conducted evaluations must provide support.

(c) *Request timeframe.*

(1) Offerors may request a postaward debriefing by submitting a written request for the debriefing to the contracting officer within 3 days after receipt of the award notice in accordance with 15.207–2. Such offerors must be debriefed and furnished the basis for the selection decision and contract award.

(2) To the maximum extent practicable, the debriefing should occur within 5 days after receipt of the written request. Offerors that requested a postaward debriefing in lieu of a preaward debriefing, or whose debriefing was delayed for compelling reasons beyond contract award, also should be debriefed within this time period.

(3) Untimely debriefing requests may be accommodated.

(4) An offeror that was notified of its exclusion from the competitive range is not entitled to a postaward debriefing if the offeror failed to submit a timely preaward debriefing request, however such a request may be accommodated.

(5) The deadlines for filing protests are not extended when the Government accommodates an untimely debriefing request or an offeror's request to delay a preaward debriefing until after award. Preaward debriefings delayed pursuant to 15.206–2(a)(2) could affect the timeliness of any protest filed subsequent to the debriefing.

(d) *Method.* Debriefings may be conducted by any method acceptable to the contracting officer.

(e) *Content.*

(1) At a minimum, the debriefing information must include—

(i) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;

(ii) The overall evaluated cost or price and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance

information, if applicable, on the debriefed offeror;

(iii) The overall ranking of all offerors, when any ranking was developed by the agency during the source selection;

(iv) A summary of the rationale for award;

(v) For acquisitions of commercial products, the make and model of the product to be delivered by the successful offeror;

(vi) Reasonable responses to relevant questions about whether source selection procedures contained in the request for proposals (RFP), applicable regulations, and other applicable authorities were followed by the agency;

(2) An official summary of the debriefing must be included in the contract file.

(f) *Nondisclosure.* The debriefing must not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, the debriefing must not reveal any information prohibited from disclosure by part 24 or exempt from release under the Freedom of Information Act (FOIA) (5 U.S.C. 552) including—

(1) Trade secrets;

(2) Privileged or confidential manufacturing processes and techniques;

(3) Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information; and

(4) The names of individuals providing reference information about an offeror's past performance.

15.302 Protests against award.

(a) Protests against award in negotiated acquisitions must be handled in accordance with part 33. Use of agency protest procedures that incorporate the alternative dispute resolution provisions of E.O. 12979 is encouraged for both preaward and postaward protests.

(b) If a protest causes the agency, within 1 year of contract award, to—

(1) Issue a new RFP on the protested contract award, provide the information in paragraph (c) of this section to all prospective offerors for the new RFP; or

(2) Issue a new request for revised proposals on the protested contract award, provide the information in paragraph (c) of this section to offerors that were in the competitive range and are requested to submit revised proposals.

(c) The following information should be provided to appropriate parties:

(1) Information provided to unsuccessful offerors in any debriefings

conducted on the original award regarding the successful offeror's proposal; and

(2) Other nonproprietary information that would have been provided to the original offerors.

15.303 Discovery of mistakes.

Mistakes in a contractor's proposal that are disclosed after award must be processed substantially in accordance with the procedures for mistakes in bids in part 14.

15.304 Defective certified cost or pricing data after award.

(a)(1) If, after award, certified cost or pricing data are found to be inaccurate, incomplete, or noncurrent as of the date of final agreement on price or an earlier date agreed upon by the parties given on the contractor's or subcontractor's Certificate of Current Cost or Pricing Data, the Government is entitled to a price adjustment, including profit or fee, of any significant amount by which the price was increased because of the defective data.

(i) This entitlement is ensured by including in the contract one of the clauses prescribed in 15.109(j) and (k), and is set forth in the clauses at 52.215–10, *Price Reduction for Defective Certified Cost or Pricing Data*, and 52.215–11, *Price Reduction for Defective Certified Cost or Pricing Data—Modifications*.

(ii) The clauses give the Government the right to a price adjustment for defects in certified cost or pricing data submitted by the contractor, a prospective subcontractor, or an actual subcontractor.

(2) In arriving at a price adjustment, contracting officers must consider the time by which the certified cost or pricing data became reasonably available to the contractor, and the extent to which the Government relied upon the defective data.

(3) The clauses referred to in paragraph (a)(1)(i) of this subsection recognize that the Government's right to a price adjustment is not affected by any of the following circumstances:

(i) The contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position;

(ii) The contracting officer should have known that the certified cost or pricing data in issue were defective even though the contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the contracting officer;

(iii) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under such contract; or

(iv) Certified cost or pricing data were required; however, the contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data relating to the contract.

(4) Subject to paragraphs (a)(5) and (6) of this subsection, allow an offset for any understated certified cost or pricing data submitted in support of price negotiations, up to the amount of the Government's claim for overstated pricing data arising out of the same pricing action (e.g., the initial pricing of the same contract or the pricing of the same change order).

(5) An offset must be allowed only in an amount supported by the facts and if the contractor—

(i) Certifies to the contracting officer that, to the best of the contractor's knowledge and belief, the contractor is entitled to the offset in the amount requested; and

(ii) Proves that the certified cost or pricing data were available before the "as of" date specified on the Certificate of Current Cost or Pricing Data but were not submitted. Such offsets need not be in the same cost groupings (e.g., material, direct labor, or indirect costs).

(6) An offset must not be allowed if—

(i) The understated data were known by the contractor to be understated before the "as of" date specified on the Certificate of Current Cost or Pricing Data; or

(ii) The Government proves that the facts demonstrate that the price would not have increased in the amount to be offset even if the available data had been submitted before the "as of" date specified on the Certificate of Current Cost or Pricing Data.

(7)(i) In addition to the price adjustment, the Government is entitled to recovery of any overpayment plus interest on the overpayments. The Government is also entitled to penalty amounts on certain of these overpayments. Overpayment occurs only when payment is made for supplies or services accepted by the Government. Overpayments do not result from amounts paid for contract financing, as defined in part 32.

(ii) In calculating the interest amount due, contracting officers must—

(A) Determine the defective pricing amounts that have been overpaid to the contractor;

(B) Consider the date of each overpayment (the date of overpayment for this interest calculation must be the date payment was made for the related completed and accepted contract items; or for subcontract defective pricing, the date payment was made to the prime contractor, based on prime contract progress billings or deliveries, which

included payments for a completed and accepted subcontract item); and

(C) Apply the underpayment interest rate(s) in effect for each quarter from the time of overpayment to the time of repayment, utilizing rate(s) prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(a)(2).

(iii) In arriving at the amount due for penalties on contracts where the submission of defective certified cost or pricing data was a knowing submission, obtain an amount equal to the amount of overpayment made. Obtain the advice of counsel before taking any contractual actions concerning penalties,

(iv) In the demand letter, include—

(A) The repayment amount;

(B) The penalty amount (if any);

(C) The interest amount through a specified date; and

(D) A statement that interest will continue to accrue until repayment is made.

(b) If, after award, the contracting officer learns or suspects that the data furnished were not accurate, complete, and current, or were not adequately verified by the contractor as of the time of negotiation, request an audit to evaluate the accuracy, completeness, and currency of the data. The Government may evaluate the profit-cost relationships only if the audit reveals that the data certified by the contractor were defective. Do not reprice the contract solely because the profit was greater than forecast or because a contingency specified in the submission failed to materialize.

(c) For each advisory audit received based on a postaward review that indicates defective pricing, make a determination as to whether or not the data submitted were defective and relied upon. Before making such a determination, give the contractor an opportunity to support the accuracy, completeness, and currency of the data in question. Prepare a memorandum documenting both the determination and any corrective action taken as a result. Send one copy of this memorandum to the auditor and, if the contract has been assigned for administration, one copy to the ACO. A copy of the memorandum or other notice of the contracting officer's determination must be provided to the contractor. When the contracting officer determines that the contractor submitted defective cost or pricing data, ensure, in accordance with agency procedures, that information relating to the final determination is reported as part of the contractor's performance information in accordance with part 42. Agencies must ensure updated information that changes a contracting

officer's prior final determination is reported into the FAPIIS module of Contractor Performance Assessment Reporting System in the event of a—

(1) Contracting officer's decision in accordance with the Contract Disputes statute;

(2) Board of Contract Appeals decision; or

(3) Court decision.

(d) If both the contractor and subcontractor submitted, and the contractor certified, or should have certified, cost or pricing data, the Government has the right, under the clauses at 52.215–10, *Price Reduction for Defective Certified Cost or Pricing Data*, and 52.215–11, *Price Reduction for Defective Certified Cost or Pricing Data—Modifications*, to reduce the prime contract price if it was significantly increased because a subcontractor submitted defective data. This right applies whether these data supported subcontract cost estimates or supported firm agreements between subcontractor and contractor.

(e) If Government audit discloses defective subcontractor certified cost or pricing data, the information necessary to support a reduction in prime contract and subcontract prices may be available only from the Government. To the extent necessary to secure a prime contract price reduction, contracting officers should make this information available to the prime contractor or appropriate subcontractors, upon request. If release of the information would compromise Government security or disclose trade secrets or confidential business information, the contracting officers must release it only under conditions that will protect it from improper disclosure. Information made available under this paragraph must be limited to that used as the basis for the prime contract price reduction. In order to afford an opportunity for corrective action, give the prime contractor reasonable advance notice before determining to reduce the prime contract price.

(1) When a prime contractor includes defective subcontract data in arriving at the price but later awards the subcontract to a lower priced subcontractor (or does not subcontract for the work), any adjustment in the prime contract price due to defective subcontract data is limited to the difference (plus applicable indirect cost and profit markups) between the subcontract price used for pricing the prime contract, and either the actual subcontract price or the actual cost to the contractor, if not subcontracted, provided the data on which the actual

subcontract price is based are not themselves defective.

(2) Under cost-reimbursement contracts and under all fixed-price contracts except firm-fixed-price contracts and fixed-price contracts with economic price adjustment, payments to subcontractors that are higher than they would be had there been no defective subcontractor certified cost or pricing data must be the basis for disallowance or nonrecognition of costs under the clauses prescribed in 15.109(j) and (k). The Government has a continuing and direct financial interest in such payments that is unaffected by the initial agreement on prime contract price.

15.305 Estimating systems.

(a) Cognizant audit activities, when appropriate, must establish and manage regular programs for reviewing selected contractors' estimating systems or methods, in order to reduce the scope of reviews to be performed on individual proposals, expedite the negotiation process, and increase the reliability of proposals. The results of estimating system reviews must be documented in survey reports.

(b) Auditors must send a copy of the estimating system survey report and a copy of the official notice of corrective action required to each contracting office and contract administration office having substantial business with that contractor. Significant deficiencies not corrected by the contractor must be considered in subsequent proposal analyses and negotiations.

Subpart 15.4—Contract Pricing

15.400 Scope.

This subpart contains cost and price negotiation policies and procedures for pricing negotiated prime contracts (including subcontracts) and contract modifications, including modifications to contracts awarded by sealed bidding.

15.401 Definitions.

As used in this subpart—

Price means cost plus any fee or profit applicable to the contract type.

Subcontract (except as used in 15.405–2) also includes a transfer of commercial products or commercial services between divisions, subsidiaries, or affiliates of a contractor or a subcontractor (10 U.S.C. 3701(2) and 41 U.S.C. 3501(a)(2)).

15.402 General.

(a) *Requirement for cost or pricing data.* In establishing the reasonableness of the offered prices—

(1) Obtain certified cost or pricing data when required by 15.403–3, along

with data other than certified cost or pricing data as necessary to establish a fair and reasonable price; or

(2) When certified cost or pricing data are not required by 15.403–3, obtain data other than certified cost or pricing data as necessary to establish a fair and reasonable price (10 U.S.C. 3705(a) and 41 U.S.C. 3505(a)).

(b) *Obtaining data.* Obtain the type and quantity of data necessary to establish a fair and reasonable price, but not more data than is needed. The submission of additional data sufficient to support the determination of the fair and reasonable price is required if a fair and reasonable price cannot be established from an analysis of the data obtained or submitted to date.

(c) *Independent Price.* Price each contract separately and independently and do not—

(1) Consider proposed price reductions under other contracts;

(2) Consider losses or profits realized or anticipated under other contracts; or

(3) Include in a contract price any amount for a specified contingency, to the extent that the contract provides for a price adjustment based upon the occurrence of that contingency.

15.403 Obtaining cost or pricing data.

15.403–1 Data other than certified cost or pricing data.

(a) *Order of preference.* For acquisitions that do not require certified cost or pricing data, generally use the following order of preference to determine the type of data to require:

(1) No additional data from the offeror, when adequate price competition exists (see 15.403–2);

(2) Data related to prices (e.g., established catalog or market prices, sales to non-governmental and governmental entities), relying first on—

(i) Data available within the Government; then

(ii) Data obtained from sources other than the offeror; and then, if necessary,

(iii) Data obtained from the offeror; then,

(3) Cost data to the extent necessary for the contracting officer to determine a fair and reasonable price.

(b) *Requirement.*

(1) Require submission of data other than certified cost or pricing data to the extent necessary to determine a fair and reasonable price (10 U.S.C. 3705(a) and 41 U.S.C. 3505(a)). At a minimum, the data must include appropriate data on the prices at which the same item or similar items have previously been sold, adequate for determining the reasonableness of the price. This data is not required when price reasonableness

is established through adequate price competition or prices set by law or regulation, unless paragraph (e) of this subsection applies.

(2) Data other than certified cost or pricing data may be required to determine the cost realism of competing proposals or to evaluate competing approaches.

(c) *Data Requests.* When requesting data—

(1) Use the contractor's format for data submission, but see 15.104–4(b)(2);

(2) Ensure that data used to support price negotiations are sufficiently current to permit negotiation of a fair and reasonable price; and

(3) Limit requests for updated data to the data that affect the adequacy of the proposal for negotiations (e.g., changes in price lists).

(d) *Refusals to submit data.* As specified in section 808 of the Strom Thurmond NDAA for FY 1999 (Pub. L. 105–261), an offeror who does not comply with a requirement to submit data for a contract or subcontract in accordance with paragraph (a)(1) of this subsection is ineligible for award unless the head of the contracting activity (HCA) determines that it is in the best interest of the Government to make the award to that offeror, based on consideration of the following:

(1) The effort made to obtain the data.

(2) The need for the item or service.

(3) Increased cost or significant harm to the Government if award is not made.

(e) *Data when adequate price competition exists.* If adequate price competition exists, but there are unusual circumstances in which additional data are necessary to determine the reasonableness of price, obtain the additional data from sources other than the offeror, to the maximum extent practicable. In addition, request data to determine the cost realism of competing proposals or to evaluate competing approaches.

(f) *Data for commercial products and commercial services.* When acquiring a commercial product or commercial service—

(1) Use price analysis to determine whether the price is fair and reasonable;

(2) Require the offeror to submit data other than certified cost or pricing data when the contracting officer is unable to determine a price fair and reasonable after obtaining data from sources other than the offeror. This data may include history of sales to non-governmental and governmental entities, cost data, or any other information the contracting officer requires;

(3) Limit requests for sales data to data for the same or similar items during a relevant time period;

(4) To the maximum extent practicable, request data in the format regularly maintained by the offeror as part of its commercial operations;

(5) Do not disclose outside the Government data obtained relating to commercial products or commercial services that is exempt from disclosure under part 24 or the FOIA (5 U.S.C. 552(b)); and

(6) For services that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered and sold competitively in substantial quantities in the commercial marketplace, see 15.403–2(c)(3)(ii).

15.403–2 Prohibitions on obtaining certified cost or pricing data.

(a) *At or below the simplified acquisition threshold.* Certified cost or pricing data must not be obtained for acquisitions at or below the SAT.

(b) *Exceptions to certified cost or pricing data requirements.* Do not require certified cost or pricing data to support any contracts, subcontracts, or modifications—

(1) When the contracting officer determines that prices agreed upon are based on adequate price competition (see standards in paragraph (c)(1) of this subsection);

(2) When the contracting officer determines that prices agreed upon are based on prices set by law or regulation (see standards in paragraph (c)(2) of this subsection);

(3) When a commercial product or commercial service is being acquired (see standards in paragraph (c)(3) of this subsection);

(4) When a waiver has been granted (see standards in paragraph (c)(4) of this subsection); or

(5) When modifying a contract or subcontract for commercial products or commercial services (see standards in paragraph (c)(3) of this subsection).

(c) *Standards for exceptions—*

(1) *Adequate price competition.* (i) A price is based on adequate price competition when—

(A) Two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement;

(B) Award will be made to the offeror whose proposal represents the best value where price is a substantial factor in source selection; and

(C) There is no finding that the price of the otherwise successful offeror is unreasonable. Any finding that the price is unreasonable must be supported by a statement of the facts and approved at a level above the contracting officer.

(ii) For agencies other than DoD, NASA, and the Coast Guard, a price is

also based on adequate price competition when

(A) There was a reasonable expectation, based on market research or other assessment, that two or more responsible offerors, competing independently, would submit priced proposals in response to the request for proposal's (RFP) expressed requirement, even though only one proposal is received from a responsible offeror and if—

(1) Based on the proposal received, the contracting officer can reasonably conclude that the proposal was submitted with the expectation of competition, *e.g.*, circumstances indicate that—

(i) The offeror believed that at least one other offeror was capable of submitting a meaningful proposal; and

(ii) The offeror had no reason to believe that other potential offerors did not intend to submit a proposal; and

(2) The determination that the proposed price is based on adequate price competition and is reasonable has been approved at a level above the contracting officer; or

(B) Price analysis clearly demonstrates that the proposed price is reasonable in comparison with current or recent prices for the same or similar items, adjusted to reflect changes in market conditions, economic conditions, quantities, or terms and conditions under contracts that resulted from adequate price competition.

(2) *Prices set by law or regulation.* Pronouncements in the form of periodic rulings, reviews, or similar actions of a governmental body, or embodied in the laws, are sufficient to set a price.

(3) *Commercial products and commercial services.*

(i) Any acquisition that the contracting officer determines meets the commercial product or commercial service definition in 2.101, or any modification, as defined in paragraph (3)(i) of the commercial product definition, that does not change a commercial product to other than commercial, is exempt from the requirement for certified cost or pricing data. If the contracting officer determines that a product or service claimed to be commercial is not, and that no other exception or waiver for certified cost or pricing data applies, the submission of certified cost or pricing data is required.

(ii) In accordance with section 41 U.S.C. 3501:

(A) When purchasing services that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered and sold competitively in substantial

quantities in the commercial marketplace, they may be considered commercial services (thus meeting the purpose of 41 U.S.C. chapter 35 and 10 U.S.C. chapter 271 for truth in negotiations) only if the contracting officer determines in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price of such services.

(B) In order to make this determination, the offeror may be asked to submit prices paid for the same or similar commercial services under comparable terms and conditions by both Government and commercial customers; and

(C) If the contracting officer determines that the information described in paragraph (c)(3)(ii)(B) of this section is not sufficient to determine the reasonableness of price, other relevant information regarding the basis for price or cost, including information on labor costs, material costs and overhead rates may be requested.

(iii) The following requirements apply to minor modifications defined in paragraph (3)(ii) of the definition of a commercial product at 2.101 that do not change the commercial product to other than commercial:

(A) For acquisitions funded by any agency other than DoD, NASA, or Coast Guard, such modifications of a commercial product are exempt from the requirement for submission of certified cost or pricing data.

(B) For acquisitions funded by DoD, NASA, or Coast Guard, such modifications of a commercial product are exempt from the requirement for submission of certified cost or pricing data provided the total price of all such modifications under a particular contract action does not exceed the greater of the threshold for obtaining certified cost or pricing data in 15.403–3(a) or 5 percent of the total price of the contract at the time of contract award.

(C) For acquisitions funded by DoD, NASA, or Coast Guard such modifications of a commercial product are not exempt from the requirement for submission of certified cost or pricing data on the basis of the exemption provided for at 15.403–2(c)(3) if the total price of all such modifications under a particular contract action exceeds the greater of the threshold for obtaining certified cost or pricing data in 15.403–3(a) or 5 percent of the total price of the contract at the time of contract award.

(iv) Any acquisition for other than commercial products or services treated as commercial products or commercial services at 12.001(b), except sole source

contracts greater than \$25 million, is exempt from the requirements for certified cost or pricing data (41 U.S.C. 1903).

(4) *Waivers.*

(i) In exceptional cases, the HCA may, without power of delegation, waive the requirement for submission of certified cost or pricing data if the price can be determined to be fair and reasonable without submission of certified cost or pricing data. The authorization for the waiver and the supporting rationale must be in writing.

(ii) If the HCA has waived the requirement for submission of certified cost or pricing data, the contractor or higher-tier subcontractor to whom the waiver relates must be considered as having been required to provide certified cost or pricing data. Consequently, award of any lower-tier subcontract expected to exceed the certified cost or pricing data threshold requires the submission of certified cost or pricing data unless—

(A) An exception otherwise applies to the subcontract; or

(B) The waiver specifically includes the subcontract and the rationale supporting the waiver for that subcontract.

15.403-3 Certified cost or pricing data.

(a) *Threshold.* Unless an exception at 15.403-2 applies, obtain certified cost or pricing data when an action meets or exceeds the threshold of \$2.5 million (for prime contracts awarded on or after July 1, 2018). The threshold is \$950,000 for prime contracts awarded prior to July 1, 2018, unless otherwise stated in the contract. Consider requesting a waiver when the standards at 15.403-2(c)(4) can be met.

(b) *Actions requiring certified cost or pricing data.* Certified cost or pricing data are required before completing any of the following actions expected to exceed the current threshold or, in the case of existing contracts, the threshold specified in the existing contract:

(1) The award of any negotiated contract (except for undefinitized actions such as letter contracts).

(2) The award of a subcontract at any tier, if the contractor and each higher-tier subcontractor were required to furnish certified cost or pricing data.

(3) The modification of any sealed bid or negotiated contract (whether or not certified cost or pricing data were initially required) or any subcontract covered by paragraph (b)(2) of this subsection.

(i) Price adjustment amounts must consider both increases and decreases (e.g., a \$500,000 modification resulting from a reduction of \$2,000,000 and an

increase of \$1,500,000 is a \$3,500,000 pricing adjustment exceeding the \$2,500,000 threshold). This requirement does not apply when unrelated and separately priced changes for which certified cost or pricing data would not otherwise be required are included for administrative convenience in the same modification.

(ii) Negotiated final pricing actions (e.g., termination settlements and total final price agreements for fixed-price incentive and redeterminable contracts) are contract modifications requiring certified cost or pricing data if—

(A) The total final price agreement for such settlements or agreements exceeds the pertinent threshold set forth at paragraph (a) of this subsection; or

(B) The partial termination settlement plus the estimate to complete the continued portion of the contract exceeds the pertinent threshold set forth at paragraph (a) of this subsection.

(iii) Certified cost or pricing data are not required for modifications—

(A) Solely for overrun funding or interim billing price adjustments; or

(B) To exercise an option at the price established at contract award or initial negotiation.

(c) *Required documentation from offerors.* When certified cost or pricing data are required, require the contractor or prospective contractor to submit to the contracting officer (and to have any subcontractor or prospective subcontractor submit to the prime contractor or appropriate subcontractor tier) the following in support of any proposal:

(1) The certified cost or pricing data and data other than certified cost or pricing data required by the contracting officer to determine that the price is fair and reasonable.

(2) A *Certificate of Current Cost or Pricing Data*, in the format specified in 15.403-4, certifying that to the best of its knowledge and belief, the cost or pricing data were accurate, complete, and current as of the date of agreement on price or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price.

(d) *Inflation adjustments.* When a clause refers to the certified cost or pricing threshold and the threshold is adjusted for inflation pursuant to part 1, the changed threshold applies throughout the remaining term of the contract, unless there is another threshold adjustment.

(e) *Requests for certified data below the threshold.* Unless prohibited because an exception at 15.403-2 applies, the HCA without power of delegation, may authorize the

contracting officer to obtain certified cost or pricing data for pricing actions below the pertinent threshold in paragraph (a) of this subsection, provided the action exceeds the SAT. The HCA must justify the requirement for certified cost or pricing data and provide a written finding that certified cost or pricing data are necessary to determine whether the price is fair and reasonable and the facts supporting that finding.

(f) *Delayed exception.* If certified cost or pricing data are requested and submitted by an offeror, but an exception is later found to apply, the data must not be considered certified cost or pricing data and must not be certified in accordance with 15.403-4.

(g) *Foreign governments.* The requirements of this subsection also apply to contracts entered into by an agency on behalf of a foreign government.

15.403-4 Certificate of current cost or pricing data.

(a) When certified cost or pricing data are required, require the contractor to execute a Certificate of Current Cost or Pricing Data, using the format in this paragraph, and must include the executed certificate in the contract file.

Certificate of Current Cost or Pricing Data

This is to certify that, to the best of my knowledge and belief, the cost or pricing data (as defined in part 2 of the Federal Acquisition Regulation (FAR) and required under FAR subsection 15.403-3) submitted, either actually or by specific identification in writing, to the Contracting Officer or to the Contracting Officer's representative in support of _____* are accurate, complete, and current as of _____.**. This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the offeror and the Government that are part of the proposal.

Firm _____

Signature _____

Name _____

Title _____

Date of execution * * * _____

* Identify the proposal, request for price adjustment, or other submission involved, giving the appropriate identifying number (e.g., RFP No.).

** Insert the day, month, and year when price negotiations were concluded and price agreement was reached or, if applicable, an earlier date agreed upon between the parties that is as close as

practicable to the date of agreement on price.

* * * Insert the day, month, and year of signing, which should be as close as practicable to the date when the price negotiations were concluded and the contract price was agreed to.

(End of certificate)

(b) The certificate does not constitute a representation as to the accuracy of the contractor's judgment on the estimate of future costs or projections. It applies to the data upon which the judgment or estimate was based. This distinction between fact and judgment should be clearly understood. If the contractor had information reasonably available at the time of agreement showing that the negotiated price was not based on accurate, complete, and current data, the contractor's responsibility is not limited by any lack of personal knowledge of the information on the part of its negotiators.

(c) The contracting officer and contractor are encouraged to reach a prior agreement on criteria for establishing closing or cutoff dates when appropriate in order to minimize delays associated with proposal updates. Closing or cutoff dates should be included as part of the data submitted with the proposal and, before agreement on price, data should be updated by the contractor to the latest closing or cutoff dates for which the data are available. Use of cutoff dates coinciding with reports is acceptable, as certain data may not be reasonably available before normal periodic closing dates (e.g., actual indirect costs). Data within the contractor's or a subcontractor's organization on matters significant to contractor management and to the Government will be treated as reasonably available. What is significant depends upon the circumstances of each acquisition.

(d) Possession of a Certificate of Current Cost or Pricing Data is not a substitute for examining and analyzing the contractor's proposal.

15.404 Proposal analysis.

(a) *General.* The objective of proposal analysis is to ensure that the final agreed-to price is fair and reasonable.

(1) Contracting officers are responsible for evaluating the reasonableness of the offered prices. The analytical techniques and procedures described in this section may be used, individually or in combination with others, to ensure that the final price is fair and reasonable. The complexity and circumstances of each acquisition

should determine the level of detail of the analysis required.

(2) Price analysis must be used when certified cost or pricing data are not required. When a fair and reasonable price cannot be determined through price analysis alone, cost analysis may also be used to evaluate data other than certified cost or pricing data to determine cost reasonableness or cost realism.

(3) Cost analysis must be used when certified cost or pricing data are required. However, price analysis must be used to verify that the overall price offered is fair and reasonable.

(4) Cost realism must be used when contemplating the award of a cost-reimbursement contract.

(b) *Advice and assistance.* The advice and assistance of other experts may be requested to ensure that an appropriate analysis is performed.

Recommendations or conclusions regarding the Government's review or analysis of an offeror's or contractor's proposal must not be disclosed to the offeror or contractor without the concurrence of the contracting officer.

(c) *Mistakes and discrepancies in data.* Any discrepancy or mistake of fact (such as duplications, omissions, and errors in computation) contained in the certified cost or pricing data or data other than certified cost or pricing data submitted in support of a proposal must be brought to the contracting officer's attention.

15.404-1 Price analysis.

(a) *General.* Price analysis is the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit.

(b) *Techniques.* The Government may use various price analysis techniques and procedures to ensure a fair and reasonable price, including, but not limited to, the following:

(1) Comparison of proposed prices received in response to the RFP.

(2) Comparison of the proposed prices to historical prices paid, whether by the Government or other than the Government, for the same or similar items. This method may be used for commercial products or commercial services including those "of a type" or when requiring minor modifications for commercial products.

(i) The prior price must be a valid basis for comparison. If there has been a significant time lapse between the last acquisition and the present one, if the terms and conditions of the acquisition are significantly different, or if the reasonableness of the prior price is

uncertain, then the prior price may not be a valid basis for comparison.

(ii) The prior price must be adjusted to account for materially differing terms and conditions, quantities and market and economic factors. For similar items, also adjust the prior price to account for material differences between the similar item and the item being procured.

(iii) Expert technical advice should be obtained when analyzing similar items, or commercial products or commercial services that are "of a type", or requiring minor modifications for commercial products, to ascertain the magnitude of changes required and to assist in pricing the required changes.

(3) Use of parametric estimating methods/application of rough yardsticks (such as dollars per pound or per horsepower, or other units) to highlight significant inconsistencies that warrant additional pricing inquiry.

(4) Comparison with competitive published price lists, published market prices of commodities, similar indexes, and discount or rebate arrangements.

(5) Comparison of proposed prices with independent Government cost estimates.

(6) Comparison of proposed prices with prices obtained through market research for the same or similar items.

(7) Analysis of data other than certified cost or pricing data provided by the offeror.

(c) *Preferred method of analysis.* The techniques at 15.404-1(b)(1) and (2) are the preferred methods for price analysis. However, if the contracting officer determines that information on competitive proposed prices or previous contract prices is not available or is insufficient to determine that the price is fair and reasonable, use any of the remaining techniques as appropriate to the circumstances applicable to the acquisition. The fact that a price is included in a catalog does not, in and of itself, make it fair and reasonable.

(d) *Value analysis.* Value analysis can give insight into the relative worth of a product and the Government may use it in conjunction with the price analysis techniques listed in paragraph (b) of this section.

15.404-2 Cost analysis.

(a) *General.* Cost analysis is the review and evaluation of any separate cost elements and profit or fee in an offeror's or contractor's proposal, as needed to determine a fair and reasonable price or to determine cost realism, and the application of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency.

(b) *Techniques.* The Government may use various cost analysis techniques and procedures to ensure a fair and reasonable price, including, but not limited to, the following:

(1) Verification of cost data or pricing data and evaluation of cost elements, including—

(i) The necessity for, and reasonableness of, proposed costs, including allowances for contingencies;

(ii) Projection of the offeror's cost trends, on the basis of current and historical cost or pricing data;

(iii) Reasonableness of estimates generated by appropriately calibrated and validated parametric models or cost-estimating relationships; and

(iv) The application of audited or negotiated indirect cost rates, labor rates, and cost of money or other factors.

(2) Evaluating the effect of the offeror's current practices on future costs. In conducting this evaluation, contracting officers must ensure that the effects of inefficient or uneconomical past practices are not projected into the future. In pricing production of recently developed complex equipment, contracting officers should perform a trend analysis of basic labor and materials, even in periods of relative price stability.

(3) Comparison of costs proposed by the offeror for individual cost elements with—

(i) Actual costs previously incurred by the same offeror;

(ii) Previous cost estimates from the offeror or from other offerors for the same or similar items;

(iii) Other cost estimates received in response to the Government's request;

(iv) The independent Government cost estimate by technical personnel; and

(v) Forecasts of planned expenditures.

(4) Verification that the offeror's cost submissions are in accordance with the contract cost principles and procedures in part 31 and, when applicable, the requirements and procedures in 48 CFR chapter 99.

(5) Review to determine whether any cost data or pricing data, necessary to make the offeror's proposal suitable for negotiation, have not been either submitted or identified in writing by the offeror. If there are such data, contracting officers must attempt to obtain and use them in the negotiations or make satisfactory allowance for the incomplete data.

(6) Analysis of the results of any make-or-buy program reviews, in evaluating subcontract costs.

15.404-3 Cost realism analysis.

(a) *General.* Cost realism analysis is the process of independently reviewing

and evaluating specific elements of each offeror's proposed cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed; reflect a clear understanding of the requirements; and are consistent with the unique methods of performance and materials described in the offeror's technical proposal.

(b) *Probable Cost.* Cost realism analyses must be performed on cost-reimbursement contracts to determine the probable cost of performance for each offeror.

(1) The probable cost may differ from the proposed cost and should reflect the Government's best estimate of the cost of any contract that is most likely to result from the offeror's proposal. The probable cost must be used for purposes of evaluation to determine the best value.

(2) The probable cost is determined by adjusting each offeror's proposed cost, and fee when appropriate, to reflect any additions or reductions in cost elements to realistic levels based on the results of the cost realism analysis.

(c) *Competitive fixed-price-type contracts.* Cost realism analyses may also be used on competitive fixed-price incentive contracts or, in exceptional cases, on other competitive fixed-price-type contracts when new requirements may not be fully understood by competing offerors, there are quality concerns, or past experience indicates that contractors' proposed costs have resulted in quality or service shortfalls. Results of the analysis may be used in performance risk assessments and responsibility determinations. However, proposals must be evaluated using the criteria in the RFP, and the offered prices must not be adjusted as a result of the analysis.

15.404-4 Technical cost or price analysis.

(a) *Labor and materials.* At a minimum, the technical analysis must examine the types and quantities of material proposed and the need for the types and quantities of labor hours and the labor mix. Any other data that may be pertinent to an assessment of the offeror's ability to accomplish the technical requirements or to the cost or price analysis of the service or product being proposed should also be included in the analysis.

(b) *Technical assistance.* Contracting officers should request:

(1) Personnel having specialized knowledge, skills, experience, or capability in engineering, science, or management perform a technical analysis of the proposed types and quantities of materials, labor, processes, special tooling, equipment or real

property, the reasonableness of scrap and spoilage, and other associated factors set forth in the proposal(s) in order to determine the need for and reasonableness of the proposed resources, assuming reasonable economy and efficiency.

(2) Technical assistance in evaluating pricing related to items that are "similar to" items being purchased, or commercial products or commercial services that are "of a type", or requiring minor modifications for commercial products, to ascertain the magnitude of changes required and to assist in pricing the required changes.

15.404-5 Unit prices.

(a) *General.* Except when pricing an item on the basis of adequate price competition or catalog or market price, unit prices must reflect the intrinsic value of an item or service and be in proportion to an item's base cost (e.g., manufacturing or acquisition costs).

(b) *Price distortion.* (1) Except for the acquisition of commercial products, when offerors identify items of supply that they will not manufacture or to which they will not contribute significant value, the information must be used to determine whether the intrinsic value of an item has been distorted through application of overhead and whether such items should be considered for breakout.

(2) Any method of distributing costs to line items that distorts the unit prices must not be used. For example, distributing costs equally among line items is not acceptable except when there is little or no variation in base cost. (10 U.S.C. 3703(a)(1)(A) and 41 U.S.C. 3503(a)(1)(A)).

15.404-6 Unbalanced pricing.

(a) *General.* (1) Unbalanced pricing may increase performance risk and could result in payment of unreasonably high prices. Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more line items is significantly over or understated as indicated by the application of cost or price analysis techniques.

(2) The greatest risks associated with unbalanced pricing occur when—

(i) Startup work, mobilization, first articles, or first article testing are separate line items;

(ii) Base quantities and option quantities are separate line items; or

(iii) The evaluated price is the aggregate of estimated quantities to be ordered under separate line items of an indefinite-delivery contract.

(b) *Policy.* (1) All proposals with separately priced line items or subline

items must be analyzed to determine if the prices are unbalanced. If cost or price analysis techniques indicate that an proposal is unbalanced consider—

(i) The risks to the Government associated with the unbalanced pricing in determining the competitive range and in making the source selection decision; and

(ii) Whether award of the contract will result in paying unreasonably high prices for contract performance.

(2) A proposal may be rejected if the contracting officer determines that the lack of balance poses an unacceptable risk to the Government.

15.404–7 Review and justification of pass-through contracts.

(a) *Policy.* When an offeror informs the contracting officer, pursuant to clause 52.215–22, *Limitations on Pass-Through Charges-Identification of Subcontractor Effort*, that it intends to award subcontracts for more than 70 percent of the total cost of work to be performed under the contract, task or delivery order—

(1) Consider the availability of alternative contract vehicles and the feasibility of contracting directly with a subcontractor or subcontractors that will perform the bulk of the work. If such alternative approaches are selected, any resulting RFP must be issued in accordance with the competition requirements under part 6;

(2) Make a written determination that the contracting approach selected is in the best interest of the Government; and

(3) Document the basis for such determination. (section 802 of the NDAA for FY 2013 (Pub. L. 112.239)).

(b) *Exemption.* Contract actions set aside for small business, 8(a), HUBZone, SDVOSB, and WOSB concerns are exempt from the requirements of this subsection (see section 1615 of the NDAA for FY 2014 (Pub. L. 113–66)).

15.404–8 Subcontract pricing considerations.

(a) *Policy.* Contracting officers are responsible for the determination of a fair and reasonable price for the prime contract, including subcontracting costs. To support this effort, the prime contractor or subcontractor must—

(1) Conduct appropriate cost or price analyses to establish the reasonableness of proposed subcontract prices;

(2) Include the results of these analyses in the price proposal; and

(3) When required by paragraph (b) of this subsection, submit subcontractor certified cost or pricing data to the Government as part of its own certified cost or pricing data.

(b) *Certified cost or pricing data.* Any contractor or subcontractor that is

required to submit certified cost or pricing data also must obtain and analyze certified cost or pricing data before awarding any subcontract, purchase order, or modification expected to exceed the certified cost or pricing data threshold, unless an exception in 15.403–2 applies to that action.

(1) The contractor must submit, or cause to be submitted by the subcontractor(s), certified cost or pricing data to the Government for subcontracts that are the lower of either—

(i) \$20 million or more; or

(ii) Both more than the pertinent certified cost or pricing data threshold and more than 10 percent of the prime contractor's proposed price, unless the contracting officer believes such submission is unnecessary.

(2) Require the contractor or subcontractor to submit to the Government (or cause submission of) subcontractor certified cost or pricing data below the thresholds in paragraph (b)(1) of this section and data other than certified cost or pricing data that the contracting officer considers necessary for adequately pricing the prime contract.

(3) Subcontractor certified cost or pricing data must be submitted in the format provided in Table 15–1 of 15.408–2 or the alternate format specified in the RFP.

(4) Subcontractor certified cost or pricing data must be current, accurate, and complete as of the date of price agreement, or, if applicable, an earlier date agreed upon by the parties and specified on the contractor's Certificate of Current Cost or Pricing Data. Contractors must update subcontractor's data, as appropriate, during source selection and negotiations.

(5) If there is more than one prospective subcontractor for any given work, the contractor need only submit to the Government certified cost or pricing data for the prospective subcontractor most likely to receive the award.

(c) *Approved purchasing system.* In determining the reasonableness of the prime contract price, consider whether a contractor or subcontractor has an approved purchasing system, has performed cost or price analysis of proposed subcontractor prices, or has negotiated the subcontract prices before negotiation of the prime contract. This does not relieve contracting officers from the responsibility to analyze the contractor's submission, including subcontractor's certified cost or pricing data.

15.404–9 Profit.

(a) *General.* This subsection prescribes policies for establishing the profit or fee portion of the Government prenegotiation objective in price negotiations based on cost analysis.

(b) *Policy.* Structured approaches (see paragraph (d) of this subsection) for determining profit or fee prenegotiation objectives provide a discipline for ensuring that all relevant factors are considered.

(1) Subject to the authorities in part 1, agencies making noncompetitive contract awards over \$100,000 totaling \$50 million or more a year—

(i) Must use a structured approach for determining the profit or fee objective in those acquisitions that require cost analysis (Agencies may use another agency's structured approach); and

(ii) May prescribe specific exemptions for situations in which mandatory use of a structured approach would be clearly inappropriate.

(2) When the price negotiation is based on cost analysis, contracting officers in agencies that have a structured approach must use it to analyze profit. When not using a structured approach, contracting officers must comply with paragraph (d)(1) of this subsection in developing profit or fee prenegotiation objectives.

(3) When the price negotiation is not based on cost analysis, contracting officers are not required to analyze profit.

(c) *Contracting officer responsibilities.* Contracting officers—

(1) Must use the Government prenegotiation cost objective amounts as the basis for calculating the profit or fee prenegotiation objective.

(2) Must not require any prospective contractor to submit breakouts or supporting rationale for its profit or fee objective but may consider it, if it is submitted voluntarily.

(3) Before applying profit or fee factors, must exclude—

(i) From the pre-negotiation cost objective amounts, the purchase cost of contractor-acquired property that is categorized as equipment, as defined in FAR 45, and where such equipment is to be charged directly to the contract; and

(ii) Facilities capital cost of money included in the cost objective amounts. If the prospective contractor fails to identify or propose facilities capital cost of money in a proposal for a contract that will be subject to the cost principles for contracts with commercial organizations, facilities capital cost of money will not be an allowable cost in any resulting contract.

(4) Must not negotiate a price or fee that exceeds the following statutory limitations, imposed by 10 U.S.C. 3322(b) and 41 U.S.C. 3905:

(i) For experimental, developmental, or research work performed under a cost-plus-fixed-fee contract, the fee must not exceed 15 percent of the contract's estimated cost, excluding fee.

(ii) For architect-engineer services for public works or utilities using cost-type contracts, the estimated cost and fee for production and delivery of designs, plans, drawings, and specifications must not exceed 6 percent of the estimated cost of construction of the public work or utility, excluding fees.

(iii) For other cost-plus-fixed-fee contracts, the fee must not exceed 10 percent of the contract's estimated cost, excluding fee.

(iv) The contracting officer's signature on the price negotiation memorandum or other documentation supporting determination of fair and reasonable price documents the contracting officer's determination that the statutory price or fee limitations have not been exceeded.

(5) May use the basic contract's profit or fee rate as the prenegotiation objective for a change or modification, if that change or modification calls for essentially the same type and mix of work as the basic contract and is of relatively small dollar value compared to the total contract value.

(d) *Profit-analysis factors*—

(1) *Common factors*. Unless it is clearly inappropriate or not applicable, each factor outlined in paragraphs (d)(1)(i) through (vi) of this subsection must be considered by agencies in developing their structured approaches and by contracting officers in analyzing profit, whether or not using a structured approach.

(i) *Contractor effort*. This factor measures the complexity of the work and the resources required of the prospective contractor for contract performance. Greater profit opportunity should be provided under contracts requiring a high degree of professional and managerial skill and to prospective contractors whose skills, facilities, and technical assets can be expected to lead to efficient and economical contract performance. The subfactors in paragraphs (d)(1)(i)(A) through (D) of this subsection must be considered in determining contractor effort, but they may be modified in specific situations to accommodate differences in the categories used by prospective contractors for listing costs—

(A) *Material acquisition*. This subfactor measures the managerial and technical effort needed to obtain the

required purchased parts and material, subcontracted items, and special tooling. Considerations include the complexity of the items required, the number of purchase orders and subcontracts to be awarded and administered, whether established sources are available or new or second sources must be developed, and whether material will be obtained through routine purchase orders or through complex subcontracts requiring detailed specifications. Profit consideration should correspond to the managerial and technical effort involved.

(B) *Conversion direct labor*. This subfactor measures the contribution of direct engineering, manufacturing, and other labor to converting the raw materials, data, and subcontracted items into the contract items. Considerations include the diversity of engineering, scientific, and manufacturing labor skills required and the amount and quality of supervision and coordination needed to perform the contract task.

(C) *Conversion-related indirect costs*. This subfactor measures how much the indirect costs contribute to contract performance. The labor elements in the allocable indirect costs should be given the profit consideration they would receive if treated as direct labor. The other elements of indirect costs should be evaluated to determine whether they merit only limited profit consideration because of their routine nature, or are elements that contribute significantly to the proposed contract.

(D) *General management*. This subfactor measures the prospective contractor's other indirect costs and general and administrative (G&A) expense, their composition, and how much they contribute to contract performance. Considerations include how labor in the overhead pools would be treated if it were direct labor, whether elements within the pools are routine expenses or instead are elements that contribute significantly to the proposed contract, and whether the elements require routine as opposed to unusual managerial effort and attention.

(ii) *Contract cost risk*.

(A) This factor measures the degree of cost responsibility and associated risk that the prospective contractor will assume as a result of the contract type contemplated and considering the reliability of the cost estimate in relation to the complexity and duration of the contract task. Determination of contract type should be closely related to the risks involved in timely, cost-effective, and efficient performance. This factor should compensate contractors

proportionately for assuming greater cost risks.

(B) The contractor assumes the greatest cost risk in a closely priced firm-fixed-price contract under which it agrees to perform a complex undertaking on time and at a predetermined price. Some firm-fixed-price contracts may entail substantially less cost risk than others because, for example, the contract task is less complex or many of the contractor's costs are known at the time of price agreement, in which case the risk factor should be reduced accordingly. The contractor assumes the least cost risk in a cost-plus-fixed-fee level-of-effort contract, under which it is reimbursed those costs determined to be allocable and allowable, plus the fixed fee.

(C) In evaluating assumption of cost risk, contracting officers must, except in unusual circumstances, treat time-and-materials, labor-hour, and firm-fixed-price, level-of-effort term contracts as cost-plus-fixed-fee contracts.

(iii) *Federal socioeconomic programs*. This factor measures the degree of support given by the prospective contractor to Federal socioeconomic programs, such as those involving small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, WOSB concerns, veteran-owned, HUBZone, SDVOSB concerns, sheltered workshops for workers with disabilities, and energy conservation. Greater profit opportunity should be provided contractors that have displayed unusual initiative in these programs.

(iv) *Capital investments*. This factor takes into account the contribution of contractor investments to efficient and economical contract performance.

(v) *Cost-control and other past accomplishments*. This factor allows additional profit opportunities to a prospective contractor that has previously demonstrated its ability to perform similar tasks effectively and economically. In addition, consideration should be given to measures taken by the prospective contractor that result in productivity improvements, and other cost-reduction accomplishments that will benefit the Government in follow-on contracts.

(vi) *Independent development*. Under this factor, the contractor may be provided additional profit opportunities in recognition of independent development efforts relevant to the contract end item without Government assistance. The contracting officer should consider whether the development cost was recovered

directly or indirectly from Government sources.

(2) *Additional factors.* In order to foster achievement of program objectives, each agency may include additional factors in its structured approach or take them into account in the profit analysis of individual contract actions.

15.405 Special cost or pricing areas.

15.405-1 Inaccurate, incomplete, or noncurrent cost or pricing data.

(a) If, before agreement on price, the contracting officer learns that any certified cost or pricing data submitted are inaccurate, incomplete, or noncurrent, immediately bring the matter to the attention of the prospective contractor, whether the defective data increase or decrease the contract price.

(b) Consider any new data submitted to correct the deficiency, or consider the inaccuracy, incompleteness, or noncurrency of the data when negotiating the contract price. The price negotiation memorandum must reflect the adjustments made to the data or the corrected data used to negotiate the contract price.

15.405-2 Make-or-buy programs.

(a) *Evaluation, negotiation, and agreement.* Evaluate and negotiate proposed make-or-buy programs as soon as practicable after their receipt and before contract award.

(1) When the program is to be incorporated in the contract and the design status of the product being acquired does not permit accurate precontract identification of major items or work efforts, contracting officers must notify the prospective contractor in writing that these items or efforts, when identifiable, must be added under the clause at 52.215-9, *Changes or Additions to Make-or-Buy Program*.

(2) Contracting officers normally must not agree to proposed "make items" when the products or services are not regularly manufactured or provided by the contractor and are available—quality, quantity, delivery, and other essential factors considered—from another firm at equal or lower prices, or when they are regularly manufactured or provided by the contractor, but are available—quality, quantity, delivery, and other essential factors considered—from another firm at lower prices. Contracting officers may agree to these as "make items" if an overall lower Governmentwide cost would result or it is otherwise in the best interest of the Government. If this situation occurs in any fixed-price incentive or cost-plus-incentive-fee contract, specify these

items in the contract and state that they are subject to paragraph (d) of the clause at 52.215-9, *Changes or Additions to Make-or-Buy Program*. If the contractor proposes to reverse the categorization of such items during contract performance, the contract price must be subject to equitable reduction.

(b) *Incorporating make-or-buy programs in certain existing contracts.* The make-or-buy program may be incorporated in negotiated contracts for—

(1) Major systems or their subsystems or components, regardless of contract type; or

(2) Other supplies and services if—

(i) The contract is a cost-reimbursable contract, or a cost-sharing contract in which the contractor's share of the cost is less than 25 percent; and

(ii) The contracting officer determines that technical or cost risks justify Government review and approval of changes or additions to the make-or-buy program.

15.405-3 Forward pricing rate agreements.

(a) All data submitted in connection with the FPRA, updated as necessary, form a part of the total data that the offeror certifies to be accurate, complete, and current at the time of agreement on price for an initial contract or for a contract modification.

(b) Use FPRA rates as bases for pricing all contracts, modifications, and other contractual actions to be performed during the period covered by the agreement. Conditions that may affect the agreement's validity must be reported promptly to the ACO. If the ACO determines that a changed condition invalidates the agreement, the ACO must notify all interested parties of the extent of its effect and status of efforts to establish a revised FPRA.

(c) Do not require certification at the time of agreement for data supplied in support of FPRA's or other advance agreements. When a FPRA or other advance agreement is used to price a contract action that requires a certificate, the certificate supporting that contract action must cover the data supplied to support the FPRA or other advance agreement, and all other data supporting the action.

15.405-4 Should-cost review.

(a) *General.* (1) Should-cost reviews are a specialized form of cost analysis. Should-cost reviews differ from traditional evaluation methods because they do not assume that a contractor's historical costs reflect efficient and economical operation. Instead, these reviews evaluate the economy and efficiency of the contractor's existing

work force, methods, materials, equipment, real property, operating systems, and management. These reviews are accomplished by a multi-functional team of Government contracting, contract administration, pricing, audit, and engineering representatives. The objective of should-cost reviews is to promote both short and long-range improvements in the contractor's economy and efficiency in order to reduce the cost of performance of Government contracts. In addition, by providing rationale for any recommendations and quantifying their impact on cost, the Government will be better able to develop realistic objectives for negotiation.

(2) There are two types of should-cost reviews: program should-cost review and overhead should-cost review. These should-cost reviews may be performed together or independently. The scope of a should-cost review can range from a large-scale review examining the contractor's entire operation (including plant-wide overhead and selected major subcontractors) to a small-scale tailored review examining specific portions of a contractor's operation.

(b) *Program should-cost review.*

(1) A program should-cost review is used to evaluate significant elements of direct costs, such as material and labor, and associated indirect costs, usually associated with the production of major systems. When a program should-cost review is conducted relative to a contractor proposal, a separate audit report on the proposal is required.

(2) A program should-cost review should be considered, particularly in the case of a major system acquisition, when—

(i) Some initial production has already taken place;

(ii) The contract will be awarded on a sole source basis;

(iii) There are future year production requirements for substantial quantities of like items;

(iv) The items being acquired have a history of increasing costs;

(v) The work is sufficiently defined to permit an effective analysis and major changes are unlikely;

(vi) Sufficient time is available to plan and adequately conduct the should-cost review; and

(vii) Personnel with the required skills are available or can be assigned for the duration of the should-cost review.

(3) Decide which elements of the contractor's operation have the greatest potential for cost savings and assign the available personnel resources accordingly. The expertise of on-site Government personnel should be used,

when appropriate. While the particular elements to be analyzed are a function of the contract work task, elements such as manufacturing, pricing and accounting, management and organization, and subcontract and vendor management are normally reviewed in a should-cost review.

(4) In acquisitions for which a program should-cost review is conducted, a separate program should-cost review team report, prepared in accordance with agency procedures, is required. Consider the findings and recommendations contained in the program should-cost review team report when negotiating the contract price. After completing the negotiation, provide the ACO a report of any identified uneconomical or inefficient practices, together with a report of correction or disposition agreements reached with the contractor. Establish a follow-up plan to monitor the correction of the uneconomical or inefficient practices.

(c) *Overhead should-cost review.*

(1) An overhead should-cost review is used to evaluate indirect costs, such as fringe benefits, shipping and receiving, real property, and equipment, depreciation, plant maintenance and security, taxes, and G&A activities. It is normally used to evaluate and negotiate an FPRA with the contractor. When an overhead should-cost review is conducted, a separate audit report is required.

(2) The following factors should be considered when selecting contractor sites for overhead should-cost reviews:

- (i) Dollar amount of Government business.
- (ii) Level of Government participation.
- (iii) Level of noncompetitive Government contracts.
- (iv) Volume of proposal activity.
- (v) Major system or program.
- (vi) Corporate reorganizations, mergers, acquisitions, or takeovers.
- (vii) Other conditions (*e.g.*, changes in accounting systems, management, or business activity).

(3) The objective of the overhead should-cost review is to evaluate significant indirect cost elements in-depth, and identify and recommend corrective actions regarding inefficient and uneconomical practices. If it is conducted in conjunction with a program should-cost review, a separate overhead should-cost review report is not required. However, the findings and recommendations of the overhead should-cost team, or any separate overhead should-cost review report, must be provided to the ACO. The ACO should use this information to form the

basis for the Government position in negotiating an FPRA with the contractor. The ACO must establish a follow-up plan to monitor the correction of the uneconomical or inefficient practices.

15.406 Data to support proposal analysis.

(a) *Field pricing assistance.*

(1) Request field pricing assistance when the information available at the buying activity is inadequate to determine a fair and reasonable price. The request must reflect the minimum essential supplementary information needed to conduct a technical or cost or pricing analysis.

(2) Tailor the type of information and level of detail requested in accordance with the specialized resources available at the buying activity and the magnitude and complexity of the required analysis. Field pricing assistance is generally available to provide—

- (i) Technical, audit, and special reports associated with the cost elements of a proposal, including subcontracts;
- (ii) Information on related pricing practices and history;
- (iii) Information to help contracting officers determine commerciality and a fair and reasonable price, including—
 - (A) Verifying sales history to source documents;
 - (B) Identifying special terms and conditions;
 - (C) Identifying customarily granted or offered discounts for the item;
 - (D) Verifying the item to an existing catalog or price list;
 - (E) Verifying historical data for a product or service previously not determined commercial that the offeror is now trying to qualify as a commercial product or commercial service; and
 - (F) Identifying general market conditions affecting determinations of commerciality and a fair and reasonable price.

(iv) Information relative to the business, technical, production, or other capabilities and practices of an offeror.

(b) *Reporting field pricing information.*

(1) Field pricing review results, including supporting rationale, may be reported directly to the contracting officer orally, in writing, or by any other method acceptable to the contracting officer.

(i) Contracting officers and field pricing experts are encouraged to use telephonic and/or electronic means to request and send pricing information.

(ii) When it is necessary to have written technical and audit reports, request that the audit agency concurrently forward the audit report to

the requesting contracting officer and the ACO. The completed field pricing assistance results may reference audit information, but need not reconcile the audit recommendations and technical recommendations. A copy of the information submitted to the contracting officer by field pricing personnel must be provided to the audit agency.

(2) Audit and field pricing information, whether written or reported telephonically or electronically, must be made a part of the official contract file.

(c) *Audit assistance for prime contracts or subcontracts.*

(1) Contact the cognizant audit office directly to request assistance, particularly when an audit is the only field pricing support required. The audit office must send the audit report, or otherwise transmit the audit recommendations, directly to the contracting officer.

(i) The auditor must not reveal the audit conclusions or recommendations to the offeror/contractor without obtaining the concurrence of the contracting officer. However, the auditor may discuss statements of facts with the contractor.

(ii) Contracting officers must be notified immediately of any information disclosed to the auditor after submission of a report that may significantly affect the audit findings and, if necessary, a supplemental audit report must be issued.

(2) Do not request a separate preaward audit of indirect costs unless the information already available from an existing audit, completed within the preceding 12 months, is considered inadequate for determining the reasonableness of the proposed indirect costs (41 U.S.C. 4706 and 10 U.S.C. 3841).

(3) The auditor is responsible for the scope and depth of the audit. Copies of updated information that will significantly affect the audit must be provided to the auditor by the contracting officer.

(4) General access to the offeror's books and financial records is limited to the auditor. This limitation does not preclude the contracting officer or the ACO, or their representatives, from requesting that the offeror provide or make available any data or records necessary to analyze the offeror's proposal.

(d) *Deficient proposals.*

(1) The ACO or the auditor, as appropriate, must notify the contracting officer immediately if the data provided for review is so deficient as to preclude review or audit, or if the contractor or offeror has denied access to any records

considered essential to conduct a satisfactory review or audit. Oral notifications must be confirmed promptly in writing, including a description of deficient or denied data or records.

(2) Immediately take appropriate action to obtain the required data. Should the offeror/contractor again refuse to provide adequate data, or provide access to necessary data, withhold the award or price adjustment and refer the contract action to a higher authority, providing details of the attempts made to resolve the matter and a statement of the practicability of obtaining the supplies or services from another source.

15.407 Price negotiation.

(a) The purpose of performing cost or price analysis is to develop a negotiation position that permits the contracting officer and the offeror an opportunity to reach agreement on a fair and reasonable price. A fair and reasonable price does not require that agreement be reached on every element of cost, nor is it mandatory that the agreed price be within the contracting officer's initial negotiation position. Contracting officers are responsible for exercising the requisite judgment needed to reach a negotiated settlement with the offeror and is solely responsible for the final price agreement. However, when significant audit or other specialist recommendations are not adopted, provide rationale that supports the negotiation result in the price negotiation documentation.

(b) The contracting officer's primary concern is the overall price the Government will actually pay. The contracting officer's objective is to negotiate a contract of a type and with a price providing the contractor the greatest incentive for efficient and economical performance. The negotiation of a contract type and a price are related and should be considered together with the issues of risk and uncertainty to the contractor and the Government.

(c) The Government's cost objective and proposed pricing arrangement directly affect the profit or fee objective. Because profit or fee is only one of several interrelated variables, contracting officers must not agree on profit or fee without concurrent agreement on cost and type of contract.

(d) If, however, the contractor insists on a price or demands a profit or fee that the contracting officer considers unreasonable, and the contracting officer has taken all authorized actions (including determining the feasibility of

developing an alternative source) without success, the contracting officer must refer the contract action to a level above the contracting officer and document the contract file.

15.408 Documentation.

15.408-1 Prenegotiation objectives.

(a) The prenegotiation objectives establish the Government's initial negotiation position and are based on the results of the contracting officer's analysis of the offeror's proposal.

(b) Establish prenegotiation objectives before negotiating a pricing action. The scope and depth of the analysis supporting the objectives should be directly related to the dollar value, importance, and complexity of the pricing action. When cost analysis is required, document the pertinent issues to be negotiated, the cost objectives, and a profit or fee objective.

15.408-2 Documenting the negotiation.

(a) Document in the contract file the principal elements of the negotiated agreement. The documentation (e.g., price negotiation memorandum) must include the following:

- (1) The purpose of the negotiation.
- (2) A description of the acquisition, including appropriate identifying numbers (e.g., RFP No.).
- (3) The name, position, and organization of each person representing the contractor and the Government in the negotiation.
- (4) The current status of any contractor systems (e.g., purchasing, estimating, accounting, and compensation) to the extent they affected and were considered in the negotiation.

(5) If certified cost or pricing data were not required in the case of any price negotiation exceeding the certified cost or pricing data threshold, the exception used and the basis for it.

(6) If certified cost or pricing data were required, the extent to which the contracting officer—

(i) Relied on the certified cost or pricing data submitted and used them in negotiating the price;

(ii) Recognized as inaccurate, incomplete, or noncurrent any certified cost or pricing data submitted; the action taken by the contracting officer and the contractor as a result; and the effect of the defective data on the price negotiated; or

(iii) Determined that an exception applied after the data were submitted and, therefore, considered not to be certified cost or pricing data.

(7) A summary of the contractor's proposal, any field pricing assistance

recommendations, including the reasons for any pertinent variances from them, the Government's negotiation objective, and the negotiated position.

(i) When the determination of a fair and reasonable price is based on cost analysis, the summary must address each major cost element.

(ii) When determination of a fair and reasonable price is based on price analysis, the summary must include the source and type of data used to support the determination.

(8) The most significant facts or considerations controlling the establishment of the prenegotiation objectives and the negotiated agreement including an explanation of any significant differences between the two positions.

(9) To the extent such direction has a significant effect on the action, a discussion and quantification of the impact of direction given by Congress, other agencies, and higher-level officials (i.e., officials who would not normally exercise authority during the award and review process for the instant contract action).

(10) The basis for the profit or fee prenegotiation objective and the profit or fee negotiated.

(11) Documentation of fair and reasonable pricing.

(b) Whenever field pricing assistance has been obtained, forward a copy of the negotiation documentation to the office(s) providing assistance. When appropriate, information on how advisory field support can be made more effective should be provided separately.

Table 15-1—Instructions for Submitting Cost/Price Proposals When Certified Cost or Pricing Data Are Required

This document provides instructions for preparing a contract pricing proposal when certified cost or pricing data are required.

Note 1: There is a clear distinction between submitting certified cost or pricing data and merely making available books, records, and other documents without identification. The requirement for submission of certified cost or pricing data is met when all accurate certified cost or pricing data reasonably available to the offeror have been submitted, either actually or by specific identification, to the Contracting Officer or an authorized representative. As later data come into your possession, it should be submitted promptly to the Contracting Officer in a manner that clearly shows how the data relate to the offeror's price proposal. The requirement for submission of certified cost or pricing data continues

up to the time of agreement on price, or an earlier date agreed upon between the parties if applicable.

Note 2: By submitting your proposal, you grant the Contracting Officer or an authorized representative the right to examine records that formed the basis for the pricing proposal. That examination can take place at any time before award. It may include those books, records, documents, and other types of factual data (regardless of form or whether the data are specifically referenced or included in the proposal as the basis for pricing) that will permit an adequate evaluation of the proposed price.

I. General Instructions

A. You must provide the following information on the first page of your pricing proposal:

(1) RFP, contract, and/or modification number;

(2) Name and address of offeror;

(3) Name, telephone number, and email address of the point of contact;

(4) Name of contract administration office (if available);

(5) Type of contract action (that is, new contract, change order, price revision/redetermination, letter contract, unpriced order, or other);

(6) Proposed cost; profit or fee; and total;

(7) Whether you will require the use of Government property in the performance of the contract, and, if so, what property;

(8) Whether your organization is subject to cost accounting standards (CAS); whether your organization has submitted a CASB Disclosure Statement, and if it has been determined adequate; whether you have been notified that you are or may be in noncompliance with your Disclosure Statement or CAS (other than a noncompliance that the cognizant Federal agency official has determined to have an immaterial cost impact), and, if yes, an explanation; whether any aspect of this proposal is inconsistent with your disclosed practices or applicable CAS, and, if so, an explanation; and whether the proposal is consistent with your established estimating and accounting principles and procedures and FAR part 31, *Cost Principles*, and, if not, an explanation;

(9) The following statement: This proposal reflects our estimates and/or actual costs as of this date and conforms with the instructions in the RFP and FAR 15.408–2, Table 15–1. By submitting this proposal, we grant the Contracting Officer and authorized representative(s) the right to examine, at any time before award, those records,

which include books, documents, accounting procedures and practices, and other data, regardless of type and form or whether such supporting information is specifically referenced or included in the proposal as the basis for pricing, that will permit an adequate evaluation of the proposed price.

(10) Date of submission; and

(11) Name, title, and signature of authorized representative.

B. In submitting your proposal, you must include an index, appropriately referenced, of all the certified cost or pricing data and information accompanying or identified in the proposal. In addition, you must annotate any future additions and/or revisions, up to the date of agreement on price, or an earlier date agreed upon by the parties, on a supplemental index.

C. As part of the specific information required, you must submit, with your proposal—

(1) Certified cost or pricing data (as defined at FAR 2.101). You must clearly identify on your cover sheet that certified cost or pricing data are included as part of the proposal.

(2) Information reasonably required to explain your estimating process, including—

(i) The judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data; and

(ii) The nature and amount of any contingencies included in the proposed price.

D. You must show the relationship between line item prices and the total contract price. You must attach cost-element breakdowns for each proposed line item, using the appropriate format prescribed in the “Formats for Submission of Line Item Summaries” section of this table. You must furnish supporting breakdowns for each cost element, consistent with your cost accounting system.

E. When more than one line item is proposed, you must also provide summary total amounts covering all line items for each element of cost.

F. Whenever you have incurred costs for work performed before submission of a proposal, you must identify those costs in your cost/price proposal.

G. If you have reached an agreement with Government representatives on use of forward pricing rates/factors, identify the agreement, include a copy, and describe its nature.

H. As soon as practicable after final agreement on price or an earlier date agreed to by the parties, but before the award resulting from the proposal, you must, under the conditions stated in

FAR 15.403–4, submit a Certificate of Current Cost or Pricing Data.

II. Cost Elements

Depending on your system, you must provide breakdowns for the following basic cost elements, as applicable:

A. *Materials and services.* Provide a consolidated priced summary of individual material quantities included in the various tasks, orders, or line items being proposed and the basis for pricing (vendor quotes, invoice prices, etc.). Include raw materials, parts, components, assemblies, and services to be produced or performed by others. For all items proposed, identify the item and show the source, quantity, and price. Conduct price analyses of all subcontractor proposals. Conduct cost analyses for all subcontracts when certified cost or pricing data are submitted by the subcontractor. Include these analyses as part of your own certified cost or pricing data submissions for subcontracts expected to exceed the appropriate threshold in FAR 15.403–3(a). Submit the subcontractor certified cost or pricing data and data other than certified cost or pricing data as part of your own certified cost or pricing data as required in paragraph IIA(2) of this table. These requirements also apply to all subcontractors if required to submit certified cost or pricing data.

(1) *Adequate Price Competition.* Provide data showing the degree of competition and the basis for establishing the source and reasonableness of price for those acquisitions (such as subcontracts, purchase orders, material order, etc.) exceeding, or expected to exceed, the appropriate threshold set forth at FAR 15.403–3(a) priced on the basis of adequate price competition. For interorganizational transfers priced at other than the cost of comparable competitive commercial work of the division, subsidiary, or affiliate of the contractor, explain the pricing method (see FAR 31).

(2) *All Other.* Obtain certified cost or pricing data from prospective sources for those acquisitions (such as subcontracts, purchase orders, material order, etc.) exceeding the threshold set forth in FAR 15.403–3(a) and not otherwise exempt, in accordance with FAR 15.403–2. Also provide data showing the basis for establishing source and reasonableness of price. In addition, provide a summary of your cost analysis and a copy of certified cost or pricing data submitted by the prospective source in support of each subcontract, or purchase order that is the lower of either \$20 million or more,

or both more than the pertinent certified cost or pricing data threshold and more than 10 percent of the prime contractor's proposed price. Also submit any information reasonably required to explain your estimating process (including the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price). The Contracting Officer may require you to submit cost or pricing data in support of proposals in lower amounts. Subcontractor certified cost or pricing data must be accurate, complete and current as of the date of final price agreement, or an earlier date agreed upon by the parties, given on the prime contractor's Certificate of Current Cost or Pricing Data. The prime contractor is responsible for updating a prospective subcontractor's data. For standard commercial products fabricated by the offeror that are generally stocked in inventory, provide a separate cost breakdown, if priced based on cost. For interorganizational transfers priced at cost, provide a separate breakdown of cost elements. Analyze the certified cost or pricing data and submit the results of your analysis of the prospective source's proposal. When submission of a

prospective source's certified cost or pricing data is required as described in this paragraph, it must be included as part of your own certified cost or pricing data. You must also submit any data other than certified cost or pricing data obtained from a subcontractor, either actually or by specific identification, along with the results of any analysis performed on that data.

B. *Direct Labor.* Provide a time-phased (e.g., monthly, quarterly, etc.) breakdown of labor hours, rates, and cost by appropriate category, and furnish bases for estimates.

C. *Indirect Costs.* Indicate how you have computed and applied your indirect costs, including cost breakdowns. Show trends and budgetary data to provide a basis for evaluating the reasonableness of proposed rates. Indicate the rates used and provide an appropriate explanation.

D. *Other Costs.* List all other costs not otherwise included in the categories described above (e.g., special tooling, travel, computer and consultant services, preservation, packaging and packing, spoilage and rework, and Federal excise tax on finished articles) and provide bases for pricing.

E. *Royalties.* If royalties exceed \$1,500, you must provide the following

information on a separate page for each separate royalty or license fee:

(1) Name and address of licensor.

(2) Date of license agreement.

(3) Patent numbers.

(4) Patent application serial numbers, or other basis on which the royalty is payable.

(5) Brief description (including any part or model numbers of each contract item or component on which the royalty is payable).

(6) Percentage or dollar rate of royalty per unit.

(7) Unit price of contract item.

(8) Number of units.

(9) Total dollar amount of royalties.

(10) If specifically requested by the Contracting Officer, a copy of the current license agreement and identification of applicable claims of specific patents (see part 27 and 31).

F. *Facilities Capital Cost of Money.* When you elect to claim facilities capital cost of money as an allowable cost, you must submit Form CASB CMF and show the calculation of the proposed amount (see 31.205-10 and 48 CFR 9904.414).

III. Formats for Submission of Line Item Summaries

A. *New Contracts (Including Letter Contracts)*

Cost elements	Proposed contract estimate—total cost	Proposed contract estimate—unit cost	Reference
(1)	(2)	(3)	(4)

Column and Instruction

(1) Enter appropriate cost elements.

(2) Enter those necessary and reasonable costs that, in your judgment, will properly be incurred in efficient contract performance. When any of the costs in this column have already been incurred (e.g., under a letter contract),

describe them on an attached supporting page. When preproduction or startup costs are significant, or when specifically requested to do so by the Contracting Officer, provide a full identification and explanation of them.

(3) Optional, unless required by the Contracting Officer.

(4) Identify the attachment in which the information supporting the specific cost element may be found. (Attach separate pages as necessary.)

B. *Change Orders, Modifications, and Claims*

Cost elements	Estimated cost of all work deleted	Cost of deleted work already performed	Net cost to be deleted	Cost of work added	Net cost of change	Reference
(1)	(2)	(3)	(4)	(5)	(6)	(7)

Column and Instruction

(1) Enter appropriate cost elements.

(2) Include the current estimates of what the cost would have been to complete the deleted work not yet performed (not the original proposal estimates), and the cost of deleted work already performed.

(3) Include the incurred cost of deleted work already performed, using actuals incurred if possible, or, if actuals are not available, estimates from your accounting records. Attach a detailed inventory of work, materials, parts, components, and hardware already purchased, manufactured, or performed

and deleted by the change, indicating the cost and proposed disposition of each line item. Also, if you desire to retain these items or any portion of them, indicate the amount offered for them.

(4) Enter the net cost to be deleted, which is the estimated cost of all

deleted work less the cost of deleted work already performed. Column (2) minus Column (3) equals Column (4).

(5) Enter your estimate for cost of work added by the change. When nonrecurring costs are significant, or when specifically requested to do so by the Contracting Officer, provide a full

identification and explanation of them. When any of the costs in this column have already been incurred, describe them on an attached supporting schedule.

(6) Enter the net cost of change, which is the cost of work added, less the net cost to be deleted. Column (5) minus

Column (4) equals Column (6). When this result is negative, place the amount in parentheses.

(7) Identify the attachment in which the information supporting the specific cost element may be found. (Attach separate pages as necessary.)

C. Price Revision/Redetermination

Cutoff date	Number of units completed	Number of units to be completed	Contract amount	Redetermination proposal amount	Difference	Cost elements	Incurred cost—preproduction	Incurred cost—completed units	Incurred cost—work in process	Total incurred cost	Estimated cost to complete	Estimated total cost	Reference
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)

(Use as applicable)

Column and Instruction

(1) Enter the cutoff date required by the contract, if applicable.

(2) Enter the number of units completed during the period for which experienced costs of production are being submitted.

(3) Enter the number of units remaining to be completed under the contract.

(4) Enter the cumulative contract amount.

(5) Enter your redetermination proposal amount.

(6) Enter the difference between the contract amount and the redetermination proposal amount. When this result is negative, place the amount in parentheses. Column (4) minus Column (5) equals Column (6).

(7) Enter appropriate cost elements. When residual inventory exists, the final costs established under fixed-price-incentive and fixed-price-redeterminable arrangements should be net of the fair market value of such inventory. In support of subcontract costs, submit a listing of all subcontracts subject to repricing action, annotated as to their status.

(8) Enter all costs incurred under the contract before starting production and other nonrecurring costs (usually referred to as startup costs) from your books and records as of the cutoff date. These include such costs as preproduction engineering, special plant rearrangement, training program, and any identifiable nonrecurring costs such as initial rework, spoilage, pilot runs, etc. In the event the amounts are not segregated in or otherwise available from your records, enter in this column your best estimates. Explain the basis for each estimate and how the costs are charged on your accounting records (e.g., included in production costs as direct engineering labor, charged to manufacturing overhead). Also show how the costs would be allocated to the

units at their various stages of contract completion.

(9) Enter in Column (9) the production costs from your books and records (exclusive of preproduction costs reported in Column (8)) of the units completed as of the cutoff date.

(10) Enter in Column (10) the costs of work in process as determined from your records or inventories at the cutoff date. When the amounts for work in process are not available in your records but reliable estimates for them can be made, enter the estimated amounts in Column (10) and enter in Column (9) the differences between the total incurred costs (exclusive of preproduction costs) as of the cutoff date and these estimates. Explain the basis for the estimates, including identification of any provision for experienced or anticipated allowances, such as shrinkage, rework, design changes, etc. Furnish experienced unit or lot costs (or labor hours) from inception of contract to the cutoff date, improvement curves, and any other available production cost history pertaining to the item(s) to which your proposal relates.

(11) Enter total incurred costs (Total of Columns (8), (9), and (10)).

(12) Enter those necessary and reasonable costs that in your judgment will properly be incurred in completing the remaining work to be performed under the contract with respect to the item(s) to which your proposal relates.

(13) Enter total estimated cost (Total of Columns (11) and (12)).

(14) Identify the attachment in which the information supporting the specific cost element may be found. (Attach separate pages as necessary.)

Subpart 15.5—Unsolicited Proposals

15.500 Scope.

This subpart contains policies and procedures for the submission, receipt, evaluation, and acceptance or rejection of unsolicited proposals.

15.501 Definitions.

As used in this subpart—

Advertising material means material designed to acquaint the Government with a prospective contractor's present products, services, or potential capabilities, or designed to stimulate the Government's interest in buying such products or services.

Commercial product or commercial service offer means an offer of a commercial product or commercial service that the vendor wishes to see introduced in the Government's supply system as an alternate or a replacement for an existing supply item. This term does not include innovative or unique configurations or uses of commercial products or commercial services that are being offered for further development and that may be submitted as an unsolicited proposal.

Contribution means a concept, suggestion, or idea presented to the Government for its use with no indication that the source intends to devote any further effort to it on the Government's behalf.

15.502 General.

(a) *Purpose*. Unsolicited proposals allow unique and innovative ideas or approaches developed outside the Government to be made available to Government agencies for use in accomplishing their missions.

(b) *Intent*. Unsolicited proposals are offered with the intent that the Government will award a contract to the offeror for research and development (R&D) or other efforts supporting the Government mission. Only the cognizant contracting officer has the authority to bind the Government regarding unsolicited proposals.

(c) *Early communication*. Preliminary contact with technical and other appropriate agency personnel before preparing a detailed unsolicited proposal or submitting proprietary information to the Government may

save considerable time and effort for both parties.

(d) *Information for potential offerors.*

Agencies must make the following information available to potential offerors of unsolicited proposals:

(1) Definition and content of an unsolicited proposal acceptable for formal evaluation.

(2) Requirements concerning responsible prospective contractors and organizational conflicts of interest.

(3) Guidance on preferred methods for submitting ideas/concepts to the Government, such as any agency: upcoming RFP; Broad Agency Announcements (BAA); Small Business Innovative Research programs (SBIR); Small Business Technology Transfer (STTR) programs; program research and development announcements; or grant programs.

(4) Agency points of contact for information regarding advertising, contributions, and other types of transactions similar to unsolicited proposals.

(5) Information sources on agency objectives and areas of potential interest.

(6) Procedures for submission and evaluation of unsolicited proposals.

(7) Instructions for identifying and marking proprietary information so that it is protected and restrictive legends conform to this subpart.

(e) *Prohibitions.*

(1) Government personnel should not use any data, concept, idea, or other part of an unsolicited proposal as the basis, or part of the basis, for a RFP or in negotiations with any other firm unless the offeror is notified of and agrees to the intended use. This prohibition does not preclude using any data, concept, or idea in the proposal that also is available from another source without restriction.

(2) Government personnel should not disclose restrictively marked information included in an unsolicited proposal. The disclosure of such information concerning trade secrets, processes, operations, style of work, apparatus, and other matters, except as authorized by law, may result in criminal penalties under 18 U.S.C. 1905.

15.503 Preparing unsolicited proposals.

15.503-1 Scope of proposals.

(a) Unsolicited proposals may be submitted for new and innovative ideas that do not already fall under topic areas publicized under BAA, SBIR topics, STTR topics, program R&D announcements, or any other Government-initiated RFP or program.

(b) A valid unsolicited proposal must—

(1) Be innovative and unique;

(2) Be independently originated and developed by the offeror;

(3) Be prepared without Government supervision, endorsement, direction, or direct Government involvement;

(4) Include sufficient detail to permit a determination that Government support could be worthwhile and the proposed work could benefit the agency's research and development or other mission responsibilities;

(5) Not be an advance proposal for a known agency requirement that can be acquired by competitive methods; and

(6) Not address a previously published agency requirement.

(c) Advertising material, commercial product or commercial service offers, contributions, or routine correspondence on technical issues, are not unsolicited proposals.

(d) Unsolicited proposals in response to a publicized general statement of agency needs are considered to be independently originated.

15.503-2 Content of proposals.

Unsolicited proposals must contain the following information to permit consideration in an objective and timely manner:

(a) Basic information including—

(1) Offeror's name and address and type of organization; e.g., profit, nonprofit, educational, small business;

(2) Names and telephone numbers of technical and business personnel to be contacted for evaluation or negotiation purposes;

(3) Identification of proprietary data to be used only for evaluation purposes;

(4) Names of other Federal, State, or local agencies or parties receiving the proposal or funding the proposed effort;

(5) Date of submission; and

(6) Signature of a person authorized to represent and contractually obligate the offeror.

(b) Technical information including—

(1) Concise title and short abstract of the proposed effort;

(2) A reasonably complete discussion stating the objectives of the effort or activity, the method of approach and extent of effort to be employed, the nature and extent of the anticipated results, and the manner in which the work will help to support accomplishment of the agency's mission;

(3) Names and biographical information on the offeror's key personnel who would be involved, including alternates; and

(4) Type of support needed from the agency; e.g., Government property or personnel resources.

(c) Supporting information including—

(1) Proposed price or total estimated cost for the effort in sufficient detail for meaningful evaluation;

(2) Period of time for which the proposal is valid (a 6-month minimum is suggested);

(3) Type of contract preferred;

(4) Proposed duration of effort;

(5) Brief description of the organization, previous experience, relevant past performance, and facilities to be used;

(6) Other statements, if applicable, about organizational conflicts of interest, security clearances, and environmental impacts; and

(7) The names and telephone numbers of agency technical or other agency points of contact already contacted regarding the proposal.

15.503-3 Restricting use and disclosure of data.

(a) Unsolicited proposals may include data that the offeror does not want disclosed to the public for any purpose or used by the Government except for evaluation purposes. If the offeror wishes to restrict the use and disclosure of data, the title page must be marked the following legend:

Use and Disclosure of Data

This proposal includes data that must not be disclosed outside the Government and must not be duplicated, used, or disclosed, in whole or in part, for any purpose other than to evaluate this proposal. However, if a contract is awarded to this offeror as a result of, or in connection with, the submission of these data, the Government must have the right to duplicate, use, or disclose the data to the extent provided in the resulting contract. This restriction does not limit the Government's right to use information contained in these data if they are obtained from another source without restriction. The data subject to this restriction are contained in Sheets [insert numbers or other identification of sheets].

(b) The offeror must also mark each sheet of data it wishes to restrict with the following legend: Use or disclosure of data contained on this sheet is subject to the restriction on the title page of this proposal.

(c) An offeror should identify trade secrets, commercial or financial information, and privileged or confidential information to the Government

15.504 Receipt and initial review of unsolicited proposals.

(a) Agencies must establish procedures for controlling the receipt,

evaluation, and timely disposition of unsolicited proposals. The procedures must include controls on the reproduction and disposition of proposal material, particularly data identified by the offeror as subject to duplication, use, or disclosure restrictions; and identify agency points of contact to coordinate the receipt and handling of unsolicited proposals.

(b) Agencies may decline evaluation or consideration of unsolicited proposals submitted concurrently to more than one agency, or distributed in bulk.

15.504 Initial Review.

(a) Before beginning a comprehensive evaluation, the agency contact point must determine if the proposal—

- (1) Is a valid unsolicited proposal, as described at 15.503–1(b);
- (2) Is suitable for submission in response to an existing agency requirement;
- (3) Is related to the agency mission;
- (4) Contains sufficient technical information and cost-related or price-related information for evaluation;
- (5) Has overall scientific, technical, or socioeconomic merit;
- (6) Has been approved by a responsible official or other representative authorized to obligate the offeror contractually; and
- (7) Complies with the marking requirements of this subpart.

(b) If the proposal meets these requirements, the contact point must promptly acknowledge receipt and process the proposal.

(c) If a proposal is rejected because the proposal does not meet these requirements, the agency contact point must promptly inform the offeror in writing of the reasons for rejection and the proposed disposition of the unsolicited proposal.

15.504–2 Handling use and disclosure of data restrictions.

(a) *Alternate legend.* When an unsolicited proposal meeting the requirements at 15.504–1(a) is marked with a legend different from that at 15.503–3, the agency point of contact must—

(1) Return the proposal to the offeror and notify them that the proposal cannot be considered because it is impracticable for the Government to comply with the legend and that the agency will consider the proposal if it is resubmitted with the proper legend; and

(2) Unless the offeror clearly states in writing that no restrictions are imposed on the disclosure or use of the data contained in the proposal, mark the unsolicited proposal as follows:

Unsolicited Proposal—Use of Data Limited

All Government personnel must exercise extreme care to ensure that the information in this proposal is not disclosed to an individual who has not been authorized access to such data in accordance with FAR part 3, and is not duplicated, used, or disclosed in whole or in part for any purpose other than evaluation of the proposal, without the written permission of the offeror. If a contract is awarded on the basis of this proposal, the terms of the contract must control disclosure and use. This notice does not limit the Government's right to use information contained in the proposal if it is obtainable from another source without restriction. This is a Government notice, and must not by itself be construed to impose any liability upon the Government or Government personnel for disclosure or use of data contained in this proposal.

(3) Not use this notice to justify withholding of a record, or to improperly deny the public access to a record, where an obligation is imposed by FOIA (5 U.S.C. 552).

(b) Evaluation by personnel outside of the agency or the Government.

(1) When an agency receives an unsolicited proposal from other than an educational or nonprofit organization or institution, and an evaluation by Government personnel outside the agency or non-Government personnel is necessary, written permission must be obtained from the offeror before releasing the proposal for evaluation. The agency point of contact should—

(i) Attach a cover sheet marked with the legend in paragraph (a)(2) of this section;

(ii) Change the beginning of the legend to read “All Government and non-Government personnel * * *”; and

(iii) Require any non-Government evaluator to agree in writing that data in the proposal will not be disclosed to persons outside the Government.

(2) When an agency receives an unsolicited proposal without a restrictive legend from an educational or nonprofit organization or institution, and evaluation outside of the Government is necessary, the agency point of contact should follow paragraphs (b)(1)(i) through (iii) of this section.

(3) When an agency receives an unsolicited proposal with a restrictive legend from an educational or nonprofit organization or institution, and evaluation by non-Government personnel is necessary, the agency point of contact must—

(i) Follow paragraphs (b)(1)(i) through (iii) of this section; and

(ii) Obtain written permission from the offeror before releasing the proposal for evaluation.

15.505 Evaluation of unsolicited proposals.

(a) Agencies must evaluate unsolicited proposals for energy savings performance contracts in accordance with the procedures in 10 CFR 436.33(b).

(b) The agency point of contact must coordinate the evaluation of proposals and attach the legend at 15.504–2(a)(2) to each copy of the proposal distributed for evaluation.

(c) When evaluating unsolicited proposals, evaluators should consider, at a minimum, the following factors:

- (1) Unique, innovative and meritorious methods, approaches, or concepts demonstrated by the proposal;
- (2) Overall scientific, technical, or socioeconomic merits of the proposal;
- (3) Potential contribution of the effort to the agency's specific mission;
- (4) Offeror's capabilities, related experience, facilities, techniques, or unique combinations of these that are integral factors for achieving the proposal objectives;

(5) Qualifications, capabilities, and experience of the proposed principal investigator, team leader, or key personnel critical to achieving the proposal objectives; and

(6) Realism of the proposed cost.

(d) Evaluators must notify the agency point of contact of their recommendations when the evaluation is complete.

(e) A favorable evaluation of an unsolicited proposal does not, in itself, justify awarding a contract without providing for full and open competition. The agency point of contact should return an unsolicited proposal to the offeror, citing reasons, when its substance—

(1) Is available to the Government without restriction from another source;

(2) Closely resembles a pending competitive acquisition requirement;

(3) Does not relate to the activity's mission; or

(4) Does not demonstrate an innovative and unique method, approach, or concept, or is otherwise not deemed a meritorious proposal.

15.506 Criteria for acceptance and negotiation of an unsolicited proposal.

Begin negotiations on a sole source basis only when—

(a) An unsolicited proposal receives a favorable comprehensive evaluation;

(b) A justification and approval is obtained in accordance with part 6;

(c) The agency technical office sponsoring the contract furnishes the necessary funds; and

(d) The requirements for posting a presolicitation notice of a proposed contract action are met.

PART 38 [Removed and Reserved]

■ 2. Remove and reserve part 38, consisting of section 38.000 and subparts 38.1 and 38.2.

■ 3. Revise part 44 to read as follows:

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

Sec.

44.000 Scope of part.

44.001 Definitions.

Subpart 44.1—[Reserved]

Subpart 44.2—Evaluation and award.

44.201 Consent to subcontracts and requirements for advance notice.

44.201–1 Consent requirements.

44.201–2 Advance notification requirements.

44.201–3 Contracting officer's responsibilities.

44.201–4 Consent limitations.

44.201–5 Contract clauses.

Subpart 44.3—Postaward

44.301 Contractors' purchasing systems reviews.

44.301–1 Objective.

44.301–2 Requirements.

44.301–3 Responsibilities for granting, withholding or withdrawing approval.

44.301–4 Notice.

44.301–5 Withholding or withdrawing approval.

Subpart 44.4—Subcontracts for Commercial Products and Commercial Services

44.401 Definition.

44.402 Requirements.

44.403 Contract clause.

Authority: 41 U.S.C. 1121(b); 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

44.000 Scope of part.

(a) This part prescribes policies and procedures for consent to subcontracts or advance notification of subcontracts, and for review and approval of contractors' purchasing systems.

(b) The consent and advance notification requirements of subpart 44.2 do not apply to prime contracts for commercial products or commercial services.

44.001 Definitions.

As used in this part—

Contractor means the total contractor organization or a separate entity of it, such as an affiliate, division, or plant, that performs its own purchasing.

Contractor purchasing system review (CPSR) means the complete assessment

of a contractor's purchasing of material and services, subcontracting, and subcontract management from developing the requirement through completing subcontract performance.

Subcontract means any contract as defined in subpart 2.1 entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

Subcontractor means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

Subpart 44.1—[Reserved]

Subpart 44.2—Evaluation and award.

44.201 Consent to subcontracts and requirements for advance notice.

44.201–1 Consent requirements.

(a) If the contractor has an approved purchasing system, consent is required for subcontracts specifically identified by the contracting officer in paragraph (d) of 52.244–2, Subcontracts. The contracting officer may require consent to subcontract to protect the Government because of the subcontract type, complexity, or value, or because the subcontract needs special surveillance.

(b) If the contractor does not have an approved purchasing system, consent to subcontract is required for certain subcontracts identified in paragraph (c) of 52.244–2, Subcontracts.

44.201–2 Advance notification requirements.

Under cost-reimbursement contracts, the contractor is required by statute to notify the contracting officer as follows:

(a) For the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration, unless the contractor maintains an approved purchasing system, 10 U.S.C. 3322(c) requires notification before the award of any cost-plus-fixed-fee subcontract, or any fixed-price subcontract that exceeds the greater of the simplified acquisition threshold or 5 percent of the total estimated cost of the contract.

(b) For civilian agencies other than the Coast Guard and the National Aeronautics and Space Administration, even if the contractor has an approved purchasing system, 41 U.S.C. 3905 requires notification before the award of any cost-plus-fixed-fee subcontract, or any fixed-price subcontract that exceeds either the simplified acquisition

threshold or 5 percent of the total estimated cost of the contract.

44.201–3 Contracting officer's responsibilities.

(a) The contracting officer responsible for consent (see part 42 regarding delegation) must review the contractor's notification (*i.e.*, request to subcontract) and supporting data to ensure that the proposed subcontract is appropriate for the risks involved and consistent with current policy and sound business judgment.

(b) Careful and thorough review and consideration of the request to subcontract is necessary when—

(1) The contractor's purchasing system or performance is inadequate;

(2) Close working relationships or ownership affiliations between the contractor and subcontractor may preclude free competition or result in higher prices;

(3) Subcontracts are proposed for award on a noncompetitive basis, at prices that appear to be unreasonable, or at higher prices than those offered to the Government in comparable circumstances; or

(4) Subcontracts are proposed on a cost-reimbursement, time-and-materials, or labor-hour basis.

(c) If the advance notification or consent requirements were satisfied for certain subcontracts evaluated during negotiations, the contracting officer must identify those subcontracts in paragraph (j) of the clause at 52.244–2. Designation of specific subcontractors during contract negotiations does not in itself satisfy the requirements for advance notification or consent pursuant to the clause at 52.244–2.

44.201–4 Consent limitations.

(a) The contracting officer's consent to a subcontract or approval of the contractor's purchasing system does not constitute a determination of the acceptability of the subcontract terms or price, or of the allowability of costs, unless the consent or approval specifies otherwise.

(b) Contracting officers must not consent to—

(1) Cost-reimbursement subcontracts if the fee exceeds the fee limitations in part 15;

(2) Subcontracts providing for payment on a cost-plus-a-percentage-of-cost basis;

(3) Subcontracts obligating the contracting officer to deal directly with the subcontractor; or

(4) Subcontracts that make the results of arbitration, judicial determination, or voluntary settlement between the prime contractor and subcontractor binding on the Government.

44.201–5 Contract clauses.

(a)(1) Insert the clause at 52.244–2, Subcontracts, in solicitations and contracts, other than those for commercial products or commercial services, when contemplating—

- (i) A cost-reimbursement contract;
- (ii) A labor-hour, time-and-materials, or letter contract that exceeds the simplified acquisition threshold; or
- (iii) A fixed-price contract that exceeds the simplified acquisition threshold under which unpriced contract actions (including unpriced modifications or unpriced delivery orders) are anticipated.

(2) If a cost-reimbursement contract is planned, for civilian agencies other than the Coast Guard and the National Aeronautics and Space Administration, use the clause with its Alternate I.

(3) Use of this clause is not required in—

- (i) Fixed-price architect-engineer contracts; or
- (ii) Contracts for mortuary services, refuse services, or shipment and storage of personal property, when an agency-prescribed clause on approval of subcontractors' facilities is required.

(b) The contracting officer may insert the clause at 52.244–4, Subcontractors and Outside Associates and Consultants (Architect-Engineer Services), in architect-engineer contracts.

(c) When contracting by negotiation, insert the clause at 52.244–5, Competition in Subcontracting, in solicitations and contracts, other than those for commercial products and commercial services, when the contract amount is expected to exceed the simplified acquisition threshold, unless—

- (1) A firm-fixed-price contract, awarded on the basis of adequate price competition or whose prices are set by law or regulation, is planned; or
- (2) A time-and-materials, labor-hour, or architect-engineer contract is planned.

Subpart 44.3—Postaward**44.301 Contractors' purchasing systems reviews.****44.301–1 Objective.**

The objective of a contractor purchasing system review (CPSR) is to assess the efficiency and effectiveness with which the contractor spends Government funds and complies with Government policy when subcontracting. The review provides the basis for granting, withholding, or withdrawing approval of the contractor's purchasing system.

44.301–2 Requirements.

(a) The responsible contracting officer (see part 42 regarding delegation) must determine if a CPSR is needed based on factors such as the past performance of the contractor, and the volume, complexity and dollar value of subcontracts.

(b) If a determination is made under paragraph (a) to conduct a CPSR, at least every three years the contracting officer must determine whether a CPSR is needed.

(c) The contracting officer must monitor a contract to ensure that the contractor is effectively managing its purchasing program.

(d) Surveillance must be accomplished in accordance with a plan developed by the contracting officer with the assistance of subcontracting, audit, pricing, technical, or other specialists as necessary. The plan should cover pertinent phases of a contractor's purchasing system and pertinent operations that affect the contractor's purchasing and subcontracting.

44.301–3 Responsibilities for granting, withholding or withdrawing approval.

The contracting officer is responsible for granting, withholding, or withdrawing approval of a contractor's purchasing system, and must—

- (a) Approve a purchasing system only after determining that the contractor's purchasing policies and practices are efficient and adequately protect the Government's interests; and
- (b) Promptly notify the contractor in writing after granting, withholding, or withdrawing approval.

44.301–4 Notice.

(a) The notice granting purchasing system approval must include—

- (1) Identification of the plant or plants covered by the approval;
- (2) The effective date of approval; and
- (3) A statement that system approval—

(i) Applies to all Federal Government contracts at that plant to the extent that cross-servicing arrangements exist;

(ii) Waives the contractual requirement for advance notification in fixed-price contracts, but not for cost-reimbursement contracts;

(iii) Waives the contractual requirement for consent to subcontracts in fixed-price contracts and for specified subcontracts in cost-reimbursement contracts but not for those subcontracts, if any, selected for special surveillance and identified in the contract Schedule; and

(iv) May be withdrawn at any time at the contracting officer's discretion.

(b) In certain circumstances, the contracting officer may require consent for certain subcontracts or classes of subcontracts even though the contractor's purchasing system is approved. The system approval notification must identify the class or classes of subcontracts requiring consent. When sufficient weaknesses in a particular area of subcontracting are identified, requiring consent to subcontract provides the contracting officer additional visibility. See 52.244–2(d).

44.301–5 Withholding or withdrawing approval.

(a) The contracting officer must withhold or withdraw approval of a contractor's purchasing system when major weaknesses exist or when the contractor is unable to provide enough information upon which to make an affirmative determination. The contracting officer may withdraw approval at any time based on a determination that the contractor's purchasing system has deteriorated or to protect the Government's interest.

(b) When approval is withheld or withdrawn, the contracting officer must notify the contractor in writing within 10 days after completing the review. The notice must specify the deficiencies that must be corrected to qualify the system for approval and request the contractor to furnish within 15 days a plan to correct the deficiencies. If the plan is accepted, the contracting officer must make a follow-up review as soon as the contractor notifies the contracting officer that the deficiencies have been corrected.

(c) The contracting officer must withhold or withdraw approval when the contractor consistently does not comply with requirements.

Subpart 44.4—Subcontracts for Commercial Products and Commercial Services**44.401 Definition.**

Subcontract, as used in this subpart, includes a transfer of commercial products or commercial services between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

44.402 Requirements.

(a) *Preference*. Require contractors and subcontractors to incorporate, to the maximum extent practicable, commercial products, commercial services, or nondevelopmental items as components of items supplied to the agency.

(b) *Flowdown*. The clauses listed in the clause at 52.244–6, Subcontracts for

Commercial Products and Commercial Services, flow down to subcontracts for commercial products and commercial services as indicated in the specific clause. Do not require a contractor or subcontractor to apply to any of its divisions, subsidiaries, affiliates, subcontractors, or suppliers that are furnishing commercial products, commercial components, or commercial services a clause that is not listed in 52.244–6.

(c) *Inapplicable laws.* A list of laws that do not apply to subcontracts for the acquisition of commercial products, including commercially available off-the-shelf items, or commercial services is available at www.acquisition.gov/inapplicablelaws.

44.403 Contract clause.

Insert the clause at 52.244–6, Subcontracts for Commercial Products and Commercial Services, in solicitations and contracts, including those for commercial products (other than commercially available off-the-shelf (COTS) items) and commercial services.

PART 51 [Removed and Reserved]

■ 4. Remove and reserve part 51, consisting of section 51.000 and subparts 51.1 and 51.2.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. The authority citation for 48 CFR Part 52 continues to read as follows:

Authority: 41 U.S.C. 1121(b); 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

52.208–4 through 52.208–7 [Removed and Reserved]

■ 6. Remove and reserve sections 52.208–4 through 52.208–7.

■ 7. Revise section 52.208–9 to read as follows:

52.208–9 Contractor Use of Mandatory Sources of Supply or Services.

As prescribed in 8.105–1(b), insert the following clause:

Contractor Use of Mandatory Sources of Supply or Services (DATE)

(a) Certain supplies or services to be provided under this contract for use by the Government are required by law to be obtained from nonprofit agencies participating in the program operated by the Committee for Purchase From People Who Are Blind or Severely Disabled (the Committee) under 41 U.S.C. 8504. The Committee operates under the name AbilityOne Commission. Additionally, some of these supplies are available from the Defense Logistics Agency (DLA), the General

Services Administration (GSA), or the Department of Veterans Affairs (VA). The Contractor must obtain mandatory supplies or services to be provided for Government use under this contract from the specific sources indicated in the contract schedule.

(b) The Contractor must immediately notify the Contracting Officer if a mandatory source is unable to provide the supplies or services by the time required, or if the quality of supplies or services provided by the mandatory source is unsatisfactory. The Contractor must not purchase the supplies or services from other sources until the Contracting Officer has notified the Contractor that the Committee or an AbilityOne central nonprofit agency has authorized purchase from other sources.

(c) Price and delivery information for the mandatory supplies is available from the Contracting Officer for the supplies obtained through the DLA/GSA/VA distribution facilities. For mandatory supplies or services that are not available from DLA/GSA/VA, price and delivery information is available from the appropriate central nonprofit agency. Payments must be made directly to the source making delivery. Points of contact for AbilityOne central nonprofit agencies are:

- (1) National Industries for the Blind (www.NIB.org), 3000 Potomac Avenue, Alexandria, VA 22305, (703) 310–0500; and
- (2) SourceAmerica (www.SourceAmerica.org) (formerly known as the National Industries for the Severely Handicapped), 8401 Old Courthouse Road, Vienna, VA 22182, (571) 226–4660.

(End of clause)

■ 8. Add sections 52.208–XX and 52.208–YY to read as follows:

52.208–XX Government Supply Sources.

As prescribed in 8.105–2(c), insert the following clause:

Government Supply Sources (DATE)

The Contracting Officer may issue the Contractor an authorization to use Government supply sources in the performance of this contract. Title to all property acquired by the Contractor under such an authorization vests in the Government unless otherwise specified in the contract. The provisions of the clause at FAR 52.245–1, Government Property, apply to all property acquired under such authorization.

(End of clause)

52.208–YY GSA Fleet Vehicles and Related Services.

As prescribed in 8.105–3(c), insert the following clause:

GSA Fleet Vehicles and Related Services (DATE)

The Contracting Officer may issue the Contractor an authorization to obtain GSA Fleet vehicles and related services for use in the performance of this contract. The use, service, and maintenance of GSA Fleet vehicles and the use of related services by the Contractor must be in accordance with 41 CFR 101–39 and 41 CFR 102–34.

(End of clause)

■ 9. Revise sections 52.212–1 and 52.212–2 to read as follows:

52.212–1 Instructions to Offerors—Commercial Products and Commercial Services.

As prescribed in 12.205(a)(1), insert the following provision:

Instructions to Offerors—Commercial Products and Commercial Services (DATE)

(a) *Submission of offers.* Submit signed and dated offers to the office specified in this solicitation at or before the exact time specified in this solicitation. As a minimum, offers must include—

- (1) The solicitation number;
- (2) The name, address, telephone number of the Offeror;
- (3) The Offeror's Unique Entity Identifier (UEI) and, if applicable, Electronic Funds Transfer (EFT) indicator;
- (4) Information necessary to evaluate the factors contained in the provision at 52.212–2 or as described in the solicitation;
- (5) Responses to provisions that require Offeror completion of information, representations, and certifications (other than those collected via the System for Award Management (SAM)); and
- (6) A statement specifying the extent of agreement with all terms, conditions, and provisions included in the solicitation and any solicitation amendments.

(b) *Period for acceptance of offers.* The Offeror agrees to hold the prices in its offer firm for 60 calendar days from the date specified for receipt of offers, unless another time period is specified in an addendum to the solicitation.

(c) *Late submissions, modifications, revisions, and withdrawals of offers.*

(1) Offerors are responsible for submitting offers and any modifications or revisions to the Government office designated in the solicitation by the time specified in the solicitation.

(2) Any offer, modification, or revision received after the time specified for receipt of offers is “late” and will not be considered unless it is received before award is made and the Contracting Officer determines that accepting the late offer would not unduly delay the acquisition and is in the Government's best interests. However, a late modification of an otherwise successful offer that makes its terms more favorable to the Government will be considered at any time it is received and may be accepted.

(3) If an emergency or unanticipated event interrupts normal Government processes so that offers cannot be received at the Government office designated for receipt of offers by the exact time specified in the solicitation, and urgent Government requirements preclude amendment of the solicitation or other notice of an extension of the closing date, the time specified for receipt of offers will be deemed to be extended to the same time of day specified in the solicitation on the first work day on which normal Government processes resume.

(4) Offerors may withdraw their offers by written notice to the Government received at any time before award.

(d) *Contract award (not applicable to Invitation for Bids)*. The Government intends to evaluate offers and award a contract without negotiations with Offerors. Therefore, the Offeror's initial offer should contain the Offeror's best terms. However, the Government reserves the right to conduct negotiations, if necessary. The Government may reject any or all offers if such action is in the public interest, accept other than the lowest offer, and waive informalities and minor irregularities in offers received.

(e) *Debriefings*. If a postaward debriefing is given to requesting Offerors, the Government will disclose the following information, if applicable:

(1) The agency's evaluation of the significant weak or deficient factors in the debriefed Offeror's offer.

(2) The overall evaluated cost or price and technical rating of the successful Offeror and the debriefed Offeror and past performance information on the debriefed Offeror.

(3) The overall ranking of all Offerors when any ranking was developed by the agency during source selection.

(4) A summary of the rationale for award.

(5) For acquisitions of commercial products, the make and model of the product to be delivered by the successful Offeror.

(6) Reasonable responses to relevant questions posed by the debriefed Offeror as to whether the agency followed source-selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities.

(End of provision)

52.212-2 Evaluation—Commercial Products and Commercial Services.

As prescribed in 12.205(a)(2), insert the following provision:

Evaluation—Commercial Products and Commercial Services (DATE)

(a) *Evaluation factors*. The Government will award a contract resulting from this solicitation to the Offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered. The following factors will be used to evaluate offers:

[Insert evaluation factors in the relative order of importance. For requests for proposals, state: Evaluation factors other than price when combined are [significantly more important than price/approximately equal to price/significantly less important] than price. For invitations for bids, list only price and price-related factors.]

(b) *Options (if applicable)*. The Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. The Government may determine that an offer is unacceptable if the option prices are significantly unbalanced. The evaluation of options does not obligate the Government to exercise the option(s).

(c) *Notice of award*. A written notice of award or acceptance of an offer furnished to the successful Offeror within the time for

acceptance specified in the offer, will result in a binding contract without further action by either party. Before the offer's specified expiration time, the Government may accept an offer (or part of an offer), whether or not there are negotiations after its receipt, unless a written notice of withdrawal is received before award.

(End of provision)

52.212-3 [Removed and Reserved]

■ 10. Remove and reserve section 52.212-3.

■ 11. Revise section 52.212-4 to read as follows:

52.212-4 Terms and Conditions—Commercial Products and Commercial Services.

As prescribed in 12.205(b), insert the following clause:

Terms and Conditions—Commercial Products and Commercial Services (DATE)

(a) *Definitions*. The clause at Federal Acquisition Regulation (FAR) 52.202-1, Definitions, is incorporated by reference.

(b) *Inspection/Acceptance*. The Contractor must only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or performance of nonconforming services at no increase in contract price. If repair/replacement or reperformance will not correct the defects or is not possible, the Government may seek an equitable price reduction or adequate consideration for acceptance of nonconforming supplies or services. The Government must exercise its post acceptance rights—

(1) Within a reasonable time after the defect was discovered or should have been discovered; and

(2) Before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

(c) *Assignment*. The Contractor or its assignee may assign its rights to receive payment due as a result of performance of this contract to a bank, trust company, or other financing institution, including any Federal lending agency in accordance with the Assignment of Claims Act (31 U.S.C. 3727). However, when a third party makes payment (e.g., use of the Governmentwide commercial purchase card), the Contractor may not assign its rights to receive payment under this contract.

(d) *Changes*. Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

(e) *Disputes*. This contract is subject to 41 U.S.C. chapter 71, Contract Disputes. Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal, or action arising under or relating to this contract will be a dispute to be resolved in accordance with the clause FAR 52.233-1, Disputes, which is

incorporated in this contract by reference. The Contractor must proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.

(f) *Excusable delays*. The Contractor will be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence. Examples of occurrences include acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. When an excusable delay occurs, the Contractor must—

(1) Notify the Contracting Officer in writing as soon as possible;

(2) Remedy the delay as quickly as possible; and

(3) Notify the Contracting Officer when the occurrence is over.

(g) *Invoice*. The Government will handle invoices according to the Prompt Payment Act (31 U.S.C. 3903) and 5 CFR part 1315. The Contractor must submit invoices to the address designated in the contract to receive invoices. An invoice must include the information required by 5 CFR 1315.9(b).

(h) *Patent indemnity*. The Contractor must indemnify the Government and its officers, employees, and agents against liability, including costs, for actual or alleged direct or contributory infringement of, or inducement to infringe, any United States or foreign patent, trademark, or copyright, arising out of the performance of this contract, provided the Contractor is reasonably notified of such claims and proceedings.

(i) *Payment—*

(1) *Items accepted*. Payment will be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract.

(2) *Prompt payment*. The Government will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and prompt payment regulations at 5 CFR part 1315.

(3) *Discount*. In connection with any discount offered for early payment, time will be computed from the date of the invoice. For the purpose of computing the discount earned, payment will be considered to have been made on the date that appears on the payment check or the specified payment date if an electronic funds transfer payment is made.

(4) *Overpayments*. If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor must—

(i) Remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment including the—

(A) Circumstances of the overpayment (e.g., duplicate payment, erroneous payment, liquidation errors, date(s) of overpayment);

(B) Affected contract number and delivery order number, if applicable;

(C) Affected line item or subtitle item, if applicable; and

(D) Contractor point of contact; and
(ii) Provide a copy of the remittance and supporting documentation to the Contracting Officer.

(5) *Interest.*

(i) All amounts that become payable by the Contractor to the Government under this contract will bear simple interest from the date due until paid unless paid within 30 days of becoming due. The interest rate will be the interest rate established by the Secretary of the Treasury as provided in 41 U.S.C. 7109, which is applicable to the period in which the amount becomes due, as provided in (i)(6)(v) of this clause, and then at the rate applicable for each 6-month period as fixed by the Secretary until the amount is paid.

(ii) The Government may issue a demand for payment to the Contractor upon finding a debt is due under the contract.

(iii) *Final decisions.* The Contracting Officer will issue a final decision as required by FAR part 33 if—

(A) The Contracting Officer and the Contractor are unable to reach agreement on the existence or amount of a debt within 30 days;

(B) The Contractor fails to liquidate a debt previously demanded by the Contracting Officer within the timeline specified in the demand for payment, unless the amounts were not repaid because the Contractor has requested an installment payment agreement; or

(C) The Contractor requests a deferment of collection on a debt previously demanded by the Contracting Officer (see FAR part 32).

(iv) If a demand for payment was previously issued for the debt, the demand for payment included in the final decision must identify the same due date as the original demand for payment.

(v) Amounts will be due at the earliest of the following dates:

(A) The date fixed under this contract.

(B) The date of the first written demand for payment, including any demand for payment resulting from a termination for cause.

(vi) The interest charge will be computed for the actual number of calendar days involved beginning on the due date and ending on—

(A) The date on which the designated office receives payment from the Contractor;

(B) The date of issuance of a Government check to the Contractor from which an amount otherwise payable has been withheld as a credit against the contract debt; or

(C) The date on which an amount withheld and applied to the contract debt would otherwise have become payable to the Contractor.

(vii) The interest charge made under this clause may be reduced under the procedures for interest credits prescribed in FAR part 32 in effect on the date of this contract.

(j) *Risk of loss.* Unless the contract specifically provides otherwise, risk of loss or damage to the supplies provided under this contract will remain with the Contractor until, and will pass to the Government upon—

(1) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or

(2) Delivery of the supplies to the Government at the destination specified in

the contract, if transportation is f.o.b. destination.

(k) *Taxes.* The contract price includes all applicable Federal, State, and local taxes and duties.

(l) *Termination for the Government's convenience.* The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor must immediately stop all work and must immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor will be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor will not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor will not be paid for any work performed or costs incurred which reasonably could have been avoided.

(m) *Termination for cause.* The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. The Government will send a cure notice to the Contractor, unless the reason for the termination is late delivery. In the event of termination for cause, the Government will not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor will be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination will be deemed a termination for convenience.

(n) *Title.* Unless specified elsewhere in this contract, title to items furnished under this contract will pass to the Government upon acceptance, regardless of when or where the Government takes physical possession.

(o) *Warranty.* The Contractor warrants and implies that the items delivered under this contract are merchantable and fit for use for the particular purpose described in this contract.

(p) *Limitation of liability.* Except as otherwise provided by an express warranty, the Contractor will not be liable to the Government for consequential damages resulting from any defect or deficiencies in accepted items.

(q) *Compliance with laws unique to Government contracts.* The Contractor agrees to comply with 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracts; 40 U.S.C. chapter 37, Contract Work Hours and Safety Standards; 41 U.S.C. chapter 87, Kickbacks; 49 U.S.C. 40118, Government-financed air transportation; and 41 U.S.C. chapter 21 relating to procurement integrity.

(r) *Order of precedence.* Any inconsistencies in this solicitation or contract must be resolved by giving precedence in the following order:

(1) The schedule of supplies/services.

(2) The Disputes, Payments, Invoice, Compliance with Laws Unique to Government Contracts, and Unauthorized Obligations paragraphs of this clause.

(3) Other contract clauses incorporated in the solicitation or contract.

(4) Addenda to this solicitation or contract.

(5) Solicitation provisions incorporated in the solicitation.

(6) Other paragraphs of this clause.

(7) Other documents, exhibits, and attachments.

(8) The specification.

(s) *Unauthorized obligations.*

(1) Except as stated in paragraph (s)(2) of this clause, when any supply or service acquired under this contract is subject to any End User License Agreement (EULA), Terms of Service (TOS), or similar legal instrument or agreement, that includes any clause requiring the Government to indemnify the Contractor or any person or entity for damages, costs, fees, or any other loss or liability that would create an Anti-Deficiency Act violation (31 U.S.C. 1341), the following will govern:

(i) Any such clause is unenforceable against the Government.

(ii) Neither the Government nor any Government-authorized end user will be deemed to have agreed to such clause by virtue of it appearing in the EULA, TOS, or similar legal instrument or agreement. If the EULA, TOS, or similar legal instrument or agreement is invoked through an "I agree" click box or other comparable mechanism (e.g., "click-wrap" or "browse-wrap" agreements), execution does not bind the Government or any Government authorized end user to such clause.

(iii) Any such clause is deemed to be stricken from the EULA, TOS, or similar legal instrument or agreement.

(2) Paragraph (s)(1) of this clause does not apply to indemnification by the Government that is expressly authorized by statute and specifically authorized under applicable agency regulations and procedures.

(t) *Comptroller General examination of record.* This paragraph applies if this contract was awarded using other than sealed bid procedures and is in excess of the simplified acquisition threshold on the date of award of this contract.

(1) The Comptroller General of the United States, or an authorized representative of the Comptroller General, will have access to and the right to examine any of the Contractor's directly pertinent records involving transactions related to this contract.

(2) The Contractor must make available at its offices, at all reasonable times, the records, materials, and other evidence for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified in FAR part 4, longer period required by statute, or periods specified in other clauses of this contract. If this contract is completely or partially terminated, the records relating to the work terminated must be made available

for 3 years after any resulting final termination settlement. Records relating to appeals under the disputes clause or to litigation or the settlement of claims arising under or relating to this contract must be made available until such appeals, litigation, or claims are finally resolved.

(3) As used in this clause, records include books, documents, accounting procedures and practices, and other data, regardless of type and regardless of form. This clause does not require the Contractor to create or maintain any record that the Contractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(u) *Incorporation by reference.* The Contractor's representations and certifications, including those completed electronically via the System for Award Management (SAM), are incorporated by reference into the contract.

(End of clause)

Alternate I (DATE). As prescribed at 12.205(b)(1)(i), substitute the following paragraphs (a), (b), (i), (l), and (m) for paragraphs (a), (b), (i), (l), and (m) in the basic clause.

(a) The clause at Federal Acquisition Regulation (FAR) 52.202-1, Definitions, is incorporated by reference. As used in this clause—

Direct materials means those materials that enter directly into the end product, or that are used or consumed directly in connection with the furnishing of the end product or service.

Hourly rate means the rate(s) prescribed in the contract for payment for labor that meets the labor category qualifications of a labor category specified in the contract that are—

- (1) Performed by the contractor;
- (2) Performed by the subcontractors;

or

- (3) Transferred between divisions, subsidiaries, or affiliates of the contractor under a common control.

Materials means—

(1) Direct materials, including supplies transferred between divisions, subsidiaries, or affiliates of the contractor under a common control;

(2) Subcontracts for supplies and incidental services for which there is not a labor category specified in the contract;

(3) Other direct costs (e.g., incidental services for which there is not a labor category specified in the contract, travel, computer usage charges, etc.);

(4) The following subcontracts for services which are specifically excluded from the hourly rate: *[Insert any subcontracts for services to be excluded from the hourly rates prescribed in the schedule.];* and

(5) Indirect costs specifically provided for in this clause.

Subcontract means any contract, as defined in FAR 2.101, entered into with

a subcontractor to furnish supplies or services for performance of the prime contract or a subcontract including transfers between divisions, subsidiaries, or affiliates of a contractor or subcontractor. It includes, but is not limited to, purchase orders, and changes and modifications to purchase orders.

(b) *Inspection/Acceptance.*

(1) The Government has the right to inspect and test all materials furnished and services performed under this contract at all places and times before acceptance. The Government will perform inspections and tests in a manner that will not unduly delay the work.

(2) If the Government performs inspection or tests on the premises of the Contractor or a subcontractor, the Contractor must furnish and must require subcontractors to furnish all reasonable facilities and assistance for the safe and convenient performance of these duties.

(3) Unless otherwise specified in the contract, the Government will accept or reject services and materials at the place of delivery as promptly as practicable after delivery, and they will be presumed accepted 60 days after the date of delivery, unless accepted earlier.

(4) At any time during contract performance, but not later than 6 months (or such other time as may be specified in the contract) after acceptance of the services or materials last delivered under this contract, the Government may require the Contractor to replace or correct services or materials that at time of delivery failed to meet contract requirements. Except as otherwise specified in paragraph (b)(6) of this clause, the cost of replacement or correction will be determined under paragraph (i) of this clause, but the "hourly rate" for labor hours incurred in the replacement or correction will be reduced to exclude that portion of the rate attributable to profit. Unless otherwise specified below, the portion of the "hourly rate" attributable to profit will be 10 percent. The Contractor must not tender for acceptance materials and services required to be replaced or corrected without disclosing the former requirement for replacement or correction, and, when required, must disclose the corrective action taken. *[Insert portion of labor rate attributable to profit.]*

(5)(i) If the Contractor fails to proceed with reasonable promptness to perform required replacement or correction, and if the replacement or correction can be performed within the ceiling price (or the ceiling price as increased by the Government), the Government may—

(A) By contract or otherwise, perform the replacement or correction, charge to the Contractor any increased cost, or deduct such increased cost from any amounts paid or due under this contract; or

(B) Terminate this contract for cause.

(ii) Failure to agree to the amount of increased cost to be charged to the Contractor will be a dispute under the Disputes clause of the contract.

(6) Notwithstanding paragraphs (b)(4) and (5) of this clause, the Government may, at any time, require the Contractor to remedy by correction or replacement, without cost to the Government, any failure by the Contractor to comply with the requirements of this contract, if the failure is due to—

(i) Fraud, lack of good faith, or willful misconduct on the part of the Contractor's managerial personnel; or

(ii) The conduct of one or more of the Contractor's employees selected or retained by the Contractor after any of the Contractor's managerial personnel has reasonable grounds to believe that the employee is habitually careless or unqualified.

(7) This clause applies in the same manner and to the same extent to corrected or replacement materials or services as to materials and services originally delivered under this contract.

(8) The Contractor has no obligation or liability under this contract to correct or replace materials and services that at time of delivery do not meet contract requirements, except as provided in this clause or as may be otherwise specified in the contract.

(9) Unless otherwise specified in the contract, the Contractor's obligation to correct or replace Government-furnished property will be governed by the clause pertaining to Government property.

(i) *Payments.*

(1) *Work performed.* The Government will pay the Contractor as follows upon the submission of commercial invoices approved by the Contracting Officer:

(i) *Hourly rate.*

(A) The amounts will be computed by multiplying the appropriate hourly rates prescribed in the contract by the number of direct labor hours performed. Fractional parts of an hour will be payable on a prorated basis.

(B) The rates will be paid for all labor performed on the contract that meets the labor qualifications specified in the contract. Labor hours incurred to perform tasks for which labor qualifications were specified in the contract will not be paid to the extent the work is performed by individuals that do not meet the qualifications specified in the contract, unless

specifically authorized by the Contracting Officer.

(C) Invoices may be submitted once each month (or at more frequent intervals, if approved by the Contracting Officer) to the Contracting Officer or the authorized representative.

(D) When requested by the Contracting Officer or the authorized representative, the Contractor must substantiate invoices (including any subcontractor hours reimbursed at the hourly rate in the schedule) by evidence of actual payment, individual daily job timecards, records that verify the employees meet the qualifications for the labor categories specified in the contract, or other substantiation specified in the contract.

(E) Unless the Schedule prescribes otherwise, the hourly rates in the Schedule will not be varied by virtue of the Contractor having performed work on an overtime basis.

(1) If no overtime rates are provided in the Schedule and the Contracting Officer approves overtime work in advance, overtime rates will be negotiated.

(2) Failure to agree upon these overtime rates will be treated as a dispute under the Disputes clause of this contract.

(3) If the Schedule provides rates for overtime, the premium portion of those rates will be reimbursable only to the extent the overtime is approved by the Contracting Officer.

(ii) *Materials.*

(A) If the Contractor furnishes materials that meet the definition of a commercial product at FAR 2.101, the price to be paid for such materials will not exceed the Contractor's established catalog or market price, adjusted to reflect the—

- (1) Quantities being acquired; and
- (2) Any modifications necessary because of contract requirements.

(B) Except as provided for in paragraph (i)(1)(ii)(A) and (D)(2) of this clause, the Government will reimburse the Contractor the actual cost of materials (less any rebates, refunds, or discounts received by the contractor that are identifiable to the contract) provided the Contractor—

(1) Has made payments for materials in accordance with the terms and conditions of the agreement or invoice; or

(2) Makes these payments within 30 days of the submission of the Contractor's payment request to the Government and such payment is in accordance with the terms and conditions of the agreement or invoice.

(C) To the extent able, the Contractor must—

(1) Obtain materials at the most advantageous prices available with due regard to securing prompt delivery of satisfactory materials; and

(2) Give credit to the Government for cash and trade discounts, rebates, scrap, commissions, and other amounts that are identifiable to the contract.

(D) Unless listed below, other direct and indirect costs will not be reimbursed.

(1) *Other direct costs.* The Government will reimburse the Contractor on the basis of actual cost for the following, provided such costs comply with the requirements in paragraph (i)(1)(ii)(B) of this clause: *[Insert each element of other direct costs (e.g., travel, computer usage charges, etc. Insert "None" if no reimbursement for other direct costs will be provided. If this is an indefinite delivery contract, the Contracting Officer may insert "Each order must list separately the elements of other direct charge(s) for that order or, if no reimbursement for other direct costs will be provided, insert "None""]]*

(2) *Indirect costs (material handling, subcontract administration, etc.).* The Government will reimburse the Contractor for indirect costs on a pro-rata basis over the period of contract performance at the following fixed price: *[Insert a fixed amount for the indirect costs and payment schedule. Insert "\$0" if no fixed price reimbursement for indirect costs will be provided. (If this is an indefinite delivery contract, the Contracting Officer may insert "Each order must list separately the fixed amount for the indirect costs and payment schedule or, if no reimbursement for indirect costs, insert "None")."]]*

(2) *Total cost.* The total cost to the Government for the performance of this contract must not exceed the ceiling price set forth in the Schedule. The Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within such ceiling price. If at any time the Contractor has reason to believe that the hourly rate payments and material costs that will accrue in performing this contract in the next succeeding 30 days, if added to all other payments and costs previously accrued, will exceed 85 percent of the ceiling price in the Schedule, the Contractor must notify the Contracting Officer giving a revised estimate of the total price to the Government for performing this contract with supporting reasons and documentation. If at any time during the performance of this contract, the Contractor has reason to believe that the total price to the Government for

performing this contract will be substantially greater or less than the stated ceiling price, the Contractor must so notify the Contracting Officer, giving a revised estimate of the total price for performing this contract, with supporting reasons and documentation. If at any time during performance of this contract, the Government has reason to believe that the work to be required in performing this contract will be substantially greater or less than the stated ceiling price, the Contracting Officer will so advise the Contractor, giving the revised estimate of the total amount of effort to be required under the contract.

(3) *Ceiling price.* The Government will not be obligated to pay the Contractor any amount in excess of the ceiling price in the Schedule, and the Contractor will not be obligated to continue performance if to do so would exceed the ceiling price set forth in the Schedule, unless and until the Contracting Officer notifies the Contractor in writing that the ceiling price has been increased and specifies in the notice a revised ceiling that will constitute the ceiling price for performance under this contract. When and to the extent that the ceiling price set forth in the Schedule has been increased, any hours expended and material costs incurred by the Contractor in excess of the ceiling price before the increase will be allowable to the same extent as if the hours expended and material costs had been incurred after the increase in the ceiling price.

(4) *Access to records.* At any time before final payment under this contract, the Contracting Officer (or authorized representative) will have access to the following (access must be limited to the listing below unless otherwise agreed to by the Contractor and the Contracting Officer):

(i) Records that verify that the employees whose time has been included in any invoice meet the qualifications for the labor categories specified in the contract;

(ii) For labor hours (including any subcontractor hours reimbursed at the hourly rate in the schedule), when timecards are required as substantiation for payment—

(A) The original timecards (paper-based or electronic);

(B) The Contractor's timekeeping procedures;

(C) Contractor records that show the distribution of labor between jobs or contracts; and

(D) Employees whose time has been included in any invoice for the purpose of verifying that these employees have

worked the hours shown on the invoices.

(iii) For material and subcontract costs that are reimbursed on the basis of actual cost—

(A) Any invoices or subcontract agreements substantiating material costs; and

(B) Any documents supporting payment of those invoices.

(5) *Overpayments/Underpayments.*

Each payment previously made will be subject to reduction to the extent of amounts, on preceding invoices, that are found by the Contracting Officer not to have been properly payable and will also be subject to reduction for overpayments or to increase for underpayments. The Contractor must promptly pay any such reduction within 30 days unless the parties agree otherwise. The Government will pay any such increases within 30 days, unless the parties agree otherwise. The Contractor's payment will be made by check. If the Contractor becomes aware of a duplicate invoice payment or that the Government has otherwise overpaid on an invoice payment, the Contractor must—

(i) Remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment including the—

(A) Circumstances of the overpayment (e.g., duplicate payment, erroneous payment, liquidation errors, date(s) of overpayment);

(B) Affected contract number and delivery order number, if applicable;

(C) Affected line item or subtitle item, if applicable; and

(D) Contractor point of contact.

(ii) Provide a copy of the remittance and supporting documentation to the Contracting Officer.

(6) *Interest.*

(i) All amounts that become payable by the Contractor to the Government under this contract will bear simple interest from the date due until paid unless paid within 30 days of becoming due. The interest rate will be the interest rate established by the Secretary of the Treasury, as provided in 41 U.S.C. 7109, which is applicable to the period in which the amount becomes due, and then at the rate applicable for each six-month period as established by the Secretary until the amount is paid.

(ii) The Government may issue a demand for payment to the Contractor upon finding a debt is due under the contract.

(iii) The Contracting Officer will issue a final decision if—

(A) The Contracting Officer and the Contractor are unable to reach

agreement on the existence or amount of a debt in a timely manner;

(B) The Contractor fails to liquidate a debt previously demanded by the Contracting Officer within the timeline specified in the demand for payment unless the amounts were not repaid because the Contractor has requested an installment payment agreement; or

(C) The Contractor requests a deferment of collection on a debt previously demanded by the Contracting Officer.

(iv) If a demand for payment was previously issued for the debt, the demand for payment included in the final decision must identify the same due date as the original demand for payment.

(v) Amounts will be due at the earliest of the following dates:

(A) The date fixed under this contract.

(B) The date of the first written demand for payment, including any demand for payment resulting from a default termination.

(vi) The interest charge will be computed for the actual number of calendar days involved beginning on the due date and ending on—

(A) The date on which the designated office receives payment from the Contractor;

(B) The date of issuance of a Government check to the Contractor from which an amount otherwise payable has been withheld as a credit against the contract debt; or

(C) The date on which an amount withheld and applied to the contract debt would otherwise have become payable to the Contractor.

(vii) The interest charge made under this clause may be reduced under the procedures prescribed in FAR part 32 in effect on the date of this contract.

(viii) Upon receipt and approval of the invoice designated by the Contractor as the "completion invoice" and supporting documentation, and upon compliance by the Contractor with all terms of this contract, any outstanding balances will be paid within 30 days unless the parties agree otherwise. The completion invoice, and supporting documentation, must be submitted by the Contractor as promptly as practicable following completion of the work under this contract, but in no event later than 1 year (or such longer period as the Contracting Officer may approve in writing) from the date of completion.

(7) *Release of claims.* The Contractor, and each assignee under an assignment entered into under this contract and in effect at the time of final payment under this contract, must execute and deliver, at the time of and as a condition

precedent to final payment under this contract, a release discharging the Government, its officers, agents, and employees of and from all liabilities, obligations, and claims arising out of or under this contract, subject only to the following exceptions:

(i) Specified claims in stated amounts, or in estimated amounts if the amounts are not susceptible to exact statement by the Contractor.

(ii) Claims, together with reasonable incidental expenses, based upon the liabilities of the Contractor to third parties arising out of performing this contract, that are not known to the Contractor on the date of the execution of the release, and of which the Contractor gives notice in writing to the Contracting Officer not more than 6 years after the date of the release or the date of any notice to the Contractor that the Government is prepared to make final payment, whichever is earlier.

(iii) Claims for reimbursement of costs (other than expenses of the Contractor by reason of its indemnification of the Government against patent liability), including reasonable incidental expenses, incurred by the Contractor under the terms of this contract relating to patents.

(8) *Prompt payment.* The Government will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and prompt payment regulations at 5 CFR part 1315.

(9) *Discount.* In connection with any discount offered for early payment, time will be computed from the date of the invoice. For the purpose of computing the discount earned, payment will be considered to have been made on the date that appears on the payment check or the specified payment date if an electronic funds transfer payment is made.

(l) *Termination for the Government's convenience.* The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor must immediately stop all work under this contract and must immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor will be paid an amount for direct labor hours (as defined in the Schedule of the contract) determined by multiplying the number of direct labor hours expended before the effective date of termination by the hourly rate(s) in the contract, less any hourly rate payments already made to the Contractor plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system that

have resulted from the termination. The Contractor will not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor will not be paid for any work performed or costs incurred that reasonably could have been avoided.

(m) *Termination for cause.* The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon written request, with adequate assurances of future performance. The Government will send a cure notice to the Contractor, unless the reason for the termination is late delivery. Subject to the terms of this contract, the Contractor will be paid an amount computed under paragraph (i), Payments, of this clause, but the "hourly rate" for labor hours expended in furnishing work not delivered to or accepted by the Government will be reduced to exclude that portion of the rate attributable to profit. Unless otherwise specified in paragraph (b)(4) of this clause, the portion of the "hourly rate" attributable to profit will be 10 percent. In the event of termination for cause, the Contractor will be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination will be deemed a termination for convenience.

52.212-5 [Removed and Reserved]

■ 12. Remove and reserve section 52.212-5.

52.213-1 through 52.213-3 [Removed and Reserved]

■ 13. Remove and reserve sections 52.213-1 through 52.213-3.

■ 14. Revise section 52.213-4 to read as follows:

52.213-4 Terms and Conditions—Simplified Acquisitions (Noncommercial).

As prescribed in 13.204(b), insert the following clause:

Terms and Conditions—Simplified Acquisitions (Noncommercial) (DATE)

(a) *Inspection/Acceptance.* The Contractor must only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at

no increase in contract price. If repair/replacement or reperformance will not correct the defects or is not possible, the Government may seek an equitable price reduction or adequate consideration for acceptance of nonconforming supplies or services. The Government must exercise its post acceptance rights—

(1) Within a reasonable period of time after the defect was discovered or should have been discovered; and

(2) Before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

(b) *Excusable delays.* The Contractor will be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence. Examples of occurrences include acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. When an excusable delay occurs, the Contractor must—

(1) Notify the Contracting Officer in writing, as soon as possible;

(2) Remedy the delay as quickly as possible; and

(3) Notify the Contracting Officer in writing, when the occurrence is over.

(c) *Termination for the Government's convenience.* The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor must immediately stop all work and must immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor will be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor will not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor will not be paid for any work performed or costs incurred which reasonably could have been avoided.

(d) *Termination for cause.* The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. The Government will send a cure notice to the Contractor, unless the reason for the termination is late delivery. In the event of termination for cause, the Government will not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor will be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination will be deemed a termination for convenience.

(e) *Warranty.* The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract.

(End of clause)

■ 15. Revise sections 52.215-1 and 52.215-2 to read as follows:

52.215-1 Instructions to Offerors—Competitive Acquisition.

As prescribed in 15.109(a)(1), insert the following provision:

Instructions to Offerors—Competitive Acquisition (DATE)

(a) *Definitions.* As used in this provision—

In writing, writing, or written means any worded or numbered expression that can be read, reproduced, and later communicated, and includes electronically transmitted and stored information.

Proposal modification is a change made to a proposal before the request for proposal closing date and time, or made in response to an amendment, or made to correct a mistake at any time before award.

Proposal revision is a change to material elements of a proposal made after the request for proposal closing date, at the request of or as allowed by a Contracting Officer, as the result of negotiations.

Time, if stated as a number of days, is calculated using calendar days, unless otherwise specified, and will include Saturdays, Sundays, and legal holidays. However, if the last day falls on a Saturday, Sunday, or legal holiday, then the period must include the next working day.

(b) *Amendments to requests for proposals.* If this request for proposal (RFP) is amended, all terms and conditions that are not amended remain unchanged. Offerors must acknowledge receipt of any amendment to this RFP by the date and time specified in the amendment(s).

(c) *Submission, modification, revision, and withdrawal of proposals.*

(1)(i) Proposals and proposal modifications must be—

(A) Submitted using the method and the format specified in the RFP;

(B) Addressed to the office specified in the RFP; and

(C) Showing the time and date specified for receipt, the RFP number, and the name and address of the Offeror.

(ii) Offerors using commercial carriers should ensure that the proposal is marked on the outermost wrapper with the information in paragraphs (c)(1)(i)(B) and (C) of this provision.

(2) The first page of the proposal must show—

(i) The RFP number;

(ii) The name, address, and telephone number of the Offeror (and electronic address if available);

(iii) A statement specifying the extent of agreement with all terms, conditions, and provisions included in the RFP and agreement to furnish any or all items upon which prices are offered at the price set opposite each item;

(iv) Names, titles, and telephone number (and electronic addresses if available) of

persons authorized to negotiate on the Offeror's behalf with the Government in connection with this RFP; and

(v) Name, title, and signature of person authorized to sign the proposal. Proposals signed by an agent must be accompanied by evidence of that agent's authority, unless that evidence has been previously furnished to the issuing office.

(3)(i) Offerors are responsible for submitting proposals, and any modifications or revisions, so as to reach the Government office designated in the RFP by the time specified in the RFP. If no time is specified in the RFP, the time for receipt is 4:30 p.m., local time, for the designated Government office on the date that proposal or revision is due.

(ii) Any proposal, modification, or revision, received at the Government office designated in the RFP after the exact time specified for receipt of proposals is "late" and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late proposal is in the Government's best interest and would not unduly delay the acquisition.

(iii) Acceptable evidence to establish the time of receipt at the Government installation includes the time/date stamp of that installation on the proposal wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel.

(iv) If an emergency or unanticipated event interrupts normal Government processes so that proposals cannot be received at the office designated for receipt of proposals by the exact time specified in the RFP, and urgent Government requirements preclude amendment of the RFP, the time specified for receipt of proposals will be deemed to be extended to the same time of day specified in the RFP on the first work day on which normal Government processes resume.

(v) Proposals may be withdrawn by written notice received at any time before award. Oral proposals in response to oral RFPs may be withdrawn orally. Proposals may be withdrawn in person by an Offeror or an authorized representative, if the identity of the person requesting withdrawal is established and the person signs a receipt for the proposal before award.

(4) Unless otherwise specified in the RFP, the Offeror may propose to provide any item or combination of items.

(5) Offerors must submit proposals in response to this RFP in English, unless otherwise permitted by the RFP, and in U.S. dollars, unless the provision at FAR 52.225-17, Evaluation of Foreign Currency Offers, is included in the RFP.

(6) Offerors may submit modifications to their proposals at any time before the RFP closing date and time, and may submit modifications in response to an amendment, or to correct a mistake at any time before award.

(7) Offerors may submit revised proposals only if requested or allowed by the Contracting Officer.

(8) Proposals may be withdrawn at any time before award. Withdrawals are effective upon receipt of notice by the Contracting Officer.

(d) *Expiration date.* Proposals in response to this RFP will be valid for the number of days specified on the RFP cover sheet (unless a different period is proposed by the Offeror).

(e) *Restriction on disclosure and use of data.* Offerors that include in their proposals data that they do not want disclosed to the public for any purpose, or used by the Government except for evaluation purposes, must—

(1) Mark the title page with the following legend: This proposal includes data that must not be disclosed outside the Government and must not be duplicated, used, or disclosed—in whole or in part—for any purpose other than to evaluate this proposal. If, however, a contract is awarded to this Offeror as a result of, or in connection with, the submission of this data, the Government must have the right to duplicate, use, or disclose the data to the extent provided in the resulting contract. This restriction does not limit the Government's right to use information contained in this data if it is obtained from another source without restriction. The data subject to this restriction are contained in sheets [insert numbers or other identification of sheets]; and

(2) Mark each sheet of data it wishes to restrict with the following legend: Use or disclosure of data contained on this sheet is subject to the restriction on the title page of this proposal.

(f) *Contract award.*

(1) The Government intends to award a contract or contracts resulting from this RFP to the responsible Offeror(s) whose proposal(s) represents the best value after evaluation in accordance with the factors and subfactors in the RFP.

(2) The Government may reject any or all proposals if such action is in the Government's interest.

(3) The Government may waive informalities and minor irregularities in proposals received.

(4) The Government intends to evaluate proposals and award a contract without negotiations with Offerors (except clarifications as described in FAR 15.202(b)). Therefore, the Offeror's initial proposal should contain the Offeror's best terms from a cost or price and technical standpoint. The Government reserves the right to conduct negotiations if the Contracting Officer later determines them to be necessary. If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly evaluated proposals.

(5) The Government reserves the right to make an award on any item for a quantity less than the quantity offered, at the unit cost or prices offered, unless the Offeror specifies otherwise in the proposal.

(6) The Government reserves the right to make multiple awards if, after considering the additional administrative costs, it is in the Government's best interest to do so.

(7) The Government may determine that a proposal is unacceptable if the prices

proposed are materially unbalanced between line items or subline items. Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more line items is significantly overstated or understated as indicated by the application of cost or price analysis techniques. A proposal may be rejected if the Contracting Officer determines that the lack of balance poses an unacceptable risk to the Government.

(8) If a cost realism analysis is performed, cost realism may be considered by the source selection authority in evaluating performance or schedule risk.

(9) A written award or acceptance of proposal mailed or otherwise furnished to the successful Offeror within the time specified in the proposal will result in a binding contract without further action by either party.

(10) If a post-award debriefing is given to requesting Offerors, the Government must disclose the following information, if applicable:

(i) The agency's evaluation of the significant weaknesses or deficiencies in the debriefed Offeror's proposal.

(ii) The overall evaluated cost or price and technical rating of the successful and the debriefed Offeror and past performance information on the debriefed Offeror.

(iii) The overall ranking of all Offerors, when any ranking was developed by the agency during source selection.

(iv) A summary of the rationale for award.

(v) For acquisitions of commercial products, the make and model of the product to be delivered by the successful Offeror.

(vi) Reasonable responses to relevant questions posed by the debriefed Offeror as to whether source selection procedures set forth in the RFP, applicable regulations, and other applicable authorities were followed by the agency.

(End of provision)

Alternate I (DATE). As prescribed in 15.109(a)(2), replace paragraph (f)(4) of the basic provision with the following paragraph (f)(4):

(f)(4) The Government intends to evaluate proposals and award a contract after conducting negotiations with Offerors whose proposals have been determined to be within the competitive range. If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly evaluated proposals. Therefore, the Offeror's initial proposal should contain the Offeror's best terms from a price and technical standpoint.

Alternate II (DATE). As prescribed in 15.109(a)(3), add the following paragraph (c)(9) to the basic provision:

(c)(9) Offerors may submit proposals that depart from stated requirements. Such proposals must clearly identify why acceptance of the proposal would be advantageous to the Government. Any deviations from the terms and conditions of the RFP, as well as the comparative advantage to the Government, must be clearly identified and explicitly defined. The Government reserves the right to amend the RFP to allow all Offerors an opportunity to submit revised proposals based on the revised requirements.

52.215-2 Audit and Records—Negotiation.

As prescribed in 15.109(b)(1), insert the following clause:

Audit and Records—Negotiation (DATE)

(a) *Definition.* As used in this clause, *records* includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.

(b) *Examination of costs.* If this is a cost-reimbursement, incentive, time-and-materials, labor-hour, or price redeterminable contract, or any combination of these, the Contractor must maintain and the Contracting Officer, or an authorized representative of the Contracting Officer, must have the right to examine and audit all records and other evidence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of this contract. This right of examination must include inspection at all reasonable times of the Contractor's plants, or parts of them, engaged in performing the contract.

(c) *Certified cost or pricing data.* If the Contractor is required to submit certified cost or pricing data in connection with any pricing action relating to this contract, the Contracting Officer, or an authorized representative of the Contracting Officer, in order to evaluate the accuracy, completeness, and currency of the certified cost or pricing data, must have the right to examine and audit all of the Contractor's records, including computations and projections, related to—

- (1) The proposal for the contract, subcontract, or modification;
- (2) Communications on the proposal(s), including those related to negotiating;
- (3) Pricing of the contract, subcontract, or modification; or
- (4) Performance of the contract, subcontract or modification.

(d) *Comptroller General.* (1) The Comptroller General of the United States, or an authorized representative, must have access to and the right to examine any of the

Contractor's directly pertinent records involving transactions related to this contract or a subcontract hereunder and to interview any current employee regarding such transactions.

(2) This paragraph may not be construed to require the Contractor or subcontractor to create or maintain any record that the Contractor or subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(e) *Reports.* If the Contractor is required to furnish cost, funding, or performance reports, the Contracting Officer or an authorized representative of the Contracting Officer must have the right to examine and audit the supporting records and materials, for the purpose of evaluating—

(1) The effectiveness of the Contractor's policies and procedures to produce data compatible with the objectives of these reports; and

(2) The data reported.

(f) *Availability.* The Contractor must make available at its office at all reasonable times the records, materials, and other evidence described in paragraphs (a), (b), (c), (d), and (e) of this clause, for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified for contractor record retention in Part 4 of the Federal Acquisition Regulation (FAR), or for any longer period required by statute or by other clauses of this contract. In addition—

(1) If this contract is completely or partially terminated, the Contractor must make available the records relating to the work terminated until 3 years after any resulting final termination settlement; and

(2) The Contractor must make available records relating to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to this contract until such appeals, litigation, or claims are finally resolved.

(g) *Subcontracts.* (1) The Contractor must insert the substance of this clause, including this paragraph (g), in all subcontracts, other than those for commercial products or commercial services, that—

(i) Exceed the simplified acquisition threshold, as defined in FAR part 2 on the date of subcontract award; and

(ii) Are cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable type or any combination of these—

(A) For which certified cost or pricing data are required; or

(B) That require the subcontractor to furnish reports as discussed in paragraph (e) of this clause.

(2) The clause may be altered only as necessary to identify properly the contracting parties and the Contracting Officer under the Government contract.

(End of clause)

Alternate I [Reserved].

Alternate II (DATE). As prescribed in 15.109(b)(3), add the following paragraph (h) to the clause:

(h) The provisions of the OMB Uniform Guidance at 2 CFR part 200, subpart F apply to this contract.

Alternate III (DATE). As prescribed in 15.109(b)(4), delete paragraph (d) of the clause and redesignate the remaining paragraphs accordingly, then replace the redesignated paragraph (e) of the basic clause with the following paragraph (e):

(e) *Availability.* The Contractor must make available at its office at all reasonable times the records, materials, and other evidence described in paragraphs (a), (b), (c), and (d) of this clause, for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified for contractor record retention in Part 4 of the Federal Acquisition Regulation, or for any longer period required by statute or by other clauses of this contract. In addition—

(1) If this contract is completely or partially terminated, the Contractor must make available the records relating to the work terminated until 3 years after any resulting final termination settlement; and

(2) The Contractor must make available records relating to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to this contract until such appeals, litigation, or claims are finally resolved.

52.215-3 and 52.215-5 [Removed and Reserved]

■ 16. Remove and reserve sections 52.215-3 and 52.215-5.

■ 17. Revise section 52.215-6 to read as follows:

52.215-6 Place of Performance.

As prescribed in 15.109(f), insert the following provision:

Place of Performance (DATE)

(a) The Offeror, in the performance of any contract resulting from this request for proposals, ☐ intends, ☐ does not intend [check applicable block] to use one or more plants or facilities located at a different address from the address of the Offeror as indicated in this proposal.

(b) The Offeror must provide the following information in the space below if it checks "intends" in paragraph (a) of this provision:

Place of performance (street address, city, state, county, zip code)	Name and address of owner and operator of the plant or facility if other than Offeror or respondent
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(End of provision)

■ 18. Revise sections 52.215–8 through 52.215–23 to read as follows:

52.215–8 Order of Precedence—Uniform Contract Format.

As prescribed in 15.109(h), insert the following clause:

Order of Precedence—Uniform Contract Format (DATE)

Any inconsistency in this request for proposal or contract must be resolved by giving precedence in the following order:

- (a) The Schedule (excluding the specifications).
- (b) Representations and other instructions.
- (c) Contract clauses.
- (d) Other documents, exhibits, and attachments.
- (e) The specifications.

(End of clause)

52.215–9 Changes or Additions to Make-or-Buy Program.

As prescribed in 15.109(i)(1), insert the following clause:

Changes or Additions to Make-or-Buy Program (DATE)

(a) The Contractor must perform in accordance with the make-or-buy program incorporated in this contract. If the Contractor proposes to change the program, the Contractor must, reasonably in advance of the proposed change—

- (1) Notify the Contracting Officer in writing; and
 - (2) Submit a justification in sufficient detail to permit evaluation.
- (3) Changes in the place of performance of any “make” items in the program are subject to this requirement.

(b) For items deferred at the time of negotiation of this contract for later addition to the program, the Contractor must, at the earliest possible time—

- (1) Notify the Contracting Officer of each proposed addition; and
 - (2) Provide a justification in sufficient detail to permit evaluation.
- (c) Modification of the make-or-buy program to incorporate proposed changes or additions must be effective upon the Contractor’s receipt of the Contracting Officer’s written approval.

(End of clause)

Alternate I (DATE). As prescribed in 15.109(i)(2)(i) add the following paragraph (d) to the clause:

(d) If the Contractor desires to reverse the categorization of “make” or “buy” for any item or items designated in the contract as subject to this paragraph, it must—

- (1) Support its proposal with certified cost or pricing data in accordance with FAR 15.408–2, Table 15–1, when required by FAR 15.403–3, and data other than certified cost or pricing data, to permit evaluation; and
- (2) After approval is granted, promptly negotiate with the Contracting

Officer an equitable reduction in the contract price in accordance with paragraph (k) of the Incentive Price Revision—Firm Target clause or paragraph (m) of the Incentive Price Revision—Successive Targets clause of this contract.

Alternate II (DATE). As prescribed in 15.109(i)(2)(ii), add the following paragraph (d) to the clause:

(d) If the Contractor desires to reverse the categorization of “make” or “buy” for any item or items designated in the contract as subject to this paragraph, it must—

- (1) Support its proposal with certified cost or pricing data in accordance with FAR 15.408–2, Table 15–1, when required by FAR 15.403–3, and data other than certified cost or pricing data, to permit evaluation;
- (2) Support its proposal with cost or pricing data to permit evaluation; and
- (3) After approval is granted, promptly negotiate with the Contracting Officer an equitable reduction in the contract’s total estimated cost and fee in accordance with paragraph (e) of the Incentive Fee clause of this contract.

52.215–10 Price Reduction for Defective Certified Cost or Pricing Data.

As prescribed in 15.109(j), insert the following clause:

Price Reduction for Defective Certified Cost or Pricing Data (DATE)

(a) If any price, including profit or fee, negotiated in connection with this contract, or any cost reimbursable under this contract, was increased by any significant amount because—

- (1) The Contractor or a subcontractor furnished certified cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data; or
- (2) A subcontractor or prospective subcontractor furnished the Contractor certified cost or pricing data that were not complete, accurate, and current as certified in the Contractor’s Certificate of Current Cost or Pricing Data; or
- (3) Any of these parties furnished data of any description that were not accurate, the price or cost must be reduced accordingly and the contract must be modified to reflect the reduction.

(b) Any reduction in the contract price under paragraph (a) of this clause due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract must be limited to the amount, plus applicable overhead and profit markup, by which the actual subcontract, or the actual cost to the Contractor if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor; provided, that the actual subcontract price was not itself affected by defective certified cost or pricing data.

(c)(1) If the Contracting Officer determines under paragraph (a) of this clause that a price or cost reduction should be made, the Contractor agrees not to raise the following matters as a defense:

(i) The Contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the contract would not have been modified even if accurate, complete, and current certified cost or pricing data had been submitted.

(ii) The Contracting Officer should have known that the certified cost or pricing data in issue were defective even though the Contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the Contracting Officer.

(iii) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under the contract.

(iv) The Contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data.

(2)(i) Except as prohibited by paragraph (c)(2)(ii) of this clause, an offset in an amount determined appropriate by the Contracting Officer based upon the facts must be allowed against the amount of a contract price reduction if—

(A) The Contractor certifies to the Contracting Officer that, to the best of the Contractor’s knowledge and belief, the Contractor is entitled to the offset in the amount requested; and

(B) The Contractor proves that the certified cost or pricing data were available before the “as of” date specified on its Certificate of Current Cost or Pricing Data, and that the data were not submitted before such date.

(ii) An offset must not be allowed if—

(A) The understated data were known by the Contractor to be understated before the “as of” date specified on its Certificate of Current Cost or Pricing Data; or

(B) The Government proves that the facts demonstrate that the contract price would not have increased in the amount to be offset even if the available data had been submitted before the “as of” date specified on its Certificate of Current Cost or Pricing Data.

(d) If any reduction in the contract price under this clause reduces the price of items for which payment was made prior to the date of the modification reflecting the price reduction, the Contractor must be liable to and must pay the United States at the time such overpayment is repaid—

(1) Interest compounded daily, as required by 26 U.S.C. 6622, on the amount of such overpayment to be computed from the date(s) of overpayment to the Contractor to the date the Government is repaid by the Contractor at the applicable underpayment rate effective for each quarter prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(a)(2); and

(2) A penalty equal to the amount of the overpayment, if the Contractor or subcontractor knowingly submitted certified cost or pricing data that were incomplete, inaccurate, or noncurrent.

(End of clause)

52.215–11 Price Reduction for Defective Certified Cost or Pricing Data—Modifications.

As prescribed in 15.109(k), insert the following clause:

Price Reduction for Defective Certified Cost or Pricing Data—Modifications (DATE)

(a) This clause must become operative only for any modification to this contract involving a pricing adjustment expected to exceed the threshold for submission of certified cost or pricing data in Federal Acquisition Regulation (FAR) 15.403–3(a) on the date of execution of the modification, except that this clause does not apply to any modification if an exception under FAR 15.403–2 applies.

(b) If any price, including profit or fee, negotiated in connection with any modification under this clause, or any cost reimbursable under this contract, was increased by any significant amount because the Contractor or a subcontractor furnished certified cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data; a subcontractor or prospective subcontractor furnished the Contractor certified cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data; or any of these parties furnished data of any description that were not accurate, the price or cost must be reduced accordingly and the contract must be modified to reflect the reduction. This right to a price reduction is limited to that resulting from defects in data relating to modifications for which this clause becomes operative under paragraph (a) of this clause.

(c) Any reduction in the contract price under paragraph (b) of this clause due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract must be limited to the amount, plus applicable overhead and profit markup, by which the actual subcontract, or the actual cost to the Contractor if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor; provided, that the actual subcontract price was not itself affected by defective certified cost or pricing data.

(d)(1) If the Contracting Officer determines under paragraph (b) of this clause that a price or cost reduction should be made, the Contractor agrees not to raise the following matters as a defense:

(i) The Contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the contract would not have been modified even if accurate, complete, and current certified cost or pricing data had been submitted.

(ii) The Contracting Officer should have known that the certified cost or pricing data in issue were defective even though the Contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the Contracting Officer.

(iii) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under the contract.

(iv) The Contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data.

(2)(i) Except as prohibited by paragraph (d)(2)(ii) of this clause, an offset in an amount determined appropriate by the Contracting Officer based upon the facts must be allowed against the amount of a contract price reduction if—

(A) The Contractor certifies to the Contracting Officer that, to the best of the Contractor's knowledge and belief, the Contractor is entitled to the offset in the amount requested; and

(B) The Contractor proves that the certified cost or pricing data were available before the "as of" date specified on its Certificate of Current Cost or Pricing Data, and that the data were not submitted before such date.

(ii) An offset must not be allowed if—

(A) The understated data were known by the Contractor to be understated before the "as of" date specified on its Certificate of Current Cost or Pricing Data; or

(B) The Government proves that the facts demonstrate that the contract price would not have increased in the amount to be offset even if the available data had been submitted before the "as of" date specified on its Certificate of Current Cost or Pricing Data.

(e) If any reduction in the contract price under this clause reduces the price of items for which payment was made prior to the date of the modification reflecting the price reduction, the Contractor must be liable to and must pay the United States at the time such overpayment is repaid—

(1) Interest compounded daily, as required by 26 U.S.C. 6622, on the amount of such overpayment to be computed from the date(s) of overpayment to the Contractor to the date the Government is repaid by the Contractor at the applicable underpayment rate effective for each quarter prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(a)(2); and

(2) A penalty equal to the amount of the overpayment, if the Contractor or subcontractor knowingly submitted certified cost or pricing data that were incomplete, inaccurate, or noncurrent.

(End of clause)

52.215–12 Subcontractor Certified Cost or Pricing Data.

As prescribed in 15.109(l)(1), insert the following clause:

Subcontractor Certified Cost or Pricing Data (DATE)

(a) *Submission of data.* Before awarding any subcontract expected to exceed the threshold for submission of certified cost or pricing data in Federal Acquisition Regulation (FAR) 15.403–3(a), on the date of agreement on price or the date of award, whichever is later; or before pricing any subcontract modification involving a pricing adjustment expected to exceed the threshold for submission of certified cost or pricing data in FAR 15.403–3(a), the Contractor must

require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), in accordance with FAR 15.408–2, Table 15–1 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price), unless an exception under FAR 15.403–2 applies. If the threshold for submission of certified cost or pricing data specified in FAR 15.403–3(a) is adjusted for inflation as set forth in FAR part 1, then the changed threshold applies throughout the remaining term of the contract, unless there is a subsequent threshold adjustment.

(b) *Certification.* The Contractor must require the subcontractor to certify in substantially the form prescribed in FAR 15.403–4 that, to the best of its knowledge and belief, the data submitted under paragraph (a) of this clause were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.

(c) *Subcontracts.* In all subcontracts, other than those for commercial products or commercial services, that, when entered into, exceed the threshold for submission of certified cost or pricing data at FAR 15.403–3(a), the Contractor must insert either—

(1) The substance of this clause, including this paragraph (c), if paragraph (a) of this clause requires submission of certified cost or pricing data for the subcontract; or

(2) The substance of the clause at FAR 52.215–13, *Subcontractor Certified Cost or Pricing Data—Modifications.*

(End of clause)

Alternate I (DATE). As prescribed in 15.109(l)(2), replace paragraph (a) of the basic clause with the following paragraph (a):

(a) *Submission of data.* Unless an exception under FAR 15.403–2 applies, the Contractor must require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), in accordance with FAR 15.408–2, Table 15–1 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price) before awarding any subcontract expected to exceed \$2.5 million under any prime contract awarded before July 1, 2018.

52.215–13 Subcontractor Certified Cost or Pricing Data—Modifications.

As prescribed in 15.109(m)(1), insert the following clause:

Subcontractor Certified Cost or Pricing Data—Modifications (DATE)

(a) *General.* The requirements of paragraphs (b) and (c) of this clause must—

(1) Become operative only for any modification to this contract involving a pricing adjustment expected to exceed the threshold for submission of certified cost or pricing data in Federal Acquisition Regulation (FAR) 15.403–3(a) on the date of execution of the modification; and

(2) Be limited to such modifications.

(b) *Submission of data.* Before awarding any subcontract expected to exceed the threshold for submission of certified cost or pricing data in FAR 15.403–3(a), on the date of agreement on price or the date of award, whichever is later; or before pricing any subcontract modification involving a pricing adjustment expected to exceed the threshold for submission of certified cost or pricing data in FAR 15.403–3(a), the Contractor must require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), in accordance with FAR 15.408–2, Table 15–1 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price), unless an exception under FAR 15.403–2 applies. If the threshold for submission of certified cost or pricing data specified in FAR 15.403–3(a) is adjusted for inflation as set forth in FAR part 1, then the changed threshold applies throughout the remaining term of the contract, unless there is a subsequent threshold adjustment.

(c) *Certification.* The Contractor must require the subcontractor to certify in substantially the form prescribed in FAR 15.403–4 that, to the best of its knowledge and belief, the data submitted under paragraph (b) of this clause were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.

(d) *Subcontracts.* The Contractor must insert the substance of this clause, including this paragraph (d), in all subcontracts, other than those for commercial products or commercial services, that exceed the threshold for submission of certified cost or pricing data in FAR 15.403–3(a) on the date of agreement on price or the date of award, whichever is later.

(End of clause)

Alternate I (DATE). As prescribed in 15.109(m)(2), replace paragraphs (a), (b), and (d) of the basic clause with the following for paragraphs (a), (b), and (d):

(a) *General.* The requirements of paragraphs (b) and (c) of this clause must—

(1) Become operative only for any modification to this contract involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed the threshold for submission of certified cost or pricing data at FAR 15.403–3(a); and

(2) Be limited to such modifications.

(b) *Submission of data.* Unless an exception under FAR 15.403–2 applies, the Contractor must require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), in accordance with FAR 15.408–2, Table 15–1 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price) before modifying a subcontract under a prime contract awarded before July 1, 2018 if the modification involves a pricing adjustment expected to exceed \$2.5 million.

(d) *Subcontracts.* The Contractor must insert the substance of this clause, including this paragraph (d), in all subcontracts, other than those for commercial products or commercial services, that exceed \$2.5 million.

52.215–14 Integrity of Unit Prices.

As prescribed in 15.109(n)(1), insert the following clause:

Integrity of Unit Prices (DATE)

(a) *Cost distribution.* Any proposal submitted for the negotiation of prices for items of supplies must distribute costs within contracts on a basis that ensures that unit prices are in proportion to the items' base cost (e.g., manufacturing or acquisition costs). Any method of distributing costs to line items that distorts unit prices must not be used. For example, distributing costs equally among line items is not acceptable except when there is little or no variation in base cost. Nothing in this paragraph requires submission of certified cost or pricing data not otherwise required by law or regulation.

(b) *Identification of certain supplies.* When requested by the Contracting Officer, the Offeror/Contractor must also identify those supplies that it will not manufacture or to which it will not contribute significant value.

(c) *Subcontracts.* The Contractor must include the substance of this clause, less paragraph (b), in all subcontracts except those—

(1) Valued at or below the simplified acquisition threshold, as defined in Federal Acquisition Regulation (FAR) 2.101 on the date of subcontract award;

(2) For construction or architect-engineer services under FAR part 36;

(3) For utility services under FAR part 41;

(4) For services where supplies are not required;

(5) For commercial products and commercial services; or

(6) For petroleum products.

(End of clause)

Alternate I (DATE). As prescribed in 15.109(n)(2), replace paragraph (b) of

the basic clause with the following paragraph (b):

(b) The Offeror/Contractor must also identify those supplies that it will not manufacture or to which it will not contribute significant value.

52.215–15 Pension Adjustments and Asset Reversions.

As prescribed in 15.109(o), insert the following clause:

Pension Adjustments and Asset Reversions (DATE)

(a) *Notification of termination.* The Contractor must promptly notify the Contracting Officer in writing when it determines that it will terminate a defined-benefit pension plan or otherwise recapture such pension fund assets.

(b) *Adjustment amount.* For segment closings, pension plan terminations, or curtailment of benefits, the amount of the adjustment must be—

(1) For contracts and subcontracts that are subject to full coverage under the Cost Accounting Standards (CAS) Board rules and regulations (48 CFR Chapter 99), the amount measured, assigned, and allocated in accordance with 48 CFR 9904.413–50(c)(12); and

(2) For contracts and subcontracts that are not subject to full coverage under the CAS, the amount measured, assigned, and allocated in accordance with 48 CFR 9904.413–50(c)(12), except the numerator of the fraction at 48 CFR 9904.413–50(c)(12)(vi) must be the sum of the pension plan costs allocated to all non-CAS covered contracts and subcontracts that are subject to Federal Acquisition Regulation (FAR) subpart 31.2 or for which certified cost or pricing data were submitted.

(c) *Equitable share.* For all other situations where assets revert to the Contractor, or such assets are constructively received by it for any reason, the Contractor must, at the Government's option, make a refund or give a credit to the Government for its equitable share of the gross amount withdrawn. The Government's equitable share must reflect the Government's participation in pension costs through those contracts for which certified cost or pricing data were submitted or that are subject to FAR subpart 31.2.

(d) *Subcontracts.* The Contractor must include the substance of this clause in all subcontracts, other than those for commercial products or commercial services, for which it is anticipated that certified cost or pricing data will be required or for which any preaward or postaward cost determinations will be subject to FAR part 31.

(End of clause)

52.215–16 Facilities Capital Cost of Money.

As prescribed in 15.109(p), insert the following provision:

Facilities Capital Cost of Money (DATE)

(a) Facilities capital cost of money will be an allowable cost under the contemplated contract, if the criteria for allowability in

FAR 31.205–10(b) are met. One of the allowability criteria requires the Offeror to propose facilities capital cost of money in its proposal.

(b) If the Offeror does not propose this cost, it will be an unallowable cost under a contract awarded to the Offeror as a result of this solicitation.

(End of provision)

52.215–17 Waiver of Facilities Capital Cost of Money.

As prescribed in 15.109(q), insert the following clause:

Waiver of Facilities Capital Cost of Money (DATE)

The Contractor did not include facilities capital cost of money as a proposed cost of this contract. Therefore, it is an unallowable cost under this contract.

(End of clause)

52.215–18 Reversion or Adjustment of Plans for Postretirement Benefits (PRB) Other Than Pensions.

As prescribed in 15.109(r), insert the following clause:

Reversion or Adjustment of Plans for Postretirement Benefits (PRB) Other Than Pensions (DATE)

(a) *Notification of termination.* The Contractor must promptly notify the Contracting Officer in writing when the Contractor determines that it will terminate or reduce the benefits of a PRB plan.

(b) *Equitable share.* If PRB fund assets revert or inure to the Contractor, or are constructively received by it under a plan termination or otherwise, the Contractor must refund or credit the Government for its equitable share. The equitable share must reflect the Government's previous participation in PRB costs through those contracts for which certified cost or pricing data were required or which were subject to cost principles of the Federal Acquisition Regulation subpart 31.2. When determining or agreeing on the method for recovery of the Government's equitable share, the contracting parties should consider the following methods: cost reduction, amortizing the credit over a number of years (with appropriate interest), cash refund, or some other agreed upon method. Should the parties be unable to agree on the method for recovery of the Government's equitable share, through good faith negotiations, the Contracting Officer must designate the method of recovery.

(c) *Subcontracts.* The Contractor must insert the substance of this clause, including this paragraph (c), in all subcontracts, other than those for commercial products or commercial services, for which it is anticipated that certified cost or pricing data will be required or for which any preaward or postaward cost determinations will be subject to FAR part 31.

(End of clause)

52.215–19 Notification of Ownership Changes.

As prescribed in 15.109(s), insert the following clause:

Notification of Ownership Changes (DATE)

(a) *Notification.* The Contractor must notify the Administrative Contracting Officer (ACO), in writing, within 30 days, when:

(1) The Contractor becomes aware that a change in its ownership has occurred, or is certain to occur, that could result in changes in the valuation of its capitalized assets in the accounting records; or

(2) Changes to asset valuations or any other cost changes have occurred or are certain to occur as a result of a change in ownership.

(b) *Responsibilities.* The Contractor must—

(1) Maintain current, accurate, and complete inventory records of assets and their costs;

(2) Provide the ACO or designated representative ready access to the records upon request;

(3) Ensure that all individual and grouped assets, their capitalized values, accumulated depreciation or amortization, and remaining useful lives are identified accurately before and after each of the Contractor's ownership changes; and

(4) Retain and continue to maintain depreciation and amortization schedules based on the asset records maintained before each Contractor ownership change.

(c) *Subcontracts.* The Contractor must include the substance of this clause, including this paragraph (c), in all subcontracts, except those for commercial products or commercial services, for which it is anticipated that certified cost or pricing data will be required or for which any preaward or postaward cost determinations will be subject to FAR part 31.

(End of clause)

52.215–20 Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.

As prescribed in 15.109(t)(1), insert the following provision:

Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data (DATE)

(a) *Exceptions from certified cost or pricing data.* (1) In lieu of submitting certified cost or pricing data, Offerors may submit a written request for exception by submitting the information described in the following subparagraphs. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted, and whether the price is fair and reasonable.

(i) *Identification of the law or regulation establishing the price offered.* If the price is controlled under law by periodic rulings, reviews, or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

(ii) *Commercial product and commercial service exception.* For a commercial product

and commercial service exception, the Offeror must submit, at a minimum, information on prices at which the same item or similar items have previously been sold in the commercial market that is adequate for evaluating the reasonableness of the price for this acquisition. Such information may include—

(A) For catalog items, a copy of or identification of the catalog and its date, or the appropriate pages for the offered items, or a statement that the catalog is on file in the buying office to which the proposal is being submitted. Provide a copy or describe current discount policies and price lists (published or unpublished), *e.g.*, wholesale, original equipment manufacturer, or reseller. Also explain the basis of each offered price and its relationship to the established catalog price, including how the proposed price relates to the price of recent sales in quantities similar to the proposed quantities;

(B) For market-priced items, the source and date or period of the market quotation or other basis for market price, the base amount, and applicable discounts. In addition, describe the nature of the market;

(C) For items included on an active Federal Supply Schedule contract, proof that an exception has been granted for the schedule item.

(2) The Offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and the reasonableness of price. For items priced using catalog or market prices, or law or regulation, access does not extend to cost or profit information or other data relevant solely to the Offeror's determination of the prices to be offered in the catalog or marketplace.

(b) *Requirements for certified cost or pricing data.* If the Offeror is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:

(1) The Offeror must prepare and submit certified cost or pricing data, data other than certified cost or pricing data, and supporting attachments in accordance with the instructions contained in Table 15–1 of FAR 15.408–2, which is incorporated by reference with the same force and effect as though it were inserted here in full text. The instructions in Table 15–1 are incorporated as a mandatory format to be used in this contract, unless the Contracting Officer and the Contractor agree to a different format and change this clause to use Alternate I.

(2) As soon as practicable after agreement on price, but before contract award (except for unpriced actions such as letter contracts), the Offeror must submit a Certificate of Current Cost or Pricing Data, as prescribed by FAR 15.403–4.

(End of provision)

Alternate I (DATE). As prescribed in 15.109(t)(2), replace paragraph (b)(1) of the basic provision with the following paragraph (b)(1):

(b)(1) The Offeror must submit certified cost or pricing data, data other

than certified cost or pricing data, and supporting attachments in the following format: *[Insert description of the data and format that are required, and include access to records necessary to permit an adequate evaluation of the proposed price in accordance with 15.408–2, Table 15–1, Note 2. The description may be inserted at the time of issuing the request for proposals, or the Contracting Officer may specify that the Offeror's format will be acceptable, or the description may be inserted as the result of negotiations.]*

Alternate II (DATE). As prescribed in 15.109(t)(3), add the following paragraph (c) to the basic provision:

(c) When the proposal is submitted, also submit one copy each to the Administrative Contracting Officer, and the Contract Auditor.

Alternate III (DATE). As prescribed in 15.109(t)(4), add the following paragraph (c) to the basic provision (if Alternate II is also used, redesignate the following paragraph as paragraph (d)).

(c) Submit the cost portion of the proposal via the following electronic media: *[Insert media format, e.g., electronic spreadsheet format, electronic mail, etc.]*

Alternate IV (DATE). As prescribed in 15.109(t)(5), replace the basic provision with the following:

(a) Submission of certified cost or pricing data is not required.

(b) Provide data described below: *[Insert description of the data, format, and access to records needed in accordance with 15.104–4(a)(3).]*

52.215–21 Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications.

As prescribed in 15.109(u)(1), insert the following clause:

Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications (DATE)

(a) *Exceptions from certified cost or pricing data.*

(1) In lieu of submitting certified cost or pricing data for modifications under this contract, for price adjustments expected to exceed the threshold set forth in Federal Acquisition Regulation (FAR) 15.403–3(a) on the date of the agreement on price or the date of the award, whichever is later, the Contractor may submit a written request for exception by submitting the information described in paragraphs (a)(1)(i) and (ii) of this clause. If the threshold for submission of certified cost or pricing data specified in FAR 15.403–3(a) is adjusted for inflation as set forth in FAR part 1, the changed threshold applies throughout the remaining term of the contract, unless there is a subsequent threshold adjustment. The Contracting

Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted, and whether the price is fair and reasonable—

(i) Identification of the law or regulation establishing the price offered. If the price is controlled under law by periodic rulings, reviews, or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

(ii) Information on modifications of contracts or subcontracts for commercial products or commercial services.

(A) If—

(1) The original contract or subcontract was granted an exception from certified cost or pricing data requirements because the price agreed upon was based on adequate price competition or prices set by law or regulation, or was a contract or subcontract for the acquisition of a commercial product or commercial service; and

(2) The modification (to the contract or subcontract) is not exempted based on one of these exceptions, then the Contractor may provide information to establish that the modification would not change the contract or subcontract from a contract or subcontract for the acquisition of a commercial product or commercial service, to a contract or subcontract for the acquisition of other than a commercial product or commercial service.

(B) For a commercial product and commercial service exception, the Contractor must provide, at a minimum, information on prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price of the modification. Such information may include—

(1) For catalog items, a copy of or identification of the catalog and its date, or a statement that the catalog is on file in the buying office to which the proposal is being submitted. Provide a copy or describe current discount policies and price lists (published or unpublished), e.g., wholesale, original equipment manufacturer, or reseller. Also explain the basis of each offered price and its relationship to the established catalog price, including how the proposed price relates to the price of recent sales in quantities similar to the proposed quantities.

(2) For market-priced items, the source and date or period of the market quotation or other basis for market price, the base amount, and applicable discounts. In addition, describe the nature of the market.

(3) For items included on an active Federal Supply Schedule (FSS) contract, proof that an exception has been granted for the FSS item.

(2) The Contractor grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this clause, and the reasonableness of price. For items priced using catalog or market prices, or law or regulation, access does not extend to cost or profit information or other data relevant solely to the Contractor's determination of

the prices to be offered in the catalog or marketplace.

(b) *Requirements for certified cost or pricing data.* If the Contractor is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:

(1) The Contractor must submit certified cost or pricing data, data other than certified cost or pricing data, and supporting attachments in accordance with the instructions contained in Table 15–1 of FAR 15.408–2, which is incorporated by reference with the same force and effect as though it were inserted here in full text. The instructions in Table 15–1 are incorporated as a mandatory format to be used in this contract, unless the Contracting Officer and the Contractor agree to a different format and change this clause to use Alternate I.

(2) As soon as practicable after agreement on price, but before award (except for unpriced actions), the Contractor must submit a Certificate of Current Cost or Pricing Data, as prescribed by FAR 15.403–4.

(End of clause)

Alternate I (DATE). As prescribed in 15.109(u)(2), replace paragraph (b)(1) of the basic clause with the following paragraph (b)(1).

(b)(1) The Contractor must submit certified cost or pricing data, data other than certified cost or pricing data, and supporting attachments prepared in the following format: *[Insert description of the data and format that are required and include access to records necessary to permit an adequate evaluation of the proposed price in accordance with 15.408–2, Table 15–1, Note 2. The description may be inserted at the time of issuing the request for proposals, or the Contracting Officer may specify that the Offeror's format will be acceptable, or the description may be inserted as the result of negotiations.]*

Alternate II (DATE). As prescribed in 15.109(u)(3), add the following paragraph (c) to the basic clause:

(c) When the proposal is submitted, also submit one copy each to: (1) the Administrative Contracting Officer, and (2) the Contract Auditor.

Alternate III (DATE). As prescribed in 15.109(u)(4), add the following paragraph (c) to the basic clause (if Alternate II is also used, redesignate the following paragraph as paragraph (d)):

(c) Submit the cost portion of the proposal via the following electronic media: *[Insert media format]*

Alternate IV (DATE). As prescribed in 15.109(u)(5), replace the basic provision with the following:

(a) Submission of certified cost or pricing data is not required.

(b) Provide data described below: *[Insert description of the data, format, and access to records needed in accordance with 15.104–4(a)(3).]*

52.215–22 Limitations on Pass-Through Charges—Identification of Subcontract Effort.

As prescribed in 15.109(v), use the following provision:

Limitations on Pass-Through Charges—Identification of Subcontract Effort (DATE)

(a) *Definitions.* Added value, excessive pass-through charge, subcontract, and subcontractor, as used in this provision, are defined in the clause of this request for proposals entitled “Limitations on Pass-Through Charges” (FAR 52.215–23).

(b) *General.* The Offeror’s proposal must exclude excessive pass-through charges.

(c) *Performance of work by the Contractor or a subcontractor.* (1) The Offeror must identify in its proposal the total cost of the work to be performed by the Offeror, and the total cost of the work to be performed by each subcontractor, under the contract, task order, or delivery order.

(2) If the Offeror intends to subcontract more than 70 percent of the total cost of work to be performed under the contract, task order, or delivery order, the Offeror must identify in its proposal—

(i) The amount of the Offeror’s indirect costs and profit/fee applicable to the work to be performed by the subcontractor(s); and

(ii) A description of the added value provided by the Offeror as related to the work to be performed by the subcontractor(s).

(3) If any subcontractor proposed under the contract, task order, or delivery order intends to subcontract to a lower-tier subcontractor more than 70 percent of the total cost of work to be performed under its subcontract, the Offeror must identify in its proposal—

(i) The amount of the subcontractor’s indirect costs and profit/fee applicable to the work to be performed by the lower-tier subcontractor(s); and

(ii) A description of the added value provided by the subcontractor as related to the work to be performed by the lower-tier subcontractor(s).

(End of provision)

52.215–23 Limitations on Pass-Through Charges.

As prescribed in 15.109(w)(1) and (2), use the following clause:

Limitations on Pass-Through Charges (DATE)

(a) *Definitions.* As used in this clause—
Added value means that the Contractor performs subcontract management functions that the Contracting Officer determines are a benefit to the Government (e.g., processing orders of parts or services, maintaining inventory, reducing delivery lead times, managing multiple sources for contract requirements, coordinating deliveries, performing quality assurance functions).

Excessive pass-through charge, with respect to a Contractor or subcontractor that adds no or negligible value to a contract or subcontract, means a charge to the Government by the Contractor or subcontractor that is for indirect costs or

profit/fee on work performed by a subcontractor (other than charges for the costs of managing subcontracts and any applicable indirect costs and associated profit/fee based on such costs).

No or negligible value means the Contractor or subcontractor cannot demonstrate to the Contracting Officer that its effort added value to the contract or subcontract in accomplishing the work performed under the contract (including task or delivery orders).

Subcontract means any contract, as defined in Federal Acquisition Regulation (FAR) part 2, entered into by a subcontractor to furnish supplies or services for performance of the contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

Subcontractor, as defined in FAR part 44, means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime Contractor or another subcontractor.

(b) *General.* The Government will not pay excessive pass-through charges. The Contracting Officer must determine if excessive pass-through charges exist.

(c) *Reporting.* Required reporting of performance of work by the Contractor or a subcontractor. The Contractor must notify the Contracting Officer in writing if—

(1) The Contractor changes the amount of subcontract effort after award such that it exceeds 70 percent of the total cost of work to be performed under the contract, task order, or delivery order. The notification must identify the revised cost of the subcontract effort and must include verification that the Contractor will provide added value; or

(2) Any subcontractor changes the amount of lower-tier subcontractor effort after award such that it exceeds 70 percent of the total cost of the work to be performed under its subcontract. The notification must identify the revised cost of the subcontract effort and must include verification that the subcontractor will provide added value as related to the work to be performed by the lower-tier subcontractor(s).

(d) *Recovery of excessive pass-through charges.* If the Contracting Officer determines that excessive pass-through charges exist;

(1) For other than fixed-price contracts, the excessive pass-through charges are unallowable in accordance with the provisions in FAR 31; and

(2) For applicable DoD fixed-price contracts, the Government must be entitled to a price reduction for the amount of excessive pass-through charges included in the contract price.

(e) *Access to records.* (1) The Contracting Officer, or authorized representative, must have the right to examine and audit all the Contractor’s records (as defined at FAR 52.215–2(a)) necessary to determine whether the Contractor proposed, billed, or claimed excessive pass-through charges.

(2) For those subcontracts to which paragraph (f) of this clause applies, the Contracting Officer, or authorized representative, must have the right to examine and audit all the subcontractor’s records (as defined at FAR 52.215–2(a))

necessary to determine whether the subcontractor proposed, billed, or claimed excessive pass-through charges.

(f) *Subcontracts.*

(1) For contracts with agencies other than DoD, the Contractor must insert the substance of this clause, including this paragraph (f), in all cost-reimbursement subcontracts, other than those for commercial products and commercial services, that exceed the simplified acquisition threshold, as defined in FAR part 2 on the date of subcontract award.

(2) For contracts with DoD, the Contractor must insert the substance of this clause, including this paragraph (f), in all cost-reimbursement and fixed-price subcontracts that exceed the threshold for obtaining cost or pricing data at FAR 15.403–3(a) on the date of subcontract award, except those that are—

(i) For a commercial product or commercial service;

(ii) A firm-fixed price subcontract awarded on the basis of adequate price competition;

(iii) A firm-fixed price subcontract with economic price adjustment awarded on the basis of adequate price competition; or

(iv) A fixed-price incentive subcontract awarded on the basis of adequate price competition.

(End of clause)

Alternate I (DATE). As prescribed in 15.109(w)(3), Replace paragraph (b) of the basic clause, with the following paragraph (b):

(b) *General.* The Government will not pay excessive pass-through charges. The Contracting Officer has determined that there will be no excessive pass-through charges, provided the Contractor performs the disclosed value-added functions.

■ 19. Revise sections 52.244–2, 52.244–4, 52.244–5, and 52.244–6 to read as follows:

52.244–2 Subcontracts.

As prescribed in 44.201–5(a)(1), insert the following clause:

Subcontracts (DATE)

(a) *Definitions.* As used in this clause—

Approved purchasing system means a Contractor’s purchasing system that has been reviewed and approved in accordance with part 44 of the Federal Acquisition Regulation (FAR).

Consent to subcontract means the Contracting Officer’s written consent for the Contractor to enter into a particular subcontract.

Subcontract means any contract, as defined in FAR Subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of the prime contract or a subcontract. It includes, but is not limited to, purchase orders, and changes and modifications to purchase orders.

(b) When this clause is included in a fixed-price type contract, consent to subcontract is required only on unpriced contract actions (including unpriced modifications or

unpriced delivery orders), and only if required in accordance with paragraph (c) or (d) of this clause.

(c) If the Contractor does not have an approved purchasing system, consent to subcontract is required for any subcontract that—

(1) Is of the cost-reimbursement, time-and-materials, or labor-hour type; or

(2) Is fixed-price and exceeds—

(i) For a contract awarded by the Department of Defense, the Coast Guard, or the National Aeronautics and Space Administration, the greater of the simplified acquisition threshold, as defined in FAR 2.101 on the date of subcontract award, or 5 percent of the total estimated cost of the contract; or

(ii) For a contract awarded by a civilian agency other than the Coast Guard and the National Aeronautics and Space Administration, either the simplified acquisition threshold, as defined in FAR 2.101 on the date of subcontract award, or 5 percent of the total estimated cost of the contract.

(d) If the Contractor has an approved purchasing system, the Contractor nevertheless must obtain the Contracting Officer's written consent before placing the following subcontracts:

(e)(1) The Contractor must notify the Contracting Officer reasonably in advance of placing any subcontract or modification thereof for which consent is required under paragraph (b), (c), or (d) of this clause, including the following information:

(i) A description of the supplies or services to be subcontracted.

(ii) Identification of the type of subcontract to be used.

(iii) Identification of the proposed subcontractor.

(iv) The proposed subcontract price.

(v) The subcontractor's current, complete, and accurate certified cost or pricing data and Certificate of Current Cost or Pricing Data, if required by other contract provisions.

(vi) The subcontractor's Disclosure Statement or Certificate relating to Cost Accounting Standards when such data are required by other provisions of this contract.

(vii) A negotiation memorandum reflecting—

(A) The principal elements of the subcontract price negotiations;

(B) The most significant considerations controlling establishment of initial or revised prices;

(C) The reason certified cost or pricing data were or were not required;

(D) The extent, if any, to which the Contractor did not rely on the subcontractor's certified cost or pricing data in determining the price objective and in negotiating the final price;

(E) The extent to which it was recognized in the negotiation that the subcontractor's certified cost or pricing data were not accurate, complete, or current; the action taken by the Contractor and the subcontractor; and the effect of any such defective data on the total price negotiated;

(F) The reasons for any significant difference between the Contractor's price objective and the price negotiated; and

(G) A complete explanation of the incentive fee or profit plan when incentives are used. The explanation must identify each critical performance element, management decisions used to quantify each incentive element, reasons for the incentives, and a summary of all trade-off possibilities considered.

(2) The Contractor is not required to notify the Contracting Officer in advance of entering into any subcontract for which consent is not required under paragraph (b), (c), or (d) of this clause.

(f) Unless the consent or approval specifically provides otherwise, neither consent by the Contracting Officer to any subcontract nor approval of the Contractor's purchasing system will constitute a determination—

(1) Of the acceptability of any subcontract terms or conditions;

(2) Of the allowability of any cost under this contract; or

(3) To relieve the Contractor of any responsibility for performing this contract.

(g) No subcontract or modification thereof placed under this contract will provide for payment on a cost-plus-a-percentage-of-cost basis, and any fee payable under cost-reimbursement type subcontracts must not exceed the fee limitations in FAR part 15.

(h) The Contractor must give the Contracting Officer immediate written notice of any action or suit filed, and prompt notice of any claim made against the Contractor by any subcontractor or vendor that, in the opinion of the Contractor, may result in litigation related in any way to this contract, with respect to which the Contractor may be entitled to reimbursement from the Government.

(i) The Government reserves the right to review the Contractor's purchasing system as set forth in FAR subpart 44.3.

(j) Paragraphs (c) and (e) of this clause do not apply to the following subcontracts, which were evaluated during negotiations:

(End of clause)

Alternate I (DATE). As prescribed in 44.201–5(a)(2), substitute the following paragraph (e)(2) for paragraph (e)(2) of the basic clause:

(e)(2) If the Contractor has an approved purchasing system and consent is not required under paragraph (c) or (d) of this clause, the Contractor nevertheless must notify the Contracting Officer reasonably in advance of entering into any cost-plus-fixed-fee subcontract, or fixed-price subcontract that exceeds either the simplified acquisition threshold, as defined in FAR 2.101 on the date of subcontract award, or 5 percent of the total estimated cost of this contract. The notification must include the information required by

paragraphs (e)(1)(i) through (iv) of this clause.

52.244–4 Subcontractors and Outside Associates and Consultants (Architect-Engineer Services).

As prescribed in 44.201–5(b), insert the following clause:

Subcontractors and Outside Associates and Consultants (Architect-Engineer Services) (DATE)

Any subcontractors and outside associates or consultants required by the Contractor in connection with the services covered by the contract will be limited to individuals or firms that were specifically identified and agreed to during negotiations. The Contractor must obtain the Contracting Officer's written consent before making any substitution for these subcontractors, associates, or consultants.

(End of clause)

52.244–5 Competition in Subcontracting.

As prescribed in 44.201–5(c), insert the following clause:

Competition in Subcontracting (DATE)

(a) The Contractor must select subcontractors (including suppliers) on a competitive basis to the maximum practical extent consistent with the objectives and requirements of the contract.

(b) If the Contractor is an approved mentor under the DoD Mentor-Protégé Program (10 U.S.C. 4902), the Contractor may award subcontracts under this contract on a noncompetitive basis to its protégés.

(End of clause)

52.244–6 Subcontracts for Commercial Products and Commercial Services.

As prescribed in 44.403, insert the following clause:

Subcontracts for Commercial Products and Commercial Services (DATE)

(a) *Definitions.* As used in this clause—
Commercial product, commercial service, and *nondevelopmental item* have the meanings contained in Federal Acquisition Regulation (FAR) 2.101.

Subcontract has the meaning at FAR 44.401.

(b) *Requirements.*

(1) To the maximum extent practicable, the Contractor must incorporate, and require its subcontractors at all tiers to incorporate, commercial products, commercial services, or non-developmental items as components of items to be supplied under this contract.

(2) If a clause in the following table is included in the contract, the Contractor must insert the clause in subcontracts for commercial products or commercial services and must flow down the requirements of the clause to subcontracts as indicated in the specific clause:

No.	Title	Date
52.203-13	Contractor Code of Business Ethics and Conduct	DATE.
52.203-17	Contractor Employee Whistleblower Rights	DATE.
52.203-19	Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements	DATE.
52.204-9	Personal Identity Verification of Contractor Personnel	DATE.
52.219-8 *	Utilization of Small Business Concerns	DATE.
52.222-35	Equal Opportunity for Veterans	DATE.
52.222-36	Equal Opportunity for Workers with Disabilities	DATE.
52.222-37	Employment Reports on Veterans	DATE.
52.222-40	Notification of Employee Rights Under the National Labor Relations Act	DATE.
52.222-41	Service Contract Labor Standards	DATE.
52.222-50	Combating Trafficking in Persons	DATE.
52.222-50 with Alt I	Combating Trafficking in Persons, with its Alternate I	DATE.
52.222-51	Exemption from Application of the Service Contract Labor Standards to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements.	DATE.
52.222-53	Exemption from Application of the Service Contract Labor Standards to Contracts for Certain Services—Requirements	DATE.
52.222-54	Employment Eligibility Verification	DATE.
52.222-62	Paid Sick Leave Under Executive Order 13706	DATE.
52.224-3	Privacy Training	DATE.
52.224-3 with Alt I	Privacy Training, with Alternate I	DATE.
52.225-26	Contractors Performing Private Security Functions Outside the United States	DATE.
52.232-40	Providing Accelerated Payments to Small Business Subcontractors	DATE.
52.240-3	Security Prohibitions and Exclusions	DATE.
52.240-3 with Alt I	Security Prohibitions and Exclusions, with its Alternate I	DATE.
52.247-64	Preference for Privately Owned U.S.-Flag Commercial Vessels	DATE.

* Include only if the subcontract offers further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds the applicable threshold specified in FAR 19.109(a)(1) on the date of subcontract award, the subcontractor must include 52.219-8 in lower tier subcontracts that offer subcontracting opportunities.

(c) *Subcontracts*. The Contractor must include the terms of this clause, including this paragraph (c), in subcontracts, including those for commercial products (other than

COTS items) or commercial services awarded under this contract.

(End of clause)

52.251-1 and 52.251-2 [Removed and Reserved]

■ 20. Remove and reserve sections 52.251-1 and 52.251-2.

[FR Doc. 2026-19162 Filed 9-17-26; 8:45 am]

BILLING CODE 6820-EP-P



FEDERAL REGISTER

Vol. 91

Friday,

No. 180

September 18, 2026

Part V

Office of Management and Budget

Office of Federal Procurement Policy

Department of Defense

General Services Administration

National Aeronautics and Space Administration

48 CFR Parts 6, 7, 35 et al.

Federal Acquisition Regulation: Revolutionary Federal Acquisition Regulation
Overhaul Parts 16, 17, and 35; Proposed Rule

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 16, 17, 35, and 52

[FAR Case 2026–006, Docket No. FAR–2026–0006, Sequence No. 1]

RIN 9000–AO91

Federal Acquisition Regulation: Revolutionary Federal Acquisition Regulation Overhaul Parts 16, 17, and 35

AGENCY: Office of Federal Procurement Policy (OFPP), Office of Management and Budget (OMB); Department of Defense (DoD); General Services Administration (GSA); and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: OFPP, DoD, GSA, and NASA (collectively referred to as the Federal Acquisition Regulatory Council or FAR Council) are proposing to amend the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.) 14275, Restoring Common Sense to Federal Procurement. The E.O. directs the elimination of excessive acquisition regulations to stop the inefficient use of American taxpayer dollars. The FAR Council is issuing twelve proposed rules that collectively, if finalized, would streamline the FAR in its entirety. This rule proposes revisions to FAR part 16, Types of Contracts, part 17, Special Contracting Methods, part 35, Research and Development Contracting, and part 52, Solicitation Provisions and Contract Clauses.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before October 19, 2026, to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2026–006 to the Federal eRulemaking portal at <https://www.regulations.gov>. Follow the instructions for sending comments.

Instructions: Please submit comments only and cite “FAR Case 2026–006” in all correspondence related to this case. Include your name, company name (if any), and “FAR Case 2026–006” on any

attached document. Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal and/or business confidential information provided. Public comments may be submitted as an individual, as an organization, or anonymously (see frequently asked questions at <https://www.regulations.gov/faq>). To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

Docket: For access to the docket to read background documents or comments received, go to <https://www.regulations.gov/FAR-2026-0006>.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact FARpolicy@gsa.gov or call 202–969–4075 and cite “FAR Case 2026–006.” For information pertaining to status, publication schedules, or alternate instructions for submitting comments if <https://www.regulations.gov> cannot be used, contact the Regulatory Secretariat Division at 202–501–4755 or GSARegSec@gsa.gov. Please cite “FAR Case 2026–006.”

SUPPLEMENTARY INFORMATION:

I. Background

E.O. 14275, Restoring Common Sense to Federal Procurement (April 15, 2025), resets the foundation for Federal buying by requiring the FAR Council to produce a streamlined FAR that is simpler, clearer, and structured for speed. According to the E.O., the FAR has evolved from its original purpose (*i.e.*, to establish uniform procedures across executive departments and agencies), into an excessive and overcomplicated regulatory framework and bureaucracy. While meant to “deliver, on a timely basis, the best value product or service to the customer, while maintaining the public’s trust and fulfilling public policy objectives,” the FAR has become an expensive barrier to achieving those objectives. As a result, the E.O. directed the FAR Council and OMB to create an agile, effective, and efficient regulation that contains only provisions required by statute or essential to sound procurement.

To implement E.O. 14275, OMB issued Memorandum M–25–26, Overhauling the Federal Acquisition Regulation, which announced the “Revolutionary FAR Overhaul” (RFO) and created a roadmap for producing simpler regulations aligned to statute, rewritten in plain language, and including nonstatutory requirements that are necessary to conducting a sound

procurement. The memorandum described a new streamlined vision for the FAR, to be maintained alongside nonregulatory governmentwide guidance to provide a common-sense authoritative foundation for nimble response and delivery of mission capability.

This new vision represents a paradigm shift where over-engineered regulations designed for paperwork and compliance are replaced with streamlined regulations focused on core stewardship principles and nonregulatory guidance that will be used in concert with the streamlined FAR focused on proven buying strategies, critical thinking, market awareness (including to expand awareness of goods, products, and materials offered in the United States), and risk literacy to enhance workforce problem-solving. The significant reduction of unnecessary mandates is intended to clarify and reinforce the contracting officer’s discretion to determine the best way to apply policies and practices. The newly established, nonregulatory guidance, which has been inspired by acquisition innovation advocates, category managers, other experienced practitioners, and many years of feedback from the contractor community—is expected to facilitate contracting officers’ use of their discretion more efficiently and effectively to make smarter buying decisions.

OMB Memorandum M–25–26 also directed the FAR Council to complete the regulatory overhaul in two phases, each with robust public input. The FAR Council conducted its phase one effort in fiscal year 2025 by issuing model class deviations to replace each part in the FAR until such time as formal rulemaking occurred. This proposed rule is one of a series that constitute the FAR Council’s phase two effort to obtain public comment through formal rulemaking.

II. Discussion and Analysis

A summary of proposed changes to existing FAR parts 16, 17, and 35, and their corresponding provisions and clauses in part 52 follows:

A. General

1. General RFO Updates.

This proposed rule generally reorganizes the FAR parts into phases of acquisition and simplifies the text into plain language, where possible. The plain language efforts include changes to active voice, edits to improve readability, and reorganization to present information more logically. None of the plain language edits are

intended to change existing FAR requirements. The rewriting of the entire FAR also required edits to harmonize the changes being proposed such as updating the cross-references. This aligns with the Federal plain language guidelines as directed by the Plain Writing Act of 2010 (5 U.S.C. 301 note).

2. *Standardization of prescriptions.*

This rule proposes revisions to standardize prescriptions for provisions and clauses. These changes are intended to provide better clarity around the applicability of provisions and clauses such as whether they apply to commercial products and services.

3. *Use of “must” instead of “shall”.*

Additional revisions are being proposed throughout the FAR text and FAR provisions and clauses to replace the use of the term “shall” with “must” or “will,” as appropriate, to impose requirements.

4. *Non-statutory requirements.*

Section 4 of the E.O. required amendments to the FAR to ensure it contains only provisions that are required by statute or that are otherwise necessary to support simplicity and usability, strengthen the efficacy of the procurement system, or protect economic or national security. The FAR Council reviewed all non-statutory requirements to determine if they are

still relevant and essential to sound procurement in today’s contracting environment based on the criteria from section 4 of the E.O. The proposed rule retains non-statutory requirements that further one or more of the elements of sound procurements, including those requirements that serve as guardrails to protecting taxpayer interests and promote taxpayer confidence in the procurement system. Non-statutory requirements that were beneficial but not essential were retained in the non-regulatory guidance documents. Other non-statutory requirements that did not meet these standards, were removed. The Council considered the extent to which regulation is the most efficient means for capturing the benefit of the policy. For example, most “how to” requirements were found to be more appropriately suited for non-regulatory coverage which better enables a contracting officer to use discretion in determining the application of a strategy to a given situation and limits the risk of overapplication, which can create wasteful burden on the contracting parties.

As part of the RFO, the FAR Council has created a number of non-regulatory resources, including the FAR Companion, which provides insight from experienced practitioners across

the government on using more streamlined practices and processes. The migration of significant coverage to non-regulatory guidance is intended to ensure that the benefits of the policy are not outweighed by the compliance burden of a more rigidly written regulation that is prone to application in an overly broad manner. This approach was explained to the public in a set of “frequently asked questions” that were posted on the Revolutionary FAR Overhaul homepage shortly after the initiative was launched.

B. *FAR Part 16*

The proposed rule, if finalized, would revise FAR part 16 to eliminate excessive acquisition regulations to stop the inefficient use of American taxpayer dollars through the removal of obsolete and non-statutory content not essential to sound procurement, and to simplify, clarify, and streamline the policies and procedures pertaining to contract types. These revisions would further emphasize the use of fixed-price contract types. The proposed rule would also reorganize FAR part 16 to first address contract types, then contract mechanisms (indefinite-delivery contracts, letter contracts, and agreements), with subparts updated as follows.

Existing FAR Reference	Proposed FAR Subpart
16.1 Selecting Contract Types	16.1 Selecting Contract Types.
16.2 Fixed-Price Contracts	16.2 Fixed-Price Contracts.
16.3 Cost-Reimbursement Contracts	16.3 Cost-Reimbursement Contracts.
16.4 Incentive Contracts	16.4 Incentive Contracts.
16.5 Indefinite-Delivery Contracts	16.6 Indefinite-Delivery Contracts.
16.6 Time-and-Materials, Labor-Hour, and Letter Contracts	16.5 Time-and-Materials and Labor-Hour Contracts.
16.603 Letter Contracts	16.7 Letter Contracts.
16.7 Agreements	16.8 Agreements.

The following is a list of substantive changes proposed for FAR part 16.

1. *Shift from Restrictive to Permissive Framework in Contract Type Selection.*

The proposed rule, if finalized, would shift the guiding principles on contract type selection from a restrictive to a permissive framework, consistent with 10 U.S.C. 3321 and 41 U.S.C. 3901. This change would allow agencies to more easily utilize contract types not explicitly mentioned in the FAR and would allow for better congruence with commercial practices if the contract type promotes the best interest of the Government and is not expressly prohibited by statute. Alternate I to provision 52.216–1, Type of Contract, would provide offerors the opportunity to propose an alternative contract type.

2. *Changes Reflective of E.O. 14402, Promoting Efficiency, Accountability,*

and Performance in Federal Contracting.

On April 30, 2026, the President issued E.O. 14402, Promoting Efficiency, Accountability, and Performance in Federal Contracting. Section 3(b) of the E.O. directed the Administrator for Federal Procurement Policy, in coordination with the FAR Council, to propose amendments to the Federal Acquisition Regulation, consistent with the policies of the order.

Section 1 of the E.O. states that fixed-price contracts with performance-based considerations should serve as the default and preferred method of procurement in order to advance cost predictability and budget discipline, appropriate contractor incentives and accountability, and streamlined procurement and contract administration.

Section 2 of the E.O. requires agencies to justify the use of non-fixed-price contract types in writing, with the justification signed by the agency head. The E.O. requires agency head approval of the contract at various total potential contract value thresholds.

The proposed rule would revise FAR part 16 to adhere to the preference for fixed-price contracts with performance-based considerations, and adds justification and approval requirements for other than fixed-price contracts and firm-fixed-price, level-of-effort term contracts. New section 16.104 describes the justification and approval requirements.

3. *Consumption-Based Solutions.*

The proposed rule includes changes consistent with section 1825 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2026 (Pub.

L. 119–60) for consistent use across the Federal Government. New language would include the definition of “consumption-based solution,” and clarification that contracting officers may acquire consumption-based solutions where supplies and services are capable of being metered and billed based on actual usage as fixed-price units. The acquisition of fixed-priced units on a consumption basis would be considered a firm-fixed price contract. The inclusion of this language would support the use of consumption-based contracts, a common commercial practice for a variety of supplies and services, including but not limited to cloud computing capacity.

4. Delineation Between “Ordering Period” and “Period of Performance.”

The proposed 16.601–2 would include a clear delineation between “ordering period” for task-order contracts and delivery-order contracts, “period of performance” for their orders, and “effective period of the contract.” The clauses at 52.216–21, Requirements, and 52.216–22, Indefinite Quantity, have been edited for clarity given the delineation of these terms.

5. On-ramps and Off-ramps under Multiple-Award Contracts.

The proposed rule, if finalized, would include policies and procedures related to “on-ramping” (adding new contractors) and “off-ramping” (removing contractors) from a multiple-award contract to maintain a current, competitive, and innovative pool of vendors. Alternates I and II to provision 52.216–22, Indefinite Quantity, are proposed to provide for off-ramps with various cancellation policies.

6. Inclusion of Blanket Purchase Agreements (BPAs) under Multiple-Award Contracts.

The proposed rule would include the policies and procedures to issue and use BPAs under multiple-award contracts, similar to those permitted under the Federal Supply Schedules. If finalized, this policy would allow contracting officers to utilize fair opportunity procedures to issue BPAs within the scope of the contract if authorized under the multiple-award contract.

7. Significant Reorganization of Ordering Procedures for Task-Order Contracts and Delivery-Order Contracts.

The proposed rule would reorganize the postaward ordering placement into two sections: 16.606, which would be applicable to all task-order contracts and delivery-order contracts, regardless of the number of awardees, and 16.607, which would be applicable to multiple-award contracts only. Section 16.607 would address purchases at or below the micro-purchase threshold, fair

opportunity procedures applicable to all purchases above the micro-purchase threshold, and specific instructions for fair opportunity depending on dollar value. The instructions in 16.607 would further emphasize the broad discretion the contracting officer has in developing appropriate order placement procedures for the acquisition at hand and encourages utilization of innovative techniques.

8. Inclusion of FAR Case 2020–005, Explanations to Unsuccessful Offerors on Certain Orders Under Task-Order Contracts and Delivery-Order Contracts (88 FR 53855).

The proposed rule would revise the FAR to implement section 874 of the NDAA for FY 2020 (Pub. L. 116–92) which, for task orders or delivery orders exceeding the simplified acquisition threshold (SAT) but not greater than \$7.5 million, requires contracting officers to provide, upon written request from an unsuccessful offeror, a brief explanation as to why the offeror was unsuccessful, including the rationale for award and an evaluation of the significant weak or deficient factors in the offeror’s offer.

Section 874 of the NDAA uses the term “unsuccessful offeror.” The proposed FAR 16.607–4 would use the term “contractor who competed for the order, but was not awarded the order.” Both terms are synonymous; referring to an entity who has been awarded a basic contract but has been unsuccessful for the award of an order competed under the basic contract.

The proposed rule would require contracting officers to notify all contractors who competed for the order, but were not awarded the order, when the total price of a task order or delivery order exceeds \$7.5 million. If the \$7.5 million threshold is met or exceeded, contracting officers would be directed to the procedures at FAR part 15 when providing a postaward notification or postaward debriefing, respectively.

The FAR threshold at 16.505 (included in the proposed rule at 16.607–4 and 16.607–5) is currently \$7.5 million as a result of three inflation adjustments in accordance with FAR 1.109. FAR Case 2014–022 published on July 2, 2015, at 80 FR 38293, which raised the threshold from \$5 million to \$5.5 million; 2019–013 published on October 2, 2020, at 85 FR 62485, which raised the threshold to \$6 million; and FAR Case 2024–001 published on August 27, 2025, at 90 FR 41872, which raised the threshold to \$7.5 million.

The proposed rule would implement the requirement for contracting officers to, upon written request from an unsuccessful awardee, provide a brief

explanation as to why the awardee was unsuccessful for a task order or delivery order exceeding the SAT but not exceeding \$7.5 million. While the statutory threshold is \$5.5 million, the proposed rule would impose these brief explanation requirements at the higher \$7.5 million threshold to align with the current threshold. This would avoid a gap between \$5.5 million and \$7.5 million. This new brief explanation requirement for orders above the SAT and below \$7.5 million would not provide a debriefing at the level of detail currently afforded to unsuccessful awardees over \$7.5 million, however, this information is expected to benefit entities by improving future offers. While not expressly required by the statute, the proposed rule would add a postaward notification requirement for the applicable task orders and delivery orders to ensure unsuccessful awardees are provided an opportunity to obtain the brief explanation as to why the awardee was unsuccessful in a timely manner.

9. Streamlining of 52.216–7, Allowable Cost and Payment.

The proposed rule would remove a number of items required for an adequate indirect cost proposal in clause 52.216–7, Allowable Cost and Payment, paragraph (d)(2)(iii).

Paragraph (j), Subcontract Information, would be limited to only those subcontracts with a value exceeding the threshold for requiring certified cost or pricing data as prescribed in FAR 15.403–3.

The detailed information previously required by paragraph (k) for time-and-materials and labor-hour contracts such as labor rates, labor hours, and other detailed costs elements would be removed. The summary level information previously required by paragraph (k) would be relocated to paragraph (h).

Paragraph (l), which required submission of reconciliation of total payroll per IRS form 941 to total labor costs distribution, would be removed in its entirety.

The information previously required by paragraph (o) for contracts physically completed in this fiscal year would be relocated to paragraph (h) and is limited to level-of-effort information, contract ceiling amount, and an indication of whether the contract is ready to close. Contract fee computations would no longer be required.

The removal of these items would reduce the amount of information required from contractors for an incurred cost audit submission and would therefore reduce the time

required for contract closeout and impact settlement agreements.

10. Clarification on Applicability of 52.216–7, Allowable Cost and Payment, to Cost-Type Incentive Contracts.

FAR paragraph 16.305(a), clause 52.216–16, Incentive Price Revision-Firm Target, and clause 52.216–17, Incentive Price Revision-Successive Targets, would be altered to clarify applicability of 52.216–7, Allowable Cost and Payment, to cost-type incentive contracts, including fixed-price cost incentive contracts.

Fixed-price cost incentive contracts are hybrid contracts that use actual costs, including indirect costs, to negotiate a final incentive payment. FAR 42.503–1(c)(2) and FAR

31.103(b)(3) would require the use of established final indirect cost rates (FICR) to calculate costs in fixed-price cost incentive contracts in order to comply with 10 U.S.C. 3743(a) and 41 U.S.C. 4303(a). This change would erase ambiguity in the applicability of FAR clause 52.216–7, which includes the process to calculate FICR.

FAR clauses 52.216–16 and 52.216–17 currently acknowledge that “costs” mean “allowable costs” in accordance with the cost principles in FAR Part 31. The proposed rule adds language clarifying that FICR should be used for calculating incurred costs and, if the contractor does not already have a contract which establishes FICR, they

should follow the process in paragraph (d) of the allowable cost and payment clause to establish FICR.

C. FAR Part 17

The proposed rule would revise FAR part 17 to eliminate excessive acquisition regulations to stop the inefficient use of American taxpayer dollars through the removal of obsolete and non-statutory content not essential to sound procurement, and to simplify, clarify, and streamline the policies and procedures pertaining to special contracting methods. Subparts would be rearranged to remove reserved subparts and ensure similar content is placed together.

Existing FAR reference	Proposed FAR subpart
17.1 Multiyear Contracting	17.1 Multiyear Contracting.
17.2 Options	17.2 Options.
17.3 [Reserved]	N/A.
17.4 Leader Company Contracting	17.3 Leader Company Contracting.
17.5 Interagency Acquisitions	17.4 Interagency Acquisitions.
17.6 Management and Operating Contracts	17.6 Management and Operating Contracts.
17.7 Interagency Acquisitions: Acquisitions by Nondefense Agencies on Behalf of the Department of Defense.	17.5 Interagency Acquisitions: Acquisitions by Nondefense Agencies on Behalf of the Department of Defense.
17.8 Reverse Auctions	17.7 Reverse Auctions.

The following substantive changes are proposed to FAR part 17.

1. Clarification on Multiyear Contracts for Supplies and Services for DoD, NASA, and the Coast Guard.

The proposed rule would include language reflective of the limitations on the use of multiyear contracts for supplies and services by DoD, NASA, and the Coast Guard in accordance with 10 U.S.C. 3501 and 10 U.S.C. 3531 in 17.103–1.

2. Removal of General Five-Year Limitation on Contract Duration.

The proposed rule would replace the non-statutory five-year limitation on contract duration for all contracts previously included at 17.204(e) with a requirement to “follow any statutory or regulatory limits on contract duration.” An example of such a statutory limitation is the five-year limit on initial ordering periods, and ten-year limit on total potential ordering period, for indefinite-delivery contracts given in 10 U.S.C. 3403.

3. Modernize Option for Increased Quantity Clauses to Apply to Both Services and Supplies.

The proposed rule would remove limitations on the use of clause 52.217–6, Option for Increased Quantity, and clause 52.217–7, Option for Increased Quantity—Separately Priced Line Item, in solicitations and contracts for the purchases of services. As currently written, the FAR prescribes the

provisions and clauses contracting officers use when including options in solicitations and contracts, but lacks a FAR clause for use when contracting officers identify a potential need for additional quantities of services during a contract’s performance period. An example of such a need is when a program office has a bona fide need for a definite quantity of services but identifies circumstances where an increase in the demand for those services may reasonably occur.

While FAR subpart 17.2, as currently codified, permits the use of options for increased quantities of services, the FAR lacks any corresponding clause for doing so. The limiting language included in these prescriptions have prevented many agencies from adequately utilizing 52.217–6 and 52.217–7, or forced increased acquisition time and costs associated with seeking a deviation or drafting of acquisition-unique clause.

The proposed rule would provide contracting officers with a corresponding policy to allow the use of FAR clause 52.217–6 and 52.217–7 when procuring additional requirements during a contract’s performance period. The inclusion of such a clause during initial competition of the contract would allow for the prices included for such surge requirements to be determined on the basis of competition,

rather than negotiated as a sole-source modification during contract administration. The cost and lead time associated with exercising an option for increased quantity is less than that of issuing a sole-source modification or engaging in a competition for a new award of the same items.

4. Modernize Option To Extend Services to Apply to Services and Supplies.

The proposed rule would allow for the use of clause 52.217–8, Option to Extend Services, renamed Option to Extend, in task-order contracts and delivery-order contracts for requirements other than services. This clause allows for the Government to continue to utilize an existing contract for up to six months at the current rate.

The clause was previously prescribed for use in solicitations and contracts “for services when the inclusion of an option is appropriate.” FAR subpart 17.2, as currently codified, permits the use of options for extensions of contract duration.

The limiting language included in the codified prescription has prevented many agencies from adequately utilizing 52.217–8, or forced increased acquisition time and costs associated with seeking a deviation or drafting of acquisition-unique clause.

Allowing use of this clause for an indefinite delivery contract for critical supplies, for example, would provide

for the provision of supplies without interruption in the case of a delay in a follow-on award due to protest or other reasons. The transaction cost associated with the extension of a contract utilizing 52.217–8 is less than that of issuing a competitive or sole-source bridge contract.

The proposed rule updates this clause and prescribes it for use in solicitations and contracts “when adding an option to extend the period of performance for services, ordering period for any requirement, or both to ensure continuity of services for up to six months is appropriate.” Limiting the use of this clause to services for periods of performance, specifically, is appropriate to prevent the inadvertent use of the clause in increasing the end date of a supply contract.

5. Add Language on Handling of Expiring Contracts During a Lapse in Appropriations.

The proposed rule would include a new paragraph in clauses 52.217–8, Option to Extend Services, renamed Option to Extend, and 52.217–9, Option to Extend the Term of Contract, to allow for the Government and contractor to mutually agree to toll or delay the option exercise time period, such as 30 days after the resumption of Government operations, in the event the period to exercise the option ends during a lapse in appropriations.

The addition of this paragraph would allow for a more expedient return to operations and allow for reduced transaction costs as a result of a Government shutdown.

6. Removal of Best Interest Determination Requirement Under Economy Act Interagency Acquisitions.

Section 875 of the John S. McCain NDAA for FY 2019 (Pub. L. 115–232), entitled “Promotion of the Use of Government-Wide and Other Interagency Contracts”, removed the requirement to include in the FAR a determination that “an interagency acquisition is the best procurement alternative.” The proposed rule would remove this requirement from the FAR.

7. Changes to Management and Operating Contracts.

The proposed rule would remove language regarding competition and reviews of contractor performance for Management and Operating contracts. Removal of this non-statutory language would reduce confusion and emphasizes the use of competition in accordance with the Competition in Contracting Act of 1984.

8. Incorporation of FAR Case 2023–003, Prohibition on the Use of Reverse Auctions for Complex, Specialized, or

Substantial Design and Construction Services (89 FR 70157).

The proposed rule would amend the FAR to implement section 2 of the Construction Consensus Procurement Improvement Act of 2021 (Pub. L. 117–28). Section 2 of the Construction Consensus Procurement Improvement Act of 2021 amended section 402 of Title IV of Division U of the Consolidated Appropriations Act, 2021 (Pub. L. 116–260) entitled the Construction Consensus Procurement Improvement Act of 2020 to require rulemaking to promulgate a definition of “complex, specialized, or substantial design and construction services”, which includes site planning and design; architectural and engineering services (as defined in 40 U.S.C. 1102); interior design; performance of substantial construction work for facility, infrastructure, and environmental restoration projects; and construction or substantial alteration of public buildings or public works. The statute prohibits the use of reverse auctions for such services having a value that exceeds the simplified acquisition threshold (SAT). This change is reflected in new definitions, a revised applicability section, and in clauses 52.217–10, 52.217–11, and 52.217–12.

The proposed rule would establish a new definition in FAR subpart 17.8 for “complex, specialized, or substantial design and construction services” that reflects the statutory definition to support its use at FAR subpart 17.8 and in FAR part 36. In addition, the definition of “reverse auction” in FAR 2.101 would be revised to better reflect the statutory definition provided in the Construction Consensus Procurement Improvement Act of 2021 (see FAR case 2026–001, Revolutionary FAR Overhaul Parts 1, 2, 4, 33, 39, 40 and 53).

While the statute does not prohibit the use of reverse auctions for the subject services at or below the SAT, a reverse auction may only be used if market research indicates it is appropriate (see FAR 17.702–1(a)) and not prohibited by regulation or statute (see FAR 17.702–2, and FAR part 36).

The FAR identifies two types of procurements for which reverse auctions may not be used, regardless of dollar value:

a. Procurements for the design and construction of a public building, facility or work using the two-phase design-build selection procedures authorized by 10 U.S.C. 3241 and 41 U.S.C. 3309, as implemented at FAR part 36, may not be conducted using a reverse auction.

b. Procurements for architectural and engineering services subject to 40 U.S.C.

chapter 11, commonly known as the Brooks Architect Engineer Act, may not be awarded using reverse auctions because reverse auctions do not comply with the qualifications-based selection processes required by statute and implemented at FAR part 36.

D. FAR Part 35

The proposed rule would revise FAR part 35 to eliminate excessive acquisition regulations to stop the inefficient use of American taxpayer dollars through the removal of obsolete and non-statutory content not essential to sound procurement, and to simplify, clarify, and streamline the policies and procedures pertaining to research and development contracting. Several areas within existing FAR part 35 were extraneous or were addressed in multiple locations across the existing FAR, and therefore are proposed for removal. The following substantive changes are proposed to FAR part 35.

1. Clarity on Scope of Research and Development.

The proposed rule would include clarifying language on the purpose of research and development previously included in the FAR and information on the delivery of initial or additional items created as a result of such research and development.

2. Clarity on Use of Grants, Cooperative Agreements, and Other Transaction Authorities.

The proposed rule would include clarifying language on the types of agreements that may be issued in response to the selection of a proposal resulting from a research and development solicitation or Broad Agency Announcement. While the use of grants, cooperative agreements, and other transaction authority are not regulated by the FAR, a variety of solicitation types that may lead to such an agreement are regulated by the FAR (e.g., Broad Agency Announcements). Therefore, for the ease of decision of award medium for the contracting officer overseeing such a solicitation, the description of such agreements would be appropriate in the FAR.

3. Removing Preference for “Well-Established” Entities and Ambiguity with Publicizing Requirements in Part 5.

The proposed rule would remove language regarding providing solicitations to “only a reasonable number of responsible sources” and the requirement for agencies to “continually search for and develop information on sources competent to perform R&D work.” The preference for “well-established” entities conflicts with the full and open competition requirements of FAR part 6 and the solicitation

publicizing requirements in FAR parts 5 and 35. Continually searching for potential R&D sources is in an agency's best interest, and further incentivized via agency small business goals. Therefore, inclusion in the FAR is unnecessary.

4. Clarified applicability of FAR part 15.

The proposed rule would clarify that the general research and development evaluation procedures provided in FAR part 35 may be used alone, or in conjunction with the Broad Agency Announcement evaluation procedures at 35.102 or part 15 evaluation procedures. This clarification would allow contracting officers maximum flexibility depending on the type and complexity of research and development desired.

For example, if a Government requirement exists related to developing a specific system or hardware for a major system, FAR part 15 solicitation and evaluation procedures may be appropriate to use in tandem with FAR part 35. If a requirement is for basic and applied research directed toward advancing the state-of-the-art, and varying technical/scientific approaches

are reasonably expected to where no apples-to-apples comparison is possible, the Broad Agency Announcement technique provided in 35.102 may be appropriate to use on its own for flexibility in evaluation and agreement type.

E. FAR Part 52

Discussion and analysis for provisions and clauses updated in this rule.

Provisions and clauses associated with a particular FAR part are discussed within the relevant FAR part's analysis (e.g., proposed changes to FAR clause 52.216–7 are addressed at Discussion and Analysis section II.B.9).

Potential future provision and clause renumbering. As a result of the RFO, the FAR Council is considering establishing a new subpart in part 52 and relocating and renumbering all provisions and clauses under this new subpart. This means, if FAR subpart 52.4 was used, all provisions and clauses would begin with 52.4 instead of 52.2. The FAR Council welcomes comments on the potential impact of such a change on contractors, Government personnel, and other stakeholders.

III. Applicability to Contracts and Subcontracts Valued at or Below the Simplified Acquisition Threshold and for Commercial Products and Commercial Services

The following sections address the applicability of provisions and clauses prescribed in FAR parts 16, 17, and 35 to solicitations and contracts valued at or below the simplified acquisition threshold (SAT) and those for the acquisition of commercial products, commercially available off-the-shelf (COTS) items, and commercial services. Prescriptions for provisions and clauses in these parts have been updated to reflect applicability to commercial acquisitions.

This rule proposes to add the following new alternate clauses and provisions. These alternate clauses and provisions would hold the same applicability to solicitations and contracts valued at or below the simplified acquisition threshold (SAT) and those for the acquisition of commercial products, commercially available off-the-shelf (COTS) items, and commercial services, as the basic clauses and provisions.

Provision or clause	No.	Name	Prescription reference
Provision	52.216–1, Alt. I	Type of Contract, Alternate I	16.105.
Clause	52.216–22, Alt. I	Indefinite Quantity, Alternate I	16.605(e)(1).
Clause	52.216–22, Alt. II	Indefinite Quantity, Alternate II	16.605(e)(2).

A. Contracts and Subcontracts Valued at or Below the Simplified Acquisition Threshold

This proposed rule, if finalized, does not alter the prescriptions of provisions and clauses included in this proposed rule to change their applicability to contracts and subcontracts valued at or below the SAT.

B. Contracts and Subcontracts for Commercial Products, Commercially Available Off-the-Shelf Items, and Commercial Services

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial products and commercial services and gives the FAR Council the authority to determine to apply a law to contracts or subcontracts for the acquisition of commercial products and commercial services. 41 U.S.C. 1907 exempts contracts for commercially available off-the-shelf (COTS) items from certain provisions of law unless the Administrator for Federal Procurement Policy determines that

doing so would not be in the best interest of the Federal Government.

Section 839 of the John S. McCain NDAA for FY 2019 (Pub. L. 115–232) required the FAR Council and the Administrator of Federal Procurement Policy to review prior determinations under 41 U.S.C. 1906 and 41 U.S.C. 1907, as well as the applicability of provisions and clauses to contracts and subcontracts for commercial products, COTS items, and commercial services that do not implement statute or Executive order, and propose amendments to the FAR to eliminate or exempt such requirements from commercial acquisitions, unless there are specific reasons to retain particular requirements.

In accordance with section 839 of the NDAA for FY 2019 and their authorities under 41 U.S.C. 1906 and 1907, the FAR Council reviewed the applicability of the provisions and clauses associated with the FAR parts covered by this proposed rule.

The following table reflects the FAR Council and Administrator of Federal Procurement Policy's proposed determination regarding the applicability of the provisions and clauses to solicitations and contracts for commercial products, COTS items, and/or commercial services. In making proposed applicability determinations, the FAR Council considered factors such as whether the provision or clause advances national security or economic security, contributes to the resilience of contractors and subcontractors in the federal marketplace, or advances uniformity and clarity in the performance of basic functions that are essential to sound procurement.

Accordingly, this proposed rule, if finalized, would revise provision and clause prescriptions to clearly reflect applicability to commercial acquisitions as outlined in the table. An "X" in the following table indicates the provision or clause would apply to that category of commercial acquisition, as prescribed:

Provision/clause No.	Title	Commercial products	Commercial services	COTS items
52.216-1	Type of Contract	X	X	X
52.216-1 Alt I	Type of Contract	X	X	X
52.216-2	Economic Price Adjustment-Standard Supplies	X	X	X
52.216-3	Economic Price Adjustment-Semistandard Supplies	X	X	X
52.216-4	Economic Price Adjustment-Labor and Material	X	X	X
52.216-5	Price Redetermination-Prospective			
52.216-6	Price Redetermination-Retroactive			
52.216-7	Allowable Cost and Payment			
52.216-7 Alt I	Allowable Cost and Payment			
52.216-7 Alt II	Allowable Cost and Payment			
52.216-7 Alt III	Allowable Cost and Payment			
52.216-7 Alt IV	Allowable Cost and Payment			
52.216-8	Fixed Fee			
52.216-9	Fixed Fee-Construction			
52.216-10	Incentive Fee			
52.216-11	Cost Contract-No Fee			
52.216-11 Alt I	Cost Contract-No Fee			
52.216-12	Cost-Sharing Contract-No Fee			
52.216-12 Alt I	Cost-Sharing Contract-No Fee			
52.216-15	Predetermined Indirect Cost Rates			
52.216-16	Incentive Price Revision-Firm Target			
52.216-16 Alt I	Incentive Price Revision-Firm Target			
52.216-17	Incentive Price Revision-Successive Targets			
52.216-17 Alt I	Incentive Price Revision-Successive Targets			
52.216-18	Ordering	X	X	X
52.216-19	Order Limitations	X	X	X
52.216-20	Definite Quantity	X	X	X
52.216-21	Requirements	X	X	X
52.216-21 Alt I	Requirements	X	X	X
52.216-21 Alt II	Requirements	X	X	X
52.216-21 Alt III	Requirements	X	X	X
52.216-21 Alt IV	Requirements	X	X	X
52.216-22	Indefinite Quantity	X	X	X
52.216-22 Alt I	Indefinite Quantity	X	X	X
52.216-22 Alt II	Indefinite Quantity	X	X	X
52.216-23	Execution and Commencement of Work	X	X	X
52.216-24	Limitation of Government Liability	X	X	X
52.216-25	Contract Definitization	X	X	X
52.216-25 Alt. I	Contract Definitization	X	X	X
52.216-26	Payments of Allowable Costs Before Definitization			
52.216-27	Single or Multiple Awards	X	X	X
52.216-28	Multiple Awards for Advisory and Assistance Services		X	
52.216-29	Time-and-Materials/Labor-Hour Proposal Requirements—Other Than Commercial Acquisition With Adequate Price Competition.			
52.216-30	Time-and-Materials/Labor-Hour Proposal Requirements—Other Than Commercial Acquisition Without Adequate Price Competition.			
52.216-31	Time-and-Materials/Labor-Hour Proposal Requirements—Commercial Acquisition.	X	X	X
52.216-32	Task-Order and Delivery-Order Ombudsman	X	X	X
52.216-32 Alt. I	Task-Order and Delivery-Order Ombudsman	X	X	X
52.217-2	Cancellation Under Multiyear Contracts	X	X	X
52.217-3	Evaluation Exclusive of Options	X	X	X
52.217-4	Evaluation of Options Exercised at Time of Contract Award	X	X	X
52.217-5	Evaluation of Options	X	X	X
52.217-6	Option for Increased Quantity	X	X	X
52.217-7	Option for Increased Quantity-Separately Priced Line Item	X	X	X
52.217-8	Option to Extend	X	X	X
52.217-9	Option to Extend the Term of the Contract	X	X	X
52.217-10	Reverse Auction	X	X	X
52.217-11	Reverse Auction—Orders	X	X	X
52.217-12	Reverse Auction Services		X	

The FAR Council also reviewed subcontract flow down requirements in clauses associated with the FAR parts covered by this proposed rule. None of the clauses and provisions prescribed in FAR parts 16, 17, or 35 contain subcontract flow down requirements.

IV. Expected Impact of the Rule

A. Overview

The intended impact of the RFO, as stated in E.O. 14275, is to restore the Government's ability to "deliver on a timely basis the best value product or service to the customer, while

maintaining the public's trust and fulfilling public policy objectives." Each of the RFO rulemakings is designed to contribute to this impact by emphasizing mission first, by aligning acquisition activities directly to achieving the agency's overarching objectives and serving the public

interest and elevating the importance of fiscal responsibility. The proposed RFO rules focus on three goals in particular: (1) timely acquisition and delivery, (2) lower cost and accountability in all spending, and (3) increased competition.

Timeliness. Timely acquisition and delivery are essential for mission success. To this end, RFO rules propose to eliminate mandates that unnecessarily interfere with agency discretion to determine the best way to procure products and services. The proposed RFO rules highlight more clearly streamlined and simplified authorities that allow buyers to use their time more efficiently and are expected to reduce time between solicitation and award. The proposed RFO rules are expected to make it easier for contracting officers to leverage commercial practices that are familiar to the marketplace. This is expected to make it easier for sellers to engage and respond to Government solicitations more rapidly.

Lower cost. E.O. 14271, Ensuring Commercial, Cost-Effective Solutions in Federal Contracts (April 15, 2025), directs the Government to utilize, to the maximum extent practicable, the commercial marketplace and the innovations of private enterprise to provide better, more cost-effective services to taxpayers, as envisioned by the Federal Acquisition Streamlining Act. The procurement of custom products and services where a suitable or superior commercial solution would have fulfilled the Government's needs has resulted in avoidable waste to the detriment of American taxpayers.

To address these concerns, consistent with associated responsibilities in section 839 of the John S. McCain NDAA for FY 2019 (Pub. L. 115–232), the FAR Council reviewed prescriptions for provisions and clauses to ensure all prescriptions are clear regarding their applicability to acquisitions for commercial products and services. Currently, many prescriptions do not specify applicability to commercial acquisitions and leave the applicability determination to contracting officer interpretation. By specifically stating when a provision or clause can be applied to commercial acquisitions, proposed RFO rules should decrease the likelihood of inclusion of provisions and clauses in commercial acquisitions that are not required by law and drive greater consistency in the terms and conditions used in these contracts. In turn, these changes should increase the participation of commercial sellers, who are unwilling or unable to manage the cost of complying with noncommercial

requirements, and also improve taxpayer access to affordable commercial solutions.

Some RFO rules propose to delete requirements placed on commercial or noncommercial sellers that are not related to performance of the contract, drive up cost without attendant performance benefits, and may misdirect efforts away from innovation, investment and economic growth. Greater emphasis on timeliness should reduce bidders' carrying costs, enabling them to pass those savings on to customers through lower prices.

Increased competition. Since enactment of the Competition in Contracting Act of 1984 (Title VII of Pub. L. 98–369), competition has been the cornerstone of the Federal acquisition system. The benefits of competition are well established: competition saves money for the taxpayer, improves contractor performance, curbs fraud, and promotes accountability for results. Competition also drives contractor resilience and positions the U.S. market to develop a strategic advantage for the nation.

According to data in the SAM Contract Award Management, roughly 45 percent of contract dollars were awarded in FY 2025 either without competition or with competition that received only one offer. Of equal concern, the Federal marketplace has seen a significant decline over the past 20 years in the number of businesses—especially small businesses—participating in the Federal supplier base. Studies suggest that high compliance costs lead to the misallocation of resources away from more profitable activities and discourage innovation, investment, and economic growth (Council of Economic Advisers, Executive Office of the President, June 2025, *The Economic Benefits of Current Deregulatory Policies*, <https://www.whitehouse.gov/wp-content/uploads/2025/03/The-Economic-Benefits-of-Current-Deregulatory-Efforts.pdf>). This may shelter incumbent contractors and stifle competition, reducing startup activity and job formation.

The RFO rules seek to increase participation in agency competitions and the resilience of the Federal supplier base, which includes commercial entities, small businesses, manufacturers, and nontraditional suppliers. The RFO will achieve this outcome by removing regulatory mandates that are not rooted in statute or essential to sound procurement, promoting greater reliance on practices that reduce transaction costs, and improving the quality of

communications with offerors and potential offerors. Access to a broader range of solutions in a more dynamic marketplace will drive better return for each taxpayer dollar spent and increase taxpayer confidence in the Federal acquisition system.

B. Impact of Rule

The Government has conducted a regulatory impact analysis (RIA) for the RFO rulemaking inclusive of this proposed rule for FAR parts 16, 17, and 35. The RIA includes a discussion of the anticipated effects of the rulemakings as follows:

1. FAR Part 16.

This proposed rule would implement revisions to FAR part 16, Types of Contracts, that are expected to have a significant positive impact on both industry and the Government. These changes are intended to benefit and reduce burden on both Government and contractors.

1.1 Shift from Restrictive to Permissive Framework in Contract Type Selection.

The proposed rule would shift the guiding principles on contract type selection from a restrictive to a permissive framework, consistent with 10 U.S.C. 3321 and 41 U.S.C. 3901. This change would allow agencies to more easily utilize contract types not explicitly mentioned in the FAR and allow for better congruence with commercial practices if the contract type promotes the best interest of the Government and is not expressly prohibited by statute.

This change would reduce Government burden by reducing the number of deviations and associated reviews sought. This change would reduce the burden on contractors by allowing the Government to utilize the same contract types used in the private sector.

1.2 Firm-Fixed Price Contracts on a Consumption Basis.

The proposed rule would include new paragraph 16.202–2(b), Consumption basis, and new section 16.202–3, Required content. The inclusion of this paragraph and section would clarify that the use of fixed-price units on a consumption basis is a type of firm-fixed-price contract type. The proposed rule would revise the FAR in conformance with section 1825 of the NDAA for FY 2026 (Pub. L. 119–60), which required the Department of Defense to implement procurement policies relevant to consumption-based solutions, to ensure consistent application across the Government.

The inclusion of consumption-based solutions supports agencies when using this common commercial practice for procuring a variety of supplies and services, including but not limited to cloud computing capacity. This change would reduce Government burden by reducing the number of deviations and associated reviews sought, and seeks to reduce the burden on contractors by allowing for the use of the same contract types used in the private sector.

1.3 On-ramps and Off-ramps under Multiple-Award Contracts.

The proposed rule includes policies and procedures related to “on-ramping” (adding new contractors) and “off-ramping” (removing contractors) from a multiple-award contract to maintain a current, competitive, and innovative pool of vendors. New Alternates I and II to provision 52.216–22, Indefinite Quantity, are included to provide for off-ramps with various cancellation policies.

This change is expected to benefit the Government through ensuring continued competition throughout the life of a multiple-award contract and through cost savings in reducing the payment of minimums for awardees who choose not to engage in order competitions under the multiple-award contract. This is expected to benefit contractors in allowing for the ability to propose to enter existing indefinite delivery vehicles, and to choose to exit multiple-award contracts to avoid administrative expenses without the use of termination procedures or costly negotiations.

1.4 Inclusion of Blanket Purchase Agreements (BPAs) under Multiple-Award Contracts.

The proposed rule includes the policies and procedures to issue and use BPAs under multiple-award contracts, similar to those permitted under the Federal Supply Schedules. BPAs are anticipated to facilitate strategic demand management, especially for IT, professional services, and recurring operational support. BPAs would allow for concentrated competition amongst vendors with relevant capabilities and aligned pricing models, resulting in higher-quality proposals and better mission outcomes. Agencies may create small business BPAs to support sustained participation of small business vendors.

This change is expected to benefit the Government in encouraging use of existing multi-award contracts by reducing transaction costs for repetitive buys through the use of pre-priced supplies or services, allowing agencies to move faster without sacrificing competition. This rule would reduce

administrative burden for contractors and Government, by removing the need for repetitive order solicitations, duplicative evaluations, and duplicative documentation.

Because prices for out-years or additional items can be set competitively in the initial issuance of a BPA, this rule is expected to benefit contractors in increased utilization of existing multi-award contracts and reduced proposal costs for new orders and sole-source modifications. Vendors under BPAs know to expect recurring opportunities, allowing agencies to recognize cost savings through ceiling rates and volume-based or tiered pricing.

1.5 Significant Reorganization of Ordering Procedures for Task-Order Contracts and Delivery-Order Contracts.

The rule would reorganize the postaward ordering placement into two sections: 16.606, which is applicable to all task-order contracts and delivery-order contracts, regardless of the number of awardees, and 16.607, which is applicable to multiple-award contracts only. Section 16.607 would provide tailored procedures based on dollar thresholds—including micro-purchase rules and fair-opportunity requirements—and reinforces the contracting officer’s discretion in order placement procedures. By encouraging innovation and customized acquisition strategies, these improvements would strengthen competition and allow more tailored ordering solutions.

These changes are expected to benefit both the Government and contractors with clear requirements, shorter order solicitations, streamlined comparisons instead of traditional Part 15-adjacent source selections, and the potential to reduce proposal costs through the use of task and delivery order solicitations that only require information needed to make an informed selection decision.

1.6 Inclusion of FAR Case 2020–005, Explanations to Unsuccessful Offerors on Certain Orders Under Task-Order Contracts and Delivery-Order Contracts (88 FR 53855).

To align with section 874 of the FY2020 NDAA, the rule would require agencies to send brief written explanations upon request to contractors who competed but did not win task or delivery orders valued between the SAT and \$7.5 million. This change would bolster transparency, giving industry insight into evaluation results and helping them refine future proposals and ensuring consistency and fairness in feedback delivery.

1.7 Streamlining of 52.216–7, Allowable Cost and Payment.

The proposed rule would remove a number of required items for an adequate indirect cost proposal in clause 52.216–7, Allowable Cost and Payment, paragraph (d)(2)(iii). The removal of these items would reduce the amount of information required from contractors for an incurred cost audit submission, and would therefore provide a reduction in the time required for contract closeout and impact settlement agreements. Less information required from the contractors would reduce the time the Government requires to analyze this information.

2. Part 17.

This proposed rule would implement revisions to FAR Part 17, Special Contracting Methods, that are expected to have a positive impact and reduce burden on both industry and the Government.

2.1 Removal of the General Five-Year Limitation on Contract Duration.

The proposed rule would replace the non-statutory five-year limitation on contract duration for all contracts previously included at 17.204(e) with a requirement to “follow any statutory or regulatory limits on contract duration.” This removal would allow agencies to more easily align contract structure with mission realities, allowing for contracts to be re-competed when performance demands versus an arbitrary calendar. For those actions not restricted by statute or regulation, duration would be a business judgement based on what best supports mission outcomes, competition, and value.

For the Government, contract durations based on mission needs instead of an arbitrary, unrelated timeline would result in more realistic acquisition strategies, fewer workaround structures, and better mission continuity. Competition is still a motivator for positive performance, either for future solicitations or for orders under multiple-award contracts or blanket purchase agreements.

This change would allow for contractors to spread startup costs over longer periods, capture lifecycle savings, and avoid paying repeatedly for “year one” inefficiencies, providing for an overall lower total cost of projects. Framing contract duration based on mission needs instead of an arbitrary five-year limitation would reduce the burden of too-frequent competition, including the acquisition resources, proposal costs, and performance risk associated, allowing teams to focus on mission delivery. Realistic contract durations based on mission needs would allow contractors to invest in workforce development, process

improvement, and price more rationally to create value over the long term. By reducing the competition cycle, this change would help to alleviate contractor workforce attrition and the associated knowledge and morale loss.

2.2 Modernize Option for Increased Quantity Clauses to Apply to Both Services and Supplies.

The proposed rule would provide contracting officers with a corresponding policy to allow the use of FAR clause 52.217–6, Option for Increased Quantity, and 52.217–7, Option for Increased Quantity—Separately Priced Line Item, when procuring additional quantities of supplies or services during a contract's performance period. These clauses were previously only applicable to supplies.

The use of these clauses for services would enable the initial competition to reflect the anticipated reality of the mission instead of having to react to it. The inclusion of such a clause during initial competition of the contract would allow for the prices included for such surge requirements to be determined on the basis of competition, rather than negotiated as a sole-source modification during contract administration.

This rule is expected to benefit the Government and contractors in allowing for competitively priced volume-based or tiered pricing for additional services, resulting in lower total cost and administrative burden.

This rule would reduce acquisition time and costs associated with seeking a deviation or drafting of acquisition-unique clauses for such an effort, which has been a common practice across the Government. The cost and lead time associated with exercising an option for increased quantity is significantly lower than that of issuing a sole-source modification or engaging in a competition for a new award of the same items. This rule therefore eliminates redundant solicitations, reduces the review cycle, and allows for more meaningful competition reflective of the anticipated future need.

For contractors, this rule is expected to provide visibility into potential future requirements and a clear ceiling for additional work, allowing for better planning and more accurate forecasting. These elements would result in lower bid and proposal costs because neither a new competition nor a sole-source modification would be required.

2.3 Modernize Option to Extend Services to Apply to Services and Supplies.

The proposed rule would allow for the use of clause 52.217–8, Option to Extend Services, renamed Option to

Extend, in task-order contracts and delivery-order contracts for requirements other than services. This clause allows for the Government to continue to utilize an existing contract for up to six months at the current rate. Applicability of this clause was previously limited to only service contracts.

This change would allow the Government to plan for necessary extensions to existing contracts at the same price due to complex transitions, slipped awards, delayed appropriations, and protests. The use of this clause would prevent the loss of leverage and unfavorable terms often experienced in last-minute negotiations for critical needs.

This change would allow for reduced acquisition time and costs associated with negotiating a sole-source modification or engaging in a competition for a new award for the same items. This change therefore is expected to eliminate redundant solicitations and reduce the review cycle, allowing the Government and the contractor to focus on the mission and not expensive and time-intensive proposals and negotiations.

2.4 Addition of Language on Handling of Expiring Contracts During a Lapse in Appropriations.

The proposed rule would include a new paragraph in clauses 52.217–8, Option to Extend Services, renamed Option to Extend, and 52.217–9, Option to Extend the Term of Contract, to allow for the Government and contractor to toll or delay the option exercise time period up to 30 days after the resumption of Government operations in the event the period to exercise the option ends during a lapse in appropriations.

The addition of this paragraph would allow for a more expedient return to operations and allow for reduced transaction costs as a result of a Government shutdown for both the Government and contractors. This change would allow for reduced acquisition time and costs associated with negotiating a sole-source contract or engaging in a competition for a new award due to contracts with actionable option periods ending during a lapse in appropriations.

For the Government, this change would reduce the risk of lapses of critical supplies or services and prevent the loss of leverage and unfavorable terms often experienced in last-minute negotiations for critical needs. This change is expected to reduce future urgent solicitations and the associated review cycle, allowing the Government and the contractor to focus on the

mission and not expensive and time-intensive proposals and negotiations.

2.5 Changes to Management and Operating Contracts.

The proposed rule would remove language regarding competition and reviews of contractor performance for Management and Operating contracts. Removal of this non-statutory language would reduce confusion and emphasize the use of competition in accordance with the Competition in Contract Act of 1984. This is expected to benefit the Government, as competition is the main driver of price reasonableness. This is expected to benefit potential contractors, as well—providing space to compete long-held sole-source contracts.

2.6 Incorporation of FAR Case 2023–0003, Prohibition on the Use of Reverse Auctions for Complex, Specialized, or Substantial Design and Construction Services (89 FR 70157).

The proposed rule would amend the FAR to implement section 2 of the Construction Consensus Procurement Improvement Act of 2021 (Pub. L. 117–28). This proposed change is not expected to have a significant impact on the public or the Government because the rulemaking does not supersede current statutory direction on the use of FAR part 36 procedures for construction. Contracting officers would still be required to conduct market research to determine the most appropriate contracting method for the particular procurement. Requirements for sealed bidding, design-build construction, and architect-engineering services would remain unchanged.

Offerors participating in competitive procurements that are valued at or below the SAT would still be provided advance notices and solicitations in accordance with FAR 36.211 and for actions anticipated to be awarded to a small business, 15 U.S.C. 644(w). Use of a reverse auction as the method of obtaining pricing would not impact these requirements.

3. Part 35 Research and Development.

This proposed rule would implement revisions to FAR part 35, Research and Development Contracting, that are not expected to have a significant impact on contractors, subcontractors, or the Government. The proposed changes to FAR part 35 are primarily removal of superfluous information and clarification of existing policies.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is

necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Executive Order 14192

This rule is subject to E.O. 14192, Unleashing Prosperity Through Deregulation. This proposed rule, if finalized as proposed, is anticipated to be an E.O. 14192 deregulatory action. See discussion in the “Expected Impact of the Rule” section of this preamble.

VII. Regulatory Flexibility Act

This proposed rule, if finalized, may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612. However, an Initial Regulatory Flexibility Analysis (IRFA) is as follows:

1. Reasons for the action.

Executive Order (E.O.) 14275, Restoring Common Sense to Federal Procurement, directs the elimination of excessive acquisition regulations to stop the inefficient use of American taxpayer dollars. The E.O. directs the first comprehensive end-to-end overhaul of the FAR in its 40-year history. The E.O. establishes the policy that the FAR should “contain only provisions that are required by statute or that are otherwise necessary to support simplicity and usability, strengthen the efficacy of the procurement system, or protect economic or national security interests.” In response to E.O. 14275, the Office of Management and Budget issued memorandum M–25–26, Overhauling the Federal Acquisition Regulation. The Memo directed the FAR Council to complete a “revolutionary overhaul” of the FAR. Therefore, the FAR Council is issuing twelve proposed rules that collectively, if finalized, will streamline the FAR in its entirety.

2. Objectives of, and legal basis for, the rule.

The revolutionary FAR overhaul (RFO) rewrite represents a paradigm shift in Federal acquisition. It emphasizes streamlining, clarity, and accessibility, while ensuring that the regulation focuses only on statutory mandates and foundational procurement principles. The RFO is designed to simplify compliance for contracting professionals, improve acquisition speed and agility, and reinforce mission outcomes over process formalities.

The basis for the RFO is E.O. 14275. The authority for promulgation of the FAR is 41 U.S.C. 1121(b); 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy

provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

3. Description of and an estimate of the number of small entities to which the rule will apply.

All small entities who want to contract with the Federal Government will have to familiarize themselves with the reorganized, streamlined, and revised FAR, including the content of this rulemaking. As of January 2026, there are 401,196 entities registered in the System for Award Management (SAM) that were small for at least one North American Industry Classification System (NAICS) code they had selected.

Proposed revisions to FAR parts 16, 17, and 35, and associated changes in FAR part 52, apply broadly to all Federal offerors and contractors, including small businesses across all sectors.

This proposed rule may have a positive impact on small entities by simplifying and streamlining acquisition regulations. Because these changes do not impose new reporting, recordkeeping, or compliance obligations on contractors, including small entities, and do not require changes to internal systems, ethics programs, or business practices, they are not expected to result in additional costs. Accordingly, the proposed revisions to FAR parts 16, 17, and 35 and associated changes in FAR part 52 do not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the rule.

This proposed rule does not create any new reporting, recordkeeping, or other compliance requirements. Instead, this proposed rule, if finalized, would reduce the following existing reporting requirements.

a. Clause 52.216–7, Allowable Cost and Payment, (d)(2)(iii) would be edited to reduce the required data to be submitted to support an adequate indirect cost rate proposal. For more information about the changes to reporting requirements, see section VIII of this notice.

b. Clause 52.216–15, Predetermined Indirect Cost Rates. This clause repeats the requirement in the clause at FAR 52.216–7, paragraph (d), for the contractor to submit an adequate final indirect cost rate proposal, and therefore the same expected reduction in reporting requirements.

5. Relevant Federal rules which may duplicate, overlap, or conflict with the rule.

The proposed rule, if finalized, would not duplicate, overlap, or conflict with other Federal rules.

6. Description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes, and which minimize any significant economic impact of the rule on small entities.

The FAR Council has not, at this stage, identified any significant alternatives that would minimize the impact of the rule on small entities while also implementing the requirements of E.O. 14275. The FAR Council will consider any significant alternatives identified by commenters for the final rule.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. The FAR Council invites comments from small business concerns and other interested parties on the expected impact of this proposed rule on small entities.

The FAR Council will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite “5 U.S.C. 610 (FAR Case 2026–006)” in correspondence.

VIII. Paperwork Reduction Act

This rule includes information collections under the Paperwork Reduction Act (44 U.S.C. 3501–3521). Following are the specific collections associated with each FAR part in this rule as previously approved by OMB followed by how each collection would be affected by the proposed rule. If a FAR part is not listed below, then there are no information collections associated with the part.

A. FAR Part 16

1. OMB Control No. 9000–0067, *Certain Federal Acquisition Regulation Part 16 Contract Pricing Requirements—FAR Sections Affected: 52.216–2, 52.216–3, 52.216–4, 52.216–5, 52.216–6, 52.216–16, and 52.216–17.*

The changes under this proposed rule, if finalized, would not affect the information collection or the paperwork burden previously approved by OMB. The collection would remain unchanged.

2. OMB Control No. 9000–0069, *Indirect Cost Rate Proposals, Payments to Small Business Subcontractors, and Bankruptcy Notifications—FAR Sections Affected: 52.216–7, 52.216–15, 52.242–4, 52.242–5 and 52.242–13.*

The changes under this proposed rule, if finalized, would revise this information collection and the paperwork burden previously approved by OMB.

a. Clause 52.216–7, Allowable Cost and Payment, (d)(2)(iii) has been edited to reduce the required data to be submitted to support an adequate indirect cost rate proposal.

Paragraph (j), Subcontract Information, is now limited to only those subcontracts with a value exceeding the threshold for requiring certified cost or pricing data as prescribed in FAR 15.403–3.

The detailed information previously required by paragraph (k) for time-and-materials and labor-hour contracts such as labor rates, labor hours, and other detailed costs elements was removed and relocates only the summary level information to paragraph (h).

Paragraph (l), which required submission of reconciliation of total payroll per IRS form 941 to total labor costs distribution, is removed in its entirety.

The information previously required by paragraph (o) for contracts physically completed in this fiscal year has been relocated to paragraph (h) and is limited to level-of-effort information, contract ceiling amount, and an indication of whether the contract is ready to close. Contract fee computations are no longer required.

The proposed changes are expected to decrease the overall burden related to the preparation and submission of incurred costs proposals and streamline the initial determination adequacy. Contractors will spend less time preparing the submission and estimate 10 percent based on the statements from Industry in their response to OIRA's Request for Information (RFI) for burden reduction suggestion. In addition, contractors and Government will spend less time reviewing and discussing information that provide little value to the initial adequacy determination. These changes will promote efficiency in the setting of final indirect cost rates.

b. Clause 52.216–15, Predetermined Indirect Cost Rates, repeats the requirement in the clause at FAR 52.216–7, paragraph (d), for the contractor to submit an adequate final indirect cost rate proposal, however it does not impose any additional reporting requirements.

c. The revised annual burden is estimated as follows:

Respondents/Recordkeepers: 6,265.

Total Annual Responses: 6,265.

Total Burden Hours: 1,353,807.

B. Comments Regarding Paperwork Burden

The FAR Council will publish a separate first notice in accordance with the Paperwork Reduction Act seeking comments on the changes to the collections of information affected by this proposed rule.

IX. Severability

If any portion (e.g., section, clause, sentence) of this rule is held to be invalid or unenforceable facially, or as applied to any entity or circumstance, it shall be severable from the remainder of this rule, and shall not affect the remainder thereof, or its application to

entities not similarly situated or to other dissimilar circumstances. The various portions of this rule are independent and serve distinct purposes. Even if one aspect were rendered invalid, the other benefits of the rule would still be applicable.

List of Subjects in 48 CFR Parts 16, 17, 35, and 52

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, OFPP, DoD, GSA, and NASA propose amending 48 CFR parts 16, 17, 35, and 52 as set forth below:

■ 1. Revise parts 16, 17, and 35 to read as follows:

PART 16—TYPES OF CONTRACTS

Sec.

16.000 Scope of part.

16.001 Definitions.

Subpart 16.1—Selecting Contract Types

16.101 Policies.

16.102 Negotiating contract type.

16.103 Documenting contract type.

16.104 Executive Order 14402 justification for covered contracts and orders.

16.105 Solicitation provision.

Subpart 16.2—Fixed-Price Contracts

16.201 General.

16.202 Firm-fixed-price contracts.

16.202–1 Description.

16.202–2 Application.

16.202–3 Required content.

16.203 Fixed-price contracts with economic price adjustment.

16.203–1 Description.

16.203–2 Application.

16.203–3 Limitations.

16.203–4 Contract clauses.

16.204 Fixed-price contracts with prospective price redetermination.

16.204–1 Description.

16.204–2 Application.

16.204–3 Limitations.

16.204–4 Contract clause.

16.205 Fixed-ceiling-price contracts with retroactive price redetermination.

16.205–1 Description.

16.205–2 Application.

16.205–3 Limitations.

16.205–4 Contract clause.

16.206 Firm-fixed-price, level-of-effort term contracts.

16.206–1 Description.

16.206–2 Application.

16.206–3 Limitations.

Subpart 16.3—Cost-Reimbursement Contracts

16.301 General.

16.301–1 Description.

16.301–2 Application.

16.301–3 Limitations.

16.302 Cost contracts.

16.303 Cost-sharing contracts.

16.304 Cost-plus-fixed-fee contracts.

16.304–1 Description.

16.304–2 Limitations.

16.304–3 Completion and term forms.

16.305 Contract clauses.

Subpart 16.4—Incentive Contracts

16.401 General.

16.401–1 Description.

16.401–2 Limitations.

16.401–3 Collection and analysis of fee data.

16.401–4 Incentive strategy best practices.

16.402 Award-fee.

16.402–1 Application.

16.402–2 Limitations.

16.402–3 Fixed-price contracts with award fees.

16.402–4 Cost-plus-award-fee contracts.

16.403 Application of predetermined, formula-type incentives.

16.403–1 Cost incentives.

16.403–2 Performance incentives.

16.403–3 Delivery incentives.

16.403–4 Structuring multiple-incentive contracts.

16.404 Fixed-price cost incentive contracts.

16.404–1 Fixed-price cost incentive (firm target) contracts.

16.404–2 Fixed-price cost incentive (successive targets) contracts.

16.405 Cost-plus-incentive-fee contracts.

16.406 Contract clauses.

Subpart 16.5—Time-and-Materials and Labor-Hour Contracts

16.500 Scope.

16.501 Time-and-materials contracts.

16.501–1 Description.

16.501–2 Application.

16.501–3 Limitations.

16.501–4 Solicitation provisions.

16.501–5 Postaward requirements.

16.502 Labor-hour contracts.

Subpart 16.6—Indefinite-Delivery Contracts

16.600 Scope.

16.601 General.

16.601–1 Definitions.

16.601–2 Policies.

16.602 Definite-quantity contracts.

16.602–1 Description.

16.602–2 Application.

16.603 Requirements contracts.

16.603–1 Description.

16.603–2 Application.

16.603–3 Limitations.

16.603–4 Required content.

16.604 Indefinite-quantity contracts.

16.604–1 Description.

16.604–2 Application.

16.604–3 Multiple award preference.

16.604–4 On-ramps and off-ramps.

16.604–5 Required content.

16.605 Solicitation provisions and contract clauses.

16.606 Postaward procedures for placement of task and delivery orders.

16.607 Additional ordering procedures for multiple-award contracts.

16.607–1 Placement of orders valued at or below the micro-purchase threshold.

16.607–2 Fair opportunity procedures.

16.607–3 Orders exceeding the micro-purchase threshold but not more than the SAT.

16.607–4 Orders exceeding the SAT but not more than \$7.5 million.

- 16.607–5 Orders exceeding \$7.5 million.
- 16.607–6 Exceptions to fair opportunity.
- 16.607–7 Items peculiar to one manufacturer.
- 16.608 Protests of orders.

Subpart 16.7—Letter Contracts

- 16.701 Description.
- 16.702 Application.
- 16.703 Limitations.
- 16.704 Contract clauses.

Subpart 16.8—Agreements

- 16.801 Scope.
- 16.802 Basic agreements.
 - 16.802–1 Description.
 - 16.802–2 Application.
 - 16.802–3 Limitations.
- 16.803 Basic ordering agreements.
 - 16.803–1 Description.
 - 16.803–2 Application.
 - 16.803–3 Limitations.

Authority: 41 U.S.C. 1121(b); 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

16.000 Scope of part.

This part prescribes policies and procedures for selecting contract type(s) appropriate to the circumstances of the acquisition. Except for limited instructions regarding the placement of task and delivery orders, the entirety of this part applies to the pre-solicitation phase and is meant to guide acquisition planning.

16.001 Definitions.

As used in this part—

Award-Fee Board means the team of individuals identified in the award-fee plan who have been designated to assist the Fee-Determining Official in making award-fee determinations.

Consumption-based solution means a model under which a service is provided to the Government and may utilize any combination of software, hardware or equipment, data, and labor or services that provides a capability that is metered and billed based on actual usage at fixed-price units.

Established price means a price that—

(1) Is an established catalog or market price for a commercial product or commercial service sold in substantial quantities to the general public; and

(2) Is the net price after applying any standard trade discounts offered by the contractor.

Fee-Determining Official means the designated agency official(s) who reviews the recommendations of the Award-Fee Board in determining the amount of award fee to be earned by the contractor for each evaluation period.

Rollover of unearned award fee means the process of transferring unearned award fee, which the contractor had an opportunity to earn, from one

evaluation period to a subsequent evaluation period, thus allowing the contractor an additional opportunity to earn that previously unearned award fee.

Subpart 16.1—Selecting Contract Types

16.101 Policies.

(a) Unless expressly prohibited by statute or this regulation, contract types that promote the best interests of the Government, but are not described in this regulation, are permitted for use in accordance with agency procedures (see 10 U.S.C. 3321(a) and 41 U.S.C. 3901). Ensure selection of contract type is consistent with the Guiding Principles for the System in 1.102.

(b) Do not use a cost-plus-a-percentage-of-cost system of contracting (see 10 U.S.C. 3322(a) and 41 U.S.C. 3905(a)).

(c) Prime contracts (including letter contracts) other than firm-fixed-price contracts must, by an appropriate clause, prohibit cost-plus-a-percentage-of-cost subcontracts (see clauses prescribed in part 44 for cost-reimbursement contracts and part 16 for fixed-price contracts).

16.102 Negotiating contract type.

(a)(1) Selecting the contract type is generally a matter for negotiation and requires the exercise of sound judgment. Consider contract terms, risks (e.g., technical, performance, delivery), and pricing.

(2) Contracting officers may instruct offerors in the solicitation to propose an alternative contract type within their response to the solicitation.

(b) Fixed-price contract types are the default and preferred contract types. If a fixed-price contract type is not appropriate for an entire contract, consider whether a portion of the contract can be established on a fixed-price basis.

(c) Use a firm-fixed-price contract (see section 16.202) when the risk involved is minimal or can be predicted with an acceptable degree of certainty. However, when a reasonable basis for firm pricing does not exist, consider other contract types and negotiate a contract type (or combination of types) that will appropriately tie profit to contractor performance.

(d) In the course of an acquisition program, a series of contracts, or a single long-term contract, changing circumstances may necessitate different contract types than those used initially. Contracting officers should avoid extended use of a cost-reimbursement or time-and-materials contract after

experience provides a basis for firmer pricing.

16.103 Documenting contract type.

(a) Except as identified in paragraph (b) of this section, document and explain in the acquisition plan, or in the contract file if a written acquisition plan is not required by agency procedures—

(1) Why the contract type selected must be used to meet the agency's needs. For other than fixed-price contracts, discuss—

(i) An analysis of why the use of other than a fixed-price contract (e.g., cost reimbursement, time-and-materials, labor hour, innovative contract type) is appropriate;

(ii) Rationale that details specific facts and circumstances (e.g., lack of incentive to control costs, complexity of the requirements, uncertain work duration, contractor's technical capability and financial responsibility, or adequacy of the contractor's accounting system), and associated reasoning essential to support the contract type selection;

(2) The Government's risks and the burden to manage the contract type selected. As applicable, discuss—

(i) How the Government identified the risks (e.g., pre-award survey, or past performance information);

(ii) The nature of the risks (e.g., inadequate contractor's accounting system, weaknesses in contractor's internal control, non-compliance with Cost Accounting Standards, or lack of or inadequate earned value management system); and

(iii) How the Government will manage and mitigate the risks;

(3) An assessment of whether Government resources are adequate to properly plan for, award, and administer the contract type selected (e.g., resources needed and the additional risks to the Government if adequate resources are not provided);

(4) Why a level-of-effort, price redetermination, or fee provision was included; and

(5) For other than a fixed-price contract, a discussion of planned actions to minimize the use of other than fixed-price contracts on future acquisitions for the same requirement and to transition to fixed-price contracts to the maximum extent practicable.

(b) Documentation of contract type is not required for the following:

(1) Fixed-price acquisitions made under simplified acquisition procedures.

(2) Contracts on a firm-fixed-price basis (see section 16.202) other than those for major systems or research and development.

16.104 Executive Order 14402 justification for covered contracts and orders.

(a) *Definition.* As used in this section, *covered contract or order* means a contract or order that is—

- (1) Other than fixed-price;
- (2) Firm-fixed-price, level-of-effort term; or
- (3) A hybrid contract that includes one or more elements described in paragraphs (1) and (2).

(b) *Policy.* This section implements Executive Order 14402, Promoting Efficiency, Accountability, and Performance in Federal Contracting, April 30, 2026. The head of the agency must approve a written justification described in paragraph (d) of this section prior to using a covered contract or order.

(c) *Application.* (1) *Thresholds.* Unless an exception in paragraph (e) of this section applies, a justification is required for covered contracts and orders valued at or above—

- (i) \$100 million, for DoD;
- (ii) \$35 million, for NASA;
- (iii) \$25 million, for Department of Homeland Security; or
- (iv) \$10 million, for all other Federal agencies.

(2) *Hybrid contracts or orders.* A hybrid contract or order is a covered contract or order when the value of the other than fixed-price or firm-fixed-price, level-of-effort term portion meets or exceeds the thresholds.

(3) *Single-award indefinite-delivery contracts.* A single-award indefinite-delivery contract (IDC) is a covered contract if the estimated total value of the known and forecasted covered orders meets or exceeds the thresholds. Use the contract ceiling price if the contract only allows for covered orders.

(4) *Blanket purchase agreements.* The head of the agency decides whether the justification requirement applies when the blanket purchase agreement (BPA) is awarded, or when each order under the BPA is placed.

(5) *Duration of a justification.* An approved justification is valid for the duration of the contract or order.

(d) *Procedures.* (1) Submit to the head of the agency the required justification for approval that includes—

- (i) The information in section 16.103; and
- (ii) Any determination and findings required for the contract type (see 12.104(b)(1), 16.401–2, 16.501–3).

(2) The head of the agency may only delegate the justification approval to the chief acquisition officer of the agency or another non-career official in the Senior Executive Service within the agency.

(e) *Exceptions.* The justification requirement does not apply to—

(1) Multiple-award contracts. However, the justification requirement does apply to task orders, delivery orders, and BPAs under those contracts;

(2) Contracts in support of a response to an emergency, major disaster, or contingency operation;

(3) Research and development contracts or orders (see part 35); or

(4) Pre-production development for a major system acquisition (see part 34).

16.105 Solicitation provision.

The contracting officer may complete and insert the provision at 52.216–1, Type of Contract, in a solicitation, including those for commercial products and commercial services. When the solicitation provides the opportunity for an offeror to propose an alternative contract type, use the provision with its Alternate I.

Subpart 16.2—Fixed-Price Contracts**16.201 General.**

(a) Fixed-price types of contracts provide for a firm price or, in certain cases, an adjustable price. Fixed-price contracts with adjustable prices may include a ceiling price, a target price (including target cost), or both. Unless otherwise specified in the contract, the ceiling price or target price may only be adjusted through contract clauses that provide for equitable adjustment or other revision of the contract price under stated circumstances.

(b) Use firm-fixed-price or fixed-price with economic price adjustment contracts when acquiring commercial products and commercial services, except as provided in 12.104.

(c) Time-and-materials contracts and labor-hour contracts are not fixed-price contracts.

16.202 Firm-fixed-price contracts.**16.202–1 Description.**

(a) *General.* A firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor's experience in performing the contract.

(b) *Incentives.* The contracting officer may use a firm-fixed-price contract in conjunction with an award-fee incentive (see 16.402) and performance or delivery incentives (see 16.403–2 and 16.403–3) when the award fee or incentive is based solely on factors other than cost. The contract type remains firm-fixed-price when used with these incentives.

16.202–2 Application.

(a) *General.* A firm-fixed-price contract is suitable for acquiring supplies or services on the basis of

clearly defined functional or detailed specifications (see part 11) when the contracting officer can establish fair and reasonable prices at the outset.

(b) *Consumption basis.* Contracting officers may acquire consumption-based solutions where supplies and services are capable of being metered and billed based on actual usage as fixed-price units.

16.202–3 Required content.

When acquiring on a consumption basis, the contract must include the following:

(a) Predetermined pricing at fixed-price units. The contractor may offer volume discounts or other equitable adjustments to the unit price(s) without changing the contract type.

(b) A guaranteed minimum, a ceiling, and fiscal controls limiting the agency's obligation to the obligated funding identified in the contract (see part 32).

(c) A requirement for the contractor to notify the contracting officer when the Government has used 75 percent and 90 percent of the funded amount, respectively, of the contract.

16.203 Fixed-price contracts with economic price adjustment.**16.203–1 Description.**

(a) A fixed-price contract with economic price adjustment provides for upward and downward revision of the stated contract price when specific events occur. Economic price adjustments are of three general types:

(1) Adjustments based on established prices. These price adjustments are based on increases or decreases from an agreed-upon level in published or established prices of specific items or the contract end items.

(2) Adjustments based on actual costs of labor or material. These price adjustments are based on increases or decreases in specified costs of labor or material that the contractor actually experiences during contract performance.

(3) Adjustments based on cost indexes of labor or material. These price adjustments are based on increases or decreases in labor or material cost standards or indexes that are specifically identified in the contract.

(b) The contracting officer may use a fixed-price contract with economic price adjustment in conjunction with an award-fee incentive (see 16.402) and performance or delivery incentives (see 16.403 and 16.404). This combination is appropriate when the award fee or incentive is based solely on factors other than cost. The contract type remains fixed-price with economic price

adjustment when used with these incentives.

16.203-2 Application.

(a) A fixed-price contract with economic price adjustment may be used when—

(1) There is serious doubt concerning the stability of market or labor conditions that will exist during an extended period of contract performance; and

(2) Contingencies that would otherwise be included in the contract price may be identified and covered separately in the contract. Price adjustments based on established prices should normally be restricted to industry-wide contingencies. Price adjustments based on labor and material costs should be limited to contingencies beyond the contractor's control. For use of economic price adjustment in sealed bid contracts, see part 14.

(b) When establishing the base level from which adjustments will be made, do not include contingency allowances in both the base price and the adjustment requested by the contractor under the economic price adjustment clause.

(c) In contracts that do not require submission of certified cost or pricing data, obtain adequate data to establish the base level from which adjustment will be made and require verification of data submitted if necessary.

16.203-3 Limitations.

A fixed-price contract with economic price adjustment may be used only if the contracting officer determines that it is necessary to protect the contractor and the Government against significant fluctuations in labor or material costs or to provide for contract price adjustment in the event of changes in the contractor's established prices.

16.203-4 Contract clauses.

(a) *Adjustment based on established prices-standard supplies.*

(1) Insert the clause at 52.216-2, Economic Price Adjustment-Standard Supplies, or an agency-prescribed clause, in solicitations and contracts, including those for commercial products or commercial services, when contracting by negotiation and all of the following conditions apply:

(i) A fixed-price contract is contemplated.

(ii) The requirement is for standard supplies that have an established catalog or market price.

(iii) The contracting officer has made the determination specified in 16.203-3.

(2) The contracting officer may modify the clause by increasing the 10

percent limit on aggregate increases specified in 52.216-2(c)(1), upon approval by the chief of the contracting office.

(b) *Adjustment based on established prices-semistandard supplies.* (1) Insert the clause at 52.216-3, Economic Price Adjustment-Semistandard Supplies, or an agency-prescribed clause in solicitations and contracts, including those for commercial products or commercial services, when contracting by negotiation and all of the following conditions apply:

(i) A fixed-price contract is contemplated.

(ii) The requirement is for semistandard supplies for which the prices can be reasonably related to the prices of nearly equivalent standard supplies that have an established catalog or market price.

(iii) The contracting officer has made the determination specified in 16.203-3.

(2) Before entering into the contract, the contracting officer and contractor must agree in writing on the identity of the standard supplies and the corresponding line items to which the clause applies.

(3) If the supplies are standard, except for preservation, packaging, and packing requirements, the clause prescribed in 16.203-4(a) must be used rather than this clause.

(4) The contracting officer may modify the clause by increasing the 10 percent limit on aggregate increases specified in 52.216-3(c)(1), upon approval by the chief of the contracting office.

(c) *Adjustments based on actual cost of labor or material.* (1) Insert a clause that is substantially the same as the clause at 52.216-4, Economic Price Adjustment-Labor and Material, or an agency-prescribed clause in solicitations and contracts, including those for commercial products and commercial services, when contracting by negotiation and all of the following conditions apply:

(i) A fixed-price contract is contemplated.

(ii) There is no major element of design engineering or development work involved.

(iii) One or more identifiable labor or material cost factors are subject to change.

(iv) The contracting officer has made the determination specified in 16.203-3.

(2) Describe in detail in the contract Schedule—

(i) The types of labor and materials subject to adjustment under the clause;

(ii) The labor rates, including fringe benefits (if any) and unit prices of

materials that may be increased or decreased; and

(iii) The quantities of the specified labor and materials allocable to each unit to be delivered under the contract.

(3) When negotiating adjustments under the clause—

(i) Consider work in process and materials on hand at the time of changes in labor rates, including fringe benefits (if any) or material prices;

(ii) Not include in adjustments any indirect cost (except fringe benefits as defined in 31.205-6(l) or profit); and

(iii) Consider only those fringe benefits specified in the contract Schedule.

(4) The contracting officer may modify the clause by increasing the 10 percent limit on aggregate increases specified in 52.216-4(c)(4), upon approval by the chief of the contracting office.

(d) *Adjustments based on cost indexes of labor or material.* The contracting officer should consider using an economic price adjustment clause based on cost indexes of labor or material in solicitations and contracts, including those for commercial products or commercial services, under the circumstances described in paragraphs(d)(1) and (d)(2) of this section.

(1) A clause providing adjustment based on cost indexes of labor or materials may be appropriate when—

(i) The contract involves an extended period of performance with significant costs to be incurred beyond 1 year after performance begins;

(ii) The contract amount subject to adjustment is substantial; and

(iii) The economic variables for labor and materials are too unstable to permit a reasonable division of risk between the Government and the contractor, without this type of clause.

(2) Any clause using this method must be prepared and approved using agency procedures.

16.204 Fixed-price contracts with prospective price redetermination.

16.204-1 Description.

A fixed-price contract with prospective price redetermination provides for—

(a) A firm-fixed-price for an initial period of contract deliveries or performance; and

(b) Prospective redetermination, at a stated time or times during performance, of the price for subsequent periods of performance.

16.204-2 Application.

A fixed-price contract with prospective price redetermination may

be used in acquisitions of quantity production or services for which it is possible to negotiate a fair and reasonable firm-fixed-price for an initial period, but not for subsequent periods of contract performance.

(a) The initial period should be the longest period for which it is possible to negotiate a fair and reasonable firm-fixed-price. Each subsequent pricing period should be at least 12 months.

(b) The contract may provide for a ceiling price based on evaluation of the uncertainties involved in performance and their possible cost impact.

16.204-3 Limitations.

This contract type may only be used when—

(a) Negotiations have established that using a firm-fixed-price or fixed-price cost incentive contract is not appropriate for the acquisition;

(b) The contractor's accounting system is adequate for price redetermination;

(c) The prospective pricing periods can be made to conform with operation of the contractor's accounting system; and

(d) There is reasonable assurance that price redetermination actions will take place promptly at the specified times.

16.204-4 Contract clause.

Insert the clause at 52.216-5, Price Redetermination-Prospective, in solicitations and contracts, other than those for commercial products or commercial services, when contracting by negotiation, a fixed-price contract is contemplated, and the conditions specified in 16.204-2 and 16.204-3 apply.

16.205 Fixed-ceiling-price contracts with retroactive price redetermination.

16.205-1 Description.

A fixed-ceiling-price contract with retroactive price redetermination provides for (a) a fixed ceiling price and (b) retroactive price redetermination within the ceiling after completion of the contract.

16.205-2 Application.

A fixed-ceiling-price contract with retroactive price redetermination is appropriate when it is established at the outset that a fair and reasonable firm-fixed-price cannot be negotiated, and that the amount involved and short performance period make the use of any other fixed-price contract type impracticable.

(a) A ceiling price must be negotiated for the contract at a level that reflects a reasonable sharing of risk by the contractor. The established ceiling price

may be adjusted only if required by the operation of contract clauses providing for equitable adjustment or other revision of the contract price under stated circumstances.

(b) The contract should be awarded only after negotiation of a billing price that is as fair and reasonable as the circumstances permit.

16.205-3 Limitations.

This contract type may only be used when—

(a) The contract is for research and development and the estimated cost is at or below the simplified acquisition threshold (SAT);

(b) The contractor's accounting system is adequate for price redetermination;

(c) There is reasonable assurance that the price redetermination will take place promptly at the specified time; and

(d) The head of the contracting activity (or a higher-level official, if required by agency procedures) approves its use in writing.

16.205-4 Contract clause.

Insert the clause at 52.216-6, Price Redetermination-Retroactive, in solicitations and contracts, other than those for commercial products or commercial services, when a fixed-price contract is contemplated and the conditions in 16.205-2 and 16.205-3 apply.

16.206 Firm-fixed-price, level-of-effort term contracts.

16.206-1 Description.

A firm-fixed-price, level-of-effort term contract requires—

(a) The contractor to provide a specified level of effort, over a stated period of time, on work towards a deliverable that can be described in general terms; and

(b) The Government to pay the contractor a fixed dollar amount for the effort.

16.206-2 Application.

A firm-fixed-price, level-of-effort term contract is suitable for investigation or study in a specific research and development area. The deliverable of the contract is usually a report showing the results achieved through application of the required level of effort. However, payment is based on the effort expended rather than on the results achieved.

16.206-3 Limitations.

This contract type may be used only when—

(a) The work required cannot otherwise be clearly defined;

(b) The required level of effort is identified and agreed upon in advance;

(c) There is reasonable assurance that the intended deliverable cannot be achieved by expending less than the stipulated effort; and

(d) The agency head approves a justification if required by 16.104.

Subpart 16.3—Cost-Reimbursement Contracts

16.301 General.

16.301-1 Description.

Cost-reimbursement contracts allow for the reimbursement of allowable incurred costs. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling value that the contractor may not exceed (except at its own risk) without the approval of the contracting officer.

16.301-2 Application.

Use cost-reimbursement contracts only when—

(a) The requirements cannot be sufficiently defined to allow for a fixed-price type contract; or

(b) Uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract.

16.301-3 Limitations.

(a) A cost-reimbursement contract may be used only when—

(1) A written acquisition plan has been approved at least one level above the contracting officer (see 7.102(d));

(2) The agency head approves a justification if required by 16.104;

(3) The contractor's accounting system can adequately segregate, accumulate and allocate costs specifically attributed to the contract or order during contract performance; and

(4) Before award of the contract or order, sufficient Government resources are available to award and manage a contract other than firm-fixed-priced (see part 7). This includes designating a contracting officer's representative to monitor contractor performance and cost controls (see part 1).

(b) The use of cost-reimbursement contracts is not allowed for the purchase of commercial products and commercial services (see part 12).

16.302 Cost contracts.

A cost contract is a cost-reimbursement contract that does not include fee.

16.303 Cost-sharing contracts.

A cost-sharing contract is a cost-reimbursement contract that does not include fee, and the Government

reimburses only a portion of the allowable costs. State in the contract the agreed upon portion or percentage of allowable costs that will be reimbursed.

16.304 Cost-plus-fixed-fee contracts.

16.304-1 Description.

A cost-plus-fixed-fee contract is a cost-reimbursement contract that includes payment of an agreed upon fixed-fee. The fixed fee does not change with actual cost but may be adjusted as a result of changes in the work to be performed under the contract.

16.304-2 Limitations.

A cost-plus-fixed-fee contract must not be awarded unless the contracting officer complies with all limitations listed at 15.404-9 and 16.301-3.

16.304-3 Completion and term forms.

A cost-plus-fixed-fee contract may take one of two basic forms-completion or term.

(a) The completion form describes the scope of work by stating a definite goal or target and specifying an end product. This form of contract normally requires the contractor to complete and deliver the specified end product (*e.g.*, a final report of research accomplishing the goal or target) within the estimated cost, if possible, as a condition for payment of the entire fixed fee. However, if the work costs more than estimated, the Government may increase allowable costs to complete the work without increasing the fee.

(b) The term form describes the scope of work in general terms and requires the contractor to work at a specified level of effort for a specific time period. The term form may not be used unless required by the contract to provide a specific level of effort within a definite time period. Under this form, if the performance is considered satisfactory by the Government, the fixed fee is payable at the end of the agreed upon period. Renewal for further periods of performance is a new acquisition that involves new cost and fee arrangements.

16.305 Contract clauses.

(a) Insert the clause at 52.216-7, Allowable Cost and Payment, in solicitations and contracts, other than those for commercial products or commercial services, when a cost-reimbursement contract, including cost-type incentive contracts described in subpart 16.4, or a time-and-materials contract is anticipated. If the contract is a time-and-materials contract, the clause at 52.216-7 applies in conjunction with the clause at 52.232-7, Payments under Time-and-Materials and Labor-Hour Contracts, but only to the portion of the

contract that provides for reimbursement of materials (as defined in the clause at 52.232-7) at actual cost. The clause at 52.216-7 does not apply to labor-hour contracts.

(1) Use the clause with its Alternate I for the acquisition of construction.

(2) Use the clause with its Alternate II if the contract is with an educational institution.

(3) Use the clause with its Alternate III if the contract is with a State or local government.

(4) Use the clause with its Alternate IV if the contract is with a nonprofit organization other than an educational institution, a State or local government, or a nonprofit organization exempted under the OMB Uniform Guidance at 2 CFR part 200, appendix VIII.

(b) Insert the clause at 52.216-8, Fixed Fee, in solicitations and contracts, other than those for commercial products or commercial services, when a cost-plus-fixed-fee contract (other than a construction contract) is anticipated.

(c) Insert the clause at 52.216-9, Fixed Fee-Construction, in solicitations and contracts, other than those for commercial products or commercial services, when a cost-plus-fixed-fee construction contract is anticipated.

(d) Insert the clause at 52.216-10, Incentive Fee, in solicitations and contracts, other than those for commercial products or commercial services, when a cost-plus-incentive-fee contract is anticipated.

(e)(1) Insert the clause at 52.216-11, Cost Contract-No Fee, in solicitations and contracts, other than those for commercial products or commercial services, when a cost-reimbursement contract that provides no fee and is not a cost-sharing contract is anticipated. This clause may be modified by substituting \$10,000 in lieu of \$100,000 as the maximum reserve in paragraph (b) if the contractor is a nonprofit organization.

(2) Use the clause with its Alternate I if a cost-reimbursement research and development contract with an educational institution or a nonprofit organization that provides no profit and is not a cost-sharing contract is anticipated, and if the contracting officer determines that withholding of a portion of allowable costs is not required.

(f)(1) Insert the clause at 52.216-12, Cost-Sharing Contract-No Fee, in solicitations and contracts, other than those for commercial products or commercial services, when a cost-sharing contract is anticipated. The contracting officer may modify the clause by substituting \$10,000 in lieu of \$100,000 as the maximum reserve in

paragraph (b) if the contract is with a nonprofit organization.

(2) Use the clause with its Alternate I if a cost-sharing research and development contract with an educational institution or a nonprofit organization is anticipated, and if the contracting officer determines that withholding of a portion of allowable costs is not required.

(g) Insert the clause at 52.216-15, Predetermined Indirect Cost Rates, in solicitations and contracts, other than those for commercial products or commercial services, when a cost-reimbursement research and development contract with an educational institution (see part 42) is anticipated and predetermined indirect cost rates are to be used.

Subpart 16.4—Incentive Contracts

16.401 General.

16.401-1 Description.

(a) Incentive contracts are designed to obtain specific acquisition objectives by—

(1) Establishing realistic and achievable targets that are clearly communicated to the contractor; and

(2) Including appropriate incentive arrangements designed to—

(i) Motivate contractor efforts that might not otherwise be emphasized; and

(ii) Discourage contractor inefficiency and waste.

(b) Fixed-price and cost-reimbursement contracts may include incentives when appropriate.

(c) The two types of incentives are award-fee (16.402) and predetermined, formula-type incentives based on objective criteria including performance, delivery, cost, or multiple criteria (16.403, 16.404, and 16.405).

(1) Use objective criteria to the maximum extent practicable to measure contract performance.

(2) When predetermined, formula-type incentives on technical performance or delivery are included, profit or fee increases are only earned when performance exceeds the targets. Decreases apply when contractors fail to meet these targets. These incentive increases or decreases relate only to performance targets, not minimum performance requirements.

(3) Consider use of a multiple-incentive contract containing both objective incentives and subjective award-fee criteria when objective criteria exist but it is in the best interest of the Government to also incentivize subjective elements of performance.

(d) No incentive contract may provide for other incentives without also providing a cost incentive or constraint.

16.401–2 Limitations.

(a) A determination and findings, signed by the head of the contracting activity, must be completed for all incentive- and award-fee contracts justifying that the use of this type of contract is in the best interest of the Government. The determination for award-fee contracts must address all of the suitability items in 16.402–1.

(b)(1) For cost-reimbursement incentive contracts, the agency head must approve a justification if required by 16.104.

(2) For fixed-price incentive contracts based solely on factors other than cost, a justification is not required.

16.401–3 Collection and analysis of fee data.

Each agency must collect relevant data on incentive and award fees paid to contractors and include performance measures to evaluate such data on a regular basis to determine effectiveness of incentive and award fees as a tool for improving contractor performance and achieving desired program outcomes. This information should be considered as part of the acquisition planning process (see part 7) in determining the appropriate type of contract to be used for future acquisitions.

16.401–4 Incentive strategy best practices.

Each agency head must provide processes for sharing proven incentive strategies for the acquisition of different types of products and services among contracting and program management officials.

16.402 Award-fee.**16.402–1 Application.**

An award-fee contract is suitable for use when—

(a) The work to be performed is too complex or uncertain to set predetermined objective incentive targets applicable to cost, schedule, and technical performance;

(b) The likelihood of meeting acquisition objectives will be increased by using a contract that effectively motivates the contractor toward exceptional performance and provides the Government with the flexibility to evaluate both actual performance and the circumstances under which work was achieved; and

(c) Any additional administrative effort and cost required to monitor and evaluate performance are justified by the expected benefits as documented by a risk and cost benefit analysis to be included in the determination and findings referenced in 16.401–2.

16.402–2 Limitations.

(a) *Justification for other than fixed-price.* For award-fee contracts, except for fixed-price award-fee contracts based solely on factors other than cost, the agency head must approve a justification, if required by 16.104.

(b) *Award-fee plan.* Do not award an award-fee contract unless an award-fee plan is completed in accordance with the requirements in paragraph (d) of this section.

(c) *Award-fee amount.* The amount of award fee earned must be in line with the contractor's overall cost, schedule, and technical performance as measured against contract requirements in accordance with the criteria stated in the award-fee plan. Award fee must not

be earned if the contractor's overall cost, schedule, and technical performance in the aggregate is below satisfactory. The basis for all award-fee determinations must be documented in the contract file to include, at a minimum, a determination that overall cost, schedule, and technical performance in the aggregate is or is not at a satisfactory level. This determination and the approach for determining the award fee are unilateral decisions made solely at the discretion of the Government.

(d) *Award-fee plan.* All contracts providing for award fees must be supported by an award-fee plan that sets up the process for evaluating award fee and an Award-Fee Board for completing the award-fee evaluation. Award-fee plans must—

(1) Be approved by the Fee-Determining Official unless otherwise authorized by agency procedures;

(2) Identify the award-fee evaluation criteria and how they are connected to acquisition objectives which must be defined in terms of contract cost, schedule, and technical performance. Criteria should motivate the contractor to enhance performance in the areas rated, but not at the expense of at least minimum acceptable performance in all other areas;

(3) Describe how the contractor's performance will be evaluated against the award-fee evaluation criteria;

(4) Use the adjectival rating and associated description as well as the award-fee pool earned percentages shown in Table 16–1. Contracting officers may supplement the adjectival rating description. The approach used to determine the adjectival rating must be documented in the award-fee plan;

TABLE 16–1

Award-fee adjectival rating	Award-fee pool available to be earned	Description
Excellent	91%–100%	Contractor has exceeded almost all of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and evaluated against the criteria in the award-fee plan for the award-fee evaluation period.
Very Good	76%–90%	Contractor has exceeded many of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and evaluated against the criteria in the award-fee plan for the award-fee evaluation period.
Good	51%–75%	Contractor has exceeded some of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and evaluated against the criteria in the award-fee plan for the award-fee evaluation period.
Satisfactory	No Greater Than 50%.	Contractor has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and evaluated against the criteria in the award-fee plan for the award-fee evaluation period.
Unsatisfactory	0%	Contractor has failed to meet overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and evaluated against the criteria in the award-fee plan for the award-fee evaluation period.

(5) Earning any award fee when a contractor's overall cost, schedule, and technical performance in the aggregate is below satisfactory is not allowed;

(6) Provide for evaluation period(s) to be conducted at stated intervals during the contract period of performance so that the contractor will periodically be informed of the quality of its performance and the areas in which improvement is expected (e.g., six months, nine months, twelve months, or at specific milestones); and

(7) Define the total award-fee pool amount and how this amount is allocated to each evaluation period.

(e) *Rollover of unearned award fee.* The use of rollover of unearned award fee is prohibited.

16.402-3 Fixed-price contracts with award fees.

Award-fee provisions may be used in fixed-price contracts when the Government wishes to motivate a contractor and other incentives cannot be used because contractor performance cannot be measured objectively. Such contracts must establish a fixed-price (including normal profit) for the work, which will be paid for satisfactory contract performance. Any award fee earned will be paid in addition to that fixed-price. See 16.402-1 and 16.402-2 for the requirements on using this contract type.

16.402-4 Cost-plus-award-fee contracts.

(a) A cost-plus-award-fee contract is a cost-reimbursement contract that provides a fee consisting of—

(1) A base amount fixed at inception of the contract, if applicable and at the discretion of the contracting officer; and

(2) An award fee that the contractor may earn in whole or in part to provide motivation for excellence in the areas of cost, schedule, and technical performance.

(b) See 16.301, 16.402-1, and 16.402-2 for the requirements relative to utilizing this contract type.

16.403 Application of predetermined, formula-type incentives.

16.403-1 Cost incentives.

(a) Cost incentives take the form of a profit or fee adjustment formula and are intended to motivate the contractor to effectively manage costs.

(b) Except for award-fee contracts (see 16.402), cost incentive contracts include a target cost, a target profit or fee, and a profit or fee adjustment formula that (within the constraints of a price ceiling or minimum and maximum fee) provides that—

(1) If actual costs equal the target cost, the contractor will earn the target profit or fee;

(2) If actual costs exceed the target cost, the contractor's earned profit or fee will be lower than the target profit or fee; and

(3) If actual costs are less than the target cost, the contractor's earned profit or fee will be higher than the target profit or fee.

(c) See 16.404 for fixed-price cost incentive contracts and 16.405 for cost-reimbursable cost incentive contracts.

16.403-2 Performance incentives.

(a) Performance incentives may be considered in connection with specific, objectively measurable product characteristics (e.g., a missile range, an aircraft speed, an engine thrust, or a vehicle maneuverability) or other specific areas of the contractor's performance. Incentives should be linked to the contractor's profit or fee based on how their actual performance compares to the set targets.

(b) To the maximum extent practicable, positive and negative performance incentives for objectively measured tasks should be considered when the quality of performance is critical, and incentives are likely to motivate the contractor.

16.403-3 Delivery incentives.

(a) Delivery incentives should be considered when improvement from a required delivery schedule is important to the Government.

(b) Delivery incentive contracts should include how the reward-penalty structure is affected by Government-caused delays or other delays beyond the control, and without the fault or negligence, of the contractor or subcontractor.

16.403-4 Structuring multiple-incentive contracts.

A properly structured multiple-incentive arrangement should—

(a) Motivate the contractor to work towards outstanding results in all incentive areas; and

(b) Encourage trade-offs between incentive areas to align with the Government's goals. Due to the connection of cost, technical performance, and delivery goals, a contract that focuses on only one of the goals may jeopardize control over the others. All multiple-incentive contracts must include a cost incentive (or constraint) that prevents rewarding a contractor for greater technical performance or delivery results when the cost of those results outweighs their value to the Government.

16.404 Fixed-price cost incentive contracts.

(a) *Description.* A fixed-price cost incentive contract is a fixed-price contract that uses an established formula to adjust profit upward or downward and establishes the final contract price based on actual costs. Two forms of fixed-price cost incentive contracts based on cost incentives, firm target and successive targets, are further described in 16.404-1 and 16.404-2.

(b) *Application.* A fixed-price cost incentive contract is appropriate when—

(1) A firm-fixed-price contract is not suitable;

(2) The contractor's acceptance of a degree of cost responsibility will provide a positive profit incentive to control costs and increase performance; and

(3) If the contract also includes technical, performance or delivery incentives, the technical/performance/delivery incentives should provide opportunities for the incentives to improve the contractor's management of the work.

(c) *Billing prices.* In fixed-price cost incentive contracts, interim billing prices are established for payment. Billing prices may be adjusted, within the ceiling limit, when requested by either party to the contract, when it becomes apparent that final price will be substantially different from the target price.

16.404-1 Fixed-price cost incentive (firm target) contracts.

(a) *Description.* A fixed-price cost incentive (firm target) contract specifies a target cost, a target profit, a price ceiling (but not a profit ceiling or floor), and a formula for profit adjustments. When the final cost is less than the target cost, application of the formula results in a final profit greater than the target profit; conversely, when final cost is more than target cost, application of the formula results in a final profit less than the target profit, or even a net loss. If the final negotiated cost exceeds the price ceiling, the contractor absorbs the difference as a loss.

(b) *Limitations.* This contract type may be used only when—

(1) The contractor's accounting system is adequate for providing data to support negotiation of final cost and incentive price revision; and

(2) Adequate cost or pricing information for establishing reasonable firm targets is available at the time of initial contract negotiation.

(c) *Contract schedule.* Specify in the contract schedule the target cost, target

profit, and price ceiling for each item subject to incentive price revision.

16.404–2 Fixed-price cost incentive (successive targets) contracts.

(a) *Description.* A fixed-price cost incentive (successive targets) contract specifies the following elements, all of which are negotiated at the outset:

- (1) An initial target cost.
 - (2) An initial target profit.
 - (3) An initial profit adjustment formula to calculate the firm target profit, including a ceiling and floor for the firm target profit.
 - (4) The production point at which the firm target cost and firm target profit will be negotiated.
 - (5) A ceiling price.
- (b) *Limitations.* This contract type may be used only when—

- (1) The contractor's accounting system is adequate for providing data for negotiating firm targets and a realistic profit adjustment formula, as well as later negotiation of final costs; and
- (2) Cost or pricing information adequate for establishing a reasonable firm target cost is expected to be available early on in contract performance.

(c) *Contract schedule.* Specify in the contract schedule the initial target cost, initial target profit, and initial target price for each item subject to incentive price revision.

16.405 Cost-plus-incentive-fee contracts.

The cost-plus-incentive-fee contract is a cost-reimbursement contract that adjusts the initially negotiated fee based on a formula comparing total allowable costs to total target costs. This contract type includes a target cost, target fee, minimum and maximum fees, and a fee adjustment formula. After contract performance, the contractor's fee is determined using the specified fee formula. The formula provides for fee greater than the target fee when total allowable costs are less than target costs, and fee less than the target fee when total allowable costs exceed target costs, creating an incentive for effective contract management. When total allowable costs fall outside the range of the fee formula, the contractor receives total allowable costs plus either the minimum or maximum fee.

16.406 Contract clauses.

(a) Insert the clause at 52.216–16, Incentive Price Revision-Firm Target, in solicitations and contracts, other than those for commercial products or commercial services, when a fixed-price cost incentive (firm target) contract is contemplated. Use the clause with its

Alternate I if the contract calls for supplies or services to be ordered under a provisioning document or Government option and the prices are to be subject to the incentive price revision under the clause.

(b) Insert the clause at 52.216–17, Incentive Price Revision-Successive Targets, in solicitations and contracts, other than those for commercial products or commercial services, when a fixed-price cost incentive (successive targets) contract is contemplated. Use the clause with its *Alternate I* if the contract calls for supplies or services to be ordered under a provisioning document or Government option and the prices are to be subject to incentive price revision under the clause.

(c) Insert the clause at 52.216–10, Incentive Fee, in solicitations and contracts, other than those for commercial products or commercial services, when a cost-plus-incentive-fee contract is contemplated.

(d) Insert an appropriate award-fee clause in solicitations and contracts, including those for commercial products or commercial services, when an award-fee contract is contemplated, provided that the clause—

- (1) Is prescribed by or approved under agency acquisition regulations;
- (2) Is compatible with the clause at 52.216–7, Allowable Cost and Payment; and
- (3) Expressly provides that the award amount and the award-fee determination methodology are unilateral decisions made solely at the discretion of the Government.

Subpart 16.5—Time-and-Materials and Labor-Hour Contracts

16.500 Scope.

Time-and-materials contracts and labor-hour contracts are not fixed-price contracts.

16.501 Time-and-materials contracts.

Definitions for the purposes of Time-and-Materials Contracts.

Direct materials means those materials that enter directly into the end product, or that are used or consumed directly in connection with the furnishing of the end product or service.

Hourly rate means the rate(s) prescribed in the contract for payment for labor that meets the labor category qualifications of a labor category specified in the contract that are—

- (1) Performed by the contractor;
- (2) Performed by the subcontractors; or
- (3) Transferred between divisions, subsidiaries, or affiliates of the contractor under a common control.

Materials means—

(1) Direct materials, including supplies transferred between divisions, subsidiaries, or affiliates of the contractor under a common control;

(2) Subcontracts for supplies and incidental services for which there is not a labor category specified in the contract;

(3) Other direct costs (e.g., incidental services for which there is not a labor category specified in the contract, travel, computer usage charges, etc.); and

(4) Applicable indirect costs.

16.501–1 Description.

A time-and-materials contract provides for acquiring supplies or services on the basis of—

(a) Direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit; and

(b) Actual cost for materials (except as provided for in part 31).

16.501–2 Application.

A time-and-materials contract may be used only when it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence.

(a) *Government surveillance.* A time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, appropriate Government surveillance of contractor performance is required to give reasonable assurance that efficient methods and effective cost controls are being used.

(b) *Fixed hourly rates.* (1) The contract must specify separate fixed hourly rates that include wages, overhead, general and administrative expenses, and profit for each category of labor.

(2) For acquisitions of other than commercial products or commercial services awarded without adequate price competition (see part 15), the contract must specify separate fixed hourly rates that include wages, overhead, general and administrative expenses, and profit for each category of labor to be performed by—

- (i) The contractor;
- (ii) Each subcontractor; and
- (iii) Each division, subsidiary, or affiliate of the contractor under a common control.

(3) For contract actions that are not awarded using competitive procedures, unless exempt under paragraph (b)(4) of this section, the fixed hourly rates for services transferred between divisions, subsidiaries, or affiliates of the contractor under a common control—

(i) Must not include profit for the transferring organization; but

(ii) May include profit for the prime contractor.

(4) For contract actions that are not awarded using competitive procedures, the fixed hourly rates for services that meet the definition of “commercial service” that are transferred between divisions, subsidiaries, or affiliates of the contractor under a common control may be the established catalog or market rate when—

(i) It is the established practice of the transferring organization to price interorganizational transfers at other than cost for commercial work of the contractor or any division, subsidiary or affiliate of the contractor under a common control; and

(ii) The contracting officer has determined the price to be reasonable.

(c) *Material handling costs.* When included as part of material costs, material handling costs must include only costs clearly excluded from the labor-hour rate. Material handling costs may include all appropriate indirect costs allocated to direct materials in accordance with the contractor’s usual accounting procedures consistent with part 31.

16.501–3 Limitations.

A time-and-materials contract or order may be used only if—

(a) The contracting officer prepares a determination and findings that no other contract type is suitable. The determination and findings must be—

(1) Signed by the contracting officer prior to the execution of the base period or any option periods of the contracts; and

(2) Approved by the head of the contracting activity prior to the execution of the base period when the base period plus any option periods exceeds three years;

(b) The agency head approves a justification if required by 16.104; and

(c) The contract or order includes a ceiling price that the contractor exceeds at its own risk. See part 12 for further limitations on use of time-and-materials or labor-hour contracts for acquisition of commercial products and commercial services.

16.501–4 Solicitation provisions.

(a) Insert the provision at 52.216–29, Time-and-Materials/Labor-Hour Proposal Requirements—Other Than Commercial Acquisition With Adequate Price Competition, in solicitations, other than those for commercial products or commercial services, when the use of a time-and-materials or labor-hour type of contract is contemplated, and the price

is expected to be based on adequate price competition. If authorized by agency procedures, the contracting officer may amend the provision to make mandatory one of the three approaches in paragraph (c) of the provision; or to require the identification of all subcontractors, divisions, subsidiaries, or affiliates included in a blended labor rate; or both.

(b) Insert the provision at 52.216–30, Time-and-Materials/Labor-Hour Proposal Requirements—Other Than Commercial Acquisition Without Adequate Price Competition, in solicitations, other than those for commercial products or commercial services, when the use of a time-and-materials or labor-hour type of contract is contemplated if the price is not expected to be based on adequate price competition.

(c) Insert the provision at 52.216–31, Time-and-Materials/Labor-Hour Proposal Requirements—Commercial Acquisition, in solicitations for commercial products or commercial services when a time-and-materials or labor-hour contract is contemplated.

16.501–5 Postaward requirements.

Prior to an increase in the ceiling price of a time-and-materials or labor-hour contract or order—

(a) Conduct an analysis of pricing and other relevant factors to determine if the action is in the best interest of the Government;

(b) Document the decision in the contract or order file; and

(c) When making a change that modifies the general scope of—

(1) A contract, follow the procedures at part 6, 12.102, or 13.101;

(2) An order issued under the Federal Supply Schedules, follow the procedures at subpart 8.4; or

(3) An order issued under multiple-award task-order contracts and delivery-order contracts, follow the procedures at 16.607–6.

16.502 Labor-hour contracts.

Description. A labor-hour contract is a variation of the time-and-materials contract, differing only in that materials are not supplied by the contractor. See part 12, 16.501–2, and 16.501–3 for application and limitations for time-and-materials contracts that also apply to labor-hour contracts.

Subpart 16.6—Indefinite-Delivery Contracts

16.600 Scope.

(a) This subpart prescribes policies and procedures for making awards of

indefinite-delivery contracts and subsequent orders and establishes a preference for making multiple awards of indefinite-quantity contracts.

(b) This subpart does not limit the use of other than competitive procedures authorized by part 6.

(c) See part 19 for procedures to set aside part or parts of multiple-award contracts for small businesses and to reserve one or more awards for small business on multiple-award contracts.

(d) The statutory multiple-award preference (see 10 U.S.C. 3403 and 41 U.S.C. 4103) implemented by this subpart does not apply to architect-engineer contracts subject to the procedures in part 36. However, agencies are not precluded from making multiple awards for architect-engineer services using the procedures in this subpart, provided the selection of contractors and placement of orders are consistent with part 36.

(e) This subpart does not limit the authority of the General Services Administration (GSA) to enter into schedule, multiple-award, or task-order contracts or delivery-order contracts under any other provision of law. Therefore, GSA regulations and the coverage for the Federal Supply Schedule program take precedence over this subpart.

16.601 General.

16.601–1 Definitions.

As used in this subpart—

Delivery-order contract means a contract for supplies that does not procure or specify a firm quantity of supplies (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of supplies during the period of the contract.

Task-order contract means a contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.

16.601–2 Policies.

(a) There are three types of indefinite-delivery contracts: definite-quantity contracts, requirements contracts, and indefinite-quantity contracts. The appropriate type of indefinite-delivery contract may be used to acquire supplies or services or both when the exact times and quantities of future deliveries are not known at the time of contract award. Pursuant to 10 U.S.C. 3401 and 41 U.S.C. 4101, requirements contracts and indefinite-quantity contracts are also known as delivery-order contracts or task-order contracts.

(b)(1) Indefinite-delivery contracts may provide for any appropriate cost or pricing arrangement under this part. Cost or pricing arrangements that provide for an estimated quantity of supplies or services (e.g., estimated number of labor hours) must comply with the appropriate procedures of this subpart.

(2) In accordance with 10 U.S.C. 3206(c), for DoD, NASA, and the Coast Guard—

(i) The contracting officer may choose not to include price or cost as an evaluation factor for award when a solicitation—

(A) Has an estimated value exceeding the simplified acquisition threshold;

(B) Will result in multiple-award contracts that are for the same or similar services; and

(C) States that the Government intends to make an award to each and all qualifying offerors.

(ii) If the contracting officer chooses not to include price or cost as an evaluation factor for the contract award in accordance with paragraph (b)(2)(i) of this section, the contracting officer must consider price or cost as one of the factors in the selection decision for each order placed under the contract.

(iii) The exception in paragraph (b)(2)(i) of this section must not apply to solicitations for multiple-award contracts that provide for sole source orders pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

(c) Task-order contracts and delivery-order contracts (requirements contracts and indefinite-quantity contracts) have an ordering period in which orders may be placed. Individual task and delivery orders have a period of performance effective for that specific task or delivery order's scope of work. The effective period of a task-order contract or delivery-order contract includes the ordering period of the base contract and any period of performance of task orders beyond the end of the ordering period, provided the order was issued during the ordering period.

(1) *Limitation on ordering period.* In accordance with 10 U.S.C. 3403, for the DoD, NASA, and the Coast Guard, the head of an agency entering into a task-order contract or delivery-order contract may provide for the contract to cover any period up to five years and may extend the contract period for one or more successive periods pursuant to an option provided in the contract or a modification of the contract. The total contract period as extended may not exceed 10 years unless such head of an agency determines in writing that exceptional circumstances necessitate a longer contract period.

(2) *Limitation on ordering period for task-order contracts for advisory and assistance services.*

(i) In accordance with 10 U.S.C. 3405, except as provided for in paragraphs (c)(2)(ii) and (iii) of this section, the ordering period of a task-order contract for advisory and assistance services, including all periods of extensions of the contract under options, modifications or otherwise, may not exceed 5 years.

(ii) The 5-year limitation does not apply when—

(A) A longer ordering period is specifically authorized by statute; or

(B) The contract is for an acquisition of supplies or services that includes the acquisition of advisory and assistance services and the contracting officer, or other official designated by the head of the agency, determines that the advisory and assistance services are incidental and not a significant component of the contract.

(iii) The contracting officer may extend the contract on a sole-source basis for a period not exceeding 6 months if the contracting officer, or other official designated by the head of the agency, determines that—

(A) The award of a follow-on contract is delayed by circumstances that were not reasonably foreseeable at the time the initial contract was entered into; and

(B) The extension is necessary to ensure continuity of services, pending the award of, and commencement of performance under, the follow-on contract.

16.602 Definite-quantity contracts.

16.602–1 Description.

A definite-quantity contract provides for delivery of a definite (fixed) quantity of specific supplies or services for a fixed period, with deliveries or performance to be scheduled at designated locations upon order. The delivery schedule, location, or both may be flexible or set, but the total number of items or services to be delivered under the contract will not change.

16.602–2 Application.

A definite-quantity contract may be used when it can be determined in advance that—

(a) The exact quantity of supplies or services required during the contract period is known at the time of award; and

(b) The supplies or services are regularly available or will be available after a short lead time.

16.603 Requirements contracts.

16.603–1 Description.

A requirements contract provides for filling all actual purchase requirements of designated Government activities for supplies or services during a specified ordering period exclusively from one contractor, with deliveries or performance to be scheduled by placing orders with the contractor.

16.603–2 Application.

A requirements contract may be appropriate for acquiring any supplies or services when the Government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that designated Government activities will need during a definite period.

16.603–3 Limitations.

(a) No requirements contract in an amount estimated to exceed \$150 million (including all options) may be awarded to a single source unless a determination is executed in accordance with 16.604–3(a)(4).

(b) *Limitations on use of requirements contracts for advisory and assistance services.* (1) Except as provided in paragraph (b)(2) of this section, no solicitation for a requirements contract for advisory and assistance services exceeding three years and \$20 million (including all options) may be issued unless the contracting officer or other official designated by the head of the agency determines in writing that the services required are so unique or highly specialized that it is not practicable to make multiple awards using the procedures in 16.604–3(b).

(2) The limitation in paragraph (b)(1) of this section does not apply to a contract for the acquisition of supplies or services that includes acquisition of advisory and assistance services if the head of the executive agency entering into the contract determines that, under the contract, advisory and assistance services are necessarily incidental to, and not a significant component of, the contract.

16.603–4 Required content.

(a) Requirements contracts obligate the contractor to supply all the designated Government activities' actual needs, and the designated Government activities to purchase all their requirements from that specific contractor, within stated limits of the contract. The contract must state, if feasible, the maximum limit of the contractor's obligation to deliver and the Government's obligation to order. The contract may also set minimum or maximum limits or both on the

quantities the Government may order under each individual order or over a specified period of time.

(b) The solicitation and resulting contract must state a realistic estimated total quantity. This estimated total quantity is not a representation to an offeror or contractor that the estimate is guaranteed quantity, or that conditions affecting requirements will stay the same. The contracting officer should base the estimate on the most current information available, and may calculate the estimate based on records of previous requirements and consumption, or by other means.

(c) When a requirements contract is used to acquire work (e.g., repair, modification, or overhaul) on existing items of Government property, specify in the Schedule that failure of the Government to furnish such items in the amounts or quantities described in the Schedule as “estimated” or “maximum” will not entitle the contractor to any equitable adjustment in price under the Government Property clause of the contract.

16.604 Indefinite-quantity contracts.

16.604–1 Description.

(a) An indefinite-quantity contract provides for an indefinite quantity, within stated limits, of supplies or services. The Government places orders for individual requirements during the ordering period of the contract. Quantity limits may be stated as number of units or as dollar values.

(b) The contract must require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services. To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity, but it should not exceed the amount that the Government is fairly certain to order.

(c) In addition, if ordered, the contractor is required to furnish any additional quantities, not to exceed the stated maximum. The contracting officer should establish a reasonable maximum quantity based on market research, trends on recent contracts for similar supplies or services, survey of potential users, or any other rational basis.

(d) The contract may also specify maximum or minimum quantities that the Government may order under each task or delivery order and the maximum that it may order during a specific period of time.

16.604–2 Application.

The contracting officer may use an indefinite-quantity contract when the Government knows what kind of

supplies or services it requires and a certain minimum amount that it expects to require, but does not know exactly how much will be needed or when during the effective period. The contracting officer should use an indefinite-quantity contract only when the Government expects to have ongoing, repeated requirements for the supplies or services.

16.604–3 Multiple award preference.

(a)(1) Except for indefinite-quantity contracts for advisory and assistance services (see paragraph (b) of this section), contracting officers must, to the maximum extent practicable, give preference to awarding multiple indefinite-quantity contracts under a single solicitation to different contractors for the same or similar supplies or services.

(2) Document the decision whether to make multiple awards in the acquisition plan or contract file. Reasons for deciding that multiple awards are not in the best interests of the Government include, but are not limited to—

(i) Only one contractor is capable of providing performance at the level of quality required because the supplies or services are unique or highly specialized;

(ii) Based on the contracting officer's knowledge of the market, more favorable terms and conditions, including pricing, will be provided if a single award is made;

(iii) The expected cost of administration of multiple contracts outweighs the expected benefits of making multiple awards;

(iv) The projected orders are so integrally related that only a single contractor can reasonably perform the work;

(v) The total estimated value of the contract is at or below the SAT.

(3) The contracting officer may determine that a class of acquisitions is not appropriate for multiple awards.

(4)(i) No task-order contract or delivery-order contract in an amount estimated to exceed \$150 million (including all options) may be awarded to a single source unless the head of the agency determines in writing that—

(A) The task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work;

(B) The contract provides only for firm-fixed-price (see 16.202) task or delivery orders for—

(1) Products for which unit prices are established in the contract; or

(2) Services for which prices are established in the contract for the specific tasks to be performed;

(C) Only one source is qualified and capable of performing the work at a reasonable price to the Government; or
(D) It is necessary in the public interest to award the contract to a single source due to exceptional circumstances.

(ii) The head of the agency must notify Congress within 30 days after any determination under paragraph (a)(4)(i)(D) of this section.

(iii) The requirement for a determination for a single-award contract greater than \$150 million—

(A) Is in addition to any applicable requirements of part 6; and

(B) Is not applicable for architect-engineer services awarded pursuant to part 36.

(b) *Preference for multiple awards for advisory and assistance services.* (1) In accordance with 10 U.S.C. 3405 and 41 U.S.C. 4105, except as provided in paragraph (b)(2) of this section, if an indefinite-quantity contract for advisory and assistance services is estimated to exceed 3 years and \$20 million (including all options), the solicitation must provide for multiple awards unless—

(i) The contracting officer or other official designated by the head of the agency determines in writing—

(A) It is not practicable to award more than one contract because the services required are unique or highly specialized or the tasks are so integrally related; or

(B) After the evaluation of offers, that only one offeror is capable of providing the services required at the level of quality required; or

(ii) Only one offer is received.

(2) The requirements of paragraph (b)(1) of this section do not apply to a contract for the acquisition of supplies or services that includes acquisition of advisory and assistance services if the head of an agency entering into such contract determines in writing during acquisition planning that, under the contract, advisory and assistance services are necessarily incident to, and not a significant component of, the contract.

16.604–4 On-ramps and off-ramps.

To maintain a current, competitive, and innovative pool of vendors on a multiple-award contract, the solicitation and contract may provide for—

(a) Adding one or more new contractors (on-ramp) and increasing the maximum quantity during open seasons; and

(b) Removing a contractor (off-ramp) for underperforming, failure to actively participate in order competitions, other circumstances defined in the contract, or if requested by the contractor.

16.604–5 Required content.

An indefinite-quantity solicitation and contract must—

(a) Specify the ordering period of the contract, including the number of options and the period for which the Government may extend the contract ordering period under each option;

(b) Specify the total minimum and maximum quantity of supplies or services the Government will acquire under the contract;

(c) Specify the last date that a contractor will be required to make deliveries under orders issued during the ordering period (see 52.216–22(d));

(d) Include a statement of work, specifications, or other description that reasonably describes the general scope, nature, complexity, and purpose of the supplies or services the Government will acquire under the contract in a manner that will enable a prospective offeror to decide whether to submit an offer;

(e) State any uniform ordering procedures that the Government will use in issuing all orders, including the ordering media; otherwise, the ordering procedures are at the discretion of the ordering contracting officer;

(f) Specify the activities authorized to issue orders;

(g) Include authorization for placing oral orders, if appropriate, provided that the Government has established procedures for obligating funds and that oral orders are confirmed in writing; and

(h) When multiple awards are anticipated—

(1) Specify any fair opportunity procedures and selection criteria that must apply to all competed orders; otherwise, the procedures and selection criteria are at the discretion of the ordering contracting officer (see 16.607);

(2) Specify whether one or more blanket purchase agreements (BPAs) may be established under the contract according to 16.607–2(c)(3);

(3) Advise whether the Government reserves the right to conduct on-ramps, off-ramps, or both according to 16.604–4. Specify details of contemplated on-ramps and off-ramps. If the ordering period exceeds five years, provide for on-ramps according to 16.604–4, unless the contracting officer documents that on-ramps are not in the best interests of the Government.

16.605 Solicitation provisions and contract clauses.

(a) Insert the clause at 52.216–18, Ordering, in solicitations and contracts, including those for commercial products or commercial services, when a definite-quantity contract, a

requirements contract, or an indefinite-quantity contract is contemplated.

(b) Insert a clause substantially the same as the clause at 52.216–19, Order Limitations, in solicitations and contracts, including those for commercial products or commercial services, when—

(1) A definite-quantity contract, a requirements contract, or an indefinite-quantity contract is contemplated;

(2) The contracting officer desires maximum or minimum quantities that the Government may order under each task or delivery order; and

(3) When the Government desires to have a maximum that may be ordered over a specific period of time.

(c) Insert the clause at 52.216–20, Definite Quantity, in solicitations and contracts, including those for commercial products or commercial services, when a definite-quantity contract is contemplated.

(d)(1) Insert the clause at 52.216–21, Requirements, in solicitations and contracts, including those for commercial products or commercial services, when a requirements contract is contemplated.

(2) Use the clause with its *Alternate I* if the contract is for nonpersonal services and related supplies and covers estimated requirements that exceed a specific Government activity's internal capability to produce or perform.

(3) Use the clause with its *Alternate II* if the contract includes subsistence for both Government use and resale in the same Schedule and similar products may be acquired on a brand-name basis (but see paragraph (d)(5) of this section if the contract also involves a partial small business set-aside).

(4) Use the clause with its *Alternate III* if the contract involves a partial small business set-aside (but see paragraph (d)(5) of this section if the contract also includes subsistence for Government use and resale in the same schedule and similar products may be acquired on a brand-name basis).

(5) Use the clause with its *Alternate IV* if the contract—

(i) Includes subsistence for Government use and resale in the same schedule and similar products may be acquired on a brand-name basis; and

(ii) Involves a partial small business set-aside.

(e) Insert the clause at 52.216–22, Indefinite Quantity, in solicitations and contracts, including those for commercial products or commercial services, when an indefinite-quantity contract is contemplated.

(1) Use the clause with a paragraph substantially the same as its *Alternate I* if off-ramping is contemplated and the

agency desires a unilateral cancellation executable by either party. The contracting officer may vary the 30-day period in which the cancellation becomes effective from as few as 15 days to as many as 90 days.

(2) Use the clause with a paragraph substantially the same as its *Alternate II* if off-ramping is contemplated and the agency wishes to retain discretion to disapprove contractor-requested off-ramps. The contracting officer may vary the 30-day period in which the cancellation becomes effective from as few as 15 days to as many as 90 days.

(f) Insert the provision at 52.216–27, Single or Multiple Awards, in solicitations for indefinite-quantity contracts, including those for commercial products or commercial services, that may result in multiple contract awards. Modify the provision to specify the estimated number of awards. Do not use this provision for advisory and assistance services contracts that exceed 3 years and \$20 million (including all options).

(g) Insert the provision at 52.216–28, Multiple Awards for Advisory and Assistance Services, in solicitations if the acquisition value exceeds \$20 million (including all options), for task-order contracts for advisory and assistance services that exceed 3 years, including those for commercial services, unless a determination has been made under 16.604–3(b)(1)(i). Modify the provision to specify the estimated number of awards.

(h) Insert the clause at 52.216–32, Task-Order and Delivery-Order Ombudsman, in solicitations and contracts, including those for commercial products or commercial services, when a multiple-award task-order contract or delivery-order contract is contemplated.

(1) Use the clause with its *Alternate I* when the contract will be available for use by multiple agencies (e.g., Governmentwide acquisition contracts or multi-agency contracts).

(2) Use the clause with its *Alternate I*, and complete paragraph (d)(2), in the notice of intent to place an order and the resulting order, when placing orders under the multiple-award contract available for use by multiple agencies.

16.606 Postaward procedures for placement of task and delivery orders.

(a) Orders must be within the scope, issued within the specified ordering period, and be within the maximum value of the contract.

(b) All orders placed under a task-order contract or delivery-order contract must contain the following information:

(1) Date of order.

(2) Contract number and order number.

(3) For supplies and services, line-item number, subline item number (if applicable), description, quantity, and unit price or estimated cost and fee (as applicable). The corresponding line-item number and subline item number from the base contract must also be included.

(4) Delivery or performance schedule.

(5) Statement of work that clearly specifies all requirements. For service orders, performance-based acquisition methods must be used to the maximum extent practicable (see subpart 37.1).

(6) Place of delivery or performance (including consignee).

(7) Any packaging, packing, and shipping instructions.

(8) Accounting and appropriation data.

(9) Method of payment and payment office, if not specified in the contract or BPA (see part 32).

(10) North American Industry Classification System code (see part 19).

(c) Orders placed under a task-order contract or delivery-order contract awarded by another agency (*i.e.*, a Governmentwide acquisition contract, or multi-agency contract)—

(1) Are not exempt from the development of acquisition plans (see part 7), and an information technology acquisition strategy (see part 39);

(2) May not be used to circumvent conditions and limitations imposed on the use of funds (*e.g.*, 31 U.S.C. 1501(a)(1)); and

(3) Must comply with all FAR requirements for a consolidated or bundled contract when the order meets the definition at 2.101 of “consolidation” or “bundling”.

(d) In accordance with section 1427(b) of Public Law 108–136 (40 U.S.C. 1103 note), orders placed under multi-agency contracts for services that substantially or to a dominant extent specify performance of architect-engineer services, as defined in 2.101, must—

(1) Be awarded using the procedures at part 36.

(2) Require the direct supervision of a professional architect or engineer licensed, registered, or certified in the State, possession, Federal District, or outlying area in which the services are to be performed.

(e) When using the Governmentwide commercial purchase card as a method of payment, orders at or below the micro-purchase threshold are exempt from verification in the System for Award Management as to whether the contractor has a delinquent debt subject to collection under the Treasury Offset Program.

(f) If the contract or BPA did not establish the price for the supply or service, establish prices for each order using the policies and methods in subpart 15.4 or part 12, as applicable.

(g) For additional requirements for cost-reimbursement orders, see subpart 16.3.

(h) For additional requirements for time-and-materials or labor-hour orders, see subpart 16.5.

(i) The contracting officer should rely on the small business representations at the contract level (but see part 19 for order rerepresentations).

16.607 Additional ordering procedures for multiple-award contracts.

These procedures apply to placing orders and establishing BPAs against multiple-award contracts. See 16.607–2(c)(3)(iv)(B) and (vii) for placing orders against BPAs.

16.607–1 Placement of orders valued at or below the micro-purchase threshold.

Each order or BPA valued at or below the micro-purchase threshold may be placed with any multiple-award contractor that can meet the agency’s needs. Although not required to solicit from a specific number of contractors, ordering activities should attempt to distribute orders and BPAs among multiple-award contractors.

16.607–2 Fair opportunity procedures.

(a) *Fair opportunity.* (1) Provide each awardee a fair opportunity to be considered for each order or BPA exceeding the micro-purchase threshold according to paragraph (c) of this section and 16.607–3 through 16.607–5, unless a sole source order or BPA is justified and approved according to 16.607–6.

(2) The contracting officer has broad discretion to develop appropriate order or BPA placement procedures. To maximize efficiency, ordering activities are encouraged to use innovative approaches when placing orders and establishing BPAs commensurate with the risk and complexity of the requirement. To solicit orders and BPAs against indefinite-quantity contracts, issue an order or BPA solicitation (*e.g.*, request for quotation, request for proposal, or request for task plan).

(3) The contracting officer should keep submission requirements to a minimum. The ordering process is not subject to the competition requirements in part 6 or the policies in subpart 15.2 or part 14. The contracting officer may use streamlined procedures, including oral presentations. The contracting officer is not required to have evaluation plans, score offeror responses, or

establish a competitive range before communicating with contractors competing for an order or soliciting revised responses to the order or BPA solicitation.

(4) See part 19 for procedures to set aside orders or BPAs for small businesses under multiple-award contracts.

(b) *Task-order and delivery-order ombudsman.* The head of the agency must designate a task-order and delivery-order ombudsman. The ombudsman must review complaints from contractors and ensure they are afforded a fair opportunity to be considered, consistent with the procedures in the contract. The ombudsman must be a senior agency official who is independent of the contracting officer and may be the agency’s advocate for competition.

(c) *Procedures.*

(1) *Requirements.*

(i) Do not use any method (such as allocation or designation of any preferred awardee) that would not result in fair consideration being given to all awardees prior to placing each order.

(ii) Tailor the procedures to the risk and complexity of each acquisition.

(iii) Include the procedures in the order or BPA solicitation.

(iv) Consider price or cost under each order as one of the factors in the selection decision.

(v) Except for DoD, document in the contract file a justification for use of the lowest price technically acceptable source selection process, including an explanation that the criteria at 15.102–2(c)(1) are met.

(vi) Except for DoD, avoid using the lowest price technically acceptable source selection process to acquire certain supplies and services in accordance with 15.102–2(c)(2).

(2) *Considerations.* The contracting officer should consider the following when developing the placement procedures:

(i) Past performance on earlier orders under the contract, including quality, timeliness, and cost control. When past performance under the multiple-award contract is available and sufficient, it is unnecessary to consider past performance under other efforts.

(ii) Potential impact on other orders placed with the contractor.

(iii) Minimum order requirements.

(iv) The amount of time contractors need to make informed business decisions on whether to respond to order or BPA solicitations.

(v) Whether contractors could be encouraged to respond to order or BPA solicitations by outreach efforts to promote exchanges of information, such as—

(A) Seeking comments from two or more contractors on draft statements of work;

(B) Using a multiphase approach when effort required to respond to a potential order or BPA solicitation may be resource intensive (*e.g.*, requirements are complex or need continued development), where all contractors are initially considered on price considerations (*e.g.*, rough estimates), and other considerations as appropriate (*e.g.*, proposed conceptual approach, past performance).

(3) *Blanket purchase agreements.* If authorized in the multiple-award contract according to 16.604–5(h)(2), the contracting officer may establish one or more BPAs to fill anticipated repetitive needs for supplies or services. Establish BPAs using the fair opportunity procedures at 16.607–3 through 16.607–5, based on the total estimated value of the BPA. BPAs must include—

(i) Sufficient detail about the need, such as scope of work or objectives;

(ii) An ordering period, inclusive of any options or award terms. BPAs may be established with an ordering period that extends beyond the current term of a contractor's multiple-award contract, so long as there are option periods in the contractor's contract that, if exercised by the administering contracting officer, will cover the BPA's ordering period, including options and award terms;

(iii) Ordering activity requirements (*e.g.*, invoicing, delivery, and discounts/other concessions) that are not otherwise included in the master multiple-award contract;

(iv) Ordering procedures that—

(A) Identify the customers/individuals authorized to place orders and any limitations surrounding the placement of orders; and

(B) For multiple-award BPAs, ensure that for each order BPA recipients are provided the fair opportunity procedures in 16.607–3 through 16.607–5, based on the total estimated value of the order;

(v) On-ramps according to 16.604–4 if the ordering period of the BPA exceeds five years, unless the contracting officer documents that on-ramps are not in the best interest of the Government.

(vi) On an annual basis or prior to exercise of an option or award of an award term, review and prepare a written determination providing that—

(A) The BPA still represents the best value;

(B) Estimated quantities/amounts have been reached or exceeded;

(C) The BPA ordering procedures are being followed;

(D) Additional price discounts or other concessions can be obtained; and

(E) The ordering period of the contract against which the BPA is established is still in effect.

(vii) When placing orders against a multiple-award indefinite-delivery BPA, follow the ordering procedures established by the BPA.

16.607–3 Orders exceeding the micro purchase threshold but not more than the SAT.

(a) Fairly consider all contractors offering the supplies or services. If information available to the contracting officer allows each contractor to be fairly considered, the contracting officer may place an order without further soliciting contractors, or by soliciting fewer than all contractors.

(b) Document the file to the extent necessary to support the award decision, such as demonstrating that each contractor was fairly considered.

16.607–4 Orders exceeding the SAT but not more than \$7.5 million.

(a) *Definition.* Day, as used in this section, has the meaning set forth at subpart 33.1.

(b) *Notice.* Provide a fair notice of the intent to place an order to all contractors offering the products or services by issuing—

(1) A solicitation including a description of the work to be performed and the basis on which selection will be made; or

(2) A notice of intent to place an order that requires contractors to respond in order to receive the solicitation or be considered for the order.

(c) *Award decision documentation.* Document the file to the extent necessary to support the award decision, such as demonstrating that each quotation, offer, proposal, or other response to a notice was fairly considered.

(d) *Postaward notice.* Within 7 days after the award of the order, provide written notice to all of the contractors who competed, but were not awarded the order. At a minimum, the notice must provide the name of the awardee of the order and the total price of the order.

(e) *Explanation.* If the agency receives a written request within 3 days of the contractor receiving the notification of award in paragraph (d), provide a brief explanation of why the offeror was not selected. The explanation must include—

(1) A summary of the rationale for the award; and

(2) An evaluation of the significant weaknesses or deficiencies in the contractor's offer.

(f) *Explanation documentation.* Retain a record of the brief explanation in the task order or delivery order file.

16.607–5 Orders exceeding \$7.5 million.

(a) *Procedures.* Provide a fair notice of the intent to place an order to all contractors offering the products or services according to 16.607–4(b). A fair notice must—

(1) Include a clear statement of the agency's requirements;

(2) Allow for a reasonable response period; and

(3) Disclose the significant factors and subfactors, as applicable, including cost or price, that the agency expects to consider in evaluating quotations, offers, or other responses to notices, and their relative importance;

(b) *Documentation.* Document the file to the extent necessary to support the award decision, such as demonstrating—

(1) That each quotation, offer, or other response to a notice was fairly considered; and

(2) When award is made using tradeoffs, the relative importance of quality and price or cost factors.

(c) *Postaward notices and debriefings.* Provide postaward notifications and debriefings according to part 15. A summary of the debriefing must be included in the task or delivery order file.

16.607–6 Exceptions to fair opportunity.

(a) *Procedures.* Orders placed and BPAs established against multiple-award contracts are exempt from the competition requirements in part 6. However, justify placing an order or BPA exceeding the micro-purchase threshold (MPT) on a sole source basis in accordance with this section.

(b) *Exceptions.* An order or a BPA exceeding the MPT may be placed on a sole source basis when:

(1) The agency need for the supplies or services is so urgent that providing a fair opportunity would result in unacceptable delays;

(2) Only one awardee is capable of providing the supplies or services required at the level of quality required because the supplies or services ordered are unique or highly specialized;

(3) The order or BPA must be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to an order or BPA already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original order or BPA;

(4) It is necessary to satisfy a minimum guarantee;

(5) For orders exceeding the SAT, or BPAs expected to exceed the SAT, a

statute expressly authorizes or requires that the purchase be made from a specified source; or

(6) For DoD, NASA, and the Coast Guard, the order or BPA satisfies one of the exceptions permitting the use of other than full and open competition listed in 6.103 (10 U.S.C. 3406(c)(5)). Do not use the public interest exception unless Congress is notified in accordance with 10 U.S.C. 3204(a)(7).

(c) *Small business considerations.* Part 19 and Public Law 111–240 (15 U.S.C. 644(r)) provide authority for setting aside orders and placing orders under reserves, which are not subject to the justification, approval, and posting requirements in paragraphs (d)–(f) of this section.

(d) *Justification.* The justification for an exception to fair opportunity must be in writing and include the following:

(1) *Orders exceeding the micro-purchase threshold but not more than the SAT.* Document the basis for using an exception to the fair opportunity process. For the logical follow-on exception, the rationale must describe why the relationship between the initial order and the follow-on is logical (*e.g.*, in terms of scope, period of performance, or value).

(2) *Orders exceeding the SAT.* As a minimum, each justification must include the following information:

(i) Identification of the agency and the contracting activity, and specific identification of the document as a “Justification for an Exception to Fair Opportunity.”

(ii) Nature or description of the action being approved.

(iii) A description of the supplies or services required to meet the agency’s needs (including the estimated value).

(iv) Identification of the exception to fair opportunity (see paragraph (b) of this section) and the supporting rationale, including a demonstration that the proposed contractor’s unique qualifications or the nature of the acquisition requires use of the exception cited. If the contracting officer uses the logical follow-on exception, the rationale must describe why the relationship between the initial order and the follow-on is logical (*e.g.*, in terms of scope, period of performance, or value).

(v) A determination by the contracting officer that the anticipated cost to the Government will be fair and reasonable.

(vi) Any other facts supporting the justification.

(vii) A statement of the actions, if any, the agency may take to remove or overcome any barriers that led to the exception to fair opportunity before any subsequent acquisition for the supplies or services is made.

(viii) The contracting officer’s certification that the justification is accurate and complete to the best of the contracting officer’s knowledge and belief.

(ix) Evidence that any supporting data that is the responsibility of technical or requirements personnel (*e.g.*, verifying the Government’s minimum needs or requirements or other rationale for an exception to fair opportunity) and which form a basis for the justification have been certified as complete and accurate by the technical or requirements personnel.

(x) A written determination by the approving official that one of the circumstances in paragraphs (b)(1) through (6) of this section applies to the order.

(e) *Approval.* The justification for an exception to fair opportunity must be approved in writing by the following official, or an official with a higher approval authority in Table 16–2:

TABLE 16–2—APPROVAL AUTHORITIES FOR EXCEPTIONS TO FAIR OPPORTUNITY

Value (including options)	Approval authority
(1) \$900,000 or less	Contracting officer. Accomplished by certification required at 16.607–6(d)(2)(viii).
(2) >\$900,000–\$20,000,000	Advocate for competition of the activity placing the order. Not delegable.
(3) >\$20,000,000–\$90,000,000 (>\$20,000,000–\$150,000,000 for DoD, NASA, and USCG)	The head of the procuring activity placing the order. May be delegated to a general or flag officer of the armed forces or a civilian in a grade above GS–15 (or in a comparable or higher position under another schedule).
(4) >\$90,000,000 (>\$150,000,000 for DoD, NASA, and USCG)	Senior procurement executive of the agency placing the order. Not delegable, except in the case of the Under Secretary of Defense for Acquisition and Sustainment, acting as the senior procurement executive for the Department of Defense.

(f) *Posting.* (1) Except as provided in paragraph (f)(4), within 14 days after placing an order or establishing a BPA exceeding the SAT on a sole source basis according to paragraph (b)—

(i) Publish a notice to the Governmentwide Point of Entry (GPE); and

(ii) Post the justification required by paragraph (d)(2) for a minimum of 30 days—

(A) At the GPE <https://www.sam.gov>; and

(B) On the website of the agency, which may provide access to the justifications by linking to the GPE.

(2) In the case of an order permitted under paragraph (b)(1) of this section,

the justification must be posted within 30 days after award of the order.

(3) Contracting officers must carefully screen all justifications for contractor proprietary data and remove all such data, and such references and citations as are necessary to protect the proprietary data, before posting the justification. Contracting officers must also be guided by the exemptions to disclosure of information contained in the Freedom of Information Act (5 U.S.C. 552) and the prohibitions against disclosure in part 24 in determining whether other data should be removed. Although the submitter notice process set out in Executive Order 12600 “Predisclosure Notification Procedures

for Confidential Commercial Information” does not apply, if the justification appears to contain proprietary data, the contracting officer should provide the contractor that submitted the information an opportunity to review the justification for proprietary data before posting the justification, redacted as necessary. This process must not prevent or delay posting the justification in accordance with the timeframes required in paragraphs (f)(1)–(2) of this section.

(4) The posting requirement does not apply when disclosure would compromise the national security (*e.g.*, would result in disclosure of classified

information) or create other security risks.

16.607–7 Items peculiar to one manufacturer.

(a) Justify restricting consideration to an item peculiar to one manufacturer (e.g., a particular brand-name, product, or a feature of a product that is peculiar to one manufacturer). A brand-name item, even if available on more than one contract, is an item peculiar to one manufacturer. Brand-name specifications must not be used unless the particular brand-name, product, or feature is essential to the Government's requirements and market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency's needs.

(b) Brand-name requirements must be justified and approved when the requirement is determined, using the format(s) and requirements from 16.607–6(d)–(e), modified to show the brand-name justification, unless—

(1) A justification covering the requirements in the order was previously approved for the contract in accordance with 6.103–1(d); or

(2) The base contract is a single-award contract.

(c)(1) For an order exceeding \$40,000—

(i) Post the justification and supporting documentation on the agency website used (if any) to solicit offers for orders under the contract; or

(ii) Provide the justification and supporting documentation along with the fair notice of intent to place an order issued according to 16.607–4, or to all awardees solicited according to 16.607–3.

(2) The justification for brand-name requirements may apply to the portion of the acquisition requiring the brand-name item. If the justification is to cover only the portion of the acquisition which is brand-name, then it should identify the applicable portion. The approval level requirements will then only apply to that portion.

(3) The requirements in paragraph (c)(1) of this section do not apply when disclosure would compromise the national security (e.g., would result in disclosure of classified information) or create other security risks.

(d) The justification is subject to the screening requirement in 16.607–6(f)(3).

16.608 Protests of orders.

(a) No protest under part 33 is authorized in connection with the issuance or proposed issuance of an order under a task-order contract or delivery-order contract, except—

(1) A protest on the grounds that the order increases the scope, period, or maximum value of the contract; or

(2)(i) For agencies other than DoD, NASA, and the Coast Guard, a protest of an order exceeding \$10 million (41 U.S.C. 4106(f)); or

(ii) For DoD, NASA, or the Coast Guard, a protest of an order exceeding \$35 million (10 U.S.C. 3406(f)).

(b) Protests of orders exceeding the thresholds stated in paragraph (a)(2) of this section may only be filed with the Government Accountability Office, in accordance with the procedures at 33.105.

(c) For protests of small business size status for set-aside orders, see part 19.

Subpart 16.7—Letter Contracts

16.701 Description.

A letter contract is a written preliminary contractual instrument that authorizes the contractor to begin immediately manufacturing supplies or performing services.

16.702 Application.

(a)(1) A letter contract may be used when the Government's interests demand that the contractor be given a binding commitment so that work can start immediately and negotiating a definitive contract is not possible in sufficient time to meet the requirement.

(2) A letter contract should be as complete and definite as feasible under the circumstances.

(b) When a letter contract award is based on price competition, include an overall price ceiling in the letter contract.

(c)(1) Each letter contract must, as required by the clause at 52.216–25, Contract Definitization, contain a negotiated definitization schedule including—

(i) Dates for submission of the contractor's price proposal, required certified cost or pricing data and data other than certified cost or pricing data, and make-or-buy and subcontracting plans if required;

(ii) A date for the start of negotiations; and

(iii) A target date for definitization, which must be the earliest practicable date for definitization.

(2) The schedule will provide for definitization of the contract within 180 days after the date of the letter contract or before completion of 40 percent of the work to be performed, whichever occurs first. However, the contracting officer may, in extreme cases and according to agency procedures, authorize an additional period.

(3) If, after exhausting all reasonable efforts, the contracting officer and the

contractor cannot negotiate a definitive contract because of failure to reach agreement as to price or fee, the clause at 52.216–25 requires the contractor to proceed with the work and provides that the contracting officer may, with the approval of the head of the contracting activity, determine a reasonable price or fee in accordance with subpart 15.4 and part 31, subject to appeal as provided in the Disputes clause.

(d) The maximum liability of the Government inserted in the clause at 52.216–24, Limitation of Government Liability, must be the estimated amount necessary to cover the contractor's requirements for funds before definitization. However, it must not exceed 50 percent of the estimated cost of the definitive contract unless approved in advance by the official that authorized the letter contract.

(e) Assign a priority rating to the letter contract if it is appropriate under part 11.

16.703 Limitations.

(a) A letter contract may be used only after the head of the contracting activity determines in writing that no other contract is suitable.

(b) The agency head must approve a justification if required by 16.104.

(c) Letter contracts must not—

(1) Commit the Government to a definitive contract exceeding the funds available at the time the letter contract is executed;

(2) Be entered into without competition when competition is required by part 6; or

(3) Be amended to satisfy a new requirement unless that requirement is inseparable from the existing letter contract. Any such amendment is subject to the same requirements and limitations as a new letter contract.

16.704 Contract clauses.

(a) Insert in each letter contract the clauses required by this regulation for the type of definitive contract contemplated and any additional clauses known to be appropriate for it.

(b) Insert the following clauses in solicitations and contracts, including those for commercial products or commercial services, when a letter contract is contemplated:

(1) The clause at 52.216–23, Execution and Commencement of Work, except that this clause may be omitted from letter contracts awarded on SF 26.

(2) The clause at 52.216–24, Limitation of Government Liability, with dollar amounts completed in a manner consistent with 16.702(d).

(3) The clause at 52.216–25, Contract Definitization, with its paragraph (b)

completed in a manner consistent with 16.702(c). If at the time of entering into the letter contract, the contracting officer knows that the definitive contract will be based on adequate price competition or will otherwise meet the criteria of part 15 for not requiring submission of certified cost or pricing data, the words “and certified cost or pricing data in accordance with FAR 15.408–2, Table 15–1 supporting its proposal” may be deleted from paragraph (a) of the clause. If the letter contract is being awarded on the basis of price competition, use the clause with its *Alternate I*.

(c) Insert the clause at 52.216–26, Payments of Allowable Costs Before Definitization, in solicitations and contracts, other than those for commercial products or commercial services, when a cost-reimbursement definitive contract is contemplated, unless the acquisition involves conversion, alteration, or repair of ships.

Subpart 16.8—Agreements

16.801 Scope.

This subpart prescribes policies and procedures for establishing and using basic agreements and basic ordering agreements.

16.802 Basic agreements.

16.802–1 Description.

(a) A basic agreement is a written instrument of understanding, negotiated between an agency or contracting activity and a contractor, that—

(1) Contains contract clauses applying to future contracts between the parties during its term; and

(2) Contemplates separate future contracts that will incorporate by reference or attachment the required and applicable clauses agreed upon in the basic agreement.

(b) A basic agreement is not a contract.

16.802–2 Application.

A basic agreement should be used when a substantial number of separate contracts may be awarded to a contractor during a particular period and significant recurring negotiating problems have been experienced with the contractor. Basic agreements may be used with negotiated fixed-price or cost-reimbursement contracts.

(a) Basic agreements must contain—

(1) Clauses required for negotiated contracts by statute, executive order, and this regulation; and

(2) Other clauses prescribed in this regulation or agency acquisition regulations that the parties agree to include in each contract as applicable.

(b) Each basic agreement must provide for discontinuing its future applicability upon 30 days written notice by either party.

(c) Each basic agreement must be reviewed annually before the anniversary of its effective date and revised as necessary to conform to the requirements of this regulation. Basic agreements may need to be revised due to mandatory statutory requirements. A basic agreement may be changed only by modifying the agreement itself and not by a contract incorporating the agreement.

(d) Discontinuing or modifying a basic agreement must not affect any prior contract incorporating the basic agreement.

(e) Contracting officers of one agency should obtain and use existing basic agreements of another agency to the maximum practical extent.

16.802–3 Limitations.

(a) *General.* A basic agreement must not—

(1) Cite appropriations or obligate funds;

(2) State or imply any agreement by the Government to place future contracts or orders with the contractor; or

(3) Be used in any manner to restrict competition.

(b) *Contracts incorporating basic agreements.* (1) Each contract incorporating a basic agreement must include a scope of work and price, delivery, and other appropriate terms that apply to the particular contract. The basic agreement must be incorporated into the contract by specific reference (including reference to each amendment) or by attachment.

(2) Include clauses pertaining to subjects not covered by the basic agreement, but applicable to the contract being negotiated, in the same manner as if there were no basic agreement.

(3) When new work is added to an existing contract, the modification must incorporate the most recent basic agreement. These terms will apply only to work added by the modification. This is not required if the contract or modification already includes all clauses required by statute, executive order, and this regulation as of the date of the modification. If it is in the Government's interest and the contractor agrees, the modification may incorporate the most recent basic agreement for application to the entire contract as of the date of the modification.

16.803 Basic ordering agreements.

16.803–1 Description.

(a) A basic ordering agreement is a written instrument of understanding, negotiated between an agency, contracting activity, or contracting office and a contractor, that contains—

(1) Terms and clauses applying to future contracts (orders) between the parties during its term;

(2) A description, as specific as practicable, of supplies or services to be provided, and

(3) Methods for pricing, issuing, and delivering future orders under the basic ordering agreement.

(b) A basic ordering agreement is not a contract.

16.803–2 Application.

A basic ordering agreement is used to expedite contracting for supplies or services when specific items, quantities, and prices are uncertain at the time the agreement is executed, but a substantial number of requirements for the type of supplies or services covered by the agreement are anticipated to be purchased from the contractor. These procedures, when applied appropriately, can result in benefits and cost savings by reducing administrative lead-time, inventory investment, and inventory obsolescence due to design changes.

16.803–3 Limitations.

(a) A basic ordering agreement must not state or imply any agreement by the Government to place future contracts or orders with the contractor or be used in any manner to restrict competition.

(b) Each basic ordering agreement must—

(1) Describe the method for determining prices to be paid to the contractor for the supplies or services;

(2) Include delivery terms and conditions or specify how they will be determined;

(3) List one or more Government activities authorized to issue orders under the agreement;

(4) Specify the point at which each order becomes a binding contract (e.g., issuance of the order, acceptance of the order in a specified manner, or failure to reject the order within a specified number of days);

(5) Provide that failure to reach agreement on price for any order issued before its price is established (see paragraph (d)(3) of this section) is a dispute under the Disputes clause included in the basic ordering agreement; and

(6) If fast payment procedures will apply to orders, include the special data required at part 32.

(c) Basic ordering agreements may need to be revised due to mandatory statutory requirements. A basic ordering agreement must be changed only by modifying the agreement itself and not by individual orders issued under it. Modifying a basic ordering agreement must not retroactively affect orders previously issued under it.

(d) A contracting officer representing any Government activity listed in a basic ordering agreement may issue orders for required supplies or services covered by that agreement.

(1) Before issuing an order under a basic ordering agreement—

(i) Obtain competition in accordance with part 6;

(ii) If the order is being placed after competition, ensure that use of the basic ordering agreement is not prejudicial to other offerors; and

(iii) Sign or obtain any applicable justifications and approvals, and any determination and findings, and comply with other requirements in accordance with part 1, as if the order were a contract awarded independently of a basic ordering agreement.

(2) Contracting officers must—

(i) Issue orders under basic ordering agreements on Optional Form (OF) 347, Order for Supplies or Services, or on any other appropriate contractual instrument;

(ii) Incorporate by reference the provisions of the basic ordering agreement;

(iii) If applicable, cite the authority under part 6 in each order; and

(iv) Comply with publicizing and response time requirements given in part 5 or part 12, as applicable, when a notice is required.

(3) Do not make any final commitment nor authorize the contractor to begin work on an order under a basic ordering agreement until prices have been established, unless the order establishes a ceiling price limiting the Government's obligation and either—

(i) The basic ordering agreement provides adequate procedures for timely pricing of the order early in its performance period; or

(ii) The need for the supplies or services is compelling and unusually urgent (*i.e.*, when the Government would be seriously injured, financially or otherwise, if the requirement is not met sooner than would be possible if prices were established before the work began). Proceed with pricing as soon as practical. An entire order must never be priced retroactively.

PART 17—SPECIAL CONTRACTING METHODS

Sec.

17.000 Scope of part.

Subpart 17.1—Multiyear Contracting

17.101 Authority.

17.102 Definitions.

17.103 Presolicitation.

17.103–1 Policy.

17.103–2 Procedures.

17.103–3 Solicitations.

17.104 Evaluation and Award.

17.104–1 General.

17.104–2 Cancellation provisions.

17.104–3 Congressional notification.

17.104–4 Funding at award.

17.104–5 Special procedures for DoD, NASA, and the Coast Guard.

17.105 Postaward.

17.106 Contract clauses.

Subpart 17.2—Options

17.200 Scope of subpart.

17.201 Presolicitation.

17.201–1 Use of options.

17.202 Evaluation and award.

17.202–1 Solicitation and contract requirements.

17.203 Solicitation provisions and contract clauses.

17.204 Postaward.

17.204–1 Exercise of options.

Subpart 17.3—Leader Company Contracting

17.301 Policy.

Subpart 17.4—Interagency Acquisitions

17.400 Scope of subpart.

17.401 General.

17.402 Procedures.

17.402–1 General.

17.402–2 The Economy Act.

17.403 Ordering procedures.

17.404 Reporting requirements.

Subpart 17.5—Interagency Acquisitions: Acquisitions by Nondefense Agencies on Behalf of the Department of Defense

17.500 Scope of subpart.

17.501 Definitions.

17.502 Applicability.

17.503 Policy.

Subpart 17.6—Management and Operating Contracts

17.600 Scope of subpart.

17.601 Definition.

17.602 Presolicitation.

17.602–1 Policy.

17.602–2 Limitations.

17.603 Award, renewal, and extension.

Subpart 17.7—Reverse Auctions

17.700 Scope of subpart.

17.701 Definitions.

17.702 Presolicitation.

17.702–1 Policy.

17.702–2 Applicability.

17.702–3 Reverse auction service provider.

17.703 Evaluation and award.

17.704 Solicitation provision and contract clauses.

Authority: 41 U.S.C. 1121(b); 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C.

chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

17.000 Scope of part.

This part prescribes policies and procedures for the acquisition of supplies and services through special contracting methods, including—

- (a) Multiyear contracting;
- (b) Options;
- (c) Leader company contracting;
- (d) Interagency acquisitions;
- (e) Management and operating contracts; and
- (f) Reverse auctions.

Subpart 17.1—Multiyear Contracting

17.101 Authority.

This subpart prescribes policies and procedures for acquiring supplies or services through multiyear contracting, as authorized by 10 U.S.C. 3501, 10 U.S.C. 3531, and 41 U.S.C. 3903. It addresses requirements for presolicitation planning, solicitation content, evaluation and award, funding, and cancellation provisions unique to multiyear contracts.

17.102 Definitions.

As used in this subpart—

Cancellation means the cancellation (within a contractually specified time) of the total requirements of all remaining program years. Cancellation results when the contracting officer—

(1) Notifies the contractor of nonavailability of funds for contract performance for any subsequent program year, or

(2) Fails to notify the contractor that funds are available for performance of the succeeding program year requirement.

Cancellation ceiling means the maximum cancellation charge that the contractor can receive if the contract is cancelled.

Cancellation charge means the amount of unrecovered costs which would have been recouped through amortization over the full term of the contract, including the canceled term.

Multiyear contract means a contract for the purchase of supplies or services for more than 1, but not more than 5 program years, unless otherwise authorized by statute. A multiyear contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds, and (if it does so provide) may provide for a cancellation payment to be made to the contractor if appropriations are not made. The key distinguishing difference between multiyear contracts and multiple year contracts is that multiyear contracts buy more than 1

year's requirement (of a product or service) without establishing and having to exercise an option for each program year after the first.

Nonrecurring costs means costs that are generally incurred on a one-time basis and include such costs as plant or equipment relocation, plant rearrangement, special tooling and special test equipment, preproduction engineering, preliminary design effort, initial spoilage and rework, and specialized work force training.

Recurring costs means costs that vary with the quantity being produced, such as labor and materials, and are the ongoing expenses associated with its production and maintenance.

17.103 Presolicitation.

17.103-1 Policy.

(a) Except for DoD, NASA, and the Coast Guard, the contracting officer may enter into a multiyear contract if the head of the contracting activity determines that—

(1) The need for the supplies or services is reasonably firm and continuing throughout the contract period; and

(2) A multiyear contract will serve the best interest of the Government by either encouraging competition or promoting economy in program administration, performance, and operation.

(b) For DoD, NASA, and the Coast Guard, the head of the agency may enter into a multiyear contract for supplies if—

(1) The contract will save significant costs compared to using annual contracts, or will provide necessary stability to the defense industrial base not otherwise achievable through annual contracts;

(2) The purchase amounts are expected to remain substantially unchanged throughout the contract period, in terms of production and procurement rates and total quantities;

(3) The agency head is reasonably expected to request sufficient funding throughout the contract period at the level required to avoid contract cancellation;

(4) The design of the supplies is stable, and technical risks are not excessive;

(5) Both the contract cost estimates and projected cost avoidance through the use of a multiyear contract are realistic;

(6) For Department of Defense purchases, the contract will promote national security of the United States; and

(7) For Department of Defense contracts valued at \$500,000,000 or

more, the Secretary certifies that the conditions in 10 U.S.C. 3501 paragraphs (i)(3)(C) through (G) will be met.

(c) For DoD, NASA, and the Coast Guard, the head of the agency may enter into a multiyear contract for services, and for items of supply related to such services, if—

(1) The services are of one or more of the following types—

(i) Operation, maintenance, and support of facilities and installations;

(ii) Maintenance or modification of aircraft, ships, vehicles, and other highly complex military equipment;

(iii) Specialized training necessitating high quality instructor skills;

(iv) Base services; or

(v) Environmental remediation services for—

(A) An active military installation, as defined in 10 U.S.C. 2801;

(B) A military installation being closed or realigned under a base closure law; or

(C) A site formerly used by the Department of Defense;

(2) There will be a continuing need for the services;

(3) The furnishing of such services will require a substantial initial investment (e.g., equipment, training, or specialized workforce);

(4) The contract will promote the best interests of the United States by encouraging effective competition and promoting economies in operation; and

(5) All further restrictions listed in 10 U.S.C. 3531, or any other statute, are adhered to.

17.103-2 Procedures.

(a) Agency funding of multiyear contracts must follow the policies in OMB Circular A-11 (Preparation, Submission, and Execution of the Budget) and other applicable guidance on funding multiyear contracts.

(b) Multiyear contracts for fixed assets should be either—

(1) Fully funded; or

(2) Incrementally funded in economically or programmatically viable stages. See 32.703 for incremental funding of fixed-price and cost-reimbursement contracts.

17.103-3 Solicitations.

(a) In solicitations for multiyear contracts, include—

(1) The supply or service requirements for the first program year, and the entire multiyear contract period, broken down by program year;

(2) A statement that if the Government only needs the first-year requirements, evaluation will be based on first year pricing;

(3) A provision requiring a cancellation ceiling (as a percentage or

dollar amount) and applicable dates for each program year that could be cancelled; and

(4) A statement that the Government will not award less than the first program year requirements.

(b) The solicitation must explain how the Government will compare offers for the first year against offers for the entire multiyear period. This applies to both sealed bidding and negotiated acquisitions.

17.104 Evaluation and Award.

17.104-1 General.

Follow the appropriate acquisition policies and procedures (such as those in parts 12, 14 and 15). In addition, contracting officers must comply with the requirements unique to multiyear contracting in this section, including cancellation procedures, congressional notification, and funding obligations at award.

17.104-2 Cancellation provisions.

(a) *Cancellation procedures.*

(1) All program years except the first are subject to cancellation.

(2) For each program year subject to cancellation—

(i) Set a cancellation ceiling;

(ii) Do not include amounts for requirements from prior program years; and

(iii) Lower the cancellation ceiling proportionally as requirements are completed.

(3) When calculating cancellation ceilings—

(i) Estimate reasonable startup costs, learning curve costs, and other nonrecurring costs; and

(ii) Do not include labor, materials, or other costs related to future program years.

(4) Set specific cancellation dates for each program year based on production needs and funding availability. These dates must be in the contract schedule.

(b) *Revising ceilings or dates.* The contracting officer may revise cancellation ceilings or dates after solicitation release when necessary. For sealed bidding, changes must be made by amendment before bid opening. In negotiated acquisitions, discussions may reveal a need for changes before final award.

17.104-3 Congressional notification.

(a) Except for DoD, NASA, and the Coast Guard, a multiyear contract with a cancellation ceiling over \$20 million may not be awarded until the agency head notifies Congress in writing.

(b) For DoD, NASA, and the Coast Guard, when the ceiling is over \$200 million, the agency head must notify the

House and Senate armed services and appropriations committees in writing.

(c) When Congressional notification is required by paragraph (a) or (b) of this section, do not award the contract for 31 days.

17.104-4 Funding at award.

(a) At award, obligated funds must cover either—

(1) The full contract period; or
(2) The first fiscal year plus any potential cancellation and termination costs.

(b) The contract must state the funded amount for the first program year and any amounts for cancellation or termination.

17.104-5 Special procedures for DoD, NASA, and the Coast Guard.

(a) *Participation by subcontractors and suppliers.* To the extent practicable, structure multiyear contracts to attract and retain a diverse defense industrial base.

(b) *Protection of existing authority.* To the extent practicable, multiyear contracting must not limit an agency's ability to maintain competition or terminate contracts based on performance deficiencies related to cost, quality, or schedule.

(c) *Level unit prices.* Where appropriate, negotiate level unit prices for the items to be delivered in each program year.

17.105 Postaward.

(a) *Termination vs. cancellation.* The termination for convenience procedure applies to any Government contract, including multiyear contracts. Termination differs from cancellation as follows:

(1) *Timing.* Termination can occur anytime during the contract life, while cancellation happens between fiscal years.

(2) *Quantity.* Termination can apply to total or partial quantities, while cancellation must apply to all quantities for future fiscal years.

(b) *Funding limitations upon termination.* If funds are not available to continue a multiyear contract into the next fiscal year, cancel or terminate the contract. If the Government terminates the entire contract for convenience, including all cancelable requirements, the Government obligation is no more than—

(1) The amount specified as available for contract performance; plus

(2) The applicable cancellation ceiling.

17.106 Contract clauses.

(a) Insert the clause at 52.217-2, Cancellation Under Multiyear Contracts,

in solicitations and contracts, including those for commercial products or commercial services, when a multiyear contract is contemplated.

(b) When the production period may cause an offeror to include a labor or material cost contingency in the contract price, consider using an economic price adjustment clause (see part 16).

(c) For service contracts, the contracting officer may use an economic price adjustment clause authorized by part 16, when price changes require coverage and are not included in and not already addressed by the clause at 52.222-43, Fair Labor Standards Act and Service Contract Labor Standards—Price Adjustment (Multiple Year and Option Contracts).

Subpart 17.2—Options

17.200 Scope of subpart.

This subpart prescribes policies and procedures for the use of options in contracts.

(a) Except as provided in agency regulations, this subpart does not apply to contracts for—

(1) Construction, alteration, or repair (including dredging, excavating, and painting) of buildings, bridges, roads, or other real property;

(2) Architect-engineer services; or

(3) Research and development services.

(b) Agencies may still use options in these contracts according to their own regulations.

17.201 Presolicitation.

17.201-1 Use of options.

(a) In contracting by sealed bidding or negotiation, the contracting officer may add options to contracts when beneficial to the Government, within the limitations in paragraphs (b) and (c). For sealed bidding, before including the provision at 52.217-5, Evaluation of Options, document in writing that there is a reasonable likelihood that the Government will exercise the options.

(b) Inclusion of an option is normally not beneficial to the Government when:

(1) The Government's needs involve—

(i) Minimum economic quantities (enough volume to permit the recovery of startup costs and the production of supplies at reasonable prices); and

(ii) Delivery needs far enough in the future to allow for a new competitive contract.

(2) An indefinite quantity or requirements contract better meets the Government's needs. However, these contract types may still include options if appropriate.

(c) Do not use options when—

(1) Price or availability of necessary material or labor is not reasonably foreseeable, introducing significant risk into option pricing; or

(2) Market prices for the supplies or services are likely to change significantly.

17.202 Evaluation and award.

(a) Prior to awarding the basic contract, evaluate offers for option quantities or periods included in the solicitation.

(b)(1) The contracting officer is not required to evaluate option quantities when such evaluation would not benefit the Government. This exception should be reserved for rare instances.

(2) This decision must be—

(i) In writing;

(ii) Approved at least one level above the contracting officer; and

(iii) Included in the contract file.

17.202-1 Solicitation and Contract Requirements.

(a) The solicitation and contract must clearly state limits on—

(1) The additional supplies or services the Government may purchase including the number, type, frequency or duration; or

(2) The contract duration, including any extensions.

(b) Specify in the contract the period within which the option may be exercised, allowing adequate lead time for the contractor to ensure continuous production.

(c) Follow any statutory or regulatory limits on contract duration (e.g., see 10 U.S.C. 3403 for indefinite-delivery contracts or 41 U.S.C. 6707(d) for service contracts).

17.203 Solicitation provisions and contract clauses.

(a) Insert a provision substantially the same as the provision at 52.217-3, Evaluation Exclusive of Options, in solicitations, including those for commercial products or commercial services, when the solicitation includes an option clause but does not include the provision described in either paragraph (b) or (c) of this section.

(b) Insert a provision substantially the same as the provision at 52.217-4, Evaluation of Options Exercised at Time of Contract Award, in solicitations, including those for commercial products or commercial services, when—

(1) The solicitation includes an option clause; and

(2) There is a reasonable likelihood that the option will be exercised when the contract is awarded.

(c) Insert a provision substantially the same as the provision at 52.217-5,

Evaluation of Options, in solicitations, including those for commercial products or commercial services, when—

(1) The solicitation includes an option clause; and

(2) There is a reasonable likelihood of exercise, and the option will not be exercised at the time of contract award.

(d) Insert a clause substantially the same as the clause at 52.217–6, Option for Increased Quantity, in solicitations and contracts, including those for commercial products or commercial services, when adding an option is appropriate (see 17.201), and the option quantity appears as a percentage of the basic contract quantity or as additional quantities of a specific line item.

(e) Insert a clause substantially the same as the clause at 52.217–7, Option for Increased Quantity—Separately Priced Line Item, in solicitations and contracts, including those for commercial products or commercial services, when adding an option is appropriate (see 17.201), and the option quantity appears as a separate line item with the same name as a corresponding basic line item.

(f) Insert a clause substantially the same as the clause at 52.217–8, Option to Extend, in solicitations and contracts, including those for commercial products or commercial services, when adding an option to extend the period of performance for services, ordering period for any requirement, or both is appropriate. (See 17.201 and part 37).

(g) Insert a clause substantially the same as the clause at 52.217–9, Option to Extend the Term of the Contract, in solicitations and contracts, including those for commercial products or commercial services, when adding an option is appropriate (see 17.201) and the contract needs to include any of these elements:

(1) A requirement for the Government to give the contractor advance written notice of intent to extend.

(2) A statement that an extension of the contract also extends the option.

(3) A specific limit on the total contract duration.

17.204 Postaward.

17.204–1 Exercise of options.

(a) If the contract includes an economic price adjustment clause and the contractor requests a price revision, determine how the adjustment affects option prices before exercising the option.

(b) The contracting officer may exercise options only after—

(1) Providing written notice to the contractor of the Government's

intention to exercise the option, within the time specified in the contract;

(2) Confirming that funds are available; and

(3) Determining that—

(i) The option fulfills an existing Government requirement;

(ii) The option was synopsisized as required, unless exempt (see part 5 and part 12);

(iii) The contractor does not have an active exclusion record in the System for Award Management (see part 9);

(iv) The contractor's performance on the current contract has been acceptable (for example, satisfactory or better performance ratings);

(v) After reviewing price and other factors, the option price is fair and reasonable based on current market conditions and exercise of the option is in the Government's best interest; and

(vi) The option exercise complies with the requirements of part 6 for full and open competition, *i.e.*, the option was evaluated as part of the initial competition and is exercisable at an amount specified in or reasonably determinable from the terms of the contract.

Subpart 17.3—Leader Company Contracting

17.301 Policy.

Leader company contracting is an extraordinary acquisition technique, limited to special circumstances, and may only be used in accordance with agency procedures. Under this technique, a developer or sole producer of a product or system is designated as the leader company. The leader company is responsible for furnishing assistance and proprietary know-how under an approved contract to one or more designated follower companies. The purpose is to enable those follower companies to qualify as sources of supply for the product or system, thereby expanding the industrial base and promoting competition.

Subpart 17.4—Interagency Acquisitions

17.400 Scope of subpart.

(a) This subpart prescribes policies and procedures for all interagency acquisitions under any authority, except as provided in paragraph (c) of this section. When nondefense agencies acquire supplies or services on behalf of the Department of Defense, the requirements in subpart 17.5 also apply.

(b) This subpart applies to interagency acquisitions when an agency—

(1) Requires supplies or services and uses another agency's contract; or

(2) Requests another agency to provide acquisition assistance, including but not limited to awarding or administering a contract, task order, or delivery order.

(c) This subpart does not apply to reimbursable work performed by one agency's employees for another agency (except acquisition assistance), or interagency activities where contracting is not the primary purpose.

17.401 General.

(a) Interagency acquisitions are commonly conducted through indefinite-delivery contracts.

(b) Do not use an interagency acquisition to circumvent statutory or regulatory restrictions on the obligation or use of funds.

(c) An interagency acquisition must not conflict with another agency's statutory authority or responsibility. For example, the Administrator of General Services has authority under 40 U.S.C. "Public Buildings, Property, and Works" and 41 U.S.C. division C of subtitle I ("Procurement").

17.402 Procedures.

17.402–1 General.

(a) *Written agreement on responsibility for management and administration.*

(1) *Assisted acquisitions.*

(i) Before issuing a solicitation, both the servicing agency and requesting agency must sign a written interagency agreement that establishes the basic terms and conditions governing the relationship, which must include—

(A) The roles and responsibilities for acquisition planning;

(B) Contract execution; and

(C) Administration and management of the contract(s) or order(s).

(ii) The requesting agency must—

(A) Provide the servicing agency for incorporation into the order or contract, any unique requesting agency terms, conditions and applicable agency-specific statutes, regulations, directives, and other applicable requirements, or

(B) Inform the servicing agency contracting officer in writing that there are no special requirements beyond the FAR.

(iii) For assisted acquisitions for the Department of Defense, also see subpart 17.5.

(iv) Both agencies must keep the signed agreement in their files along with sufficient documentation to permit a proper audit.

(2) *Direct acquisitions.* When the requesting agency administers the order itself, no written agreement with the servicing agency is required.

(b) *Business-case analysis requirements for establishing a multi-agency contract or Governmentwide acquisition contract.* In accordance with section 865 of Public Law 110–417, the agency business case must address how the contract will be administered, analyze all direct and indirect costs of awarding and administering the contract, and describe the impact the contract will have on the Government's ability to leverage its purchasing power. For example, the analysis should address whether the new contract could dilute the effectiveness of existing contracts. For additional requirements see OMB Memorandum M–19–13.

17.402–2 The Economy Act.

(a) The Economy Act (31 U.S.C. 1535)—

(1) Authorizes agencies to enter into agreements to obtain supplies or services from other agencies. The FAR applies when one agency uses another agency's contract. If the transaction between agencies does not result in a contract or order, the FAR does not apply;

(2) Allows orders between major organizational units within the same agency. Agencies should address the procedures for these intra-agency transactions in agency regulations; and

(3) Applies when more specific statutory authority does not exist, such as 40 U.S.C. 501 for Federal Supply Schedules (see part 8) or 40 U.S.C. 11302(e) for Governmentwide acquisition contracts (GWACs).

(b) *Payment.* (1) The servicing agency may request advance payment for estimated costs in writing.

(2) If the servicing agency approves, the requesting agency may pay actual costs after receiving the supplies or services.

(3) Bills rendered or advance payment requests must not be subject to audit or certification in advance of payment.

(4) The servicing agency must not charge, and the requesting agency must not pay, any fee exceeding the actual cost (or estimated cost if actual cost is unknown) of entering into and administering the contract or agreement under which the order is filled.

17.403 Ordering procedures.

(a) Before placing an order for supplies or services with another Government agency, the requesting agency must follow the procedures in 17.402–1 and, if under the Economy Act, 17.402–2.

(b) The order may use any form or document that both agencies accept. The order should include—

(1) A description of the supplies or services required;

(2) Delivery requirements;

(3) A funds citation;

(4) A payment provision (see 17.402–2(b) for Economy Act orders); and

(5) Acquisition authority as appropriate (see 17.403(d)).

(c) The requesting and servicing agencies should agree to procedures for resolving disagreements that may arise under interagency acquisitions. When appropriate, this may include using a third-party forum. If a third party is proposed, that party should provide their written consent.

(d) When an interagency acquisition requires the servicing agency to award a contract, these additional procedures apply:

(1) If law or regulation requires a justification and approval or a D&F, the servicing agency must prepare and issue the document. The requesting agency must provide any information needed for the justification and approval or D&F.

(2) The requesting agency must provide other assistance, such as information or special contract terms needed to comply with any conditions or limitations on the requesting agency's funds.

(3) The servicing agency is responsible for compliance with all other legal or regulatory requirements for the contract, including—

(i) Having proper legal authority for the contract action; and

(ii) Following all competition requirements in part 6. If the servicing agency is not subject to the FAR, the requesting agency must verify that contracts used to meet its requirements contain provisions protecting the Government from inappropriate charges (for example, provisions required by part 31). The requesting agency must also verify that adequate contract administration will be provided.

(e) Nonsponsoring Federal agencies may use a Federally Funded Research and Development Center (FFRDC) only if the terms of the FFRDC's sponsoring agreement allow work from agencies other than the sponsor. Work given to the FFRDC requires the sponsor's acceptance and must fall within the FFRDC's purpose, mission, general scope of effort, or special competency. (See part 35 and part 6 for procedures when using other than full and open competition.) The nonsponsoring agency must provide documentation to the sponsoring agency showing that the requested work would not place the FFRDC in direct competition with domestic private industry.

17.404 Reporting requirements.

The contracting officer for the servicing agency must ensure all service contractor reporting requirements are met in accordance with part 4.

Subpart 17.5—Interagency Acquisitions: Acquisitions by Nondefense Agencies on Behalf of the Department of Defense

17.500 Scope of subpart.

(a) Compliance with this subpart is required in addition to the policies and procedures for interagency acquisitions in subpart 17.4. This subpart establishes policies and procedures specifically for acquisitions of supplies and services by nondefense agencies on behalf of the Department of Defense (DoD).

(b) This subpart implements Public Law 110–181, section 801 (10 U.S.C. 3201 note prec.).

17.501 Definitions.

As used in this subpart—
Department of Defense (DoD) acquisition official means—

(1) A DoD contracting officer; or
(2) Any other DoD official authorized to approve a direct acquisition or an assisted acquisition on behalf of DoD.

Nondefense agency means any department or agency of the Federal Government other than the Department of Defense.

Nondefense agency that is an element of the intelligence community means the agencies identified in 50 U.S.C. 3003(4).

17.502 Applicability.

(a) This subpart applies to all acquisitions made by nondefense agencies on behalf of DoD.

(b) This subpart does not apply to contracts entered into by a nondefense agency that is an element of the intelligence community for a joint program that meets the needs of both DoD and the nondefense agency.

17.503 Policy.

(a) A DoD acquisition official may request a nondefense agency to conduct an acquisition on behalf of DoD exceeding the simplified acquisition threshold only if the head of the nondefense agency has certified that the agency will comply with applicable procurement requirements for that fiscal year, except when waived as provided by paragraph (e) of this section.

(b) A nondefense agency is compliant with applicable procurement requirements if its procurement policies, procedures, and internal controls for acquisitions on behalf of DoD, and their administration, adequately ensure the nondefense agency complies with—

(1) The Federal Acquisition Regulation and other laws and regulations that apply to procurements of supplies and services by Federal agencies; and

(2) Laws and regulations that apply to procurements of supplies and services made by DoD through other Federal agencies, including DoD financial management regulations, the Defense Federal Acquisition Regulation Supplement (DFARS), DoD class deviations, and the DFARS Procedures, Guidance, and Information (PGI). (The DFARS, DoD class deviations, and PGI are available at: <http://www.acq.osd.mil/dpap/dars>).

(c) Within 30 days of the beginning of each fiscal year, submit nondefense agency certifications of compliance to the Principal Director, Defense Pricing and Contracting at: Department of Defense, Office of the Under Secretary of Defense (Acquisition and Sustainment), Defense Pricing and Contracting, Contract Policy, Room 3B938, 3060 Defense Pentagon, Washington, DC 20301–3060.

(d)(1) The DoD acquisition official must provide the servicing nondefense agency contracting officer with any DoD-unique terms, conditions, other related statutes, regulations, directives, or other applicable requirements for incorporation into the order or contract.

(2) If there are no DoD-unique requirements beyond the FAR, the DoD acquisition official must inform the servicing nondefense agency contracting officer in writing.

(3) Nondefense agency contracting officers are responsible for ensuring support provided in response to DoD's request complies with paragraph (b) of this section.

(e) The limitation in paragraph (a) of this section does not apply to acquisitions of supplies and services on behalf of DoD by a nondefense agency during any fiscal year for which the Under Secretary of Defense for Acquisition and Sustainment has determined in writing that it is necessary in DoD's interest to acquire certain supplies and services through the nondefense agency during that fiscal year.

(f) Nondefense agency certifications, determinations, and additional information are available at <https://www.acq.osd.mil/asda/dpc/cp/policy/interagency-acquisition.html>.

Subpart 17.6—Management and Operating Contracts

17.600 Scope of subpart.

This subpart establishes policies and procedures for management and

operating contracts for the Department of Energy and any other agencies with the necessary statutory authority.

17.601 Definition.

Management and operating contract means an agreement where the Government contracts for the operation, maintenance, or support, on its behalf, of a Government-owned or -controlled research, development, special production, or testing facility that primarily serves one or more major programs of the Federal agency.

17.602 Presolicitation.

17.602–1 Policy.

The head of an agency, without power of delegation, and with statutory authority, may authorize contracting officers, in writing, to enter into or renew management and operating contracts. This authorization must comply with the agency's statutory authority or 41 U.S.C. chapter 33, and the agency's regulations for such contracts. Every authorized contract must state this authorization on its face.

17.602–2 Limitations.

(a) Do not authorize management and operating contracts for—

(1) Functions involving direction, supervision, or control of Government personnel, except supervision related to training;

(2) Functions involving the exercise of police or regulatory powers in the Government's name, other than guard or plant protection services;

(3) Functions determining basic Government policies;

(4) Day-to-day staff or management functions of the agency or any of its elements; or

(5) Functions that may be better accomplished by the use or rental of Government property under subpart 45.3, Authorizing the Use and Rental of Government Property.

(b) An authorization under 17.602–1 is considered sufficient proof of compliance with paragraph (a) of this section. Nothing in paragraph (a) affects the validity or legality of such an authorization.

(c) For use of project labor agreements, see part 22.

17.603 Award, renewal, and extension.

(a) Effective performance under management and operating contracts typically requires high expertise levels and continuity in operations and personnel. Therefore, contracting officers must take extraordinary steps before award to ensure that—

(1) The prospective contractor has sufficient technical and managerial capacity,

(2) Organizational conflicts of interest are adequately addressed; and

(3) The contract gives the Government broad and continuing rights to involve itself in technical and managerial decision making about performance, when necessary.

(b) Review each management and operating contract, following agency procedures, at appropriate intervals and at least once every 5 years.

(1) The review should determine if meaningful improvement in performance or cost might reasonably be achieved.

(2) Any extension or renewal of a management and operating contract must be authorized at a level within the agency no lower than the level at which the original contract was authorized under 17.602–1.

Subpart 17.7—Reverse Auctions

17.700 Scope of subpart.

This subpart prescribes policies and procedures for conducting reverse auctions and using reverse auction service providers.

17.701 Definitions.

As used in this subpart—

Complex, specialized, or substantial design and construction services (section 2 of the Construction Consensus Procurement Improvement Act of 2021 (Pub. L. 117–28)) means—

(1) Site planning and landscape design;

(2) Architectural and engineering services (as defined in 40 U.S.C. 1102);

(3) Interior design;

(4) Performance of substantial construction work for facility, infrastructure, and environmental restoration projects; or

(5) Construction or substantial alteration of public buildings or public works.

Government data means any information, document, media, or machine-readable material regardless of physical form or characteristics, that is created or obtained by the Government in the course of official Government business.

Government-related data means any information, document, media, or machine-readable material regardless of physical form or characteristics that is created or obtained by a contractor through the storage, processing, or communication of Government data. This does not include a contractor's business records (e.g., financial records, legal records, etc.) or data such as

operating procedures, software coding, or algorithms that are not uniquely applied to the Government data.

Reverse auction service provider means a commercial or Government entity that provides a means for conducting reverse auctions when acquiring supplies or services to be used by the Government.

17.702 Presolicitation.

17.702–1 Policy.

(a) Reverse auctions may be appropriate when market research shows that—

(1) A competitive marketplace exists for the supplies or services being acquired;

(2) Multiple offerors can meet the agency's requirement; and

(3) The nature of the supplies or services (such as clearly defined specifications or less complex requirements) supports an iterative bidding process.

(b) The reverse auction process is used to obtain pricing for an acquisition. When using reverse auctions, contracting officers must still follow the appropriate acquisition policies and procedures (such as those in parts 8, 12, 13, 15 or 16).

(c) When acquiring reverse auction services from a commercial provider, agencies must—

(1) Use competitive procedures, unless an exception applies;

(2) Detail the provider's fee structure in the resulting contract or agreement; and

(3) Make the contract or agreement details, including the fee structure, available to contracting officers to consider when deciding whether to use that provider, as required by 17.702–3.

(d) When acquiring reverse auction services, ensure the solicitation and contract include—

(1) Descriptions of Government data and Government-related data;

(2) Data ownership, licensing, delivery, and disposition instructions for relevant types of Government data and Government-related data (such as DD Form 1423, Contract Data Requirements List, work statement task, line item); and

(3) Disposition instructions that must allow for data transition in commercially available or open and non-proprietary format and for permanent records according to National Archives and Records Administration guidance.

(e) Contracting officers must only use reverse auction service providers that—

(1) Do not claim or imply they can or will obtain a Government contract for auction participants;

(2) Allow entities to register for free as potential offerors for Government reverse auctions on their platform;

(3) Allow each entity, during registration, to sign a proprietary data protection agreement with the provider that does not affect Government solicitation or contract terms;

(4) Protect from unauthorized use or disclosure and do not release outside the Government—

(i) All contractor bid or proposal information and source selection information related to providing reverse auction services to the Government;

(ii) All information generated to support issuing a task order, delivery order, or order under a blanket purchase agreement; and

(iii) Information an offeror identifies as restricted from duplication, use, or disclosure for any purpose except evaluating the reverse auction participant's price or proposal;

(5) Allow offerors to see the successive lowest price(s) offered in the auction without revealing the identities of other offerors;

(6) At the close of each auction—

(i) Provide the Government with the apparent successful offer, including information that separately identifies the offeror's price and the price for each provider fee or charge in the total price; and

(ii) Provide the Government with all information and documentation received from offerors responding to the reverse auction;

(7) Do not participate as an offeror in any reverse auction they host for the Government. This prohibition includes participation by any entity with which the provider has a relationship creating an actual or potential conflict of interest; and

(8) Assert no rights or license in the data gathered or generated during a reverse auction.

(f) Only a contracting officer may—

(1) Exclude an offeror from participating in an auction;

(2) Determine the awardee(s) of any reverse auction; or

(3) Determine that the offeror is a responsible prospective contractor (see part 9).

17.702–2 Applicability.

Do not use reverse auction processes for—

(a) Complex, specialized, or substantial design and construction services.

(1) Do not use reverse auctions for an award of a contract, blanket purchase agreement, or order if the award is anticipated to exceed the simplified acquisition threshold for complex,

specialized, or substantial design and construction services (see 17.701) in accordance with the Construction Consensus Procurement Improvement Act of 2021 (Pub. L. 117–28).

(2) Contracting officers may use reverse auctions for procurements for complex, specialized, or substantial design and construction services at or below the simplified acquisition threshold—

(i) If market research indicates it may be appropriate; and

(ii) Use of a reverse auction is not otherwise prohibited by regulation or statute (see 36.002(c) and 36.102).

(b) Procurements using sealed bidding procedures (see part 14); or

(c) Acquisition of personal protective equipment, in accordance with Sections 813 and 814 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328); Section 882 of the NDAA for FY 2018 (Pub. L. 115–91); and Section 880 of the John S. McCain NDAA for FY 2019 (Pub. L. 115–232, 41 U.S.C. 3701 note).

17.702–3 Reverse auction service provider.

When considering using a reverse auction service provider—

(a) Conduct market research of available sources of reverse auction services (such as existing agency contracts or agreements, commercial service providers, or Government service providers);

(b) Evaluate the fee structure for each reverse auction service provider; and

(c) Document in the contract file that using a reverse auction service provider is cost effective.

17.703 Evaluation and award.

(a) When conducting a reverse auction—

(1) Do not reveal the identity of offeror(s) except for the awardee's identity after making an award from the auction;

(2) Allow offerors to continually revise their prices downward during the reverse auction until it closes; and

(3) Allow an offeror to withdraw an offer before the auction closes.

(b) When using reverse auction service providers, contracting officers must—

(1) Include contact information, including the contracting officer name and email address, in the synopsis and solicitation so offerors can contact the contracting officer directly with questions;

(2) Upon receiving a successful offer, verify that any provider fees or charges in the price match the provider's fee structure; and

(3) Include in the contract file any information or documentation received by the reverse auction service provider from offerors responding to the reverse auction.

(c) If only one offeror participates in an auction, the contracting officer may—

(1) Cancel the auction and document the contract file with evidence of single offeror participation; or

(2) Accept the offer, but only if the price is determined to be fair and reasonable.

17.704 Solicitation provision and contract clauses.

(a) Insert the provision at 52.217–10, Reverse Auction, in solicitations, including those for commercial products or commercial services, when using a reverse auction to award a contract or blanket purchase agreement.

(b) Insert the clause at 52.217–11, Reverse Auction—Orders, in solicitations and contracts, including those for commercial products or commercial services, for a multiple-award contract or blanket purchase agreement when a reverse auction may be used to place orders under the basic contract or blanket purchase agreement.

(c) Insert the clause at 52.217–12, Reverse Auction Services, in solicitations and contracts, including those for commercial products or commercial services, for the purchase of reverse auction services.

PART 35—RESEARCH AND DEVELOPMENT CONTRACTING

Sec.

35.000 Scope of part.

35.001 Definitions.

35.002 Policy.

Subpart 35.1—Presolicitation and Solicitation

35.101 Solicitations.

35.102 Broad agency announcement.

Subpart 35.2—Evaluation and Award

35.201 Evaluation for award.

Subpart 35.3—Postaward

35.301 Scientific and technical reports.

Subpart 35.4—Federally Funded Research and Development Centers

35.401 Definitions.

35.402 Policy.

35.403 Sponsoring agreements.

35.404 Establishing or changing an FFRDC.

35.405 Using an FFRDC.

35.406 Limitation on the creation of new FFRDCs.

35.407 Reviewing FFRDCs.

35.408 Terminating an FFRDC.

35.409 Master list of FFRDCs.

Authority: 41 U.S.C. 1121(b); 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C.

chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

35.000 Scope of part.

(a) This part prescribes policies and procedures specifically for research and development (R&D) contracting.

(b) This part does not address acquisitions for independent research and development (IR&D) (see 31.205–18).

(c) The primary purpose of contracted R&D programs is to advance scientific and technical knowledge and apply that knowledge to the extent necessary to achieve agency and national goals.

(d) R&D contracts initially awarded from the competitive selection of a proposal may contain a line item or option(s) for—

(1) The development and demonstration or initial production of technology developed under the contract; or

(2) The delivery of initial or additional items if the item or a prototype is created as the result of research and development work performed under the contract.

35.001 Definitions.

As used in this subpart—

Applied research

(1) Means the effort that—

(i) Normally follows basic research, but may not be severable from the related basic research;

(ii) Attempts to determine and exploit the potential of scientific discoveries or improvements in technology, materials, processes, methods, devices, or techniques; and

(iii) Attempts to advance the state of the art; and

(2) Does not include development (as defined in this section).

Development means the systematic use of scientific and technical knowledge in the design, development, testing, or evaluation of a potential new product or service (or of an improvement in an existing product or service) to meet specific performance requirements or objectives. It includes the functions of design engineering, prototyping, and engineering testing. It excludes subcontracted technical effort that is for the sole purpose of developing an additional source for an existing product.

35.002 Policy.

(a) *Use of contracts.* Use contracts only when the principal purpose of the acquisition is for the direct benefit or use of the Federal Government.

(b) *Use of grants, cooperative agreements, and other transaction authorities not subject to this regulation.*

(1) Use grants when—

(i) The principal purpose of the transaction is to stimulate or support research and development for a purpose other than the direct benefit or use of the Federal Government; and

(ii) Substantial involvement is not expected between the Government and the recipient.

(2) Use cooperative agreements when—

(i) The principal purpose of the transaction is to stimulate or support research and development for a purpose other than the direct benefit or use of the Federal Government; and

(ii) Substantial involvement is expected between the Government and the recipient.

(3) Use other transaction authorities and purchases through procurement for experimental purposes in accordance with the agency's authority.

(c) *Cost sharing.* Cost sharing policies (which are not otherwise required by law) under Government contracts must be in accordance with part 16, part 42, and agency procedures.

Subpart 35.1—Presolicitation and Solicitation

35.101 Solicitations.

(a) This section applies to all solicitations for research and development. Solicitations for research and development may use the evaluation procedures in this section alone, or in conjunction with section 35.102 or part 15.

(b) Publicize the solicitation through the Governmentwide point of entry (GPE) in accordance with part 5. In addition to the GPE, information about the solicitation may be published in scientific, technical, or engineering periodicals, or other electronic platforms and communities used by the target audience.

(c) Solicitations must require offerors to—

(1) Describe their technical and management approach;

(2) Identify any technical uncertainties;

(3) Propose specific solutions to resolve uncertainties; and

(4) Disclose any planned subcontracting of scientific or technical work.

(d) R&D solicitations should include evaluation factors to identify the most technically competent offerors, such as:

(1) The offeror's understanding of the scope of work.

(2) The quality of the offeror's proposed approach to meet the scientific and technical objectives, or the merit of the ideas or concepts presented.

(3) The offeror's access to qualified engineering, scientific, or other technical staff.

(4) The offeror's relevant experience.

(5) Any innovative ideas the offeror proposes in the specific scientific or technical field.

(6) The offeror's access to the necessary research, testing, laboratory, or shop facilities.

(e) Besides technical evaluation factors, also consider management capability, as appropriate, including—

(1) Management capabilities, including cost control methods;

(2) Experience and past performance;

(3) Subcontracting practices; and

(4) Any other significant evaluation criteria (e.g., unrealistically low cost estimates in proposals for cost-reimbursement or fixed-price incentive contracts).

(f) Although cost or price is not usually the deciding factor in selecting a contractor to perform R&D, cost or price remains a mandatory evaluation factor.

(g) The contracting officer should ensure potential offerors completely understand the details of the work, especially the Government interpretation of the work statement. For complex requirements, the contracting officer should give potential offerors a chance to comment on the details of the requirements as contained in the work statement, the contract schedule, and any related specifications. This may be done at a preproposal conference or other forum for communicating with industry.

(h) When appropriate, solicitations should allow offerors to propose an alternative contract type (see subpart 16.1).

(i) The Government may issue an exploratory request to identify existing ideas or prior work in a specific field of research. Any such request must clearly state that it does not impose any obligation on the Government or signify a firm intention to enter into a contract or otherwise pay for the information provided in responses.

35.102 Broad agency announcement.

(a) *General.* This paragraph prescribes procedures for the use of the broad agency announcement (BAA) with peer or scientific review (see 6.101(b)(3)(ii)) for the acquisition of basic and applied research, as well as that part of development not related to developing a specific system or hardware procurement.

(1) BAAs may be used by agencies to fulfill their requirements for scientific study and experimentation directed toward advancing the state-of-the-art or

increasing knowledge or understanding rather than focusing on a specific system or hardware solution.

(2) Use the BAA technique when meaningful proposals with varying technical/scientific approaches are reasonably expected.

(b) The BAA and its supporting documentation must—

(1) Describe what research the agency is interested in, either for specific program needs or broad areas covering a range of agency requirements;

(2) Explain how proposals will be selected, the relative importance of selection criteria, and the evaluation method;

(3) Specify the period of time during which responses will be accepted; and

(4) Contain clear instructions for preparing and submitting proposals.

(c) Publicize the BAA through the GPE in accordance with part 5 at least once per year. In addition to the GPE, the BAA may also be published in scientific, technical, or engineering periodicals, or other electronic platforms and communities used by the target audience.

(d) Use a peer or scientific review process to evaluate proposals. Written evaluation reports are required for each proposal; however, proposals are not required to be evaluated against each other since they are responding to broad research areas rather than a common work statement.

(e) Proposals should be selected based on—

(1) Technical merit;

(2) Importance to agency programs;

(3) Availability of funds; and

(4) Cost realism and reasonableness, to the extent appropriate.

(f) A presolicitation notice under part 5 is not required for individual contract actions awarded as a result of selection from a BAA. The notice published pursuant to paragraph (c) of this section fulfills the requirement to publicize the presolicitation and solicitation notice.

Subpart 35.2—Evaluation and Award

35.201 Evaluation for award.

(a) R&D contracts should be awarded to the organization, including educational institutions, with the best ideas and highest level of expertise, but not such that the capabilities exceed the requirement.

(b) Use the procedures in part 15 to notify and debrief offerors.

(c) Evaluating a contractor's cost or price estimate serves multiple purposes: it determines whether the estimate is reasonable, reveals the offeror's understanding of the project, shows how the offeror perceives risks, and

demonstrates the offeror's ability to organize and perform the work. Cost or price analysis is an effective tool for this evaluation as appropriate (see part 15).

Subpart 35.3—Postaward

35.301 Scientific and technical reports.

(a) R&D contracts must require contractors provide scientific and technical reports, consistent with the project's objectives. These reports serve as a permanent record of work completed under the contract.

(b) Agencies should share R&D contract results with other Government activities and the private sector. Follow agency regulations regarding national security, protection of data, and policies for sharing new technology. Reports should be sent to <https://www.ntis.gov/contact-us/index.xhtml> or National Technical Information Service (NTIS), 5301 Shawnee Road, Alexandria, VA 22312.

Subpart 35.4—Federally Funded Research and Development Centers

35.401 Definitions.

As used in this subpart—

Nonsponsor means any other organization, in or outside of the Federal Government, which funds specific work to be performed by the Federally Funded Research and Development Center (FFRDC) and is not a party to the sponsoring agreement.

Primary sponsor means the lead agency responsible for managing, administering, or monitoring overall use of the FFRDC under a multiple sponsorship agreement.

Sponsor means the executive agency which manages, administers, monitors, funds, and is responsible for the overall use of a FFRDC. Multiple agency sponsorship is possible as long as one agency agrees to act as the "primary sponsor." In the event of multiple sponsors, "sponsor" refers to the primary sponsor.

35.402 Policy.

(a) This section explains Federal policy on establishing, using, reviewing, and terminating Federally Funded Research and Development Centers (FFRDCs) and related sponsoring agreements.

(b) A FFRDC meets special long-term research or development needs that cannot be met as effectively by existing Government or contractor resources. FFRDCs allow agencies to use private sector resources for work integral to the agency's mission. To fulfill its responsibilities, a FFRDC has special access to—

(1) Government and supplier data, including sensitive and proprietary information;

(2) Government employees; and

(3) Government facilities, equipment, and real property.

(c) The FFRDC must—

(1) Conduct business appropriately considering its special relationship with the Government;

(2) Operate in the public interest with objectivity and independence;

(3) Be free of organizational conflicts of interest; and

(4) Fully disclose its affairs to the sponsoring agency.

(d) FFRDCs must not use their privileged access to information or facilities to compete with the private sector. However, a FFRDC may perform work for agencies other than its sponsor under the Economy Act or other applicable laws when the work is not otherwise available from the private sector.

(e) FFRDCs are operated, managed, or administered by—

(1) A university or consortium of universities;

(2) A nonprofit organization; or

(3) An industrial firm, as an autonomous organization or as an identifiable separate operating unit of a parent organization.

(f) Long-term relationships between the Government and FFRDCs are encouraged to provide the continuity that attracts high-quality personnel. This relationship should help the FFRDC stay current in its field(s) of expertise, maintain its objectivity and independence, understand its sponsor's needs, and provide a quick response capability.

35.403 Sponsoring agreements.

(a)(1) When establishing an FFRDC, the Government and the FFRDC must create a written sponsorship agreement. This agreement serves three key purposes—

(i) Establishes a long-term relationship;

(ii) Defines the FFRDC's purpose and mission; and

(iii) Ensures regular evaluation of the FFRDC.

(2) Regardless of its form, the sponsor must clearly identify it as a sponsoring agreement.

(b) While specific content will vary based on circumstances, all sponsoring agreements or sponsoring agency policies and procedures must include the following requirements at a minimum—

(1) A clear statement of the FFRDC's purpose;

(2) Provisions for orderly termination or nonrenewal, including how to handle

assets and liabilities. The agreement must clearly define ownership of capital assets in the event the relationship ends;

(3) A method to identify retained earnings (reserves) and a plan for using and disposing of these funds;

(4) A prohibition preventing the FFRDC from competing with non-FFRDCs for Federal contracts except for FFRDC operations. This restriction does not apply to the FFRDC's parent organization or other subsidiaries in their non-FFRDC activities. The FFRDC may respond to requests for information, qualifications or capabilities unless restricted by the Sponsor; and

(5) Clear rules about whether the FFRDC may accept work from organizations other than its sponsor(s). If allowed, the agreement must outline—

(i) Procedures to follow for non-sponsor work; and

(ii) Any limitations on which non-sponsors may provide work (*e.g.*, other Federal agencies, State or local governments, or non-profit organizations).

(c) The sponsoring agreement or agency policies may also include other provisions as needed, such as—

(1) Cost elements requiring advance agreement when using cost-type contracts; and

(2) Factors affecting fee negotiations when the sponsor determines fee is appropriate.

(d) The agreement term must not exceed 5 years, but may be renewed after review in increments of up to 5 years.

35.404 Establishing or changing an FFRDC.

To establish a FFRDC, or change its basic purpose and mission, the sponsor must—

(a) Verify existing alternative sources cannot effectively meet the special research or development needs;

(b) Publish at least one notice to the GPE 90 days or more before issuing the contract action, indicating the agency's intention, and requesting comments. Notice is not required when the action is required by law;

(c) Ensure the Government has expertise available to adequately and objectively evaluate the FFRDC's work;

(d) Notify the Executive Office of the President, Office of Science and Technology Policy, Washington, DC 20506;

(e) Establish controls to ensure the Government pays reasonable costs for services;

(f) Define the FFRDC's purpose and mission clearly enough to distinguish

work appropriate for the FFRDC vs. work for non-FFRDCs;

(g) Maintain reasonable continuity in support levels, consistent with agency needs and the sponsoring agreement;

(h) Ensure the FFRDC—

(1) Is operated, managed, or administered by an autonomous organization or as an identifiably separate operating unit of a parent organization;

(2) Works in the public interest;

(3) Remains free from organizational conflict of interest; and

(4) Discloses its affairs (as an FFRDC) to the primary sponsor;

(i) Not allow quantity production or manufacturing unless authorized by legislation; and

(j) Obtain approval from the head of the sponsoring agency.

35.405 Using an FFRDC.

(a) All work placed with the FFRDC must align with its purpose, mission, general scope of effort, or special competency.

(b) When permitted by the sponsor, a nonsponsoring Federal agency may contract directly with the FFRDC, in which case that Federal agency is responsible for compliance with part 6. The nonsponsoring agency must provide the documentation regarding competition with domestic private industry required by 17.403(e) to the sponsoring agency.

35.406 Limitation on the creation of new FFRDCs.

Pursuant to 10 U.S.C. 4126, the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, the Secretary of Homeland Security, and the Administrator of the National Aeronautics and Space Administration may not obligate or expend amounts appropriated to the Department of Defense for purposes of operating an FFRDC that was not in existence before June 2, 1986, until—

(a) The head of the agency submits a report to Congress describing the center's purpose, mission, and general scope of the center's effort; and

(b) A period of 60 days, beginning on the date such report is received by Congress, has elapsed.

35.407 Reviewing FFRDCs.

(a) Before extending a FFRDC contract or agreement, the sponsor must conduct a comprehensive review of its use and need. Coordinate the review with any co-sponsors. If the sponsor decides to end its sponsorship, it must inform other agencies that use the FFRDC of its decision and give them an opportunity to assume sponsorship.

(b) The head of the sponsoring agency must approve continuing or terminating sponsorship, based on the following:

(1) An examination of the sponsor's special technical needs and mission requirements that are performed by the FFRDC to determine if and at what level they continue to exist.

(2) Consideration of alternative sources to meet the sponsor's needs.

(3) An assessment of the efficiency and effectiveness of the FFRDC in meeting the sponsor's needs, including the FFRDC's ability to maintain its objectivity, independence, quick response capability, currency in its field(s) of expertise, and familiarity with the needs of its sponsor.

(4) An assessment of the adequacy of the FFRDC management in ensuring a cost-effective operation.

(5) A determination that the criteria for establishing the FFRDC continue to be satisfied and that the sponsoring agreement is in compliance with the requirements of this subpart.

35.408 Terminating an FFRDC.

When a sponsor no longer needs the FFRDC, the sponsorship may be transferred to one or more Government agencies, if appropriately justified. If the FFRDC is not transferred to another Government agency, it must be phased out.

35.409 Master list of FFRDCs.

The National Science Foundation (NSF) maintains a master Government list of FFRDCs. Primary sponsors must provide information on each FFRDC, including sponsoring agreements, mission statements, funding data, and type of R&D being performed, to the NSF upon its request for such information.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 2. The authority citation for 48 CFR Part 52 continues to read as follows:

Authority: 41 U.S.C. 1121(b); 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

■ 3. Revise sections 52.216–1 through 52.216–12 and sections 52.216–15 through 52.216–32 to read as follows:

52.216–1 Type of Contract.

As prescribed in 16.105, complete and insert the following provision:

Type of Contract (DATE)

The Government contemplates award of a _____ [Contracting Officer insert specific type of contract] contract resulting from this solicitation.

(End of provision)

Alternate I (DATE). As prescribed in 16.105, add the following sentence to the end of the basic provision:

Offerors may propose an alternative contract type.

52.216–2 Economic Price Adjustment—Standard Supplies.

As prescribed in 16.203–4(a), insert the following clause:

Economic Price Adjustment—Standard Supplies (DATE)

(a) The Contractor warrants that the unit price stated in the Schedule for _____ [Offeror insert Schedule line item number] does not exceed the Contractor's applicable established price in effect on the contract date for like quantities of the same item. The term unit price excludes any part of the price directly resulting from requirements for preservation, packaging, or packing beyond standard commercial practice. The term established price means a price that—

(1) Is an established catalog or market price for a commercial product or commercial service sold in substantial quantities to the general public; and

(2) Is the net price after applying any standard trade discounts offered by the Contractor.

(b) The Contractor must promptly notify the Contracting Officer of the amount and effective date of each decrease in any applicable established price. Each corresponding contract unit price will be decreased by the same percentage that the established price is decreased. The decrease will apply to those items delivered on and after the effective date of the decrease in the Contractor's established price, and this contract will be modified accordingly.

(c) If the Contractor's applicable established price is increased after the contract date, the corresponding contract unit price will be increased, upon the Contractor's written request to the Contracting Officer, by the same percentage that the established price is increased, and the contract will be modified accordingly, subject to the following limitations:

(1) The aggregate of the increases in any contract unit price under this clause must not exceed 10 percent of the original contract unit price.

(2) The increased contract unit price will be effective—

(i) On the effective date of the increase in the applicable established price if the Contracting Officer receives the Contractor's written request within 10 days thereafter; or

(ii) If the written request is received later, on the date the Contracting Officer receives the request.

(3) The increased contract unit price must not apply to quantities scheduled under the contract for delivery before the effective date of the increased contract unit price, unless failure to deliver before that date results from causes beyond the control and without the fault or negligence of the Contractor, within the meaning of the Default clause.

(4) No modification increasing a contract unit price will be executed under this

paragraph (c) until the Contracting Officer verifies the increase in the applicable established price.

(5) Within 30 days after receipt of the Contractor's written request, the Contracting Officer may cancel, without liability to either party, any undelivered portion of the contract items affected by the requested increase.

(d) During the time allowed for the cancellation provided for in paragraph (c)(5) of this clause, and thereafter if there is no cancellation, the Contractor must continue deliveries according to the contract delivery schedule, and the Government must pay for such deliveries at the contract unit price, increased to the extent provided by paragraph (c) of this clause.

(End of clause)

52.216–3 Economic Price Adjustment—Semistandard Supplies.

As prescribed in 16.203–4(b), insert the following clause:

Economic Price Adjustment—Semistandard Supplies (DATE)

(a) The Contractor warrants that the supplies identified as line items _____ [Offeror insert Schedule line item number] in the Schedule are, except for modifications required by the contract specifications, supplies for which it has an established price. The term established price means a price that—

(1) Is an established catalog or market price for a commercial product or commercial service sold in substantial quantities to the general public; and

(2) Is the net price after applying any standard trade discounts offered by the Contractor.

(b) The Contractor further warrants that, as of the date of this contract, any difference between the unit prices stated in the contract for these line items and the Contractor's established prices for like quantities of the nearest commercial equivalents are due to compliance with contract specifications and with any contract requirements for preservation, packaging, and packing beyond standard commercial practice.

(c) The Contractor must promptly notify the Contracting Officer of the amount and effective date of each decrease in any applicable established price. Each corresponding contract unit price (exclusive of any part of the unit price that reflects modifications resulting from compliance with specifications or with requirements for preservation, packaging, and packing beyond standard commercial practice) will be decreased by the same percentage that the established price is decreased. The decrease will apply to those items delivered on and after the effective date of the decrease in the Contractor's established price, and this contract will be modified accordingly.

(d) If the Contractor's applicable established price is increased after the contract date, the corresponding contract unit price (exclusive of any part of the unit price resulting from compliance with specifications or with requirements for preservation, packaging, and packing beyond standard commercial practice) will be

increased, upon the Contractor's written request to the Contracting Officer, by the same percentage that the established price is increased, and the contract will be modified accordingly, subject to the following limitations:

(1) The aggregate of the increases in any contract unit price under this clause must not exceed 10 percent of the original contract unit price.

(2) The increased contract unit price will be effective—

(i) On the effective date of the increase in the applicable established price if the Contracting Officer receives the Contractor's written request within 10 days thereafter; or

(ii) If the written request is received later, on the date the Contracting Officer receives the request.

(3) The increased contract unit price must not apply to quantities scheduled under the contract for delivery before the effective date of the increased contract unit price, unless failure to deliver before that date results from causes beyond the control and without the fault or negligence of the Contractor, within the meaning of the Default clause.

(4) No modification increasing a contract unit price will be executed under this paragraph (d) until the Contracting Officer verifies the increase in the applicable established price.

(5) Within 30 days after receipt of the Contractor's written request, the Contracting Officer may cancel, without liability to either party, any undelivered portion of the contract items affected by the requested increase.

(e) During the time allowed for the cancellation provided for in paragraph (d)(5) of this clause, and thereafter if there is no cancellation, the Contractor must continue deliveries according to the contract delivery schedule, and the Government must pay for such deliveries at the contract unit price, increased to the extent provided by paragraph (d) of this clause.

(End of clause)

52.216-4 Economic Price Adjustment—Labor and Material.

As prescribed in 16.203-4(c), insert the following clause:

Economic Price Adjustment—Labor and Material (DATE)

(a) The Contractor must notify the Contracting Officer if, at any time during contract performance, the rates of pay for labor (including fringe benefits) or the unit prices for material shown in the Schedule either increase or decrease. The Contractor must furnish this notice within 60 days after the increase or decrease, or within any additional period that the Contracting Officer may approve in writing, but not later than the date of final payment under this contract. The notice must include the Contractor's proposal for an adjustment in the contract unit prices to be negotiated under paragraph (b) of this clause, and must include, in the form required by the Contracting Officer, supporting data explaining the cause, effective date, and amount of the increase or decrease and the amount of the Contractor's adjustment proposal.

(b) Promptly after the Contracting Officer receives the notice and data under paragraph (a) of this clause, the Contracting Officer and the Contractor will negotiate a price adjustment in the contract unit prices and its effective date. However, the Contracting Officer may postpone the negotiations until an accumulation of increases and decreases in the labor rates (including fringe benefits) and unit prices of material shown in the Schedule results in an adjustment allowable under paragraph (c)(3) of this clause. The Contracting Officer will modify this contract to include the price adjustment and its effective date and to revise the labor rates (including fringe benefits) or unit prices of material as shown in the Schedule to reflect the increases or decreases resulting from the adjustment. The Contractor must continue performance pending agreement on, or determination of, any adjustment and its effective date.

(c) Any price adjustment under this clause is subject to the following limitations:

(1) Any adjustment must be limited to the effect on unit prices of the increases or decreases in the rates of pay for labor (including fringe benefits) or unit prices for material shown in the Schedule. There must be no adjustment for—

(i) Supplies or services for which the production cost is not affected by such changes;

(ii) Changes in rates or unit prices other than those shown in the Schedule; or

(iii) Changes in the quantities of labor or material used from those shown in the Schedule for each item.

(2) No upward adjustment will apply to supplies or services that are required to be delivered or performed before the effective date of the adjustment, unless the Contractor's failure to deliver or perform according to the delivery schedule results from causes beyond the Contractor's control and without its fault or negligence, within the meaning of the Default clause.

(3) There will be no adjustment for any change in rates of pay for labor (including fringe benefits) or unit prices for material which would not result in a net change of at least 3 percent of the then-current total contract price. This limitation will not apply, however, if, after final delivery of all line items, either party requests an adjustment under paragraph (b) of this clause.

(4) The aggregate of the increases in any contract unit price made under this clause must not exceed 10 percent of the original unit price. There is no percentage limitation on the amount of decreases that may be made under this clause.

(d) The Contracting Officer may examine the Contractor's books, records, and other supporting data relevant to the cost of labor (including fringe benefits) and material during all reasonable times until the end of 3 years after the date of final payment under this contract or the time periods specified for contractor record retention in part 4 of the Federal Acquisition Regulation (FAR), whichever is earlier.

(End of clause)

52.216-5 Price Redetermination—Prospective.

As prescribed in 16.204-4, insert the following clause:

Price Redetermination—Prospective (DATE)

(a) *General.* The unit prices and the total price stated in this contract must be periodically redetermined in accordance with this clause, except that—

(1) The prices for supplies delivered and services performed before the first effective date of price redetermination (see paragraph (c) of this clause) must remain fixed; and

(2) In no event will the total amount paid under this contract exceed any ceiling price included in the contract.

(b) *Definition.* Costs, as used in this clause, means allowable costs in accordance with part 31 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract.

(c) *Price redetermination periods.* For the purpose of price redetermination, performance of this contract is divided into successive periods. The first period will extend from the date of the contract to _____, [see Note (1)] and the second and each succeeding period will extend for _____ [insert appropriate number] months from the end of the last preceding period, except that the parties may agree to vary the length of the final period. The first day of the second and each succeeding period will be the effective date of price redetermination for that period.

(d) *Data submission.* (1) Not more than _____ nor less than _____ [see Note (2)] days before the end of each redetermination period, except the last, the Contractor must submit—

(i) Proposed prices for supplies that may be delivered or services that may be performed in the next succeeding period, and—

(A) An estimate and breakdown of the costs of these supplies or services in the format of Table 15-1, FAR 15.408-2, or in any other form on which the parties may agree;

(B) Sufficient data to support the accuracy and reliability of this estimate; and

(C) An explanation of the differences between this estimate and the original (or last preceding) estimate for the same supplies or services; and

(ii) A statement of all costs incurred in performing this contract through the end of the _____ month (see Note (3)) before the submission of proposed prices in the format of Table 15-1, FAR 15.408-2 (or in any other form on which the parties may agree), with sufficient supporting data to disclose unit costs and cost trends for—

(A) Supplies delivered and services performed; and

(B) Inventories of work in process and undelivered contract supplies on hand (estimated to the extent necessary).

(2) The Contractor must also submit, to the extent that it becomes available before negotiations on redetermined prices are concluded—

(i) Supplemental statements of costs incurred after the date stated in paragraph (d)(1)(ii) of this clause for—

(A) Supplies delivered and services performed; and

(B) Inventories of work in process and undelivered contract supplies on hand (estimated to the extent necessary); and

(ii) Any other relevant data that the Contracting Officer may reasonably require.

(3) If the Contractor fails to submit the data required by paragraphs (d)(1) and (2) of this clause, within the time specified, the Contracting Officer may suspend payments under this contract until the data are furnished. If it is later determined that the Government has overpaid the Contractor, the Contractor must repay the excess to the Government immediately. Unless repaid within 30 days after the end of the data submittal period, the amount of the excess will bear interest, computed from the date the data were due to the date of repayment, at the rate established in accordance with the Interest clause.

(e) *Price redetermination.* Upon the Contracting Officer's receipt of the data required by paragraph (d) of this clause, the Contracting Officer and the Contractor must promptly negotiate to redetermine fair and reasonable prices for supplies that may be delivered or services that may be performed in the period following the effective date of price redetermination.

(f) *Contract modifications.* Each negotiated redetermination of prices must be evidenced by a modification to this contract, signed by the Contractor and the Contracting Officer, stating the redetermined prices that apply during the redetermination period.

(g) *Adjusting billing prices.* Pending execution of the contract modification (see paragraph (f) of this clause), the Contractor must submit invoices or vouchers in accordance with the billing prices stated in this contract. If at any time it appears that the then-current billing prices will be substantially greater than the estimated final prices, or if the Contractor submits data showing that the redetermined price will be substantially greater than the current billing prices, the parties must negotiate an appropriate decrease or increase in billing prices. Any billing price adjustment must be reflected in a contract modification and must not affect the redetermination of prices under this clause. After the contract modification for price redetermination is executed, the total amount paid or to be paid on all invoices or vouchers must be adjusted to reflect the agreed-upon prices, and any requested additional payments, refunds, or credits must be made promptly.

(h) *Quarterly limitation on payments statement.* This paragraph (h) applies only during periods for which firm prices have not been established.

(1) Within 45 days after the end of the quarter of the Contractor's fiscal year in which a delivery is first made (or services are first performed) and accepted by the Government under this contract, and for each quarter thereafter, the Contractor must submit to the contract administration office (with a copy to the contracting office and the cognizant contract auditor) a statement,

cumulative from the beginning of the contract, showing—

(i) The total contract price of all supplies delivered (or services performed) and accepted by the Government and for which final prices have been established;

(ii) The total costs (estimated to the extent necessary) reasonably incurred for, and properly allocable solely to, the supplies delivered (or services performed) and accepted by the Government and for which final prices have not been established;

(iii) The portion of the total interim profit (used in establishing the initial contract price or agreed to for the purpose of this paragraph (h)) that is in direct proportion to the supplies delivered (or services performed) and accepted by the Government and for which final prices have not been established; and

(iv) The total amount of all invoices or vouchers for supplies delivered (or services performed) and accepted by the Government (including amounts applied or to be applied to liquidate progress payments).

(2) The statement required by paragraph (h)(1) of this clause need not be submitted for any quarter for which either no costs are to be reported under paragraph (h)(1)(ii) of this clause, or revised billing prices have been established in accordance with paragraph (g) of this clause, and do not exceed the existing contract price, the Contractor's price-redetermination proposal, or a price based on the most recent quarterly statement, whichever is least.

(3) Notwithstanding any provision of this contract authorizing greater payments, if on any quarterly statement the amount under paragraph (h)(1)(iv) of this clause exceeds the sum due the Contractor, as computed in accordance with paragraphs (h)(1)(i), (ii), and (iii) of this clause, the Contractor must immediately refund or credit to the Government the amount of this excess. The Contractor may, when appropriate, reduce this refund or credit by the amount of previous refunds or credits effected under this clause. If any portion of the excess has been applied to the liquidation of progress payments, then that portion may, instead of being refunded, be added to the unliquidated progress payment account, consistent with the Progress Payments clause. The Contractor must provide complete details to support any claimed reductions in refunds.

(4) If the Contractor fails to submit the quarterly statement within 45 days after the end of each quarter and it is later determined that the Government has overpaid the Contractor, the Contractor must repay the excess to the Government immediately. Unless repaid within 30 days after the end of the statement submittal period, the amount of the excess will bear interest, computed from the date the quarterly statement was due to the date of repayment, at the rate established in accordance with the Interest clause.

(i) *Subcontracts.* No subcontract placed under this contract may provide for payment on a cost-plus-a-percentage-of-cost basis.

(j) *Disagreements.* If the Contractor and the Contracting Officer fail to agree upon redetermined prices for any price redetermination period within 60 days (or

within such other period as the parties agree) after the date on which the data required by paragraph (d) of this clause are to be submitted, the Contracting Officer will promptly issue a decision in accordance with the Disputes clause. For the purpose of paragraphs (f), (g), and (h) of this clause, and pending final settlement of the disagreement on appeal, by failure to appeal, or by agreement, this decision will be treated as an executed contract modification. Pending final settlement, price redetermination for subsequent periods, if any, will continue to be negotiated as provided in this clause.

(k) *Termination.* If this contract is terminated, prices must continue to be established in accordance with this clause for (1) completed supplies and services accepted by the Government and (2) those supplies and services not terminated under a partial termination. All other elements of the termination will be resolved in accordance with other applicable clauses of this contract.

(End of clause)

Notes: (1) Express in terms of units delivered, or as a date; but in either case the period should end on the last day of a month.

(2) Insert the number of days chosen so that the Contractor's submission will be late enough to reflect recent cost experience (taking into account the Contractor's accounting system), but early enough to permit review, audit (if necessary), and negotiation before the start of the prospective period.

(3) Insert "first," except that "second" may be inserted if necessary to achieve compatibility with the Contractor's accounting system.

52.216–6 Price Redetermination—Retroactive.

As prescribed in 16.205–4, insert the following clause:

Price Redetermination—Retroactive (DATE)

(a) *General.* The unit price and the total price stated in this contract must be redetermined in accordance with this clause, but in no event will the total amount paid under this contract exceed _____ [insert dollar amount of ceiling price].

(b) *Definition.* "Costs," as used in this clause, means allowable costs in accordance with part 31 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract.

(c) *Data submission.* (1) Within _____ [Contracting Officer insert number of days] days after delivery of all supplies to be delivered and completion of all services to be performed under this contract, the Contractor must submit—

(i) Proposed prices;

(ii) A statement in the format of Table 15–1, FAR 15.408–2, or in any other form on which the parties may agree, of all costs incurred in performing the contract; and

(iii) Any other relevant data that the Contracting Officer may reasonably require.

(2) If the Contractor fails to submit the data required by paragraph (c)(1) of this clause within the time specified, the Contracting

Officer may suspend payments under this contract until the data are furnished. If it is later determined that the Government has overpaid the Contractor, the excess must be repaid to the Government immediately. Unless repaid within 30 days after the end of the data submittal period, the amount of the excess will bear interest, computed from the date the data were due to the date of repayment, at the rate established in accordance with the Interest clause.

(d) *Price determination.* Upon the Contracting Officer's receipt of the data required by paragraph (c) of this clause, the Contracting Officer and the Contractor must promptly negotiate to redetermine fair and reasonable prices for supplies delivered and services performed by the Contractor under this contract.

(e) *Contract modification.* The negotiated redetermination of price must be evidenced by a modification to this contract, signed by the Contractor and the Contracting Officer.

(f) *Adjusting billing prices.* Pending execution of the contract modification (see paragraph (e) of this clause), the Contractor must submit invoices or vouchers in accordance with billing prices stated in this contract. If at any time it appears that the then-current billing prices will be substantially greater than the estimated final prices, or if the Contractor submits data showing that the redetermined prices will be substantially greater than the current billing prices, the parties must negotiate an appropriate decrease or increase in billing prices. Any billing price adjustment must be reflected in a contract modification and must not affect the redetermination of prices under this clause. After the contract modification for price redetermination is executed, the total amount paid or to be paid on all invoices or vouchers must be adjusted to reflect the agreed-upon prices, and any resulting additional payments, refunds, or credits must be made promptly.

(g) *Quarterly limitation on payments statement.* This paragraph (g) applies until final price redetermination under this contract has been completed.

(1) Within 45 days after the end of the quarter of the Contractor's fiscal year in which a delivery is first made (or services are first performed) and accepted by the Government under this contract, and for each quarter thereafter, the Contractor must submit to the contract administration office (with a copy to the contracting office and the cognizant contract auditor), a statement, cumulative from the beginning of the contract, showing—

(i) The total contract price of all supplies delivered (or services performed) and accepted by the Government and for which final prices have been established;

(ii) The total costs (estimated to the extent necessary) reasonably incurred for, and properly allocable solely to, the supplies delivered (or services performed) and accepted by the Government and for which final prices have not been established;

(iii) The portion of the total interim profit (used in establishing the initial contract price or agreed to for the purpose of this paragraph (g)) that is in direct proportion to the supplies delivered (or services performed)

and accepted by the Government and for which final prices have not been established; and

(iv) The total amount of all invoices or vouchers for supplies delivered (or services performed) and accepted by the Government (including amounts applied or to be applied to liquidate progress payments).

(2) Notwithstanding any provision of this contract authorizing greater payments, if on any quarterly statement the amount under paragraph (g)(1)(iv) of this clause exceeds the sum due the Contractor, as computed in accordance with paragraphs (g)(1)(i), (ii), and (iii) of this clause, the Contractor must immediately refund or credit to the Government the amount of this excess. The Contractor may, when appropriate, reduce this refund or credit by the amount of previous refunds or credits effected under this clause. If any portion of the excess has been applied to the liquidation of progress payments, then that portion may, instead of being refunded, be added to the unliquidated progress payment account, consistent with the Progress Payments clause. The Contractor must provide complete details to support any claimed reduction in refunds.

(3) If the Contractor fails to submit the quarterly statement within 45 days after the end of each quarter and it is later determined that the Government has overpaid the Contractor, the Contractor must repay the excess to the Government immediately. Unless repaid within 30 days after the end of the statement submittal period, the amount of the excess will bear interest, computed from the date the quarterly statement was due to the date of repayment, at the rate established in accordance with the Interest clause.

(h) *Subcontracts.* No subcontract placed under this contract may provide for payment on a cost-plus-a-percentage-of-cost basis.

(i) *Disagreements.* If the Contractor and the Contracting Officer fail to agree upon redetermined prices within 60 days (or within such other period as the parties agree) after the date on which the data required by paragraph (c) of this clause are to be submitted, the Contracting Officer will promptly issue a decision in accordance with the Disputes clause. For the purpose of paragraphs (e), (f), and (g) of this clause, and pending final settlement of the disagreement on appeal, by failure to appeal, or by agreement, this decision will be treated as an executed contract modification.

(j) *Termination.* If this contract is terminated before price redetermination, prices must be established in accordance with this clause for completed supplies and services not terminated. All other elements of the termination will be resolved in accordance with other applicable clauses of this contract.

(End of clause)

52.216–7 Allowable Cost and Payment.

As prescribed in 16.305(a), insert the following clause:

Allowable Cost and Payment (DATE)

(a) *Invoicing.* (1) The Government will make payments to the Contractor when

requested as work progresses, but (except for small business concerns) not more often than once every 2 weeks, in amounts determined to be allowable by the Contracting Officer in accordance with Federal Acquisition Regulation (FAR) subpart 31.2 in effect on the date of this contract and the terms of this contract. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract.

(2) Contract financing payments are not subject to the interest penalty provisions of the Prompt Payment Act. Interim payments made prior to the final payment under the contract are contract financing payments, except interim payments if this contract contains *Alternate I* to the clause at 52.232–25.

(3) The designated payment office will make interim payments for contract financing on the _____ [Contracting Officer insert day as prescribed by agency head; if not prescribed, insert “30th”] day after the designated billing office receives a proper payment request. In the event that the Government requires an audit or other review of a specific payment request to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the specified due date.

(b) *Reimbursing costs.* (1) For the purpose of reimbursing allowable costs (except as provided in paragraph (b)(2) of this clause, with respect to pension, deferred profit sharing, and employee stock ownership plan contributions), the term “costs” includes only—

(i) Those recorded costs that, at the time of the request for reimbursement, the Contractor has paid by cash, check, or other form of actual payment for items or services purchased directly for the contract;

(ii) When the Contractor is not delinquent in paying costs of contract performance in the ordinary course of business, costs incurred, but not necessarily paid, for—

(A) Supplies and services purchased directly for the contract and associated financing payments to subcontractors, provided payments determined due will be made—

(1) In accordance with the terms and conditions of a subcontract or invoice; and

(2) Ordinarily within 30 days of the submission of the Contractor's payment request to the Government;

(B) Materials issued from the Contractor's inventory and placed in the production process for use on the contract;

(C) Direct labor;

(D) Direct travel;

(E) Other direct in-house costs; and

(F) Properly allocable and allowable indirect costs, as shown in the records maintained by the Contractor for purposes of obtaining reimbursement under Government contracts; and

(iii) The amount of financing payments that have been paid by cash, check, or other forms of payment to subcontractors.

(2) Accrued costs of Contractor contributions under employee pension plans

must be excluded until actually paid unless—

(i) The Contractor's practice is to make contributions to the retirement fund quarterly or more frequently; and

(ii) The contribution does not remain unpaid 30 days after the end of the applicable quarter or shorter payment period (any contribution remaining unpaid must be excluded from the Contractor's indirect costs for payment purposes).

(3) Notwithstanding the audit and adjustment of invoices or vouchers under paragraph (g) of this clause, allowable indirect costs under this contract must be obtained by applying indirect cost rates established in accordance with paragraph (d) of this clause.

(4) Any statements in specifications or other documents incorporated in this contract by reference designating performance of services or furnishing of materials at the Contractor's expense or at no cost to the Government must be disregarded for purposes of cost-reimbursement under this clause.

(c) *Small business concerns.* A small business concern may receive more frequent payments than every 2 weeks.

(d) *Final indirect cost rates.* (1) Final annual indirect cost rates and the appropriate bases must be established in accordance with subpart 42.5 of the Federal Acquisition Regulation (FAR) in effect for the period covered by the indirect cost rate proposal.

(2)(i) The Contractor must submit an adequate final indirect cost rate proposal to the Contracting Officer (or cognizant Federal agency official) and auditor within the 6-month period following the expiration of each of its fiscal years. Reasonable extensions, for exceptional circumstances only, may be requested in writing by the Contractor and granted in writing by the Contracting Officer. The Contractor must support its proposal with adequate supporting data.

(ii) The proposed rates must be based on the Contractor's actual cost experience for that period. The appropriate Government representative and the Contractor must establish the final indirect cost rates as promptly as practical after receipt of the Contractor's proposal.

(iii) An adequate indirect cost rate proposal must include the following data unless otherwise specified by the cognizant Federal agency official:

(A) Summary of all claimed indirect expense rates, including pool, base, and calculated indirect rate.

(B) *General and Administrative expenses (final indirect cost pool).* Schedule of claimed expenses by element of cost as identified in accounting records (Chart of Accounts).

(C) *Overhead expenses (final indirect cost pool).* Schedule of claimed expenses by element of cost as identified in accounting records (Chart of Accounts) for each final indirect cost pool.

(D) *Occupancy expenses (intermediate indirect cost pool).* Schedule of claimed expenses by element of cost as identified in accounting records (Chart of Accounts) and expense reallocation to final indirect cost pools.

(E) Claimed allocation bases, by element of cost, used to distribute indirect costs.

(F) Facilities capital cost of money factors computation.

(G) Reconciliation of books of account (*i.e.*, General Ledger) and claimed direct costs by major cost element.

(H) Schedule of direct costs by contract and subcontract expense applied at claimed rates. This schedule must include a summary of total labor and nonlabor billed for Time and Materials (T&M) and Labor Hour contracts, including the total cost billed after applying indirect rates. A subsidiary schedule of Government participation percentages in each of the allocation base amounts is also required. For contracts physically completed during the fiscal year, the schedule must include the contract number, level-of-effort information, the contract ceiling amount, and confirmation of whether the contract is ready to close.

(I) Schedule of cumulative direct and indirect costs claimed and billed by contract and subcontract.

(J) *Subcontract information.* Listing of subcontracts with a value exceeding the threshold for requiring certified cost or pricing data as prescribed in FAR 15.403–3, awarded to companies for which the contractor is the prime or upper-tier contractor (include prime and subcontract numbers; subcontract value and award type; amount claimed during the fiscal year; and the subcontractor name, address, and point of contact information).

(K) Listing of decisions/agreements/approvals and description of accounting/organizational changes.

(L) Certificate of final indirect costs (see 52.242–4, Certification of Final Indirect Costs).

(iv) The following supplemental information is not required to determine if a proposal is adequate, but may be required during the audit process:

(A) Comparative analysis of indirect expense pools detailed by account to prior fiscal year and budgetary data.

(B) General organizational information and limitation on allowability of compensation for certain contractor personnel. See 31.205–6(p).

(C) Identification of prime contracts under which the contractor performs as a subcontractor.

(D) Description of accounting system (excludes contractors required to submit a Cost Accounting Standards (CAS) Disclosure Statement or contractors where the description of the accounting system has not changed from the previous year's submission).

(E) Procedures for identifying and excluding unallowable costs from the costs claimed and billed (excludes contractors where the procedures have not changed from the previous year's submission).

(F) Certified financial statements and other financial data (*e.g.*, trial balance, compilation, review, etc.).

(G) Management letter from outside Certified Public Accountants (CPAs) concerning any internal control weaknesses.

(H) Actions that have been and/or will be implemented to correct the weaknesses

described in the management letter from paragraph (d)(2)(iv)(G) of this clause.

(I) List of all internal audit reports issued since the last disclosure of internal audit reports to the Government.

(J) Annual internal audit plan of scheduled audits to be performed in the fiscal year when the final indirect cost rate submission is made.

(K) Federal and State income tax returns.

(L) Securities and Exchange Commission 10–K annual report.

(M) Minutes from board of directors meetings.

(N) Listing of delay claims and termination claims submitted which contain costs relating to the subject fiscal year.

(O) Contract briefings, which generally include a synopsis of all pertinent contract provisions, such as: contract type, contract amount, product or service(s) to be provided, contract performance period, rate ceilings, advance approval requirements, pre-contract cost allowability limitations, and billing limitations.

(v) The Contractor must update the billings on all contracts to reflect the final settled rates and update the schedule of cumulative direct and indirect costs claimed and billed, as required in paragraph (d)(2)(iii)(I) of this clause, within 60 days after settlement of final indirect cost rates.

(3) The Contractor and the appropriate Government representative must execute a written understanding setting forth the final indirect cost rates.

(i) The understanding must specify—

(A) The agreed-upon final annual indirect cost rates;

(B) The bases to which the rates apply;

(C) The periods for which the rates apply;

(D) any specific indirect cost items treated as direct costs in the settlement; and

(E) The affected contract and/or subcontract, identifying any with advance agreements or special terms and the applicable rates.

(ii) The understanding must not change any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for in this contract.

(iii) The understanding is incorporated into this contract upon execution.

(4) Failure by the parties to agree on a final annual indirect cost rate will be a dispute within the meaning of the Disputes clause.

(5) Within 120 days (or longer period if approved in writing by the Contracting Officer) after settlement of the final annual indirect cost rates for all years of a physically complete contract, the Contractor must submit a completion invoice or voucher to reflect the settled amounts and rates. The completion invoice or voucher must include settled subcontract amounts and rates. The prime contractor is responsible for settling subcontractor amounts and rates included in the completion invoice or voucher and providing status of subcontractor audits to the Contracting Officer upon request.

(6)(i) If the Contractor fails to submit a completion invoice or voucher within the time specified in paragraph (d)(5) of this clause, the Contracting Officer may—

(A) Determine the amounts due to the Contractor under the contract; and

(B) Record this determination in a unilateral modification to the contract.

(ii) This determination constitutes the final decision of the Contracting Officer in accordance with the Disputes clause.

(e) *Billing rates.* Until final annual indirect cost rates are established for any period, the Government will reimburse the Contractor at billing rates established by the Contracting Officer or by an authorized representative (the cognizant auditor), subject to adjustment when the final rates are established. These billing rates—

(1) Will be the anticipated final rates; and

(2) May be prospectively or retroactively revised by mutual agreement, at either party's request, to prevent substantial overpayment or underpayment.

(f) *Quick-closeout procedures.* Quick-closeout procedures are applicable when the conditions in FAR 42.507 are satisfied.

(g) *Audit.* At any time or times before final payment, the Contracting Officer may have the Contractor's invoices or vouchers and statements of cost audited. Any payment may be—

(1) Reduced by amounts found by the Contracting Officer not to constitute allowable costs; or

(2) Adjusted for prior overpayments or underpayments.

(h) *Final payment.* (1) Upon approval of a completion invoice or voucher submitted by the Contractor in accordance with paragraph (d)(5) of this clause, and upon the Contractor's compliance with all terms of this contract, the Government will promptly pay any balance of allowable costs and that part of the fee (if any) not previously paid.

(2) The Contractor must pay to the Government any refunds, rebates, credits, or other amounts (including interest, if any) accruing to or received by the Contractor or any assignee under this contract, to the extent that those amounts are properly allocable to costs for which the Contractor has been reimbursed by the Government. Reasonable expenses incurred by the Contractor for securing refunds, rebates, credits, or other amounts will be allowable costs if approved by the Contracting Officer. Before final payment under this contract, the Contractor and each assignee whose assignment is in effect at the time of final payment must execute and deliver—

(i) An assignment to the Government, in form and substance satisfactory to the Contracting Officer, of refunds, rebates, credits, or other amounts (including interest, if any) properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract; and

(ii) A release discharging the Government, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract, except—

(A) Specified claims stated in exact amounts, or in estimated amounts when the exact amounts are not known;

(B) Claims (including reasonable incidental expenses) based upon liabilities of the Contractor to third parties arising out of the performance of this contract; *provided*, that the claims are not known to the Contractor on the date of the execution of the release, and that the Contractor gives notice of the

claims in writing to the Contracting Officer within 6 years following the release date or notice of final payment date, whichever is earlier; and

(C) Claims for reimbursement of costs, including reasonable incidental expenses, incurred by the Contractor under the patent clauses of this contract, excluding, however, any expenses arising from the Contractor's indemnification of the Government against patent liability.

(End of clause)

Alternate I (DATE). As prescribed in 16.305(a)(1), substitute the following paragraph (b)(1)(iii) for paragraph (b)(1)(iii) of the basic clause:

(b)(1)(iii) The amount of progress and other payments to the Contractor's subcontractors that either have been paid, or that the Contractor is required to pay pursuant to the clause of this contract entitled "Prompt Payment for Construction Contracts." Payments must be made by cash, check, or other form of payment to the Contractor's subcontractors under similar cost standards.

Alternate II (DATE). As prescribed in 16.305(a)(2), substitute the following paragraph (a)(1) for paragraph (a)(1) of the basic clause:

(a)(1) The Government will make payments to the Contractor when requested as work progresses, but not more often than once every two weeks, in amounts determined to be allowable by the Contracting Officer in accordance with FAR subpart 31.3 in effect on the date of this contract and the terms of this contract. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract.

Alternate III (DATE). As prescribed in 16.305(a)(3), substitute the following paragraph (a)(1) for paragraph (a)(1) of the basic clause:

(a)(1) The Government will make payments to the Contractor when requested as work progresses, but not more often than once every two weeks, in amounts determined to be allowable by the Contracting Officer in accordance with FAR subpart 31.6 in effect on the date of this contract and the terms of this contract. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract.

Alternate IV (DATE). As prescribed in 16.305(a)(4), substitute the following

paragraph (a)(1) for paragraph (a)(1) of the basic clause:

(a)(1) The Government will make payments to the Contractor when requested as work progresses, but not more often than once every two weeks, in amounts determined to be allowable by the Contracting Officer in accordance with FAR subpart 31.7 in effect on the date of this contract and the terms of this contract. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract.

52.216–8 Fixed Fee.

As prescribed in 16.305(b), insert the following clause:

Fixed Fee (DATE)

(a) The Government will pay the Contractor for performing this contract the fixed fee specified in the Schedule.

(b) Payment of the fixed fee will be made as specified in the Schedule; provided that the Contracting Officer withholds a reserve not to exceed 15 percent of the total fixed fee or \$100,000, whichever is less, to protect the Government's interest. The Contracting Officer will release 75 percent of all fee withholds under this contract after receipt of an adequate certified final indirect cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent and royalty reports, and is not delinquent in submitting final vouchers on prior years' settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

(End of clause)

52.216–9 Fixed Fee—Construction.

As prescribed in 16.305(c), insert the following clause:

Fixed Fee—Construction (DATE)

(a) The Government will pay the Contractor for performing this contract the fixed fee specified in the Schedule.

(b) Payment of the fixed fee will be made in installments based upon the percentage of completion of the work as determined from estimates submitted to and approved by the Contracting Officer, but subject to the withholding provisions of paragraph (c) of this clause.

(c) The Contracting Officer must withhold a reserve not to exceed 15 percent of the total fixed fee or \$100,000, whichever is less, to protect the Government's interest. The Contracting Officer will release 75 percent of all fee withholds under this contract after receipt of an adequate certified final indirect

cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent and royalty reports, and is not delinquent in submitting final vouchers on prior years' settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

(End of clause)

52.216–10 Incentive Fee.

As prescribed in 16.305(d), insert the following clause:

Incentive Fee (DATE)

(a) *General.* The Government will pay the Contractor for performing this contract a fee determined as provided in this contract.

(b) *Target cost and target fee.* The target cost and target fee specified in the Schedule are subject to adjustment if the contract is modified in accordance with paragraph (d) of this clause.

(1) *Target cost*, as used in this contract, means the estimated cost of this contract as initially negotiated, adjusted in accordance with paragraph (d) of this clause.

(2) *Target fee*, as used in this contract, means the fee initially negotiated on the assumption that this contract would be performed for a cost equal to the estimated cost initially negotiated, adjusted in accordance with paragraph (d) of this clause.

(c) *Withholding of payment.* (1) Normally, the Government will pay the fee to the Contractor as specified in the Schedule. However, when the Contracting Officer considers that performance or cost indicates that the Contractor will not achieve target, the Government will pay on the basis of an appropriate lesser fee. When the Contractor demonstrates that performance or cost clearly indicates that the Contractor will earn a fee significantly greater than the target fee, the Government may, at the sole discretion of the Contracting Officer, pay on the basis of an appropriate higher fee.

(2) Payment of the incentive fee will be made as specified in the Schedule; provided that the Contracting Officer withholds a reserve not to exceed 15 percent of the total incentive fee or \$100,000, whichever is less, to protect the Government's interest. The Contracting Officer will release 75 percent of all fee withholds under this contract after receipt of an adequate certified final indirect cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent and royalty reports, and is not delinquent in submitting final vouchers on prior years' settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

(d) *Equitable adjustments.* When the work under this contract is increased or decreased

by a modification to this contract or when any equitable adjustment in the target cost is authorized under any other clause, equitable adjustments in the target cost, target fee, minimum fee, and maximum fee, as appropriate, must be stated in a supplemental agreement to this contract.

(e) *Fee payable.* (1) The fee payable under this contract will be the target fee increased by _____ [Contracting Officer insert Contractor's participation] cents for every dollar that the total allowable cost is less than the target cost or decreased by _____ [Contracting Officer insert Contractor's participation] cents for every dollar that the total allowable cost exceeds the target cost. In no event will the fee be greater than _____ [Contracting Officer insert percentage] percent or less than _____ [Contracting Officer insert percentage] percent of the target cost.

(2) The fee will be subject to adjustment, to the extent provided in paragraph (d) of this clause, and within the minimum and maximum fee limitations in paragraph (e)(1) of this clause, when the total allowable cost is increased or decreased as a consequence of (i) payments made under assignments or (ii) claims excepted from the release as required by paragraph (h)(2) of the Allowable Cost and Payment clause.

(3) If this contract is terminated in its entirety, the portion of the target fee payable must not be subject to an increase or decrease as provided in this paragraph. The termination must be accomplished in accordance with other applicable clauses of this contract.

(4) For the purpose of fee adjustment, *total allowable cost* must not include allowable costs arising out of—

(i) Any of the causes covered by the Excusable Delays clause to the extent that they are beyond the control and without the fault or negligence of the Contractor or any subcontractor;

(ii) The taking effect, after negotiating the target cost, of a statute, court decision, written ruling, or regulation that results in the Contractor's being required to pay or bear the burden of any tax or duty or rate increase in a tax or duty;

(iii) Any direct cost attributed to the Contractor's involvement in litigation as required by the Contracting Officer pursuant to a clause of this contract, including furnishing evidence and information requested pursuant to the Notice and Assistance Regarding Patent and Copyright Infringement clause;

(iv) The purchase and maintenance of additional insurance not in the target cost and required by the Contracting Officer, or claims for reimbursement for liabilities to third persons pursuant to the Insurance—Liability to Third Persons clause;

(v) Any claim, loss, or damage resulting from a risk for which the Contractor has been relieved of liability by the Government Property clause; or

(vi) Any claim, loss, or damage resulting from a risk defined in the contract as unusually hazardous or as a nuclear risk and against which the Government has expressly agreed to indemnify the Contractor.

(5) All other allowable costs are included in "total allowable cost" for fee adjustment

in accordance with this paragraph (e), unless otherwise specifically provided in this contract.

(f) *Contract modification.* The total allowable cost and the adjusted fee determined as provided in this clause must be evidenced by a modification to this contract signed by the Contractor and Contracting Officer.

(g) *Inconsistencies.* In the event of any language inconsistencies between this clause and provisioning documents or Government options under this contract, compensation for spare parts or other supplies and services ordered under such documents must be determined in accordance with this clause.

(End of clause)

52.216–11 Cost Contract—No Fee.

As prescribed in 16.305(e), insert the following clause:

Cost Contract—No Fee (DATE)

(a) The Government will not pay the Contractor a fee for performing this contract.

(b) After payment of 80 percent of the total estimated cost shown in the Schedule, the Contracting Officer may withhold further payment of allowable cost until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interest. This reserve must not exceed one percent of the total estimated cost shown in the Schedule or \$100,000, whichever is less.

(End of clause)

Alternate I (DATE). As prescribed in 16.305(e)(2), delete paragraph (b) of the basic clause.

52.216–12 Cost-Sharing Contract—No Fee.

As prescribed in 16.305(f), insert the following clause:

Cost-Sharing Contract—No Fee (DATE)

(a) The Government will not pay to the Contractor a fee for performing this contract.

(b) After paying 80 percent of the Government's share of the total estimated cost of performance shown in the Schedule, the Contracting Officer may withhold further payment of allowable cost until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interest. This reserve must not exceed one percent of the Government's share of the total estimated cost shown in the Schedule or \$100,000, whichever is less.

(End of clause)

Alternate I (DATE). As prescribed in 16.305(f)(2), delete paragraph (b) of the basic clause.

52.216–15 Predetermined Indirect Cost Rates.

As prescribed in 16.305(g), insert the following clause:

Predetermined Indirect Cost Rates (DATE)

(a) Notwithstanding the Allowable Cost and Payment clause of this contract, the

allowable indirect costs under this contract will be obtained by applying predetermined indirect cost rates to bases agreed upon by the parties, as specified in this clause.

(b)(1) The Contractor must submit an adequate final indirect cost rate proposal to the Contracting Officer (or cognizant Federal agency official) and auditor within the 6-month period following the expiration of each of its fiscal years. Reasonable extensions, for exceptional circumstances only, may be requested in writing by the Contractor and granted in writing by the Contracting Officer. The Contractor must support its proposal with adequate supporting data.

(2) The proposed rates must be based on the Contractor's actual cost experience for that period. The appropriate Government representative and the Contractor must establish the final indirect cost rates as promptly as practical after receipt of the Contractor's proposal.

(c) Allowability of costs and acceptability of cost allocation methods will be determined in accordance with FAR subpart 31.3 in effect on the date of this contract.

(d) Predetermined rate agreements in effect on the date of this contract will be incorporated into the contract Schedule. The Contracting Officer (or cognizant Federal agency official) and Contractor must negotiate rates for subsequent periods and execute a written indirect cost rate agreement setting forth the results. The indirect cost rate agreement must not change any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for in this contract. The agreement is incorporated into this contract upon execution. The agreement must specify—

(1) The agreed-upon predetermined indirect cost rates;

(2) The bases to which the rates apply;

(3) The period for which the rates apply; and

(4) The specific items treated as direct costs or any changes in the items previously agreed to be direct costs.

(e) Pending establishment of predetermined indirect cost rates for any fiscal year (or other period agreed to by the parties), the Contractor will be reimbursed either at the rates fixed for the previous fiscal year (or other period) or at billing rates acceptable to the Contracting Officer (or cognizant Federal agency official), subject to appropriate adjustment when the final rates for that period are established.

(f) Any failure by the parties to agree on any predetermined indirect cost rates under this clause will not be considered a dispute within the meaning of the Disputes clause. If for any fiscal year (or other period specified in the Schedule) the parties fail to agree to predetermined indirect cost rates, the allowable indirect costs will be obtained by applying final indirect cost rates established in accordance with the Allowable Cost and Payment clause.

(g) Allowable indirect costs for the period from the beginning of performance until the end of the Contractor's fiscal year (or other period specified in the Schedule) will be obtained using the predetermined indirect cost rates and the bases shown in the Schedule.

(End of clause)

52.216–16 Incentive Price Revision—Firm Target.

As prescribed in 16.406(a), insert the following clause:

Incentive Price Revision—Firm Target (DATE)

(a) *General.* The supplies or services identified in the Schedule as Items _____ [Contracting Officer insert Schedule line item numbers] are subject to price revision in accordance with this clause; *provided*, that in no event will the total final price of these items exceed the ceiling price of \$ _____ [Contracting Officer to insert value]. The contracting officer will issue a modification identifying any supplies or services that are to be—

(1) Ordered separately under, or otherwise added to, this contract; and

(2) Subject to price revision in accordance with the terms of this clause.

(b) *Definition.* “Costs,” as used in this clause, means allowable costs in accordance with part 31 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract.

(c) *Data submission.* (1) Within _____ [Contracting Officer insert number of days] days after the end of the month in which the Contractor has delivered the last unit of supplies and completed the services specified by item number in paragraph (a) of this clause, the Contractor must submit in the format of Table 15–1, FAR 15.408–2, or in any other form on which the parties agree—

(i) A detailed statement of all costs incurred up to the end of that month in performing all work under the items;

(ii) An estimate of costs of further performance, if any, that may be necessary to complete performance of all work under the items;

(iii) A list of all residual inventory and an estimate of its value; and

(iv) Any other relevant data that the Contracting Officer may reasonably require.

(2) The Contractor's final indirect cost rates must be settled before contract prices are established, unless the quick-closeout procedure in 42.507 is used. If the Contractor does not have another Federal contract which requires the establishment of final indirect cost rates for the relevant fiscal year, the contractor must submit the data required by, and the parties must follow the procedures identified in, paragraph (d) of 52.216–7, Allowable Cost and Payment, to establish final indirect cost rates.

(3) If the Contractor fails to submit the data required by paragraphs (c)(1) and (c)(2) of this clause within the time specified and it is later determined that the Government has overpaid the Contractor, the Contractor must repay the excess to the Government immediately. Unless repaid within 30 days after the end of the data submittal period, the amount of the excess will bear interest, computed from the date the data were due to the date of repayment, at the rate established in accordance with the Interest clause.

(d) *Price revision.* Upon the Contracting Officer's receipt of the data required by paragraph (c) of this clause, the Contracting

Officer and the Contractor must promptly establish the total final price of the items specified in paragraph (a) of this clause by applying to final negotiated cost an adjustment for profit or loss, as follows:

(1) On the basis of the information required by paragraph (c) of this clause, together with any other pertinent information, the parties must negotiate the total final cost incurred or to be incurred for supplies delivered (or services performed) and accepted by the Government and which are subject to price revision under this clause.

(2) The total final price will be established by applying to the total final negotiated cost an adjustment for profit or loss, as follows:

(i) If the total final negotiated cost is equal to the total target cost, the adjustment is the total target profit.

(ii) If the total final negotiated cost is greater than the total target cost, the adjustment is the total target profit, less _____ [Contracting Officer insert percent] percent of the amount by which the total final negotiated cost exceeds the total target cost.

(iii) If the final negotiated cost is less than the total target cost, the adjustment is the total target profit plus _____ [Contracting Officer insert percent] percent of the amount by which the total final negotiated cost is less than the total target cost.

(e) *Contract modification.* The total final price of the items specified in paragraph (a) of this clause must be evidenced by a modification to this contract, signed by the Contractor and the Contracting Officer. This price will not be subject to revision, notwithstanding any changes in the cost of performing the contract, except to the extent that—

(1) The parties may agree in writing, before the determination of total final price, to exclude specific elements of cost from this price and to a procedure for subsequent disposition of those elements; and

(2) Adjustments or credits are explicitly permitted or required by this or any other clause in this contract.

(f) *Adjusting billing prices.* (1) Pending execution of the contract modification (see paragraph (e) of this clause), the Contractor must submit invoices or vouchers in accordance with billing prices as provided in this paragraph. The billing prices must be the target prices shown in this contract.

(2) If at any time it appears from information provided by the contractor under paragraph (g)(2) of this clause that the then-current billing prices will be substantially greater than the estimated final prices, the parties must negotiate a reduction in the billing prices. Similarly, the parties may negotiate an increase in billing prices by any or all of the difference between the target prices and the ceiling price, upon the Contractor's submission of factual data showing that final cost under this contract will be substantially greater than the target cost.

(3) Any billing price adjustment must be reflected in a contract modification and will not affect the determination of the total final price under paragraph (d) of this clause. After the contract modification establishing the total final price is executed, the total amount

paid or to be paid on all invoices or vouchers will be adjusted to reflect the total final price, and any resulting additional payments, refunds, or credits will be made promptly.

(g) *Quarterly limitation on payments statement.* This paragraph (g) applies until final price revision under this contract has been completed.

(1) Within 45 days after the end of each quarter of the Contractor's fiscal year in which a delivery is first made (or services are first performed) and accepted by the Government under this contract, and for each quarter thereafter, the Contractor must submit to the contract administration office (with a copy to the contracting office and the cognizant contract auditor) a statement, cumulative from the beginning of the contract, showing—

(i) The total contract price of all supplies delivered (or services performed) and accepted by the Government and for which final prices have been established;

(ii) The total costs (estimated to the extent necessary) reasonably incurred for, and properly allocable solely to, the supplies delivered (or services performed) and accepted by the Government and for which final prices have not been established;

(iii) The portion of the total target profit (used in establishing the initial contract price or agreed to for the purpose of this paragraph (g)) that is in direct proportion to the supplies delivered (or services performed) and accepted by the Government and for which final prices have not been established—increased or decreased in accordance with paragraph (d)(2) of this clause, when the amount stated under paragraph (g)(1)(ii) of this clause differs from the aggregate target costs of the supplies or services; and

(iv) The total amount of all invoices or vouchers for supplies delivered (or services performed) and accepted by the Government (including amounts applied or to be applied to liquidate progress payments).

(2) Notwithstanding any provision of this contract authorizing greater payments, if on any quarterly statement the amount under paragraph (g)(1)(iv) of this clause exceeds the sum due the Contractor, as computed in accordance with paragraphs (g)(1)(i), (ii), and (iii) of this clause, the Contractor must immediately refund or credit to the Government the amount of this excess. The Contractor may, when appropriate, reduce this refund or credit by the amount of previous refunds or credits effected under this clause. If any portion of the excess has been applied to the liquidation of progress payments, then that portion may, instead of being refunded, be added to the unliquidated progress payment account consistent with the Progress Payments clause. The Contractor must provide complete details to support any claimed reductions in refunds.

(3) If the Contractor fails to submit the quarterly statement within 45 days after the end of each quarter and it is later determined that the Government has overpaid the Contractor, the Contractor must repay the excess to the Government immediately. Unless repaid within 30 days after the end of the statement submittal period, the amount of the excess will bear interest, computed

from the date the quarterly statement was due to the date of repayment, at the rate established in accordance with the Interest clause.

(h) *Subcontracts.* No subcontract placed under this contract may provide for payment on a cost-plus-a-percentage-of-cost basis.

(i) *Disagreements.* If the Contractor and the Contracting Officer fail to agree upon the total final price within 60 days (or within such other period as the Contracting Officer may specify) after the date on which the data required by paragraph (c) of this clause are to be submitted, the Contracting Officer will promptly issue a decision in accordance with the Disputes clause.

(j) *Termination.* If this contract is terminated before the total final price is established, prices of supplies or services subject to price revision will be established in accordance with this clause for (1) completed supplies and services accepted by the Government and (2) those supplies and services not terminated under a partial termination. All other elements of the termination will be resolved in accordance with other applicable clauses of this contract.

(k) *Equitable adjustment under other clauses.* If an equitable adjustment in the contract price is made under any other clause of this contract before the total final price is established, the adjustment will be made in the total target cost and may be made in the maximum dollar limit on the total final price, the total target profit, or both. If the adjustment is made after the total final price is established, only the total final price will be adjusted.

(l) *Exclusion from target price and total final price.* If any clause of this contract provides that the contract price does not or will not include an amount for a specific purpose, then neither any target price nor the total final price includes or will include any amount for that purpose.

(m) *Separate reimbursement.* If any clause of this contract expressly provides that the cost of performance of an obligation must be at Government expense, that expense will not be included in any target price or in the total final price, but will be reimbursed separately.

(n) *Taxes.* As used in the Federal, State, and Local Taxes clause or in any other clause that provides for certain taxes or duties to be included in, or excluded from, the contract price, the term “contract price” includes the total target price or, if it has been established, the total final price. When any of these clauses requires that the contract price be increased or decreased as a result of changes in the obligation of the Contractor to pay or bear the burden of certain taxes or duties, the increase or decrease will be made in the total target price or, if it has been established, in the total final price, so that it will not affect the Contractor's profit or loss on this contract.

(End of clause)

Alternate I (DATE). As prescribed in 16.406(a), add the following paragraph (o) to the basic clause:

(o) *Provisioning and options.* Parts, other supplies, or services that are to be furnished under this contract on the

basis of a provisioning document or Government option will be subject to price revision in accordance with this clause. Any prices established for these parts, other supplies, or services under a provisioning document or Government option will be treated as target prices. Target cost and profit covering these parts, other supplies, or services may be established separately, in the aggregate, or in any combination, as the parties may agree.

52.216–17 Incentive Price Revision—Successive Targets.

As prescribed in 16.406(b), insert the following clause:

Incentive Price Revision—Successive Targets (DATE)

(a) *General.* The supplies or services identified in the Schedule as Items _____ [Contracting Officer insert line item numbers] are subject to price revision in accordance with this clause; *provided*, that in no event will the total final price of these items exceed the ceiling price of \$ _____ [Contracting Officer to insert value]. The prices of these items shown in the Schedule are the initial target prices, which include an initial target profit of _____ [Contracting Officer insert percent] percent of the initial target cost. The contracting officer will issue a modification identifying any supplies or services that are to be—

(1) Ordered separately under, or otherwise added to, this contract; and

(2) Subject to price revision in accordance with this clause.

(b) *Definition.* “Costs,” as used in this clause, means allowable costs in accordance with part 31 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract.

(c) *Submitting data for establishing the firm fixed price or a final profit adjustment formula.* (1) Within _____ [Contracting Officer insert number of days] days after the end of the month in which the Contractor has completed _____ [see Note 1], the Contractor must submit the following data:

(i) A proposed firm fixed price or total firm target price for supplies delivered and to be delivered and services performed and to be performed.

(ii) A detailed statement of all costs incurred in the performance of this contract through the end of the month specified in paragraph (c) of this clause, in the format of Table 15–1, FAR 15.408–2 (or in any other form on which the parties may agree), with sufficient supporting data to disclose unit costs and cost trends for—

(A) Supplies delivered and services performed; and

(B) Inventories of work in process and undelivered contract supplies on hand (estimated to the extent necessary).

(iii) An estimate of costs of all supplies delivered and to be delivered and all services performed and to be performed under this contract, using the statement of costs incurred plus an estimate of costs to complete performance, in the format of Table

15–1, FAR 15.408–2 (or in any other form on which the parties may agree), together with—

(A) Sufficient data to support the accuracy and reliability of the estimate; and

(B) An explanation of the differences between this estimate and the original estimate used to establish the initial target prices.

(2) The Contractor must also submit, to the extent that it becomes available before negotiations establishing the total firm price are concluded—

(i) Supplemental statements of costs incurred after the end of the month specified in paragraph (c)(1) of this clause for—

(A) Supplies delivered and services performed; and

(B) Inventories of work in process and undelivered contract supplies on hand (estimated to the extent necessary); and

(ii) Any other relevant data that the Contracting Officer may reasonably require.

(3) The Contractor's final indirect cost rates must be settled before contract prices are established, unless the quick-closeout procedure in 42.507 is used. If the Contractor does not have another Federal contract which requires the establishment of final indirect cost rates for the relevant fiscal year, the contractor must submit the data required by, and the parties must follow the procedures identified in, paragraph (d) of 52.216–7, Allowable Cost and Payment, to establish final indirect cost rates.

(4) If the Contractor fails to submit the data required by paragraphs (c)(1), (2), and (3) of this clause within the time specified and it is later determined that the Government has overpaid the Contractor, the Contractor must repay the excess to the Government immediately. Unless repaid within 30 days after the end of the data submittal period, the amount of the excess will bear interest, computed from the date the data were due to the date of repayment, at the rate established in accordance with the Interest clause.

(d) *Establishing firm fixed price or final profit adjustment formula.* Upon the Contracting Officer's receipt of the data required by paragraph (c) of this clause the Contracting Officer and the Contractor must promptly establish either a firm fixed price or a profit adjustment formula for determining final profit, as follows:

(1) The parties must negotiate a total firm target cost, based upon the data submitted under paragraph (c) of this clause.

(2) If the total firm target cost is more than the total initial target cost, the total initial target profit must be decreased. If the total firm target cost is less than the total initial target cost, the total initial target profit must be increased. The initial target profit must be increased or decreased by _____ percent [see Note 2] of the difference between the total initial target cost and the total firm target cost. The resulting amount will be the total firm target profit; *provided*, that in no event will the total firm target profit be less than _____ percent or more than _____ percent [Contracting Officer insert percents] of the total initial target cost.

(3) If the total firm target cost plus the total firm target profit represent a reasonable price for performing that part of the contract subject to price revision under this clause,

the parties may agree on a firm fixed price, which must be evidenced by a contract modification signed by the Contractor and the Contracting Officer.

(4) Failure of the parties to agree to a firm fixed price will not constitute a dispute under the Disputes clause. If agreement is not reached, or if establishment of a firm fixed price is inappropriate, the Contractor and the Contracting Officer must establish a profit adjustment formula under which the total final price will be established by applying to the total final negotiated cost an adjustment for profit or loss, determined as follows:

(i) If the total final negotiated cost is equal to the total firm target cost, the adjustment is the total firm target profit.

(ii) If the total final negotiated cost is greater than the total firm target cost, the adjustment is the total firm target profit, less

[Contracting Officer insert Contractor's participation] percent of the amount by which the total final negotiated cost exceeds the total firm target cost.

(iii) If the total final negotiated cost is less than the total firm target cost, the adjustment is the total firm target profit, plus [Contracting Officer insert Contractor's participation] percent of the amount by which the total final negotiated cost is less than the total firm target cost.

(iv) The total firm target cost, total firm target profit, and the profit adjustment formula for determining final profit must be evidenced by a modification to this contract signed by the Contractor and the Contracting Officer.

(e) *Submitting data for final price revision.* Unless a firm fixed price has been established in accordance with paragraph (d) of this clause within _____ [Contracting Officer insert number of days] days after the end of the month in which the Contractor has delivered the last unit of supplies and completed the services specified by item number in paragraph (a) of this clause, the Contractor must submit in the format of Table 15–1, FAR 15.408–2 (or in any other form on which the parties agree)—

(1) A detailed statement of all costs incurred up to the end of that month in performing all work under the items;

(2) An estimate of costs of further performance, if any, that may be necessary to complete performance of all work under the items;

(3) A list of all residual inventory and an estimate of its value; and

(4) Any other relevant data that the Contracting Officer may reasonably require.

(f) *Final price revision.* Unless a firm fixed price has been agreed to in accordance with paragraph (d) of this clause, the Contractor and the Contracting Officer must, promptly after submission of the data required by paragraph (e) of this clause, establish the total final price, as follows:

(1) On the basis of the information required by paragraph (e) of this clause, together with any other pertinent information, the parties must negotiate the total final cost incurred or to be incurred for the supplies delivered (or services performed) and accepted by the Government and which are subject to price revision under this clause.

(2) The total final price will be established by applying to the total final negotiated cost

an adjustment for final profit or loss determined as agreed upon under paragraph (d)(4) of this clause.

(g) *Contract modification.* The total final price of the items specified in paragraph (a) of this clause must be evidenced by a modification to this contract, signed by the Contractor and the Contracting Officer. This price will not be subject to revision, notwithstanding any changes in the cost of performing the contract, except to the extent that—

(1) The parties may agree in writing, before the determination of total final price, to exclude specific elements of cost from this price and to a procedure for subsequent disposition of these elements; and

(2) Adjustments or credits are explicitly permitted or required by this or any other clause in this contract.

(h) *Adjustment of billing prices.* (1) Pending execution of the contract modification (see paragraph (e) of this clause), the Contractor must submit invoices or vouchers in accordance with billing prices as provided in this paragraph. The billing prices will be the initial target prices shown in this contract until firm target prices are established under paragraph (d) of this clause. When established, the firm target prices will be used as the billing prices.

(2) If at any time it appears from information provided by the contractor under paragraph (i)(1) of this clause that the then-current billing prices will be substantially greater than the estimated final prices, the parties must negotiate a reduction in the billing prices. Similarly, the parties may negotiate an increase in billing prices by any or all of the difference between the target prices and the ceiling price, upon the Contractor's submission of factual data showing that the final cost under this contract will be substantially greater than the target cost.

(3) Any adjustment of billing prices must be reflected in a contract modification and will not affect the determination of any price under paragraph (d) or (f) of this clause. After the contract modification establishing the total final price is executed, the total amount paid or to be paid on all invoices or vouchers will be adjusted to reflect the total final price, and any resulting additional payments, refunds, or credits will be made promptly.

(i) *Quarterly limitation on payments statement.* This paragraph (i) applies until a firm fixed price or a total final price is established under paragraph (d)(3) or (f)(2) of this clause.

(1) Within 45 days after the end of each quarter of the Contractor's fiscal year in which a delivery is first made (or services are first performed) and accepted by the Government under this contract, and for each quarter thereafter, the Contractor must submit to the contract administration office (with a copy to the contracting office and the cognizant contract auditor) a statement, cumulative from the beginning of the contract, showing—

(i) The total contract price of all supplies delivered (or services performed) and accepted by the Government and for which final prices have been established;

(ii) The total cost (estimated to the extent necessary) reasonably incurred for, and

properly allocable solely to, the supplies delivered (or services performed) and accepted by the Government and for which final prices have not been established;

(iii) The portion of the total interim profit (used in establishing the initial contract price or agreed to for the purpose of this paragraph (i)) that is in direct proportion to the supplies delivered (or services performed) and accepted by the Government and for which final prices have not been established—increased or decreased in accordance with paragraph (d)(4) of this clause when the amount stated under paragraph (i)(1)(ii) of this clause differs from the aggregate firm target costs of the supplies or services; and

(iv) The total amount of all invoices or vouchers for supplies delivered (or services performed) and accepted by the Government (including amounts applied or to be applied to liquidate progress payments).

(2) Notwithstanding any provision of this contract authorizing greater payments, if on any quarterly statement the amount under paragraph (i)(1)(iv) of this clause exceeds the sum due the Contractor, as computed in accordance with paragraphs (i)(1)(i), (ii), and (iii) of this clause the Contractor must immediately refund or credit to the Government the amount of this excess. The Contractor may, when appropriate, reduce this refund or credit by the amount of previous refunds or credits effected under this clause. If any portion of the excess has been applied to the liquidation of progress payments, then that portion may, instead of being refunded, be added to the unliquidated progress payment account consistent with the Progress Payments clause. The Contractor must provide complete details to support any claimed reductions in refunds.

(3) If the Contractor fails to submit the quarterly statement within 45 days after the end of each quarter and it is later determined that the Government has overpaid the Contractor, the Contractor must repay the excess to the Government immediately. Unless repaid within 30 days after the end of the statement submittal period, the amount of the excess will bear interest, computed from the date the quarterly statement was due to the date of repayment, at the rate established in accordance with the Interest clause.

(j) *Subcontracts*. No subcontract placed under this contract may provide for payment on a cost-plus-a-percentage-of-cost basis.

(k) *Disagreements*. If the Contractor and the Contracting Officer fail to agree upon (1) a total firm target cost and a final profit adjustment formula or (2) a total final price, within 60 days (or within such other period as the Contracting Officer may specify) after the date on which the data required in paragraphs (c) and (e) of this clause are to be submitted, the Contracting Officer will promptly issue a decision in accordance with the Disputes clause.

(l) *Termination*. If this contract is terminated before the total final price is established, prices of supplies or services subject to price revision will be established in accordance with this clause for (1) completed supplies and services accepted by the Government and (2) those supplies or services not terminated under a partial

termination. All other elements of the termination must be resolved in accordance with other applicable clauses of this contract.

(m) *Equitable adjustments under other clauses*. If an equitable adjustment in the contract price is made under any other clause of this contract before the total final price is established, the adjustment will be made in the total target cost and may be made in the maximum dollar limit on the total final price, the total target profit, or both. If the adjustment is made after the total final price is established, only the total final price will be adjusted.

(n) *Exclusion from target price and total final price*. If any clause of this contract provides that the contract price does not or will not include an amount for a specific purpose, then neither any target price nor the total final price includes or will include any amount for that purpose.

(o) *Separate reimbursement*. If any clause of this contract expressly provides that the cost of performance of an obligation will be at Government expense, that expense will not be included in any target price or in the total final price, but will be reimbursed separately.

(p) *Taxes*. As used in the Federal, State, and Local Taxes clause or in any other clause that provides for certain taxes or duties to be included in, or excluded from, the contract price, the term *contract price* includes the total target price or, if it has been established, the total final price. When any of these clauses requires that the contract price be increased or decreased as a result of changes in the obligation of the Contractor to pay or bear the burden of certain taxes or duties, the increase or decrease will be made in the total target price or, if it has been established, in the total final price, so that it will not affect the Contractor's profit or loss on this contract.

(End of clause)

Notes: (1) The degree of completion may be based on a percentage of contract performance or any other reasonable basis.

(2) The language may be changed to describe a negotiated adjustment pattern under which the extent of adjustment is not the same for all levels of cost variation.

Alternate I (DATE). As prescribed in 16.406(b), add the following paragraph (q) to the basic clause:

(q) *Provisioning and options*. Parts, other supplies, or services that are to be furnished under this contract on the basis of a provisioning document or Government option will be subject to price revision in accordance with this clause. Any prices established for these parts, other supplies, or services under a provisioning document or Government option will be treated as initial target prices, or target prices as agreed upon and stipulated in the pricing document supporting the provisioning or added items. Initial or firm target costs and profits and final prices covering these parts, other supplies, or services may be established separately, in the aggregate,

or in any combination, as the parties may agree.

52.216–18 Ordering.

As prescribed in 16.605(a), insert the following clause:

Ordering (DATE)

(a) Any supplies and services to be furnished under this contract must be ordered by issuance of delivery orders or task orders by the individuals or activities designated in the Schedule. Such orders may be issued from _____ through _____ [insert dates].

(b) All delivery orders or task orders are subject to the terms and conditions of this contract. In the event of conflict between a delivery order or task order and this contract, the contract will control.

(c) A delivery order or task order is considered “issued” when—

(1) If sent by mail (includes transmittal by U.S. mail or private delivery service), the Government deposits the order in the mail; or

(2) If sent electronically, the Government either—

(i) Posts a copy of the delivery order or task order to a Government document access system, and notice is sent to the Contractor; or

(ii) Distributes the delivery order or task order via email to the Contractor's email address.

(d) Orders may be issued by methods other than those enumerated in this clause only if authorized in the contract.

(End of clause)

52.216–19 Order Limitations.

As prescribed in 16.605(b), insert a clause substantially the same as follows:

Order Limitations (DATE)

(a) *Minimum order*. When the Government requires supplies or services covered by this contract in an amount of less than

_____ [insert dollar figure or quantity], the Government is not obligated to purchase, nor is the Contractor obligated to furnish, those supplies or services under the contract.

(b) *Maximum order*. The Contractor is not obligated to honor—

(1) Any order for a single item exceeding _____ [insert dollar figure or quantity];

(2) Any order for a combination of items exceeding _____ [insert dollar figure or quantity]; or

(3) A series of orders from the same ordering office within _____ days that together call for quantities exceeding the limitation in paragraph (b)(1) or (b)(2) of this clause.

(c) If this is a requirements contract (*i.e.*, includes the Requirements clause at 52.216–21 of the Federal Acquisition Regulation (FAR)), the Government is not required to order a part of any one requirement from the Contractor if that requirement exceeds the maximum-order limitations in paragraph (b) of this clause.

(d) Notwithstanding paragraphs (b) and (c) of this clause, the Contractor must honor any

order exceeding the maximum order limitations in paragraph (b), unless that order (or orders) is returned to the ordering office within _____ days after issuance, with written notice stating the Contractor's intent not to ship the item (or items) called for and the reasons. Upon receiving this notice, the Government may acquire the supplies or services from another source.

(End of clause)

52.216–20 Definite Quantity.

As prescribed in 16.605(c), insert the following clause:

Definite Quantity (DATE)

(a) This is a definite-quantity, indefinite-delivery contract for the supplies or services specified, and effective for the period stated, in the Schedule.

(b) The Government must order the quantity of supplies or services specified in the Schedule, and the Contractor must furnish them when ordered. Delivery or performance will be at locations designated in orders issued in accordance with the Ordering clause and the Schedule.

(c) Except for any limitations on quantities in the Order Limitations clause or in the Schedule, there is no limit on the number of orders that may be issued. The Government may issue orders requiring delivery to multiple destinations or performance at multiple locations.

(d) Any order issued during the ordering period of this contract and not completed within that time must be completed by the Contractor within the time specified in the order. The contract will govern the Contractor's and Government's rights and obligations with respect to that order to the same extent as if the order were completed during the contract's effective period; *provided*, that the Contractor will not be required to make any deliveries under this contract after _____ [insert date].

(End of clause)

52.216–21 Requirements.

As prescribed in 16.605(d)(1), insert the following clause:

Requirements (DATE)

(a) This is a requirements contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies or services specified in the Schedule are estimates only and are not purchased by this contract. Except as this contract may otherwise provide, if the Government's requirements do not result in orders in the quantities described as *estimated* or *maximum* in the Schedule, that fact will not constitute the basis for an equitable price adjustment.

(b) Delivery or performance must be made only as authorized by orders issued in accordance with the Ordering clause. Subject to any limitations in the Order Limitations clause or elsewhere in this contract, the Contractor must furnish to the Government all supplies or services specified in the Schedule and called for by orders issued in accordance with the Ordering clause. The

Government may issue orders requiring delivery to multiple destinations or performance at multiple locations.

(c) Except as this contract otherwise provides, the Government must order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule.

(d) The Government is not required to purchase from the Contractor requirements exceeding any limit on total orders under this contract.

(e) If the Government urgently requires delivery of any quantity of an item before the earliest date that delivery may be specified under this contract, and if the Contractor will not accept an order providing for the accelerated delivery, the Government may acquire the urgently required goods or services from another source.

(f) Any order issued during the ordering period of this contract and not completed within that period must be completed by the Contractor within the time specified in the order. The contract will govern the Contractor's and Government's rights and obligations with respect to that order to the same extent as if the order were completed during the contract's ordering period; *provided*, that the Contractor will not be required to make any deliveries under this contract after _____ [insert date].

(End of clause)

Alternate I (DATE). As prescribed in 16.605(d)(2), substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) The estimated quantities are not the total requirements of the Government activity specified in the Schedule, but are estimates of requirements exceeding the quantities that the activity may itself furnish within its own capabilities. Except as this contract otherwise provides, the Government will order from the Contractor all of that activity's requirements for supplies and services specified in the Schedule that exceed the quantities that the activity may itself furnish within its own capabilities.

Alternate II (DATE). As prescribed in 16.605(d)(3), add the following paragraph (g) to the basic clause:

(g) The requirements referred to in this contract are for items to be manufactured according to Government specifications. Notwithstanding anything to the contrary stated in the contract, the Government may acquire similar products by brand name from other sources for resale.

Alternate III (DATE). As prescribed in 16.605(d)(4), substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) The Government's requirements for each item or subitem of supplies or services described in the Schedule are being purchased through one non-set-

aside contract and one set-aside contract. Therefore, the Government will order from each Contractor approximately one-half of the total supplies or services specified in the Schedule that are required to be purchased by the specified Government activity or activities. The Government may choose between the set-aside Contractor and the non-set-aside Contractor in placing any particular order. However, the Government will allocate successive orders, in accordance with its delivery requirements, to maintain as close a ratio as is reasonably practicable between the total quantities ordered from the two Contractors.

Alternate IV (DATE). As prescribed in 16.605(d)(5), substitute the following paragraph (c) for paragraph (c) of the basic clause and add the following paragraph (g) to the basic clause:

(c) The Government's requirements for each item or subitem of supplies or services described in the Schedule are being purchased through one non-set-aside contract and one set-aside contract. Therefore, the Government will order from each Contractor approximately one-half of the total supplies or services specified in the Schedule that are required to be purchased by the specified Government activity or activities. The Government may choose between the set-aside Contractor and the non-set-aside Contractor in placing any particular order. However, the Government will allocate successive orders, in accordance with its delivery requirements, to maintain as close a ratio as is reasonably practicable between the total quantities ordered from the two Contractors.

(g) The requirements referred to in this contract are for items to be manufactured according to the Government specifications. Notwithstanding anything to the contrary stated in the contract, the Government may acquire similar products by brand name from other sources for resale.

52.216–22 Indefinite Quantity.

As prescribed in 16.605(e), insert the following clause:

Indefinite Quantity (DATE)

(a) This is an indefinite-quantity contract for the supplies or services specified, and available for ordering for the period stated, in the Schedule. The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.

(b) Delivery or performance must be made only as authorized by orders issued in accordance with the Ordering clause. The

Contractor must furnish to the Government, when and if ordered, the supplies or services specified in the Schedule up to and including the quantity designated in the Schedule as the *maximum*. The Government must order at least the quantity of supplies or services designated in the Schedule as the *minimum*.

(c) Except for any limitations on quantities in the Order Limitations clause or in the Schedule, there is no limit on the number of orders that may be issued. The Government may issue orders requiring delivery to multiple destinations or performance at multiple locations.

(d) Any order issued during the ordering period of this contract and not completed within that period must be completed by the Contractor within the time specified in the order, which may include order options to be exercised after the ordering period of this contract but before the end of the period of performance of the order. The contract will govern the Contractor's and Government's rights and obligations with respect to that order, including options exercised, to the same extent as if the order were completed during the contract's ordering period; *provided*, that the Contractor must not be required to make any deliveries under this contract after _____ [insert date].

(End of clause)

Alternate I (DATE). As prescribed in 16.605(e)(1), add a paragraph (e) substantially the same as the following to the basic clause:

(e) Either party may cancel this contract in whole or in part by providing written notice. The cancellation will take effect 30 calendar days after the other party receives the notice of cancellation. If either party makes such notification, no further orders may be issued against the contract, but orders already awarded will be completed unless a termination action is taken against the order. If the Contractor elects to cancel this contract, the Government will not reimburse the minimum guarantee.

Alternate II (DATE). As prescribed in 16.605(e)(2), add paragraphs (e) and (f) substantially the same as the following to the basic clause:

(e) The Government may cancel this contract in whole or in part by providing written notice. The cancellation will take effect 30 calendar days after the contractor receives the notice of cancellation. No further orders may be issued against the contract, but orders already awarded will be completed unless a termination action is taken against the order.

(f) The Contractor may request to cancel this contract by submitting a written cancellation request to the contracting officer. The cancellation will take effect 30 calendar days after the Government receives the cancellation request, unless the

contracting officer informs the contractor, before cancellation is effective, that cancellation is not approved. A Contractor who requests cancellation is not eligible for the minimum guarantee. If cancelled, no further orders may be issued against the contract, but orders already awarded will be completed unless a termination action is taken against the order.

52.216–23 Execution and Commencement of Work.

As prescribed in 16.704(b)(1), insert the following clause:

Execution and Commencement of Work (DATE)

The Contractor must indicate acceptance of this letter contract by signing three copies of the contract and returning them to the Contracting Officer not later than _____ [insert date]. Upon acceptance by both parties, the Contractor must proceed with performance of the work, including purchase of necessary materials.

(End of clause)

52.216–24 Limitation of Government Liability.

As prescribed in 16.704(b)(2), insert the following clause:

Limitation of Government Liability (DATE)

(a) In performing this contract, the Contractor is not authorized to make expenditures or incur obligations exceeding _____ [Contracting Officer insert obligated amount less termination liability] dollars.

(b) The maximum amount for which the Government is liable if this contract is terminated is _____ [Contracting Officer insert obligated amount] dollars.

(End of clause)

52.216–25 Contract Definitization.

As prescribed in 16.704(b)(3), insert the following clause:

Contract Definitization (DATE)

(a) A _____ [insert specific type of contract] definitive contract is contemplated. The Contractor agrees to begin promptly negotiating with the Contracting Officer the terms of a definitive contract that will include (1) all clauses required by the Federal Acquisition Regulation (FAR) on the date of execution of the letter contract, (2) all clauses required by law on the date of execution of the definitive contract, and (3) any other mutually agreeable clauses, terms, and conditions. The Contractor agrees to submit a _____ [insert specific type of proposal (e.g., fixed-price or cost-and-fee)] proposal, including data other than certified cost or pricing data, and certified cost or pricing data, in accordance with FAR 15.408–2, Table 15–1, supporting its proposal.

(b) The schedule for definitizing this contract is [insert target date for

definitization of the contract and dates for submission of proposal, beginning of negotiations, and, if appropriate, submission of make-or-buy and subcontracting plans and certified cost or pricing data]:

(c) If agreement on a definitive contract to supersede this letter contract is not reached by the target date in paragraph (b) of this clause, or within any extension of it granted by the Contracting Officer, the Contracting Officer may, with the approval of the head of the contracting activity, determine a reasonable price or fee in accordance with subpart 15.4 and part 31 of the FAR, subject to Contractor appeal as provided in the Disputes clause. In any event, the Contractor must proceed with completion of the contract, subject only to the Limitation of Government Liability clause.

(1) After the Contracting Officer's determination of price or fee, the contract will be governed by—

(i) All clauses required by the FAR on the date of execution of this letter contract for either fixed-price or cost-reimbursement contracts, as determined by the Contracting Officer under this paragraph (c);

(ii) All clauses required by law as of the date of the Contracting Officer's determination; and

(iii) Any other clauses, terms, and conditions mutually agreed upon.

(2) To the extent consistent with paragraph (c)(1) of this clause, all clauses, terms, and conditions included in this letter contract will continue in effect, except those that by their nature apply only to a letter contract.

(End of clause)

Alternate I (DATE). As prescribed in 16.704(b)(3), add the following paragraph (d) to the basic clause:

(d) The definitive contract resulting from this letter contract will include a negotiated _____ [insert “price ceiling” or “firm fixed price”] in no event to exceed _____ [insert the proposed price upon which the award was based].

52.216–26 Payments of Allowable Costs Before Definitization.

As prescribed in 16.704(c), insert the following clause:

Payments of Allowable Costs Before Definitization (DATE)

(a) *Reimbursement rate*. Pending the placing of the definitive contract referred to in this letter contract, the Government will promptly reimburse the Contractor for all allowable costs under this contract at the following rates:

(1) One hundred percent of approved costs representing financing payments to subcontractors under fixed-price subcontracts, provided that the Government's payments to the Contractor will not exceed 80 percent of the allowable costs of those subcontractors.

(2) One hundred percent of approved costs representing cost-reimbursement subcontracts; *provided*, that the

Government's payments to the Contractor must not exceed 85 percent of the allowable costs of those subcontractors.

(3) Eighty-five percent of all other approved costs.

(b) *Limitation of reimbursement.* To determine the amounts payable to the Contractor under this letter contract, the Contracting Officer will determine allowable costs in accordance with the applicable cost principles in part 31 of the Federal Acquisition Regulation (FAR). The total reimbursement made under this paragraph must not exceed 85 percent of the maximum amount of the Government's liability, as stated in this contract.

(c) *Invoicing.* Payments must be made promptly to the Contractor when requested as work progresses, but (except for small business concerns) not more often than every 2 weeks, in amounts approved by the Contracting Officer. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost incurred by the Contractor in the performance of this contract.

(d) *Allowable costs.* For the purpose of determining allowable costs, the term "*costs*" includes—

(1) Those recorded costs that result, at the time of the request for reimbursement, from payment by cash, check, or other form of actual payment for items or services purchased directly for the contract;

(2) When the Contractor is not delinquent in payment of costs of contract performance in the ordinary course of business, costs incurred, but not necessarily paid, for—

(i) Supplies and services purchased directly for the contract and associated financing payments to subcontractors, provided payments determined due will be made—

(A) In accordance with the terms and conditions of a subcontract or invoice; and

(B) Ordinarily within 30 days of the submission of the Contractor's payment request to the Government;

(ii) Materials issued from the Contractor's stores inventory and placed in the production process for use on the contract;

(iii) Direct labor;

(iv) Direct travel;

(v) Other direct in-house costs; and

(vi) Properly allocable and allowable indirect costs as shown on the records maintained by the Contractor for purposes of obtaining reimbursement under Government contracts; and

(3) The amount of financing payments that the Contractor has paid by cash, check, or other forms of payment to subcontractors.

(e) *Small business concerns.* A small business concern may receive more frequent payments than every 2 weeks.

(f) *Audit.* At any time before final payment, the Contracting Officer may have the Contractor's invoices or vouchers and statements of costs audited. Any payment may be—

(1) Reduced by any amounts found by the Contracting Officer not to constitute allowable costs; or

(2) Adjusted for overpayments or underpayments made on preceding invoices or vouchers.

(End of clause)

52.216–27 Single or Multiple Awards.

As prescribed in 16.605(f), insert the following provision:

Single or Multiple Awards (DATE)

The Government may elect to award a single delivery-order contract or task-order contract or to award multiple delivery-order contracts or task-order contracts for the same or similar supplies or services to two or more sources under this solicitation.

(End of provision)

52.216–28 Multiple Awards for Advisory and Assistance Services.

As prescribed in 16.605(g), insert the following provision:

Multiple Awards for Advisory and Assistance Services (DATE)

The Government intends to award multiple contracts for the same or similar advisory and assistance services to two or more sources under this solicitation unless the Government determines, after evaluation of offers, that only one offeror is capable of providing the services at the level of quality required.

(End of provision)

52.216–29 Time-and-Materials/Labor-Hour Proposal Requirements—Other Than Commercial Acquisition With Adequate Price Competition.

As prescribed in 16.501–4(a), insert the following provision:

Time-and-Materials/Labor-Hour Proposal Requirements—Other Than Commercial Acquisition With Adequate Price Competition (DATE)

(a) The Government contemplates award of a Time-and-Materials or Labor-Hour type of contract resulting from this solicitation.

(b) The Offeror must specify fixed hourly rates in its offer that include wages, overhead, general and administrative expenses, and profit. The Offeror must specify whether the fixed hourly rate for each labor category applies to labor performed by—

(1) The Offeror;

(2) Subcontractors; and/or

(3) Divisions, subsidiaries, or affiliates of the Offeror under a common control;

(c) The Offeror must establish fixed hourly rates using—

(1) Separate rates for each category of labor to be performed by each subcontractor and for each category of labor to be performed by the Offeror, and for each category of labor to be transferred between divisions, subsidiaries, or affiliates of the Offeror under a common control;

(2) Blended rates for each category of labor to be performed by the Offeror, including labor transferred between divisions,

subsidiaries, or affiliates of the Offeror under a common control, and all subcontractors; or

(3) Any combination of separate and blended rates for each category of labor to be performed by the Offeror, affiliates of the Offeror under a common control, and subcontractors.

(End of provision)

52.216–30 Time-and-Materials/Labor-Hour Proposal Requirements—Other Than Commercial Acquisition Without Adequate Price Competition.

As prescribed in 16.501–4(b), insert the following provision:

Time-and-Materials/Labor-Hour Proposal Requirements—Other Than Commercial Acquisition Without Adequate Price Competition (DATE)

(a) The Government contemplates award of a Time-and-Materials or Labor-Hour type of contract resulting from this solicitation.

(b) The Offeror must specify separate fixed hourly rates in its offer that include wages, overhead, general and administrative expenses, and profit for each category of labor to be performed by—

(1) The Offeror;

(2) Each subcontractor; and

(3) Each division, subsidiary, or affiliate of the Offeror under a common control.

(c) Unless exempt under paragraph (d) of this provision, the fixed hourly rates for services transferred between divisions, subsidiaries, or affiliates of the Offeror under a common control—

(1) Must not include profit for the transferring organization; but

(2) May include profit for the prime Contractor.

(d) The fixed hourly rates for services that meet the definition of "commercial service" at Federal Acquisition Regulation 2.101 that are transferred between divisions, subsidiaries, or affiliates of the Offeror under a common control may be the established catalog or market rate when it is the established practice of the transferring organization to price interorganizational transfers at other than cost for commercial work of the Offeror or any division, subsidiary or affiliate of the Offeror under a common control.

(End of provision)

52.216–31 Time-and-Materials/Labor-Hour Proposal Requirements—Commercial Acquisition.

As prescribed in 16.501–4(c), insert the following provision:

Time-and-Materials/Labor-Hour Proposal Requirements—Commercial Acquisition (DATE)

(a) The Government contemplates award of a Time-and-Materials or Labor-Hour type of contract resulting from this solicitation.

(b) The Offeror must specify fixed hourly rates in its offer that include wages, overhead, general and administrative expenses, and profit. The Offeror must specify whether the fixed hourly rate for each

labor category applies to labor performed by—

- (1) The Offeror;
- (2) Subcontractors; and/or
- (3) Divisions, subsidiaries, or affiliates of the Offeror under a common control.

(End of provision)

52.216–32 Task-Order and Delivery-Order Ombudsman.

As prescribed in 16.605(h), insert the following clause:

Task-Order and Delivery-Order Ombudsman (DATE)

(a) In accordance with 41 U.S.C. 4106(g), the Agency has designated the following task-order and delivery-order Ombudsman for this contract. The Ombudsman must review complaints from the Contractor concerning all task-order and delivery-order actions for this contract and ensure the Contractor is afforded a fair opportunity for consideration in the award of orders, consistent with the procedures in the contract.

[Contracting Officer to insert name, address, telephone number, and email address for the Agency Ombudsman or provide the URL address where this information may be found.]

(b) Consulting an ombudsman does not alter or postpone the timeline for any other process (e.g., protests).

(c) Before consulting with the Ombudsman, the Contractor is encouraged to first address complaints with the Contracting Officer for resolution. When requested by the Contractor, the Ombudsman may keep the identity of the concerned party or entity confidential, unless prohibited by law or agency procedure.

(End of clause)

Alternate I (DATE). As prescribed in 16.605(h), add the following paragraph (d) to the basic clause.

(d) *Contracts used by multiple agencies.*

(1) This is a contract that is used by multiple agencies. Complaints from Contractors concerning orders placed under contracts used by multiple agencies are primarily reviewed by the task-order and delivery-order Ombudsman for the ordering activity.

(2) The ordering activity has designated the following task-order and delivery-order Ombudsman for this order:

[The ordering activity's contracting officer to insert the name, address, telephone number, and email address for the ordering activity's Ombudsman or provide the URL address where this information may be found.]

(3) Before consulting with the task-order and delivery-order Ombudsman for the ordering activity, the Contractor is encouraged to first address complaints with the ordering activity's Contracting Officer for resolution. When requested by the Contractor, the task-order and delivery-order Ombudsman for the ordering activity may keep the identity of the concerned party or entity confidential, unless prohibited by law or agency procedure.

(End of clause)

■ 4. Revise sections 52.217–2 through 52.217–12 to read as follows:

52.217–2 Cancellation Under Multiyear Contracts.

As prescribed in 17.106(a), insert the following clause:

Cancellation Under Multiyear Contracts (DATE)

(a) “Cancellation,” as used in this clause, means that the Government is canceling its requirements for all supplies or services in program years subsequent to that in which notice of cancellation is provided. Cancellation will occur by the date or within the time period specified in the Schedule, unless a later date is agreed to, if the Contracting Officer—

(1) Notifies the Contractor that funds are not available for contract performance for any subsequent program year; or

(2) Fails to notify the Contractor that funds are available for performance of the succeeding program year requirement.

(b) Except for cancellation under this clause or termination under the Default clause, any reduction by the Contracting Officer in the requirements of this contract will be considered a termination under the Termination for Convenience of the Government clause.

(c) If cancellation under this clause occurs, the Contractor will be paid a cancellation charge not over the cancellation ceiling specified in the Schedule as applicable at the time of cancellation.

(d) The cancellation charge will cover only—

(1) Costs—

(i) Incurred by the Contractor and/or subcontractor;

(ii) Reasonably necessary for performance of the contract;

(iii) That would have been equitably amortized over the entire multiyear contract period but, because of the cancellation, are not so amortized; and

(2) A reasonable profit or fee on the costs.

(e) The cancellation charge will be computed and the claim made for it as if the claim were being made under the Termination for Convenience of the Government clause of this contract. The Contractor must submit the claim promptly but no later than 1 year from the date—

(1) Of notification of the nonavailability of funds; or

(2) Specified in the Schedule by which notification of the availability of additional funds for the next succeeding program year is required to be issued, whichever is earlier, unless extensions in writing are granted by the Contracting Officer.

(f) The Contractor's claim may include—

(1) Reasonable nonrecurring costs (see part 15 of the Federal Acquisition Regulation) which are applicable to and normally would have been amortized in all supplies or services which are multiyear requirements;

(2) Allocable portions of the costs of facilities acquired or established for the conduct of the work, to the extent that it is impracticable for the Contractor to use the

facilities in its commercial work, and if the costs are not charged to the contract through overhead or otherwise depreciated;

(3) Costs incurred for the assembly, training, and transportation to and from the job site of a specialized work force; and

(4) Costs not amortized solely because the cancellation had precluded anticipated benefits of Contractor or subcontractor learning.

(g) The claim must not include—

(1) Labor, material, or other expenses incurred by the Contractor or subcontractors for performance of the canceled work;

(2) Any cost already paid to the Contractor;

(3) Anticipated profit or unearned fee on the canceled work; or

(4) For service contracts, the remaining useful commercial life of facilities. “Useful commercial life” means the commercial utility of the facilities rather than their physical life with due consideration given to such factors as location of facilities, their specialized nature, and obsolescence.

(h) This contract may include an option clause with the period for exercising the option limited to the date in the contract for notification that funds are available for the next succeeding program year. If so, the Contractor agrees not to include in option quantities any costs of a startup or nonrecurring nature that have been fully set forth in the contract. The Contractor further agrees that the option quantities will reflect only those recurring costs and a reasonable profit or fee necessary to furnish the additional option quantities.

(i) Quantities added to the original contract through the option clause of this contract will be included in the quantity canceled for the purpose of computing allowable cancellation charges.

(End of clause)

52.217–3 Evaluation Exclusive of Options.

As prescribed in 17.203(a), insert a provision substantially the same as the following:

Evaluation Exclusive of Options (Date)

The Government will evaluate offers for award purposes by including only the price for the basic requirement; i.e., options will not be included in the evaluation for award purposes.

(End of provision)

52.217–4 Evaluation of Options Exercised at Time of Contract Award.

As prescribed in 17.203(b), insert a provision substantially the same as the following:

Evaluation of Options Exercised at Time of Contract Award (DATE)

Except when it is determined in accordance with FAR 17.202(b) not to be in the Government's best interests, the Government will evaluate the total price for the basic requirement together with any option(s) exercised at the time of award.

(End of provision)

52.217–5 Evaluation of Options.

As prescribed in 17.203(c), insert a provision substantially the same as the following:

Evaluation of Options (Date)

Except when it is determined in accordance with FAR 17.202(b) not to be in the Government's best interests, the Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. Evaluation of options will not obligate the Government to exercise the option(s).

(End of provision)

52.217–6 Option for Increased Quantity.

As prescribed in 17.203(d), insert a clause substantially the same as the following:

Option for Increased Quantity (Date)

The Government may increase the quantity of supplies or services called for in the Schedule at the unit price specified. The Contracting Officer may exercise the option by written notice to the Contractor within _____ [insert in the clause the period of time in which the Contracting Officer has to exercise the option]. Delivery of the added items or performance of added services must continue at the same rate as the like items or services called for under the contract, unless the parties otherwise agree.

(End of clause)

52.217–7 Option for Increased Quantity-Separately Priced Line Item.

As prescribed in 17.203(e), insert a clause substantially the same as the following:

Option for Increased Quantity-Separately Priced Line Item (DATE)

The Government may require the delivery of the numbered line item, identified in the Schedule as an option item, in the quantity and at the price stated in the Schedule. The Contracting Officer may exercise the option by written notice to the Contractor within _____ [insert in the clause the period of time in which the Contracting Officer has to exercise the option]. Delivery of added items or performance of added services must continue at the same rate that like items or services are called for under the contract, unless the parties otherwise agree.

(End of clause)

52.217–8 Option to Extend.

As prescribed in 17.203(f), insert a clause substantially the same as the following:

Option to Extend (Date)

(a) The Government may require continued performance of the contract within the limits and at the rates specified in the contract. These rates may be adjusted only as a result

of revisions to prevailing labor rates provided by the Secretary of Labor.

(b) The option provision may be exercised more than once, but the total extension of the period of performance, ordering period, or both as a result of this clause must not exceed 6 months.

(c) The Contracting Officer may exercise the option by written notice to the Contractor within _____ [insert the period of time within which the Contracting Officer may exercise the option].

(d) In the event the period to exercise this option ends during a lapse in appropriations impacting the agency without the Government exercising this option, the Government and Contractor may mutually agree to toll or extend the period to exercise the option until the date that is days after the lapse ends [30 days unless a different number of days is inserted].

(End of clause)

52.217–9 Option To Extend the Term of the Contract.

As prescribed in 17.203(g), insert a clause substantially the same as the following:

Option To Extend the Term of the Contract (Date)

(a) The Government may extend the term of this contract by written notice to the Contractor within _____ [insert the period of time within which the Contracting Officer may exercise the option]; provided that the Government gives the Contractor a preliminary written notice of its intent to extend at least _____ days [60 days unless a different number of days is inserted] before the contract expires. The preliminary notice does not commit the Government to an extension.

(b) If the Government exercises this option, the extended contract will be considered to include this option clause.

(c) The total duration of this contract, including the exercise of any options under this clause, must not exceed _____ (months) (years).

(d) In the event the period to provide written notice of intent to exercise this option or the period to exercise this option ends during a lapse in appropriations impacting the agency without the Government exercising this option, the Government and Contractor may mutually agree to toll or extend the period to provide written notice of intent to exercise the option or exercise the option until the date that is _____ [Contracting Officer insert number of days] days after the lapse ends [30 days unless a different number of days is inserted].

(End of clause)

52.217–10 Reverse Auction

As prescribed in 17.704(a), insert the following provision:

Reverse Auction (Date)

(a) *Definitions.* As used in this provision—
Reverse auction means a real-time auction generally conducted through an electronic medium among two or more offerors who

compete by submitting bids for an award of a supply contract, service contract, purchase order, or blanket purchase agreement, or for an award of an order under a contract or blanket purchase agreement, with the ability to submit revised lower bids at any time before the closing of the auction (section 2 of the Construction Consensus Procurement Improvement Act of 2021 (Pub. L. 117–28)).

Reverse auction service provider means a commercial or Government entity that provides a means for conducting reverse auctions when acquiring supplies or services to be used by the Government.

(b) *Reverse auction.* The Government intends to conduct a reverse auction under this solicitation to award a contract or blanket purchase agreement.

(c) *Offeror agreement.* By submission of a quote or proposal in response to the solicitation, the Offeror agrees to participate in the reverse auction and agrees that the Government may reveal to all Offerors the offered price(s) in the auction, without revealing any Offeror's identity, except for the awardee's identity subsequent to an award resulting from the auction. The Offeror may withdraw its agreement to further participate in the process by withdrawing its offer before the close of the auction by notifying the Contracting Officer via the contact method identified in the solicitation.

(d) *Only one offer.* If the reverse auction produces only one offer, the Government reserves the right to cancel the auction.

(e) *Release of information.* The Government may use a reverse auction service provider to conduct the reverse auction. Any price or proposal information or source selection information received by the reverse auction service provider in relation to the reverse auction must not be released, outside of the Government, unless otherwise required by law. However, this does not prevent the Government from revealing to all Offerors the offered price(s) in the auction, without revealing any Offeror's identity. Price or proposal information includes, but is not limited to—

(1) Contractor bid or proposal information, as defined at Federal Acquisition Regulation 3.104–1; and

(2) Information identified by the Offeror as restricted from duplication, use, or disclosure—in whole or in part—for any purpose other than to evaluate the Offeror's price or proposal.

(End of provision)

52.217–11 Reverse Auction—Orders.

As prescribed in 17.704(b), insert the following clause:

Reverse Auction—Orders (Date)

(a) *Definitions.* As used in this clause—
Reverse auction means a real-time auction generally conducted through an electronic medium among two or more offerors who compete by submitting bids for an award of a supply contract, service contract, purchase order, or blanket purchase agreement, or for an award of an order under a contract or blanket purchase agreement, with the ability to submit revised lower bids at any time before the closing of the auction (section 2 of

the Construction Consensus Procurement Improvement Act of 2021 (Pub. L. 117–28)).

Reverse auction service provider means a commercial or Government entity that provides a means for conducting reverse auctions when acquiring supplies or services to be used by the Government.

(b) *Reverse auction*. The Contracting Officer may conduct a reverse auction to award an order under this contract or blanket purchase agreement.

(c) *Contractor agreement*. When a reverse auction is conducted under this contract or blanket purchase agreement, the following applies:

(1) The Contractor's or blanket purchase agreement holder's submission of a quote or proposal in response to the solicitation for an order constitutes agreement to participate in the auction.

(2) The Contractor agrees that the Government may reveal to all Offerors the offered price(s) in the auction, without revealing any Offerors' identity, except for the awardee's identity subsequent to an award resulting from the auction.

(3) The Contractor or blanket purchase agreement holder may withdraw its agreement to further participate in the reverse auction by withdrawing its offer. To withdraw an offer made in response to a reverse auction solicitation issued under this contract or blanket purchase agreement, the Contractor or blanket purchase agreement holder must notify the Contracting Officer of the request before the close of the auction via the contact method identified in the solicitation.

(4) If the reverse auction produces only one offer, the Government reserves the right to cancel the auction.

(d) *Release of information*. The Government may use a reverse auction service provider to conduct the reverse auction. Any price or proposal information or source selection information received by the reverse auction service provider in relation to the reverse auction must not be released, outside of the Government, unless otherwise required by law. However, this does not prevent the Government from revealing to all Contractors or blanket purchase agreement holders the offered price(s) in the auction, without revealing any Contractor or blanket purchase agreement holder's identity. Price or proposal information includes, but is not limited to—

(1) Contractor bid or proposal information, as defined at Federal Acquisition Regulation 3.104–1;

(2) Price or proposal information similarly generated for a task order or delivery order or an order under a blanket purchase agreement; and

(3) Information identified by the Contractor or blanket purchase agreement holder as restricted from duplication, use, or disclosure—in whole or in part—for any purpose other than to evaluate the Contractor or blanket purchase agreement holder's price or proposal.

(End of clause)

52.217–12 Reverse Auction Services.

As prescribed in 17.704(c), insert the following clause:

Reverse Auction Services (Date)

(a) Definitions.

Government data means any information, document, media, or machine-readable material regardless of physical form or characteristics, that is created or obtained by the Government, in the course of official Government business.

Government-related data means any information, document, media, or machine-readable material regardless of physical form or characteristics that is created or obtained by a contractor through the storage, processing, or communication of Government data. This does not include a contractor's business records (e.g., financial records, legal records, etc.) or data such as operating procedures, software coding, or algorithms that are not uniquely applied to the Government data.

Reverse auction means a real-time auction generally conducted through an electronic medium among two or more offerors who compete by submitting bids for an award of a supply contract, service contract, purchase order, or blanket purchase agreement, or for an award of an order under a contract or blanket purchase agreement, with the ability to submit revised lower bids at any time before the closing of the auction (section 2 of the Construction Consensus Procurement Improvement Act of 2021 (Pub. L. 117–28)).

(b) *Duties of the reverse auction service provider*. When providing reverse auction services to the Government, the Contractor must—

(1) Not assert or imply that it can or will obtain a Government contract for the participants of a reverse auction;

(2) Allow entities to register, at no cost, as potential offerors for any reverse auction conducted on behalf of the Government on the provider's reverse auction platform. As part of the registration process, the Contractor must allow each entity the opportunity to execute a proprietary data protection agreement with the Contractor; however, the Contractor must not negotiate terms in the agreement that affect the terms and conditions of a Government solicitation or contract;

(3) Limit access to, use of, and disclosure of Government data and Government-related data.

(i) The Contractor must not access, use, or disclose Government data unless specifically authorized by the terms of this contract or a task order or delivery order issued under this contract.

(ii) If authorized by the terms of this contract or a task order or delivery order issued under this contract, any access to, or use or disclosure of, Government data must only be for purposes specified in this contract or task order or delivery order.

(iii) The Contractor must ensure that its employees are subject to all such access, use, and disclosure prohibitions and obligations.

(iv) These access, use, and disclosure prohibitions and obligations must survive the expiration or termination of this contract.

(v) The Contractor must notify the Contracting Officer promptly of any requests from a third party for access to Government data or Government-related data, including any warrants, seizures, or subpoenas it receives, including those from another Federal, State, or local agency. The Contractor must cooperate with the Contracting Officer to take all measures to protect Government data and Government-related data from any unauthorized disclosure.

(4) Assert no right or license in the data gathered or generated during a reverse auction. Use Government-related data only to manage the operational environment that supports the Government data and for no other purpose unless otherwise permitted with the prior written approval of the Contracting Officer.

(5) Protect from unauthorized use or disclosure and not release outside of the Government any price or proposal information or any source selection information (see Federal Acquisition Regulation (FAR) 2.101) received by the Contractor in relation to a reverse auction. Price or proposal information includes, but is not limited to—

(i) Contractor bid or proposal information, as defined at FAR 3.104–1;

(ii) Price or proposal information similarly generated for a task order or delivery order or an order under a blanket purchase agreement; and

(iii) Information identified by the reverse auction participant as restricted from duplication, use, or disclosure—in whole or in part—for any purpose other than to evaluate the reverse auction participant's price or proposal;

(6) Allow offerors to see the successive lowest price(s) offered in the auction without revealing an offeror's identity;

(7) Not participate as an offeror in any reverse auction, which the Contractor is hosting on behalf of the Government. This prohibition includes participation in a reverse auction by any entity with which the Contractor has a relationship that raises an actual or potential conflict of interest;

(8) At the close of each auction—

(i) Provide the Contracting Officer with the successful offer, along with information that separately identifies the offeror's price and the price for each provider fee or charge included in the total price; and

(ii) Provide the Contracting Officer with all information and documentation received from reverse auction participants in response to the reverse auction.

(End of clause)

[FR Doc. 2026–19160 Filed 9–17–26; 8:45 am]

BILLING CODE 6820–EP–P



FEDERAL REGISTER

Vol. 91

Friday,

No. 180

September 18, 2026

Part VI

Office of Management and Budget

Office of Federal Procurement Policy

Department of Defense

General Services Administration

National Aeronautics and Space Administration

48 CFR Parts 14, 28, et al.

Federal Acquisition Regulation: Revolutionary Federal Acquisition Regulation
Overhaul Parts 14, 28, 36, and 52; Proposed Rule

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 14, 28, 36, and 52

[FAR Case 2026–010, Docket No. FAR–2026–0010, Sequence No. 1]

RIN 9000–AO83

Federal Acquisition Regulation: Revolutionary Federal Acquisition Regulation Overhaul Parts 14, 28, 36, and 52

AGENCY: Office of Federal Procurement Policy (OFPP), Office of Management and Budget (OMB); Department of Defense (DoD); General Services Administration (GSA); and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: OFPP, DoD, GSA, and NASA (collectively referred to as the Federal Acquisition Regulatory Council or FAR Council) are proposing to amend the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.) 14275, Restoring Common Sense to Federal Procurement. The E.O. directs the elimination of excessive acquisition regulations to stop the inefficient use of American taxpayer dollars. The FAR Council is issuing twelve proposed rules that collectively will streamline the FAR in its entirety. This rule proposes revisions to FAR parts 14, 28, 36, and 52.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before October 19, 2026, to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2026–010 to the Federal eRulemaking portal at <https://www.regulations.gov>. Follow the instructions for sending comments.

Instructions: Please submit comments only and cite “FAR Case 2026–010” in all correspondence related to this case. Include your name, company name (if any), and “FAR Case 2026–010” on any attached document. Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal and/or business

confidential information provided. Public comments may be submitted as an individual, as an organization, or anonymously (see frequently asked questions at <https://www.regulations.gov/faq>). To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

Docket: For access to the docket to read background documents or comments received, go to <https://www.regulations.gov/FAR-2026-010>.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact FARpolicy@gsa.gov or call 202–969–4075 and cite “FAR Case 2026–010.” For information pertaining to status, publication schedules, or alternate instructions for submitting comments if <https://www.regulations.gov> cannot be used, contact the Regulatory Secretariat Division at 202–501–4755 or GSARegSec@gsa.gov. Please cite “FAR Case 2026–010.”

SUPPLEMENTARY INFORMATION:

I. Background

E.O. 14275, Restoring Common Sense to Federal Procurement (April 15, 2025), resets the foundation for Federal buying by requiring the FAR Council to produce a streamlined FAR that is simpler, clearer, and structured for speed. According to the E.O., the FAR has evolved from its original purpose (*i.e.*, to establish uniform procedures across executive departments and agencies), into an excessive and overcomplicated regulatory framework and bureaucracy. While meant to “deliver, on a timely basis, the best value product or service to the customer, while maintaining the public’s trust and fulfilling public policy objectives,” the FAR has become an expensive barrier to achieving those objectives. As a result, the E.O. directed the FAR Council and OMB to create an agile, effective, and efficient regulation that contains only provisions required by statute or essential to sound procurement.

To implement E.O. 14275, OMB issued Memorandum M–25–26, Overhauling the Federal Acquisition Regulation, which announced the “Revolutionary FAR Overhaul” (RFO) and created a roadmap for producing simpler regulation aligned to statute, rewritten in plain language, and including nonstatutory requirements that are necessary to conducting a sound procurement. The memorandum described a new streamlined vision for the FAR, to be maintained alongside nonregulatory governmentwide

guidance to provide a common-sense authoritative foundation for nimble response and delivery of mission capability.

This new vision represents a paradigm shift where over-engineered regulations designed for paperwork and compliance are replaced with streamlined regulations focused on core stewardship principles and nonregulatory guidance that will be used in concert with the streamlined FAR focused on proven buying strategies, critical thinking, market awareness (including to expand awareness of goods, products, and materials offered in the United States), and risk literacy to enhance workforce problem-solving. The significant reduction of unnecessary mandates is intended to clarify and reinforce the contracting officer’s discretion to determine the best way to apply policies and practices. The newly established, nonregulatory guidance, which has been inspired by acquisition innovation advocates, category managers, other experienced practitioners, and many years of feedback from the contractor community—is expected to facilitate contracting officers’ use of their discretion more efficiently and effectively to make smarter buying decisions.

OMB Memorandum M–25–26 also directed the FAR Council to complete the regulatory overhaul in two phases, each with robust public input. The FAR Council conducted its phase one effort in fiscal year 2025 by issuing model class deviations to replace each part in the FAR until such time as formal rulemaking occurred. This proposed rule is one of a series that constitute the FAR Council’s phase two effort to obtain public comment through formal rulemaking.

II. Discussion and Analysis

A summary of proposed changes to existing FAR parts 14, 28, and 36 and their corresponding provisions and clauses in part 52 follows:

A. General

1. General RFO Updates

This proposed rule generally reorganizes the FAR parts into phases of acquisition and simplifies the text into plain language, where possible. The plain language efforts include changes to active voice, edits to improve readability, and reorganization to present information more logically. None of the plain language edits are intended to change existing FAR requirements. The rewriting of the entire FAR also required edits to

harmonize the changes being proposed such as updating the cross-references. This aligns with the Federal plain language guidelines as directed by the Plain Writing Act of 2010 (5 U.S.C. 301 note).

2. Standardization of Prescriptions

This rule proposes revisions to standardize prescriptions for provisions and clauses. These changes are intended to provide better clarity around the applicability of provisions and clauses such as whether they apply to commercial products and services.

3. Use of “Must” Instead of “Shall”

Additional revisions are being proposed throughout the FAR text and FAR provisions and clauses to replace the use of the term “shall” with “must” or “will,” as appropriate, to impose requirements.

4. Non-Statutory Requirements

Section 4 of the E.O. required amendments to the FAR to ensure it contains only provisions that are required by statute or that are otherwise necessary to support simplicity and usability, strengthen the efficacy of the procurement system, or protect economic or national security. The FAR Council reviewed all non-statutory requirements to determine if they are still relevant and essential to sound procurement in today’s contracting environment based on the criteria from section 4 of the E.O. The proposed rule retains non-statutory requirements that further one or more of the elements of sound procurements, including those requirements that serve as guardrails to protecting taxpayer interests and promote taxpayer confidence in the procurement system. Non-statutory requirements that were beneficial but not essential were retained in the non-regulatory guidance documents. Other non-statutory requirements that did not meet these standards, were removed. The Council considered the extent to which regulation is the most efficient means for capturing the benefit of the policy. For example, most “how to” requirements were found to be more appropriately suited for non-regulatory coverage which better enables a contracting officer to use discretion in determining the application of a strategy to a given situation and limits the risk of overapplication, which can create wasteful burden on the contracting parties.

As part of the RFO, the FAR Council has created a number of non-regulatory resources, including the FAR Companion, which provides insight from experienced practitioners across

the government on using more streamlined practices and processes. The migration of significant coverage to non-regulatory guidance is intended to ensure that the benefits of the policy are not outweighed by the compliance burden of a more rigidly written regulation that is prone to application in an overly broad manner. This approach was explained to the public in a set of “frequently asked questions” that were posted on the Revolutionary FAR Overhaul homepage shortly after the initiative was launched.

B. Summary of Changes to FAR Part 14, Sealed Bidding

The proposed rule, if finalized, would revise FAR part 14 to simplify and streamline the policies and procedures pertaining to sealed bidding. These proposed revisions align with the broader RFO initiatives and do not substantively change the policy or procedures in the part. Several types of streamlining are highlighted below with specific examples for further illustration.

1. Restructuring and Eliminating Redundancy

The proposed rule, if finalized, would remove the general uniform contract format text since it was duplicative of existing text in FAR part 15 but it would retain use instructions for sealed bidding; it would move the text regarding publicizing contract actions to FAR part 5; it would move the text regarding protests against award to FAR part 33; it would remove permissive, nonstatutory price-related factors; and it would remove outdated regulations regarding facsimile bids and bid envelopes.

2. Pre-Bid Conference

The proposed rule, if finalized, would remove the text permitting pre-bid conferences at FAR 14.207. While pre-bid conferences are value added in certain circumstances, it is unnecessary for the FAR to give permission to the contracting officer to use a pre-bid conference or define its purpose.

C. Summary of Changes to FAR part 28, Bonds and Insurance

The proposed rule, if finalized, would revise FAR part 28 to simplify and make administrative corrections. The proposed revisions align with the broader RFO initiatives and would not substantively change policy or procedures.

D. Summary of Changes to FAR part 36, Construction and Architect-Engineering Contracts

The proposed rule, if finalized, would revise FAR part 36 to simplify and streamline the policies and procedures pertaining to construction contracting and architect-engineering contracting. The proposed revisions align with the broader RFO initiatives. Several types of streamlining are highlighted below with specific examples for further illustration.

1. Restructuring

In addition to the acquisition lifecycle phasing, the proposed rule includes extensive restructuring to improve readability. The existing FAR part 36 text originated from 1946 committee recommendations to standardize acquisition policies and procedures between departments. As such, many of the regulations for construction contracts and architect-engineer contracts were comingled. As part of the restructuring, the proposed rule would separate construction regulations from architect-engineer regulations. Further proposed revisions include the removal of duplicative text and removal of unnecessary provisions and clauses. For example, the proposed rule would remove the existing FAR text regarding publicizing contract actions from FAR part 36 and would point the contracting officer to FAR part 5.

2. Eliminating Extraneous Content

Several paragraphs within FAR part 36 contained nonstatutory suggestive or permissive text. For example, the text at FAR 36.212 provides suggestive/permissive guidance that the contracting officer may conduct a preconstruction conference. Removal of this text and the associated clause at FAR 52.236–26, Preconstruction Conference, would not prohibit nor limit the contracting officer from establishing a requirement for an optional or mandatory preconstruction conference; rather, it would shift the requirement to the solicitation stage. By identifying the requirement for a preconstruction conference within the invitation for bid, the Government would be providing industry with the clarity needed to accurately estimate administrative costs. The FAR Council has recommended this removed text for inclusion in the reference FAR Companion guide.

The proposed rule would also remove FAR provision 52.236–1, Performance of Work by the Contractor. The E.O. 14275, Restoring Common Sense to Federal Procurement, directs the removal of regulations restricting competition. This

clause is proposed for removal as it is believe to restrict competition on fixed-price contracts because not all construction prime contractors perform certain scopes of work.

In addition, the proposed rule would remove the clause FAR 52.236–4, Physical Data, because the intent of the clause is served by the FAR clause 52.236–3, Site Investigation and Conditions Affecting the Work. The identification of data provided to bidders should already be included within the invitation for bid. The text of FAR clause 52.236–3 states, “. . .including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract”, which further supports the data provided by the Government should already be part of the invitation for bid.

The proposed rule would remove nonstatutory text at FAR 36.519 and the associated FAR clause 52.236–19, Organization and Direction of the Work. Additionally, the mandate for full-time resident direction by an owner or senior officer represents a nonstatutory overreach. While contractors may currently seek approval for alternative oversight, Government intervention in internal organizational structures remains unnecessary and contradicts FAR 52.236–6, Superintendence by the Contractor.

The existing FAR text at 36.210 provides the contracting officer the opportunity to plan for prospective bidders to inspect the work site, examine data provided by the Government, etc., for the purposes of preparing and submitting a more informed and complete and accurate bid. Since there is no statute prohibiting such action, there is no need for the permissive text in the regulation. Further, the associated provision at FAR 52.236–27, Site Visit, is also unnecessary as the invitation for bid can clearly articulate the same information. The proposed removal of this text and the associated provision would not prohibit nor limit the contracting officer from providing the opportunity or requirement for offerors to visit the site or examine Government provided information.

The proposed rule would also remove FAR 36.520 and the associated provision at FAR 52.236–28, Preparation of Offers—Construction. This provision is redundant as it merely instructs offerors to comply with the solicitation terms to avoid rejection—a fundamental requirement already established in the invitation for bid and general procurement law.

E. Summary of Changes to FAR Part 52, Contract Clauses

1. Plain Language Update

As part of the broader plain language initiative, the term “shall” has been replaced with “must” throughout all affected clauses and prescriptions in this rulemaking to promote clarity and consistency. These updates will streamline contract drafting and compliance, reduce ambiguity, and save time for both contracting officers and contractors.

2. Clarification of FAR Clause Applicability to Commercial Products and Commercial Services

This rule clarifies the applicability of FAR part 52 clause prescriptions to commercial acquisitions to ensure consistent treatment across the FAR. Conforming revisions were made to prescriptions associated with FAR parts 14, 28, and 36 to accurately reflect when clauses apply to commercial products and commercial services. Affected prescriptions include those at 14.207, 14.208, 28.102–3, 28.103–4, 28.106–4, 28.203–4, 28.204–4, 28.309, 28.311–1, 28.312, 28.313, and 36.101–7.

3. Part 52 Renumbering

As a result of the RFO, the FAR Council is considering establishing a new FAR subpart in part 52 and relocating and renumbering all provisions and clauses under this new subpart. This means, if FAR subpart 52.4 was used, all provisions and clauses would begin with 52.4 instead of 52.2. This change is anticipated to prevent confusion and increase compliance by creating a clear distinction between versions of a provision or clause prior to the RFO. Other benefits include avoiding potential clause numbering conflicts and information system and data collection impacts. The FAR Council welcomes comments on the potential impact of such a change on contractors, Government personnel, and other stakeholders.

III. Applicability to Contracts and Subcontracts Valued at or Below the Simplified Acquisition Threshold and for Commercial Products and Commercial Services

The following sections address the applicability of provisions and clauses prescribed in FAR parts 14, 28, and 36 to solicitations and contracts valued at or below the simplified acquisition threshold (SAT) and those for the acquisition of commercial products, commercially available off-the-shelf (COTS) items, and commercial services.

Prescriptions for provisions and clauses in these parts have been updated to reflect applicability to commercial acquisitions.

A. Contracts and Subcontracts Valued at or Below the Simplified Acquisition Threshold

This proposed rule, if finalized, does not alter the prescriptions of provisions and clauses included in this proposed rule to change their applicability to contracts and subcontracts valued at or below the SAT.

B. Contracts and Subcontracts for Commercial Products, Commercially Available Off-The-Shelf Items, and Commercial Services.

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial products and commercial services and gives the FAR Council the authority to determine to apply a law to contracts or subcontracts for the acquisition of commercial products and commercial services. 41 U.S.C. 1907 exempts contracts for commercially available off-the-shelf (COTS) items from certain provisions of law unless the Administrator for Federal Procurement Policy determines that doing so would not be in the best interest of the Federal Government.

Section 839 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232) required the FAR Council and the Administrator of Federal Procurement Policy to review prior determinations under 41 U.S.C. 1906 and 41 U.S.C. 1907, as well as the applicability of provisions and clauses to contracts and subcontracts for commercial products, COTS items, and commercial services that do not implement statute or Executive order, and propose amendments to the FAR to eliminate or exempt such requirements from commercial acquisitions, unless there are specific reasons to retain particular requirements.

In accordance with section 839 of the NDAA for FY 2019 and their authorities under 41 U.S.C. 1906 and 1907, the FAR Council reviewed the applicability of the provisions and clauses associated with the FAR parts covered by this proposed rule.

The following table reflects the FAR Council and Administrator of Federal Procurement Policy’s proposed determination regarding the applicability of the provisions and clauses to solicitations and contracts for commercial products, COTS items, and/or commercial services. In making proposed applicability determinations, the FAR Council considered factors

such as whether the provision or clause advances national security or economic security, contributes to the resilience of contractors and subcontractors in the Federal marketplace, or advances

uniformity and clarity in the performance of basic functions that are essential to sound procurement.

Accordingly, this proposed rule, if finalized, would revise provision and clause prescriptions to clearly reflect

applicability to commercial acquisitions as outlined in the table. An “X” in the following table indicates the provision or clause will apply to that category of commercial acquisition, as prescribed:

Provision/clause No.	Title	Commercial products	Commercial services	COTS items
52.214-3	Amendments to Invitations for Bids	X	X	X
52.214-4	False Statements in Bids	X	X	X
52.214-5	Submission of Bids	X	X	X
52.214-6	Explanation to Prospective Bidders	X	X	X
52.214-7	Late Submissions, Modifications, and Withdrawals of Bids	X	X	X
52.214-10	Contract Award-Sealed Bidding	X	X	X
52.214-12	Preparation of Bids	X	X	X
52.214-14	Place of Performance-Sealed Bidding	X	X	X
52.214-15	Period for Acceptance of Bids	X	X	X
52.214-16	Minimum Bid Acceptance Period	X	X	X
52.214-18	Preparation of Bids-Construction .....	.....	X	.....
52.214-19	Contract Award-Sealed Bidding-Construction .....	.....	X	.....
52.214-20	Bid Samples	X	X	X
52.214-20 Alt I	Bid Samples	X	X	X
52.214-20 Alt II	Bid Samples	X	X	X
52.214-21	Descriptive Literature	X	X	X
52.214-21 Alt I	Descriptive Literature	X	X	X
52.214-22	Evaluation of Bids for Multiple Awards	X	X	X
52.214-23	Late Submissions, Modifications, Revisions, and Withdrawals of Technical Proposals under Two-Step Sealed Bidding.	.....	.....	.....
52.214-24	Multiple Technical Proposals .....	.....	.....	.....
52.214-25	Step Two of Two-Step Sealed Bidding .....	.....	.....	.....
52.214-26	Audit and Records-Sealed Bidding .....	.....	.....	.....
52.214-27	Price Reduction for Defective Certified Cost or Pricing Data-Modifications-Sealed Bidding.	X	X	.....
52.214-28	Subcontractor Certified Cost or Pricing Data-Modifications-Sealed Bidding.	.....	.....	.....
52.214-28 Alt I	Subcontractor Certified Cost or Pricing Data-Modifications-Sealed Bidding.	.....	.....	.....
52.214-29	Order of Precedence-Sealed Bidding .....	.....	.....	.....
52.214-34	Submission of Offers in the English Language	X	X	X
52.214-35	Submission of Offers in U.S. Currency	X	X	X
52.228-1	Bid Guarantee	X	X	X
52.228-2	Additional Bond Security	X	X	.....
52.228-3	Workers' Compensation Insurance (Defense Base Act) .....	.....	X	.....
52.228-4	Workers' Compensation and War-Hazard Insurance Overseas .....	.....	.....	.....
52.228-5	Insurance-Work on a Government Installation .....	.....	.....	.....
52.228-7	Insurance-Liability to Third Persons .....	.....	.....	.....
52.228-8	Liability and Insurance-Leased Motor Vehicles	X	X	.....
52.228-9	Cargo Insurance .....	.....	X	.....
52.228-10	Vehicular and General Public Liability Insurance .....	.....	X	.....
52.228-11	Individual Surety—Pledge of Assets	X	X	.....
52.228-12	Prospective Subcontractor Requests for Bonds .....	.....	X	.....
52.228-13	Alternative Payment Protections .....	.....	X	.....
52.228-14	Irrevocable Letter of Credit	X	X	.....
52.228-15	Performance and Payment Bonds-Construction .....	.....	X	.....
52.228-16	Performance and Payment Bonds-Other Than Construction	X	X	.....
52.228-16 Alt I	Performance and Payment Bonds-Other Than Construction	X	X	.....
52.228-17	Individual Surety—Pledge of Assets (Bid Guarantee)	X	X	.....
52.236-2	Differing Site Conditions .....	.....	X	.....
52.236-3	Site Investigation and Conditions Affecting the Work .....	.....	X	.....
52.236-5	Material and Workmanship .....	.....	X	.....
52.236-6	Superintendence by the Contractor .....	.....	X	.....
52.236-7	Permits and Responsibilities .....	.....	X	.....
52.236-8	Other Contracts .....	.....	X	.....
52.236-9	Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements.	.....	X	.....
52.236-10	Operations and Storage Areas .....	.....	X	.....
52.236-11	Use and Possession Prior to Completion .....	.....	X	.....
52.236-12	Cleaning Up .....	.....	X	.....
52.236-13	Accident Prevention .....	.....	X	.....
52.236-13 Alt I	Accident Prevention .....	.....	X	.....
52.236-14	Availability and Use of Utility Services .....	.....	X	.....
52.236-15	Schedules for Construction Contracts .....	.....	X	.....
52.236-16	Quantity Surveys .....	.....	X	.....
52.236-16 Alt I	Quantity Surveys .....	.....	X	.....

Provision/clause No.	Title	Commercial products	Commercial services	COTS items
52.236–17	Layout of Work .....	.....	X	.....
52.236–18	Work Oversight in Cost-Reimbursement Construction Contracts .....	.....	.....	.....
52.236–21	Specifications and Drawings for Construction .....	.....	X	.....
52.236–21 Alt I	Specifications and Drawings for Construction .....	.....	X	.....
52.236–21 Alt II	Specifications and Drawings for Construction .....	.....	X	.....
52.236–22	Design Within Funding Limitations .....	.....	.....	.....
52.236–23	Responsibility of the Architect-Engineer Contractor .....	.....	.....	.....
52.236–24	Work Oversight in Architect-Engineer Contracts .....	.....	.....	.....
52.236–25	Requirements for Registration of Designers .....	.....	.....	.....

The FAR Council also reviewed subcontract flow down requirements in clauses associated with the FAR parts covered by this proposed rule. The following table reflects the FAR Council and Administrator of Federal Procurement Policy's proposal regarding

whether those clauses flow down to subcontracts for commercial products, COTS items, and/or commercial services. This proposed rule, if finalized, would revise the subcontract paragraphs in these clauses to clearly state whether the clause flows down to

commercial subcontracts, as outlined in the table. An "X" in the following table indicates the provision or clause will apply to subcontracts for that category of commercial subcontracts, as described in the clause:

Clause No.	Title	Commercial products	Commercial services	COTS items
52.214–26	Audit and Records-Sealed Bidding .....	.....	.....	.....
52.214–28	Subcontractor Certified Cost or Pricing Data-Modifications ..	.....	.....	.....
52.214–28 Alt I	Subcontractor Certified Cost or Pricing Data-Modifications ..	.....	.....	.....
52.228–3	Workers' Compensation Insurance (Defense Base Act) .....	.....	X	.....
52.228–4	Workers' Compensation and War-Hazard Insurance Overseas.	.....	.....	.....
52.228–5	Insurance-Work on a Government Installation .....	.....	.....	.....
52.236–13	Accident Prevention .....	.....	X	.....
52.236–13 Alt I	Accident Prevention .....	.....	X	.....

IV. Expected Impact of the Rule

The intended impact of the RFO, as stated in E.O. 14275, is to restore the Government's ability to "deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives." Each of the RFO rulemakings is designed to contribute to this impact by emphasizing mission first, by aligning acquisition activities directly to achieving the agency's overarching objectives and serving the public interest and elevating the importance of fiscal responsibility. The proposed RFO rules focus on three goals in particular: (1) timely acquisition and delivery, (2) lower cost and accountability in all spending, and (3) increased competition.

Timeliness. Timely acquisition and delivery are essential for mission success. To this end, RFO rules propose to eliminate mandates that unnecessarily interfere with agency discretion to determine the best way to procure products and services. The proposed RFO rules highlight more clearly streamlined and simplified authorities that allow buyers to use their time more efficiently and are expected to reduce time between solicitation and award. The proposed RFO rules are

expected to make it easier for contracting officers to leverage commercial practices that are familiar to the commercial marketplace. This is expected to make it easier for sellers to engage and respond to Government solicitations more rapidly.

Lower cost. E.O. 14271, Ensuring Commercial, Cost-Effective Solutions in Federal Contracts (April 15, 2025), directs the Government to utilize, to the maximum extent practicable, the commercial marketplace and the innovations of private enterprise to provide better, more cost-effective services to taxpayers, as envisioned by the Federal Acquisition Streamlining Act. The procurement of custom products and services where a suitable or superior commercial solution would have fulfilled the Government's needs has resulted in avoidable waste to the detriment of American taxpayers.

To address these concerns, consistent with associated responsibilities in section 839 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232), the FAR Council reviewed prescriptions for provisions and clauses to ensure all prescriptions are clear regarding their applicability to acquisitions for commercial products and services. Currently, many

prescriptions do not specify applicability to commercial acquisitions and leave the applicability determination to contracting officer interpretation. By specifically stating when a provision or clause can be applied to commercial acquisitions, proposed RFO rules should decrease the likelihood of inclusion of provisions and clauses in commercial acquisitions that are not required by law and drive greater consistency in the terms and conditions used in these contracts. In turn, these changes should increase the participation of commercial sellers, who are unwilling or unable to manage the cost of complying with noncommercial requirements, and also improve taxpayer access to affordable commercial solutions.

Some RFO rules propose to delete requirements placed on commercial or noncommercial sellers that are not related to performance of the contract, drive up cost without attendant performance benefits, and may misdirect efforts away from innovation, investment and economic growth. Greater emphasis on timeliness should reduce bidders' carrying costs, enabling them to pass those savings on to customers through lower prices.

Increased competition. Since enactment of the Competition in

Contracting Act of 1984 (Title VII of Pub. L. 98–369), competition has been the cornerstone of the Federal acquisition system. The benefits of competition are well established: competition saves money for the taxpayer, improves contractor performance, curbs fraud, and promotes accountability for results. Competition also drives contractor resilience and positions the U.S. market to develop a strategic advantage for the nation.

According to data in the System for Award Management, roughly 45 percent of contract dollars were awarded in FY 2025 either without competition or with competition that received only one offer. Of equal concern, the Federal marketplace has seen a significant decline over the past 20 years in the number of businesses—especially small businesses—participating in the Federal supplier base. Studies suggest that high compliance costs lead to the misallocation of resources away from more profitable activities and discourage innovation, investment, and economic growth (Council of Economic Advisers, Executive Office of the President, June 2025, *The Economic Benefits of Current Deregulatory Policies*, <https://www.whitehouse.gov/wp-content/uploads/2025/03/The-Economic-Benefits-of-Current-Deregulatory-Efforts.pdf>). This may shelter incumbent contractors and stifle competition, reducing startup activity and job formation.

The RFO rules seek to increase participation in agency competitions and the resilience of the Federal supplier base which includes commercial entities, small businesses, manufacturers, and nontraditional suppliers. The RFO will achieve this outcome by removing regulatory mandates that are not rooted in statute or essential to sound procurement, promoting greater reliance on practices that reduce transaction costs, and improving the quality of communications with offerors and potential offerors. Access to a broader range of solutions in a more dynamic marketplace will drive better return for each taxpayer dollar spent and increase taxpayer confidence in the Federal acquisition system.

The Government has conducted a regulatory impact analysis (RIA) for the RFO rulemaking inclusive of this proposed rule for FAR parts 14, 28, and 36. The RIA includes a discussion of the anticipated effects of the rulemakings as follows:

1. FAR Part 14

The changes to FAR part 14 are not expected to have a significant impact on

contractors or subcontractors. The proposed changes to FAR part 14 are primarily internal Government procedures.

This proposed rule simplifies and streamlines the sealed bidding policies without changing fundamental requirements. The consolidation of content and elimination of redundant and permissive text will reduce the time contracting officers spend navigating regulations.

These proposed revisions will reduce administrative burden through clearer, more concise regulations; potentially faster processing of sealed bidding acquisitions; eventually reduced risk of procedural errors.

While the changes are primarily internal to Government, industry may experience ancillary benefits associated with Government process improvements (e.g., increased shared understanding through plain language adjustments, faster processing with improved clarity).

For these reasons, this proposed rule is expected to make it somewhat less burdensome on contracting officers and industry once they have after the initial learning curve. Ultimately, the changes should make sealed bidding acquisitions easier.

2. FAR Part 28

The changes to FAR part 28 are not expected to have a significant impact on contractors or subcontractors. The proposed changes to FAR part 28 are primarily internal Government procedures and implement administrative corrections that align with the broader RFO initiatives.

3. FAR Part 36

The proposed changes to FAR part 36 simplify and streamline construction and architect-engineer policies without changing fundamental requirements. This reorganization, consolidation of content, and elimination of redundant and unnecessary text will reduce the time contracting officers spend navigating regulations and will also promote competition.

The proposed rule removes the non-statutory FAR clause 52.236–1, Performance of Work by the Contractor. This clause restricts competition because not all contractors self-perform work. By removing this competition restricting clause, the Government should eventually experience greater competition, which should result in lower prices.

This proposed rule removes the duplicative text regarding publicizing contract actions throughout the existing FAR part 36 text and now points the contracting officer to FAR part 5. By

removing this existing duplicative text and consolidating it to FAR part 5, the Government will eliminate time spent by contracting officers bouncing between the two parts.

The proposed rule removes non-statutory text at FAR 36.519 and the associated clause 52.236–19, Organization and Direction of the Work. This clause imposes an unnecessary burden by requiring contractors to establish and maintain project specific organizational. Additionally, the mandate for full-time resident direction by an owner or senior officer represents a non-statutory overreach. While contractors may currently seek approval for alternative oversight, Government intervention in internal organizational structures remains unnecessary and contradicts FAR 52.236–6, Superintendence by the Contractor. Removing this clause eliminates the unnecessary costs associated with unnecessary project specific reports and eliminates potential cost-padding for senior leadership oversight and streamlines contractor operations.

The proposed rule removes the permissive text at FAR 36.522 and its associated clause, 52.236–26, Preconstruction Conference. This removal does not impede a contracting officer's authority to mandate such a conference; rather, it shifts the requirement to the solicitation stage. By identifying the need for a preconstruction conference within the invitation for bid, the Government provides industry with the clarity needed to accurately estimate administrative costs. This ensures the Government pays only for defined requirements rather than anticipatory contingencies.

The proposed rule further eliminates the permissive language at FAR 36.210 and the associated provision 52.236–27, Site Visit. Because no statute prohibits contracting officers from allowing site inspections or data examinations, the existing regulatory text is redundant; the authority to offer these opportunities exists inherently. Removing this provision does not restrict a contracting officer's ability to mandate or facilitate site visits but rather removes unnecessary verbiage that merely restates an existing authority.

The proposed rule removes FAR 36.520 and the associated provision 52.236–28, Preparation of Offers—Construction. This provision is redundant as it merely instructs offerors to comply with the solicitation terms to avoid rejection—a fundamental requirement already established in the invitation for bid and general procurement law. Eliminating this text

streamlines the regulation by removing unnecessary restatements of the requirement for bid responsiveness.

The proposed rule reduces administrative burden through clearer, more concise regulations; potentially faster processing of construction and architect-engineer contract awards; and reduced risk of procedural errors.

For these reasons, this rule is expected to make it easier for contracting officers to accomplish award of construction and architect-engineer contracts. However, this change is not expected to create measurable direct cost savings for the Government or contractors as these proposed changes to FAR part 36 are primarily internal Government procedures.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Executive Order 14192

This rule is subject to E.O. 14192, Unleashing Prosperity Through Deregulation. This proposed rule, if finalized as proposed, is anticipated to be an E.O. 14192 deregulatory action. See discussion in the “Expected Impact of the Rule” section of this preamble.

VII. Regulatory Flexibility Act

This proposed rule, if finalized, may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act 5 U.S.C. 601–612.

However, an Initial Regulatory Flexibility Analysis (IRFA) is as follows:

1. Reasons for the action.

Executive Order (E.O.) 14275, Restoring Common Sense to Federal Procurement, directs the elimination of excessive acquisition regulations to stop the inefficient use of American taxpayer dollars. The E.O. directs the first comprehensive end-to-end overhaul of the FAR in its 40-year history. The E.O. establishes the policy that the FAR should “contain only provisions that are required by statute or that are otherwise

necessary to support simplicity and usability, strengthen the efficacy of the procurement system, or protect economic or national security interests.”

In response to E.O. 14275, the Office of Management and Budget issued memorandum M–25–26, Overhauling the Federal Acquisition Regulation. The Memo directed the FAR Council to complete a “revolutionary overhaul” of the FAR. Therefore, the FAR Council is issuing twelve proposed rules that collectively will streamline the FAR in its entirety.

2. Objectives of, and legal basis for, the rule.

The revolutionary FAR overhaul (RFO) rewrite represents a paradigm shift in Federal acquisition. It emphasizes streamlining, clarity, and accessibility, while ensuring that the regulation focuses only on statutory mandates and foundational procurement principles. The RFO is designed to simplify compliance for contracting professionals, improve acquisition speed and agility, and reinforce mission outcomes over process formalities.

The basis for the RFO is E.O. 14275. The authority for promulgation of the FAR is 41 U.S.C. 1121(b); 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

3. Description of and an estimate of the number of small entities to which the rule will apply.

All small entities who want to contract with the Federal Government will have to familiarize themselves with the reorganized, streamlined, and revised FAR, including the content of this rulemaking. As of January 2026, there are 401,196 entities registered in the System for Award Management (SAM) that were small for at least one North American Industry Classification System (NAICS) code they had selected.

a. FAR Part 14

The proposed revisions to FAR part 14 simplify and streamline the policies and procedures pertaining to sealed bidding by reorganizing the text into the acquisition lifecycle, and by removing or relocating FAR text that is outdated, redundant, or otherwise unnecessary. These revisions align with the broader RFO initiatives and do not substantively change the policy or procedures in the part.

b. FAR Part 28

The proposed revision to FAR part 28 simplifies and makes administrative corrections. These revisions align with the broader RFO initiatives and do not

substantively change policy or procedures.

c. FAR Part 36

The proposed revisions to FAR part 36 simplify, streamline, restructure, and remove extraneous policies and procedures pertaining to construction contracting and architect-engineering contracting. The revisions align with the broader RFO initiatives.

d. FAR Part 52

This change clarifies the applicability of provisions and clauses to commercial applications in clauses associated with updates to prescriptions in FAR parts 14, 28, and 36. In addition to these clarifications, the rule includes plain language edits, such as improvements to readability, updates to active voice, and replacement of the term “shall” with “must,” to promote consistency across prescriptions and clauses. Any costs are negligible and limited to internal policy updates. Therefore, the changes are not expected to have a significant economic impact on a substantial number of small entities.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the rule.

This proposed rule, if finalized, does not contain any new reporting, recordkeeping or other compliance requirements.

a. FAR Part 14

This proposed rule does not contain any new reporting, recordkeeping, or other compliance requirements under FAR part 14. The revisions are structural and editorial in nature and do not impose additional compliance obligations on contractors. Small entities may need to review the reorganized content and update internal procedures, but no new reporting or recordkeeping requirements are introduced.

b. FAR Part 28

This proposed rule does not contain any new reporting, recordkeeping, or other compliance requirements under FAR part 28. The revisions do not create new compliance obligations; they simply improve clarity and eliminate redundancy.

c. FAR Part 36

This proposed rule does not contain any new reporting, recordkeeping, or other compliance requirements under FAR part 36. The revisions reduce administrative burden by simplifying documentation requirements and do not introduce new compliance activities.

d. FAR Part 52

This proposed rule does not contain any new reporting, recordkeeping, or other compliance requirements under FAR part 52. The updates clarify the applicability of prescriptions and clauses to commercial acquisitions and make conforming revisions to clauses associated with FAR parts 14, 28, and 36. These changes are editorial and organizational in nature and do not impose new compliance obligations.

5. *Relevant Federal rules which may duplicate, overlap, or conflict with the rule.*

The proposed rule, if finalized, would not duplicate, overlap, or conflict with other Federal rules.

6. *Description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes, and which minimize any significant economic impact of the rule on small entities.*

The FAR Council has not, at this stage, identified any significant alternatives that would minimize the impact of the rule on small entities, while also implementing the requirements of E.O. 14275. The FAR Council will consider any significant alternatives identified by commenters for the final rule.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. The FAR Council invites comments from small business concerns and other interested parties on the expected impact of this proposed rule on small entities.

The FAR Council will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite “5 U.S.C. 610 (FAR Case 2026–010)” in correspondence.

VIII. Paperwork Reduction Act

This rule includes information collections under the Paperwork Reduction Act (44 U.S.C. 3501–3521). Following are the specific collections associated with each FAR part in this rule as previously approved by OMB followed by how each collection would be affected by the proposed rule. If a FAR part is not listed below, then there are no information collections associated with the part.

A. FAR Part 14

- OMB Control No. 9000–0013, *Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—FAR Sections Affected: 52.214–28, 52.215–12, 52.215–13, 52.215–20, and 52.215–21.* The changes under this proposed rule, if finalized, would not affect the information collection or the paperwork burden previously approved by OMB. The collection would remain unchanged.

- OMB Control No. 9000–0034, *Examination of Records by Comptroller General and Contract Audit—FAR Section(s) Affected: 52.212–5(d), 52.214–26, 52.215–2.* The changes under this proposed rule, if finalized, would not affect the information collection or the paperwork burden previously approved by OMB. The collection would remain unchanged.

- OMB Control No. 9000–0037, *Presolicitation Notice and Response—FAR Sections Affected: 14.205; 15.201(c); and 36.213–2.* The changes under this proposed rule, if finalized, would remove the information collection in its entirety. The collection would be discontinued.

- OMB Control No. 9000–0047, *Place of Performance—FAR Sections Affected: 52.214–14, and 52.215–6.* The changes under this proposed rule, if finalized, would not affect the information collection or the paperwork burden previously approved by OMB. The collection would remain unchanged.

B. FAR Part 28

- OMB Control No. 9000–0001, *Certain Federal Acquisition Regulation Part 28 Requirements (SF 24, 25, 25–A, 25–B, 28, 34, 35, 273, 274, 275, 1414 through 1418; Sections: 52.228–1, 52.228–2, 52.228–11, 52.228–13 through 52.228–17).* The changes under this proposed rule, if finalized, would not affect the information collection or the paperwork burden previously approved by OMB. The collection would remain unchanged.

- OMB Control No. 9000–0135, *Prospective Subcontractor Requests for Bonds; FAR 52.228–12.* The changes under this proposed rule, if finalized, would not affect the information collection or the paperwork burden previously approved by OMB. The collection would remain unchanged.

C. FAR Part 36

- OMB Control No. 9000–0037, *Presolicitation Notice and Response.* See details in section VIII.A of this preamble.

- OMB Control No. 9000–0064, *Certain Federal Acquisition Regulation*

Part 36 Construction Contract Requirements; FAR Sections Affected: 52.236–5, 52.236–15, and 52.236–19. The changes under this proposed rule, if finalized, would revise this information collection and the paperwork burden previously approved by OMB due to the removal of the clause at FAR 52.236–19.

The revised annual burden is estimated as follows:

Respondents: 3,762.

Total Annual Responses: 13,258.

Total Burden Hours: 21,331.

- OMB Control No. 9000–0157, *Architect-Engineer Qualifications (SF 330).* The changes under this proposed rule, if finalized, would not affect the information collection or the paperwork burden previously approved by OMB. The collection would remain unchanged.

D. Comments Regarding Paperwork Burden.

The FAR Council will publish a separate first notice in accordance with the Paperwork Reduction Act seeking comments on the changes to these collections of information affected by this rule.

IX. Severability

If any portion (e.g., section, clause, sentence) of this rule is held to be invalid or unenforceable facially, or as applied to any entity or circumstance, it shall be severable from the remainder of this rule, and shall not affect the remainder thereof, or its application to entities not similarly situated or to other dissimilar circumstances. The various portions of this rule are independent and serve distinct purposes. Even if one aspect were rendered invalid, the other benefits of the rule would still be applicable.

List of Subjects in 48 CFR 14, 28, 36, and 52

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, OFPP, DoD, GSA, and NASA propose amending 48 CFR parts 14, 28, 36, and 52 as set forth below:

■ 1. Revise parts 14, 28, and 36 to read as follows:

PART 14—SEALED BIDDING

Sec.

14.000 Scope of part.

14.001 Definitions.

Subpart 14.1—General

14.101 Using sealed bidding.

Subpart 14.2—Presolicitation

- 14.201 Preparation of invitations for bids.
- 14.201–1 Format.
- 14.202 Uniform contract format.
- 14.202–1 Part I—Schedule.
- 14.202–2 Part II Contract Clauses.
- 14.202–3 Part III Documents, exhibits, and other attachments.
- 14.202–4 Part IV Representations and instructions.
- 14.203 Requirements.
- 14.204 Economic purchase quantities (supplies).
- 14.205 Bid samples.
- 14.206 Descriptive literature.
- 14.207 Solicitation provisions.
- 14.208 Contract clauses.
- 14.209 Soliciting bids.
- 14.210 Submission of bids.
- 14.211 Two-Step sealed bidding.
- 14.211–1 General.
- 14.211–2 Conditions for use.
- 14.211–3 Procedures.

Subpart 14.3—Evaluation and award

- 14.301 Submission, modification, or withdrawal of bids.
- 14.302 Receipt of an unreadable electronic bid.
- 14.303 Bid opening.
- 14.304 Mistakes in bids.
- 14.304–1 General.
- 14.304–2 Apparent clerical mistakes.
- 14.304–3 Other mistakes disclosed before award.
- 14.305 Cancellation of invitations after opening.
- 14.306 Evaluation.
- 14.306–1 Responsiveness of bids.
- 14.306–2 Responsible bidder—reasonableness of price.
- 14.306–3 Rejection of individual bids.
- 14.306–4 Rejection of all bids.
- 14.306–5 Restrictions on disclosure of descriptive literature.
- 14.306–6 All or none qualifications.
- 14.306–7 Minor informalities or irregularities in bids.
- 14.306–8 Prompt payment discounts.
- 14.306–9 Economic price adjustment.
- 14.307 Award.
- 14.308 Award of equal low bids.
- 14.309 Information to bidders.
- 14.309–1 Award of unclassified contracts.
- 14.309–2 Award of classified contracts.

Subpart 14.4—Postaward

- 14.401 Mistakes after award.
- 14.402 Pricing modifications.

Authority: 41 U.S.C. 1121(b); 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

14.000 Scope of part.

This part prescribes—

(a) The basic requirements of contracting for supplies and services (including construction) by sealed bidding;

(b) The information to be included in the invitation for bids (IFB);

(c) Procedures concerning the submission of bids;

(d) Requirements for opening bids, evaluating bids, awarding contracts; and

(e) Procedures for two-step sealed bidding.

14.001 Definitions.

As used in this part:

Acceptable evidence means a verifiable record, either physical or electronic, that provides a clear and authenticated account of the exact time a submission was received by the Government, which includes:

(1) The time/date stamp of that installation on the bid wrapper;

(2) Other documentary evidence of receipt maintained by the installation (e.g., receiving reports, mailroom logs, or internal logs);

(3) Oral testimony or statements of Government personnel; or

(4) Electronic metadata, electronic audit trails, server gateway logs, or delivery receipts generated by the bidder's or the Government's email system.

Government control means the point at which a bid has been delivered, either physically or electronically, into the custody of the Government, such that the bidder can no longer modify or exercise dominion over the submission.

Subpart 14.1—General.**14.101 Using sealed bidding.**

(a) Sealed bidding is a method of contracting that employs competitive bids, public opening of bids, and awards.

(b) Use sealed bidding whenever the conditions in 6.101(b)(1) are met.

(c) Use firm-fixed-price contracts when using sealed bidding or fixed-price contracts with economic price adjustment clauses when some flexibility is necessary and feasible.

Subpart 14.2—Presolicitation.**14.201 Preparation of invitations for bids.****14.201–1 Format.**

(a) Prepare IFB and contracts using parts I, II, III, and IV of the uniform contract format (see 15.109) to the maximum extent practicable.

(b) The uniform contract format is not required when contracting for—

(1) Construction (see part 36);

(2) Shipbuilding (including design, construction, and conversion), ship overhaul, and ship repair;

(3) Subsistence items;

(4) Supplies or services requiring special contract forms prescribed elsewhere in this regulation that are inconsistent with the uniform contract format; or

(5) Firm-fixed-price or fixed-price with economic price adjustment

acquisitions that use the simplified contract format.

(c)(1) The contracting officer may use the simplified contract format in lieu of the uniform contract format.

(2) The contracting officer has flexibility in preparation and organization of the simplified contract format. The following format should be used to the maximum extent practicable:

(i) Use Standard Form (SF) 1447, Solicitation/Contract, as the first page of the IFB.

(ii) Include the following for each line item:

(A) Line item number.

(B) Description of supplies or services, or data sufficient to identify the requirement.

(C) Quantity and unit of issue.

(D) Unit price and amount.

(E) Packaging and marking requirements.

(F) Inspection and acceptance, quality assurance, and reliability requirements.

(G) Place of delivery, performance and delivery dates, period of performance, and f.o.b. point.

(H) Other item-peculiar information as necessary (e.g., individual fund citations).

(iii) Include the clauses required by this regulation. Additional clauses must be incorporated only when necessary to the particular acquisition.

(iv) List of documents and attachments (include if necessary).

(v) Representations and instructions:

(A) Insert the IFB provisions that require representations, certifications, or the submission of other information by offerors.

(B) Insert the IFB provisions required by 14.207. Include any other information/instructions necessary to guide offerors.

(C) Insert all price related factors and any significant price related subfactors for award.

(D) Upon award, retain the representations and instructions in the contract file.

14.202 Uniform contract format.**14.202–1 Part I—Schedule.**

Prepare the Schedule as follows:

(a) *Section A, Solicitation/contract form.*

(1) For sealed bidding the SF 33 or the SF 1447 may be used. When the SF 1447 is used as the IFB document, insert the information in subdivisions (a)(2)(i) and (a)(2)(iv) of this section in block 9 of the SF 1447.

(2) If the SF 33 or the SF 1447 are not used, include the following on the first page of the IFB:

(i) Name, address, and location of issuing activity, including room and building where bids must be submitted.

(ii) Invitation for bids number.

(iii) Date of issuance.

(iv) Time specified for receipt of bids.

(v) Number of pages.

(vi) Requisition or other purchase authority.

(vii) Requirement for a bidder to provide its name and complete address, including street, city, county, State, and ZIP code.

(viii) A statement that bidders should include in the bid the address to which payment should be mailed, if that address is different from that of the bidder.

(b) *Section B, Supplies or services and prices.*

(1) See 15.109–1(b).

(2) Optional Form 336, Continuation Sheet, may be used.

(c) *Section C, Description/ specifications.*

See 15.109–1(c).

(d) *Section D, Packaging and marking.*

See 15.109–1(d).

(e) *Section E, Inspection and acceptance.*

See 15.109–1(e).

(f) *Section F, Deliveries or performance.*

See 15.109–1(f).

(g) *Section G, Contract administration data.*

See 15.109–1(g).

(h) *Section H, Special contract requirements.*

See 15.109–1(h).

14.202–2 Part II Contract Clauses.

Section I, Contract clauses (see 15.109–2).

14.202–3 Part III Documents, exhibits, and other attachments.

Section J, List of documents, exhibits, and other attachments (see 15.109–3).

14.202–4 Part IV Representations and instructions.

Prepare the representations and instructions as follows:

(a) Section K, Representations, certifications, and other statements of bidders (see 15.109–4(a)).

(b) Section L, Instructions, conditions, and notices to bidders (see 15.109–4(b)). Insert in this section solicitation provisions, other information, instructions not required elsewhere to guide bidders, include the time and place for bid openings.

(c) Section M, Factors for award. Identify the price related factors other than the bid price that will be considered in evaluating bids and awarding the contract.

14.203 Requirements.

(a) An IFB must clearly, accurately, and completely describe the Government requirements.

(b) Restrictive specifications or requirements that might unduly limit the number of bidders are prohibited.

(c) Include all documents and information (whether attached or incorporated by reference) prospective bidders will need for the purpose of bidding.

(d) State in the IFB that bids will be evaluated without discussions (see 52.214–10 and, for construction contracts, 52.214–19).

(e) When considering establishing qualification requirements, see and follow subpart 9.2.

14.204 Economic purchase quantities (supplies).

Comply with the economic purchase quantity planning requirements for supplies in part 7. See part 7 for instructions regarding use of the provision at 52.207–4, Economic Purchase Quantity—Supplies, and for guidance on handling responses to that provision.

14.205 Bid samples.

(a) Do not require bidders to furnish bid samples unless—

(1) Characteristics of the product cannot be described adequately in the specification or purchase description;

(2) Necessary to determine the responsiveness of the bid. Do not use samples to determine a bidder's ability to produce the required items; and

(3) Products must be suitable from the standpoint of balance, facility of use, general “feel”, color, pattern, or other characteristics that cannot be described adequately in the specification.

(b) If the contracting officer requires bid samples, the IFB must state—

(1) The number and, if appropriate, size, and description of the bid samples required; and

(2) List all the characteristics for which the bid samples will be examined.

(c)(1) Contracting officers may waive bid sample requirements when a bidder offers a product previously or currently contracted for or tested by the Government and found to comply with specification requirements conforming in every material respect with those in the current IFB. (See 14.207(j)(2)).

(2) Where samples required by a Federal, Military, or other formal specification are not considered necessary and a waiver of the sample requirements of the specification is authorized, include a statement in the invitation that notwithstanding the

requirements of the specification, samples are not required.

(d) Bid samples furnished with a bid that are not required by the invitation generally will not be considered as qualifying the bid and will be disregarded. However, the bid sample will not be disregarded if it is clear from the bid or accompanying papers that the bidder's intention was to qualify the bid. If the qualification does not conform to the IFB, see 14.306–3(d).

(e)(1) Return samples that are not destroyed in testing to bidders at their request and expense, unless otherwise specified in the invitation.

(2) Request disposition instructions from bidders.

(3) Samples are ordinarily returned collect to the address from which received if disposition instructions are not received within 30 days. Small items may be returned by mail, postage prepaid.

(4) Transmit samples that are intended for inspection purposes in connection with deliveries to the inspecting activity concerned, with instructions to retain the sample until completion of the contract or until disposition instructions are furnished.

(5) Where samples are consumed or their usefulness is impaired by tests, dispose as scrap unless the bidder requests their return.

14.206 Descriptive literature.

(a) Do not require bidders to furnish descriptive literature unless it is needed before award to determine whether the products offered meet the specification and to establish exactly what the bidder proposes to furnish.

(b) Document in the contract file the justification why product acceptability cannot be determined without the submission of descriptive literature, except when the contract specifications require submission.

(c)(1) If the invitation will require descriptive literature, the IFB must clearly state—

(i) What descriptive literature the bidders must furnish;

(ii) The purpose for requiring the literature;

(iii) The extent of its consideration in the evaluation of bids; and

(iv) The rules that will apply if a bidder fails to furnish the literature before bid opening or if the literature provided does not comply with the requirements of the invitation.

(2) If bidders must furnish descriptive literature, see 14.207(k).

(d)(1) The contracting officer may waive the requirement for descriptive literature if—

(i) The bidder states in the bid that the product being offered is the same as a

product previously or currently being furnished to the contracting activity; and

(ii) The contracting officer determines that the product offered complies with the specification requirements of the current IFB. When the contracting officer waives the requirement, see 14.207(k)(2).

(2) When descriptive literature is not necessary and a waiver of literature requirements of a specification has been authorized, include a statement in the invitation that, despite the requirements of the specifications, descriptive literature is not required.

(3) If the IFB provides for a waiver, a bidder may submit a bid on the basis of either the descriptive literature furnished with the bid or a previously furnished product. If the bid is submitted on one basis, the bidder may not have it considered on the other basis after bids are opened.

(e) If descriptive literature is furnished when it is not required by the IFB, follow the procedures at 14.205(d).

14.207 Solicitation provisions.

(a) The provisions prescribed in this section apply to preparation and submission of bids in general. See other FAR parts for provisions and clauses related to specific acquisition requirements.

(b) Insert in all IFBs, including those for commercial products and commercial services, the provisions at—

(1) 52.214–3, Amendments to Invitations for Bids; and

(2) 52.214–4, False Statements in Bids.

(3) 52.214–5, Submission of Bids.

(4) 52.214–6, Explanation to Prospective Bidders.

(5) 52.214–7, Late Submissions, Modifications, and Withdrawals of Bids.

(c) Insert the provision at 52.214–10, Contract Award—Sealed Bidding in IFBs, including those for commercial products and commercial services, but excluding those for construction.

(d) Insert the provision at 52.214–12, Preparation of Bids in IFBs to which the uniform contract format applies, including those for commercial products and commercial services.

(e) Insert the provision at 52.214–14, Place of Performance—Sealed Bidding, in IFBs, including those for commercial products and commercial services but excluding those in which the place of performance is specified by the Government.

(f) Insert the provision at 52.214–15, Period for Acceptance of Bids, in IFBs, including those for commercial products and commercial services, that are not issued on SF 33 or SF 1447 except IFBs—

(1) For construction work, which includes construction that is a commercial service; or

(2) That the Government specifies a minimum acceptance period.

(g) Insert the provision at 52.214–16, Minimum Bid Acceptance Period, in IFBs, including those for commercial products and commercial services, except for construction, if the contracting officer determines that a minimum acceptance period must be specified.

(h) Insert the provision at 52.214–18, Preparation of Bids—Construction, in IFBs for construction contracts, including those for construction that is a commercial service.

(i) Insert the provision at 52.214–19, Contract Award—Sealed Bidding—Construction, in IFBs for construction work, including for construction that is a commercial service.

(j)(1) Insert the provision at 52.214–20, Bid Samples, in IFBs, including those for commercial products and commercial services, if bid samples are required.

(2) If it appears that the conditions in 14.205(c)(1) will apply and the contracting officer anticipates granting waivers and—

(i) If the nature of the required product does not necessitate limiting the grant of a waiver to a product produced at the same plant in which the product previously acquired or tested was produced, use the provision with its Alternate I; or

(ii) If the nature of the required product necessitates limiting the grant of a waiver to a product produced at the same plant in which the product previously acquired or tested was produced, use the provision with its Alternate II.

(3) See 14.205(c)(2) regarding waiving the requirement for all bidders.

(k)(1) Insert the provision at 52.214–21, Descriptive Literature, in IFBs including those for commercial products and commercial services, if—

(i) Descriptive literature is required to evaluate the technical acceptability of an offered product and

(ii) The required information will not be readily available unless it is submitted by bidders.

(2) Use the basic clause with its Alternate I if the possibility exists that the contracting officer may waive the requirement for furnishing descriptive literature for a bidder offering a previously supplied product that meets specification requirements of the current IFB.

(3) See 14.206(d)(2) regarding waiving the requirement for all bidders.

(l) Insert the provision at 52.214–22, Evaluation of Bids for Multiple Awards, in IFBs, including those for commercial products and commercial services, if the contracting officer determines that multiple awards might be made if doing so is economically advantageous to the Government.

(m) Insert the provision at 52.214–23, Late Submissions, Modifications, Revisions, and Withdrawals of Technical Proposals under Two-Step Sealed Bidding, other than those for commercial products or commercial services, in solicitations for technical proposals in step one of two-step sealed bidding.

(n) Insert the provision at 52.214–24, Multiple Technical Proposals, other than those for commercial products or commercial services, in solicitations for technical proposals in step one of two-step sealed bidding if the contracting officer permits the submission of multiple technical proposals.

(o) Insert the provision at 52.214–25, Step Two of Two-Step Sealed Bidding, in IFBs, other than those for commercial products or commercial services, issued under step two of two-step sealed bidding.

(p) Insert the provision at 52.214–34, Submission of Offers in the English Language, in solicitations that include any of the clauses prescribed in part 25, including those for commercial products and commercial services. It may be included in other solicitations when the contracting officer decides that it is necessary.

(q) Insert the provision at 52.214–35, Submission of Offers in U.S. Currency, in solicitations, including those for commercial products and commercial services, that include any of the clauses prescribed in part 25, unless the contracting officer includes the clause at 52.225–17, Evaluation of Foreign Currency Offers, as prescribed in part 25. It may be included in other solicitations when the contracting officer decides that it is necessary.

14.208 Contract clauses.

(a) Insert the clause at 52.214–26, Audit and Records—Sealed Bidding, in solicitations and contracts, other than those for commercial products and commercial services, if the contract amount is expected to exceed the threshold at part 15 for submission of certified cost or pricing data.

(b)(1) Insert the clause at 52.214–27, Price Reduction for Defective Certified Cost or Pricing Data—Modifications—Sealed Bidding, in solicitations and contracts, including those for commercial products (other than commercially available off-the-shelf

items) and commercial services, if the contract amount is expected to exceed the threshold for submission of certified cost or pricing data at part 15.

(2) In exceptional cases, the head of the contracting activity may waive the requirement for inclusion of the clause in a contract with a foreign government or agency of that government. The authorizations for the waiver and the reasons for granting it must be in writing.

(c) Insert the clause at 52.214–28, Subcontractor Certified Cost or Pricing Data—Modifications—Sealed Bidding, in solicitations and contracts, other than those for commercial products and commercial services, if the contract amount is expected to exceed the threshold for submission of certified cost or pricing data at part 15.

(1) This clause may also be included upon request of a contractor in connection with a prime contract entered into before July 1, 2018 by modifying the contract without requiring consideration to replace clause 52.214–28, Subcontractor Certified Cost or Pricing Data—Modifications—Sealed Bidding, with its Alternate I.

(2) In exceptional cases, the head of the contracting activity may waive the requirement for inclusion of the clause in a contract with a foreign government or agency of that government. The authorizations for the waiver and the reasons for granting it must be in writing.

(d) Insert the clause at 52.214–29, Order of Precedence—Sealed Bidding, in solicitations and contracts, other than those for commercial products and commercial services, to which the uniform contract format applies.

14.209 Soliciting bids.

(a) See subpart 5.1 for presolicitation notices.

(b) See subpart 5.2 for publicizing the IFB.

(c) Specify in the IFB whether bids will be accepted by paper submission, or electronic transmission method, or both.

(d) If the IFB has been issued and it becomes necessary to make changes in quantity, specifications, delivery schedules, opening dates, etc., or to make a correction, such changes must be accomplished by amendment of the IFB using Standard Form 30, Amendment of Solicitation/Modification of Contract. Amendments must—

(1) Be issued before the time set for bid opening;

(2) If determined necessary by the contracting officer, consider the amount

of time remaining until bid opening and the need for an extension to the bid opening date;

(3) Be published in the GPE, if the IFB was published in the GPE, as a solicitation amendment;

(4) If applicable, be displayed in the bid room;

(5) Provide all prospective bidders equal access to the amendment providing the information necessary to submit bids; and

(6) Require acknowledgment of each amendment within each bidder's bid.

(e) When electronic bids are specified, include in the IFB the acceptable methods and the necessary information that allows bidders to submit bids that are compatible with Government systems.

(f) When a contracting office is located in the United States, any IFB sent to a prospective bidder located outside the United States must be sent by electronic data interchange or air mail if security classification permits.

(g)(1) The master IFB is provided to potential sources who are requested to retain it for continued and repetitive use.

(2) Subsequent individual IFB must reference the date of the current master IFB and identify any changes.

(3) When using a master IFB—

(i) Make available copies of the master IFB on request; and

(ii) Provide the cognizant contract administration activity a current copy of the master IFB.

(h) Retain records of IFB and records of bids as a record of each invitation a contracting office issues and each abstract or record of bids. The file for each invitation must show the—

(1) Distribution that was made;

(2) Date the invitation was issued; and

(3) Names and addresses of

prospective bidders who requested the invitation and were not included on the original IFB list must be added to the list and made a part of the record.

(i) An IFB may be cancelled by the contracting officer when clearly in the public interest;

(1) Where there is no longer a requirement for the supplies or services; or

(2) Where amendments to the IFB would be of such magnitude that a new IFB is desirable.

(j) If an IFB is cancelled prior to the date and time specified in 14.301—

(1) Identify the IFB number and short title or subject matter;

(2) Briefly explain the reason for the cancellation; and

(3) Where appropriate, assure prospective bidders that they will be given an opportunity to bid on any

resolicitation of bids or any future requirements for the type of supplies or services involved.

14.210 Submission of bids.

(a) Allow prospective bidders a reasonable time to prepare and submit bids in response to all invitations, consistent with the needs of the Government.

(b) Provide at least 30 calendar days when a presolicitation notice is required (see subpart 5.1).

(c) Require bidders to submit sealed bids to be opened publicly at the time and place stated in the IFB.

14.211 Two-Step sealed bidding.

14.211–1 General.

Two-step sealed bidding is a combination of competitive procedures designed to obtain the benefits of sealed bidding when adequate specifications are not available. The objective is to permit the development of a sufficiently descriptive and not unduly restrictive statement of the Government's requirements, including an adequate technical data package, so that subsequent acquisitions may use conventional sealed bidding methods. This two-step method is especially useful in acquisitions requiring technical proposals, particularly those for complex items.

(a) Step one consists of the request for submission, evaluation, and (if necessary) discussion of a technical proposal. No pricing is submitted with step one. The objective is to determine the acceptability of the supplies or services offered. As used in this context, the word technical has a broad connotation and includes, among other things, the engineering approach, special manufacturing processes, and special testing techniques. It is the proper step for clarification of questions relating to technical requirements. Conformity to the technical requirements is resolved in this step, but not responsibility as defined in part 9.

(b) Step two involves the submission of sealed priced bids by those who submitted acceptable technical proposals in step one. Bids submitted in step two are evaluated and the awards made in accordance with subpart 14.3.

14.211–2 Conditions for use.

(a) Unless other factors require the use of sealed bidding, the contracting officer may use two-step sealed bidding rather than negotiation when all of the following conditions are present:

(1) Available specifications or purchase descriptions are not definite or complete or may be too restrictive

without technical evaluation, and any necessary discussion, of the technical aspects of the requirement to ensure mutual understanding between each source and the Government.

(2) Definite criteria exist for evaluating technical proposals.

(3) More than one technically qualified source is expected to be available.

(4) There is sufficient time to use the two-step method.

(5) The contracting officer intends to award a firm-fixed-price contract or a fixed-price contract with economic price adjustment.

(b) None of the following precludes the use of two-step sealed bidding:

(1) Multiyear contracting;

(2) Government property to be made available to the successful bidder;

(3) A total small business set-aside (see part 19);

(4) The use of a set-aside or price evaluation preference for HUBZone small business concerns (see part 19);

(5) The use of a set-aside for service-disabled veteran-owned small business concerns (see part 19);

(6) The use of a set-aside for economically disadvantaged women-owned small business concerns and women-owned small business concerns eligible under the Women-Owned Small Business Program (see part 19); or

(7) A first or subsequent production quantity is being acquired under a performance specification.

14.211-3 Procedures.

(a) *Step one.*

(1) Post a presolicitation notice for technical proposals in accordance with part 5. The request must include, as a minimum, the following:

(i) A description of the supplies or services required.

(ii) A statement of intent to use the two-step method.

(iii) The requirements of the technical proposal.

(iv) The evaluation criteria, to include all factors and any significant subfactors.

(v) A statement that the technical proposals must not include prices or pricing information.

(vi) The date, or date and hour, by which the technical proposal must be received.

(vii) A statement that, in the second step—

(A) The contracting officer will consider awards based upon bids that have acceptable technical proposals, either initially or as a result of discussions; and

(B) Each bid must be based on the bidder's own technical proposals.

(viii) A statement that—

(A) Bidders should submit technical proposals that are acceptable without additional explanation or information;

(B) The Government may make a final determination regarding a technical proposal's acceptability solely on the basis as submitted; and

(C) The Government may proceed with the second step without requesting further information from any bidder; however, the Government may request additional information from bidders about their technical proposals that it considers reasonably susceptible of being made acceptable and may discuss bids with their bidders.

(ix) A statement that a notice of unacceptability will be forwarded to the bidder upon completion of the technical proposal evaluation and final determination of unacceptability.

(x) A statement either that each bidder may only submit one technical proposal or, if authorized, multiple technical proposals. When specifications permit different technical approaches, it is generally in the Government's interest to authorize multiple technical proposals. If multiple technical proposals are authorized, see 14.207(n).

(2) Include information on delivery or performance requirements that may assist bidders in determining whether or not to submit a technical proposal. Indicate that the information is not binding on the Government and that the invitation issued under step two will include actual delivery or performance requirements.

(3) Upon receipt—

(i) Safeguard technical proposals against disclosure to unauthorized persons;

(ii) Accept and handle data marked in accordance with part 15 and 27; and

(iii) Remove any reference to price or cost.

(4) Establish a time period for evaluating technical proposals. The period may vary with the complexity and number of technical proposals involved. However, the evaluation should be completed quickly.

(5)(i) Base evaluations on the criteria in the request for technical proposals but not consideration of responsibility as defined in part 9. Categorize technical proposals as—

(A) Acceptable;

(B) Reasonably susceptible of being made acceptable; or

(C) Unacceptable.

(ii) Categorize any proposal that modifies, or fails to conform to the essential requirements or specifications of, the request for technical proposals as unacceptable.

(6)(i) The contracting officer may proceed directly with step two if there

are sufficient acceptable proposals to ensure adequate price competition under step two, and if further time, effort and delay to make additional technical proposals acceptable and thereby increase competition would not be in Government's interest. If this is not the case, request bidders whose technical proposals may be made acceptable to submit additional clarifying or supplementing information. Identify the nature of the deficiencies in the technical proposal or the nature of the additional information required. The contracting officer may also arrange negotiations for this purpose. Do not discuss a technical proposal with any bidder other than the submitter.

(ii) When requesting additional information, establish an appropriate time for bidders to conclude discussions, if any, submit all additional information, and incorporate such additional information as part of their technical proposals. The contracting officer may extend the due date for such submissions at their discretion. If the additional information is incorporated into a technical proposal within the established time, and the contracting officer determines that the technical proposal is acceptable, update its category to acceptable.

(7) When a technical proposal is found unacceptable (either initially or after negotiations), promptly notify the bidder of the basis of the determination and that a revision of the technical proposal will not be considered. Upon written request, debrief unsuccessful bidders (see 15.206).

(8) Late technical proposals are governed by 14.301.

(9) If it is necessary to discontinue two-step sealed bidding, include a statement of the facts and circumstances in the contract file. Notify each bidder in writing. When step one results in no acceptable technical proposals or only one acceptable technical proposal, the acquisition may be continued by negotiation.

(b) *Step two.*

(1) Follow sealed bidding procedures except that IFB in step two must—

(i) Be issued only to those bidders that submitted acceptable technical proposals in step one;

(ii) Include the provision prescribed in 14.207(o);

(iii) Clearly state that the bidder must comply with the specifications and the bidder's technical proposal; and

(iv) Not be solicited through the Governmentwide point of entry (GPE) as an acquisition opportunity nor publicly posted.

(2) List the names of firms that submitted acceptable proposals in step one through the GPE for the benefit of prospective subcontractors (see 5.101).

Subpart 14.3—Evaluation and award

14.301 Submission, modification, or withdrawal of bids.

(a) Bidders are responsible for submitting bids, and any modifications or withdrawals not later than the exact time set for opening of bids. If no time is specified in the IFB, the time for receipt is 4:30 p.m., local time, for the designated Government office on the date that bids are due.

(b) Bids may be modified or withdrawn by any method authorized by the IFB.

(c) The receiving official receiving a paper bid submission, modification or withdrawal must—

(1) Write on the envelope—

(i) The date and time of receipt and by whom; and

(ii) The IFB number; and

(2) Sign the envelope.

(3) Not disclose bid information before the time set for bid opening. See part 3 for requirements for protecting information including access to and disclosure thereof.

(d) A bidder or its authorized representative may withdraw a paper bid submission in person if, before the exact time set for opening of bids, the identity of the persons requesting withdrawal is established and that person signs a receipt for the bid.

(e) A bidder may withdraw an electronically submitted bid if notice is received in the office designated in the IFB not later than the exact time set for opening of bids. Upon withdrawal of an electronically transmitted bid, the data received must not be viewed and, to the maximum extent practical, must be purged from primary and backup data storage systems.

(f)(1) Any bid, modification, or withdrawal of a bid received at the Government office designated in the IFB after the exact time specified for receipt of bids is “late” and will not be considered unless—

(i) It is received before award is made; and

(ii) The contracting officer determines that accepting the late bid is in the Government’s best interest and would not unduly delay the acquisition; and—

(A) If it was transmitted through an electronic commerce method authorized by the IFB, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of bids; or

(B) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of bids and was under the Government’s control prior to the time set for receipt of bids.

(2) The contracting officer will consider and may accept, a late modification of an otherwise successful bid, that makes its terms more favorable to the Government, at any time it is received.

(g) If an emergency or unanticipated event (e.g., weather emergencies, government-wide or agency-specific network outages, server crashes, or cybersecurity-related blocking of authorized file types) interrupts normal Government processes so that bids cannot be received at the Government office designated for receipt of bids by the exact time specified in the IFB, and urgent Government requirements preclude amendment of the bid opening date, the time specified for receipt of bids will be deemed to be extended to the same time of day specified in the IFB on the first work day on which normal Government processes resume.

(h) Promptly notify any bidder if its bid, modification, or withdrawal was received late, and must inform the bidder whether its bid will be considered, unless contract award is imminent, and the notices prescribed in 14.309 would suffice.

(i) Late bids and modifications that are not considered must be held unopened, unless opened for identification, until after award and then retained with other unsuccessful bids. However, any bid bond or guarantee must be returned.

(j) If available, the following must be included in the contract files for each late bid, modification, or withdrawal:

(1) The date and hour of receipt.

(2) A statement, with supporting rationale, regarding whether the bid was considered for award.

(3) The envelope, wrapper, or other evidence of the date of receipt.

14.302 Receipt of an unreadable electronic bid.

If a bid received at the Government facility by electronic data interchange is unreadable to the degree that conformance to the essential requirements of the IFB cannot be ascertained, immediately notify the bidder that the bid will be rejected unless the bidder provides clear and convincing evidence—

(a) Of the content of the bid as originally submitted; and

(b) That the unreadable condition of the bid was caused by Government

software or hardware error, malfunction, or other Government mishandling.

14.303 Bid opening.

(a) All bids (including modifications) received before the time set for the opening of bids must be secured in a locked bid box, a safe, or in a secure restricted-access electronic bid box (i.e., secure password protected file folder on a controlled access Government computer network).

(b) The bid opening officer must inform those present at the public bid opening that the time set for the opening of bids has arrived.

(c)(1) The bid opening officer must personally and publicly open all bids received before the exact time set for opening of bids and if practical, read the bids aloud to all present.

(2) The public may not attend bid openings for classified acquisitions. No public record must be made of bids or bid prices received in response to classified IFB.

(d) The contracting officer may postpone the public bid opening if determined in writing that there is reason to believe—

(1) An important segment of bidders has been delayed in the mail;

(2) That there are delays in the communications system specified for transmission of bids;

(3) That circumstances beyond the control of the bidders have delayed their timely submission, (e.g., flood, fire, accident, weather, strikes, or Government equipment blackout or malfunction); or

(4) That emergency or unanticipated events has interrupted normal Governmental processes so that the scheduled opening of bids is impractical.

(e) Publicly post a determination to postpone a bid opening under paragraph (d) of this section. If practical before issuance of a formal amendment of the invitation, communicate the determination to the prospective bidders likely to attend the scheduled bid opening.

(f) In the case of paragraph (d)(4) of this section, and when urgent Government requirements preclude amendment of the IFB, the time specified for opening of bids will be deemed to be extended to the same time of day specified in the IFB on the first workday on which normal Government processes resume. In such cases, the time of actual bid opening must be deemed to be the time set for bid opening for the purpose of determining “late bids” under section 14.301. A note should be made on the abstract of bids

or otherwise added to the file explaining the circumstances of the postponement.

(g) The bid opening officer must complete and certify the accuracy of the Standard Form 1409, Abstract of Offers, or Optional Form 1419, Abstract of Offers—Construction (or automated equivalent) as soon after bid opening as practicable. Where bid items are too numerous to warrant complete recording of all bids, abstract entries for individual bids may be limited to item numbers and bid prices. The contracting activity may use the extra columns and SF 1410, Abstract of Offers—Continuation, and OF 1419A, Abstract of Offers—Construction, Continuation Sheet, to label and record such information as necessary.

(h) Abstracts of offers for unclassified acquisitions must be available for public inspection.

14.304 Mistakes in bids.

14.304–1 General.

(a) After the opening of bids, examine all bids for mistakes.

(b) The authority to permit correction of bids is limited to bids that, as submitted, are responsive to the invitation. The authority does not permit correction of bids to make them responsive.

(c) If the contracting officer identifies an apparent mistake or has reason to believe that a mistake exists request the bidder verify its bid, calling attention to the suspected mistake.

(d) If the bidder asserts a mistake in its bid, the matter must be processed in accordance with this section and 14.304. Such actions must be taken before award.

14.304–2 Apparent clerical mistakes.

The contracting officer may correct any clerical mistake, apparent on its face in the bid, before award. The contracting officer first must obtain from the bidder a verification of the bid intended. Examples of apparent mistakes are obvious—

- (a) Misplacement of a decimal point;
- (b) Incorrect discounts (for example, 1 percent 10 days, 2 percent 20 days, 5 percent 30 days);
- (c) Reversal of the price f.o.b. destination and price f.o.b. origin; and
- (d) Mistake in designation of unit.

14.304–3 Other mistakes disclosed before award.

(a) A bidder may request in writing permission from the contracting officer to correct a mistake after providing clear and convincing evidence that establishes both the existence of the mistake, and the bid actually intended.

(1) If the contracting officer accepts the clear and convincing evidence and the correction does not cause the bidder to outbid other lower bids, the contracting officer may allow the correction.

(2) If the correction causes the bidder to outbid one or more otherwise lower bids, the head of the agency may make a determination to permit the correction only if the mistake and intended bid are obvious from the final bid documents.

(b) If a bidder requests permission to withdraw a bid rather than correct it, the evidence is clear and convincing both as to the existence of a mistake and as to the bid actually intended, and the bid, both as uncorrected and as corrected, is the lowest received, the head of the agency may make a determination to correct the bid and not permit its withdrawal.

(c) If, under paragraph (a) or (b) of this section—

(1) The evidence of a mistake is clear and convincing only as to the mistake but not as to the intended bid, or

(2) The evidence reasonably supports the existence of a mistake but is not clear and convincing, an official above the contracting officer, unless otherwise provided by agency procedures, may make a determination permitting the bidder to withdraw the bid.

(d) If the evidence does not warrant a determination under paragraph (a), (b), or (c) of this section, the head of the agency may make a determination that the bid be neither withdrawn nor corrected.

(e) Heads of agencies may delegate their authority to make the determinations under paragraphs (a), (b), (c), and (d) of this section to a central authority, or a limited number of authorities as necessary, in their agencies, without power of redelegation.

(f) Before issuance of the determinations in this section, legal counsel within the respective agency must provide concurrence.

(g) Process Government suspected or alleged mistakes in bids as follows:

- (1) A mere statement by the administrative officials that they are satisfied that an error was made is insufficient.
- (2) Immediately request that the bidder verify its bid.
 - (i) Actions taken to verify bids must be sufficient to reasonably assure the contracting officer that the bid as confirmed is without error, or to elicit the allegation of a mistake by the bidder.
 - (ii) To assure that the bidder will be put on notice of a suspected mistake by the contracting officer, the bidder should be advised as appropriate—

(A) That its bid is so much lower than the other bids or the Government's estimate as to indicate a possibility of error;

(B) Of important or unusual characteristics of the specifications;

(C) Of changes in requirements from previous purchases of a similar item; or

(D) Of any other information, proper for disclosure, that leads the contracting officer to believe that there is a mistake in bid.

(3) If the bid is verified, consider the bid as originally submitted.

(4) If the time for acceptance of bids is likely to expire before a decision can be made, request all bidders whose bids may become eligible for award to extend the time for acceptance of their bids.

(5) If the bidder whose bid is believed erroneous does not (or cannot) grant an extension of time, the bid must be considered as originally submitted (but see paragraph (g)(8) of this section).

(6) If the bidder alleges a mistake, advise the bidder to make a written request to withdraw or modify the bid. The request must be supported by statements (sworn statements, if possible) and must include all pertinent evidence such as the bidder's file copy of the bid, the original worksheets and other data used in preparing the bid, subcontractors' quotations, if any, published price lists, and any other evidence that establishes the existence of the error, the manner in which it occurred, and the bid actually intended.

(7) When the bidder furnishes evidence supporting an alleged mistake, refer the case to the appropriate authority together with the following data:

- (i) A signed copy of the bid involved.
- (ii) A copy of the IFB and any specifications or drawings relevant to the alleged mistake.
- (iii) An abstract or record of the bids received.
- (iv) The bidder's written request to withdraw or modify the bid, together with the bidder's written statement and supporting evidence.
- (v) A written statement by the contracting officer providing—

- (A) A description of the supplies or services involved;
- (B) The expiration date of the bid in question and of the other bids submitted;
- (C) Specific information as to how and when the mistake was alleged;
- (D) A summary of the evidence submitted by the bidder;
- (E) In the event only one bid was received, a quotation of the most recent contract price for the supplies or services involved or, in the absence of a recent comparable contract, the

contracting officer's estimate of a fair price for the supplies or services;

(F) Any additional pertinent evidence; and

(G) A recommendation to consider the bid as submitted or to authorize the bidder to withdraw or modify its bid.

(8) Where the bidder fails or refuses to furnish evidence in support of a suspected or alleged mistake, consider the bid as submitted unless—

(i) The amount of the bid is so far out of line with the amounts of other bids received, or with the amount estimated by the agency or determined by the contracting officer to be reasonable; or

(ii) There are other indications of error which are so clear, as to reasonably justify the conclusion that acceptance of the bid would be unfair to the bidder or to other bona fide bidders. Document all attempts made to obtain the information required and the action taken with respect to correct the bid.

(h) Each agency must maintain records of all determinations made in accordance with this section, the facts involved, and the action taken in each case. Include copies of all such determinations in the file.

(i) Nothing contained in this section prevents an agency from submitting doubtful cases to the Comptroller General for advance decision.

14.305 Cancellation of invitations after opening.

(a) Unless there is a compelling reason to reject all bids and cancel the invitation after the opening, award to the responsible bidder who submitted the lowest responsive bid.

(b) Invitations may be cancelled after opening when, consistent with paragraph (a) of this section, the agency head determines in writing that—

(1) Inadequate or ambiguous specifications were cited in the invitation;

(2) Specifications have been revised;

(3) The supplies or services being contracted for are no longer required;

(4) The invitation did not provide for consideration of all factors of cost to the Government, such as cost of transporting Government-furnished property to bidders' plants;

(5) Bids received indicate that the needs of the Government can be satisfied by a less expensive article differing from that for which the bids were invited;

(6) All otherwise acceptable bids received are at unreasonable prices, or only one bid is received and the contracting officer cannot determine the reasonableness of the bid price;

(7) The bids were not independently arrived at in open competition, were

collusive, or were submitted in bad faith (see part 3 for reports to be made to the Department of Justice);

(8) No responsive bid has been received from a responsible bidder;

(9) A cost comparison as prescribed in OMB Circular A-76 shows that performance by the Government is more economical; or

(10) For other reasons, cancellation is clearly in the public's interest.

(c) If award is delayed beyond the bidders' acceptance periods, request bidders extend in writing the bid acceptance period (with consent of sureties, if any) in order to avoid the need for resoliciting.

(d) Under some circumstances, completion of the acquisition after cancellation of the IFB may be appropriate.

(1) If the IFB has been cancelled for the reasons specified in paragraphs (b)(6) through (8) of this section, and the agency head has authorized, in the determination in paragraph (b) of this section, the completion of the acquisition through negotiation, proceed in accordance with paragraph (e) of this section.

(2) If the IFB has been cancelled for the reasons specified in paragraphs (b)(1), (2), (4), (5), or (10) of this section, or for the reasons in paragraphs (b)(6), (7), or (8) of this section and completion through negotiation is not authorized under paragraph (d)(1) of this section, proceed with a new acquisition.

(e) When the agency head has determined, in accordance with paragraph (d)(1) of this section, that an IFB should be canceled and that use of negotiation is in the Government's interest, the contracting officer may negotiate (in accordance with part 15, as appropriate) and make award without issuing a new IFB provided—

(1) Each responsible bidder in the sealed bid acquisition has been given notice that negotiations will be conducted and has been given an opportunity to participate in negotiations; and

(2) The award is made to the responsible bidder offering the lowest negotiated price.

14.306 Evaluation.

14.306-1 Responsiveness of bids.

(a) To be considered for award, a bid must comply in all material respects with the IFB.

(b) Bids must be filled out, executed, and submitted in accordance with the instructions in the invitation. If a bidder uses its own bid form or a letter to submit a bid, the bid may be considered only if—

(1) The bidder accepts all the terms and conditions of the invitation; and

(2) Award on the bid would result in a binding contract with terms and conditions that do not vary from the terms and conditions of the invitation.

(c) Bids submitted by electronic commerce may be considered only if the electronic commerce method was specifically stipulated or permitted by the IFB.

(d) If any sample fails to conform to the characteristics listed in the invitation, the respective bid will be rejected as nonresponsive.

14.306-2 Responsible bidder—reasonableness of price.

(a) Prior to award determine that—

(1) The apparent awardee(s) is responsible (see subpart 9.1); and

(2) The prices offered are reasonable and not materially unbalanced.

(b) The price analysis techniques in part 15 should be used as guidelines for determining reasonableness and if prices offered are materially unbalanced.

(c) In each case the determination must be made in the light of all prevailing circumstances. Particular care must be taken in cases where only a single bid is received.

14.306-3 Rejection of individual bids.

(a) Reject bids that fail to conform to the basic requirements of the IFB.

(b) Unless the invitation authorized the submission of alternate bids and the supplies offered as alternates meet the requirements specified in the invitation, reject bids that do not conform to the requirements.

(c) Reject bids that fail to conform to the delivery schedule or permissible alternates stated in the invitation.

(d) If the bidder imposes conditions that would modify requirements of the invitation or limit the bidder's liability to the Government, reject the bid. For example, bids must be rejected in which the bidder—

(1) Protects against future changes in conditions, such as increased costs, if total possible costs to the Government cannot be determined;

(2) Fails to state a price and indicates that price will be the price in effect at time of delivery;

(3) States a price but qualifies it as being subject to the price in effect at time of delivery;

(4) When not authorized by the invitation, conditions or qualifies a bid by stipulating that it is to be considered only if, before date of award, the bidder receives (or does not receive) award under a separate IFB;

(5) Requires the Government to determine that the bidder's product

meets applicable Government specifications; or

(6) Limits rights of the Government under any contract clause.

(e) A low bidder may be requested to delete objectionable conditions from a bid provided the conditions do not go to the substance, as distinguished from the form, of the bid, or work an injustice on other bidders. A condition goes to the substance of a bid where it affects price, quantity, quality, or delivery of the items offered.

(f) The contracting officer may reject any bid if they determine in writing that it is unreasonable as to the total price of the bid or the prices for individual line items as well.

(g) The contracting officer may reject any bid if the prices for any line items or subline items are materially unbalanced (see 15.404-6).

(h) Reject any bid received from a person or concern that is suspended, debarred, proposed for debarment, or declared ineligible as of the bid opening date unless determined in writing that there is a compelling reason for such action (see subpart 9.4).

(i) Unless a bid is received from a small business concern (see part 19 with respect to certificates of competency), reject low bids received from concerns determined to be not responsible pursuant to part 9.

(j) Reject a bid when a bid guarantee is required and a bidder fails to furnish the guarantee in accordance with the requirements of the IFB, except as otherwise provided in part 28.

(k) Preserve the originals of all rejected bids, and any written findings with respect to such rejections with the contract file.

(l) After submitting a bid, if all of a bidder's assets or that part related to the bid are transferred during the period between the bid opening and the award, the transferee may not be able to take over the bid. Reject the bid unless the transfer is effected by merger, operation of law, or other means not barred by 41 U.S.C. 6305 or 31 U.S.C. 3727.

14.306-4 Rejection of all bids.

When it is determined necessary to reject all bids, notify each bidder that all bids have been rejected and provide the reason for such action.

14.306-5 Restrictions on disclosure of descriptive literature.

When a bid is accompanied by descriptive literature, and the bidder imposes a restriction that prevents the public disclosure of such literature, the restriction may render the bid nonresponsive. The restriction renders the bid nonresponsive if it prohibits the

disclosure of sufficient information to permit competing bidders to know the essential nature and type of the products offered or those elements of the bid that relate to quantity, price, and delivery terms. The provisions of this paragraph do not apply to unsolicited descriptive literature submitted by a bidder if such literature does not qualify the bid.

14.306-6 All or none qualifications.

Except where prohibited by the IFB, an 'all or none' qualification by a bidder does not render the bid nonresponsive. Do not permit bidders to withdraw or modify all or none qualifications after bid opening since such qualifications are substantive and affect the rights of other bidders.

14.306-7 Minor informalities or irregularities in bids.

A minor informality or irregularity is merely a matter of form and not of substance or some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired. Either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the Government. Examples of minor informalities or irregularities include failure of a bidder to—

- (a) Return the number of copies of signed bids required by the invitation;
- (b) Furnish required information concerning the number of its employees;
- (c) Sign its bid, but only if—

(1) The unsigned bid is accompanied by other material indicating the bidder's intention to be bound by the unsigned bid (such as the submission of a bid guarantee or a letter signed by the bidder, with the bid, referring to and clearly identifying the bid itself); or

(2) The firm submitting a bid has formally adopted or authorized, before the date set for opening of bids, the execution of documents by written, printed, or stamped signature and submits evidence of such authorization and the bid carries such a signature;

(d) Acknowledge receipt of an amendment to an IFB, but only if—

(1) The bid received clearly indicates that the bidder received the amendment, such as where the amendment added another item to the invitation and the bidder submitted a bid on the item; or

(2) The amendment involves only a matter of form or has either no effect or merely a negligible effect on price, quantity, quality, or delivery of the item bid upon.

14.306-8 Prompt payment discounts.

Prompt payment discounts must not be considered in the evaluation of bids.

14.306-9 Economic price adjustment.

(a) Bidder proposed economic price adjustment.

(1) When an IFB does not contain an economic price adjustment clause but a bidder proposes one with a ceiling that the price will not exceed, evaluate the bid on the basis of the maximum possible economic price adjustment of the quoted base price.

(2) If the bid is eligible for award, request the bidder to agree to the inclusion in the award of an approved economic price adjustment clause (see part 16) that is subject to the same ceiling. If the bidder will not agree to an approved clause, the contracting officer may award based on the bid as originally submitted.

(3) Reject bids that contain economic price adjustments with no ceiling unless a clear basis for evaluation exists.

(b)(1) When an invitation contains a Government proposed economic price adjustment clause and no bidder takes exception to the provisions, evaluate bids on the basis of the quoted prices without the allowable economic price adjustment being added.

(2) Reject a bid as nonresponsive if a bidder increases the maximum percentage of economic price adjustment stipulated in the invitation or limits the downward economic price adjustment provisions of the invitation.

(3) Reject a bid as nonresponsive if a bid indicates deletion of the economic price adjustment clause because the downward economic price adjustment provisions are thereby limited.

(4) When a bidder decreases the maximum percentage of economic price adjustment stipulated in the invitation, evaluate the bid at the base price on an equal basis with bids that do not reduce the stipulated ceiling. However, after evaluation, if the bidder offering the lower ceiling is in a position to receive the award, the award must reflect the lower ceiling.

14.307 Award.

(a) Make contract award—

(1) By written or electronic notice,

(2) Within the time for acceptance

specified in the bid or an extension, and

(3) To that responsible bidder whose bid, conforming to the invitation, will be most advantageous to the

Government, considering only price and the price-related factors included in the invitation.

(b) When more than one award results from any single IFB, separate award documents must be executed.

(c) When an award is made to a bidder for less than all of the items that may be awarded to that bidder and additional items are being withheld for subsequent award, the IFB and award document must state that the Government may make subsequent awards for those additional items within the bid acceptance period.

(d) All provisions of the IFB, including any acceptable additions or changes made by a bidder in the bid, must be clearly and accurately set forth (either expressly or by reference) in the award document.

(e)(1) Award is generally made by using the Award portion of Standard Form (SF) 33, Solicitation, Offer, and Award, or SF 1447, Solicitation/Contract. If an offer on an SF 33 leads to further changes, the resulting contract must be prepared as a bilateral document on SF 26, Award/Contract.

(2) Use of the Award portion of SF 33, SF 26, or SF 1447, does not preclude the additional use of informal documents, including electronic communications, as notices of awards.

(3) Do not physically include Part IV in the contract. Award by acceptance of a bid on the award portion of Standard Form 33, Solicitation Offer and Award (SF 33), Standard Form 26, Award/Contract (SF 26), or Standard Form 1447, Solicitation/Contract (SF 1447), incorporates Section K, Representations, certifications, and other statements of bidders, in the resultant contract even though not physically attached.

(f) Any discount offered will form a part of the award and will be taken by the payment center if payment is made within the discount period specified by the bidder.

(1) As an alternative to indicating a discount in conjunction with the offer, bidders may prefer to offer discounts on individual invoices.

(2) See part 32, which prescribes the contract clause at 52.232-8, Discounts for Prompt Payment.

14.308 Award of equal low bids.

(a) Award contracts in the following order of priority when two or more low bids are equal in all respects:

(1) Small business concerns that are also labor surplus area concerns.

(2) Other small business concerns.

(3) Other business concerns.

(b) If two or more bidders remain equally eligible after application of paragraph (a) of this section, conduct a

drawing, limited to those bidders. If time permits, give the bidders involved an opportunity to attend the drawing.

The drawing must be witnessed by at least three persons, and the contract file must contain the names and addresses of the witnesses and the person supervising the drawing.

(c) When an award is to be made by using the priorities under this section, include a written agreement in the contract that the contractor will perform, or cause to be performed, the contract in accordance with the circumstances justifying the priority used to break the tie or select bids for a drawing by lot.

14.309 Information to bidders.

14.309-1 Award of unclassified contracts.

(a) At a minimum (subject to any restrictions in part 9)—

(1) Notify each unsuccessful bidder in writing or electronically within three days after contract award, that its bid was not accepted. “Day,” for purposes of the notification process, means calendar day, except that the period will run until a day which is not a Saturday, Sunday, or legal holiday; and

(2) When award is made to other than a low bidder, state the reason for rejection in the notice to each of the unsuccessful low bidders.

(b) For acquisitions covered by the World Trade Organization Government Procurement Agreement or a Free Trade Agreement (see part 25), agencies must include in notices given unsuccessful bidders from World Trade Organization Government Procurement Agreement or Free Trade Agreement countries—

(1) The dollar amount of the successful bid; and

(2) The name and address of the successful bidder.

14.309-2 Award of classified contracts.

In addition to 14.309-1, if classified information was furnished or created in connection with the IFB, advise the unsuccessful bidders, including any who did not bid, to take disposition action in accordance with agency procedures. The contracting officer may provide the name of the successful bidder and the contract price to unsuccessful bidders upon request. Information regarding a classified award must not be provided by telephone.

Subpart 14.4—Postaward

14.401 Mistakes after award.

If a contractor's discovery and request for correction of a mistake in bid is not made until after the award, process the request using the procedures of part 33 and the following:

(a) When a mistake in a contractor's bid is not discovered until after award, correct the mistake by contract modification if it would be favorable to the Government without changing the essential requirements of the specifications.

(b) In addition to the cases contemplated in paragraph (a) of this section or as otherwise authorized by law, agencies are authorized to make a determination—

(1) To rescind a contract;

(2) To reform a contract to—

(i) Delete the items involved in the mistake; or

(ii) Increase the price if the contract price, as corrected, does not exceed that of the next lowest acceptable bid under the original IFB; or

(3) That no change will be made in the contract as awarded, if the evidence does not warrant a determination under paragraphs (1) or (2).

(c) Make determinations under paragraphs (b)(1) and (2) on the basis of clear and convincing evidence that a mistake in bid was made. In addition, it must be clear that the mistake was—

(1) Mutual, or

(2) If unilaterally made by the contractor, so apparent as to have charged the contracting officer with notice of the probability of the mistake.

(d) Each proposed determination must be coordinated with legal counsel in accordance with agency procedures.

(e) Process mistakes alleged or disclosed after award as follows:

(1) Request the contractor to support the alleged mistake by submission of written statements and pertinent evidence, such as—

(i) The contractor's file copy of the bid,

(ii) The contractor's original worksheets and other data used in preparing the bid,

(iii) Subcontractors' and suppliers' quotations, if any,

(iv) Published price lists, and

(v) Any other evidence that will serve to establish the mistake, the manner in which the mistake occurred, and the bid actually intended.

(2) The case file concerning an alleged mistake must contain the following:

(i) All evidence furnished by the contractor in support of the alleged mistake.

(ii) A signed statement by the contracting officer—

(A) Describing the supplies or services involved;

(B) Specifying how and when the mistake was alleged or disclosed;

(C) Summarizing the evidence submitted by the contractor and any additional evidence considered pertinent;

(D) Quoting, in cases where only one bid was received, the most recent contract price for the supplies or services involved, or in the absence of a recent comparable contract, the contracting officer's estimate of a fair price for the supplies or services and the basis for the estimate;

(E) Setting forth the contracting officer's opinion whether a bona fide mistake was made and whether the contracting officer was, or should have been, on constructive notice of the mistake before the award, together with the reasons for, or data in support of, such opinion;

(F) Setting forth the course of action with respect to the alleged mistake that the contracting officer considers proper on the basis of the evidence, and if other than a change in contract price is recommended, the manner by which the supplies or services will otherwise be acquired; and

(G) Disclosing the status of performance and payments under the contract, including contemplated performance and payments.

(iii) A signed copy of the bid involved.

(iv) A copy of the IFB and any specifications or drawings relevant to the alleged mistake.

(v) An abstract of written record of the bids received.

(vi) A written request by the contractor to reform or rescind the contract, and copies of all other relevant correspondence between the contracting officer and the contractor concerning the alleged mistake.

(vii) A copy of the contract and any related change orders or supplemental agreements.

(f) Each agency must include in the contract file a record of—

- (1) All determinations made in accordance with this 14.401;
- (2) the facts involved, and
- (3) the action taken in each case.

14.402 Pricing modifications.

See subpart 15.4 for cost and price negotiation policies and procedures.

PART 28—BONDS AND INSURANCE

Sec.

28.000 Scope of part.

28.001 Definitions.

Subpart 28.1—Bonds and Other Financial Protections

28.100 Scope of subpart.

28.101 Bid guarantees.

28.101-1 Policy on use.

28.101-2 Solicitation provision or contract clause.

28.101-3 Authority of an attorney-in-fact for a bid bond.

28.101-4 Noncompliance with bid guarantee requirements.

28.102 Performance and payment bonds and alternative payment protections for construction contracts.

28.102-1 General.

28.102-2 Amount required.

28.102-3 Contract clauses.

28.103 Performance and payment bonds for other than construction contracts.

28.103-1 General.

28.103-2 Performance bonds.

28.103-3 Payment bonds.

28.103-4 Contract clause.

28.104 Annual performance bonds.

28.105 Other types of bonds.

28.105-1 Advance payment bonds.

28.105-2 Patent infringement bonds.

28.106 Administration.

28.106-1 Bonds and bond related forms.

28.106-2 Substitution of surety bonds.

28.106-3 Additional bond and security.

28.106-4 Contract clause.

28.106-5 Consent of surety.

28.106-6 Furnishing information.

28.106-7 Withholding contract payments.

28.106-8 Payment to subcontractors or suppliers.

Subpart 28.2—Sureties and Other Security for Bonds

28.200 Scope of subpart.

28.201 Requirements for security.

28.202 Acceptability of corporate sureties.

28.203 Individual sureties.

28.203-1 Acceptability of individual sureties.

28.203-2 Substitution of assets.

28.203-3 Release of security interest.

28.203-4 Solicitation provision and contract clause.

28.203-5 Exclusion of individual sureties.

28.204 Alternatives in lieu of corporate or individual sureties.

28.204-1 United States bonds or notes.

28.204-2 Certified or cashier's checks, bank drafts, money orders, or currency.

28.204-3 Irrevocable letter of credit.

28.204-4 Contract clause.

Subpart 28.3—Insurance

28.301 Policy.

28.302 Notice of cancellation or change.

28.303 Insurance against loss of or damage to Government property.

28.304 Risk-pooling arrangements.

28.305 Overseas workers' compensation and war-hazard insurance.

28.306 Insurance under fixed-price contracts.

28.307 Insurance under cost-reimbursement contracts.

28.307-1 Group insurance plans.

28.307-2 Liability.

28.308 Self-insurance.

28.309 Contract clauses for workers' compensation insurance.

28.310 Contract clause for work on a Government installation.

28.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.

28.311-1 Contract clause.

28.311-2 Agency solicitation provisions and contract clauses.

28.312 Contract clause for insurance of leased motor vehicles.

28.313 Contract clauses for insurance of transportation or transportation-related services.

Authority: 41 U.S.C. 1121(b); 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

28.000 Scope of part.

This part prescribes requirements for obtaining financial protection against losses under contracts that result from the use of the sealed bid or negotiated methods. It covers bid guarantees, bonds, alternative payment protections, security for bonds, and insurance.

28.001 Definitions.

As used in this part—

Attorney-in-fact means an agent, independent agent, underwriter, or any other company or individual holding a power of attorney granted by a surety.

Bid means any response to a solicitation, including a proposal under a negotiated acquisition.

Bidder means any entity that is responding or has responded to a solicitation, including an offeror under a negotiated acquisition.

Bid guarantee means a form of security assuring that the bidder (1) will not withdraw a bid within the period specified for acceptance, and (2) will execute a written contract and furnish required bonds, including any necessary coinsurance or reinsurance agreements, within the time specified in the bid, unless a longer time is allowed, after receipt of the specified forms.

Bond means a written instrument executed by a bidder or contractor (the "principal"), and a second party ("the surety" or "sureties") (except as provided in 28.204), to assure fulfillment of the principal's obligations to a third party (the "obligee" or "Government"), identified in the bond. If the principal's obligations are not met, the bond assures payment, to the extent stipulated, of any loss sustained by the obligee. The types of bonds and related documents are as follows:

(1) An advance payment bond secures fulfillment of the contractor's obligations under an advance payment provision.

(2) An annual bid bond is a single bond furnished by a bidder, in lieu of separate bid bonds, which secures all bids (on other than construction contracts) requiring bonds submitted during a specific Government fiscal year.

(3) An annual performance bond is a single bond furnished by a contractor, in lieu of separate performance bonds, to secure fulfillment of the contractor's obligations under contracts (other than

construction contracts) requiring bonds entered into during a specific Government fiscal year.

(4) A patent infringement bond secures fulfillment of the contractor's obligations under a patent provision.

(5) A payment bond assures payments as required by law to all persons supplying labor or material in the prosecution of the work provided for in the contract.

(6) A performance bond secures performance and fulfillment of the contractor's obligations under the contract.

Consent of surety means an acknowledgment by a surety that its bond given in connection with a contract continues to apply to the contract as modified.

Penal sum or penal amount means the amount of money specified in a bond (or a percentage of the bid price in a bid bond) as the maximum payment for which the surety is obligated or the amount of security required to be pledged to the Government in lieu of a corporate or individual surety for the bond.

Reinsurance means a transaction which provides that a surety, for a consideration, agrees to indemnify another surety against loss which the latter may sustain under a bond which it has issued.

Subpart 28.1—Bonds and Other Financial Protections

28.100 Scope of subpart.

This subpart prescribes requirements and procedures for the use of bonds, alternative payment protections, and all types of bid guarantees.

28.101 Bid guarantees.

28.101-1 Policy on use.

(a) Do not require a bid guarantee unless a performance bond or a performance and payment bond is also required (see 28.102 and 28.103). Except as provided in paragraph (c) of this subpart, bid guarantees must be required whenever a performance bond or a performance and payment bond is required.

(b) All types of bid guarantees are acceptable for supply or service contracts (see annual bid bonds and annual performance bonds coverage in 28.001). Only separate bid guarantees are acceptable in connection with construction contracts. Agencies may specify that only separate bid bonds are acceptable in connection with construction contracts.

(c) The chief of the contracting office may waive the requirement to obtain a bid guarantee when a performance bond

or a performance and payment bond is required if it is determined that a bid guarantee is not in the best interest of the Government for a specific acquisition (e.g., overseas construction, emergency acquisitions, sole-source contracts). Class waivers may be authorized by the agency head or designee.

28.101-2 Solicitation provision or contract clause.

(a) Insert a provision or clause substantially the same as the provision at 52.228-1, Bid Guarantee, in solicitations or contracts, including those for commercial products and commercial services, that require a bid guarantee or similar guarantee. For example, the contracting officer may modify this provision—

(1) For use in connection with construction solicitations when the agency has specified that only separate bid bonds are acceptable in accordance with 28.101-1(b);

(2) For use in solicitations for negotiated contracts; or

(3) For use in service contracts containing options for extended performance.

(b) Determine the amount of the bid guarantee, at least 20 percent of the bid price and must not exceed \$3 million, for insertion in the provision at 52.228-1 (see 28.102-2(a)). The amount must be adequate to protect the Government from loss should the successful bidder fail to execute further contractual documents and bonds as required. When the penal sum is expressed as a percentage, a maximum dollar limitation may be stated.

28.101-3 Authority of an attorney-in-fact for a bid bond.

(a) Any person signing a bid bond as an attorney-in-fact must include with the bid bond evidence of authority to bind the surety.

(b) An original, or a photocopy or facsimile of an original, power of attorney is sufficient evidence of such authority.

(c) For purposes of this section, electronic, mechanically-applied and printed signatures, seals and dates on the power of attorney must be considered original signatures, seals and dates, without regard to the order in which they were affixed.

(d) The contracting officer must—

(1) Treat the failure to provide a signed and dated power of attorney at the time of bid opening as a matter of responsiveness; and

(2) Treat questions regarding the authenticity and enforceability of the power of attorney at the time of bid

opening as a matter of responsibility. These questions are handled after bid opening.

(e)(1) If the contracting officer contacts the surety to validate the power of attorney, document the file providing, at a minimum, the following information:

(i) Name of person contacted.

(ii) Date and time of contact.

(iii) Response of the surety.

(2) If, upon investigation, the surety declares the power of attorney to have been valid at the time of bid opening, the contracting officer may require correction of any technical error.

(3) If the surety declares the power of attorney to have been invalid, do not allow the bidder to substitute a replacement power of attorney or a replacement surety.

(f) Determinations of non-responsibility based on the unacceptability of a power of attorney are not subject to the Certificate of Competency process of part 19 if the surety has disavowed the validity of the power of attorney.

28.101-4 Noncompliance with bid guarantee requirements.

(a) In sealed bidding, noncompliance with a solicitation requirement for a bid guarantee requires rejection of the bid, except in the situations described in paragraph (c) of this subsection when the noncompliance must be waived.

(b) In negotiation, noncompliance with a solicitation requirement for a bid guarantee requires rejection of an initial proposal as unacceptable, if a determination is made to award the contract based on initial proposals without discussion, except in the situations described in paragraph (c) of this subsection when noncompliance must be waived. (See part 15 for conditions regarding making awards based on initial proposals.) If the conditions for awarding based on initial proposals are not met, deficiencies in bid guarantees submitted by offerors determined to be in the competitive range must be addressed during discussions and the offeror must be given an opportunity to correct the deficiency.

(c) Noncompliance with a solicitation requirement for a bid guarantee must be waived in the following circumstances unless the contracting officer determines in writing that acceptance of the bid would be detrimental to the Government's interest when—

(1) Only one offer is received. In this case, the contracting officer may require the furnishing of the bid guarantee before award;

(2) The amount of the bid guarantee submitted is less than required, but is

equal to or greater than the difference between the offer price and the next higher acceptable offer;

(3) The amount of the bid guarantee submitted, although less than that required by the solicitation for the maximum quantity offered, is sufficient for a quantity for which the offeror is otherwise eligible for award. Any award to the offeror must not exceed the quantity covered by the bid guarantee;

(4) The bid guarantee is received late, and late receipt is waived under part 14;

(5) A bid guarantee becomes inadequate as a result of the correction of a mistake under part 14 (but only if the bidder will increase the bid guarantee to the level required for the corrected bid);

(6) An otherwise acceptable bid bond was submitted with a signed offer, but the bid bond was not signed by the offeror;

(7) An otherwise acceptable bid bond is erroneously dated or bears no date at all; or

(8) A bid bond does not list the United States as obligee, but correctly identifies the offeror, the solicitation number, and the name and location of the project involved, so long as it is acceptable in all other respects.

28.102 Performance and payment bonds and alternative payment protections for construction contracts.

28.102-1 General.

(a) 40 U.S.C. chapter 31, subchapter III, Bonds (formerly known as the Miller Act), requires performance and payment bonds for any construction contract exceeding \$150,000, except that this requirement may be waived—

(1) By the contracting officer for as much of the work as is to be performed in a foreign country upon finding that it is impracticable for the contractor to furnish such bonds; or

(2) As otherwise authorized by the Bonds statute or other law.

(b)(1) Pursuant to 40 U.S.C. 3132, for construction contracts greater than \$35,000, but not greater than \$150,000, select two or more of the following payment protections, giving particular consideration to inclusion of an irrevocable letter of credit as one of the selected alternatives:

(i) A payment bond.

(ii) An irrevocable letter of credit (ILC).

(iii) A *tripartite escrow agreement*. The prime contractor establishes an escrow account in a federally insured financial institution and enters into a tripartite escrow agreement with the financial institution, as escrow agent, and all of the suppliers of labor and

material. The escrow agreement must establish the terms of payment under the contract and of resolution of disputes among the parties. The Government makes payments to the contractor's escrow account, and the escrow agent distributes the payments in accordance with the agreement or triggers the disputes resolution procedures if required.

(iv) *Certificates of deposit*. The contractor deposits certificates of deposit from a federally insured financial institution with the contracting officer, in an acceptable form, executable by the contracting officer.

(v) A deposit of the types of security listed in 28.204-1 and 28.204-2.

(2) The contractor must submit to the Government one of the payment protections selected by the contracting officer.

(c) The contractor must furnish all bonds or alternative payment protection, including any necessary reinsurance agreements, before receiving a notice to proceed with the work or being allowed to start work.

28.102-2 Amount required.

(a) *Definition*. As used in this subsection—

Original contract price means the award price of the contract; or, for requirements contracts, the price payable for the estimated total quantity; or, for indefinite-quantity contracts, the price payable for the specified minimum quantity. Original contract price does not include the price of any options, except those options exercised at the time of contract award.

(b) *Contracts exceeding \$150,000*.

(1) *Performance bonds*. Unless the contracting officer determines that a lesser amount is adequate for the protection of the Government, the penal amount of performance bonds must equal—

(i) 100 percent of the original contract price; and

(ii) If the contract price increases, an additional amount equal to 100 percent of the increase.

(2) *Payment bonds*.

(i) Unless the contracting officer makes a written determination supported by specific findings that a payment bond in this amount is impractical, the amount of the payment bond must equal—

(A) 100 percent of the original contract price; and

(B) If the contract price increases, an additional amount equal to 100 percent of the increase.

(ii) The amount of the payment bond must be no less than the amount of the performance bond.

(c) *Contracts exceeding \$35,000 but not exceeding \$150,000*. Unless the contracting officer determines that a lesser amount is adequate for the protection of the Government, the penal amount of the payment bond or the amount of alternative payment protection must equal—

(1) 100 percent of the original contract price; and

(2) If the contract price increases, an additional amount equal to 100 percent of the increase.

(d) *Securing additional payment protection*. If the contract price increases, the Government must secure any needed additional protection by directing the contractor to—

(1) Increase the penal sum of the existing bond;

(2) Obtain an additional bond; or

(3) Furnish additional alternative payment protection.

(e) *Reducing amounts*. The contracting officer may reduce the amount of security to support a bond, subject to the conditions of 28.203-3(c) or 28.204(b).

28.102-3 Contract clauses.

(a) Insert a clause substantially the same as the clause at 52.228-15, Performance and Payment Bonds—Construction, in solicitations and contracts for construction, including those for construction that is a commercial service, but excluding those for commercial products, that contain a requirement for performance and payment bonds if the resultant contract is expected to exceed \$150,000. The contracting officer may revise paragraphs (b)(1) and/or (b)(2) of the clause to establish a lower percentage in accordance with 28.102-2(b). If the provision at 52.228-1 is not included in the solicitation, set a period of time for return of executed bonds.

(b) Insert the clause at 52.228-13, Alternative Payment Protections, in solicitations and contracts for construction, including those for construction that is a commercial service, when the estimated or actual value exceeds \$35,000 but does not exceed \$150,000. Complete the clause by specifying the payment protections selected (see 28.102-1(b)(1)) and the deadline for submission. The contracting officer may revise paragraph (b) of the clause to establish a lower percentage in accordance with 28.102-2(c).

28.103 Performance and payment bonds for other than construction contracts.

28.103-1 General.

(a) Generally, agencies must not require performance and payment bonds

for other than construction contracts. However, performance and payment bonds may be used as permitted in 28.103–2 and 28.103–3.

(b) The contractor must furnish all bonds before receiving a notice to proceed with the work.

(c) No bond must be required after the contract has been awarded if it was not specifically required in the contract, except as may be determined necessary for a contract modification.

28.103–2 Performance bonds.

(a) Performance bonds may be required for contracts exceeding the simplified acquisition threshold when necessary to protect the Government's interest. The following situations may warrant a performance bond:

(1) Government property or funds are to be provided to the contractor for use in performing the contract or as partial compensation (as in retention of salvaged material).

(2) A contractor sells assets to or merges with another concern, and the Government, after recognizing the latter concern as the successor in interest, desires assurance that it is financially capable.

(3) Substantial progress payments are made before delivery of end items starts.

(4) Contracts are for dismantling, demolition, or removal of improvements.

(b) The Government may require additional performance bond protection when a contract price is increased.

(c) Determine the contractor's responsibility (see part 9) even though a bond has been or can be obtained.

28.103–3 Payment bonds.

(a) A payment bond is required only when a performance bond is required, and if the use of payment bond is in the Government's interest.

(b) When a contract price is increased, the Government may require additional bond protection in an amount adequate to protect suppliers of labor and material.

28.103–4 Contract clause.

Insert a clause substantially the same as the clause at 52.228–16, Performance and Payment Bonds—Other than Construction, in solicitations and contracts, including those for commercial products (other than commercially available off-the-shelf items) and commercial services, that contain a requirement for both payment and performance bonds. Determine the amount of each bond for insertion in the clause. The amount must be adequate to protect the interest of the Government. Set a period of time (normally 10 days)

for return of executed bonds. Use Alternate I when only performance bonds are required.

28.104 Annual performance bonds.

(a) Annual performance bonds only apply to nonconstruction contracts. They must provide a gross penal sum applicable to the total amount of all covered contracts.

(b) When the penal sums obligated by contracts are approximately equal to or exceed the penal sum of the annual performance bond, an additional bond will be required to cover additional contracts.

28.105 Other types of bonds.

The head of the contracting activity may approve using other types of bonds in connection with acquiring particular supplies or services. These types include advance payment bonds and patent infringement bonds.

28.105–1 Advance payment bonds.

Advance payment bonds may be required only when the contract contains an advance payment provision, and a performance bond is not furnished. Determine the amount of the advance payment bond necessary to protect the Government

28.105–2 Patent infringement bonds.

(a) Contracts providing for patent indemnity may require these bonds only if—

(1) A performance bond is not furnished; and

(2) The financial responsibility of the contractor is unknown or doubtful.

(b) The contracting officer must determine the penal sum.

28.106 Administration.

28.106–1 Bonds and bond related forms.

The following Standard Forms (SF's) and Optional Forms (OF's) must be used, except in foreign countries, when a bid bond, performance or payment bond, or an individual surety is required. The bond forms must be used as indicated in the instruction portion of each form.

(a) SF 24, Bid Bond (see 28.101).

(b) SF 25, Performance Bond (see 28.102–1 and 28.106–3(b)).

(c) SF 25A, Payment Bond (see 28.102–1 and 28.106–3(b)).

(d) SF 25B, Continuation Sheet (for SFs 24, 25, and 25A).

(e) SF 28, Affidavit of Individual Surety (see 28.203).

(f) SF 34, Annual Bid Bond (see 28.001).

(g) SF 35, Annual Performance Bond (see 28.104).

(h) SF 273, Reinsurance Agreement for a Bonds Statute Performance Bond (see 28.202(a)(4)).

(i) SF 274, Reinsurance Agreement for a Bonds Statute Payment Bond (see 28.202(a)(4)).

(j) SF 275, Reinsurance Agreement in Favor of the United States (see 28.202(a)(4)).

(k) SF 1414, Consent of Surety (see 28.106–5).

(l) SF 1415, Consent of Surety and Increase of Penalty (see 28.106–3).

(m) SF 1416, Payment Bond for Other Than Construction Contracts (see 28.103–3 and 28.106–3(b)).

(n) SF 1418, Performance Bond for Other Than Construction Contracts (see 28.103–2 and 28.106–3(b)).

(o) OF 91, Release of Personal Property from Escrow (see 28.203–3).

28.106–2 Substitution of surety bonds.

(a) A new surety bond covering all or part of the obligations on a bond previously approved may be substituted for the original bond if approved by the head of the contracting activity, or as otherwise specified in agency regulation.

(b) When a new surety bond is approved, notify the principal and surety of the original bond of the effective date of the new bond.

28.106–3 Additional bond and security.

(a) When additional bond coverage is required and is secured in whole or in part by the original surety or sureties, agencies must use Standard Form 1415, Consent of Surety and Increase of Penalty. Standard Form 1415 is authorized for local reproduction.

(b) When additional bond coverage is required and is secured in whole or in part by a new surety or by one of the alternatives described in 28.204 in lieu of corporate or individual surety, agencies must use Standard Form 25, Performance Bond; Standard Form 1418, Performance Bond for Other Than Construction Contracts; Standard Form 25A, Payment Bond; or Standard Form 1416, Payment Bond for Other Than Construction Contracts.

28.106–4 Contract clause.

(a) Insert the clause at 52.228–2, Additional Bond Security, in solicitations and contracts, including those for commercial products (other than commercially available off-the-shelf items) and commercial services, when bonds are required.

(b) In accordance with section 806(a)(3) of Public Law 102–190, as amended by sections 2091 and 8105 of Public Law 103–355 (10 U.S.C. 4601 note prec.), insert the clause at 52.228–

12, Prospective Subcontractor Requests for Bonds, in solicitations and contracts other than those for commercial products and commercial services, except for construction that is a commercial service, when a payment bond will be furnished pursuant to 40 U.S.C. chapter 31, subchapter III, Bonds (see 28.102–1).

28.106–5 Consent of surety.

(a) When any contract is modified, obtain the consent of surety if—

(1) An additional bond is obtained from other than the original surety;

(2) No additional bond is required and—

(i) The modification is for new work beyond the scope of the original contract; or

(ii) The modification does not change the contract scope but changes the contract price (upward or downward) by more than 25 percent or \$50,000; or

(3) Consent of surety is required for a novation agreement (see part 42).

(b) When a contract for which performance or payment is secured by any of the types of security listed in 28.204 is modified as described in paragraph (a) of this subsection, no consent of surety is required.

(c) Agencies must use Standard Form 1414, Consent of Surety, for all types of contracts.

28.106–6 Furnishing information.

(a) The surety on the bond, upon its written request, may be furnished information on the progress of the work, payments, and the estimated percentage of completion, concerning the contract for which the bond was furnished.

(b) When a payment bond has been provided, upon request, furnish the name and address of the surety or sureties to any subcontractor or supplier who has furnished or been requested to furnish labor or material for the contract. In addition, general information concerning the work progress, payments, and the estimated percentage of completion may be furnished to persons who have provided labor or materials and have not been paid.

(c) When a payment bond has been provided for a contract, the head of the agency or designee must furnish a certified copy of the bond and the contract for which it was given to any person who makes a request therefor and who furnishes an affidavit that the requestor has supplied labor or materials for such work and payment therefor has not been made or that the requestor is being sued on such bond. The person who makes the request must be required to pay such costs of

preparation as determined by the head of the agency or designee to be reasonable and appropriate (see 40 U.S.C. 3133).

(d) Section 806(a)(2) of Public Law 102–190, as amended by sections 2091 and 8105 of Public Law 103–355 (10 U.S.C. 4601 note prec.), requires that the Federal Government provide information to subcontractors on payment bonds under contracts, including contracts for construction that is a commercial service. Upon the written or oral request of a subcontractor/supplier, or prospective subcontractor/supplier, under a contract with respect to which a payment bond has been furnished pursuant to the Bonds statute, promptly provide to the requester, either orally or in writing, as appropriate, any of the following:

(1) Name and address of the surety or sureties on the payment bond.

(2) Penal amount of the payment bond.

(3) Copy of the payment bond. The contracting officer may impose reasonable fees to cover the cost of copying and providing a copy of the payment bond.

28.106–7 Withholding contract payments.

(a) During contract performance, agencies must not withhold payments due contractors or assignees because subcontractors or suppliers have not been paid.

(b) If, after completion of the contract work, the Government receives written notice from the surety regarding the contractor's failure to meet its obligation to its subcontractors or suppliers, withhold final payment. However, the surety must agree to hold the Government harmless from any liability resulting from withholding the final payment. The contracting officer will authorize final payment upon agreement between the contractor and surety or upon a judicial determination of the rights of the parties.

(c) For any withholding incident to the labor standards provisions of the contract, see part 22.

28.106–8 Payment to subcontractors or suppliers.

The contracting officer will only authorize payment to subcontractors or suppliers from an ILC (or any other cash equivalent security) upon a judicial determination of the rights of the parties, a signed notarized statement by the contractor that the payment is due and owed, or a signed agreement between the parties as to amount due and owed.

Subpart 28.2—Sureties and Other Security for Bonds

28.200 Scope of subpart.

This subpart prescribes procedures for the use of sureties and other security to protect the Government from financial losses.

28.201 Requirements for security.

(a) Agencies must obtain adequate security for bonds (including coinsurance and reinsurance agreements) required or used with a contract for supplies or services (including construction). Acceptable forms of security include—

(1) Corporate or individual sureties; or

(2) Any of the types of security authorized in lieu of sureties by 28.204.

(b) Solicitations must not preclude offerors from using the types of surety or other security permitted by this subpart, unless prohibited by law or regulation.

28.202 Acceptability of corporate sureties.

(a)(1) Corporate sureties offered for bonds furnished with contracts performed in the United States or its outlying areas must appear on the list contained in the Department of the Treasury's Listing of Approved Sureties (Treasury Department Circular 570), "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies."

(2) The penal amount of the bond should not exceed the surety's underwriting limit stated in the Treasury Department Circular 570. If the penal amount exceeds the underwriting limit, the bond will be acceptable only if—

(i) The amount which exceeds the specified limit is coinsured or reinsured; and

(ii) The amount of coinsurance or reinsurance does not exceed the underwriting limit of each coinsurer or reinsurer.

(3) Coinsurance or reinsurance agreements must conform to the Department of the Treasury (Treasury) regulations in 31 CFR 223.10 and 223.11. When reinsurance is contemplated, require reinsurance agreements to be executed and submitted with the bonds before making a final determination on the bonds.

(4) When specified in the solicitation, the contracting officer may accept a bond from the direct writing company in satisfaction of the total bond requirement of the contract. This is permissible until necessary reinsurance agreements are executed, even though the total bond requirement may exceed

the insurer's underwriting limitation. The contractor must execute and submit necessary reinsurance agreements to the contracting officer within the time specified on the bid form, which may not exceed 45 calendar days after the execution of the bond. The contractor must use Standard Form (SF) 273, Reinsurance Agreement for a Bonds Statute Performance Bond, and SF 274, Reinsurance Agreement for a Bonds Statute Payment Bond, when reinsurance is furnished with the required performance or payment bonds. SF 275, Reinsurance Agreement in Favor of the United States, is used when reinsurance is furnished with bonds for other purposes.

(b) For contracts performed in a foreign country, sureties not appearing on Treasury Department Circular 570 are acceptable if the contracting officer determines that it is impracticable for the contractor to use Treasury listed sureties.

(c) Treasury issues supplements to Treasury Department Circular 570, notifying all Federal agencies of new approved corporate surety companies and the termination of the authority of any specific corporate surety to qualify as a surety on Federal bonds. Upon receipt of notification of termination of a company's authority to qualify as a surety on Federal bonds, review the outstanding contracts and take action necessary to protect the Government, including, where appropriate, securing new bonds with acceptable sureties in lieu of outstanding bonds with the named company.

(d) Treasury Department Circular 570 may be obtained from the U.S. Department of the Treasury, Bureau of the Fiscal Service, Surety Bond Branch, 3201 Pennsy Drive, Building E, Landover, MD 20785 or at <https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570.htm>.

28.203 Individual sureties.

28.203-1 Acceptability of individual sureties.

(a) An individual surety is acceptable for all types of bonds except position schedule bonds. Assets pledged by an individual surety must meet the eligibility requirements of Treasury's Bureau of the Fiscal Service. Per 31 U.S.C. 9310, individual sureties must pledge eligible obligations, which Treasury refers to as acceptable collateral or eligible collateral. A list of acceptable assets, entitled "Acceptable Collateral for 31 CFR part 225," may be accessed by going to <https://fiscal.treasury.gov/tcmm/resources.html> and clicking on "31 CFR part 225".

(b)(1) An individual surety must execute the bond (e.g., bid bond (SF 24), performance bond (SF 25), payment bond (SF 25A)).

(2) The net adjusted value of unencumbered assets is their market value minus the margin. The margin tables are available at www.treasurydirect.gov. The net adjusted value of unencumbered assets pledged by the individual surety must equal or exceed the penal amount (i.e., face value) of each bond.

(3) The individual surety must execute the SF 28, Affidavit of Individual Surety, and provide a security interest. One individual surety is adequate support for a bond, provided the net adjusted value of unencumbered assets pledged by that individual surety equals or exceeds the amount of the bond.

(4) An offeror or contractor may submit up to three individual sureties for each bond, in which case the net adjusted value of the pledged unencumbered assets, when combined, must equal or exceed the penal amount of the bond. Each individual surety is jointly and severally liable to the extent of the penal amount of the bond.

(c) Using the information from the SF 28 submitted by the offeror or contractor, notify the Treasury's collateral operations support team by email at BMT@fiscal.treasury.gov or by phone at 888-568-7343 of the individual surety, the assets to be pledged, and the amount necessary to cover the individual surety bond, i.e., the required amount to be collateralized. Treasury will advise the contracting officer whether the assets are eligible to be pledged, consistent with 28.203-1(a), and of the valuation of the assets offered to be pledged, consistent with the valuation standards in 28.203-1(b)(2). If after 3 business days the contracting officer has not received a response from Treasury, the contracting officer may seek assistance from the Director, Bank Policy and Oversight, at 202-504-3502. Determine whether the individual surety bond is acceptable as to the amount necessary to cover the individual surety bond based on the asset eligibility and valuation assessment from Treasury. Notify both the offeror or contractor and the individual surety of this determination.

(d) If the contracting officer determines the individual surety is acceptable, request the Treasury's collateral operations support team set up the necessary individual surety pledged asset collateral account.

(e) If the contracting officer determines that no individual surety in support of a bid guarantee is acceptable,

reject the offeror utilizing the individual surety as nonresponsible, except as provided in 28.101-4. A finding of nonresponsibility based on unacceptability of an individual surety, need not be referred to the Small Business Administration for a Certificate of Competency. (See part 19 and 61 Comp. Gen. 456 (1982).)

(f) If a contractor submits an unacceptable individual surety, or one that Treasury could not assess the asset eligibility and valuation within a reasonable time, then the contracting officer may permit the contractor to substitute an acceptable surety within a reasonable time.

(g) Evidence of possible criminal or fraudulent activities by an individual surety must be referred to the appropriate agency official in accordance with agency procedures.

28.203-2 Substitution of assets.

An individual surety may request the Government to accept a substitute asset for that currently pledged by submitting a written request, including a revised SF 28, to the responsible contracting officer. Following the requirements set forth in 28.203-1, the contracting officer may agree to the substitution of assets upon determining that the substitute assets to be pledged are adequate to protect the outstanding bond or guarantee obligations.

28.203-3 Release of security interest.

(a) After consultation with legal counsel, release the security interest on the individual surety's assets using the Optional Form 91, Release of Personal Property from Escrow, or a similar release as soon as possible consistent with the conditions in subparagraphs (a)(1) and (2) of this section. A surety's assets pledged in support of a payment bond may be released to a subcontractor or supplier upon Government receipt of a Federal district court judgment, or a sworn statement by the subcontractor or supplier that the claim is correct along with a notarized authorization of the release by the surety stating that it approves of such release.

(1) *Contracts subject to the Bonds statute.* See section 1.110 and section 28.102-1, paragraph (a). The security interest must be maintained for the later of—

(i) 1 year following final payment;

(ii) Until completion of any warranty period (applicable only to performance bonds); or

(iii) Pending resolution of all claims filed against the payment bond during the 1 year period following final payment.

(2) *Contracts subject to alternative payment protection.* See section 28.102–1, paragraph (b)(1). The security interest must be maintained for the full contract performance period plus 1 year.

(3) *Other contracts not subject to the Bonds statute.* The security interest must be maintained for 90 days following final payment or until completion of any warranty period (applicable only to performance bonds), whichever is later.

(b) Upon written request by the individual surety, the contracting officer may release the security interest on the individual surety's assets in support of a bid guarantee based upon evidence that the offer supported by the individual surety will not result in contract award.

(c) Upon written request by the individual surety, the contracting officer may release a portion of the security interest on the individual surety's assets based upon substantial performance of the contractor's obligations under its performance bond. Release of the security interest in support of a payment bond must comply with the subparagraphs (a)(1) through (3) of this section. In making this determination, the contracting officer will give consideration as to whether the contractor has reached substantial completion, final acceptance, or other substantial objective milestone and if the unreleased portion of the security is sufficient to cover the remaining contract obligations, including payments to subcontractors and other potential liabilities. The individual surety must, as a condition of the partial release, furnish an affidavit agreeing that the release of such assets does not relieve the individual surety of its obligations under the bond(s).

28.203–4 Solicitation provision and contract clause.

(a) Insert the provision at 52.228–17, Individual Surety—Pledge of Assets (Bid Guarantee), in solicitations, including for commercial products (other than commercially available off-the-shelf items) and commercial services, that require the submission of a bid guarantee.

(b) Insert the clause at 52.228–11, Individual Surety—Pledge of Assets, in solicitations and contracts, including those for commercial products (other than commercially available off-the-shelf items) and commercial services, that require the submission of performance or payment bonds.

28.203–5 Exclusion of individual sureties.

(a) An individual may be excluded from acting as a surety on bonds

submitted by offerors on procurement by the executive branch of the Federal Government, by the acquiring agency's head or designee utilizing the procedures in part 9. The exclusion must be for the purpose of protecting the Government.

(b) An individual may be excluded for any of the following causes:

(1) Failure to fulfill the obligations under any bond.

(2) Failure to disclose all bond obligations.

(3) Misrepresentation of the value of available assets or outstanding liabilities.

(4) Any false or misleading statement, signature or representation on a bond or affidavit of individual suretyship.

(5) Any other cause affecting responsibility as a surety of such serious and compelling nature as may be determined to warrant exclusion.

(c) An individual surety excluded pursuant to this section must be entered as an exclusion in the System for Award Management (SAM) (see part 9).

(d) Do not accept the bonds of individual sureties whose names appear in an active exclusion record in SAM unless the acquiring agency's head or a designee state in writing the compelling reasons justifying acceptance.

(e) An exclusion of an individual surety under this section will also preclude such party from acting as a contractor in accordance with part 9.

28.204 Alternatives in lieu of corporate or individual sureties.

(a) Any person required to furnish a bond to the Government may furnish any of the types of security listed in 28.204–1 through 28.204–3 instead of a corporate or individual surety for the bond. When any of those types of security are deposited, a statement must be incorporated in the bond form pledging the security in lieu of execution of the bond form by corporate or individual sureties. The contractor must execute the bond forms as the principal. Agencies must establish safeguards to protect against loss of the security and must return the security or its equivalent to the contractor when the bond obligation has ceased.

(b) Upon written request by any contractor securing a performance or payment bond by any of the types of security listed in 28.204–1 through 28.204–3, the contracting officer may release a portion of the security only when the conditions allowing the partial release of security in 28.203–3(c) are met. The contractor must, as a condition of the partial release, furnish an affidavit agreeing that the release of such security does not relieve the

contractor of its obligations under the bond(s).

(c) The contractor may satisfy a requirement for bond security by furnishing a combination of the types of security listed in 28.204–1 through 28.204–3 or a combination of bonds supported by these types of security and additional surety bonds under 28.202 or 28.203. During the period for which a bond supported by security is required, the contractor may substitute one type of security listed in 28.204–1 through 28.204–3 for another, or may substitute, in whole or combination, additional surety bonds under 28.202 or 28.203.

28.204–1 United States bonds or notes.

Any person required to furnish a bond to the Government has the option, instead of furnishing a surety or sureties on the bond, of depositing certain United States bonds or notes in an amount equal at their par value to the penal sum of the bond (the Act of February 24, 1919 (31 U.S.C. 9303) and Treasury Department Circular No. 154 (31 CFR part 225)). In addition, a duly executed power of attorney and agreement authorizing the collection or sale of such United States bonds or notes in the event of default of the principal on the bond must accompany the deposited bonds or notes. The contracting officer may—

(a) Turn securities over to the finance or other authorized agency official; or

(b) Deposit them with the Treasurer of the United States, a Federal Reserve Bank (or branch with requisite facilities), or other depository designated for that purpose by the Secretary of the Treasury, under procedures prescribed by the agency concerned and Treasury Department Circular No. 154 (exception: deposit all bonds and notes received in the District of Columbia with the Treasurer of the United States).

28.204–2 Certified or cashier's checks, bank drafts, money orders, or currency.

Any person required to furnish a bond has an option to furnish a certified or cashier's check, bank draft, Post Office money order, or currency, in an amount equal to the penal sum of the bond, instead of furnishing surety or sureties on the bonds. Those furnishing checks, drafts, or money orders must draw them to the order of the appropriate Federal agency.

28.204–3 Irrevocable letter of credit.

(a) Any person required to furnish a bond has the option to furnish a bond secured by an irrevocable letter of credit (ILC) in an amount equal to the penal sum required to be secured (see 28.204).

A separate ILC is required for each bond.

(b) The ILC must be irrevocable, require presentation of no document other than a written demand and the ILC (and letter of confirmation, if any), expire only as provided in paragraph (f) of this subsection, and be issued/confirmed by an acceptable federally insured financial institution as provided in paragraph (g) of this subsection.

(c) To draw on the ILC, use the sight draft set forth in the clause at 52.228–14 and present it with the ILC (including letter of confirmation, if any) to the issuing financial institution or the confirming financial institution (if any).

(d) If the contractor does not furnish an acceptable replacement ILC, or other acceptable substitute, at least 30 days before an ILC's scheduled expiration, immediately draw on the ILC.

(e) If, after the period of performance of a contract where ILCs are used to support payment bonds, there are outstanding claims against the payment bond, draw on the ILC prior to the expiration date of the ILC to cover these claims.

(f) The period for which financial security is required must be as follows:

(1) If used as a bid guarantee, the ILC should expire no earlier than 60 days after the close of the bid acceptance period.

(2) If used as an alternative to corporate or individual sureties as security for a performance or payment bond, the offeror/contractor may submit an ILC with an initial expiration date estimated to cover the entire period for which financial security is required or an ILC with an initial expiration date that is a minimum period of one year from the date of issuance. The ILC must provide that, unless the issuer provides the beneficiary written notice of non-renewal at least 60 days in advance of the current expiration date, the ILC is automatically extended without amendment for one year from the expiration date, or any future expiration date, until the period of required coverage is completed and the contracting officer provides the financial institution with a written statement waiving the right to payment. The period of required coverage must be:

(i) For contracts subject to the Bonds statute, the later of—

(A) One year following the expected date of final payment;

(B) For performance bonds only, until completion of any warranty period; or

(C) For payment bonds only, until resolution of all claims filed against the payment bond during the one-year period following final payment.

(ii) For contracts not subject to the Bonds statute, the later of

(A) 90 days following final payment; or

(B) For performance bonds only, until completion of any warranty period.

(g) Only federally insured financial institutions rated investment grade must issue or confirm the ILC. Unless the financial institution issuing the ILC had letter of credit business of at least \$25 million in the past year, ILCs over \$5 million must be confirmed by another acceptable financial institution that had letter of credit business of at least \$25 million in the past year.

(1) The offeror/contractor is required by paragraph (d) of the clause at 52.228–14, Irrevocable Letter of Credit, to provide the contracting officer a credit rating from a recognized commercial rating service that indicates the financial institution has the required rating(s) as of the date of issuance of the ILC.

(2) To support the credit rating of the financial institution(s) issuing or confirming the ILC, verify the following information:

(i) *Federal insurance*: Each financial institution is federally insured.

Verification of federal insurance is available through the Federal Deposit Insurance Corporation institution directory at the website <http://www2.fdic.gov/idas/index.asp>.

(ii) Current credit rating. The current credit rating for each financial institution is investment grade and that the credit rating is from a Nationally Recognized Statistical Rating Organization (NRSRO). NRSROs can be located at the website <http://www.sec.gov/answers/nrsro.htm> maintained by the SEC.

(3) The rating services listed in the website <http://www.sec.gov/answers/nrsro.htm> use different rating scales (e.g., AAA, AA, A, BBB, BB, B, CCC, CC, C, and D; or Aaa, Aa, A, Baa, Ba, B, Caa, Ca, and C) to provide evaluations of institutional credit risk; however, all such systems specify the range of investment grade ratings (e.g., BBB–AAA or Baa–Aaa in the examples in this section) and permit evaluation of the relative risk associated with a specific institution. If the contracting officer learns that a financial institution's rating has dropped below investment grade level, give the contractor 30 days to substitute an acceptable ILC or must draw on the ILC using the sight draft in paragraph (g) of the clause at 52.228–14.

(h) A copy of the Uniform Customs and Practice for Documentary Credits, 2007 Edition, International Chamber of Commerce Publication No. 600, is available from: ICC Books USA, 1212

Avenue of the Americas, 21st Floor, New York, NY 10036; Phone: 212–703–5078; Fax: 212–391–6568; Email: iccbooks@uscib.org; Via the internet at: <http://www.uscib.org/ucp-600-ud-4465/>.

28.204–4 Contract clause.

Insert the clause at 52.228–14, Irrevocable Letter of Credit, in solicitations and contracts, including those for commercial products (other than commercially available off-the-shelf items) and commercial services, for services, supplies, or construction, when a bid guarantee, or performance bonds, or performance and payment bonds are required.

Subpart 28.3—Insurance

28.301 Policy.

Contractors must carry insurance under the following circumstances:

(a)(1) The Government requires any contractor subject to Cost Accounting Standard (CAS) 416 (48 CFR 9904.416) to obtain insurance, by purchase or self-coverage, for the perils to which the contractor is exposed, except when the—

(i) Government, by providing in the contract in accordance with law, agrees to indemnify the contractor under specified circumstances; or

(ii) Contract specifically relieves the contractor of liability for loss of or damage to Government property.

(2) The Government reserves the right to disapprove the purchase of any insurance coverage not in the Government's interest.

(3) Allowability of the insurance program's cost must be determined in accordance with the criteria in 31.205–19.

(b) Contractors, whether or not their contracts are subject to CAS 416, are required by law and this regulation to provide insurance for certain types of perils (e.g., workers' compensation). Insurance is mandatory also when commingling of property, type of operation, circumstances of ownership, or condition of the contract make it necessary for the protection of the Government. The minimum amounts of insurance required by this regulation (see 28.307–2) may be reduced when a contract is to be performed outside the United States and its outlying areas. When more than one agency is involved, the agency responsible for review and approval of a contractor's insurance program must coordinate with other interested agencies before acting on significant insurance matters.

(c) Contractors awarded nonpersonal services contracts for health care services are required to maintain

medical liability insurance and indemnify the Government for liability producing acts or omissions by the contractor, its employees and agents (see part 37).

28.302 Notice of cancellation or change.

When the Government requires the contractor to provide insurance coverage, the policies must contain an endorsement that any cancellation or material change in the coverage adversely affecting the Government's interest must not be effective unless the insurer or the contractor gives written notice of cancellation or change as required by the contracting officer. When the coverage is provided by self-insurance, the contractor must not change or decrease the coverage without the administrative contracting officer's prior approval (see 28.308(c)).

28.303 Insurance against loss of or damage to Government property.

When the Government requires or approves insurance to cover loss of or damage to Government property (see part 45), it may be provided by specific insurance policies or by inclusion of the risks in the contractor's existing policies. The policies must disclose the Government's interest in the property.

28.304 Risk-pooling arrangements.

Agencies may establish risk-pooling arrangements. These arrangements are designed to use the services of the insurance industry for safety engineering and the handling of claims at minimum cost to the Government. The agency responsible must appoint a single manager or point of contact for each arrangement.

28.305 Overseas workers' compensation and war-hazard insurance.

(a) *Public-work contract*, as used in this subpart, means any contract for a fixed improvement or for any other project, fixed or not, for the public use of the United States or its allies, involving construction, alteration, removal, or repair, including projects or operations under service contracts and projects in connection with the national defense or with war activities, dredging, harbor improvements, dams, roadways, and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project.

(b) The Defense Base Act (42 U.S.C. 1651 *et seq.*) extends the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901) to various classes of employees working outside the United States, including those engaged in performing—

(1) Public-work contracts; or

(2) Contracts approved or financed under the Foreign Assistance Act of 1961 (Pub. L. 87-195) other than contracts—

(i) Approved or financed by the Development Loan Fund (unless the Secretary of Labor, acting upon the recommendation of a department or agency, determines that such contracts should be covered); or

(ii) Exclusively for materials or supplies.

(c) When the Defense Base Act applies to these employees, the benefits of the Longshoremen's and Harbor Workers' Compensation Act are extended through operation of the War Hazards Compensation Act (42 U.S.C. 1701 *et seq.*) to protect the employees against the risk of war hazards (injury, death, capture, or detention). When, by means of an insurance policy or a self-insurance program, the contractor provides the workers' compensation coverage required by the Defense Base Act, the contractor's employees automatically receive war-hazard risk protection.

(d) When the agency head recommends a waiver to the Secretary of Labor, the Secretary may waive the applicability of the Defense Base Act to any contract, subcontract, work location, or classification of employees.

(e) If the Defense Base Act is waived for some or all of the contractor's employees, the benefits of the War Hazards Compensation Act are automatically waived with respect to those employees for whom the Defense Base Act is waived. For those employees, the contractor must provide workers' compensation coverage against the risk of work injury or death and assume liability toward the employees and their beneficiaries for war-hazard injury, death, capture, or detention. The contract must provide either that the costs of this liability or the reasonable costs of insurance against this liability must be allowed as a cost under the contract.

28.306 Insurance under fixed-price contracts.

(a) *General.* Although the Government is not ordinarily concerned with the contractor's insurance coverage if the contract is a fixed-price contract, in special circumstances agencies may specify insurance requirements under fixed-price contracts. Examples of such circumstances include the following:

(1) The contractor is—or has a separate operation—engaged principally in Government work.

(2) Government property is involved.

(3) The work is to be performed on a Government installation.

(4) The Government elects to assume risks for which the contractor ordinarily obtains commercial insurance.

(b) *Work on a Government installation.* (1) When the clause at 52.228-5, Insurance—Work on a Government Installation, is required to be included in a fixed-price contract by 28.310, the coverage specified in 28.307 is the minimum insurance required and must be included in the contract Schedule or elsewhere in the contract. The contracting officer may require additional coverage and higher limits.

(2) When the clause at 52.228-5, Insurance—Work on a Government Installation, is not required by 28.310 but is included because the contracting officer considers it to be in the Government's interest to do so, any of the types of insurance specified in 28.307 may be omitted or the limits may be lowered, if appropriate.

28.307 Insurance under cost-reimbursement contracts.

Cost-reimbursement contracts (and subcontracts, if the terms of the prime contract are extended to the subcontract) ordinarily require the types of insurance listed in 28.307-2, with the minimum amounts of liability indicated. (See 28.308 for self-insurance.)

28.307-1 Group insurance plans.

(a) *Prior approval requirement.* Under cost-reimbursement contracts, before buying insurance under a group insurance plan, the contractor must submit the plan for approval, in accordance with agency regulations. Any change in benefits provided under an approved plan that can reasonably be expected to increase significantly the cost to the Government requires similar approval.

(b) *Premium refunds or credits.* The plan must provide for the Government to share in any premium refunds or credits paid or otherwise allowed to the contractor. In determining the extent of the Government's share in any premium refunds or credits, any special reserves and other refunds to which the contractor may be entitled in the future must be taken into account.

28.307-2 Liability.

(a) *Workers' compensation and employer's liability.* Contractors are required to comply with applicable Federal and State workers' compensation and occupational disease statutes. If occupational diseases are not compensable under those statutes, they must be covered under the employer's liability section of the insurance policy, except when contract operations are so

commingled with a contractor's commercial operations that it would not be practical to require this coverage. Employer's liability coverage of at least \$100,000 must be required, except in States with exclusive or monopolistic funds that do not permit workers' compensation to be written by private carriers. (See 28.305(c) for treatment of contracts subject to the Defense Base Act.)

(b) *General liability.* (1) Require bodily injury liability insurance coverage written on the comprehensive form of policy of at least \$500,000 per occurrence.

(2) Property damage liability insurance must be required only in special circumstances as determined by the agency.

(c) *Automobile liability.* Require automobile liability insurance written on the comprehensive form of policy. The policy must provide for bodily injury and property damage liability covering the operation of all automobiles used in connection with performing the contract. Policies covering automobiles operated in the United States must provide coverage of at least \$200,000 per person and \$500,000 per occurrence for bodily injury and \$20,000 per occurrence for property damage. The amount of liability coverage on other policies must be commensurate with any legal requirements of the locality and sufficient to meet normal and customary claims.

(d) *Aircraft public and passenger liability.* When aircraft are used in connection with performing the contract, require aircraft public and passenger liability insurance. Coverage must be at least \$200,000 per person and \$500,000 per occurrence for bodily injury, other than passenger liability, and \$200,000 per occurrence for property damage. Coverage for passenger liability bodily injury must be at least \$200,000 multiplied by the number of seats or passengers, whichever is greater.

(e) *Vessel liability.* When contract performance involves use of vessels, require, as determined by the agency, vessel collision liability and protection and indemnity liability insurance.

28.308 Self-insurance.

(a) When it is anticipated that 50 percent or more of the self-insurance costs to be incurred at a segment of a contractor's business will be allocable to negotiated Government contracts, and the self-insurance costs at the segment for the contractor's fiscal year are expected to be \$200,000 or more, the contractor must submit, in writing,

information on its proposed self-insurance program to the administrative contracting officer and obtain that official's approval of the program. The submission must be by segment or segments of the contractor's business to which the program applies and must include—

(1) A complete description of the program, including any resolution of the board of directors authorizing and adopting coverage, including types of risks, limits of coverage, assignments of safety and loss control, and legal service responsibilities;

(2) If available, the corporate insurance manual and organization chart detailing fiscal responsibilities for insurance;

(3) The terms regarding insurance coverage for any Government property;

(4) The contractor's latest financial statements;

(5) Any self-insurance feasibility studies or insurance market surveys reporting comparative alternatives;

(6) Loss history, premiums history, and industry ratios;

(7) A formula for establishing reserves, including percentage variations between losses paid and losses reserved;

(8) Claims administration policy, practices, and procedures;

(9) The method of calculating the projected average loss; and

(10) A disclosure of all captive insurance company and reinsurance agreements, including methods of computing cost.

(b) Programs of self-insurance covering a contractor's insurable risks, including the deductible portion of purchased insurance, may be approved when examination of a program indicates that its application is in the Government's interest. Agencies must not approve a program of self-insurance for workers' compensation in a jurisdiction where workers' compensation does not completely cover the employer's liability to employees, unless the contractor—

(1) Maintains an approved program of self-insurance for any employer's liability not so covered; or

(2) Shows that the combined cost to the Government of self-insurance for workers' compensation and commercial insurance for employer's liability will not exceed the cost of covering both kinds of risk by commercial insurance.

(c) Once the administrative contracting officer has approved a program, the contractor must submit to that official for approval any major proposed changes to the program. Any program approval may be withdrawn if a contracting officer finds that either—

(1) Any part of a program does not comply with the requirements of this subpart and/or the criteria at 31.205–19; or

(2) Conditions or situations existing at the time of approval that were a basis for original approval of the program have changed to the extent that a program change is necessary.

(d) To qualify for a self-insurance program, a contractor must demonstrate ability to sustain the potential losses involved. In making the determination, consider the following factors:

(1) The soundness of the contractor's financial condition, including available lines of credit.

(2) The geographic dispersion of assets, so that the potential of a single loss depleting all the assets is unlikely.

(3) The history of previous losses, including frequency of occurrence and the financial impact of each loss.

(4) The type and magnitude of risk, such as minor coverage for the deductible portion of purchased insurance or major coverage for hazardous risks.

(5) The contractor's compliance with Federal and State laws and regulations.

(e) Agencies must not approve a program of self-insurance for catastrophic risks (e.g., see part 50 for special procedures for unusually hazardous or nuclear risks). Should performance of Government contracts create the risk of catastrophic losses, the Government may, to the extent authorized by law, agree to indemnify the contractor or recognize an appropriate share of premiums for purchased insurance, or both.

(f) Self-insurance programs to protect a contractor against the costs of correcting its own defects in materials or workmanship must not be approved. For these purposes, normal rework estimates and warranty costs will not be considered self-insurance.

28.309 Contract clauses for workers' compensation insurance.

(a) Insert the clause at 52.228–3, Workers' Compensation Insurance (Defense Base Act), in solicitations and contracts, including those for commercial services, but excluding those for commercial products, when the Defense Base Act applies (see 28.305) and the—

(1) Contract will be a public-work contract performed outside the United States; or

(2) Contract will be approved or financed under the Foreign Assistance Act of 1961 (Pub. L. 87–195) and is not excluded by 28.305(b)(2).

(b) Insert the clause at 52.228–4, Workers' Compensation and War—

Hazard Insurance Overseas, in solicitations and contracts, other than those for commercial products or commercial services, when the contract will be a public-work contract performed outside the United States and the Secretary of Labor waives the applicability of the Defense Base Act (see 28.305(d)).

28.310 Contract clause for work on a Government installation.

(a) Insert the clause at 52.228–5, Insurance—Work on a Government Installation, in solicitations and contracts, other than those commercial products or commercial services, if—

(1) A fixed-price contract is contemplated;

(2) The value of the acquisition is expected to exceed the simplified acquisition threshold; and

(3) The contract will require work on a Government installation, unless—

(i) Only a small amount of work is required on the Government installation (e.g., a few brief visits per month); or

(ii) All work on the Government installation will be performed outside the United States and its outlying areas.

(b) Insert the clause at 52.228–5 in solicitations and contracts described in paragraph (a)(3)(i) and (ii) of this section only if it is in the Government's interest to do so.

28.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.

28.311–1 Contract clause.

When a cost reimbursement contract is contemplated and in accordance with agency acquisition regulations, insert the clause at 52.228–7, Insurance—Liability to Third Persons, in solicitations and contracts, other than those for commercial products, commercial services, construction, and architect-engineer services.

28.311–2 Agency solicitation provisions and contract clauses.

Agencies may prescribe their own solicitation provisions and contract clauses to implement the basic policies contained in this subpart 28.3.

28.312 Contract clause for insurance of leased motor vehicles.

Insert the clause at 52.228–8, Liability and Insurance—Leased Motor Vehicles, in solicitations and contracts, including those for commercial products (other than commercially available off-the-shelf items) and commercial services, for the leasing of motor vehicles (see part 8).

28.313 Contract clauses for insurance of transportation or transportation-related services.

(a) Insert the clause at 52.228–9, Cargo Insurance, in solicitations and contracts, including those for commercial services but excluding those for commercial products, for transportation or for transportation-related services, except when freight is shipped under rates subject to released or declared value.

(b) Insert a clause substantially the same as that at 52.228–10, Vehicular and General Public Liability Insurance, in solicitations and contracts, including those for commercial services, but excluding those for commercial products, for transportation or for transportation-related services when the contracting officer determines that vehicular liability or general public liability insurance required by law is not sufficient.

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

Sec.

36.000 Scope of part.

36.001 Definitions.

36.002 Policy.

Subpart 36.1—Pre-Solicitation

36.101 Construction.

36.101–1 Acquisition strategy.

36.101–2 Use of two-phase design-build selection procedures.

36.101–3 Scope of work.

36.101–4 Advance notices and solicitations.

36.101–5 Liquidated damages.

36.101–6 Government cost estimate.

36.101–7 Clauses.

36.102 Architect-Engineer Services.

36.102–1 Public announcement.

36.102–2 Contracting procedures and competition.

36.102–3 Government cost estimate.

36.102–4 Clauses.

Subpart 36.2—Evaluation and Award

36.201 Construction.

36.201–1 Limitations.

36.201–2 Standard and optional forms.

36.202 Architect and engineering services.

36.202–1 Evaluation.

36.202–2 Selection authority.

36.202–3 Award.

36.202–4 Short selection process for contracts not to exceed the simplified acquisition threshold.

36.202–5 Standard and optional forms.

Subpart 36.3—Postaward

36.301 Responsibilities of contracting officers.

Authority: 41 U.S.C. 1121(b); 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

36.000 Scope.

This part prescribes policies and procedures for construction and architect-engineer services. It also

includes requirements for using certain clauses and standard forms that apply to contracts for dismantling, demolition, or removal of improvements.

36.001 Definition.

As used in this part—

Firm as it relates to architect-engineer services, means any individual, partnership, corporation, association, or other legal entity permitted by law to practice the professions of architecture or engineering.

36.002 Policy.

(a) Agencies must require the use of a project labor agreement for Federal construction projects with a total estimated construction cost at or above \$35 million, unless an exception applies (see part 22).

(b) Conduct market research for Federal construction contracts valued at or above \$35 million, and ensure that the market research procedures (see subpart 7.2) involve a current and proactive examination of the market conditions in the project area to determine national, regional, and local entity interest in participating on a project that requires a project labor agreement, and to understand the availability of unions, and unionized and non-unionized contractors. Contracting officers may coordinate with agency labor advisors, as appropriate.

(c) Use one of the following acquisition procedures when contracting for the design and construction of a public building, facility, or work:

(1) Design-bid-build established under 40 U.S.C. chapter 11, Selection of Architects and Engineers.

(2) Two-phase design-build selection procedures authorized by 10 U.S.C. 3241 or 41 U.S.C. 3309.

(3) Another acquisition procedure authorized by law.

(d) Agencies must implement high-performance sustainable building design, construction, renovation, repair, commissioning, operation and maintenance, management, and deconstruction practices to ensure that—

(1) All new construction and modernization projects greater than 25,000 gross square feet are designed, constructed, and maintained to meet or exceed Government sustainable design and operations principles in accordance with the Council on Environmental Quality's Guiding Principles for Sustainable Federal Buildings and Associated Instructions (Guiding

Principles) (available at https://www.sustainability.gov/pdfs/guiding_principles_for_sustainable_federal_buildings.pdf);

(2) All renovation projects of existing Federal buildings/facilities must use, to the greatest extent possible, Government sustainable design and operations principles for existing buildings in accordance with the Guiding Principles; and

(3) Rehabilitation of Federally-owned historic buildings utilizes best practices and technologies in retrofitting to promote long-term viability of the buildings.

Subpart 36.1—Pre-Solicitation

36.101 Construction.

36.101-1 Acquisition Strategy.

(a) Only use sealed bid procedures (see part 14) for a construction contract if the conditions in part 6 for use of sealed bidding are met. However, sealed bidding should not be used if the contract will be performed outside the United States and its outlying areas.

(b) The following must be considered when determining the contract type and pricing structure and must be addressed in the acquisition plan.

(1) Generally, firm-fixed-price contracts must be used to acquire construction. They may be priced—

(i) On a lump-sum basis (when a lump sum is paid for the total work or defined parts of the work);

(ii) On a unit-price basis (when a unit price is paid for a specified quantity of work units); or

(iii) Using a combination of the two methods.

(2) Lump-sum pricing must be used in preference to unit pricing except when—

(i) Large quantities of work such as grading, paving, building outside utilities, or site preparation are involved;

(ii) Quantities of work, such as excavation, cannot be estimated with sufficient confidence to permit a lump-sum offer without a substantial contingency;

(iii) Estimated quantities of work required may change significantly during construction; or

(iv) Offerors would have to expend unusual effort to develop adequate estimates.

(3) Fixed-price contracts with economic price adjustment may be used if such a provision is customary in contracts for the type of work being acquired, or when omission of an adjustment provision would preclude a significant number of firms from

submitting offers or would result in offerors including unwarranted contingencies in proposed prices.

(4) In view of potential labor and administrative problems, cost-plus-fixed-fee, price-incentive, or other types of contracts with cost variation or cost adjustment features must not be permitted concurrently, at the same work site, with firm-fixed-price, lump sum, or unit price contracts except with the prior approval of the head of the contracting activity.

(c) Do not use reverse auctions for certain design and construction services. See 17.802-2.

(d) For construction that is a commercial service, see also part 12.

36.101-2 Use of two-phase design-build selection procedures.

(a) As authorized by 10 U.S.C. 3241 and 41 U.S.C. 3309, the two-phase design-build selection procedures may be used when the contracting officer determines in writing that this method is appropriate, based on the following:

(1) Three or more offers are anticipated.

(2) Design work must be performed by offerors before developing price or cost proposals, and a substantial expense will be incurred in preparing offers.

(3) That the contracting officer has considered:

(i) The extent to which the project requirements have been adequately defined.

(ii) The time constraints for delivery of the project.

(iii) The capability and experience of potential contractors.

(iv) The suitability of the project for use of the two-phase selection method.

(v) The capability of the agency to manage the two-phase selection process.

(vi) Other criteria established by the agency.

(b) Phase-one of the solicitation(s) must include—

(1) The scope of work;

(2) The phase-one evaluation factors, which must include—

(i) Technical approach (excluding detailed design or technical information);

(ii) Technical qualifications, such as—

(A) Specialized experience and technical competence;

(B) Capability to perform;

(C) Past performance of the offeror's team (including the architect-engineer and construction members); and

(iii) Other appropriate factors (excluding cost or price related factors);

(3) Phase-two evaluation factors (see paragraph (d) of this section); and

(4) A statement of the maximum number of offerors that will be selected

to submit phase-two proposals. Unless the contracting officer determines in writing that a number greater than five is in the Government's interest, no more than five offerors can be selected for phase-two proposals.

(c) After evaluating phase-one proposals in accordance with the solicitation, select the most highly qualified offerors and request those offerors submit phase-two proposals.

(d) Phase-two of the solicitation(s) must—

(1) Be prepared and evaluated in accordance with part 15;

(2) Include phase-two evaluation factors, such as design concepts and proposed technical solutions; and

(3) Require submission of separate technical and price proposals.

36.101-3 Scope of work.

(a) A scope of work must be included in the solicitation, and must:

(1) Define the project; and

(2) Provide prospective offerors with sufficient information regarding the Government's requirements.

(b) The scope of work may include criteria and preliminary design, budget parameters, and schedule or delivery requirements.

(c) If the agency contracts for development of the scope of work, it must use the procedures in sections 36.102 and 36.202.

36.101-4 Advance notices and solicitations.

As required by 15 U.S.C. 644(w), when the contracting officer anticipates the award of a contract to a small business pursuant to a solicitation for construction, transmit to the Governmentwide point of entry (GPE) a solicitation notice (see part 5). The solicitation notice must include information regarding the agency's definitization of equitable adjustments for change orders under construction contracts, including:

(a) A description of agency policies or procedures, in addition to that outlined in part 43, that apply to definitization of equitable adjustments for change orders under construction contracts.

(b) Data on the agency's past performance, for the prior 3 fiscal years, regarding the time required to definitize equitable adjustments for change orders under construction contracts (see part 43). Agencies must provide the data shown in the following table, or provide the address of an agency-specific, publicly accessible website containing this information.

TABLE 1 TO PARAGRAPH (B)

Time to definitize after receipt of an adequate change order definitization proposal under construction contracts	Number of change order proposals definitized under construction contracts
30 days or less. 31 to 60 days. 61 to 90 days. 91 to 180 days. 181 to 365 days. 366 or more days. After completion of contract performance via a contract modification addressing all undefinitized equitable adjustments received during contract performance.	

36.101–5 Liquidated damages.

During acquisition planning evaluate the need for liquidated damages in a construction contract in accordance with part 11 and agency policies.

36.101–6 Government cost estimate.

(a) An independent Government estimate (IGE) of the cost of construction must be prepared for any action expected to exceed the simplified

acquisition threshold. The IGE must be prepared based on a detailed analysis of the requirements.

(b) The IGE must be given to the contracting officer before receipt of any proposals. When two-step sealed bidding is used, the independent Government estimate must be prepared when the contract requirements are definitized.

36.101–7 Clauses.

(a) Insert the clauses in Table 1 in solicitations and contracts if—
(1) The acquisition value exceeds the simplified acquisition threshold; and
(2) A fixed-price contract for construction or dismantling, demolition, or removal of improvements is contemplated, including those for construction that is a commercial service.

TABLE 1 TO PARAGRAPH (A)

Clause	Title
52.236–2	Differing Site Conditions.
52.236–3	Site Investigation and Conditions Affecting the Work.
52.236–6	Superintendence by the Contractor.
52.236–8	Other Contracts.
52.236–9	Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements.
52.236–10	Operations and Storage Areas.
52.236–12	Cleaning Up.

(b) Insert the clause at 52.236–5, Material and Workmanship, in solicitations and contracts for construction, including those for construction that is a commercial service.

(c) Insert the clause at 52.236–7, Permits and Responsibilities, in solicitations and contracts when—

(1) A fixed-price contract for construction, or dismantling, demolition, or removal of improvements contract is contemplated, including those for construction that is a commercial service; or

(2) A cost-reimbursement construction contract is contemplated.

(d) Insert the clause at 52.236–11, Use and Possession Prior to Completion, in solicitations and contracts, when a fixed-price construction contract is contemplated, including those for construction that is a commercial service, and the contract award amount is expected to exceed the simplified acquisition threshold. This clause is optional if the contract award amount is expected to be at or below the simplified acquisition threshold.

(e)(1) Insert the clause at 52.236–13, Accident Prevention, in solicitations and contracts, when a fixed-price contract for construction or dismantling, demolition, or removal of improvements is contemplated, including those for construction that is a commercial service, and the contract amount is expected to exceed the simplified acquisition threshold. This clause is optional when the contract amount is expected to be at or below the simplified acquisition threshold.

(2) The clause must be used with its Alternate I when a contract for services will involve:

(i) Work of a long duration or hazardous nature; or

(ii) Performance on a Government facility that on the advice of technical representatives involves hazardous materials or operations that might endanger the safety of the public and/or Government personnel or property.

(f)(1) Insert the clause at 52.236–14, Availability and Use of Utility Services, in solicitations and contracts, when a fixed-price contract for construction or dismantling, demolition, or removal of

improvements contract is contemplated, including those for construction that is a commercial service, the contract is to be performed on Government sites, and the contracting officer decides that—

(i) The existing utility system(s) is adequate for the needs of both the Government and the contractor; and

(ii) Furnishing it is in the Government's interest.

(2) When this clause is used, list the available utilities in the contract.

(g)(1) Insert the clause at 52.236–15, Schedules for Construction Contracts, in solicitations and contracts, when a fixed-price construction contract is contemplated, including those for construction that is a commercial service, the contract amount is expected to exceed the simplified acquisition threshold, and—

(i) The period of actual work performance exceeds 60 days; or

(ii) When work performance is expected to last less than 60 days and an unusual situation exists that warrants imposition of the requirements.

(2) Contracting officers should not insert the clause in paragraph (g)(1) of

this section, in the same contract with clauses covering other management approaches for ensuring that a contractor makes adequate progress.

(h) The contracting officer may insert the clause at 52.236–16, Quantity Surveys, in solicitations and contracts, when a fixed-price construction contract providing for unit pricing of items and for payment based on quantity surveys is contemplated, including those for construction that is a commercial service. The clause must be used with its Alternate I if it is determined at a level above that of the contracting officer that—

(1) It is impracticable for Government personnel to perform the original and final surveys; and

(2) The Government wishes the contractor to perform these surveys.

(i) Insert the clause at 52.236–17, Layout of Work, in solicitations and contracts, when a fixed-price construction contract is contemplated, including those for construction that is a commercial service, and use of this clause is appropriate due to a need for accurate work layout and for siting verification during work performance.

(j) Insert the clause at 52.236–18, Work Oversight in Cost-Reimbursement Construction Contracts, in solicitations and contracts, when a cost-reimbursement construction contract is contemplated. Do not include this clause in contracts for construction that is a commercial service.

(k)(1) Insert the clause at 52.236–21, Specifications and Drawings for Construction, in solicitations and contracts, when a fixed-price contract for construction or dismantling, demolition, or removal of improvements contract is contemplated, including those for construction that is a commercial service, and the contract amount is expected to exceed the simplified acquisition threshold.

(2) Insert the clause in paragraph (k)(1) of this section in solicitations and contracts, when a fixed-price contract for construction or dismantling, demolition, or removal of improvements contract is contemplated, including those for construction that is a commercial service, and the contract amount is expected to be at or below the simplified acquisition threshold.

(3) When the Government needs record drawings—

(i) Use the clause with its Alternate I, if reproducible shop drawings are needed, or

(ii) Use the clause with its Alternate II, if reproducible shop drawings are not needed.

36.102 Architect-Engineer Services

36.102–1 Public announcement.

The Government must publicly announce all requirements for architect-engineer services (see 40 U.S.C. 1101 *et seq.*).

36.102–2 Contracting procedures and competition.

(a) Acquire architect-engineer services by negotiation and select sources in accordance with this section.

(b) The procedures of this section are competitive procedures (see part 6).

(c) Agencies must encourage firms to submit annually an updated statement of qualifications and performance data on a Standard Form (SF) 330, Part II—General Qualifications.

(d)(1) Surveying is considered to be an architectural and engineering service and must be procured pursuant to sections 36.102 and 36.202 from registered surveyors or architects and engineers. Mapping associated with the research, planning, development, design, construction, or alteration of real property is considered to be an architectural and engineering service and must be procured pursuant to sections 36.102 and 36.202.

(2) Mapping services that are not connected to traditionally understood or accepted architectural and engineering activities, are not incidental to such architectural and engineering activities or have not in themselves traditionally been considered architectural and engineering services must be procured pursuant to provisions in parts 8, 13, 14, and 15.

36.102–3 Government cost estimate.

(a) An independent Government estimate (IGE) of the cost of architect-engineer services must be prepared based on a detailed analysis of the requirements.

(b) The IGE must be given to the contracting officer before beginning negotiations for any action expected to exceed the simplified acquisition threshold.

36.102–4 Clauses.

(a) Do not include the clauses in paragraphs (b) through (e) of this section in solicitations or contracts for commercial products or commercial services.

(b) Insert the clause at 52.236–22, Design Within Funding Limitations, in fixed-price architect-engineer contracts except when—

(1) The head of the contracting activity determines in writing that cost limitations are secondary to performance considerations and

additional project funding can be expected;

(2) The design is for a standard structure and is not intended for a specific location; or

(3) There is little or no design effort involved.

(c) Insert the clause at 52.236–23, Responsibility of the Architect-Engineer Contractor, in fixed-price architect-engineer contracts.

(d) Insert the clause at 52.236–24, Work Oversight in Architect-Engineer Contracts, in all architect-engineer contracts.

(e) Insert the clause at 52.236–25, Requirements for Registration of Designers, in architect-engineer contracts, except that it may be omitted when the design will be performed—

(1) Outside the United States and its outlying areas; or

(2) In a State or outlying area of the United States that does not have registration requirements for the particular field involved.

Subpart 36.2—Evaluation and Award

36.201 Construction.

36.201–1 Limitations.

Do not award a contract for construction—

(a) At a cost to the Government—

(1) In excess of statutory cost limitations, unless applicable limitations can be and are waived in writing for the particular contract; or

(2) Which, with allowances for Government-imposed contingencies and overhead, exceeds the statutory authorization.

(b) To the firm that designed the project or to the firm's subsidiaries or affiliates, unless approved by the agency head.

36.201–2 Standard and optional forms.

(a) Standard Form 1442, Solicitation, Offer, and Award (Construction, Alteration, or Repair), must be used to solicit and submit offers, and award construction or dismantling, demolition, or removal of improvements contracts expected to exceed the simplified acquisition threshold, and may be used for contracts at or below the simplified acquisition threshold. In all sealed bid solicitations, or when the Government otherwise requires a noncancellable offer acceptance period, insert in the blank provided in Block 13D the number of calendar days that the offer must be available for acceptance after the date offers are due.

(b) Optional Form 347, Order for Supplies or Services, may be used for construction or dismantling, demolition, or removal of improvements contracts

that are at or below the simplified acquisition threshold; provided, that the contracting officer includes the clauses required (see section 36.101–7) in the simplified acquisitions (see part 13).

(c) Contracting officers may use Optional Form 1419, Abstract of Offers—Construction, and Optional Form 1419A, Abstract of Offers—Construction, Continuation Sheet, or the automated equivalents to record offers submitted in response to a sealed bid solicitation (see part 14) and may also use them to record offers submitted in response to negotiated solicitations.

36.202 Architect and engineering services.

36.202–1 Evaluation.

(a)(1) Agencies must provide for one or more permanent or ad hoc architect-engineer evaluation boards—

(i) Which may include preselection boards when authorized by agency regulations;

(ii) Composed of members who—

(A) Collectively, have experience in architecture, engineering, construction, and Government and related acquisition matters;

(B) Are appointed from among highly qualified professional employees of the agency or other agencies; and

(C) If authorized by agency procedure, are private practitioners of architecture, engineering, or related professions.

(2) One Government member of each board must be designated as the chairperson.

(b) Under the general direction of the head of the contracting activity, an evaluation board must perform the following functions:

(1) For each proposed project, evaluate the firms' Standard Form (SF) 330, Part II—General Qualifications, together, if necessary, with data submitted on the SF 330, Part I—Contract-Specific Qualifications, either already on file with the agency or submitted regarding the proposed project.

(2) Conduct discussions with at least 3 firms to consider anticipated concepts and compare alternative methods for furnishing services.

(3) Prepare a selection report for the agency head or other designated selection authority recommending, in order of preference, at least three firms that are considered to be the most highly qualified to perform the required services. The report must include a description of the discussions and evaluation conducted by the board to allow the selection authority to review the considerations upon which the recommendations are based.

36.202–2 Selection authority.

(a) The final selection decision must be made by the agency head or a designated selection authority.

(b) The final selection must be made by reviewing and considering the selection report and advice of technical and staff representatives.

(1) The final selection must be a listing, in order of preference, of the firms considered most highly qualified to perform the work.

(2) The selection authority must not add firms to the selection report.

(3) If the firm listed as the most preferred is not the firm recommended as the most highly qualified, the selection authority must provide a written explanation of the reason for the preference for inclusion in the contract file.

(4) If the firms recommended in the report are not deemed to be qualified or the report is considered inadequate for any reason, the selection authority must record the reasons and return the report for appropriate revision.

(c) All firms on the final selection list are considered selected firms with which the contracting officer may negotiate.

36.202–3 Award.

(a) Negotiate a contract with the most highly qualified firm selected by the selection authority.

(b)(1) If the contracting officer is unable to negotiate a fair and reasonable contract with the firm selected by the selection authority—

(i) Formally terminate negotiations;

(ii) Proceed to negotiate a fair and reasonable contract with the next most qualified firm; and

(iii) Continue the process until a fair and reasonable agreement is reached.

(2) If unable to reach a fair and reasonable agreement after negotiating with the firms on the final selection list, the selection authority must select additional firms in order of their competence and qualification for the contracting officer to continue negotiations until an agreement is reached.

(3) If unable to reach a fair and reasonable agreement after negotiating with all firms selected by the selection authority, reject all submissions and reissue the solicitation.

(c) During negotiations, the contracting officer is permitted to identify a specialized task and disclose the associated cost breakdown figures in the Government estimate, but only to the extent deemed necessary to arrive at a fair and reasonable price.

(d) Only award contracts for architect-engineer services to firms permitted by

law to practice the professions of architecture or engineering.

(e) An architect-engineer contract must not be awarded to a firm during the period in which any of its principals or associates are participating as members of the awarding agency's evaluation board.

(f) Debriefings of successful and unsuccessful firms may be held after final selection has taken place and will be conducted, to the extent practicable, in accordance with 15.301.

36.202–4 Short selection process for contracts not to exceed the simplified acquisition threshold.

When authorized by the agency, either or both of the short processes described in this subsection may be used to select firms for contracts not expected to exceed the simplified acquisition threshold. Otherwise, the procedures prescribed in 36.202–1, 36.202–2, and 36.202–3 must be followed.

(a) Selection by the board. The board must review and evaluate architect-engineer firms in accordance with 36.202–1, except that the selection report serves as the final selection list and must be provided directly to the contracting officer. The report serves as the authorization for the contracting officer to commence negotiations in accordance with 36.202–3.

(b) Selection by the chairperson of the board. When the board decides that formal action by the board is not necessary in connection with a particular selection, the following procedures must be followed:

(1) The chairperson of the board must perform the functions required in 36.202–1(b).

(2) The agency head or designated selection authority must review the report and approve it or return it to the chairperson for appropriate revision.

(3) Upon receipt of an approved report, the chairperson of the board must provide a copy of the report to the contracting officer which will serve as the authorization for the contracting officer to commence negotiations in accordance with 36.202–3.

36.202–5 Standard and optional forms.

(a) Use Standard Form (SF) 252, Architect-Engineer Contract, to award fixed-price contracts for architect-engineer services when the services will be performed in the United States or its outlying areas.

(b) The firm's qualifications as listed in the SF 330, Part II—General Qualifications as well as the SF 330, Part I—Contract-Specific Qualifications, must be used to evaluate firms before

awarding a contract for architect-engineer services:

(1) Use the SF 330, Part I—Contract-Specific Qualifications, to obtain information from an architect-engineer firm about its qualifications for a specific contract when the contract amount is expected to exceed the simplified acquisition threshold. Part I may be used when the contract amount is expected to be at or below the simplified acquisition threshold, if the contracting officer determines that its use is appropriate.

(2) Use the SF 330, Part II—General Qualifications, to obtain information from an architect-engineer firm about its general professional qualifications.

Subpart 36.3—Postaward

36.301 Responsibilities of contracting officers.

See part 42 for performing general contract administration functions. For construction and architect-engineer services there are additional functions including:

(a) *Performance and deliverables.* (1) Contracting officers may, in writing, request the removal of any contractor employee deemed incompetent, careless, or otherwise objectionable (see 52.236–5).

(2) Provide the contractor with a list of work remaining to be performed or corrected for any portions of the work the Government intends to possess or use, prior to taking possession or using said work (see 52.236–11).

(3) Regarding schedules for construction contracts:

(i) The contracting officer may withhold approval of progress payments if the contractor fails to submit the required schedule.

(ii)(A) Determine whether the work is progressing with sufficient diligence to meet the contract's specified completion time; and

(B) The contracting officer may terminate the contractor's right to proceed with the work, or any separable part of it, per the default terms of the contract if the contractor fails to recover lost time (see 52.236–15).

(b) *Modifications.* (1) Upon receiving written notice of differing site conditions,-

(i) Promptly investigate the site; and

(ii) Negotiate an equitable adjustment if the conditions materially differ, leading to an increase or decrease in the contractor's costs or performance time. Requests for an equitable adjustment will be allowed only if prior written notice is received and submitted before final payment (see 52.236–2).

(2) If repairs are not made promptly to damaged existing vegetation,

structures, equipment, utilities, or improvements; contracting officers may have the necessary work performed and charge the cost to the contractor (see 52.236–9).

(3) If stakes and marks are destroyed by the contractor, the contracting officer may replace them and deduct the cost from due or future payments (see 52.236–17).

(4)(i) Regarding specifications and drawings for construction—

(A) Make a written determination in the case of a discrepancy in the figures, in the drawings, or in the specifications; and

(B) Approve or disapprove shop drawings, with reasons for disapproval if applicable.

(ii) If the contracting officer approves a shop drawing variation from the contract requirements that is minor or does not impact price or performance time, a contract modification will not be issued. For all other approved variations, issue a contract modification (see 52.236–21).

(5) If a construction contract needs a modification due to architect-engineer design errors—

(i) Assess the architect-engineer's liability, with the advice of technical personnel and legal counsel;

(ii) Seek cost recovery if the amount exceeds administrative costs or if it benefits the Government; and

(iii) Include in the contract file a written statement detailing the recovery decision (see 52.236–23).

(c) *Compliance and reporting.*

(1) Ensure compliance with the labor standards requirement of the contract (e.g., payroll reviews, on-site inspections, and employee interviews to determine compliance).

(2) Contracting officers should advise contractors to promptly execute and return any required payment and performance bonds to ensure a notice to proceed is issued to commence work in a timely manner (see part 28).

(3) If appropriate, give written consent for the contractor to abandon, without removal, temporary buildings and utilities (see 52.236–10).

(4) If the contracting officer becomes aware of noncompliance with requirements or conditions that endanger public or Government personnel health or safety, the contracting officer—

(i) Must notify the contractor orally, then in writing, requesting immediate corrective action; and

(ii) May issue a stop-work order if the contractor fails to promptly take satisfactory corrective action (see 52.236–13).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 2. The authority citation for 48 CFR Part 52 continues to read as follows:

Authority: 41 U.S.C. 1121(b); 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 42 U.S.C. 2473(c).

■ 3. Revise sections 52.214–3 through 52.214–7 to read as follows:

52.214–3 Amendments to Invitations for Bids.

As prescribed in 14.207(b)(1), insert the following provision:

Amendments to Invitations for Bids (DATE)

(a) If this solicitation is amended, then all terms and conditions which are not modified remain unchanged.

(b)(1) Bidders must acknowledge receipt of any amendment to this solicitation—

(i) By signing and returning the amendment;

(ii) By identifying the amendment number and date in space provided for this purpose on the form for submitting a bid;

(iii) By letter; or

(iv) By email, if email bids are authorized in the solicitation.

(2) The Government must receive the acknowledgement by the time and at the place specified for receipt of bids.

(End of provision)

52.214–4 False Statements in Bids.

As prescribed in 14.207(b)(2), insert the following provision:

False Statements in Bids (DATE)

Bidders must provide full, accurate, and complete information as required by this solicitation and its attachments. The penalty for making false statements in bids is prescribed in 18 U.S.C. 1001.

(End of provision)

52.214–5 Submission of Bids.

As prescribed in 14.207(b)(3), insert the following provision:

Submission of Bids (DATE)

(a) Unless submitted by electronic means, bids and bid modifications must be submitted in sealed envelopes or packages—

(1) Addressed to the office specified in the solicitation; and

(2) Showing the time and date specified for receipt, the solicitation number, and the name and address of the bidder.

(b) Bidders using commercial carrier services must ensure that the bid is addressed and marked on the outermost envelope or wrapper as prescribed in subparagraphs (a)(1) and (2) of this provision when delivered to the office specified in the solicitation.

(c) Bids submitted by electronic commerce will be considered only if the electronic commerce method was specifically stipulated or permitted by the solicitation.

(End of provision)

52.214–6 Explanation to Prospective Bidders.

As prescribed in 14.207(b)(4), insert the following provision:

Explanation to Prospective Bidders (DATE)

Any prospective bidder desiring an explanation or interpretation of the solicitation, drawings, specifications, etc., must request it in writing soon enough to allow a reply to reach all prospective bidders before the submission of their bids. Oral explanations or instructions given before the award of a contract will not be binding. Any information given a prospective bidder concerning a solicitation will be furnished promptly to all other prospective bidders as an amendment to the solicitation, if that information is necessary in submitting bids or if the lack of it would be prejudicial to other prospective bidders.

(End of provision)

52.214–7 Late Submissions, Modifications, and Withdrawals of Bids.

As prescribed in 14.207(b)(5), insert the following provision:

Late Submissions, Modifications, and Withdrawals of Bids (DATE)

(a) *Definitions.*

“Acceptable evidence” means a verifiable record, either physical or electronic, that provides a clear and authenticated account of the exact time a submission was received by the Government, which includes:

(1) The time/date stamp of that installation on the bid wrapper;

(2) Other documentary evidence of receipt maintained by the installation (e.g., receiving reports, mailroom logs, or internal logs);

(3) Oral testimony or statements of Government personnel;

(4) Electronic metadata, electronic audit trails, server gateway logs, or delivery receipts generated by the bidder’s or the Government’s email system.

“Government control” means the point at which a bid has been delivered, either physically or electronically, into the custody of the Government, such that the bidder can no longer modify or exercise dominion over the submission.

(b) Bidders are responsible for submitting bids, and any modifications or withdrawals, so as to reach the Government office designated in the invitation for bids (IFB) by the time specified in the IFB. If no time is specified in the IFB, the time for receipt is 4:30 p.m., local time, for the designated Government office on the date that bids are due.

(c)(1) Any bid, modification, or withdrawal received at the Government office designated in the IFB after the exact time specified for receipt of bids is “late” and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late bid is in the best interests of the Government and would not unduly delay the acquisition; and—

(i) If it was transmitted through an electronic commerce method authorized by the IFB, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of bids; or

(ii) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of bids and was under the Government’s control prior to the time set for receipt of bids.

(2) However, a late modification of an otherwise successful bid that makes its terms more favorable to the Government, will be considered at any time it is received and may be accepted.

(d) If an emergency or unanticipated event (e.g., weather emergencies, government-wide or agency-specific network outages, server crashes, or cybersecurity-related blocking of authorized file types) interrupts normal Government processes so that bids cannot be received at the Government office designated for receipt of bids by the exact time specified in the IFB and urgent Government requirements preclude amendment of the IFB, the time specified for receipt of bids will be deemed to be extended to the same time of day specified in the solicitation on the first work day on which normal Government processes resume.

(e) Bids may be withdrawn by written notice received at any time before the exact time set for receipt of bids. A bid may be withdrawn in person by a bidder or its authorized representative if, before the exact time set for receipt of bids, the identity of the person requesting withdrawal is established and the person signs a receipt for the bid.

(End of provision)

■ 4. Revise section 52.214–10 to read as follows:

52.214–10 Contract Award—Sealed Bidding.

As prescribed in 14.207(c), insert the following provision:

Contract Award—Sealed Bidding (DATE)

(a) The Government will evaluate bids in response to this solicitation without discussions and will award a contract to the responsible bidder whose bid, conforming to the solicitation, will be most advantageous to the Government considering only price and the price-related factors specified elsewhere in the solicitation.

(b) The Government may—

(1) Reject any or all bids;

(2) Accept other than the lowest bid; and

(3) Waive informalities or minor irregularities in bids received.

(c) The Government may accept any item or group of items of a bid, unless the bidder qualifies the bid by specific limitations. Unless otherwise provided in the Schedule, bids may be submitted for quantities less than those specified. The Government reserves the right to make an award on any item for a quantity less than the quantity offered, at the unit prices offered, unless the bidder specifies otherwise in the bid.

(d) A written award or acceptance of a bid mailed or otherwise furnished to the successful bidder within the time for acceptance specified in the bid will result in a binding contract without further action by either party.

(e) The Government may reject a bid as nonresponsive if the prices bid are materially unbalanced between line items or subline items. A bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the Government even though it may be the low evaluated bid, or if it is so unbalanced as to be tantamount to allowing an advance payment.

(End of provision)

■ 5. Revise section 52.214–12 to read as follows:

52.214–12 Preparation of Bids.

As prescribed in 14.207(d), insert the following provision:

Preparation of Bids (DATE)

(a) Bidders are expected to examine the drawings, specifications, Schedule, and all instructions. Failure to do so will be at the bidder’s risk.

(b) Each bidder must furnish the information required by the solicitation. The bidder must sign the bid and print or type its name on the Schedule and each continuation sheet on which it makes an entry. Erasures or other changes must be initialed by the person signing the bid. Bids signed by an agent must be accompanied by evidence of that agent’s authority, unless that evidence has been previously furnished to the issuing office.

(c)(1) For each item offered, bidders must—

(i) Show the unit price, including, unless otherwise specified, packaging, packing, and preservation; and

(ii) Enter the extended price for the quantity of each item offered in the *Amount* column of the Schedule.

(2) In case of discrepancy between a unit price and an extended price, the unit price will be presumed to be correct, subject, however, to correction to the same extent and in the same manner as any other mistake.

(d) Bids for supplies or services other than those specified will not be considered unless authorized by the solicitation.

(e) Bidders must state a definite time for delivery of supplies or for performance of services, unless otherwise specified in the solicitation.

(f) Time, if stated as a number of days, will include Saturdays, Sundays, and holidays.

(End of provision)

■ 6. Revise sections 52.214–14 through 52.214–16 to read as follows:

52.214–14 Place of Performance—Sealed Bidding.

As prescribed in 14.207(e), insert the following provision:

Place of Performance—Sealed Bidding (DATE)

(a) The bidder, in the performance of any contract resulting from this solicitation, ☐

intends, ☐ does not intend [*check applicable box*] to use one or more plants or facilities located at a different address from the address of the bidder as indicated in this bid.

(b) If the bidder checks *intends* in paragraph (a) of this provision, it must insert in the spaces provided below the required information:

Place of performance (street address, city, county, state, zip code)	Name and address of owner and operator of the plant or facility if other than bidder

(End of provision)

52.214–15 Period for Acceptance of Bids.

As prescribed in 14.207(f), insert the following provision:

Period for Acceptance of Bids (DATE)

In compliance with the solicitation, the bidder agrees, if this bid is accepted within _____ calendar days (60 calendar days unless a different period is inserted by the bidder) from the date specified in the solicitation for receipt of bids, to furnish any or all items upon which prices are bid at the price set opposite each item, delivered at the designated point(s), within the time specified in the Schedule.

(End of provision)

52.214–16 Minimum Bid Acceptance Period.

As prescribed in 14.207(g), insert the following provision:

Minimum Bid Acceptance Period (DATE)

(a) *Acceptance period*, as used in this provision, means the number of calendar days available to the Government for awarding a contract from the date specified in this solicitation for receipt of bids.

(b) This provision supersedes any language pertaining to the acceptance period that may appear elsewhere in this solicitation.

(c) The Government requires a minimum acceptance period of _____ calendar days [*the Contracting Officer will insert the number of days*].

(d) In the space provided immediately below, bidders may specify a longer acceptance period than the Government's minimum requirement.

The bidder allows the following acceptance period: _____ calendar days.

(e) A bid allowing less than the Government's minimum acceptance period will be rejected.

(f) The bidder agrees to execute all that it has undertaken to do, in compliance with its bid, if that bid is accepted in writing within—

(1) The acceptance period stated in paragraph (c) of this provision; or

(2) Any longer acceptance period stated in paragraph (d) of this provision.

(End of provision)

■ 7. Revise sections 52.214–18 through 52.214–29 to read as follows:

52.214–18 Preparation of Bids—Construction.

As prescribed in 14.207(h), insert the following provision:

Preparation of Bids—Construction (DATE)

(a)(1) Bids must be—
(i) Submitted on the forms furnished by the Government or on copies of those forms; and
(ii) Manually signed.

(2) The person signing a bid must initial each erasure or change appearing on any bid form.

(b) The bid form may require bidders to submit bid prices for one or more items on various bases, including—

(1) Lump sum bidding;
(2) Alternate prices;
(3) Units of construction; or
(4) Any combination of subparagraphs (b)(1) through (b)(3) of this provision.

(c) If the solicitation requires bidding on all items, failure to do so will disqualify the bid. If bidding on all items is not required, bidders should insert the words *no bid* in the space provided for any item on which no price is submitted.

(d) Alternate bids will not be considered unless this solicitation authorizes their submission.

(End of provision)

52.214–19 Contract Award—Sealed Bidding—Construction.

As prescribed in 14.207(i), insert the following provision:

Contract Award—Sealed Bidding—Construction (DATE)

(a) The Government will evaluate bids in response to this solicitation without discussions and will award a contract to the responsible bidder whose bid, conforming to the solicitation, will be most advantageous to the Government, considering only price and the price-related factors specified elsewhere in the solicitation.

(b) The Government may reject any or all bids, and waive informalities or minor irregularities in bids received.

(c) The Government may accept any item or combination of items, unless doing so is precluded by a restrictive limitation in the solicitation or the bid.

(d) The Government may reject a bid as nonresponsive if the prices bid are materially unbalanced between line items or subline items. A bid is materially unbalanced when it is based on prices significantly less than

cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the Government even though it may be the low evaluated bid, or if it is so unbalanced as to be tantamount to allowing an advance payment.

(End of provision)

52.214–20 Bid Samples.

As prescribed in 14.207(j)(1), insert the following provision:

Bid Samples (DATE)

(a) *Bid sample* means a product sample required to be submitted by a bidder to show those characteristics of the offered products that cannot adequately be described by specifications, purchase descriptions, or the invitation for bid (*e.g.*, balance, facility of use, or pattern).

(b) Bidders must furnish bid samples as part of the bid. The bidder must deliver to the Government the bid samples by the time specified in the invitation for bids. If the bidder fails to submit samples on time, the Government will reject the bid, except that the Contracting Officer will consider a late sample sent by mail under the Late Submissions, Modifications, and Withdrawals of Bids provision of this solicitation.

(c) The Government will test or evaluate bid samples to determine compliance with all the characteristics listed for examination in this solicitation. The Government will reject the bid when the sample fails to conform to the required characteristics. Products delivered under any resulting contract must conform to—

(1) The approved sample for the characteristics listed for test or evaluation; and

(2) The specifications for all other characteristics.

(d) Unless otherwise specified in the solicitation, bid samples must be—

(1) Submitted at no expense to the Government; and

(2) Returned at the bidder's request and expense, unless they are destroyed during preaward testing.

(End of provision)

Alternate I (DATE). As prescribed in 14.207(j)(2)(i), insert the following *Alternate I*:

(e) At the discretion of the Contracting Officer, the requirement for furnishing

bid samples may be waived for a bidder if—

(1) The bid states that the offered product is the same as a product offered by the bidder to the _____ [as appropriate, the Contracting Officer will designate the contracting office or an alternate activity or office]; and

(2) The Contracting Officer determines that the previously offered product was accepted or tested and found to comply with specification and other requirements for technical acceptability conforming in every material respect with those in this solicitation.

Alternate II (DATE). As prescribed in 14.207(j)(2)(ii), insert the following *Alternate II*:

(e) At the discretion of the Contracting Officer, the requirements for furnishing bid samples may be waived for a bidder if—

(1) The bid states that the offered product is the same as a product offered by the bidder to the _____ [as appropriate, the Contracting Officer will designate the contracting office or an alternate activity or office] on a previous acquisition;

(2) The Contracting Officer determines that the previously offered product was accepted or tested and found to comply with specification and other requirements for technical acceptability conforming in every material respect with those of this solicitation; and

(3) The product offered under this solicitation will be produced under a resulting contract at the same plant in which the previously acquired or tested product was produced.

52.214–21 Descriptive Literature.

As prescribed in 14.207(k)(1), insert the following provision:

Descriptive Literature (DATE)

(a) *Descriptive literature*, as used in this provision, means information furnished by a bidder, such as cuts, illustrations, drawings, and brochures, that shows a product's characteristics or construction or explains its operation. The term includes only that information required to evaluate the acceptability of the product and excludes other information for operating or maintaining the product.

(b) Descriptive literature is required to establish, for the purpose of evaluation and award, details of the product offered that are specified elsewhere in the solicitation and pertain to significant elements such as—

- (1) Design;
- (2) Materials;
- (3) Components;
- (4) Performance characteristics; and
- (5) Methods of manufacture, assembly, construction, or operation.

(c) Descriptive literature, required elsewhere in this solicitation, must be—

(1) Identified to show the item(s) of the offer to which it applies; and

(2) Received by the time specified in this solicitation.

(d) If the bidder fails to submit descriptive literature on time, the Government will reject the bid, except that late descriptive literature sent by mail may be considered under the Late Submissions, Modifications, and Withdrawals of Bids provision of this solicitation.

(e) If the descriptive literature fails to show that the product offered conforms to the requirements of the solicitation, the Government will reject the bid.

(End of provision)

Alternate I (DATE). As prescribed in 14.207(k)(2), add the following paragraphs (f) and (g) to the basic provision:

(f) The Contracting Officer may waive the requirement for furnishing descriptive literature if the offeror has supplied a product that is the same as that required by this solicitation under a prior contract. A bidder that requests a waiver of this requirement must provide the following information:

Prior contract number _____

Date of prior contract _____

Line item number of product supplied _____

Name and address of Government activity to which delivery was made _____

Date of final delivery of product supplied _____

(g) Bidders must submit bids on the basis of required descriptive literature or on the basis of a previously supplied product under paragraph (f) of this provision. A bidder submitting a bid on one of these two bases may not elect to have its bid considered on the alternative basis after the time specified for receipt of bids. The Government will disregard a bidder's request for a waiver under paragraph (f) if that bidder has submitted the descriptive literature requested under this solicitation.

52.214–22 Evaluation of Bids for Multiple Awards.

As prescribed in 14.207(l), insert the following provision:

Evaluation of Bids for Multiple Awards (DATE)

In addition to other factors, bids will be evaluated on the basis of advantages and disadvantages to the Government that might result from making more than one award (multiple awards). It is assumed, for the purpose of evaluating bids, that \$500 would be the administrative cost to the Government for issuing and administering each contract awarded under this solicitation, and individual awards will be for the items or combinations of items that result in the lowest aggregate cost to the Government, including the assumed administrative costs.

(End of provision)

52.214–23 Late Submissions, Modifications, Revisions, and Withdrawals of Technical Proposals Under Two-Step Sealed Bidding.

As prescribed in 14.207(m), insert the following provision:

Late Submissions, Modifications, Revisions, and Withdrawals of Technical Proposals Under Two-Step Sealed Bidding (DATE)

(a) *Definitions.*

“Acceptable evidence” means a verifiable record, either physical or electronic, that provides a clear and authenticated account of the exact time a submission was received by the Government, which includes:

(1) The time/date stamp of that installation on the bid wrapper;

(2) Other documentary evidence of receipt maintained by the installation (e.g., receiving reports, mailroom logs, or internal logs);

(3) Oral testimony or statements of Government personnel;

(4) Electronic metadata, electronic audit trails, server gateway logs, or delivery receipts generated by the bidder's or the Government's email system.

“Government control” means the point at which a bid has been delivered, either physically or electronically, into the custody of the Government, such that the bidder can no longer modify or exercise dominion over the submission.

(b) Bidders are responsible for submitting technical proposals, and any modifications or revisions, so as to reach the Government office designated in the request for technical proposals by the time specified in the invitation for bids (IFB). If no time is specified in the IFB, the time for receipt is 4:30 p.m., local time, for the designated Government office on the date that bids or revisions are due.

(c)(1) Any technical proposal under step one of two-step sealed bidding or modification, revision, or withdrawal of such proposal received at the Government office designated in the request for technical proposals after the exact time specified for receipt will not be considered unless the Contracting Officer determines that accepting the late technical proposal would not unduly delay the acquisition; and—

(i) If it was transmitted through an electronic commerce method authorized by the request for technical proposals, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals; or

(ii) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of offers and was under the Government's control prior to the time set for receipt; or

(iii) It is the only proposal received and it is negotiated under part 15 of the Federal Acquisition Regulation.

(2) However, a late modification of an otherwise successful proposal that makes its terms more favorable to the Government will

be considered at any time it is received and may be accepted.

(d) If an emergency or unanticipated event (e.g., weather emergency, government-wide or agency-specific network outages, server crashes, or cybersecurity-related blocking of authorized file types) interrupts normal Government processes so that technical proposals cannot be received at the Government office designated for receipt of technical proposals by the exact time specified in the request for technical proposals, and urgent Government requirements preclude amendment of the request for technical proposals, the time specified for receipt of technical proposals will be deemed to be extended to the same time of day specified in the request for technical proposals on the first work day on which normal Government processes resume.

(e) Technical proposals may be withdrawn by written notice received at any time before the exact time set for receipt of technical proposals. A technical proposal may be withdrawn in person by a bidder or its authorized representative if, before the exact time set for receipt of technical proposals, the identity of the person requesting withdrawal is established and the person signs a receipt for the technical proposal.

(End of provision)

52.214–24 Multiple Technical Proposals.

As prescribed in 14.207(n), insert the following provision:

Multiple Technical Proposals (DATE)

In the first step of this two-step acquisition, solicited sources are encouraged to submit multiple technical proposals presenting different basic approaches. Each technical proposal submitted will be separately evaluated and the submitter will be notified as to its acceptability.

(End of provision)

52.214–25 Step Two of Two-Step Sealed Bidding.

As prescribed in 14.207(o), insert the following provision:

Step Two of Two-Step Sealed Bidding (DATE)

(a) This invitation for bids is issued to initiate step two of two-step sealed bidding under section 14.211 of the Federal Acquisition Regulation.

(b) The only bids that the Contracting Officer may consider for award of a contract are those received from bidders that have submitted acceptable technical proposals in step one of this acquisition under ____ [the Contracting Officer will insert the identification of the step-one request for technical proposals].

(c) Any bidder that has submitted multiple technical proposals in step one of this acquisition may submit a separate bid on each technical proposal that was determined to be acceptable to the Government.

(End of provision)

52.214–26 Audit and Records—Sealed Bidding.

As prescribed in 14.208(a), insert the following clause:

Audit and Records—Sealed Bidding (DATE)

(a) *Definition.* As used in this clause, *records* includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.

(b) *Certified cost or pricing data.* If the Contractor has been required to submit certified cost or pricing data in connection with the pricing of any modification to this contract, the Contracting Officer, or an authorized representative of the Contracting Officer, in order to evaluate the accuracy, completeness, and currency of the certified cost or pricing data, has the right to examine and audit all of the Contractor's records, including computations and projections, related to—

(1) The proposal for the modification;

(2) The discussions conducted on the proposal(s), including those related to negotiating;

(3) Pricing of the modification; or

(4) Performance of the modification.

(c) *Comptroller General.* In the case of pricing any modification, the Comptroller General of the United States, or an authorized representative, has the same rights as specified in paragraph (b) of this clause and also the right to interview any current employee regarding such transactions.

(d) *Availability.* The Contractor must make available at its office at all reasonable times the materials described in paragraph (b) of this clause, for examination, audit, or reproduction, until 3 years after final payment under this contract, or for any other period specified for contractor record retention in part 4 Federal Acquisition Regulation (FAR). FAR Subpart 4.4, Contractor Records Retention, in effect on the date of this contract, is incorporated by reference in its entirety and made a part of this contract.

(1) If this contract is completely or partially terminated, the records relating to the work terminated must be made available for 3 years after any resulting final termination settlement.

(2) Records pertaining to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to the performance of this contract must be made available until disposition of such appeals, litigation, or claims.

(e) *Subcontracts.* The Contractor must include the substance of the clause, including this paragraph (e), in subcontracts at any tier under this contract, other than those for commercial products or commercial services, if the value of the subcontract exceeds the threshold for submission of certified cost or pricing data in FAR 15.403–3(a) on the date of subcontract award.

(End of clause)

52.214–27 Price Reduction for Defective Certified Cost or Pricing Data—Modifications—Sealed Bidding.

As prescribed in 14.208(b)(1), insert the following clause:

Price Reduction for Defective Certified Cost or Pricing Data—Modifications—Sealed Bidding (DATE)

(a) This clause will become operative only for any modification to this contract involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed the threshold for the submission of certified cost or pricing data in Federal Acquisition Regulation (FAR) 15.403–3(a) on the date of execution of the modification, except that this clause does not apply to a modification if an exception under FAR 15.403–2(b) applies.

(b)(1) The contract will be modified to reflect a price reduction if any price, including profit, negotiated in connection with any modification under this clause, was increased by any significant amount because—

(i) The Contractor or a subcontractor furnished certified cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data; or

(ii) A subcontractor or prospective subcontractor furnished the Contractor certified cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data.

(iii) Any of these parties furnished data of any description that were not accurate.

(2) This right to a price reduction is limited to that resulting from defects in data relating to modifications for which this clause becomes operative under paragraph (a) of this clause.

(c) Any reduction in the contract price under paragraph (b) of this clause due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract will be limited to the amount, plus applicable overhead and profit markup, by which—

(1) The actual subcontract; or

(2) The actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor; *provided*, that the actual subcontract price was not itself affected by defective certified cost or pricing data.

(d)(1) If the Contracting Officer determines under paragraph (b) of this clause that a price or cost reduction should be made, the Contractor agrees not to raise the following matters as a defense—

(i) The Contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the contract would not have been modified even if accurate, complete, and current certified cost or pricing data had been submitted;

(ii) The Contracting Officer should have known that the certified cost or pricing data

in issue were defective even though the Contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the Contracting Officer;

(iii) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under the contract; or

(iv) The Contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data.

(2)(i) Except as prohibited by subdivision (d)(2)(ii) of this clause, an offset in an amount determined appropriate by the Contracting Officer based upon the facts will be allowed against the amount of a contract price reduction if—

(A) The Contractor certifies to the Contracting Officer that, to the best of the Contractor's knowledge and belief, the Contractor is entitled to the offset in the amount requested; and

(B) The Contractor proves that the certified cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification) and that the data were not submitted before such date.

(ii) An offset must not be allowed if—

(A) The understated data was known by the Contractor to be understated when the Certificate of Current Cost or Pricing Data was signed; or

(B) The Government proves that the facts demonstrate that the contract price would not have increased in the amount to be offset even if the available data had been submitted before the date of agreement on price.

(e) If any reduction in the contract price under this clause reduces the price of items for which payment was made prior to the date of the modification reflecting the price reduction, the Contractor will be liable to and must pay the United States at the time such overpayment is repaid—

(1) Interest compounded daily, as required by 26 U.S.C. 6622, on the amount of such overpayment to be computed from the date(s) of overpayment to the Contractor to the date the Government is repaid by the Contractor at the applicable underpayment rate effective for each quarter prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(a)(2); and

(2) A penalty equal to the amount of the overpayment, if the Contractor or subcontractor knowingly submitted certified cost or pricing data which were incomplete, inaccurate, or noncurrent.

(End of clause)

52.214–28 Subcontractor Certified Cost or Pricing Data—Modifications—Sealed Bidding.

As prescribed in 14.208(c), insert the following clause:

Subcontractor Certified Cost or Pricing Data—Modifications—Sealed Bidding (DATE)

(a) *Applicability.* The requirements of paragraphs (b) and (c) of this clause will—

(1) Become operative only for any modification to this contract involving aggregate increases and/or decreases in costs,

plus applicable profits, expected to exceed the threshold for submission of certified cost or pricing data in Federal Acquisition Regulation (FAR) 15.403–3(a) on the date of execution of the modification, and

(2) Be limited to such modifications.

(b) *Requirement.* Before awarding any subcontract expected to exceed the threshold for submission of certified cost or pricing data in FAR 15.403–3(a), on the date of agreement on price or the date of award, whichever is later, or before pricing any subcontract modifications involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed the threshold for submission of certified cost or pricing data in FAR 15.403–3(a), the Contractor must require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), as part of the subcontractor's proposal in accordance with FAR 15.408, Table 15–1 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price), unless an exception under FAR 15.403–2(b) applies. If the threshold for submission of certified cost or pricing data specified in FAR 15.403–3(a) is adjusted for inflation as set forth in FAR 1.108, then the changed threshold applies throughout the remaining term of the contract, unless there is a subsequent threshold adjustment.

(c) *Certification.* The Contractor must require the subcontractor to certify in substantially the form prescribed in section 15.406–2 of the Federal Acquisition Regulation that, to the best of its knowledge and belief, the data submitted under paragraph (b) of this clause were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.

(d) *Subcontracts.* The Contractor must include the substance of this clause, including this paragraph (d), in subcontracts at any tier under this contract, other than those for commercial products or commercial services, if the value of the subcontract, exceeds the threshold for submission of certified cost or pricing data in FAR 15.403–3(a).

(End of clause)

Alternate I (DATE). As prescribed in 14.208(c)(1), substitute the following paragraph (b) in place of paragraph (b) of the basic clause:

(b) *Requirement.* Unless an exception under FAR 15.403–2 (b) applies, the Contractor must require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), as part of the subcontractor's proposal in accordance with FAR 15.408, Table 15–1 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors

applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price)—

(1) Before modifying any subcontract that was awarded prior to July 1, 2018, involving a pricing adjustment expected to exceed \$950,000; or

(2) Before awarding any subcontract expected to exceed \$2 million on or after July 1, 2018, or modifying any subcontract that was awarded on or after July 1, 2018, involving a pricing adjustment expected to exceed \$2.5 million.

52.214–29 Order of Precedence—Sealed Bidding.

As prescribed in 14.208(d), insert the following clause:

Order of Precedence—Sealed Bidding (DATE)

Any inconsistency in this solicitation or contract must be resolved by giving precedence in the following order:

- (a) The Schedule (excluding the specifications);
- (b) Representations and other instructions;
- (c) Contract clauses;
- (d) Other documents, exhibits, and attachments; and
- (e) The specifications.

(End of clause)

52.214–31 [Removed and Reserved]

■ 8. Remove and reserve section

52.214–31.

■ 9. Revise sections 52.214–34 through 52.214–35 to read as follows:

52.214–34 Submission of Offers in the English Language.

As prescribed in 14.207(p), insert the following provision:

Submission of Offers in the English Language (DATE)

Offers submitted in response to this solicitation must be in the English language. Offers received in other than English will be rejected.

(End of provision)

52.214–35 Submission of Offers in U.S. Currency.

As prescribed in 14.207(q), insert the following provision:

Submission of Offers in U.S. Currency (DATE)

Offers submitted in response to this solicitation must be in terms of U.S. dollars. Offers received in other than U.S. dollars will be rejected.

(End of provision)

■ 10. Revise sections 52.228–1 through 52.228–5 to read as follows: 52.228–1 Bid Guarantee.

As prescribed in 28.101–2, insert a provision or clause substantially as follows:

Bid Guarantee (DATE)

(a) Failure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid.

(b) The bidder must furnish a bid guarantee in the form of a firm commitment, *e.g.*, bid bond supported by good and sufficient surety or sureties acceptable to the Government, postal money order, certified check, cashier's check, irrevocable letter of credit, or, under Treasury Department regulations, certain bonds or notes of the United States. The Contracting Officer will return bid guarantees, other than bid bonds to—

(1) Unsuccessful bidders as soon as practicable after the opening of bids; and

(2) The successful bidder upon execution of contractual documents and bonds (including any necessary coinsurance or reinsurance agreements), as required by the bid as accepted.

(c) The amount of the bid guarantee must be ____ percent of the bid price or \$____, whichever is less.

(d) If the successful bidder, upon acceptance of its bid by the Government within the period specified for acceptance, fails to execute all contractual documents or furnish executed bond(s) within 10 days after receipt of the forms by the bidder, the Contracting Officer may terminate the contract for default.

(e) In the event the contract is terminated for default, the bidder is liable for any cost of acquiring the work that exceeds the amount of its bid, and the bid guarantee is available to offset the difference.

(End of provision)

52.228–2 Additional Bond Security.

As prescribed in 28.106–4(a), insert the following clause:

Additional Bond Security (DATE)

The Contractor must promptly furnish additional security required to protect the Government and persons supplying labor or materials under this contract if—

(a) Any surety upon any bond, or issuing financial institution for other security, furnished with this contract becomes unacceptable to the Government;

(b) Any surety fails to furnish reports on its financial condition as required by the Government;

(c) The contract price is increased so that the penal sum of any bond becomes inadequate in the opinion of the Contracting Officer; or

(d) An irrevocable letter of credit (ILC) used as security will expire before the end of the period of required security. If the Contractor does not furnish an acceptable extension or replacement ILC, or other acceptable substitute, at least 30 days before an ILC's scheduled expiration, the Contracting officer has the right to immediately draw on the ILC.

(End of clause)

52.228–3 Workers' Compensation Insurance (Defense Base Act).

As prescribed in 28.309(a), insert the following clause:

Workers' Compensation Insurance (Defense Base Act) (DATE)

(a) *Requirements.* The Contractor must—

(1) Before commencing performance under this contract, establish provisions to provide for the payment of disability compensation and medical benefits to covered employees and death benefits to their eligible survivors, by purchasing workers' compensation insurance or qualifying as a self-insurer under the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932) as extended by the Defense Base Act (42 U.S.C. 1651, *et seq.*), and continue to maintain provisions to provide such Defense Base Act benefits until contract performance is completed;

(2) Within ten days of an employee's injury or death or from the date the Contractor has knowledge of the injury or death, submit Form LS–202 (Employee's First Report of Injury or Occupational Illness) to the Department of Labor in accordance with the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 930(a), 20 CFR 702.201 to 702.203);

(3) Pay all compensation due for disability or death within the time frames required by the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 914, 20 CFR 702.231 and 702.232);

(4) Provide for medical care as required by the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 907, 20 CFR 702.402 and 702.419);

(5) If controverting the right to compensation, submit Form LS–207 (Notice of Controversion of Right to Compensation) to the Department of Labor in accordance with the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 914(d), 20 CFR 702.251);

(6) Immediately upon making the first payment of compensation in any case, submit Form LS–206 (Payment Of Compensation Without Award) to the Department of Labor in accordance with the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 914(c), 20 CFR 702.234);

(7) When payments are suspended or when making the final payment, submit Form LS–208 (Notice of Final Payment or Suspension of Compensation Payments) to the Department of Labor in accordance with the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 914(c) and (g), 20 CFR 702.234 and 702.235); and

(8) Adhere to all other provisions of the Longshore and Harbor Workers' Compensation Act as extended by the Defense Base Act, and Department of Labor regulations at 20 CFR parts 701 to 704.

(b) *Resource.* For additional information on the Longshore and Harbor Workers' Compensation Act requirements see <http://www.dol.gov/owcp/dlhwcl/sdba.htm>.

(c) *Subcontracts.* The Contractor must include the substance of this clause, including this paragraph (c), in subcontracts

at any tier to which the Defense Base Act applies including those for commercial services, but excluding those for commercial products.

(End of clause)

52.228–4 Workers' Compensation and War-Hazard Insurance Overseas.

As prescribed in 28.309(b), insert the following clause:

Workers' Compensation and War-Hazard Insurance Overseas (DATE)

(a) *Defense Base Act.* This paragraph applies if the Contractor employs any person who, but for a waiver granted by the Secretary of Labor, would be subject to workers' compensation insurance under the Defense Base Act (42 U.S.C. 1651 *et seq.*). On behalf of employees for whom the applicability of the Defense Base Act has been waived, the Contractor must provide, before commencing performance under this contract, at least that workers' compensation insurance or the equivalent as the laws of the country of which these employees are nationals may require. The Contractor must continue to maintain it until performance is completed. The Contractor must insert, in all subcontracts at any tier under this contract, including those contracts for commercial services, to which the Defense Base Act would apply but for the waiver, a clause similar to this paragraph (a) (including this sentence) imposing upon those subcontractors this requirement to provide such workers' compensation insurance coverage.

(b) *War Hazards Compensation Act.*

(1) *Applicability.* This paragraph (b) applies if the Contractor or any subcontractor under this contract employs any person who, but for a waiver granted by the Secretary of Labor, would be subject to the War Hazards Compensation Act (42 U.S.C. 1701 *et seq.*).

(2) *Responsibility.* On behalf of employees for whom the applicability of the Defense Base Act (and hence that of the War Hazards Compensation Act) has been waived, the Contractor must, subject to reimbursement as provided elsewhere in this contract, afford the same protection as that provided in the War Hazards Compensation Act, except that the level of benefits must conform to any law or international agreement controlling the benefits to which the employees may be entitled. In all other respects, the standards of the War Hazards Compensation Act apply; *e.g.*, the definition of war-hazard risks (injury, death, capture, or detention as the result of a war hazard as defined in the Act), proof of loss, and exclusion of benefits otherwise covered by workers' compensation insurance or the equivalent.

(c) *Subcontracts.* Unless the Contractor elects to assume directly the liability to subcontractor employees created by this clause, the Contractor must include the substance of this clause, including this paragraph (c), in subcontracts at any tier under this contract to which the War Hazards Compensation Act would apply but for the waiver, other than those for commercial products or commercial services, in order to impose upon those subcontractors this requirement to provide war-hazard benefits.

(End of clause)

52.228–5 Insurance—Work on a Government Installation.

As prescribed in 28.310, insert the following clause:

Insurance—Work on a Government Installation (DATE)

(a) *Requirement.* The Contractor must, at its own expense, provide and maintain during the entire performance of this contract, at least the kinds and minimum amounts of insurance required in the schedule or elsewhere in the contract.

(b) *Notice.* Before commencing work under this contract, the Contractor must notify the Contracting Officer in writing that the required insurance has been obtained. The policies evidencing required insurance must contain an endorsement to the effect that any cancellation or any material change adversely affecting the Government's interest must not be effective—

(1) For such period as the laws of the State in which this contract is to be performed prescribe; or

(2) Until 30 days after the insurer or the Contractor gives written notice to the Contracting Officer, whichever period is longer.

(c) Subcontracts. The Contractor must—

(1) Insert the substance of this clause, including this paragraph (c), in subcontracts at any tier under this contract that requires work on a Government installation must other than those for commercial products or commercial services;

(2) Require subcontractors to provide and maintain the insurance required in the Schedule or elsewhere in the contract;

(3) Must maintain a copy of all subcontractors' proofs of required insurance; and

(4) Make copies available to the Contracting Officer upon request.

(End of clause)

■ 11. Revise sections 52.228–7 through 52.228–17 to read as follows:

52.228–7 Insurance—Liability to Third Persons.

As prescribed in 28.311–1, insert the following clause:

Insurance—Liability to Third Persons (DATE)

(a)(1) Except as provided in paragraph (a)(2) of this clause, the Contractor must provide and maintain workers' compensation, employer's liability, comprehensive general liability (bodily injury), comprehensive automobile liability (bodily injury and property damage) insurance, and such other insurance as the Contracting Officer may require under this contract.

(2) The Contractor may, with the approval of the Contracting Officer, maintain a self-insurance program; *provided* that, with respect to workers' compensation, the Contractor is qualified pursuant to statutory authority.

(3) All insurance required by this paragraph must be in a form and amount and for those periods as the Contracting Officer may require or approve and with insurers approved by the Contracting Officer.

(b) The Contractor agrees to submit for the Contracting Officer's approval, to the extent and in the manner required by the Contracting Officer, any other insurance that is maintained by the Contractor in connection with the performance of this contract and for which the Contractor seeks reimbursement.

(c) The Contractor must be reimbursed—

(1) For that portion—

(i) Of the reasonable cost of insurance allocable to this contract; and

(ii) Required or approved under this clause; and

(2) For certain liabilities (and expenses incidental to such liabilities) to third persons not compensated by insurance or otherwise without regard to and as an exception to the limitation of cost or the limitation of funds clause of this contract. These liabilities must arise out of the performance of this contract, whether or not caused by the negligence of the Contractor or of the Contractor's agents, servants, or employees, and must be represented by final judgments or settlements approved in writing by the Government. These liabilities are for—

(i) Loss of or damage to property (other than property owned, occupied, or used by the Contractor, rented to the Contractor, or in the care, custody, or control of the Contractor); or

(ii) Death or bodily injury.

(d) The Government's liability under paragraph (c) of this clause is subject to the availability of appropriated funds at the time a contingency occurs. Nothing in this contract will be construed as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies.

(e) The Contractor must not be reimbursed for liabilities (and expenses incidental to such liabilities)—

(1) For which the Contractor is otherwise responsible under the express terms of any clause specified in the Schedule or elsewhere in the contract;

(2) For which the Contractor has failed to insure or to maintain insurance as required by the Contracting Officer; or

(3) That result from willful misconduct or lack of good faith on the part of any of the Contractor's directors, officers, managers, superintendents, or other representatives who have supervision or direction of—

(i) All or substantially all of the Contractor's business;

(ii) All or substantially all of the Contractor's operations at any one plant or separate location in which this contract is being performed; or

(iii) A separate and complete major industrial operation in connection with the performance of this contract.

(f) The provisions of paragraph (e) of this clause do not restrict the right of the Contractor to be reimbursed for the cost of insurance maintained by the Contractor in connection with the performance of this contract, other than insurance required in accordance with this clause; *provided*, that

such cost is allowable under the Allowable Cost and Payment clause of this contract.

(g) If any suit or action is filed or any claim is made against the Contractor, the cost and expense of which may be reimbursable to the Contractor under this contract, and the risk of which is then uninsured or is insured for less than the amount claimed, the Contractor must—

(1) Immediately notify the Contracting Officer and promptly furnish copies of all pertinent papers received;

(2) Authorize Government representatives to collaborate with counsel for the insurance carrier in settling or defending the claim when the amount of the liability claimed exceeds the amount of coverage; and

(3) Authorize Government representatives to settle or defend the claim and to represent the Contractor in or to take charge of any litigation, if required by the Government, when the liability is not insured or covered by bond. The Contractor may, at its own expense, be associated with the Government representatives in any such claim or litigation.

(End of clause)

52.228–8 Liability and Insurance—Leased Motor Vehicles.

As prescribed in 28.312, insert the following clause:

Liability and Insurance—Leased Motor Vehicles (DATE)

(a) The Government will be responsible for loss of or damage to—

(1) Leased vehicles, except for—

(i) Normal wear and tear; and

(ii) Loss or damage caused by the negligence of the Contractor, its agents, or employees; and

(2) Property of third persons, or the injury or death of third persons, if the Government is liable for such loss, damage, injury, or death under the Federal Tort Claims Act (28 U.S.C. 2671–2680).

(b) The Contractor is liable for, and must indemnify and hold harmless the Government against, all actions or claims for loss of or damage to property or the injury or death of persons, resulting from the fault, negligence, or wrongful act or omission of the Contractor, its agents, or employees.

(c) The Contractor must provide and maintain insurance covering its liabilities under paragraph (b) of this clause, in amounts of at least \$200,000 per person and \$500,000 per occurrence for death or bodily injury and \$20,000 per occurrence for property damage or loss.

(d)(1) Before commencing work under this contract, the Contractor must notify the Contracting Officer in writing that the required insurance has been obtained.

(2) The policies evidencing required insurance must contain an endorsement to the effect that any cancellation or any material change adversely affecting the interests of the Government must not be effective—

(i) For such period as the laws of the State in which this contract is to be performed prescribe; or

(ii) Until 30 days after written notice to the Contracting Officer, whichever period is longer.

(3) The policies must exclude any claim by the insurer for subrogation against the Government by reason of any payment under the policies.

(e) The contract price must not include any costs for insurance or contingency to cover losses, damage, injury, or death for which the Government is responsible under paragraph (a) of this clause.

(End of clause)

52.228–9 Cargo Insurance.

As prescribed in 28.313(a), insert the following clause:

Cargo Insurance (DATE)

(a) The Contractor, at the Contractor's expense, must provide and maintain, during the continuance of this contract, cargo insurance of \$ ____ per vehicle to cover the value of property on each vehicle and of \$ ____ to cover the total value of the property in the shipment.

(b) All insurance must be written on companies acceptable to ____ [insert name of contracting agency], and policies must include such terms and conditions as required by ____ [insert name of contracting agency]. The Contractor must provide evidence of acceptable cargo insurance to ____ [insert name of contracting agency] before commencing operations under this contract.

(c) Each cargo insurance policy must include the following statement:

"It is a condition of this policy that the Company must furnish—

(1) Written notice to ____ [insert name and address of contracting agency], 30 days in advance of the effective date of any reduction in, or cancellation of, this policy; and

(2) Evidence of any renewal policy to the address specified in paragraph (1) of this statement, not less than 15 days prior to the expiration of any current policy on file with ____ [insert name of contracting agency]."

(End of clause)

52.228–10 Vehicular and General Public Liability Insurance.

As prescribed in 28.313(b), insert a clause substantially the same as the following:

Vehicular and General Public Liability Insurance (DATE)

(a) The Contractor, at the Contractor's expense, agrees to maintain, during the continuance of this contract, vehicular liability and general public liability insurance with limits of liability for—

(1) Bodily injury of not less than \$ ____ for each person and \$ ____ for each occurrence; and

(2) Property damage of not less than \$ ____ for each accident and \$ ____ in the aggregate.

(b) The Contractor also agrees to maintain workers' compensation and other legally required insurance with respect to the Contractor's own employees and agents.

(End of clause)

52.228–11 Individual Surety—Pledge of Assets.

As prescribed in 28.203–4(b), insert the following clause:

Individual Surety—Pledge of Assets (DATE)

(a) The Contractor must obtain from each person acting as an individual surety on a performance bond or a payment bond—

(1) A pledge of assets that meets the eligibility, valuation, and security requirements described in the Federal Acquisition Regulation (FAR) 28.203–1; and

(2) Standard Form 28, Affidavit of Individual Surety.

(b) The Contracting Officer may release a portion of the security interest on the individual surety's assets based upon substantial performance of the Contractor's obligations under its performance bond. The security interest in support of a performance bond must be maintained—

(1) *Contracts for the construction, alteration, or repair of any public building or public work of the Federal Government exceeding \$150,000 (40 U.S.C. 3131).* Until completion of any warranty period, or for 1 year following final payment, whichever is later.

(2) *Contracts subject to alternative payment protection (see FAR 28.102–1(b)(1)).* For the full contract performance period plus 1 year.

(3) *Other contracts not subject to the requirements of paragraph (b)(1) of this clause.* Until completion of any warranty period, or for 90 days following final payment, whichever is later.

(c) A surety's assets pledged in support of a payment bond may be released to a subcontractor or supplier upon Government receipt of a Federal district court judgment, or a sworn statement by the subcontractor or supplier that the claim is correct along with a notarized authorization of the release by the surety stating that it approves of such release. The security interest on the individual surety's assets in support of a payment bond must be maintained—

(1) *Contracts for the construction, alteration, or repair of any public building or public work of the Federal Government exceeding \$150,000 which require performance and payment bonds (40 U.S.C. 3131).* For 1 year following final payment, or until resolution of all pending claims filed against the payment bond during the 1-year period following final payment, whichever is later.

(2) *Contracts subject to alternative payment protection (see FAR 28.102–1(b)(1)).* For the full contract performance period plus 1 year.

(3) *Other contracts not subject to the requirements of paragraph (c)(1) of this clause.* For 90 days following final payment.

(d) The Contracting Officer may allow the Contractor to substitute an individual surety, for a performance or payment bond, after contract award. The Contractor must comply with the requirements of paragraph (a) of this clause within the timeframe established by the Contracting Officer.

(End of clause)

52.228–12 Prospective Subcontractor Requests for Bonds.

As prescribed in 28.106–4(b), use the following clause:

Prospective Subcontractor Requests for Bonds (DATE)

In accordance with section 806(a)(3) of Public Law 102–190, as amended by sections 2091 and 8105 of Public Law 103–355 (10 U.S.C. 4601 note prec.), upon the request of a prospective subcontractor or supplier offering to furnish labor or material for the performance of this contract for which a payment bond has been furnished to the Government pursuant to 40 U.S.C. chapter 31, subchapter III, Bonds, the Contractor must promptly provide a copy of such payment bond to the requester.

(End of clause)

52.228–13 Alternative Payment Protections.

As prescribed in 28.102–3(b), insert the following clause:

Alternative Payment Protections (DATE)

(a) The Contractor must submit one of the following payment protections: ____

(b) The amount of the payment protection must be 100 percent of the contract price.

(c) The submission of the payment protection is required within ____ days of contract award.

(d) The payment protection must provide protection for the full contract performance period plus a one-year period.

(e) Except for escrow agreements and payment bonds, which provide their own protection procedures, the Contracting Officer is authorized to access funds under the payment protection when it has been alleged in writing by a supplier of labor or material that a nonpayment has occurred, and to withhold such funds pending resolution by administrative or judicial proceedings or mutual agreement of the parties.

(f) When a tripartite escrow agreement is used, the Contractor must utilize only suppliers of labor and material that signed the escrow agreement.

(End of clause)

52.228–14 Irrevocable Letter of Credit.

As prescribed in 28.204–4, insert the following clause:

Irrevocable Letter of Credit (DATE)

(a) "Irrevocable letter of credit" (ILC), as used in this clause, means a written commitment by a federally insured financial institution to pay all or part of a stated amount of money, until the expiration date of the letter, upon presentation by the Government (the beneficiary) of a written demand therefor. Neither the financial institution nor the offeror/Contractor can revoke or condition the letter of credit.

(b) If the offeror intends to use an ILC in lieu of a bid bond, or to secure other types

of bonds such as performance and payment bonds, the letter of credit and letter of confirmation formats in paragraphs (e) and (f) of this clause must be used.

(c) The letter of credit must be irrevocable, must require presentation of no document other than a written demand and the ILC (including confirming letter, if any), must be issued/confirmed by an acceptable federally insured financial institution as provided in paragraph (d) of this clause, and—

(1) If used as a bid guarantee, the ILC must not expire earlier than 60 days after the close of the bid acceptance period;

(2) If used as an alternative to corporate or individual sureties as security for a performance or payment bond, the offeror/Contractor may submit an ILC with an initial expiration date estimated to cover the entire period for which financial security is required or may submit an ILC with an initial expiration date that is a minimum period of one year from the date of issuance. The ILC must provide that, unless the issuer provides the beneficiary written notice of non-renewal at least 60 days in advance of the current expiration date, the ILC is automatically extended without amendment for one year from the expiration date, or any future expiration date, until the period of required coverage is completed and the Contracting Officer provides the financial institution with a written statement waiving the right to payment. The period of required coverage must be:

(i) For contracts subject to 40 U.S.C. chapter 31, subchapter III, Bonds, the later of—

(A) One year following the expected date of final payment;

(B) For performance bonds only, until completion of any warranty period; or

(C) For payment bonds only, until resolution of all claims filed against the payment bond during the one-year period following final payment.

(ii) For contracts not subject to 40 U.S.C. chapter 31, subchapter III, Bonds, the later of—

(A) 90 days following final payment; or

(B) For performance bonds only, until completion of any warranty period.

(d)(1) Only federally insured financial institutions rated investment grade by a commercial rating service may issue or confirm the ILC.

(2) Unless the financial institution issuing the ILC had letter of credit business of at least \$25 million in the past year, ILCs over \$5 million must be confirmed by another acceptable financial institution that had letter of credit business of at least \$25 million in the past year.

(3) The Offeror/Contractor must provide the Contracting Officer a credit rating that indicates the financial institutions have the required credit rating as of the date of issuance of the ILC.

(4) The current rating for a financial institution is available through any of the following rating services registered with the U.S. Securities and Exchange Commission (SEC) as a Nationally Recognized Statistical Rating Organization (NRSRO). NRSRO's can be located at the website <http://www.sec.gov/answers/nrsro.htm> maintained by the SEC.

(e) The following format must be used by the issuing financial institution to create an ILC:

[Issuing Financial Institution's Letterhead or Name and Address]

Issue Date _____

Irrevocable Letter of Credit No. _____

Account party's name _____

Account party's address _____

For Solicitation No. _____

(For reference only)

TO: [U.S. Government agency]

[U.S. Government agency's address]

1. We hereby establish this irrevocable and transferable Letter of Credit in your favor for one or more drawings up to United States \$ _____. This Letter of Credit is payable at [issuing financial institution's and, if any, confirming financial institution's] office at [issuing financial institution's address and, if any, confirming financial institution's address] and expires with our close of business on _____, or any automatically extended expiration date.

2. We hereby undertake to honor your or the transferee's sight draft(s) drawn on the issuing or, if any, the confirming financial institution, for all or any part of this credit if presented with this Letter of Credit and confirmation, if any, at the office specified in paragraph 1 of this Letter of Credit on or before the expiration date or any automatically extended expiration date.

3. [This paragraph is omitted if used as a bid guarantee, and subsequent paragraphs are renumbered.] It is a condition of this Letter of Credit that it is deemed to be automatically extended without amendment for one year from the expiration date hereof, or any future expiration date, unless at least 60 days prior to any expiration date, we notify you or the transferee by registered mail, or other receipted means of delivery, that we elect not to consider this Letter of Credit renewed for any such additional period. At the time we notify you, we also agree to notify the account party (and confirming financial institution, if any) by the same means of delivery.

4. This Letter of Credit is transferable.

Transfers and assignments of proceeds are to be effected without charge to either the beneficiary or the transferee/assignee of proceeds. Such transfer or assignment must be only at the written direction of the Government (the beneficiary) in a form satisfactory to the issuing financial institution and the confirming financial institution, if any.

5. This Letter of Credit is subject to the Uniform Customs and Practice (UCP) for Documentary Credits, International Chamber of Commerce Publication No. ____ (Insert version in effect at the time of ILC issuance, e.g., "Publication 600, 2006 edition") and to the extent not inconsistent therewith, to the laws of ____ [State of confirming financial institution, if any, otherwise State of issuing financial institution].

6. If this credit expires during an interruption of business of this financial institution as described in Article 17 of the UCP, the financial institution specifically agrees to effect payment if this credit is drawn against within 30 days after the resumption of our business.

Sincerely,

[Issuing financial institution]

(f) The following format must be used by the financial institution to confirm an ILC:

[Confirming Financial Institution's Letterhead or Name and Address]

(Date) _____

Our Letter of Credit

Advice Number _____

Beneficiary: _____

[U.S. Government agency]

Issuing Financial Institution:

Issuing Financial Institution's LC No.: _____

Gentlemen:

1. We hereby confirm the above indicated Letter of Credit, the original of which is attached, issued by ____ [name of issuing financial institution] for drawings of up to United States dollars ____/U.S. ____ \$ and expiring with our close of business on ____ [the expiration date], or any automatically extended expiration date.

2. Draft(s) drawn under the Letter of Credit and this Confirmation are payable at our office located at ____.

3. We hereby undertake to honor sight draft(s) drawn under and presented with the Letter of Credit and this Confirmation at our offices as specified herein.

4. [This paragraph is omitted if used as a bid guarantee, and subsequent paragraphs are renumbered.] It is a condition of this confirmation that it be deemed automatically extended without amendment for one year from the expiration date hereof, or any automatically extended expiration date, unless:

(a) At least 60 days prior to any such expiration date, we must notify the Contracting Officer, or the transferee and the issuing financial institution, by registered mail or other receipted means of delivery, that we elect not to consider this confirmation extended for any such additional period; or

(b) The issuing financial institution must have exercised its right to notify you or the transferee, the account party, and ourselves, of its election not to extend the expiration date of the Letter of Credit.

5. This confirmation is subject to the Uniform Customs and Practice (UCP) for Documentary Credits, International Chamber of Commerce Publication No. ____ (Insert version in effect at the time of ILC issuance, e.g., "Publication 600, 2006 edition") and to the extent not inconsistent therewith, to the laws of ____ [State of confirming financial institution].

6. If this confirmation expires during an interruption of business of this financial institution as described in Article 17 of the UCP, we specifically agree to effect payment if this credit is drawn against within 30 days after the resumption of our business.

Sincerely,

[Confirming financial institution]

(g) The following format will be used by the Contracting Officer for a sight draft to draw on the Letter of Credit:

SIGHT DRAFT

[City, State]

(Date) _____

[Name and address of financial institution]

Pay to the order of _____

[Beneficiary Agency] _____
 the sum of United States \$ _____
 This draft is drawn under _____
 Irrevocable Letter of Credit No. _____
 [Beneficiary Agency]
 By: _____

(End of clause)

52.228–15 Performance and Payment Bonds—Construction.

As prescribed in 28.102–3(a), insert a clause substantially as follows:

Performance and Payment Bonds—Construction (DATE)

(a) *Definition.* As used in this clause—
Original contract price means the award price of the contract; or, for requirements contracts, the price payable for the estimated total quantity; or, for indefinite-quantity contracts, the price payable for the specified minimum quantity. Original contract price does not include the price of any options, except those options exercised at the time of contract award.

(b) *Amount of required bonds.* Unless the resulting contract price is valued at or below the threshold specified in Federal Acquisition Regulation 28.102–1(a) on the date of award of this contract, the successful offeror must furnish performance and payment bonds to the Contracting Officer as follows:

(1) *Performance bonds (Standard Form 25).* The penal amount of performance bonds at the time of contract award must be 100 percent of the original contract price.

(2) *Payment Bonds (Standard Form 25A).* The penal amount of payment bonds at the time of contract award must be 100 percent of the original contract price.

(3) *Additional bond protection.* (i) The Government may require additional performance and payment bond protection if the contract price is increased. The increase in protection generally will equal 100 percent of the increase in contract price.

(ii) The Government may secure the additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.

(c) *Furnishing executed bonds.* The Contractor must furnish all executed bonds, including any necessary reinsurance agreements, to the Contracting Officer, within the time period specified in the Bid Guarantee provision of the solicitation, or otherwise specified by the Contracting Officer, but in any event, before starting work.

(d) *Surety or other security for bonds.* The bonds must be in the form of firm commitment, supported by corporate sureties whose names appear on the list contained in Treasury Department Circular 570, individual sureties, or by other acceptable security such as postal money order, certified check, cashier's check, irrevocable letter of credit, or, in accordance with Treasury Department regulations, certain bonds or notes of the United States. Treasury Department Circular 570 may be obtained from the U.S. Department of the Treasury, Bureau of the Fiscal Service, Surety Bond

Branch, 3201 Pennsy Drive, Building E, Landover, MD 20785 or at <https://www.fiscal.treasury.gov/surety-bonds/circular-570.html>.

(e) *Notice of subcontractor waiver of protection (40 U.S.C. 3133(c)).* Any waiver of the right to sue on the payment bond is void unless it is in writing, signed by the person whose right is waived, and executed after such person has first furnished labor or material for use in the performance of the contract.

(End of clause)

52.228–16 Performance and Payment Bonds—Other Than Construction.

As prescribed in 28.103–4, insert a clause substantially as follows:

Performance and Payment Bonds—Other Than Construction (DATE)

(a) *Definition.* As used in this clause—
Original contract price means the award price of the contract or, for requirements contracts, the price payable for the estimated quantity; or, for indefinite-quantity contracts, the price payable for the specified minimum quantity. Original contract price does not include the price of any options, except those options exercised at the time of contract award.

(b) The Contractor must furnish a performance bond (Standard Form 1418) for the protection of the Government in an amount equal to _____ percent of the original contract price and a payment bond (Standard Form 1416) in an amount equal to _____ percent of the original contract price.

(c) The Contractor must furnish all executed bonds, including any necessary reinsurance agreements, to the Contracting Officer, within _____ days, but in any event, before starting work.

(d) The Government may require additional performance and payment bond protection if the contract price is increased. The Government may secure the additional protection by directing the Contractor to increase the penal amount of the existing bonds or to obtain additional bonds.

(e) The bonds must be in the form of firm commitment, supported by corporate sureties whose names appear on the list contained in Treasury Department Circular 570, individual sureties, or by other acceptable security such as postal money order, certified check, cashier's check, irrevocable letter of credit, or, in accordance with Treasury Department regulations, certain bonds or notes of the United States. Treasury Department Circular 570 may be obtained from the U.S. Department of the Treasury, Bureau of the Fiscal Service, Surety Bond Branch, 3201 Pennsy Drive, Building E, Landover, MD 20785 or at <https://www.fiscal.treasury.gov/surety-bonds/circular-570.html>.

(End of clause)

Alternate I (DATE). As prescribed in 28.103–4, substitute the following paragraphs (b) and (d) for paragraphs (b) and (d) of the basic clause:

(b) The Contractor must furnish a performance bond (Standard Form

1418) for the protection of the Government in an amount equal to _____ percent of the original contract price.

(d) The Government may require additional performance bond protection if the contract price is increased. The Government may secure the additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.

52.228–17 Individual Surety—Pledge of Assets (Bid Guarantee).

As prescribed in 28.203–4(a), insert the following provision:

Individual Surety—Pledge of Assets (Bid Guarantee) (DATE)

(a) Offerors must obtain from each person acting as an individual surety on a bid guarantee—

(1) A pledge of assets that meets the eligibility, valuation, and security requirements described in the Federal Acquisition Regulation (FAR) 28.203–1; and

(2) Standard Form 28, Affidavit of Individual Surety.

(b) The Offeror must include with its offer the information required at paragraph (a) of this provision within the timeframe specified in the provision at FAR 52.228–1, Bid Guarantee, or as otherwise established by the Contracting Officer.

(c) The Contracting Officer may release the security interest on the individual surety's assets in support of a bid guarantee based upon evidence that the offer supported by the individual surety will not result in contract award.

(End of provision)

52.236–1 [Removed and Reserved]

■ 12. Remove and reserve section 52.236–1.

■ 13. Revise sections 52.236–2 through 52.236–3 to read as follows:

52.236–2 Differing Site Conditions.

As prescribed in 36.101–7(a), insert the following clause:

Differing Site Conditions (DATE)

(a) Within 5 calendar days of discovery, the Contractor must, and before the conditions are disturbed, provide written notice to the Contracting Officer of—

(1) Latent physical conditions or subsurface conditions at the site which differ materially from those indicated in this contract; or

(2) Unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.

(b)(1) The Contracting Officer will investigate the site conditions promptly after receiving such a notice.

(2) If the conditions materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this

contract an equitable adjustment must be made under this clause.

(c) No request for an equitable adjustment to the contract under this clause will be allowed, unless the Contractor has given the written notice required.

(d) No request for an equitable adjustment to the contract for differing site conditions will be allowed if made after final payment under this contract.

(End of clause)

52.236-3 Site Investigation and Conditions Affecting the Work.

As prescribed in 36.101-7(a), insert the following clause:

Site Investigation and Conditions Affecting the Work (DATE)

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including—

(1) Conditions bearing upon transportation, disposal, handling, and storage of materials;

(2) The availability of labor, water, electric power, and roads;

(3) Uncertainties of weather, river stages, tides, or similar physical conditions at the site;

(4) The conformation and conditions of the ground; and

(5) The character of equipment and facilities needed preliminary to and during work performance.

(b) The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph does not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

(c) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

(End of clause)

52.236-4 [Removed and Reserved]

■ 14. Remove and reserve section 52.236-4.

■ 15. Revise sections 52.236-5 through 52.236-18 to read as follows:

52.236-5 Material and Workmanship.

As prescribed in 36.101-7(b), insert the following clause:

Material and Workmanship (DATE)

(a)(1) Equipment, material, and articles incorporated into the work covered by this contract must be new and of the most suitable grade for the purpose intended, unless otherwise specifically provided in this contract.

(2) References in the specifications to equipment, material, articles, or patented processes by trade name, make, or catalog number, will be regarded as establishing a standard of quality and must not be construed as limiting competition.

(3) The Contractor may, at its option, use any equipment, material, article, or process that, in the judgment of the Contracting Officer, is equal to that named in the specifications, unless otherwise specifically provided in this contract.

(b) The Contractor must obtain the Contracting Officer's approval of the machinery, mechanical, and other equipment to be incorporated into the work.

(1) When requesting approval, the Contractor must furnish to the Contracting Officer the name of the manufacturer, the model number, and other information concerning the performance, capacity, nature, and rating of the machinery and mechanical and other equipment.

(2) When required by this contract or by the Contracting Officer, the Contractor must also obtain the Contracting Officer's approval of the material or articles which the Contractor contemplates incorporating into the work.

(i) When requesting approval, the Contractor must provide appropriate and required information concerning the material or articles.

(ii) When directed to do so, the Contractor must submit samples for approval at the Contractor's expense, with shipping charges prepaid. Machinery, equipment, material, and articles that do not have the required approval are installed or used at the risk of subsequent rejection.

(c) Work under this contract must be performed in a skillful and workmanlike manner. The Contracting Officer may require, in writing, that the Contractor remove from the work any employee the Contracting Officer deems incompetent, careless, or otherwise objectionable.

(End of clause)

52.236-6 Superintendence by the Contractor.

As prescribed in 36.101-7(a), insert the following clause:

Superintendence by the Contractor (DATE)

During performance of this contract and until the work is completed and accepted, the Contractor must directly superintend the work or assign and have on site a competent superintendent who is satisfactory to the Contracting Officer and has authority to act for the Contractor.

(End of clause)

52.236-7 Permits and Responsibilities.

As prescribed in 36.101-7(c), insert the following clause:

Permits and Responsibilities (DATE)

(a) The Contractor must, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work.

(b) The Contractor is responsible for all damages to persons or property that occur as a result of the Contractor's fault or negligence.

(c) The Contractor is responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which may have been accepted under the contract.

(End of clause)

52.236-8 Other Contracts.

As prescribed in 36.101-7(a), insert the following clause:

Other Contracts (DATE)

(a) The Government may award other contracts for work at or near the site of the work under this contract. The Contractor must cooperate and coordinate with—

(1) Other contractors; and

(2) Government employees.

(b) The Contractor must adapt scheduling and performance of the work under this contract to accommodate the performance of other contractors. The Contractor's scheduling and performance must not delay or interfere with the performance of work by other contractors or Government employees.

(End of clause)

52.236-9 Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements.

As prescribed in 36.101-7(a), insert the following clause:

Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements (DATE)

(a) The Contractor must preserve and protect structures, equipment, and vegetation (such as trees, shrubs, and grass) on or adjacent to the work site, which are not to be removed, and which do not unreasonably interfere with the work required under this contract. The Contractor must only remove trees when specifically authorized to do so. If any limbs or branches of trees are broken during contract performance, the Contractor must trim those limbs or branches with a clean cut and paint the cut with a tree-pruning compound as directed by the Contracting Officer.

(b) The Contractor must protect from damage existing improvements, structures, equipment, and utilities at or near the work site, on adjacent property of a third party,

and transportation paths and routes. In the event of damage resulting from non-compliance with this contract or failure to exercise reasonable care in performing the work, the Contractor must promptly repair existing improvements structures, equipment, and utilities at or near the work site, on adjacent property of a third party, and on or near transportation paths and routes. The Contractor must repair any damage, including those that are the property of a third party.

(c) If the Contractor fails or refuses to repair the damage promptly, the Contracting Officer may have the necessary work performed and charge the cost to the Contractor.

(End of clause)

52.236–10 Operations and Storage Areas.

As prescribed in 36.101–7(a), insert the following clause:

Operations and Storage Areas (DATE)

(a) The Contractor must confine all activities and operations on site to areas authorized or approved by the Contracting Officer. The Contractor must hold and save the Government, its officers and agents, free and harmless from liability of any nature occasioned by the Contractor's performance.

(b)(1) Temporary buildings (e.g., storage sheds, shops, offices) and utilities—

(i) May be erected by the Contractor only with the approval of the Contracting Officer; and

(ii) Must only be built with labor and materials furnished by the Contractor without additional expense to the Government.

(2) The temporary buildings and utilities are the property of the Contractor and must be removed by the Contractor at its expense upon completion of the work.

(3) The temporary buildings and utilities may be abandoned and need not be removed, with written consent of the Contracting Officer.

(c) The Contractor must, as prescribed by the Contracting Officer, use only established roadways, or use temporary roadways constructed by the Contractor when and as authorized by the Contracting Officer. When materials are transported in prosecuting the work, vehicles must not be loaded beyond the loading capacity recommended by the manufacturer of the vehicle or prescribed by any Federal, State, or local law or regulation.

(End of clause)

52.236–11 Use and Possession Prior to Completion.

As prescribed in 36.101–7(d), insert the following clause:

Use and Possession Prior to Completion (DATE)

(a) The Government has the right to take possession of or use any completed or partially completed part of the work.

(1) Before taking possession of or using any work, the Contracting Officer will furnish the Contractor a list of items of work remaining to be performed or corrected on those

portions of the work that the Government intends to take possession of or use.

(2) Failure of the Contracting Officer to list any item of work does not relieve the Contractor of responsibility for complying with the terms of the contract.

(3) The Government's possession or use is not an acceptance of any work under the contract.

(b)(1) While the Government has such possession or use, the Contractor is relieved of the responsibility for the loss of or damage to the work resulting from the Government's possession or use, notwithstanding the terms of the clause in this contract entitled "Permits and Responsibilities".

(2) If prior possession or use by the Government delays the progress of the work or causes additional expense to the Contractor, an equitable adjustment must be made in the contract price or the time of completion, and the contract will be modified in writing accordingly.

(End of clause)

52.236–12 Cleaning Up.

As prescribed in 36.101–7(a), insert the following clause:

Cleaning Up (DATE)

(a) The Contractor must keep the work area, including storage areas, in a clean, neat, orderly condition, and free from accumulations of waste materials.

(b) Before completing the work, the Contractor must remove from the site any rubbish, tools, scaffolding, equipment, and materials that are not the property of the Government.

(End of clause)

52.236–13 Accident Prevention.

As prescribed in 36.101–7(e), insert the following clause:

Accident Prevention (DATE)

(a) *Responsibilities.* The Contractor must provide and maintain work environments and procedures that—

(1) Safeguard the public and Government personnel, property, materials, supplies, and equipment exposed to Contractor operations and activities;

(2) Avoid interruptions of Government operations and delays in project completion dates; and

(3) Control costs in the performance of this contract.

(b) *Requirements.* In addition, for contracts for construction or dismantling, demolition, or removal of improvements, the Contractor must—

(1) Provide appropriate safety barricades, signs, and signal lights;

(2) Comply with the standards issued by the Secretary of Labor at 29 CFR part 1926 and 29 CFR part 1910; and

(3) Ensure that any additional measures the Contracting Officer determines to be reasonably necessary for the purposes are taken.

(c) *Defense contracts.* If this contract is for construction or dismantling, demolition or removal of improvements with any

Department of Defense agency or component, the Contractor must comply with all pertinent provisions of the latest version of U.S. Army Corps of Engineers Safety and Health Requirements Manual, EM 385–1–1, in effect on the date of the solicitation.

(d) *Noncompliance.*

(1) If the Contracting Officer becomes aware of any noncompliance with these requirements or any condition that poses a serious or imminent danger to the health or safety of the public or Government personnel, the Contracting Officer will notify the Contractor orally, with written confirmation, and request immediate initiation of corrective action.

(2) This notice, when delivered to the Contractor or the Contractor's representative at the work site, is sufficient notice of the noncompliance and that corrective action is required.

(3) After receiving the notice, the Contractor must immediately take corrective action.

(4) If the Contractor fails or refuses to promptly take corrective action, the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action has been taken.

(5) The Contractor is not entitled to any equitable adjustment of the contract price or extension of the performance schedule on any stop-work order issued under this clause.

(e) *Subcontracts.* The Contractor—

(1) Must include the substance of this clause, including this paragraph (e), in all subcontracts under this contract, including those for commercial services, but excluding those for commercial products; and

(2) May modify the clause only as necessary to identify the parties.

(End of clause)

Alternate I (DATE). As prescribed at 36.101–7(e)(2) add the following paragraph (f) to the basic clause:

(f) Before commencing the work, the Contractor must—

(1) Submit a written proposed plan for implementing this clause. The plan must include an analysis of the significant hazards to life, limb, and property inherent in contract work performance and a plan for controlling these hazards; and

(2) Meet with representatives of the Contracting Officer to discuss and develop a mutual understanding relative to administration of the overall safety program.

52.236–14 Availability and Use of Utility Services.

As prescribed in 36.101–7(f), insert the following clause:

Availability and Use of Utility Services (DATE)

(a) The Government will make all reasonably required utilities available to the Contractor from existing outlets and supplies, as specified in the contract.

(b) Unless otherwise provided in the contract, the Contractor must pay for all utility costs.

(c) The Contractor, at its expense and in a workmanlike manner, must install and maintain all necessary temporary connections, distribution lines, and all meters required to measure the amount of each utility used for the purpose of determining charges.

(d) Before final acceptance by the Government, the Contractor must remove the temporary connections, distribution lines, meters, and associated paraphernalia.

(End of clause)

52.236–15 Schedules for Construction Contracts.

As prescribed in 36.101–7(g), insert the following clause:

Schedules for Construction Contracts (DATE)

(a)(1) Within five days after the work commences on the contract or another period of time determined by the Contracting Officer, the Contractor must prepare and submit to the Contracting Officer for approval a practicable schedule showing the order in which the Contractor proposes to perform the work, and the dates on which the Contractor contemplates starting and completing the work (including acquiring materials, plant, and equipment).

(2) The schedule must be in the form of a progress chart of suitable scale to indicate appropriately the percentage of work scheduled for completion by any given date during the period.

(3) If the Contractor fails to submit a schedule within the time prescribed, the Contracting Officer may withhold approval of progress payments until the Contractor submits the required schedule.

(b) The Contractor must continually update the actual progress in the schedule and must submit it to the Contracting Officer by the means prescribed in the contract for transmittals or as directed by the Contracting Officer.

(c)(1) If the Contractor falls behind the approved schedule, the Contractor must take steps necessary to recover lost time and execute in accordance with the approved schedule, without additional cost to the Government.

(2) Such steps may include increasing the number of shifts, overtime operations, days of work, and/or the amount of construction plant.

(3) The Contractor must submit, for approval, supplementary schedule(s) that demonstrate how the lost time will be recovered.

(d) If the Contractor does not recover the lost time, the Contracting Officer may determine that the Contractor is not prosecuting the work with sufficient diligence to ensure completion within the time specified in the contract. Upon making this determination, the Contracting Officer may terminate the Contractor's right to proceed with the work, or any separable part of it, in accordance with the default terms of this contract.

(End of clause)

52.236–16 Quantity Surveys.

As prescribed in 36.101–7(h), insert the following clause:

Quantity Surveys (DATE)

(a) Quantity surveys must be conducted, and the data derived from these surveys must be used in computing the quantities of work performed and the actual construction completed and in place.

(1) The Government will conduct the original and final surveys and make the computations based on them.

(2)(i) The Contractor must conduct the surveys for any periods for which progress payments are requested and must make the computations based on these surveys.

(ii) All surveys conducted by the Contractor must be conducted under the direction of a representative of the Contracting Officer, unless the Contracting Officer waives this requirement in a specific instance.

(b) Upon completing a survey, the Contractor must promptly provide the originals of all field notes and all other records relating to the survey or to the layout of the work to the Contracting Officer, which may be used by the Contracting Officer to determine the amount of progress payments.

(c) The Contractor must retain copies of all such material furnished to the Contracting Officer.

(End of clause)

Alternate I (DATE). As prescribed in 36.101–7(h) substitute the following paragraph (b) for paragraph (b) of the basic clause:

(b) The Contractor must conduct the original and final surveys and surveys for any periods for which progress payments are requested. All these surveys must be conducted under the direction of a representative of the Contracting Officer, unless the Contracting Officer waives this requirement in a specific instance. The Government must make such computations as are necessary to determine the quantities of work performed or finally in place. The Contractor must make the computations based on the surveys for any periods for which progress payments are requested.

52.236–17 Layout of Work.

As prescribed in 36.101–7(i), insert the following clause:

Layout of Work (DATE)

(a) The Contractor must layout its work from Government-established base lines and benchmarks provided on the drawings.

(b) The Contractor must be responsible for all measurements in connection with the layout.

(c) The Contractor must furnish, at its own expense, all stakes, templates, platforms, equipment, tools, materials, and labor required for the layout.

(d) The Contractor is responsible for executing the work to the lines and grades that may be established or indicated by the Contracting Officer.

(e)(1) The Contractor is responsible for maintaining and preserving all stakes and other marks established by the Contracting Officer until authorized to remove them.

(2) If such marks are destroyed by the Contractor, the Contracting Officer may replace them and deduct the expense of the replacement from any amounts due or to become due to the Contractor.

(End of clause)

52.236–18 Work Oversight in Cost-Reimbursement Construction Contracts.

As prescribed in 36.101–7(j), insert the following clause:

Work Oversight in Cost-Reimbursement Construction Contracts (DATE)

The extent and character of the work to be done by the Contractor is subject to the general supervision, direction, control, and approval of the Contracting Officer.

(End of clause)

52.236–19 [Removed and Reserved]

■ 16. Remove and reserve section

52.236–19.

■ 17. Revise sections 52.236–21 through 52.236–25 to read as follows:

52.236–21 Specifications and Drawings for Construction.

As prescribed in 36.101–7(k), insert the following clause:

Specifications and Drawings for Construction (DATE)

(a) The Contractor must keep at the site a copy of the drawings and specifications and must at all times give the Contracting Officer access thereto.

(b) Anything mentioned in the specifications and not shown on the drawings or shown on the drawings and not mentioned in the specifications, must be of like effect as if shown or mentioned in both.

(1) In case of difference between drawings and specifications, the specifications govern.

(2) In case of discrepancy in the figures, in the drawings, or in the specifications, the matter must be promptly submitted to the Contracting Officer, who will promptly make a determination in writing.

(3) Any adjustment by the Contractor without such a determination is at its own risk and expense.

(c) The Contracting Officer will furnish from time to time such detailed drawings and other information as considered necessary, unless otherwise provided.

(d)(1) Words, such as, “directed”, “required”, “ordered”, “designated”, “prescribed”, or words of like import when used, in the specifications or on the drawings are intended to mean the “direction”, “requirement”, “order”, “designation”, or “prescription”, of the Contracting Officer.

(2) Words, such as, “approved”, “acceptable”, “satisfactory”, or words of like

import mean “approved by”, or “acceptable to”, or “satisfactory to” the Contracting Officer, unless otherwise expressly stated.

(e) Where “as shown”, “as indicated”, “as detailed”, or words of similar import are used, it is understood that the reference is made to the drawings accompanying this contract unless stated otherwise. The word “provided” as used herein is understood to mean “provide complete in place”, that is “furnished and installed”.

(f) Shop drawings means detailed drawings, diagrams, illustrations, schedules, etc., submitted to the Government by the Contractor, subcontractor, or any lower tier subcontractor pursuant to a construction contract, showing in detail the proposed fabrication, assembly of, and the installation (*i.e.*, form, fit, and attachment details) of materials or equipment. The Government may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.

(g)(1) If this contract requires shop drawings, the Contractor must coordinate all such drawings, and review them for accuracy, completeness, and compliance with contract requirements and must indicate its approval thereon as evidence of such coordination and review.

(2) Shop drawings submitted to the Contracting Officer without evidence of the Contractor’s approval may be returned for resubmission.

(h) The Contracting Officer will indicate an approval or disapproval of the shop drawings and if not approved as submitted must indicate the Government’s reasons therefor.

(1) Any work done before such approval is at the Contractor’s risk.

(2) Approval by the Contracting Officer does not relieve the Contractor from responsibility for any errors or omissions in such drawings, nor from responsibility for complying with the requirements of this contract, except with respect to variations described and approved in accordance with paragraph (i) of this clause.

(i)(1) If shop drawings show variations from the contract requirements, the Contractor must describe such variations in writing, separate from the drawings, at the time of submission.

(2) If the Contracting Officer approves any such variation, the Contracting Officer will issue an appropriate contract modification, except that, if the variation is minor or does not involve a change in price or in time of performance, a modification need not be issued.

(j) The Contractor must submit to the Contracting Officer for approval four copies (unless otherwise indicated) of all shop drawings as called for under the various headings of these specifications. Three sets (unless otherwise indicated) of all shop drawings, will be retained by the Contracting Officer and one set will be returned to the Contractor.

(End of clause)

Alternate I (DATE). As prescribed at 36.101–7(k)(3)(i), add the following sentences to paragraph (j) of the basic clause:

Upon completing the work under this contract, the Contractor must furnish a complete set of all shop drawings as finally approved. These drawings must show all changes and revisions made up to the time the equipment is completed and accepted.

Alternate II (DATE). As prescribed at 36.101–7(k)(3)(ii), add the following sentences to paragraph (j) of the basic clause:

Upon completing the work under this contract, the Contractor must furnish [*Contracting Officer complete by inserting desired amount*] sets of prints of all shop drawings as finally approved. These drawings must show changes and revisions made up to the time the equipment is completed and accepted.

52.236–22 Design Within Funding Limitations.

As prescribed in 36.102–4(b), insert the following clause:

Design Within Funding Limitations (DATE)

(a) The Contractor must accomplish the design services required under this contract to permit the award of a contract, using standard Federal Acquisition Regulation procedures for the construction of the facilities designed at a price that does not exceed the estimated construction contract price as set forth in paragraph (d) of this clause.

(1) When bids or proposals for the construction contract are received that exceed the estimated price, the Contractor must perform such redesign and other services as are necessary to permit contract award within the funding limitation.

(2) These additional services must be performed at no increase in the price of this contract.

(3) The Contractor must not be required to perform such additional services at no cost to the Government if the unfavorable bids or proposals are the result of conditions beyond its reasonable control.

(b) The Contractor will promptly provide written notice to the Contracting Officer if it finds that the project will exceed or is likely to exceed the funding limitations and it is unable to design a usable facility within these limitations.

(1) Upon receipt of such written notice, the Contracting Officer will review the Contractor’s revised estimate of construction cost.

(2) The Government may, if it determines that the estimated construction contract price set forth in this contract is so low that award of a construction contract not in excess of such estimate is improbable,—

(i) Authorize a change in scope or materials as required to reduce the estimated construction cost to an amount within the estimated construction contract price set forth in paragraph (d) of this clause; or

(ii) The Government may adjust such estimated construction contract price.

(c) When bids or proposals are not solicited or are unreasonably delayed, the Government must prepare an estimate of constructing the design submitted and such estimate must be used in lieu of bids or proposals to determine compliance with the funding limitation.

(d) The estimated construction contract price for the project described in this contract is \$ ____.

(End of clause)

52.236–23 Responsibility of the Architect-Engineer Contractor.

As prescribed in 36.102–4(c), insert the following clause:

Responsibility of the Architect-Engineer Contractor (DATE)

(a) The Contractor is responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other services furnished by the Contractor under this contract.

(b) The Contractor must, without additional compensation, correct or revise any errors or deficiencies in its designs, drawings, specifications, and other services.

(c) Neither the Government’s review, approval or acceptance of, nor payment for, the services required under this contract will be construed to operate as a waiver of any rights under this contract or of any cause of action arising out of the performance of this contract.

(d) The Contractor remains liable to the Government, in accordance with applicable law, for all damages to the Government caused by the Contractor’s negligent performance of any of the services provided under this contract.

(e) The rights and remedies of the Government provided for under this contract are in addition to any other rights and remedies provided by law.

(f) If the Contractor is comprised of more than one legal entity, each such entity is jointly and severally liable hereunder.

(End of clause)

52.236–24 Work Oversight in Architect-Engineer Contracts.

As prescribed in 36.102–4(d), insert the following clause:

Work Oversight in Architect-Engineer Contracts (DATE)

The extent and character of the work to be done by the Contractor is subject to the general oversight, supervision, direction, control, and approval of the Contracting Officer.

(End of clause)

52.236–25 Requirements for Registration of Designers.

As prescribed in 36.102–4(e), insert the following clause:

Requirements for Registration of Designers (DATE)

Architects or engineers registered to practice in the particular professional field involved in a State, the District of Columbia,

or an outlying area of the United States must
prepare or review and approve the design of
architectural, structural, mechanical,

electrical, civil, or other engineering features
of the work.

(End of clause)

52.236–26 through 52.236–28 [Removed
and Reserved]

■ 18. Remove and reserve sections
52.236–26 through 52.236–28.

[FR Doc. 2026–19158 Filed 9–17–26; 8:45 am]

BILLING CODE 6820–EP–P



FEDERAL REGISTER

Vol. 91

Friday,

No. 180

September 18, 2026

Part VII

Office of Management and Budget

Office of Federal Procurement Policy

Department of Defense

General Services Administration

National Aeronautics and Space Administration

48 CFR Parts 9, 27, et al.

Federal Acquisition Regulation: Revolutionary Federal Acquisition Regulation
Overhaul Parts 9, 27, and 47; Proposed Rule

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 9, 27, 47, and 52

[FAR Case 2026–011, Docket No. FAR–2026–0011, Sequence No. 1]

RIN 9000–AO84

Federal Acquisition Regulation: Revolutionary Federal Acquisition Regulation Overhaul Parts 9, 27, and 47

AGENCY: Office of Federal Procurement Policy (OFPP), Office of Management and Budget (OMB); Department of Defense (DoD); General Services Administration (GSA); and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: OFPP, DoD, GSA, and NASA (collectively referred to as the Federal Acquisition Regulatory Council or FAR Council) are proposing to amend the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.) 14275, Restoring Common Sense to Federal Procurement. The E.O. directs the elimination of excessive acquisition regulations to stop the inefficient use of American taxpayer dollars. The FAR Council is issuing twelve proposed rules that collectively, if finalized, would streamline the FAR in its entirety. This rule proposes revisions to FAR parts 9, 27, 47, and 52.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before October 19, 2026, to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2026–011 to the Federal eRulemaking portal at <https://www.regulations.gov>. Follow the instructions for sending comments.

Instructions: Please submit comments only and cite “FAR Case 2026–011” in all correspondence related to this case. Include your name, company name (if any), and “FAR Case 2026–011” on any attached document. Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal and/or business

confidential information provided. Public comments may be submitted as an individual, as an organization, or anonymously (see frequently asked questions at <https://www.regulations.gov/faq>). To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

Docket: For access to the docket to read background documents or comments received, go to <https://www.regulations.gov/FAR-2026-0011>.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact FARpolicy@gsa.gov or call 202–969–4075 and cite “FAR Case 2026–011.” For information pertaining to status, publication schedules, or alternate instructions for submitting comments if <https://www.regulations.gov> cannot be used, contact the Regulatory Secretariat Division at 202–501–4755 or GSARegSec@gsa.gov. Please cite “FAR Case 2026–011.”

SUPPLEMENTARY INFORMATION:

I. Background

E.O. 14275, Restoring Common Sense to Federal Procurement (April 15, 2025), resets the foundation for Federal buying by requiring the FAR Council to produce a streamlined FAR that is simpler, clearer, and structured for speed. According to the E.O., the FAR has evolved from its original purpose (*i.e.*, to establish uniform procedures across executive departments and agencies), into an excessive and overcomplicated regulatory framework and bureaucracy. While meant to “deliver, on a timely basis, the best value product or service to the customer, while maintaining the public’s trust and fulfilling public policy objectives,” the FAR has become an expensive barrier to achieving those objectives. As a result, the E.O. directed the FAR Council and OMB to create an agile, effective, and efficient regulation that contains only provisions required by statute or essential to sound procurement.

To implement E.O. 14275, OMB issued Memorandum M–25–26, Overhauling the Federal Acquisition Regulation, which announced the “Revolutionary FAR Overhaul” (RFO) and created a roadmap for producing simpler regulations aligned to statute, rewritten in plain language, and including nonstatutory requirements that are necessary to conducting a sound procurement. The memorandum described a new streamlined vision for the FAR, to be maintained alongside nonregulatory governmentwide

guidance to provide a common-sense authoritative foundation for nimble response and delivery of mission capability.

This new vision represents a paradigm shift where over-engineered regulations designed for paperwork and compliance are replaced with streamlined regulations focused on core stewardship principles and nonregulatory guidance that will be used in concert with the streamlined FAR focused on proven buying strategies, critical thinking, market awareness (including to expand awareness of goods, products, and materials offered in the United States), and risk literacy to enhance workforce problem-solving. The significant reduction of unnecessary mandates is intended to clarify and reinforce the contracting officer’s discretion to determine the best way to apply policies and practices. The newly established, nonregulatory guidance, which has been inspired by acquisition innovation advocates, category managers, other experienced practitioners, and many years of feedback from the contractor community—is expected to facilitate contracting officers’ use of their discretion more efficiently and effectively to make smarter buying decisions.

OMB Memorandum M–25–26 also directed the FAR Council to complete the regulatory overhaul in two phases, each with robust public input. The FAR Council conducted its phase one effort in fiscal year 2025 by issuing model class deviations to replace each part in the FAR until such time as formal rulemaking occurred. This proposed rule is one of a series that constitute the FAR Council’s phase two effort to obtain public comment through formal rulemaking.

II. Discussion and Analysis

A summary of proposed changes to existing FAR parts 9, 27, and 47, and their corresponding provisions and clauses in part 52 are as follows:

A. General

1. General RFO updates. This proposed rule generally reorganizes the FAR parts into phases of acquisition and simplifies the text into plain language, where possible. The plain language efforts include changes to active voice, edits to improve readability, and reorganization to present information more logically. None of the plain language edits are intended to change existing FAR requirements. The rewriting of the entire FAR also required edits to harmonize the changes being proposed such as updating the cross-

references. This aligns with Federal plain language guidelines as directed by the Plain Writing Act of 2010 (5 U.S.C. 301 note).

2. *Standardization of prescriptions.*

This rule proposes revisions to standardize prescriptions for provisions and clauses. These changes are intended to provide better clarity around the applicability of provisions and clauses such as whether they apply to commercial products and services.

3. *Use of “must” instead of “shall”.*

Additional revisions are being proposed throughout the FAR text and FAR provisions and clauses to replace the use of the term “shall” with “must” or “will,” as appropriate, to impose requirements.

4. *Non-statutory requirements.*

Section 4 of the E.O. required amendments to the FAR to ensure it contains only provisions that are required by statute or that are otherwise necessary to support simplicity and usability, strengthen the efficacy of the procurement system, or protect economic or national security. The FAR Council reviewed all non-statutory requirements to determine if they are still relevant and essential to sound procurement in today’s contracting environment based on the criteria from section 4 of the E.O. The proposed rule retains non-statutory requirements that further one or more of the elements of sound procurements, including those requirements that serve as guardrails to protecting taxpayer interests and promote taxpayer confidence in the procurement system. Non-statutory requirements that were beneficial but not essential were retained in the non-regulatory guidance documents. Other non-statutory requirements that did not meet these standards, were removed. The Council considered the extent to which regulation is the most efficient means for capturing the benefit of the policy. For example, most “how to” requirements were found to be more appropriately suited for non-regulatory coverage which better enables a contracting officer to use discretion in determining the application of a strategy to a given situation and limits the risk of overapplication, which can create wasteful burden on the contracting parties.

As part of the RFO, the FAR Council has created a number of non-regulatory resources, including the FAR Companion, which provides insight from experienced practitioners across the government on using more streamlined practices and processes. The migration of significant coverage to non-regulatory guidance is intended to ensure that the benefits of the policy are

not outweighed by the compliance burden of a more rigidly written regulation that is prone to application in an overly broad manner. This approach was explained to the public in a set of “frequently asked questions” that were posted on the Revolutionary FAR Overhaul homepage shortly after the initiative was launched.

B. *FAR Part 9*

1. *Streamlining*

This proposed rule would remove or relocate FAR content that is outdated, redundant, or otherwise unnecessary. These revisions align with the broader RFO initiatives and do not substantively change policy or procedures in the part. FAR section 9.000 “Scope of Part,” is proposed to be removed because the language is duplicative. The definition of “Surveying activity” is proposed to be removed from FAR section 9.101, “Definitions,” because the definition is unnecessary. FAR section 9.104–2, “Special Standards,” is proposed to be removed as unnecessary. FAR section 9.106, “Preaward Surveys,” is proposed to be removed; this includes the reference to utilizing the Standard Form 1403, Preaward Survey of Prospective Contractor (General). FAR section 9.107, “Surveys of Nonprofit Agencies Participating in the AbilityOne Program,” is proposed to be removed because the AbilityOne Program is covered in FAR part 8, and nuances of pre-award surveys relevant to the AbilityOne Program are now covered in nonregulatory content. FAR subpart 9.6, “Contractor Team Arrangements,” is proposed to be removed as unnecessary. FAR subpart 9.7, “Defense Production Pools and Research and Development Pools,” is proposed to be removed. Lastly, this rule proposes to revise FAR section 9.103–2(b), “Satisfactory performance record,” for clarity.

2. *Section 812(a)(6) of the National Defense Authorization Act for Fiscal Year 2026*

This rule would implement section 812(a)(6) of the National Defense Authorization Act for Fiscal Year 2026 (Pub. L. 119–60). Section 812(a)(6) strikes 10 U.S.C. 3243(d)(2), which, where fewer than two actual manufacturers were available to compete in a future procurement involving a qualification requirement, required DoD agencies to make a determination before bearing the cost for a small business and prospective competitor to undergo the testing and evaluation necessary to meet the qualification requirement. A corresponding requirement for civilian

agencies remains in effect at 41 U.S.C. 3311(d)(2). FAR section 9.204(a)(2)(i) implements this requirement in the FAR. This rule proposes to change FAR 9.204(a)(2)(i) to exclude DoD from the requirement.

3. *Implementation of Executive Order 14398*

E.O. 14398 of March 26, 2026, Addressing DEI Discrimination by Federal Contractors, was published in the **Federal Register** on March 31, 2026, at 91 FR 16147. E.O. 14398 establishes that agencies should not do business with contractors that engage in any racially discriminatory diversity, equity, and inclusion (DEI) activities. Section 5 of E.O. 14398 directs the FAR Council to amend the FAR to implement the contract clause described in section 3 of the E.O. This rule proposes to add noncompliance with the resulting FAR clause, 52.222–XX, Addressing DEI Discrimination by Federal Contractors, to the list of causes for debarment and suspension at FAR 9.406–2(b)(1) and 9.407–2(a), respectively.

4. *Other Editorials*

FAR part 9 is proposed to be revised to remove reserved subparts, sections, subsections and paragraphs and to renumber the retained content to avoid numbering gaps.

FAR part 9 is proposed to be revised to replace the disused term “Federal Awardee Performance and Integrity Information System,” (FAPIIS) with “integrity records.” As part of its ongoing systems modernization effort, GSA retired FAPIIS, and integrity records are now accessed in *SAM.gov* and reported in *CPARS.gov*. The paragraph at FAR 9.105–2(b)(2)(iii), describing this distinction, is proposed to relocate to FAR 9.104–5.

The definition of “Qualified products list (QPL)” is proposed to relocate from FAR subpart 2.1 to FAR subpart 9.2 because the term is used only within the latter subpart. The definition itself remains unchanged.

C. *FAR Part 27*

1. *Overhaul of FAR Subpart 27.4*

This rule proposes to delete FAR subpart 27.4, Rights in Data and Copyrights, in its entirety, along with associated provisions and clauses, and replace it with analogous content derived from the Defense Federal Acquisition Regulation Supplement (DFARS). As revised, FAR subpart 27.4 would be titled “Technical Data, Computer Software, Computer Software Documentation, and Associated Rights Related to Other Than Commercial

Products, Components, Services, Processes, and Computer Software.” This subpart would prescribe policies and procedures for the acquisition of other-than-commercial technical data, computer software, computer software documentation, and corresponding rights to use, modify, reproduce, release, perform, display, or disclose technical data. Further, this rule proposes to add DFARS-derived provisions and clauses basically for use in other than commercial acquisitions.

To complement FAR subpart 27.4, this rule proposes to add FAR subpart 27.5, titled “Technical Data, Computer Software, Computer Software Documentation, and Associated Rights Related to Commercial Products and Computer Services.” Further, this rule proposes to add DFARS-derived provisions and clauses basically for use in commercial acquisitions. This subpart, also derived from the DFARS, would prescribe policies and procedures for the acquisition of commercial technical data, computer software, and computer software documentation related to commercial products, components, services, processes, and computer software, and corresponding rights to use, modify, reproduce, release, perform, display, or disclose such data or software.

This rule proposes therefore to replace existing FAR subpart 27.4 with two new subparts to bifurcate treatment of acquisitions of other than commercial products and services and commercial products and services.

2. Additional Patent-Related Clauses

This rule proposes to add to FAR subpart 52.2 two DFARS-derived clauses: FAR 52.227–24, Patents—Reporting of Subject Inventions, and FAR 52.227–25, Patent Rights—Ownership by the Contractor (Large Business), to complement existing patent-related clauses, all of which substantially remain. Clause prescriptions are added accordingly to FAR subpart 27.3.

3. Small Business Innovation Research (SBIR) Program and Small Business Technology Transfer (STTR) Program

This rule proposes to update coverage of the SBIR program and to add coverage of the STTR program. This revised SBIR/STTR coverage would align the FAR with the Small Business Administration (SBA) SBIR/STTR Policy Directive, effective May 3, 2023. Accordingly, this rule proposes to update the SBIR/STTR data protection period to a single, non-extendable, 20-year period. This rule also proposes to grant the Government a Government

purpose rights license after the expiration of the SBIR/STTR data protection period, rather than an unlimited rights license, and it would establish or revise several definitions to correspond to terminology used in the SBA Policy Directive.

4. Other Editorials

FAR part 27 is otherwise proposed to be revised to remove reserved sections, subsections and paragraphs and to renumber the retained content to avoid numbering gaps.

D. FAR Part 47

1. Streamlining

This rule proposes to revise FAR part 47 to eliminate outdated requirements not derived from statute or executive order. These revisions, including removing 33 clauses, align with the broader RFO initiatives and do not substantively change policy or procedures in the part.

FAR section 47.102, “Transportation Insurance”, is proposed to be deleted. FAR section 47.103–1 (renumbered as FAR 47.102–1), addressing “Transportation Payment and Audit Regulation”, is proposed to be updated from five paragraphs that detailed where and how to send paid freight bills to the General Services Administration (GSA) for audit, to a single sentence that states the statutory requirement for a prepayment audit program and directs users to 41 CFR part 102–118 for details. FAR section 47.105, “Transportation Assistance”, is proposed to be deleted. FAR subsection 47.301–2, “Participation of Transportation Officers”, is proposed to be deleted.

In FAR subsections 47.303–1 through 47.303–11, paragraph (b) of each subsection, each titled “Contractor Responsibilities,” is proposed to be removed because the content merely duplicates that found in the relevant contract clauses. The paragraphs within these subsections are proposed to be renumbered accordingly.

The following sections or subsections are proposed to be removed because the content duplicates contracting principles established in other parts of the FAR or other regulations:

- FAR 47.202, Presolicitation Planning
- FAR 47.205, Availability of Term Contracts and Basic Ordering Agreements for Transportation or for Transportation-related Services
- FAR 47.206, Preparation of Solicitations and Contracts
- FAR 47.207–2, Duration of Contract and Time of Performance
- FAR 47.207–10, Discrepancies Incident to Shipments

The following subsections are proposed to be removed because they are not required by statute or executive order, and they are not otherwise essential to sound procurement:

- FAR 47.303–12, Ex dock, pier, or warehouse, port of importation
- FAR 47.303–13, C.& f. destination
- FAR 47.303–14, C.i.f. destination
- FAR 47.303–15, F.o.b. designated air carrier’s terminal, point of exportation
- FAR 47.303–16, F.o.b. designated air carrier’s terminal, point of importation
- FAR 47.303–17, Contractor-prepaid commercial bills of lading, small package shipments

The following provisions and clauses are proposed to be removed because they are not required by statute or executive order, and they are not otherwise essential to sound procurement:

- FAR 52.247–3, Capability To Perform a Contract for the Relocation of a Federal Office
- FAR 52.247–4, Inspection of Shipping and Receiving Facilities
- FAR 52.247–6, Financial Statement
- FAR 52.247–7, Freight Excluded
- FAR 52.247–9, Agreed Weight—General Freight
- FAR 52.247–12, Supervision, Labor, or Materials
- FAR 52.247–14, Contractor Responsibility for Receipt of Shipment
- FAR 52.247–16, Contractor Responsibility for Returning Undelivered Freight
- FAR 52.247–20, Estimated Quantities or Weights for Evaluation of Offers
- FAR 52.247–24, Advance Notification by the Government
- FAR 52.247–25, Government-Furnished Equipment With or Without Operators
- FAR 52.247–26, Government Direction and Marking
- FAR 52.247–27, Contract Not Affected by Oral Agreement
- FAR 52.247–28, Contractor’s Invoices
- FAR 52.247–40, Ex Dock, Pier, or Warehouse, Port of Importation
- FAR 52.247–41, C.& f. Destination
- FAR 52.247–42, C.i.f. Destination
- FAR 52.247–43, F.o.b. Designated Air Carrier’s Terminal, Point of Exportation
- FAR 52.247–44, F.o.b. Designated Air Carrier’s Terminal, Point of Importation
- FAR 52.247–45, F.o.b. Origin and/or F.o.b. Destination Evaluation
- FAR 52.247–46, Shipping Point(s) Used in Evaluation of F.o.b. Origin Offers
- FAR 52.247–47, Evaluation—F.o.b. Origin

- FAR 52.247–49, Destination Unknown
- FAR 52.247–50, No Evaluation of Transportation Costs
- FAR 52.247–51, Evaluation of Export Offers
- FAR 52.247–55, F.o.b. Point for Delivery of Government-Furnished Property
- FAR 52.247–57, Transportation Transit Privilege Credits
- FAR 52.247–59, F.o.b. Origin—Carload and Truckload Shipments
- FAR 52.247–60, Guaranteed Shipping Characteristics
- FAR 52.247–61, F.o.b. Origin—Minimum Size of Shipments
- FAR 52.247–62, Specific Quantities Unknown
- FAR 52.247–65, F.o.b. Origin, Prepaid Freight—Small Package Shipments
- FAR 52.247–66, Returnable Cylinders

2. Other Editorials

FAR part 47 is otherwise proposed to be revised to remove reserved sections, subsections and paragraphs and to renumber the retained content to avoid numbering gaps.

E. FAR Part 52 Renumbering

As a result of the RFO, the FAR Council is considering establishing a new FAR subpart in part 52 and relocating and renumbering all provisions and clauses under this new subpart. This means, if subpart 52.4 were used, all provisions and clauses would begin with 52.4 instead of 52.2. This change is anticipated to prevent confusion and increase compliance by creating a clear distinction between versions of a provision or clause prior to the RFO. Other benefits include avoiding potential clause numbering conflicts and information system and data collection impacts. The FAR Council welcomes comments on the potential impact of such a change on contractors, Government personnel, and other stakeholders.

III. Applicability to Contracts and Subcontracts Valued at or Below the Simplified Acquisition Threshold and for Commercial Products and Commercial Services

The following sections address the applicability of provisions and clauses prescribed in FAR parts 9, 27, and 47 to solicitations and contracts valued at or below the simplified acquisition threshold (SAT) and those for the acquisition of commercial products, commercially available off-the-shelf (COTS) items, and commercial services. Prescriptions for provisions and clauses in these parts have been updated to reflect applicability to commercial acquisitions.

A. Contracts and Subcontracts Valued at or Below the Simplified Acquisition Threshold

This proposed rule, if finalized, does not alter the prescriptions of provisions and clauses included in this proposed rule to change their applicability to contracts and subcontracts valued at or below the SAT.

B. Contracts and Subcontracts for Commercial Products, Commercially Available Off-the-Shelf Items, and Commercial Services

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial products and commercial services and gives the FAR Council the authority to determine to apply a law to contracts or subcontracts for the acquisition of commercial products and commercial services. 41 U.S.C. 1907 exempts contracts for commercially available off-the-shelf (COTS) items from certain provisions of law unless the Administrator for Federal Procurement Policy determines that doing so would not be in the best interest of the Federal Government.

Section 839 of the John S. McCain National Defense Authorization Act

(NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232) required the FAR Council and the Administrator of Federal Procurement Policy to review prior determinations under 41 U.S.C. 1906 and 41 U.S.C. 1907, as well as the applicability of provisions and clauses to contracts and subcontracts for commercial products, COTS items, and commercial services that do not implement statute or Executive order, and propose amendments to the FAR to eliminate or exempt such requirements from commercial acquisitions, unless there are specific reasons to retain particular requirements.

In accordance with section 839 of the NDAA for FY 2019 and their authorities under 41 U.S.C. 1906 and 1907, the FAR Council reviewed the applicability of the provisions and clauses associated with the FAR parts covered by this proposed rule.

The following table reflects the FAR Council and Administrator of Federal Procurement Policy's proposed determination regarding the applicability of the provisions and clauses to solicitations and contracts for commercial products, COTS items, and/or commercial services. In making proposed applicability determinations, the FAR Council considered factors such as whether the provision or clause advances national security or economic security, contributes to the resilience of contractors and subcontractors in the federal marketplace, or advances uniformity and clarity in the performance of basic functions that are essential to sound procurement.

Accordingly, this proposed rule, if finalized, would revise provision and clause prescriptions to clearly reflect applicability to commercial acquisitions as outlined in the table. An “X” in the following table indicates the provision or clause would apply to that category of commercial acquisition, as prescribed:

Provision/clause No.	Title	Commercial products	Commercial services	COTS items
52.209–1	Qualification Requirements	X	X	.....
52.209–2	Prohibition on Contracting With Inverted Domestic Corporations-Representation.	X	X	X
52.209–3	First Article Approval-Contractor Testing	X	X	.....
52.209–3 Alt I	First Article Approval-Contractor Testing	X	X	.....
52.209–3 Alt II	First Article Approval-Contractor Testing	X	X	.....
52.209–4	First Article Approval-Government Testing .....	.....	.....	.....
52.209–4 Alt I	First Article Approval-Government Testing .....	.....	.....	.....
52.209–4 Alt II	First Article Approval-Government Testing .....	.....	.....	.....
52.209–5	Certification Regarding Responsibility Matters	X	X	X
52.209–6	Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, Proposed for Debarment, or Voluntarily Excluded.	X	X	.....
52.209–6 Alt I	Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, Proposed for Debarment, or Voluntarily Excluded.	X	.....	.....

Provision/clause No.	Title	Commercial products	Commercial services	COTS items
52.209-7	Information Regarding Responsibility Matters	X	X	X
52.209-9	Updates of Publicly Available Information Regarding Responsibility Matters.	X	X	X
52.209-10	Prohibition on Contracting With Inverted Domestic Corporations	X	X	X
52.209-11	Representation by Corporations Regarding Delinquent Tax Liability or a Felony Conviction under any Federal Law.	X	X	X
52.209-12	Certification Regarding Tax Matters	X	X	X
52.209-13	Violation of Arms Control Treaties or Agreements-Certification .....	.....	.....	.....
52.209-14	Reserve Officer Training Corps and Military Recruiting on Campus ....	.....	.....	.....
52.227-1	Authorization and Consent	X	X	X
52.227-1 Alt I	Authorization and Consent .....	.....	.....	.....
52.227-1 Alt II	Authorization and Consent .....	.....	X	.....
52.227-2	Notice and Assistance Regarding Patent and Copyright Infringement	X	X	X
52.227-3	Patent Indemnity .....	.....	.....	.....
52.227-3 Alt I	Patent Indemnity .....	.....	.....	.....
52.227-3 Alt II	Patent Indemnity .....	.....	.....	.....
52.227-3 Alt III	Patent Indemnity .....	.....	.....	.....
52.227-4	Patent Indemnity-Construction Contracts .....	.....	X	.....
52.227-4 Alt I	Patent Indemnity-Construction Contracts .....	.....	.....	.....
52.227-5	Waiver of Indemnity	X	X	X
52.227-6	Royalty Information .....	.....	.....	.....
52.227-6 Alt I	Royalty Information .....	.....	.....	.....
52.227-9	Refund of Royalties .....	.....	.....	.....
52.227-10	Filing of Patent Applications-Classified Subject Matter	X	X	X
52.227-11	Patent Rights-Ownership by the Contractor	X	X	X
52.227-11 Alt I	Patent Rights-Ownership by the Contractor	X	X	X
52.227-11 Alt II	Patent Rights-Ownership by the Contractor	X	X	X
52.227-11 Alt III	Patent Rights-Ownership by the Contractor	X	X	X
52.227-11 Alt IV	Patent Rights-Ownership by the Contractor	X	X	X
52.227-11 Alt V	Patent Rights-Ownership by the Contractor	X	X	X
52.227-13	Patent Rights-Ownership by the Government	X	X	X
52.227-13 Alt I	Patent Rights-Ownership by the Government	X	X	X
52.227-13 Alt II	Patent Rights-Ownership by the Government	X	X	X
52.227-24	Patents—Reporting of Subject Inventions	X	X	X
52.227-25	Patent Rights—Ownership by the Contractor (Large Business)	X	X	X
52.227-25 Alt I	Patent Rights—Ownership by the Contractor (Large Business)	X	X	X
52.227-25 Alt II	Patent Rights—Ownership by the Contractor (Large Business)	X	X	X
52.227-26	Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services.	X	X	X
52.227-26 Alt I	Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services.	X	X	X
52.227-26 Alt II	Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services.	X	X	X
52.227-27	Technical Data—Commercial Products and Commercial Services	X	X	X
52.227-27 Alt I	Technical Data—Commercial Products and Commercial Services	X	X	X
52.227-28	Rights in Bid or Proposal Information	X	X	X
52.227-29	Identification and Assertion of Use, Release, or Disclosure Restrictions.	X	X	X
52.227-30	Rights in Other Than Commercial Technical Data and Other Than Commercial Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program.	X	X	X
52.227-31	Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.	X	X	X
52.227-32	Deferred Ordering of Technical Data or Computer Software	X	X	X
52.227-33	Technical Data or Computer Software Previously Delivered to the Government.	X	X	X
52.227-34	Technical Data—Withholding of Payment	X	X	X
52.227-35	Validation of Asserted Restrictions	X	X	X
52.227-36	Additional Preaward Requirements for Small Business Technology Transfer Program.	X	X	X
52.227-37	Additional Postaward Requirements for Small Business Technology Transfer Program.	X	X	X
52.247-1	Commercial Bill of Lading Notations	X	X	X
52.247-2	Permits, Authorities, or Franchises	X	X	X
52.247-5	Familiarization with Conditions	X	X	X
52.247-8	Estimated Weights or Quantities Not Guaranteed	X	X	X
52.247-10	Net Weight-General Freight	X	X	X
52.247-11	Net Weight-Household Goods or Office Furniture	X	X	X
52.247-13	Accessorial Services-Moving Contracts	X	X	X
52.247-15	Contractor Responsibility for Loading and Unloading	X	X	X

Provision/clause No.	Title	Commercial products	Commercial services	COTS items
52.247-17	Charges	X	X	X
52.247-18	Multiple Shipments	X	X	X
52.247-19	Stopping in Transit for Partial Unloading	X	X	X
52.247-21	Contractor Liability for Personal Injury and/or Property Damage.	X	X	X
52.247-22	Contractor Liability for Loss of and/or Damage to Freight other than Household Goods.	X	X	X
52.247-23	Contractor Liability for Loss of and/or Damage to Household Goods ..	X	X	X
52.247-29	F.o.b. Origin .....	.....	.....	.....
52.247-30	F.o.b. Origin, Contractor's Facility .....	.....	.....	.....
52.247-31	F.o.b. Origin, Freight Allowed .....	.....	.....	.....
52.247-32	F.o.b. Origin, Freight Prepaid .....	.....	.....	.....
52.247-33	F.o.b. Origin, with Differentials .....	.....	.....	.....
52.247-34	F.o.b. Destination .....	.....	.....	.....
52.247-35	F.o.b. Destination, Within Consignee's Premises .....	.....	.....	.....
52.247-36	F.a.s. Vessel, Port of Shipment .....	.....	.....	.....
52.247-37	F.o.b. Vessel, Port of Shipment .....	.....	.....	.....
52.247-38	F.o.b. Inland Carrier, Point of Exportation .....	.....	.....	.....
52.247-39	F.o.b. Inland Point, Country of Importation .....	.....	.....	.....
52.247-48	F.o.b. Destination-Evidence of Shipment	X	X	X
52.247-52	Clearance and Documentation Requirements-Shipments to DoD Air or Water Terminal Transshipment Points.	X	X	X
52.247-53	Freight Classification Description	X	X	X
52.247-56	Transit Arrangements	X	X	X
52.247-58	Loading, Blocking, and Bracing of Freight Car Shipments	X	X	X
52.247-63	Preference for U.S.-Flag Air Carriers .....	.....	X	.....
52.247-64	Preference for Privately Owned U.S.-Flag Commercial Vessels	X	X	X
52.247-64 Alt I	Preference for Privately Owned U.S.-Flag Commercial Vessels	X	X	X
52.247-64 Alt II	Preference for Privately Owned U.S.-Flag Commercial Vessels	X	X	X
52.247-67	Submission of Transportation Documents for Audit .....	.....	.....	.....
52.247-68	Report of Shipment (REPSHIP)	X	X	X
52.247-69	Reporting Requirement for U.S.-Flag Air Carriers Regarding Training to Prevent Human Trafficking. ....	.....	X	.....

The FAR Council also reviewed subcontract flow down requirements in clauses associated with the FAR parts covered by this proposed rule. The following table reflects the FAR Council and Administrator of Federal Procurement Policy's proposal regarding

whether those clauses flow down to subcontracts for commercial products, COTS items, and/or commercial services. This proposed rule, if finalized, would revise the subcontract paragraphs in these clauses to clearly state whether the clause flows down to

commercial subcontracts, as outlined in the table. An "X" in the following table indicates the provision or clause would apply to subcontracts for that category of commercial subcontracts, as described in the clause:

Clause No.	Title	Commercial products	Commercial services	COTS items
52.209-6	Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, Proposed for Debarment, or Voluntarily Excluded.	X	X	.....
52.209-6 Alt I	Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, Proposed for Debarment, or Voluntarily Excluded.	X	.....	.....
52.227-1	Authorization and Consent	X	X	X
52.227-1 Alt I	Authorization and Consent	X	X	X
52.227-1 Alt II	Authorization and Consent	X	X	X
52.227-2	Notice and Assistance Regarding Patent and Copyright Infringement	X	X	X
52.227-9	Refund of Royalties .....	.....	.....	.....
52.227-10	Filing of Patent Applications-Classified Subject Matter	X	X	X
52.227-11	Patent Rights-Ownership by the Contractor .....	.....	.....	.....
52.227-11 Alt I	Patent Rights-Ownership by the Contractor .....	.....	.....	.....
52.227-11 Alt II	Patent Rights-Ownership by the Contractor .....	.....	.....	.....
52.227-11 Alt III	Patent Rights-Ownership by the Contractor .....	.....	.....	.....
52.227-11 Alt IV	Patent Rights-Ownership by the Contractor .....	.....	.....	.....
52.227-11 Alt V	Patent Rights-Ownership by the Contractor .....	.....	.....	.....
52.227-13	Patent Rights-Ownership by the Government .....	.....	.....	.....
52.227-13 Alt I	Patent Rights-Ownership by the Government .....	.....	.....	.....
52.227-13 Alt II	Patent Rights-Ownership by the Government .....	.....	.....	.....
52.227-25	Patent Rights—Ownership by the Contractor (Large Business) .....	.....	.....	.....
52.227-25 Alt I	Patent Rights—Ownership by the Contractor (Large Business) .....	.....	.....	.....
52.227-25 Alt II	Patent Rights—Ownership by the Contractor (Large Business) .....	.....	.....	.....

Clause No.	Title	Commercial products	Commercial services	COTS items
52.227–26	Rights In Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services.	X	X	X
52.227–27	Technical Data—Commercial Products and Commercial Services	X	X	X
52.227–28	Rights in Bid or Proposal Information	X	X	X
52.227–30	Rights in Other Than Commercial Technical Data and Other than Commercial Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program.	X	X	X
52.227–35	Validation of Asserted Restrictions	X	X	X
52.247–63	Preference for U.S.-Flag Air Carriers .....	.....	X	.....
52.247–64	Preference for Privately Owned U.S.-Flag Commercial Vessels	X	X	X
52.247–64 Alt I	Preference for Privately Owned U.S.-Flag Commercial Vessels	X	X	X
52.247–64 Alt II	Preference for Privately Owned U.S.-Flag Commercial Vessels	X	X	X

IV. Expected Impact of the Rule

A. Overview

The intended impact of the RFO, as stated in E.O. 14275, is to restore the Government's ability to "deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives." Each of the RFO rulemakings is designed to contribute to this impact by emphasizing mission first, by aligning acquisition activities directly to achieving the agency's overarching objectives and serving the public interest and elevating the importance of fiscal responsibility. The proposed RFO rules focus on three goals in particular: (1) timely acquisition and delivery, (2) lower cost and accountability in all spending, and (3) increased competition.

Timeliness. Timely acquisition and delivery are essential for mission success. To this end, RFO rules propose to eliminate mandates that unnecessarily interfere with agency discretion to determine the best way to procure products and services. The proposed RFO rules highlight more clearly streamlined and simplified authorities that allow buyers to use their time more efficiently and are expected to reduce time between solicitation and award. The proposed RFO rules are expected to make it easier for contracting officers to leverage commercial practices that are familiar to the commercial marketplace. This is expected to make it easier for sellers to engage and respond to Government solicitations more rapidly.

Lower cost. E.O. 14271, Ensuring Commercial, Cost-Effective Solutions in Federal Contracts (April 15, 2025), directs the Government to utilize, to the maximum extent practicable, the commercial marketplace and the innovations of private enterprise to provide better, more cost-effective services to taxpayers, as envisioned by

the Federal Acquisition Streamlining Act. The procurement of custom products and services where a suitable or superior commercial solution would have fulfilled the Government's needs has resulted in avoidable waste to the detriment of American taxpayers.

To address these concerns, consistent with associated responsibilities in section 839 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232), the FAR Council reviewed prescriptions for provisions and clauses to ensure all prescriptions are clear regarding their applicability to acquisitions for commercial products and services. Currently, many prescriptions do not specify applicability to commercial acquisitions and leave the applicability determination to contracting officer interpretation. By specifically stating when a provision or clause can be applied to commercial acquisitions, proposed RFO rules should decrease the likelihood of inclusion of provisions and clauses in commercial acquisitions that are not required by law and drive greater consistency in the terms and conditions used in these contracts. In turn, these changes should increase the participation of commercial sellers, who are unwilling or unable to manage the cost of complying with noncommercial requirements, and also improve taxpayer access to affordable commercial solutions.

Some RFO rules propose to delete requirements placed on commercial or noncommercial sellers that are not related to performance of the contract, drive up cost without attendant performance benefits, and may misdirect efforts away from innovation, investment and economic growth. Greater emphasis on timeliness should reduce bidders' carrying costs, enabling them to pass those savings on to customers through lower prices.

Increased competition. Since enactment of the Competition in

Contracting Act of 1984 (Title VII of Pub. L. 98–369), competition has been the cornerstone of the Federal acquisition system. The benefits of competition are well established: competition saves money for the taxpayer, improves contractor performance, curbs fraud, and promotes accountability for results. Competition also drives contractor resilience and positions the U.S. market to develop a strategic advantage for the nation.

According to data in the SAM Contract Award Management, roughly 45 percent of contract dollars were awarded in FY 2025 either without competition or with competition that received only one offer. Of equal concern, the Federal marketplace has seen a significant decline over the past 20 years in the number of businesses—especially small businesses—participating in the Federal supplier base. Studies suggest that high compliance costs lead to the misallocation of resources away from more profitable activities and discourage innovation, investment, and economic growth (Council of Economic Advisers, Executive Office of the President, June 2025, *The Economic Benefits of Current Deregulatory Policies*, <https://www.whitehouse.gov/wp-content/uploads/2025/03/The-Economic-Benefits-of-Current-Deregulatory-Efforts.pdf>). This may shelter incumbent contractors and stifle competition, reducing startup activity and job formation.

The RFO rules seek to increase participation in agency competitions and the resilience of the Federal supplier base, which includes commercial entities, small businesses, manufacturers, and nontraditional suppliers. The RFO will achieve this outcome by removing regulatory mandates that are not rooted in statute or essential to sound procurement, promoting greater reliance on practices that reduce transaction costs, and improving the quality of

communications with offerors and potential offerors. Access to a broader range of solutions in a more dynamic marketplace will drive better return for each taxpayer dollar spent and increase taxpayer confidence in the Federal acquisition system.

B. Impact of Rule

The Government has conducted a regulatory impact analysis (RIA) for the RFO rulemaking inclusive of this proposed rule for FAR parts 9, 27, and 47. The RIA includes a discussion of the anticipated effects of the rulemakings as follows:

1. FAR Part 9

This proposed rule, if finalized, is not expected to have a significant impact on contractors or subcontracts. The proposed changes to FAR part 9 consist basically of removal of non-statutory material, streamlining and plain-language rewriting.

2. FAR Part 27

The proposed changes to part 27 are expected to have a significant positive impact on both industry and the Government.

Alignment with the DFARS. Aligning the FAR to the DFARS with regard to data rights would lower costs for contractors because they would spend less time determining application of data rights by contractor employees and outside consultants. This follows from the DFARS-derived content providing clear definitions, better organized guidance, and simple determinations of applicable data rights (*i.e.*, the source of funds and specific categories). The DFARS-derived content ensures contractors receive adequate data rights for technology developed with both Government and private funds by granting government purpose rights (GPR) whereas the FAR lacks this category. The conceptual lack of GPR in the FAR often results in uncertainty or inadequate data rights. Further, ensuring contractors receive adequate data rights for commercial technology through separate clauses for commercial acquisitions and other than commercial acquisitions. This alignment would also create economies of scale for contractors from having to train employees, and hiring outside consultants, to operate within a single system of data rights, across all agencies (*e.g.*, standardized markings), rather than essentially two systems of data rights. This would ultimately reduce burden on industry, including small business.

The Government would also benefit from aligning the FAR to the DFARS. Adopting the DFARS-derived data rights

guidance and clauses at civilian agencies would provide better options for data rights when acquiring emerging technology. Civilian agencies would receive robust data rights and would not have to spend additional funds to acquire data rights in the future or be locked into sole-source vendors. The acquisition workforce and Government attorneys would spend less time determining application of data rights resulting from clear definitions, better organized guidance, and simpler determination of applicable data rights. This proposed change would also provide the Government with unlimited rights in eleven different categories of data, while the FAR currently provides unlimited data for only four categories. This proposed change provides clarity regarding Government rights in data developed with both Government and contractor funding. Aligning the FAR to DFARS would better allow the Government to buy as a single entity because it allows both for standardized buying and for economies of scale that are impossible with different sets of data rights. Finally, contractors would be more likely to lower prices if they have more assurance that they would receive adequate data rights and that their data would be better protected.

SBIR/STTR. By updating SBIR coverage in part 27, and by adding STTR coverage, this rule proposes to align the FAR with the current SBA SBIR/STTR Policy Directive. This includes updating the SBIR/STTR data protection period to a single, non-extendable 20-year period, rather than an extendable 4-year period. The proposed rule also provides the Government with perpetual GPR license rights after the expiration of the SBIR/STTR data protection period, rather than unlimited rights. In addition, the proposed rule implements STTR-unique requirements in the SBIR/STTR Policy Directive related to allocation of IP rights between partnering institutions and contractors under the STTR program. The proposed rule therefore impacts both contractor and Government license rights in SBIR/STTR data while respecting existing data rights.

The SBIR/STTR Policy Directive emphasizes the need to protect the IP interests of small businesses. Accordingly, this proposed rule, if finalized, provides a transparent and consistent markings framework that permits the Government to easily identify and resolve inadvertently omitted restrictive markings. This allows the Government to better protect the IP interests of our small-business industry partners.

3. FAR Part 47

This proposed rule, if finalized, is expected to have a positive impact on both industry and the Government. This rule removes a large quantity of non-statutory material, including thirty-three provisions and clauses. These changes are intended to benefit and to reduce burden on both Government and contractors.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Executive Order 14192

This rule is subject to E.O. 14192, Unleashing Prosperity Through Deregulation. This proposed rule, if finalized as proposed, is anticipated to be an E.O. 14192 deregulatory rule. See discussion in the “Expected Impact of the Rule” section of this preamble.

VII. Regulatory Flexibility Act

This proposed rule, if finalized, may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act 5 U.S.C. 601–612.

However, an Initial Regulatory Flexibility Analysis (IRFA) is as follows:

1. Reasons for the action.
Executive Order (E.O.) 14275, Restoring Common Sense to Federal Procurement, directs the elimination of excessive acquisition regulations to stop the inefficient use of American taxpayer dollars. The E.O. directs the first comprehensive end-to-end overhaul of the FAR in its 40-year history. The E.O. establishes the policy that the FAR should “contain only provisions that are required by statute or that are otherwise necessary to support simplicity and usability, strengthen the efficacy of the procurement system, or protect economic or national security interests.” In response to E.O. 14275, the Office of Management and Budget issued memorandum M–25–26, Overhauling the Federal Acquisition Regulation. The Memo directed the FAR Council to

complete a “revolutionary overhaul” of the FAR. Therefore, the FAR Council is issuing twelve proposed rules that collectively, if finalized, would streamline the FAR in its entirety.

2. Objectives of, and legal basis for, the rule.

The revolutionary FAR overhaul (RFO) rewrite represents a paradigm shift in federal acquisition. It emphasizes streamlining, clarity, and accessibility, while ensuring that the regulation focuses only on statutory mandates and foundational procurement principles. The RFO is designed to simplify compliance for contracting professionals, improve acquisition speed and agility, and reinforce mission outcomes over process formalities.

The basis for the RFO is E.O. 14275. The authority for promulgation of the FAR is 41 U.S.C. 1121(b); 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

3. Description of and an estimate of the number of small entities to which the rule will apply.

All small business concerns who want to contract with the Federal Government would need to familiarize themselves with the reorganized, streamlined, and revised FAR, including the content of this rulemaking. As of January 2026, there are 401,196 entities registered in the System for Award Management (SAM) that were small for at least one North American Industry Classification System (NAICS) code they had selected.

a. FAR Part 9.

The proposed changes to FAR part 9 consist generally of removing non-statutory content and plain-language rewriting. These revisions align with the broader RFO initiatives and do not substantively change policy. These revisions are not expected significantly to impact small businesses.

b. FAR Part 27.

The proposed changes to part 27 consist primarily of replacing the current FAR data-rights coverage and replacing it with analogous, DFARS-based coverage. This rule also proposes to add a new solicitation provision and a contract clause applicable to STTR awards where no such coverage has existed in the FAR.

c. FAR Part 47.

The proposed changes to FAR part 47 consist generally of removing non-statutory content, streamlining retained content, and plain-language rewriting. These revisions align with the broader RFO initiatives and do not substantively change policy. These revisions are not

expected significantly to impact small businesses.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the rule.

Unless stated otherwise below, this proposed rule does not create any new reporting or recordkeeping requirements, nor does it create any new compliance requirements.

a. FAR Part 27.

This proposed rule alters reporting or recordkeeping or other compliance requirements. The proposed changes to part 27 consist primarily of replacing the current FAR data-rights coverage and replacing it with analogous, DFARS-based coverage. Reporting or recordkeeping or other compliance requirements are largely similar to those in the superseded FAR material. Some requirements are currently contained in FAR clauses, such as 52.227–17, Rights in Data-Special Works, that have no analogue in the DFARS-based material, and such requirements are therefore removed from the FAR. By updating SBIR coverage and by adding STTR coverage, this rule benefits small entities particularly by emphasizing protection of small entities’ intellectual property, therefore balancing any additional compliance requirements under the rule. While the changes in reporting or recordkeeping or other compliance requirements entail familiarizations costs, such costs are difficult to quantify. Additionally, by aligning FAR and DFARS data-right requirements, this rule, if finalized, would ultimately reduce burden on industry, including small entities.

b. FAR Part 47.

This proposed rule removes reporting, recordkeeping or other compliance requirements to the extent such requirements lie in clauses removed by this rule, specifically:

- The requirement under 52.247–6 for offerors to furnish the Government with a current certified statement of the offeror’s financial condition and such data as the Government may request with respect to the offeror’s operations.

- The requirement under 52.247–51 for offerors to nominate a port/terminal of loading they recommend for the purposes of evaluation of their offer and indicate whether the prices proposed are based on f.o.b. origin or f.o.b. destination.

- The requirement under 52.247–57 for offerors to identify any transportation charges, including any transit charges, that the offeror agrees to pay, subject to reimbursement by the Government.

- The requirement under 52.247–60 for offerors to provide details on the

shipping container(s) to be used for each part or component that is packed or packaged separately.

- Requirements under 52.247–41, 52.247–42, 52.247–43, 52.247–44, and 52.247–65 for contractors to prepare or provide special annotation on a Government or commercial bill of lading; provide an ocean bill of lading or airway bill; annotate commercial shipping documents; distribute copies of the bill of lading; provide applicable transportation receipts; assist in obtaining documents for exportation or importation destinations; and/or obtain insurance documents, as applicable.

5. Relevant Federal rules which may duplicate, overlap, or conflict with the rule.

The proposed rule, if finalized, would not duplicate, overlap, or conflict with other Federal rules.

6. Description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes, and which minimize any significant economic impact of the rule on small entities.

The FAR Council has not, at this stage, identified any significant alternatives that would minimize the impact of the rule on small entities while also implementing the requirements of E.O. 14275. The FAR Council will consider any significant alternatives identified by commenters for the final rule.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. The FAR Council invites comments from small business concerns and other interested parties on the expected impact of this proposed rule on small entities.

The FAR Council will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite “5 U.S.C. 610 (FAR Case 2026–011)” in correspondence.

VIII. Paperwork Reduction Act

This rule includes information collections under the Paperwork Reduction Act (44 U.S.C. 3501–3521). Following are the specific collections associated with each FAR part in this rule as previously approved by OMB followed by how each collection would be affected by the proposed rule.

A. FAR Part 9

OMB Control No 9000–0198, Certain Federal Acquisition Regulation Part 9 Requirements.

The changes under this proposed rule, if finalized, would not affect the information collection or the paperwork burden previously approved by OMB. The collection would remain unchanged.

B. FAR Part 27

OMB Control No. 9000–0095, Federal Acquisition Regulation Part 27 Requirements.

The changes under this proposed rule, if finalized, would revise this information collection and the paperwork burden previously approved by OMB. As explained in section II.C.1 of this preamble, the DFARS provisions and clauses related to FAR subpart 27.4 are proposed to be relocated to the FAR and replace the provisions and clauses at FAR 52.227–14 through 52.227–21 and FAR 52.227–23. This relocation of provisions and clauses from the DFARS to the FAR requires the following:

- Revising the annual reporting burden for OMB Control No. 9000–0095 to be estimated as follows:

Respondents: 439.

Total Annual Responses: 13,634.

Total Burden Hours: 54,386.

- Transferring to the FAR the following OMB Control Nos. 0704–0369, DFARS Subpart 227.71, Rights in Technical Data, and Subpart 227.72, Rights in Computer Software and Computer Software Documentation, and related provisions and clauses; and 0750–0010, Defense Federal Acquisition Regulation Supplement Part 227, Patents, Data, and Copyrights; Small Business Technology Transfer Program.

The total annual reporting burden for FAR part 27 is estimated as follows:

Respondents/Recordkeepers: 47,332.

Total Annual Responses: 442,149.

Total Burden Hours: 513,057.

C. FAR Part 47

OMB Control No. 9000–0061, Federal Acquisition Regulation Part 47 Transportation Requirements.

The changes under this proposed rule, if finalized, would revise this information collection and the paperwork burden previously approved by OMB. This rule proposes to remove certain requirements as explained in section VII.4.b of this preamble.

The revised public annual burden is estimated as follows:

Respondents/Recordkeepers: 12,656.

Total Annual Responses: 259,516.

Total Burden Hours: 17,661.

D. Comments Regarding Paperwork Burden.

The FAR Council will publish a separate first notice in accordance with the Paperwork Reduction Act seeking comments on the changes to the collections of information affected by this proposed rule.

IX. Severability

If any portion (e.g., section, clause, sentence) of this rule is held to be invalid or unenforceable facially, or as applied to any entity or circumstance, it shall be severable from the remainder of this rule, and shall not affect the remainder thereof, or its application to entities not similarly situated or to other dissimilar circumstances. The various portions of this rule are independent and serve distinct purposes. Even if one aspect were rendered invalid, the other benefits of the rule would still be applicable.

List of Subjects in 48 CFR Parts 9, 27, 47, and 52

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, OFPP, DoD, GSA, and NASA propose amending 48 CFR parts 9, 27, 47, and 52 as set forth below:

- 1. Revise parts 9, 27, and 47 to read as follows:

PART 9—CONTRACTOR QUALIFICATIONS

Sec.

Subpart 9.1—Responsible Prospective Contractors

- 9.101 Definition.
- 9.102 Applicability.
- 9.103 Policy.
- 9.104 Standards.
- 9.104–1 General standards.
- 9.104–2 Application of standards.
- 9.104–3 Subcontractor responsibility.
- 9.104–4 Representation and certifications regarding responsibility matters.
- 9.104–5 Integrity Records.
- 9.104–6 Solicitation provisions and contract clauses.
- 9.105 Procedures.
- 9.105–1 Obtaining information.
- 9.105–2 Determinations and documentation.
- 9.105–3 Disclosure of preaward information.
- 9.106 Prohibition on contracting with inverted domestic corporations.
- 9.106–1 Definitions.
- 9.106–2 Authority.
- 9.106–3 Prohibition.
- 9.106–4 Representation by the offeror.
- 9.106–5 Waiver.
- 9.106–6 Solicitation provision and contract clause.

- 9.107 Prohibition on contracting with an entity involved in activities that violate arms control treaties or agreements with the United States.

- 9.107–1 Authority.
- 9.107–2 Prohibition.
- 9.107–3 Exception.
- 9.107–4 Certification by the offeror.
- 9.107–5 Solicitation provision.
- 9.108 Reserve Officer Training Corps and military recruiting on campus.
- 9.108–1 Definitions.
- 9.108–2 Authority.
- 9.108–3 Policy.
- 9.108–4 Procedures.
- 9.108–5 Contract clause.

Subpart 9.2—Qualifications Requirements

- 9.200 Scope of subpart.
- 9.201 Definitions.
- 9.202 Policy.
- 9.203 QPLs, QMLs, and QBLs.
- 9.204 Responsibilities when establishing qualification requirements.
- 9.205 Opportunity for qualification before award.
- 9.206 Acquisitions subject to qualification requirements.
- 9.206–1 General.
- 9.206–2 Contract clause.
- 9.206–3 Competition.
- 9.207 Changes in status regarding qualification requirements.

Subpart 9.3—First Article Testing and Approval

- 9.301 Definition.
- 9.302 General.
- 9.303 Use.
- 9.304 Exceptions.
- 9.305 Risk.
- 9.306 Solicitation requirements.
- 9.307 Administrative procedures.
- 9.308 Contract clauses.
- 9.308–1 Testing performed by the contractor.
- 9.308–2 Testing performed by the Government.

Subpart 9.4—Debarment, Suspension, and Ineligibility

- 9.400 Scope of subpart.
- 9.401 Applicability.
- 9.402 Policy.
- 9.403 Definitions.
- 9.404 Exclusions in the System for Award Management.
- 9.405 Effect of listing.
- 9.405–1 Continuation of current contracts.
- 9.405–2 Restrictions on subcontracting.
- 9.406 Debarment.
- 9.406–1 General.
- 9.406–2 Causes for debarment.
- 9.406–3 Procedures.
- 9.406–4 Period of debarment.
- 9.406–5 Scope of debarment.
- 9.407 Suspension.
- 9.407–1 General.
- 9.407–2 Causes for suspension.
- 9.407–3 Procedures.
- 9.407–4 Period of suspension.
- 9.407–5 Scope of suspension.
- 9.408 Contract clause.

Subpart 9.5—Organizational and Consultant Conflicts of Interest

- 9.500 Scope of subpart.

- 9.501 Definition.
- 9.502 Applicability.
- 9.503 Waiver.
- 9.504 Contracting officer responsibilities.
- 9.505 General rules.
- 9.505–1 Providing systems engineering and technical direction.
- 9.505–2 Preparing specifications or work statements.

Authority: 41 U.S.C. 1121(b); 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

9.101 Definition.

As used in this subpart—

Administrative proceeding means a non-judicial process that is adjudicatory in nature in order to make a determination of fault or liability (*e.g.*, Securities and Exchange Commission Administrative Proceedings, Civilian Board of Contract Appeals Proceedings, and Armed Services Board of Contract Appeals Proceedings). This includes administrative proceedings at the Federal and state level but only in connection with performance of a Federal contract or grant. It does not include agency actions such as contract audits, site visits, corrective plans, or inspection of deliverables.

9.102 Applicability.

(a) This subpart applies to all proposed contracts with any prospective contractor located—

(1) In the United States or its outlying areas; or

(2) Elsewhere, unless application of this subpart would be inconsistent with the laws or customs where the contractor is located.

(b) This subpart does not apply to proposed contracts with—

(1) Foreign, State, or local governments;

(2) Other U.S. Government agencies or their instrumentalities; or

(3) Agencies for people who are blind or severely disabled (see part 8).

9.103 Policy.

(a) Award contracts to responsible prospective contractors only.

(b) Do not award a contract before making an affirmative determination of contractor responsibility. Without a clear indication of responsibility, make a determination of nonresponsibility. If the prospective contractor is a small business concern, comply with 19.204, Certificates of Competency.

(c) A prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors.

9.104 Standards.

9.104–1 General standards.

To demonstrate responsibility, a prospective contractor must—

(a) Have, or have the ability to obtain, adequate financial resources to perform the contract (see 9.104–2(a));

(b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;

(c) Have a satisfactory performance record (see 9.104–2(b) and part 42). Do not determine a prospective contractor responsible or nonresponsible based solely on a lack of relevant performance history;

(d) Have a satisfactory record of integrity and business ethics (see part 42);

(e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors) (see 9.104–2(a));

(f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104–2(a)); and

(g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations (see also inverted domestic corporation prohibition at 9.106).

9.104–2 Application of standards.

(a) Ability to obtain resources. Except to the extent that a prospective contractor has sufficient resources or proposes to perform the contract by subcontracting, require evidence of the prospective contractor's ability to obtain required resources (see 9.104–1(a), (e), and (f)).

(b) Satisfactory performance record.

(1) When determining whether a prospective contractor has a satisfactory performance record, consider, as applicable, the prospective contractor's—

(i) History of meeting the quality requirements of a contract; and

(ii) History of previous compliance with subcontracting plans (if the pending contract requires a subcontracting plan).

(2) In addition to 9.104–2(b)(1)(i) and (ii), consider any other relevant information when making this determination, including—

(i) The number of contracts involved;

(ii) The extent of deficient performance in each contract;

(iii) The contractor's overall pattern of performance; and

(iv) Documented corrective actions.

(3) Presume a prospective contractor is nonresponsible if it is or has been seriously deficient in contract performance, unless the circumstances were beyond the contractor's control, or the contractor has taken meaningful corrective action.

(c)(1) *Affiliates*. Treat a prospective contractor's affiliates as separate entities. However, consider the affiliate's past performance and integrity when these factors may affect the prospective contractor's responsibility.

(2) *Joint ventures*. For a prospective contractor that is a party to a joint venture, consider the past performance of the joint venture. If the joint venture lacks past performance, consider the past performance of each party to the joint venture.

(d)(1) *Small business concerns*. Upon determining a small business concern to be nonresponsible, refer the matter to the Small Business Administration, which will decide whether to issue a Certificate of Competency (see 19.204).

(2) *Limitations on subcontracting*. A small business that does not agree to or is unable to comply with the limitations on subcontracting may be nonresponsible.

9.104–3 Subcontractor responsibility.

(a) Generally, prospective prime contractors are responsible for determining the responsibility of their prospective subcontractors (but see 9.405 and 9.405–2 regarding debarred, ineligible, or suspended firms). Determinations of prospective subcontractor responsibility may affect the determination of responsibility for the prospective prime contractor. Require a prospective contractor to provide written evidence of a proposed subcontractor's responsibility, as necessary to determine responsibility.

(b) When in the Government's interest, the contracting officer may directly determine a prospective subcontractor's responsibility (*e.g.*, when the prospective contract involves medical supplies, urgent requirements, or substantial subcontracting). Apply the same standards for prime contractor responsibility to determine subcontractor responsibility.

9.104–4 Representation and certifications regarding responsibility matters.

(a) When an offeror provides an affirmative response in paragraph (a)(1) of the provision at 52.209–5,

Certification Regarding Responsibility Matters—

(1) Promptly, upon receipt of offers, request that the offeror submit additional information to demonstrate the offeror's responsibility to the contracting officer (but see 9.405); and

(2) Notify, prior to proceeding with award, in accordance with agency procedures (see 9.406–3(a) and 9.407–3(a)), the agency official responsible for initiating debarment or suspension action, where an offeror indicates the existence of an indictment, charge, conviction, or civil judgment, or Federal tax delinquency in an amount that exceeds \$15,000.

(b) The provision at 52.209–11, Representation by Corporations Regarding Delinquent Tax Liability or a Felony Conviction under any Federal Law, implements sections 744 and 745 of Division E of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235) (and similar provisions in subsequent appropriations acts). When an offeror provides an affirmative response in paragraph (b)(1) or (2) of the provision at 52.209–11—

(1) Promptly, upon receipt of offers, request that the offeror submit additional information to demonstrate the offeror's responsibility to the contracting officer (but see 9.405);

(2) Notify, in accordance with agency procedures (see 9.406–3(a) and 9.407–3(a)), the agency official responsible for initiating debarment or suspension action; and

(3) Do not award to the offeror unless an agency suspending and debaring official has considered suspension or debarment of the corporation and made a determination that suspension or debarment is not necessary to protect the interests of the Government.

(c) If the provision at 52.209–12, Certification Regarding Tax Matters, is applicable (see 9.104–6(e)), do not award any contract in an amount greater than \$7 million, unless the offeror affirmatively certified in its offer, as required by paragraph (b)(1), (2), and (3) of the provision.

(d) Give offerors who do not furnish the representation or certifications or other requested information an opportunity to remedy the deficiency. Failure to furnish the representation or certifications or other requested information may render the offeror nonresponsible.

9.104–5 Integrity Records.

(a) Integrity records refer to the documented history of the past performance and integrity information of an offeror or contractor. Integrity records consist of two segments, a non-

public segment and a publicly-available segment:

(1) The non-public segment in *CPARS.gov* is where Government officials and contractors post information, which can only be viewed by—

(i) Government personnel and authorized users performing business on behalf of the Government; or

(ii) An offeror or contractor, when viewing data on itself; and

(2) The publicly-available segment in the responsibility/qualification (R/Q) section of *SAM.gov* is where data in the non-public segment is automatically made public after a waiting period of 14 calendar days, except for—

(i) Past performance reviews required by part 42 (see section 3010 of Pub. L. 111–212) (41 U.S.C. 2313); or

(ii) Information that is withdrawn during the 14-calendar-day waiting period by the Government official who posted it in accordance with 9.105–2(b)(2)(ii).

(b)(1) Before awarding a contract exceeding the simplified acquisition threshold, review the R/Q records in *SAM.gov*.

(2) The R/Q records also identify—

(i) An affiliate that is an immediate owner or subsidiary of the offeror, if any; and

(ii) All predecessors of the offeror that held a Federal contract or grant within the last three years.

(c)(1) When making a responsibility determination, consider all the information available in the R/Q records regarding the offeror and any immediate owner, predecessor, or subsidiary identified for that offeror, as well as other past performance information on the offeror in *CPARS.gov* (see part 42).

(2) For evaluation of information available in the R/Q records relating to an affiliate of the offeror, see 9.104–2(c).

(3) For source selection evaluations of past performance, see part 15. Use sound judgment in determining the weight and relevance of the past performance information and how it relates to the present acquisition.

(4) Given the R/Q records may contain information on any of the offeror's previous contracts and information covering a 5-year period, some of that information might be irrelevant to a determination of present responsibility. For example, a prior administrative action such as debarment, suspension, voluntary exclusion, or administrative agreement, that has expired or otherwise been resolved, or information relating to contracts for completely different products or services, might be irrelevant.

(5) Integrity records in *CPARS* provide information about prime contractors. When the contracting officer posts information about a subcontractor such as trafficking in persons violations, to the record of the prime contractor (see subpart 42.14), the prime contractor may post any mitigating factors to the record. Consider any mitigating factors the prime contractor posted, such as degree of compliance by the prime contractor with the terms of clause 52.222–50.

(d) Upon obtaining relevant R/Q records regarding criminal, civil, or administrative proceedings in connection with the award or performance of a Government contract; terminations for default or cause; determinations of nonresponsibility because the contractor does not have a satisfactory performance record or a satisfactory record of integrity and business ethics; or comparable information relating to a grant, unless the contractor has already been debarred, suspended, or has agreed to a voluntary exclusion—

(1) Promptly request from the offeror additional information to demonstrate the offeror's responsibility (but see 9.405); and

(2) Notify, prior to proceeding with award, in accordance with agency procedures (see 9.406–3(a) and 9.407–3(a)), the agency official responsible for initiating debarment or suspension action, if the information appears appropriate for the official's consideration.

(e) Document the contract file for each contract exceeding the simplified acquisition threshold to indicate how the information in the R/Q records was considered in any responsibility determination, as well as the action that was taken as a result of the information. Post nonresponsibility determinations in the integrity records in *CPARS.gov* in accordance with 9.105–2 (b)(2).

9.104–6 Solicitation provisions and contract clauses.

(a) Insert the provision at 52.209–5, Certification Regarding Responsibility Matters, in solicitations, including those for commercial products and commercial services, if the acquisition value exceeds the simplified acquisition threshold.

(b) Insert the provision at 52.209–7, Information Regarding Responsibility Matters, in solicitations, including those for commercial products or commercial services, if the acquisition value exceeds \$750,000.

(c) Insert the clause at 52.209–9, Updates of Publicly Available

Information Regarding Responsibility Matters—

(1) In solicitations, including those for commercial products or commercial services, if the acquisition value exceeds \$750,000; and

(2) In contracts, including those for commercial products or commercial services, if the prospective contractor checked “has” in paragraph (b) of the provision at 52.209–7.

(d) Insert the provision at 52.209–11, Representation by Corporations Regarding Delinquent Tax Liability or a Felony Conviction under any Federal Law, in all solicitations, including those for commercial products and commercial services.

(e) For agencies receiving funds subject to section 523 of Division B of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235) and similar provisions in subsequent appropriations acts, insert the provision at 52.209–12, Certification Regarding Tax Matters, in solicitations, including those for commercial products or commercial services, if the acquisition value exceeds \$7 million.

9.105 Procedures.

9.105–1 Obtaining information.

(a) Before determining responsibility, obtain information establishing that a prospective contractor currently meets the standards in 9.104.

(b)(1) Generally, obtain information regarding responsibility promptly after a bid opening or receipt of offers. Limit such requests to information concerning the low bidder or those offerors in range for award.

(2) For negotiated contracting, especially for research and development, consider obtaining information regarding responsibility before issuing the request for proposals.

(3) To the extent feasible, obtain or update information regarding financial resources and performance capability up to the date of award.

(c) When determining responsibility, consider the R/Q records (see 9.104–5) regarding the offeror and any immediate owner, predecessor, or subsidiary identified for that offeror and any other relevant past performance information on the offeror in *CPARS.gov* (see 9.104–1(c) and part 42). In addition, consider using the following sources of information to support such determinations:

(1) Records and experience data, including verifiable knowledge of personnel within the contracting office, audit offices, contract administration offices, and other contracting offices.

(2) The prospective contractor, including bid or proposal information

(including the certification at 52.209–5 (see 9.104–4), questionnaire replies, financial data, information on production equipment, and personnel information.

(3) Commercial sources of supplier information of a type offered to buyers in the private sector.

(4) Other sources, such as publications; suppliers, subcontractors, and customers of the prospective contractor; financial institutions; Government agencies; and business and trade associations.

(d) Contracting offices and cognizant contract administration offices that become aware of circumstances casting doubt on a contractor's ability to perform contracts successfully must promptly exchange relevant information.

9.105–2 Determinations and documentation.

(a) *Determinations.* (1) The contracting officer's signing of a contract constitutes a determination that the prospective contractor is responsible with respect to that contract. Upon rejecting an offer that would otherwise generate an award because the prospective contractor is nonresponsible, sign a determination of nonresponsibility, stating the grounds for nonresponsibility.

(2) Upon determining that a responsive small business lacks certain elements of responsibility, comply with the procedures in part 19. If, in response, the Small Business Administration issues a Certificate of Competency for the small business concern, award the contract to the concern.

(b) *Support documentation.* (1) Include in the contract file documents and reports supporting a determination of responsibility or nonresponsibility, including the use of R/Q records (see 9.104–5) and any applicable Certificate of Competency.

(2)(i) Post the determination of nonresponsibility in the integrity records in *CPARS.gov* within 3 business days of making a determination if—

(A) The contract is valued at more than the simplified acquisition threshold;

(B) The determination of nonresponsibility is based on lack of satisfactory performance record or satisfactory record of integrity and business ethics; and

(C) The Small Business Administration does not issue a Certificate of Competency.

(ii) Do not post any information in the non-public segment covered by a disclosure exemption under the

Freedom of Information Act. If the contractor asserts within 7 calendar days, to the Government official who posted the information, that some of the information posted to the non-public segment is covered by a disclosure exemption under the Freedom of Information Act, the Government official who posted the information must, within 7 calendar days, remove the posting from the integrity records in *CPARS.gov*. Resolve the issue in accordance with agency Freedom of Information Act procedures prior to reposting the releasable information.

9.105–3 Disclosure of preaward information.

Except as provided in part 24 concerning the Freedom of Information Act, do not release or disclose outside the Government information gathered for purposes of determining the responsibility of a prospective contractor.

9.106 Prohibition on contracting with inverted domestic corporations.

9.106–1 Definitions.

As used in this section—

Inverted domestic corporation means a foreign incorporated entity that meets the definition of an inverted domestic corporation under 6 U.S.C. 395(b), applied in accordance with the rules and definitions of 6 U.S.C. 395(c).

Subsidiary means an entity in which more than 50 percent of the entity is owned—

(1) Directly by a parent corporation; or

(2) Through another subsidiary of a parent corporation.

9.106–2 Authority.

Section 9.106 implements section 745 of Division D of the Consolidated Appropriations Act, 2008 (Pub. L. 110–161) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions).

9.106–3 Prohibition.

(a) Do not use appropriated funds, or funds otherwise made available, for contracts with either an inverted domestic corporation, or a subsidiary of such a corporation, except as provided in paragraph (b) of this section and in 9.106–5, Waiver.

(b) This prohibition does not apply to any contract entered into before December 26, 2007, or to any task order issued pursuant to such a contract.

(c) Consult with legal counsel if, during the performance of a contract, a contractor becomes an inverted domestic corporation or a subsidiary of one.

9.106–4 Representation by the offeror.

(a) To be eligible for contract award, an offeror must represent that it is neither an inverted domestic corporation, nor a subsidiary of an inverted domestic corporation. Any offeror that cannot so represent is ineligible for award of a contract, unless waived in accordance with the procedures at 9.106–5.

(b) The contracting officer may rely on an offeror's representation that it is not an inverted domestic corporation unless the contracting officer has reason to question the representation.

9.106–5 Waiver.

An agency head may waive the prohibition in section 9.106–3 and the requirement of section 9.106–4 for a specific contract if the agency head determines in writing that the waiver is required in the interest of national security. The agency head must report issuance of the waiver to Congress and to the Made in America Office.

9.106–6 Solicitation provision and contract clause.

(a) Include the provision at 52.209–2, Prohibition on Contracting with Inverted Domestic Corporations—Representation, in all solicitations, including those for commercial products and commercial services.

(b) Include the clause at 52.209–10, Prohibition on Contracting with Inverted Domestic Corporations, in all solicitations, including those for commercial products and commercial services.

9.107 Prohibition on contracting with an entity involved in activities that violate arms control treaties or agreements with the United States.**9.107–1 Authority.**

This section implements 22 U.S.C. 2593e.

9.107–2 Prohibition.

Do not award, renew, or extend a contract with an entity identified as excluded in the System for Award Management, specifically for this subpart, based on involvement in activities that violate arms control treaties or agreements with the United States.

9.107–3 Exception.

The prohibition in 9.107–2 does not apply to contracts for the procurement of products or services along a major route of supply to a zone of active combat or major contingency operation, as specified in statute or by the cognizant Combatant Commander, in consultation with the Chief of Mission.

9.107–4 Certification by the offeror.

(a) To be eligible for contract award, an offeror must—

(1) Certify that it does not engage and has not engaged in any activity that contributed to or was a significant factor in the President's or Secretary of State's determination that a foreign country is—

(i) In violation of its obligations undertaken in any arms control, nonproliferation, or disarmament agreement to which the United States is a party; or

(ii) Not adhering to its arms control, nonproliferation, or disarmament commitments in which the United States is a participating state; and

(2) Similarly certify regarding any entity owned or controlled by the offeror; or

(3) Provide with its offer information that the President of the United States has—

(i) Waived application under 22 U.S.C. 2593e(d) or (e); or

(ii) Determined under 22 U.S.C. 2593e(g)(2) that the entity has ceased all activities for which measures were imposed under 22 U.S.C. 2593e(b).

(b) If certifying in accordance with 52.209–13(b)(1), the Offeror is required to submit the certification with the offer. It is not included in the annual representations and certifications in the System for Award Management.

(c) The contracting officer may rely on an offeror's certification unless the contracting officer has reason to question the certification.

(d) Upon the determination of a false certification under 52.209–13, an offeror will be subject to such remedies as suspension or debarment under subpart 9.4, or termination of any contract resulting from the false certification. Debarments pursued as a remedy under subpart 9.4 are for a period of not less than 2 years, inclusive of any suspension period, if suspension precedes a debarment (see 9.406–4(a)(1)(iii) and (a)(2)).

(e) The determinations referenced in paragraph (a)(1) of this section are described in the most recent unclassified annual report provided to Congress pursuant to section 403 of the Arms Control and Disarmament Act (22 U.S.C. 2593a). The report is available at <https://www.state.gov/adherence-to-and-compliance-with-arms-control-nonproliferation-and-disarmament-agreements-and-commitments/>.

9.107–5 Solicitation provision.

Insert the provision at 52.209–13, Violation of Arms Control Treaties or Agreements—Certification, in solicitations, other than those for

commercial products or commercial services, if the acquisition value exceeds the simplified acquisition threshold.

9.108 Reserve Officer Training Corps and military recruiting on campus.**9.108–1 Definitions.**

As used in this section—
Covered agency means—

- (1) The Department of Defense;
- (2) Any department or agency for which regular appropriations are made in a Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act;
- (3) The Department of Homeland Security;
- (4) The National Nuclear Security Administration of the Department of Energy;
- (5) The Department of Transportation;

or

(6) The Central Intelligence Agency.
Institution of higher education means an institution that meets the requirements of 20 U.S.C. 1001 and includes all sub-elements of such an institution.

9.108–2 Authority.

This section implements 10 U.S.C. 983.

9.108–3 Policy.

(a) Except as provided in paragraph (b) of this section, 10 U.S.C. 983 prohibits a covered agency from providing funds by contract to an institution of higher education if the Secretary of Defense determines that the institution has a policy or practice that prohibits or in effect prevents—

(1) The Secretary of a military department from maintaining, establishing, or operating a unit of the Senior Reserve Officer Training Corps (ROTC) at that institution;

(2) A student at that institution from enrolling in a unit of the Senior ROTC at another institution of higher education;

(3) The Secretary of a military department or the Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; or

(4) Military recruiters from accessing certain information pertaining to students (who are 17 years of age or older) enrolled at that institution:

(i) Name, address, and telephone listings.

(ii) Date and place of birth, educational level, academic majors,

degrees received, and the most recent educational institution enrolled in by the student.

(b) The prohibition in paragraph (a) of this section does not apply to an institution of higher education if the Secretary of Defense determines that—

(1) The institution has ceased the policy or practice described in paragraph (a) of this section; or

(2) The institution has a long-standing policy of pacifism based on historical religious affiliation.

9.108–4 Procedures.

(a) If the Secretary of Defense determines, pursuant to the procedures at 32 CFR part 216, that an institution of higher education is ineligible to receive funds from a covered agency because of a policy or practice described in 9.108–3, then the Secretary of Defense will create an active exclusion record for the institution in the System for Award Management.

(b) Upon a determination described in paragraph (a), a covered agency must not solicit offers from, award contracts to, or consent to subcontracts with the institution. This prohibition does not apply to acquisitions at or below the simplified acquisition threshold or to acquisitions of commercial products and commercial services, including commercially available off-the-shelf items.

9.108–5 Contract clause.

When using funds from a covered agency, insert the clause at 52.209–14, Reserve Officer Training Corps and Military Recruiting on Campus, in solicitations and contracts with institutions of higher education, other than those for commercial products or commercial services, if the acquisition value exceeds the simplified acquisition threshold.

Subpart 9.2—Qualifications Requirements

9.200 Scope of subpart.

This subpart implements 10 U.S.C. 3243 and 41 U.S.C. 3311.

9.201 Definitions.

As used in this subpart—

Qualification requirement means a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract.

Qualified bidders list (QBL) means a list of bidders who have had their products examined and tested and who have satisfied all applicable qualification requirements for that product or have otherwise satisfied all applicable qualification requirements.

Qualified manufacturers list (QML) means a list of manufacturers who have had their products examined and tested and who have satisfied all applicable qualification requirements for that product.

Qualified products list (QPL) means a list of products that have been examined, tested, and have satisfied all applicable qualification requirements.

9.202 Policy.

(a)(1) Before establishing a qualification requirement, the head of the agency must prepare a written justification—

(i) Stating the necessity for the qualification requirement and specifying why the qualification requirement must be demonstrated before contract award;

(ii) Estimating the likely costs for testing and evaluation which will be incurred by the potential offeror to become qualified; and

(iii) Specifying all requirements that a potential offeror (or its product) must satisfy to become qualified.

(2) Specify only the least restrictive qualification requirements necessary to meet agency purposes.

(3) Upon request, provide potential offerors—

(i) All requirements that they or their products must satisfy to become qualified; and

(ii) At their expense (but see 9.204(a)(2) with regard to small businesses), a prompt opportunity to demonstrate their abilities to meet the standards specified for qualification using qualified personnel and facilities of the agency concerned, or of another agency obtained through interagency agreements or under contract, or other methods approved by the agency (including use of approved testing and evaluation services not provided under contract to the agency).

(4) If the services in (a)(3)(ii) of this section are under contract, select only those contractors to provide testing and evaluation services that are—

(i) Not expected to benefit from an absence of additional qualified sources; and

(ii) Required by their contracts to adhere to any restriction on technical data asserted by the potential offeror seeking qualification.

(5) Promptly inform a potential offeror seeking qualification whether it attained qualification and, in the event it has not, promptly provide it specific reasons why it did not attain qualification.

(b)(1) When justified under the circumstances, the agency activity responsible for establishing a qualification requirement for an item

must submit to the advocate for competition for the contracting activity responsible for purchasing the item, a determination that specifying a qualification requirement is unreasonable.

(2) After considering any comments from the advocate for competition reviewing the determination, the head of the contracting activity may waive the requirements of 9.202(a)(1)(ii) through (a)(5) of this section for up to 2 years with respect to the item subject to the qualification requirement. The waiver authority provided in this paragraph does not apply with respect to qualification requirements contained in a QPL, QML, or QBL.

(3) The head of the contracting activity must furnish a copy of the waiver to the head of the agency or other official responsible for actions under paragraph (a)(1) of this section.

(c) If a potential offeror can demonstrate to the satisfaction of the contracting officer that the potential offeror (or its product) meets qualification standards, or can meet them before the date specified for award of the contract, do not deny the potential offeror the opportunity to submit and have considered an offer for a contract solely because the potential offeror—

(1) Is not on a QPL, QML, or QBL maintained by the Department of Defense (DoD) or the National Aeronautics and Space Administration (NASA); or

(2) Has not been identified as meeting a qualification requirement established after October 19, 1984, by DoD or NASA; or

(3) Has not been identified as meeting a qualification requirement established by a civilian agency (not including NASA).

(d) The procedures in part 19 for referring matters to the Small Business Administration are not mandatory on the contracting officer when the basis for a referral would involve a challenge by the offeror to either the validity of the qualification requirement or the offeror's compliance with such requirement.

(e) The contracting officer need not delay a proposed award to provide a potential offeror with an opportunity to demonstrate its ability to meet qualification standards. In addition, when approved by the head of an agency or designee, a procurement need not be delayed in order to comply with paragraph (a) of this section.

(f) Within 7 years following enforcement of a QPL, QML, or QBL by DoD or NASA, or within 7 years after any qualification requirement was

originally established by a civilian agency other than NASA, the qualification requirement must be examined and revalidated in accordance with the requirements of paragraph (a) of this section. For DoD and NASA, qualification requirements, other than QPLs, QMLs, and QBLs, must be examined and revalidated within 7 years after establishment of the requirement under paragraph (a) of this section. Any periods for which a waiver under paragraph (b) of this section is in effect must be excluded in computing the 7 years within which review and revalidation must occur.

9.203 QPLs, QMLs, and QBLs.

(a)(1) Qualification in a QPL, QML, or QBL is the process by which—

(i) The Government obtains products from manufacturers or distributors for examination and testing for compliance with specification requirements; or

(ii) Manufacturers or potential offerors have an opportunity to demonstrate their abilities to meet the standards specified for qualification.

(2) Generally, qualification occurs in advance and independently of any specific acquisition action.

(3) After qualification, the products, manufacturers, or potential offerors are included in a Federal or Military QPL, QML, or QBL. (See 9.202(a)(3) regarding any product, manufacturer, or potential offeror not yet included on an applicable list.)

(b) Specifications requiring a qualified product are included—

(1) In the General Services Administration Index of Federal Specifications, Standards and Commercial Item Descriptions; and

(2) On the Department of Defense Acquisition Streamlining and Standardization Information System (ASSIST) website at <https://assist.dla.mil>.

(c) Instructions concerning qualification procedures are included in the following publications:

(1) Federal Standardization Manual, FSPM-0001.

(2) Department of Defense Manual 4120.24, Defense Standardization Program (DSP) Procedures, (www.esd.whs.mil/Directives/Issuances/dodm) as amended by Military Standards 961 and 962 (<https://assist.dla.mil>).

9.204 Responsibilities when establishing qualification requirements.

(a) *Arranging publicity.* If active competition on anticipated future qualification requirements is likely to be fewer than two manufacturers or the products of two manufacturers, the

activity responsible for establishment of the qualification requirements must—

(1) Periodically furnish through the Governmentwide point of entry (GPE) a notice seeking additional sources or products for qualification unless the contracting officer determines that such publication would compromise the national security.

(2) Bear the cost of conducting the specified testing and evaluation (excluding the costs associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern which has met the standards specified for qualification and which could reasonably be expected to compete for a contract for that requirement.

(i) For agencies other than DoD, this cost may be borne only upon a determination in accordance with agency procedures that such additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to amortize the costs incurred by the agency within a reasonable period, considering the duration and dollar value of anticipated future requirements.

(ii) A prospective contractor requesting the United States to bear testing and evaluation costs must certify as to its status as a small business concern under section 3 of the Small Business Act to receive further consideration.

(b) Other agency-activity responsibilities when establishing qualification requirements. Additional responsibilities of agencies that establish qualification requirements include:

(1) Qualifying products that meet specification requirements.

(2) Listing manufacturers and suppliers whose products are qualified in accordance with agency procedures.

(3) Furnishing QPLs, QMLs, or QBLs or the qualification requirements themselves to prospective offerors and the public upon request.

(4) Clarifying, as necessary, qualification requirements.

(5) In appropriate cases, when requested by the contracting officer, providing concurrence in a decision not to enforce a qualification requirement for a solicitation.

(6) Withdrawing or omitting qualification of a listed product, manufacturer or offeror, as necessary.

(7) Advising persons that are furnished any list of products, manufacturers or offerors meeting a

qualification requirement and suppliers whose products are on any such list that—

(i) The list does not constitute endorsement of the product, manufacturer, or other source by the Government;

(ii) The products or sources listed have been qualified under the latest applicable specification;

(iii) The list may be amended without notice;

(iv) The listing of a product or source does not release the supplier from compliance with the specification; and

(v) Use of the list for advertising or publicity is permitted. However, the list must not state or imply that a particular product or source is the only product or source of that type qualified, or that the Government in any way recommends or endorses the products or the sources listed.

(8) Reexamining a qualified product or manufacturer when—

(i) The manufacturer has modified its product, or changed the material or the processing sufficiently so that the validity of previous qualification is questionable;

(ii) The requirements in the specification have been amended or revised sufficiently to affect the character of the product; or

(iii) Circumstances require confirmation that the product conforms with the specification.

9.205 Opportunity for qualification before award.

(a) If an agency determines that a qualification requirement is necessary, the agency activity responsible for establishing the requirement must—

(1) Urge manufacturers and other potential sources to demonstrate their ability to meet the standards specified for qualification;

(2) When possible, give sufficient time to arrange for qualification before award; and

(3) Before establishing any qualification requirement, furnish notice through the GPE. The notice must include—

(i) A statement of the intent to establish a qualification requirement;

(ii) The specification number and name of the product;

(iii) The name and address of the activity to which to submit a request for the information and opportunity;

(iv) The anticipated date that the agency will begin awarding contracts subject to the qualification requirement;

(v) A precautionary notice that when a product is submitted for qualification testing, the applicant must furnish any specific information that may be

requested of the manufacturer before testing will begin; and

(vi) The approximate time period following submission of a product for qualification testing within which the applicant will be notified whether the product passed or failed the qualification testing (see 9.202(a)(5)).

(b) The activity responsible for establishing a qualification requirement must keep any list maintained of those already qualified open for inclusion of additional products, manufacturers, or other potential sources.

9.206 Acquisitions subject to qualification requirements.

9.206–1 General.

(a) Do not enforce any QPL, QML, or QBL without first complying with the requirements of 9.202(a). However, qualification requirements themselves, whether or not previously embodied in a QPL, QML, or QBL, in either of the following categories are enforceable without regard to 9.202(a):

(1) Any qualification requirement established by statute prior to October 30, 1984, for civilian agencies (not including NASA).

(2) Any qualification requirement established by statute or administrative action prior to October 19, 1984, for DOD or NASA.

(b) Except when the agency head determines that an emergency exists, whenever an agency elects not to enforce a qualification requirement, the agency may not thereafter enforce that qualification requirement unless the agency complies with 9.202(a).

(c) If a qualification requirement applies, consider only those offers identified as meeting the requirement or included on the applicable QPL, QML, or QBL, unless an offeror can satisfactorily demonstrate that it or its product, or its subcontractor or its product, can meet the qualification standards before the date specified for award.

(d) If a component of an end item is subject to a qualification requirement, ensure that all such components and their qualification requirements are properly identified in the solicitation.

(e) In acquisitions subject to qualification requirements, take the following steps:

(1) Use presolicitation notices as appropriate to advise potential suppliers before issuing solicitations involving qualification requirements. The notices must identify the specification containing the qualification requirement and establish an allowable time period, consistent with delivery requirements, for prospective offerors to demonstrate

their abilities to meet the qualification standards.

(2) Distribute solicitations to prospective contractors whether or not they have been identified as meeting applicable qualification requirements.

(3) When appropriate, request in accordance with agency procedures that a qualification requirement not be enforced in a particular acquisition and, if granted, so specify in the solicitation (see 9.206–1(b)).

(4) Forward requests from potential suppliers for information on a qualification requirement to the agency activity responsible for establishing the requirement.

(5) Allow the maximum time, consistent with delivery requirements, between issuing the solicitation and the contract award. As a minimum, comply with the time frames specified in part 5 when applicable.

9.206–2 Contract clause.

Insert the clause at 52.209–1, Qualification Requirements, in solicitations and contracts, including those for commercial products or commercial services, when the acquisition is subject to a qualification requirement.

9.206–3 Competition.

(a) *Presolicitation.* If a qualification requirement applies to an acquisition, review the applicable QPL, QML, or QBL or other identification of those sources meeting the requirement before issuing a solicitation to ascertain whether the number of sources is adequate for competition. If the number of sources is inadequate, request the agency activity which established the requirement to—

(1) Indicate the anticipated date on which any sources presently undergoing evaluation will have demonstrated their abilities to meet the qualification to allow for rescheduling; or

(2) Indicate whether a means other than the qualification requirement is feasible for testing or demonstrating quality assurance.

(b) *Postsolicitation.* Submit to the agency activity that established the qualification requirement the names and addresses of concerns that expressed interest in the acquisition but are not included on the applicable QPL, QML, or QBL or identified as meeting the qualification requirement. The activity will then assist interested concerns in meeting the standards specified for qualification (see 9.202(a)(3) and (5)).

9.207 Changes in status regarding qualification requirements.

(a) Promptly report to the agency activity that established the

qualification requirement any conditions meriting removal or omission from a QPL, QML, or QBL or that affect whether a source should continue as identified as meeting the requirement. These conditions exist when—

(1) Products or services are submitted for inspection or acceptance that do not meet the qualification requirement;

(2) Products or services were previously rejected and the defects were not corrected when resubmitted for inspection or acceptance;

(3) A supplier fails to request reevaluation following change of location or ownership of the plant where the product which met the qualification requirement was manufactured (see the clause at 52.209–1, Qualification Requirements);

(4) A manufacturer of a product which met the qualification requirement has discontinued manufacture of the product;

(5) A source requests removal from a QPL, QML, or QBL;

(6) A condition of meeting the qualification requirement was violated; *e.g.*, advertising or publicity contrary to 9.204(b)(7)(v);

(7) A revised specification imposes a new qualification requirement;

(8) Manufacturing or design changes have been incorporated in the qualification requirement;

(9) The source is listed in the System for Award Management Exclusions (see subpart 9.4); or

(10) Performance of a contract subject to a qualification requirement is otherwise unsatisfactory.

(b) After considering these or other conditions related to whether a product or source continues to meet the standards specified for qualification, an agency may take appropriate action without advance notification. The agency must, however, promptly notify the affected parties if a product or source is removed from a QPL, QML, or QBL, or will no longer be identified as meeting the standards specified for qualification. This notice must contain specific information why the product or source no longer meets the qualification requirement.

Subpart 9.3—First Article Testing and Approval

9.301 Definition.

As used in this subpart—

Approval means the contracting officer's written notification to the contractor accepting the test results of the first article.

9.302 General.

First article testing and approval (testing and approval) ensures that the contractor can furnish a product conforming to all contract requirements for acceptance. Before requiring testing and approval, consider the—

- (a) Impact on cost or time of delivery;
- (b) Risk to the Government of foregoing such test; and
- (c) Availability of other, less costly, methods of ensuring the desired quality.

9.303 Use.

Testing and approval may be appropriate when—

- (a) The contractor has not previously furnished the product to the Government;
- (b) The contractor previously furnished the product to the Government, but—
 - (1) Subsequent changes in processes or specifications have occurred;
 - (2) Production has been discontinued for an extended period of time; or
 - (3) The product acquired under a previous contract developed a problem during its life.
- (c) The product is described by a performance specification; or
- (d) An approved first article is essential to serve as a manufacturing standard.

9.304 Exceptions.

Normally, do not require testing and approval in contracts for—

- (a) Research or development;
- (b) Products requiring qualification before award (e.g., when an applicable qualified products list exists (see subpart 9.2));
- (c) Products normally sold in the commercial market; or
- (d) Products covered by complete and detailed technical specifications, unless the requirements are so novel or exacting that the products might not meet the requirements without testing and approval.

9.305 Risk.

(a) Provide sufficient time in the delivery schedule for the contractor's acquisition of materials and components as well as for production after receipt of first article approval.

(b) The contracting officer may, before approval of the first article, authorize the contractor to acquire specific materials or components or commence production to the extent necessary to meet the delivery schedule (see Alternate II of the clause at 52.209–3, First Article Approval—Contractor Testing, and Alternate II of the clause at 52.209–4, First Article Approval—Government Testing). Costs incurred

based on this authorization are allocable to the contract for—

- (1) Progress payments; and
- (2) Termination settlements if the contract is terminated for the convenience of the Government.

9.306 Solicitation requirements.

Solicitations including a testing and approval requirement must—

(a) Provide, where the contractor is responsible for the first article approval testing—

- (1) The performance or other characteristics that the first article must meet for approval;
- (2) The detailed technical requirements for the tests necessary for approval; and
- (3) The data the contractor must submit in the first article approval test report;

(b) Provide, where the Government is responsible for the first article approval testing—

- (1) The performance or other characteristics that the first article must meet for approval; and
- (2) The tests to which the first article will be subjected for approval;
- (c) Inform offerors that the requirement may be waived when supplies identical or similar to those called for have previously been delivered by the offeror and accepted by the Government (see 52.209–3(h) and 52.209–4(i));

(d) Permit the submission of alternative offers, *i.e.*, one including and the other excluding testing and approval (if eligible under paragraph (c) of this section);

(e) State clearly the first article's relationship to the contract quantity (see paragraph (e) of the clause at 52.209–3, First Article Approval—Contractor Testing, or 52.209–4, First Article Approval—Government Testing);

(f) Contain a delivery schedule for the production quantity. The delivery schedule may—

(1) Be the same whether or not testing and approval is waived; or

(2) Provide for earlier delivery when testing and approval is waived, and the Government requires earlier delivery. In the latter case, any resulting difference in delivery schedules must not be an evaluation factor for award. The clause at 52.209–4, First Article Approval—Government Testing, must contain the delivery schedule for the first article;

(g) Provide for the submission of contract numbers, if any, to document the offeror's eligibility under paragraph (c) of this section;

(h) State whether the approved first article will serve as a manufacturing standard;

(i) Include the Government's estimated testing costs as an evaluation factor, if appropriate, when the Government is responsible for first article testing; and

(j) Inform offerors that the prices for first articles and first article tests in relation to production quantities must not be materially unbalanced (see 15.404–1(g)) if first article test items or tests are to be separately priced.

9.307 Administrative procedures.

(a) Before the contractor ships the first article, or the first article test report, to the Government laboratory or other activity responsible for approval, the contract administration office must provide that activity with as much advance notification as is feasible of the forthcoming shipment, and—

(1) Advise that activity of the contractual requirements for testing and approval, or evaluation, as appropriate;

(2) Call attention to the notice requirement in paragraph (b) of the clause at 52.209–3, First Article Approval—Contractor Testing, or 52.209–4, First Article Approval—Government Testing; and

(3) Request that the activity inform the contract administration office of the date when testing or evaluation will be completed.

(b) The Government laboratory or other activity responsible for first article testing or evaluation must inform the contracting office whether to approve, conditionally approve, or disapprove the first article. The contracting officer must then notify the contractor of the action taken and furnish a copy of the notice to the contract administration office. The notice must include the first article shipment number, when available, and the applicable line-item number. Make any necessary changes in the drawings, designs, or specifications only under the Changes clause.

9.308 Contract clauses.**9.308–1 Testing performed by the contractor.**

(a) Insert the clause at 52.209–3, First Article Approval—Contractor Testing, in solicitations and contracts, including those for commercial products and commercial services, that require first article approval, and the Government requires the Contractor to conduct the first article testing.

(b) Use the clause with its Alternate I where the contract requires the contractor to produce the first article and the production quantity at the same facility.

(c) Use the clause with its Alternate II where necessary to authorize the contractor to purchase material or to

commence production before first article approval.

9.308–2 Testing performed by the Government.

(a) Insert the clause at 52.209–4, First Article Approval—Government Testing, in solicitations and contracts, other than those for commercial products or commercial services, that require first article approval, and the Government will conduct the first article test.

(b) Use the clause with its Alternate I where the contract requires the contractor to produce the first article and the production quantity at the same facility.

(c) Use the clause with its Alternate II where necessary to authorize the contractor to purchase material or to commence production before first article approval.

Subpart 9.4—Debarment, Suspension, and Ineligibility

9.400 Scope of subpart.

(a) This subpart—

(1) Prescribes policies and procedures governing the debarment and suspension of contractors by agencies for the causes given in 9.406–2 and 9.407–2;

(2) Provides for the listing of contractors debarred, suspended, proposed for debarment, and declared ineligible (see the definition of “ineligible” in 2.101); and

(3) Sets forth the consequences of this listing.

(b) Although this subpart does cover the listing of ineligible contractors (9.404) and the effect of this listing (9.405), it does not prescribe policies and procedures governing declarations of ineligibility except for contractors that have been declared ineligible pursuant to 10 U.S.C. 983 (see 9.108, and 9.405–1(b)).

(c) For Federal Acquisition Supply Chain Security Act (FASCSA) orders, see part 40.

9.401 Applicability.

In accordance with section 2455 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103–355), and Executive Order 12689, any debarment, suspension or other Governmentwide exclusion initiated under the Nonprocurement Common Rule implementing Executive Order 12549 on or after August 25, 1995, must be recognized by and effective for Executive Branch agencies as a debarment or suspension under this subpart. Similarly, any debarment, suspension, proposed debarment or other Governmentwide exclusion initiated on or after August 25, 1995,

under this subpart must also be recognized by and effective for those agencies and participants as an exclusion under the Nonprocurement Common Rule.

9.402 Policy.

(a) Agencies must solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. Debarment and suspension are discretionary actions that, taken in accordance with this subpart, are appropriate means to effectuate this policy.

(b) The serious nature of debarment and suspension requires that these remedies be imposed only in the public interest for the Government’s protection and not for purposes of punishment. Agencies must impose debarment or suspension to protect the Government’s interest and only for the causes and in accordance with the procedures in this subpart.

(c) Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

(d) When more than one agency has an interest in the debarment or suspension of a contractor, the Interagency Suspension and Debarment Committee, established under Executive Order 12549, and authorized by section 873 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417), must resolve the lead agency issue and coordinate such resolution among all interested agencies prior to the initiation of any suspension, debarment, or related administrative action by any agency.

(e) Agencies must establish appropriate procedures to implement the policies and procedures of this subpart.

9.403 Definitions.

As used in this subpart—

Administrative agreement means an agreement between an agency suspending and debaring official and the contractor used to resolve a suspension or debarment proceeding, or a potential suspension or debarment proceeding.

Affiliates.—

(1) Business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly—

(i) Either one controls or has the power to control the other; or

(ii) A third party controls or has the power to control both.

(2) Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities

and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment.

Agency means any executive department, military department or defense agency, or other agency or independent establishment of the executive branch.

Civil judgment means the disposition of a civil action by any court of competent jurisdiction, whether by verdict, decision, settlement, stipulation, other disposition that creates a civil liability for the complained of wrongful acts, or a final determination of liability under the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801–3812).

Contractor means any individual or other legal entity that—

(1) Directly or indirectly (e.g., through an affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract, including a contract for carriage under Government or commercial bills of lading, or a subcontract under a Government contract; or

(2) Conducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative of another contractor.

Conviction means—

(1) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of nolo contendere; or

(2) Any other resolution that is the functional equivalent of a judgment establishing a criminal offense by a court of competent jurisdiction, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.

Indictment means indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense is given the same effect as an indictment.

Legal proceedings means any civil judicial proceeding to which the Government is a party or any criminal proceeding. The term includes appeals from such proceedings.

Nonprocurement Common Rule means the procedures used by Federal Executive Agencies to suspend, debar, or exclude individuals or entities from

participation in nonprocurement transactions under Executive Order 12549. Examples of nonprocurement transactions are grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements. See 2 CFR part 180 and agency enacting regulations in 2 CFR subtitle B.

Pre-notice letter means a written correspondence issued to a contractor in a suspension or debarment matter, which does not immediately result in an exclusion or ineligibility. The letter is issued at the discretion of the suspending and debarring official. The letter is not a mandatory step in the suspension or debarment process.

Unfair trade practices means the commission of any of the following acts by a contractor:

(1) A violation of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) as determined by the International Trade Commission.

(2) A violation, as determined by the Secretary of Commerce, of any agreement of the group known as the "Coordination Committee" for purposes of the Export Administration Act of 1979 (50 U.S.C. App. 2401, *et seq.*) or any similar bilateral or multilateral export control agreement.

(3) A knowingly false statement regarding a material element of a certification concerning the foreign content of an item of supply, as determined by the Secretary of the Department or the head of the agency to which such certificate was furnished.

Voluntary exclusion means a contractor's written agreement to be excluded for a period under the terms of a settlement between the contractor and the suspending and debarring official of one or more agencies. A voluntary exclusion must have Governmentwide effect.

9.404 Exclusions in the System for Award Management.

(a) The General Services Administration—

(1) Operates the web-based System for Award Management (SAM) at <https://www.sam.gov>, which contains exclusion records; and

(2) Provides technical assistance to Federal agencies in the use of SAM.

(b) An exclusion record in SAM contains the—

(1) Legal business name and physical address of the entities debarred, suspended, proposed for debarment, voluntarily excluded, declared ineligible, or excluded or disqualified under the nonprocurement common

rule, with cross-references when more than one name is involved in a single action;

(2) Name of the agency or other authority taking the action;

(3) Cause for the action (see 9.406–2 and 9.407–2 for causes authorized under this subpart) or other statutory or regulatory authority;

(4) Effect of the action;

(5) Termination date for each listing;

(6) Unique Entity Identifier;

(7) Social Security Number (SSN), Employer Identification Number (EIN), or other Taxpayer Identification Number (TIN), if available; and

(8) Name and telephone number of the agency point of contact for the action.

(c) Each agency must—

(1) Identify the individual(s) responsible for entering and updating exclusions data in SAM and assign the appropriate roles;

(2) Remove the exclusion roles in SAM when the individual leaves the organization or changes functions;

(3) For each exclusion, including each voluntary exclusion, accomplished by the agency—

(i) Enter the information required by paragraph (b) of this section within 3 business days after the action becomes effective;

(ii) Determine whether it is legally permitted to enter the SSN, EIN, or other TIN, under agency authority to suspend or debar; and

(iii) Update the exclusion record in SAM, generally within 5 business days after modifying or rescinding an action;

(4) In accordance with internal retention procedures, maintain records relating to each debarment, suspension, proposed debarment, or voluntary exclusion taken or entered into by the agency;

(5) Establish procedures to ensure that the agency does not solicit offers from, award contracts to, or consent to subcontracts with contractors who have an active exclusion record in SAM, except as otherwise provided in this subpart; and

(6) Direct inquiries concerning listed contractors and other entities to the agency or other authority that took the action.

9.405 Effect of listing.

(a) Contractors debarred, suspended, proposed for debarment, or voluntarily excluded, are excluded from receiving contracts, and agencies must not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head determines that a compelling reason exists for such action (see 9.405–1(a)(2),

9.405–2, 9.406–1(d), 9.407–1(d), and 26.605–1(e)). Contractors debarred, suspended, proposed for debarment, or voluntarily excluded, are also excluded from conducting business with the Government as agents or representatives of other contractors.

(b) Contractors and other entities that have an active exclusion record in SAM because they have been declared ineligible based on statutory or other regulatory procedures are excluded from receiving contracts, and if applicable, subcontracts, under the conditions and for the period set forth in the statute or regulation. Do not solicit offers from, award contracts to, or consent to subcontracts with these contractors under those conditions and for that period.

(c) Do not enter into, renew, or extend contracts with contractors that have been declared ineligible pursuant to 22 U.S.C. 2593e.

(d) Contractors debarred, suspended, proposed for debarment, or voluntarily excluded, are excluded from acting as individual sureties (see part 28).

(e)(1) After the opening of bids or receipt of proposals or quotes, review the exclusion records in SAM.

(2) Bids received from any listed contractor in response to an invitation for bids must be entered on the abstract of bids and then rejected unless the agency head determines in writing that compelling reason exists to consider the bid.

(3) Unless the agency head determines in writing that a compelling reason exists otherwise, do not evaluate for award or include in the competitive range proposals, quotations, or offers received from, and do not conduct discussions with, a listed offeror during a period of ineligibility. If the period of ineligibility expires or is terminated prior to award, the contracting officer may, but is not required to, consider such proposals, quotations, or offers.

(4) Immediately prior to award, review again the exclusion records in SAM to ensure that no award is made to a listed contractor.

9.405–1 Continuation of current contracts.

(a) *Contractors debarred, suspended, proposed for debarment, or voluntarily excluded.* (1) Notwithstanding the debarment, suspension, proposed debarment, or voluntary exclusion, of a contractor, agencies may continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, proposed for debarment, or voluntarily excluded, unless the agency head directs otherwise. A decision as to the type of termination action, if any, to be taken should be made only after

review by agency contracting and technical personnel and by counsel to ensure the propriety of the proposed action.

(2) For contractors debarred, suspended, proposed for debarment, or voluntarily excluded, unless the agency head makes a written determination of the compelling reasons for doing so, ordering activities must not—

(i) Place orders exceeding the guaranteed minimum under indefinite quantity contracts;

(ii) Place orders under Federal Supply Schedule contracts, blanket purchase agreements, or basic ordering agreements; or

(iii) Add new work, exercise options, or otherwise extend the duration of current contracts or orders.

(b) *Ineligible contractors.* A covered agency, as defined in 9.108–1, must terminate existing contracts and must not place new orders or award new contracts with contractors that have been declared ineligible pursuant to 10 U.S.C. 983 (see 9.108), except for contracts at or below the simplified acquisition threshold or contracts for the acquisition of commercial products and commercial services.

9.405–2 Restrictions on subcontracting.

(a) If an offeror proposes a contractor debarred, suspended, proposed for debarment, or voluntarily excluded, as a subcontractor for any subcontract subject to Government consent (see part 44), do not consent to such subcontracts unless the agency head states in writing the compelling reasons for this approval action. (See 9.405 concerning declarations of ineligibility affecting subcontracting.)

(b) The Government suspends or debars contractors to protect the Government's interests. Contractors are prohibited from entering into any subcontract in excess of \$45,000, other than a subcontract for a commercially available off-the-shelf item, with a contractor that has been debarred, suspended, proposed for debarment, or voluntarily excluded, unless a compelling reason exists to do so. If a contractor intends to enter into a subcontract in excess of \$45,000, other than a subcontract for a commercially available off-the-shelf item, with a party that is debarred, suspended, proposed for debarment, or voluntarily excluded, as evidenced by the party's having an active exclusion record (see 9.404), a corporate officer or designee of the contractor is required by operation of the clause at 52.209–6, Protecting the Government's Interest when Subcontracting with Contractors Debarred, Suspended, Proposed for

Debarment, or Voluntarily Excluded, to notify the contracting officer, in writing, before entering into such subcontract. For contracts for the acquisition of commercial products, the notification requirement applies only for first-tier subcontracts. For all other contracts, the notification requirement applies to subcontracts at any tier. The notice must provide the following:

(1) The name of the subcontractor;

(2) The contractor's knowledge of the reasons for the subcontractor having an active exclusion record;

(3) The compelling reason(s) for doing business with the subcontractor notwithstanding it having an active exclusion record; and

(4) The systems and procedures the contractor has established to ensure that it is fully protecting the Government's interests when dealing with such subcontractor in view of the specific basis for the party's debarment, suspension, proposed debarment, or voluntary exclusion.

(c) The contractor's compliance with the requirements of 52.209–6 will be reviewed during Contractor Purchasing System Reviews (see part 44).

9.406 Debarment.

9.406–1 General.

(a) The suspending and debarring official is responsible for determining whether debarment is in the Government's interest. The suspending and debarring official may, in the public interest, debar a contractor for any of the causes in 9.406–2, using the procedures in 9.406–3. The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures, mitigating factors, or aggravating factors should be considered in making any debarment decision. Before arriving at any debarment decision, the suspending and debarring official should consider factors such as the following (some of the factors below could apply to individuals such as contractors that are individuals, and are so marked):

(1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.

(2) Whether the contractor (including an individual) brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner.

(3) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment (or the individual cooperated with the investigation) and, if so, made the result of the investigation available to the suspending and debarring official.

(4) Whether the contractor (including an individual) cooperated fully with Government agencies during the investigation and any court or administrative action.

(5) Whether the contractor (including an individual) has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.

(6) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.

(7) Whether the contractor (including an individual) has implemented or agreed to implement remedial measures, including any identified by the Government.

(8)(i) Whether the contractor has instituted or agreed to institute new or revised review and control procedures, ethics training, or other relevant training programs.

(ii) For an individual, whether the individual has attended relevant remediation training.

(9) Whether the contractor (including an individual) has had adequate time to eliminate the circumstances that led to the cause for debarment.

(10)(i) Whether the contractor's management recognizes, accepts, and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence.

(ii) For an individual, whether the individual recognizes, accepts, and understands the seriousness of the misconduct giving rise to the cause for debarment and has adopted practices to prevent recurrence.

(11) Whether the contractor (including an individual) has a pattern or prior history of wrongdoing, the frequency of incidents and/or duration of the wrongdoing, and the actual or potential harm or impact that results, or may result, from the wrongdoing.

(12) Whether and to what extent the contractor (including an individual) planned, initiated, or carried out the wrongdoing, and the kind of positions within the contractor's organization held by the individual involved in the wrongdoing.

(13) Whether the wrongdoing was pervasive within the contractor's organization.

(14) Whether the individual or the contractor's principals tolerated the offense.

(15) Whether the contractor (including an individual) is or has been excluded or disqualified by an agency of the Federal Government or has not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this subpart.

(16) Whether the contractor (including an individual) has entered into an administrative agreement with a Federal agency or a similar agreement with a State or local government that is not Governmentwide but is based on conduct similar to one or more of the causes for debarment specified in this subpart.

(17) Whether any other factors meriting consideration exist for the contractor (including an individual) under the circumstances.

(b) The existence or nonexistence of any aggravating or mitigating factors or remedial measures such as set forth in paragraph (a) of this section is not necessarily determinative of a contractor's present responsibility. Accordingly, if a cause for debarment exists, the contractor has the burden of demonstrating, to the satisfaction of the suspending and debarring official, its present responsibility and that debarment is not necessary.

(c) Debarment constitutes debarment of all divisions or other organizational elements of the contractor, unless the debarment decision is limited by its terms to specific divisions, organizational elements, or commodities. The suspending and debarring official may extend the debarment decision to include any affiliates of the contractor if they are—

- (1) Specifically named; and
- (2) Given written notice of the proposed debarment and an opportunity to respond (see 9.406–3(c)).

(d) A contractor's debarment, or proposed debarment, is effective throughout the executive branch of the Government, unless the agency head or a designee (except see 26.605–1(e)) states in writing the compelling reasons justifying continued business dealings between that agency and the contractor.

(e)(1) When the suspending and debarring official has authority to debar contractors from both contracts pursuant to the Federal Acquisition Regulation in this chapter and contracts for the purchase of Federal personal property pursuant to the Federal

Management Regulation (FMR) in 41 CFR part 102–38, that official must consider simultaneously debarring the contractor from the award of acquisition contracts and from the purchase of Federal personal property.

(2) A notice debarring a contractor from the award of acquisition contracts and from the purchase of Federal personal property must include the appropriate FAR and FMR citations.

9.406–2 Causes for debarment.

The suspending and debarring official may debar—

(a) A contractor for a conviction of or civil judgment for—

(1) Commission of fraud or a criminal offense in connection with—

- (i) Obtaining;
- (ii) Attempting to obtain; or
- (iii) Performing a public contract or subcontract.

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property;

(4) Intentionally affixing a label bearing a “Made in America” inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States or its outlying areas (see Section 202 of the Defense Production Act (Public Law 102–558)); or

(5) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b)(1) A contractor, based upon a preponderance of the evidence, for any of the following—

(i) Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as—

(A) Willful failure to perform in accordance with the terms of one or more contracts; or

(B) A history of failure to perform, or of unsatisfactory performance of, one or more contracts.

(ii) Violations of 41 U.S.C. chapter 81, Drug-Free Workplace, as indicated by—

(A) Failure to comply with the requirements of the clause at 52.226–7, Drug-Free Workplace; or

(B) Such a number of contractor employees convicted of violations of criminal drug statutes occurring in the

workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 26.605–1).

(iii) Intentionally affixing a label bearing a “Made in America” inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States or its outlying areas (see Section 202 of the Defense Production Act (Public Law 102–558)).

(iv) Commission of an unfair trade practice as defined in 9.403 (see Section 201 of the Defense Production Act (Public Law 102–558)).

(v) Delinquent Federal taxes in an amount that exceeds the threshold at 9.104–4(a)(2). Federal taxes are considered delinquent for purposes of this provision if both of the following criteria apply:

(A) The tax liability is finally determined. The liability is finally determined if it has been assessed. A liability is not finally determined if a pending administrative or judicial challenge remains. In the case of a judicial challenge to the liability, the liability is not finally determined until all judicial appeal rights have been exhausted.

(B) The taxpayer is delinquent in making payment. A taxpayer is delinquent if the taxpayer has failed to pay the tax liability when full payment was due and required. A taxpayer is not delinquent in cases where enforced collection action is precluded.

(vi) Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of—

(A) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

(B) Violation of the civil False Claims Act (31 U.S.C. 3729–3733); or

(C) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001.

(vii) Determination of a false certification under 52.209–13, Violation of Arms Control Treaties or Agreements-Certification.

(viii) Failure to comply with the requirements of the clause at 52.222–XX, Addressing DEI Discrimination by Federal Contractors.

(2) A contractor, based on a determination by the Secretary of

Homeland Security or the Attorney General of the United States, that the contractor is not in compliance with Immigration and Nationality Act employment provisions (see Executive Order 12989, as amended by Executive Order 13286). Such determination is not reviewable in the debarment proceedings.

(c) A contractor or subcontractor based on any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor.

9.406-3 Procedures.

(a) *Investigation and referral.*

Agencies must establish procedures for the prompt reporting, investigation, and referral to the suspending and debarring official of matters appropriate for that official's consideration.

(b) *Decision-making process.* (1)

Agencies must establish procedures governing the debarment decision-making process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures must afford the contractor (and any specifically named affiliates) an opportunity to submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment. If the suspending and debarring official extends the opportunity for the contractor to submit material in opposition, then the official should also give a deadline for submission of materials. The suspending and debarring official may use flexible procedures to allow a contractor to present matters in opposition in person or remotely through appropriate technology; if so, the suspending and debarring official should change the notice in paragraph (c)(3)(iv) of this section to include those flexible procedures.

(2) In actions not based upon a conviction or civil judgment, if the contractor's submission in opposition raises a genuine dispute over facts material to the proposed debarment, agencies must also—

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

(c) *Notice of proposal to debar.* The suspending and debarring official must issue the notice of proposed debarment

to the contractor and any specifically named affiliates.

(1) The written notice must be sent—
(i) By U.S. mail or private delivery service to the last known street address, with delivery notification service;

(ii) By email to the point of contact email address in the contractor's SAM registration, if any, or to the last known email address as confirmed by the agency; or

(iii) By certified mail to the last known street address with return receipt requested.

(2) The notice must be sent—

(i) To the contractor, the contractor's identified counsel for purposes of the administrative proceedings, or the contractor's agent for service of process; and

(ii) For each specifically named affiliate, to the affiliate itself, the affiliate's identified counsel for purposes of the administrative proceedings, or the affiliate's agent for service of process.

(3) The notice must state—

(i) That debarment is being considered;

(ii) The reasons for the proposed debarment in terms sufficient to put the contractor on notice of the conduct or transaction(s) upon which it is based;

(iii) The cause(s) relied upon under 9.406-2 for proposing debarment;

(iv) That, within 30 days after receipt of the notice, the contractor may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment, including any additional specific information that raises a genuine dispute over the material facts;

(v) The agency's procedures governing debarment decision making;

(vi) The effect of the issuance of the notice of proposed debarment;

(vii) The potential effect of an actual debarment;

(viii) That in addition to any information and argument in opposition to a proposed debarment, the contractor must identify—

(A) Specific facts that contradict the statements contained in the notice of proposed debarment. Include any information about any of the factors listed in 9.406-1(a). A general denial is insufficient to raise a genuine dispute over facts material to the proposed debarment;

(B) All existing, proposed, or prior exclusions and all similar actions taken by Federal, State, or local agencies, including administrative agreements that affect only those agencies;

(C) All criminal and civil proceedings not included in the notice of proposed debarment that grew out of facts

relevant to the cause(s) stated in the notice; and

(D) All of the contractor's affiliates; and

(ix) That if the contractor fails to disclose the information in paragraph (c)(3)(viii) of this section, or provides false information, the agency taking the action may seek further criminal, civil, or administrative action against the contractor, as appropriate.

(d) *Suspending and debarring official's decision.* (1) In actions based upon a conviction or civil judgment, or in which no genuine dispute exists over material facts, the suspending and debarring official must decide based on all the information in the administrative record, including any contractor submission. If no suspension is in effect, the suspending and debarring official must make a decision within 45 days from the date that the official administrative record is closed, unless the suspending and debarring official extends this period for good cause. The official record closes upon the expiration of the contractor's time to submit information and argument in opposition, including any extensions (see paragraph (b)(1) of this section).

(2)(i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact must be prepared. The suspending and debarring official must base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(ii) The suspending and debarring official may refer matters involving disputed material facts to another official for findings of fact. The suspending and debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(iii) The suspending and debarring official must make a decision after the conclusion of the proceedings with respect to disputed facts.

(3) In any action in which the proposed debarment is not based upon a conviction or civil judgment, the cause for debarment must be established by a preponderance of the evidence.

(e) *Notice of suspending and debarring official's decision.* (1) If the suspending and debarring official decides to impose debarment, the contractor and any affiliates involved must be given prompt notice using the procedures in paragraphs (c)(1) and (2) of this section—

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective throughout the executive branch of the Government unless the head of an agency or a designee makes the statement called for by 9.406–1(d).

(2) If debarment is not imposed, the suspending and debarring official must promptly notify the contractor and any affiliates involved, using the procedures in paragraphs (c)(1) and (2) of this section.

(f) *Administrative agreements.* (1) If the contractor enters into an administrative agreement with the Government in order to resolve a debarment or potential debarment proceeding, the suspending and debarring official must access the integrity records in *CPARS.gov*, enter the requested information, and upload documentation reflecting the administrative agreement.

(2) The suspending and debarring official is responsible for the timely and accurate submission of documentation reflecting the administrative agreement. The submission should be made within 3 business days.

(3) With regard to information that may be covered by a disclosure exemption under the Freedom of Information Act, the suspending and debarring official must follow the procedures at 9.105–2(b)(2)(ii).

(g) *Voluntary exclusions.* (1) If the contractor enters into a voluntary exclusion with the Government in order to resolve a debarment or potential debarment matter, the suspending and debarring official must access the System for Award Management website (available at <https://www.sam.gov>) and enter the requested information into the exclusions section of SAM (see 9.404(c)(3)).

(2) The suspending and debarring official is responsible for the timely and accurate submission of documentation reflecting the voluntary exclusion. The submission should be made within 3 business days.

(3) Regarding information that may be covered by a disclosure exemption under the Freedom of Information Act, the suspending and debarring official must follow the procedures at 9.105–2(b)(2)(ii).

(h) *Pre-notice letters.* Prior to initiating a proposed debarment, the suspending and debarring official has discretion to issue a pre-notice letter. A pre-notice letter is not required to initiate debarment under this subpart. (See 9.403.)

9.406–4 Period of debarment.

(a)(1) Debarment must be for a period commensurate with the seriousness of the cause(s). Generally, debarment should not exceed 3 years, except that—

(i) Debarment for violation of the provisions of 41 U.S.C. chapter 81, Drug-Free Workplace (see 26.605–1(e)) may be for a period not to exceed 5 years;

(ii) Debarments under 9.406–2(b)(2) must be for 1 year unless extended pursuant to paragraph (b) of this section; and

(iii) Debarments under 9.406–2(b)(1)(vii) must be for a period of not less than 2 years, inclusive of any suspension period, if suspension precedes a debarment (see paragraph (a)(2) of this section).

(2) If suspension precedes a debarment, the suspension period factors into determining the debarment period.

(b) The suspending and debarring official may extend the debarment for an additional period, if that official determines that an extension is necessary to protect the Government's interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based.

Debarments under 9.406–2(b)(2) may be extended for additional periods of one year if the Secretary of Homeland Security or the Attorney General determines that the contractor continues to be in violation of the employment provisions of the Immigration and Nationality Act. Upon determining that debarment for an additional period is necessary, the suspension and debarring official must follow the procedures in 9.406–3 to extend the debarment.

(c) The suspending and debarring official may reduce the period or extent of debarment, upon the contractor's request, supported by documentation, for reasons such as—

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the suspending and debarring official deems appropriate.

9.406–5 Scope of debarment.

(a) The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a contractor may be imputed to the contractor when the

conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct is evidence of such knowledge, approval, or acquiescence.

(b) The fraudulent, criminal, or other seriously improper conduct of a contractor may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the contractor who participated in, knew of, or had reason to know of the contractor's conduct.

(c) The fraudulent, criminal, or other seriously improper conduct of one contractor participating in a joint venture or similar arrangement may be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct is evidence of such knowledge, approval, or acquiescence.

9.407 Suspension.

9.407–1 General.

(a) The suspending and debarring official may, in the public interest, suspend a contractor for any of the causes in 9.407–2, using the procedures in 9.407–3.

(b)(1) Suspension is a serious action to be imposed based on adequate evidence, pending the completion of an investigation or legal proceedings, when the suspending and debarring official determines that immediate action is necessary to protect the Government's interest. In deciding whether immediate action is necessary to protect the Government's interest, the suspending and debarring official has wide discretion. The suspending and debarring official may infer the necessity for immediate action to protect the Government's interest either from the nature of the circumstances giving rise to a cause for suspension or from potential business relationships or involvement with a program of the Federal Government. In assessing the adequacy of the evidence, agencies should consider how much information is available, how credible it is given the circumstances, whether important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as contracts, inspection reports, and correspondence. An indictment or other

official findings by Federal, State, or local bodies that determine factual and/or legal matters, constitutes adequate evidence for purposes of suspension actions.

(2) The existence of a cause for suspension does not necessarily require that the contractor be suspended. The suspending and debarring official should consider the seriousness of the contractor's acts or omissions and may, but is not required to, consider remedial measures, mitigating factors, or aggravating factors, such as those in 9.406–1(a). A contractor has the burden of promptly presenting to the suspending and debarring official evidence of remedial measures or mitigating factors when it has reason to know that a cause for suspension exists. The existence or nonexistence of any remedial measures or aggravating or mitigating factors is not necessarily determinative of a contractor's present responsibility.

(c) Suspension constitutes suspension of all divisions or other organizational elements of the contractor, unless the suspension decision is limited by its terms to specific divisions, organizational elements, or commodities. The suspending and debarring official may extend the suspension decision to include any affiliates of the contractor if they are—

(1) Specifically named; and

(2) Given written notice of the suspension and an opportunity to respond (see 9.407–3(c)).

(d) A contractor's suspension is effective throughout the executive branch of the Government, unless the agency head or a designee (except see 26.605–1(e)) states in writing the compelling reasons justifying continued business dealings between that agency and the contractor.

(e)(1) When the suspending and debarring official has authority to suspend contractors from both contracts pursuant to the Federal Acquisition Regulation in this chapter and contracts for the purchase of Federal personal property pursuant to Federal Management Regulation (FMR) in 41 CFR part 102–38, that official must consider simultaneously suspending the contractor from the award of acquisition contracts and from the purchase of Federal personal property.

(2) A notice suspending a contractor from the award of acquisition contracts and from the purchase of Federal personal property must include the appropriate FAR and FMR citations.

9.407–2 Causes for suspension.

(a) The suspending and debarring official may suspend a contractor

suspected, upon adequate evidence, of—

(1) Commission of fraud or a criminal offense in connection with—

(i) Obtaining;

(ii) Attempting to obtain; or

(iii) Performing a public contract or subcontract.

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property;

(4) Violations of 41 U.S.C. chapter 81, Drug-Free Workplace, as indicated by—

(i) Failure to comply with the requirements of the clause at 52.226–7, Drug-Free Workplace; or

(ii) Such a number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 26.605–1);

(5) Intentionally affixing a label bearing a “Made in America” inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States or its outlying areas (see Section 202 of the Defense Production Act (Public Law 102–558));

(6) Commission of an unfair trade practice as defined in 9.403 (see section 201 of the Defense Production Act (Pub. L. 102–558));

(7) Delinquent Federal taxes in an amount that exceeds the threshold at 9.104–4(a)(2). See the criteria at 9.406–2(b)(1)(v) for determination of when taxes are delinquent;

(8) Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of—

(i) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

(ii) Violation of the civil False Claims Act (31 U.S.C. 3729–3733); or

(iii) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001; or

(9) Determination of a false certification under 52.209–13, Violation of Arms Control Treaties or Agreements-Certification.

(10) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(11) Failure to comply with the requirements of the clause at 52.222–XX, Addressing DEI Discrimination by Federal Contractors.

(b) Indictment for any of the causes in paragraph (a) of this section constitutes adequate evidence for suspension.

(c) The suspending and debarring official may upon adequate evidence also suspend a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

9.407–3 Procedures.

(a) *Investigation and referral.*

Agencies must establish procedures for the prompt reporting, investigation, and referral to the suspending and debarring official of matters appropriate for that official's consideration.

(b) *Decision-making process.* (1) Agencies must establish procedures governing the suspension decision-making process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures must afford the contractor (and any specifically named affiliates) an opportunity, following the imposition of suspension, to submit, in person, in writing, or through a representative, information and argument in opposition to the suspension. If the suspending and debarring official extends the opportunity for the contractor to submit material in opposition, then the official should also give a deadline for submission of materials. The suspending and debarring official may use the flexible procedures in 9.406–3(b)(1); if so, the suspending and debarring official should change the notice in paragraph (c)(5) of this section to include those flexible procedures.

(2) In actions not based on an indictment, if the contractor's submission in opposition raises a genuine dispute over facts material to the suspension and if no determination has been made, on the basis of advice from the Department of Justice, a U.S. Attorney's office, State attorney general's office, or a State or local prosecutor's office, that substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced, agencies must also—

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

(c) *Notice of suspension.* When a contractor and any specifically named affiliates are suspended, the suspending and debarring official must immediately notify them using the procedures in 9.406–3(c)(1) and (2). While describing any irregularities in terms sufficient to place the contractor on notice without disclosing the Government's evidence, the notice must state—

(1) That they have been suspended and that the suspension is based on an indictment or other adequate evidence that the contractor has committed irregularities—

(i) Of a serious nature in business dealings with the Government; or

(ii) Seriously reflecting on the propriety of further Government dealings with the contractor;

(2) That the suspension is for a temporary period pending the completion of an investigation and such legal proceedings as may ensue;

(3) Of the cause(s) relied upon under 9.407–2 for imposing suspension;

(4) Of the effect of the suspension;

(5) That, within 30 days after receipt of the notice, the contractor may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension, including any additional specific information that raises a genuine dispute over the material facts;

(6) That additional proceedings to determine disputed material facts will be conducted unless—

(i) The action is based on an indictment; or

(ii) A determination is made, on the basis of advice by the Department of Justice, a U.S. Attorney's office, State attorney general's office, or a State or local prosecutor's office, that the substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced;

(7) That, in addition to any information and argument in opposition to a suspension, the contractor must identify—

(i) Specific facts that contradict the statements contained in the notice of suspension. Include any information about any of the factors listed in 9.406–1(a). A general denial is insufficient to

raise a genuine dispute over facts material to the suspension;

(ii) All existing, proposed, or prior exclusions and all similar actions taken by Federal, State, or local agencies, including administrative agreements that affect only those agencies;

(iii) All criminal and civil proceedings not included in the notice of suspension that grew out of facts relevant to the cause(s) stated in the notice; and

(iv) All of the contractor's affiliates; and

(8) That if the contractor fails to disclose the information in paragraph (c)(7) of this section or provides false information, the agency taking the action may seek further criminal, civil, or administrative action against the contractor, as appropriate.

(d) *Suspending and debarring official's decision.* (1) The suspending and debarring official must make a decision based on all the information in the administrative record, including any submission from the contractor, for actions—

(i) Based on an indictment;

(ii) In which the contractor's submission does not raise a genuine dispute over material facts; or

(iii) In which additional proceedings to determine disputed material facts have been denied based on advice from the Department of Justice, a U.S. Attorney's office, State attorney general's office, or a State or local prosecutor's office.

(2)(i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact must be prepared. The suspending and debarring official must base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(ii) The suspending and debarring official may refer matters involving disputed material facts to another official for findings of fact. The suspending and debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(iii) The suspending and debarring official must make a decision after the conclusion of the proceedings with respect to disputed facts.

(3) The suspending and debarring official may modify or terminate the suspension or leave it in force (for example, see 9.406–4(c) for the reasons for reducing the period or extent of debarment). However, a decision to modify or terminate the suspension

must be without prejudice to the subsequent imposition of—

(i) Suspension by any other agency; or

(ii) Debarment by any agency.

(4) Prompt written notice of the suspending and debarring official's decision must be sent to the contractor and any affiliates involved, using the procedures in 9.406–3(c)(1) and (2).

(e) *Administrative agreement.* (1) If the contractor enters into an administrative agreement with the Government to resolve a suspension or potential suspension proceeding, the suspending and debarring official must access the integrity records in *CPARS.gov*, enter the requested information, and upload documentation reflecting the administrative agreement.

(2) The suspending and debarring official is responsible for the timely and accurate submission of documentation reflecting the administrative agreement. The submission should be made within 3 business days.

(3) With regard to information that may be covered by a disclosure exemption under the Freedom of Information Act, the suspending and debarring official must follow the procedures at 9.105–2(b)(2)(ii).

(f) *Voluntary exclusion.* (1) If the contractor enters into a voluntary exclusion with the Government in order to resolve a suspension or potential suspension proceeding, the suspending and debarring official must access the website (available at <https://www.sam.gov>) and enter the requested information into the exclusions section of SAM (see 9.404(c)(3)).

(2) The suspending and debarring official is responsible for the timely and accurate submission of documentation reflecting the voluntary exclusion. The submission should be made within 3 business days.

(3) Regarding information that may be covered by a disclosure exemption under the Freedom of Information Act, the suspending and debarring official must follow the procedures at 9.105–2(b)(2)(ii).

(g) *Pre-notice letter.* Prior to initiating a suspension, the suspending and debarring official has discretion to issue a pre-notice letter. A pre-notice letter is not required to initiate suspension under this subpart. (See 9.403.)

9.407–4 Period of suspension.

(a) Suspension must be for a temporary period pending the completion of an investigation and any ensuing legal proceedings, unless sooner terminated by the suspending and debarring official or as provided in this section.

(b) If legal proceedings are not initiated within 12 months after the date of the suspension notice, the suspension must be terminated unless an office of a U.S. Assistant Attorney General, U.S. Attorney, or other responsible prosecuting official requests its extension, in which case it may be extended for an additional 6 months. In no event may a suspension extend beyond 18 months, unless legal proceedings have been initiated within that period.

(c) The suspending and debarring official must notify the Department of Justice or other responsible prosecuting official of the proposed termination of the suspension, at least 30 days before the 12-month period expires, to give that official an opportunity to request an extension on the Government's behalf.

9.407–5 Scope of suspension.

The scope of suspension must be the same as that for debarment (see 9.406–5), except that the procedures of 9.407–3 must be used in imposing suspension.

9.408 Contract clause.

(a) Insert the clause at 52.209–6, Protecting the Government's Interest when Subcontracting with Contractors Debarred, Suspended, Proposed for Debarment, or Voluntarily Excluded, in solicitations and contracts when the acquisition value exceeds \$45,000, including those for commercial products (other than commercially available off-the-shelf items) and commercial services.

(b) Use the clause with its Alternate I for acquisitions of commercial products (other than commercially available off-the-shelf items).

Subpart 9.5—Organizational and Consultant Conflicts of Interest

9.500 Scope of subpart.

This subpart:

(a) Prescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest;

(b) Provides examples to assist contracting officers in applying these rules and procedures to individual contracting situations; and

(c) Implements section 8141 of the 1989 Department of Defense Appropriations Act (Pub. L. 100–463) 102 Stat. 2270–47 (1988).

9.501 Definition.

As used in this subpart—

Marketing consultant means any independent contractor who furnishes advice, information, direction, or assistance to an offeror or any other contractor in support of the preparation

or submission of an offer for a Government contract by that offeror. An independent contractor is not a marketing consultant when rendering—

- (1) Services excluded in subpart 37.4;
- (2) Routine engineering and technical services (such as installation, operation, or maintenance of systems, equipment, software, components, or facilities);
- (3) Routine legal, actuarial, auditing, and accounting services; and
- (4) Training services.

9.502 Applicability.

(a) This subpart applies to contracts with either profit or nonprofit organizations, including nonprofit organizations created largely or wholly with Government funds.

(b) The applicability of this subpart is not limited to any particular kind of acquisition. However, organizational conflicts of interest are more likely to occur in contracts involving—

- (1) Management support services;
- (2) Consultant or other professional services;
- (3) Contractor performance of or assistance in technical evaluations; or
- (4) Systems engineering and technical direction work performed by a contractor that does not have overall contractual responsibility for development or production.

(c) An organizational conflict of interest may result when factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition. In the latter case, some restrictions on future activities of the contractor may be required.

(d) Acquisitions subject to unique agency organizational conflict of interest statutes are excluded from the requirements of this subpart.

9.503 Waiver.

The agency head or a designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government's interest. Any request for waiver must be in writing, must set forth the extent of the conflict, and requires approval by the agency head or a designee. Agency heads must not delegate waiver authority below the level of head of a contracting activity.

9.504 Contracting officer responsibilities.

(a) Using the general rules, procedures, and examples in this subpart, contracting officers must analyze planned acquisitions in order to—

(1) Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and

(2) Avoid, neutralize, or mitigate significant potential conflicts before contract award.

(b) Contracting officers should obtain the advice of counsel and the assistance of appropriate technical specialists in evaluating potential conflicts and in developing any necessary solicitation provisions and contract clauses (see 9.506).

(c) In fulfilling their responsibilities for identifying and resolving potential conflicts, contracting officers should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation. The contracting officer's judgment need be formally documented only when a substantive issue concerning potential organizational conflict of interest exists.

(d) The contracting officer must award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided or mitigated. Before determining to withhold award based on conflict-of-interest considerations, the contracting officer must notify the contractor, provide the reasons therefor, and allow the contractor a reasonable opportunity to respond. If the contracting officer finds that it is in the best interest of the United States to award the contract notwithstanding a conflict of interest, a request for waiver must be submitted in accordance with 9.503. The waiver request and decision must be included in the contract file.

9.505 General rules.

The general rules in 9.505–1 through 9.505–4 prescribe limitations on contracting as the means of avoiding, neutralizing, or mitigating organizational conflicts of interest that might otherwise exist in the stated situations. Some illustrative examples are provided in 9.508. Conflicts may arise in situations not expressly covered in this section 9.505 or in the examples in 9.508. Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it. The two underlying principles are—

(a) Preventing the existence of conflicting roles that might bias a contractor's judgment; and

(b) Preventing unfair competitive advantage. In addition to the other situations described in this subpart, an unfair competitive advantage exists where a contractor competing for award of any Federal contract possesses—

(1) Proprietary information that was obtained from a Government official without proper authorization; or

(2) Source selection information that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract.

9.505-1 Providing systems engineering and technical direction.

(a) A contractor that provides systems engineering and technical direction for a system but does not have overall contractual responsibility for its development, its integration, assembly, and checkout, or its production must not—

(1) Be awarded a contract to supply the system or any of its major components; or

(2) Be a subcontractor or consultant to a supplier of the system or any of its major components.

(b) Systems engineering includes a combination of substantially all the following activities: determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design. Technical direction includes a combination of substantially all the following activities: developing work statements, determining parameters, directing other contractors' operations, and resolving technical controversies. In performing these activities, a contractor occupies a highly influential and responsible position in determining a system's basic concepts and supervising their execution by other contractors. This contractor should therefore not be in a position to make decisions favoring its own products or capabilities.

9.505-2 Preparing specifications or work statements.

(a)(1) If a contractor prepares and furnishes complete specifications covering nondevelopmental items, to be used in a competitive acquisition, that contractor must not be allowed to furnish these items, either as a prime contractor or as a subcontractor, for a reasonable period of time including, at least, the duration of the initial production contract. The restriction in this paragraph (a)(1) must not apply to—

(i) Contractors that furnish at Government request specifications or data regarding a product they provide, even though the specifications or data

may have been paid for separately or in the price of the product; or

(ii) Situations in which contractors, acting as industry representatives, help Government agencies prepare, refine, or coordinate specifications, regardless of source, provided this assistance is supervised and controlled by Government representatives.

(2) If a single contractor drafts complete specifications for nondevelopmental equipment, it should be eliminated for a reasonable time from competition for production based on the specifications. This should be done in order to avoid a situation in which the contractor could draft specifications favoring its own products or capabilities. In this way the Government can be assured of getting unbiased advice as to the content of the specifications and can avoid allegations of favoritism in the award of production contracts.

(3) In development work, it is normal to select firms that have done the most advanced work in the field. These firms can be expected to design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgeably than firms that did not participate in the development, and this can affect the time and quality of production, both of which are important to the Government. In many instances the Government may have financed the development. Thus, while the development contractor has a competitive advantage, it is an unavoidable one that is not considered unfair; hence no prohibition should be imposed.

(b)(1) If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services or provides material leading directly, predictably, and without delay to such a work statement—that contractor may not supply the system, major components of the system, or the services unless—

(i) It is the sole source;

(ii) It has participated in the development and design work; or

(iii) More than one contractor has been involved in preparing the work statement.

(2) Agencies should normally prepare their own work statements. When contractor assistance is necessary, the contractor might often be in a position to favor its own products or capabilities. To overcome the possibility of bias, contractors are prohibited from supplying a system or services acquired on the basis of work statements growing out of their services, unless excepted in paragraph (b)(1) of this section.

(3) For the reasons given in paragraph (a)(3) of this section, no prohibitions are imposed on development and design contractors.

9.505-3 Providing evaluation services.

Contracts for the evaluation of offers for products or services must not be awarded to a contractor that will evaluate its own offers for products or services, or those of a competitor, without proper safeguards to ensure objectivity to protect the Government's interests.

9.505-4 Obtaining access to proprietary information.

(a) When a contractor requires proprietary information from others to perform a Government contract and can use the leverage of the contract to obtain it, the contractor may gain an unfair competitive advantage unless restrictions are imposed. These restrictions protect the information and encourage companies to provide it when necessary for contract performance. They are not intended to protect information—

(1) Furnished voluntarily without limitations on its use; or

(2) Available to the Government or contractor from other sources without restriction.

(b) A contractor that gains access to proprietary information of other companies in performing advisory and assistance services for the Government must agree with the other companies to protect their information from unauthorized use or disclosure for as long as it remains proprietary and refrain from using the information for any purpose other than that for which it was furnished. The contracting officer must obtain copies of these agreements and ensure that they are properly executed.

(c) Contractors also obtain proprietary and source selection information by acquiring the services of marketing consultants which, if used in connection with an acquisition, may give the contractor an unfair competitive advantage. Contractors should make inquiries of marketing consultants to ensure that the marketing consultant has provided no unfair competitive advantage.

9.506 Procedures.

(a) If information concerning prospective contractors is necessary to identify and evaluate potential organizational conflicts of interest or to develop recommended actions, contracting officers should first seek the information from within the Government or from other readily

available sources. Government sources include the files and the knowledge of personnel within the contracting office, other contracting offices, the cognizant contract administration and audit activities and offices concerned with contract financing. Non-Government sources include publications and commercial services, such as credit rating services, trade and financial journals, and business directories and registers.

(b) If the contracting officer decides that a particular acquisition involves a significant potential organizational conflict of interest, the contracting officer must, before issuing the solicitation, submit for approval to the chief of the contracting office (unless a higher-level official is designated by the agency)—

(1) A written analysis, including a recommended course of action for avoiding, neutralizing, or mitigating the conflict, based on the general rules in 9.505 or on another basis not expressly stated in that section;

(2) A draft solicitation provision (see 9.507–1); and

(3) If appropriate, a proposed contract clause (see 9.507–2).

(c) The approving official must—

(1) Review the contracting officer's analysis and recommended course of action, including the draft provision and any proposed clause;

(2) Consider the benefits and detriments to the Government and prospective contractors; and

(3) Approve, modify, or reject the recommendations in writing.

(d) The contracting officer must—

(1) Include the approved provision(s) and any approved clause(s) in the solicitation or the contract, or both;

(2) Consider additional information provided by prospective contractors in response to the solicitation or during negotiations; and

(3) Before awarding the contract, resolve the conflict or the potential conflict in a manner consistent with the approval or other direction by the head of the contracting activity.

(e) If, during the effective period of any restriction (see 9.507), a contracting office transfers acquisition responsibility for the item or system involved, it must notify the successor contracting office of the restriction and send a copy of the contract under which the restriction was imposed.

9.507 Solicitation provisions and contract clause.

9.507–1 Solicitation provisions.

As indicated in the general rules in 9.505, significant potential

organizational conflicts of interest are normally resolved by imposing some restraint, appropriate to the nature of the conflict, upon the contractor's eligibility for future contracts or subcontracts. Therefore, affected solicitations must contain a provision that—

(a) Invites offerors' attention to this subpart;

(b) States the nature of the potential conflict as seen by the contracting officer;

(c) States the nature of the proposed restraint upon future contractor activities; and

(d) Depending on the nature of the acquisition, states whether or not the terms of any proposed clause and the application of this subpart to the contract are subject to negotiation.

9.507–2 Contract clause.

(a) If, as a condition of award, the contractor's eligibility for future prime contract or subcontract awards will be restricted or the contractor must agree to some other restraint, the solicitation must contain a proposed clause that specifies both the nature and duration of the proposed restraint. The contracting officer must include the clause in the contract, first negotiating the clause's final terms with the successful offeror, if it is appropriate to do so (see 9.506(d)).

(b) The restraint imposed by a clause must be limited to a fixed term of reasonable duration, sufficient to avoid the circumstance of unfair competitive advantage or potential bias. This period varies. It might end, for example, when the first production contract using the contractor's specifications or work statement is awarded, or it might extend through the entire life of a system for which the contractor has performed systems engineering and technical direction. In every case, the restriction must specify termination by a specific date or upon the occurrence of an identifiable event.

9.508 Examples.

The examples in paragraphs (a) through (i) of this section illustrate situations in which questions concerning organizational conflicts of interest may arise. They are not all inclusive but are intended to help the contracting officer apply the general rules in 9.505 to individual contract situations.

(a) Company A agrees to provide systems engineering and technical direction for the Navy on the powerplant for a group of submarines (*i.e.*, turbines, drive shafts, propellers, etc.). Company A should not be allowed

to supply any powerplant components. Company A can, however, supply components of the submarine unrelated to the powerplant (*e.g.*, fire control, navigation, etc.). In this example, the system is the powerplant, not the submarine, and the ban on supplying components is limited to those for the system only.

(b) Company A is the systems engineering and technical direction contractor for system X. After some progress, but before completion, the system is canceled. Later, system Y is developed to achieve the same purposes as system X, but in a fundamentally different fashion. Company B is the systems engineering and technical direction contractor for system Y. Company A may supply system Y or its components.

(c) Company A develops new electronic equipment and, as a result of this development, prepares specifications. Company A may supply the equipment.

(d) XYZ Tool Company and PQR Machinery Company, representing the American Tool Institute, work under Government supervision and control to refine specifications or to clarify the requirements of a specific acquisition. These companies may supply the item.

(e) Before an acquisition for information technology is conducted, Company A is awarded a contract to prepare data system specifications and equipment performance criteria to be used as the basis for the equipment competition. Since the specifications are the basis for selection of commercial hardware, a potential conflict of interest exists. Company A should be excluded from the initial follow-on information technology hardware acquisition.

(f) Company A receives a contract to define the detailed performance characteristics an agency will require for purchasing rocket fuels. Company A has not developed the particular fuels. When the definition contract is awarded, it is clear to both parties that the agency will use the performance characteristics arrived at to choose competitively a contractor to develop or produce the fuels. Company A may not be awarded this follow-on contract.

(g) Company A receives a contract to prepare a detailed plan for scientific and technical training of an agency's personnel. It suggests a curriculum that the agency endorses and incorporates in its request for proposals to institutions to establish and conduct the training. Company A may not be awarded a contract to conduct the training.

(h) Company A is selected to study the use of lasers in communications. The agency intends to ask that firms

doing research in the field make proprietary information available to Company A. The contract must require Company A to—

(1) Enter into agreements with these firms to protect any proprietary information they provide; and

(2) Refrain from using the information in supplying lasers to the Government or for any purpose other than that for which it was intended.

(i) An agency that regulates an industry wishes to develop a system for evaluating and processing license applications. Contractor X helps develop the system and process the applications. Contractor X should be prohibited from acting as a consultant to any of the applicants during its period of performance and for a reasonable period thereafter.

PART 27—PATENTS, DATA, AND COPYRIGHTS

Sec.

27.000 Scope of part.

27.001 Definition.

Subpart 27.1—General

27.101 Applicability.

Subpart 27.2—Patents and Copyrights

27.200 Scope of subpart.

27.201 Patent and copyright infringement liability.

27.201–1 General.

27.201–2 Contract clauses.

27.202 Royalties.

27.202–1 Solicitation provision and contract clause.

27.203 Security requirements for patent applications containing classified subject matter.

27.203–1 General.

27.203–2 Contract clause.

Subpart 27.3—Patent Rights Under Government Contracts

27.300 Scope of subpart.

27.301 Definitions.

27.302 Contract clauses.

27.303 Procedures.

27.303–1 General.

27.303–2 Contracts placed by or for other Government agencies.

27.303–3 Subcontracts.

27.303–4 Appeals.

27.304 Licensing background patent rights to third parties.

Subpart 27.4—Technical Data, Computer Software, Computer Software Documentation, and Associated Rights Related to Other Than Commercial Products and Commercial Services

27.400 Scope of subpart.

27.401 Definitions.

27.402 Other than commercial products, commercial services, commercial processes, commercial computer software, or commercial computer software documentation.

27.402–1 Policy.

27.402–2 [Reserved]

27.402–3 Identification of restrictions on the Government's right to use, reproduce or disclose technical data or computer software.

T27.402–4 License rights.

27.402–5 Government rights.

27.402–6 Solicitation provisions and contract clauses.

27.402–7 Use and nondisclosure agreement.

27.402–8 Deferred ordering of technical data.

27.402–9 Copyright.

27.402–10 Contractor identification and marking of technical data or computer software to be delivered with restrictive markings.

27.402–11 Contractor procedures and records.

27.402–12 Government right to establish conformity of markings.

27.402–13 Government right to review, verify, challenge, and validate asserted restrictions.

7.402–14 Conformity, acceptance, and warranty of technical data and computer software.

27.402–15 Subcontractor rights in technical data, computer software, or computer software documentation.

27.402–16 Providing technical data, computer software, or computer software documentation to foreign governments, foreign contractors, or international organizations.

27.403 Contracts under the Small Business Innovation Research Program and Small Business Technology Transfer Program.

27.403–1 Policy.

27.403–2 Rights in SBIR or STTR data.

27.403–3 STTR program requirements.

27.403–4 Solicitation provision and contract clauses.

27.404 Contracts for the acquisition of existing works.

27.404–1 General.

27.404–2 Acquisition of existing works without modification.

27.404–3 Acquisition of modified existing works.

27.405 Contracts for special works.

Subpart 27.5—Technical Data, Computer Software, Computer Software Documentation, and Associated Rights Related to Commercial Products and Commercial Services

27.500 Scope of subpart.

27.501 Definitions.

27.502 Commercial computer software and commercial computer software documentation.

27.502–1 Policy.

27.502–2 Rights in commercial computer software or commercial computer software documentation.

27.503 Technical data related to commercial products, commercial components, commercial services, or commercial processes.

27.503–1 Policy.

27.503–2 Rights in technical data.

27.503–3 Government right to review, verify, challenge, and validate asserted restrictions.

27.503–4 Contract clauses.

Authority: 41 U.S.C. 1121(b); 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

27.000 Scope of part.

This part provides policies, procedures, solicitation provisions, and contract clauses pertaining to patents, data, and copyrights.

27.001 Definition.

As used in this part—

United States means the 50 States and the District of Columbia, U.S. territories and possessions, Puerto Rico, and the Northern Mariana Islands.

Subpart 27.1—General

27.101 Applicability.

When applying this part, agencies may adopt alternative policies, procedures, solicitation provisions, and contract clauses to the extent necessary to meet the specific requirements of laws, executive orders, treaties, or international agreements.

Subpart 27.2—Patents and Copyrights

27.200 Scope of subpart.

This subpart provides policies and procedures regarding—

(a) Patent and copyright infringement liability;

(b) Royalties; and

(c) Security requirements for patent applications containing classified subject matter.

27.201 Patent and copyright infringement liability.

27.201–1 General.

(a) Pursuant to 28 U.S.C. 1498, the exclusive remedy for patent or copyright infringement by or on behalf of the Government is a suit for monetary damages against the Government in the Court of Federal Claims. No injunctive relief is available, and no direct cause of action lies against a contractor that is infringing a patent or copyright with the authorization or consent of the Government (*e.g.*, while performing a contract).

(b) The Government may expressly authorize and consent to a contractor's use or manufacture of inventions covered by U.S. patents by inserting the clause at 52.227–1, Authorization and Consent.

(c) Because of the exclusive remedies granted in 28 U.S.C. 1498, the Government requires notice and assistance from its contractors regarding any claims for patent or copyright infringement by inserting the clause at 52.227–2, Notice and Assistance, Regarding Patent and Copyright Infringement.

(d) The Government may require a contractor to reimburse it for liability for patent infringement arising out of a contract for commercial products or commercial services by inserting the clause at 52.227–3, Patent Indemnity.

27.201–2 Contract clauses.

(a)(1) Insert the clause at 52.227–1, Authorization and Consent, in solicitations and contracts, including those for commercial products and commercial services, except for acquisitions for which both complete performance and delivery are outside the United States.

(2) Use the clause with its Alternate I in R&D solicitations and contracts for which the primary purpose is R&D work, except do not use this Alternate in construction and architect-engineer contracts unless the contract calls exclusively for R&D work. Do not, however, use this Alternate in solicitations or contracts for commercial products and commercial services.

(3) Use the clause with its Alternate II in solicitations and contracts for communication services with a common carrier where the services are unregulated and not priced by a tariff schedule set by a regulatory body.

(b) Insert the clause at 52.227–2, Notice and Assistance Regarding Patent and Copyright Infringement, in solicitations and contracts, including those for commercial products and commercial services, that include the clause at 52.227–1, Authorization and Consent.

(c)(1) Insert the clause at 52.227–3, Patent Indemnity, in solicitations and contracts that may result in the delivery of commercial products or the provision of commercial services, unless—

(i) The acquisition uses part 12 procedures;

(ii) Both complete performance and delivery are outside the United States; or

(iii) The contracting officer determines that omission of the clause would be consistent with commercial practice.

(2) Use the clause with either its Alternate I (identification of excluded items) or II (identification of included items) if—

(i) The contract also requires delivery of items that are not commercial products or the provision of services that are not commercial services; or

(ii) The contracting officer determines that limitation of applicability of the clause would be consistent with commercial practice.

(3) Use the clause with its Alternate III if the solicitation or contract is for communication services and facilities

by a common carrier, and the services are unregulated and are not priced by a tariff schedule set by a regulatory body.

(d)(1) Insert the clause at 52.227–4, Patent Indemnity—Construction Contracts, in solicitations and contracts for construction or that are fixed-price for dismantling, demolition, or removal of improvements, including those for construction that is a commercial service. Do not insert the clause in contracts solely for architect-engineer services.

(2) If the contracting officer determines that the construction will necessarily involve the use of structures, products, materials, equipment, processes, or methods that are nonstandard, noncommercial, or special, the contracting officer may expressly exclude them from the patent indemnification by using the clause with its Alternate I. Note that this exclusion is for items, as distinguished from identified patents (see paragraph (e) of this subsection).

(e) When in the Government's interest, the agency head may exempt specific U.S. patents, as distinguished from items, from the patent indemnity clause. Upon written approval of the agency head, the contracting officer may insert the clause at 52.227–5, Waiver of Indemnity, in solicitations and contracts in addition to the appropriate patent indemnity clause.

(f) When in the Government's interest, the contracting officer may include a patent indemnity clause not otherwise prescribed in the solicitation and contract.

(g) Do not include in any solicitation or contract any clause whereby the Government agrees to indemnify a contractor for patent infringement.

27.202 Royalties.

27.202–1 Solicitation provision and contract clause.

(a)(1) Insert the provision at 52.227–6, Royalty Information, in—

(i) Solicitations, other than those for commercial products or commercial services, that may result in a negotiated contract for which royalty information is desired and for which certified cost or pricing data are obtained under 15.403; or

(ii) Solicitations using the procedures in part 14, other than those for commercial products or commercial services, but only if the need for such information is approved at a level above the contracting officer as being necessary for proper protection of the Government's interests.

(2) If the solicitation is for communication services and facilities

by a common carrier, use the provision with its Alternate I.

(b) If the provision at 52.227–6 is not included in the solicitation, the contracting officer may require offerors to provide information sufficient to provide this notice to the other offerors, other than solicitations for commercial products or commercial services.

(c) Insert the clause at 52.227–9, Refund of Royalties, in negotiated fixed-price solicitations and contracts, other than those for commercial products or commercial services, when royalties may be paid under the contract. For fixed-price incentive contracts, change “price” to “target cost and target profit” wherever it appears in the clause. The clause may be used in cost-reimbursement contracts where agency approval of royalties is necessary to protect the Government's interests.

27.203 Security requirements for patent applications containing classified subject matter.

27.203–1 General.

(a) Unauthorized disclosure of classified subject matter, whether in patent applications or resulting from the issuance of a patent, may violate 18 U.S.C. 792, *et seq.* (Chapter 37—Espionage and Censorship), and related statutes, and may be contrary to national security interests.

(b) Upon receipt of a patent application under paragraph (a) or (b) of the clause at 52.227–10, Filing of Patent Applications—Classified Subject Matter, ascertain the proper security classification of the patent application. If the application contains classified subject matter, inform the contractor how to transmit the application to the United States Patent Office in accordance with procedures provided by legal counsel. If the material is classified “Secret” or higher, notify the contractor within 30 days, if possible, of the Government's determination, pursuant to paragraph (a) of the clause.

(c) Upon receipt of information furnished by the contractor under paragraph (d) of the clause at 52.227–10, promptly submit that information to legal counsel regarding the security of the application.

(d) Act promptly on requests for approval of foreign filing under paragraph (c) of the clause at 52.227–10 to avoid jeopardizing patent rights of the Government or the contractor.

27.203–2 Contract clause.

Insert the clause at 52.227–10, Filing of Patent Applications—Classified Subject Matter, in—

(a) All classified solicitations and contracts, including those for

commercial products and commercial services; and

(b) Solicitations and contracts, including those for commercial products and commercial services, where the nature of the work reasonably might result in a patent application containing classified subject matter.

Subpart 27.3—Patent Rights Under Government Contracts

27.300 Scope of subpart.

This subpart provides procedures, solicitation provisions, and contract clauses pertaining to inventions made in the performance of work under a Government contract or subcontract for experimental, developmental, or research work.

27.301 Definitions.

As used in this subpart—

Invention means any invention or discovery that is or may be patentable or otherwise protectable under title 35 of the U.S. Code, or any variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*).

Made—

(1) When used in relation to any invention other than a plant variety, means the conception or first actual reduction to practice of the invention; or

(2) When used in relation to a plant variety, means that the contractor has at least tentatively determined that the variety has been reproduced with recognized characteristics.

Nonprofit organization means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)), or any nonprofit scientific or educational organization qualified under a State nonprofit organization statute.

Practical application means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

Subject invention means any invention of the contractor made in the performance of work under a Government contract.

27.302 Contract clauses.

(a)(1) Insert a patent rights clause in solicitations and contracts for experimental, developmental, or research work as prescribed in this section.

(2) This section also applies to solicitations or contracts for construction work or architect-engineer services that include—

(i) Experimental, developmental, or research work;

(ii) Test and evaluation studies; or

(iii) The design of a Government facility that may involve novel structures, machines, products, materials, processes, or equipment (including construction equipment).

(3) Do not include a patent rights clause in solicitations or contracts for construction work or architect-engineer services that call for or can be expected to involve only “standard types of construction.” “Standard types of construction” are those involving previously developed equipment, methods, and processes and in which the distinctive features include only—

(i) Variations in size, shape, or capacity of conventional structures; or

(ii) Purely artistic or aesthetic (as distinguished from functionally significant) architectural configurations and designs of both structural and nonstructural members or groupings, whether or not they qualify for design patent protection.

(b)(1) Insert the clause at 52.227–11, Patent Rights—Ownership by the Contractor, in all solicitations and contracts for requirements identified in paragraph (a)(1) and (2) of this section, including those for commercial products and commercial services, unless an alternative patent rights clause is used in accordance with paragraph (c), (d), (e) or (g) of this section.

(2) To the extent the contract does not elsewhere require the information, and unless agency supplemental regulations specify otherwise, the contracting officer may modify 52.227–11(e) or otherwise supplement the clause to require the contractor to do one or more of the following:

(i) Provide periodic (but not more frequently than annually) listings of all subject inventions required to be disclosed during the period covered by the report.

(ii) Provide a report prior to the closeout of the contract listing all subject inventions or stating that there were none.

(iii) Provide the filing date, serial number, title, patent number and issue date for any patent application filed on any subject invention in any country or,

upon request, copies of any patent application so identified.

(iv) Furnish the Government an irrevocable power to inspect and make copies of the patent application file when a Government employee is a co-inventor.

(3) Use the clause with its Alternate I if the Government must grant a foreign government a sublicense in subject inventions pursuant to a specified treaty or executive agreement. The contracting officer may modify Alternate I, if the agency head determines, at contract award, that it would be in the national interest to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement. When necessary to effectuate a treaty or agreement, Alternate I may be appropriately modified.

(4) Use the clause with its Alternate II in contracts that may be affected by existing or future treaties or agreements.

(5) Use the clause with its Alternate III in contracts with nonprofit organizations for the operation of a Government-owned facility.

(6) If the contract is for the operation of a Government-owned facility, the contracting officer may use the clause with its Alternate IV.

(7) If the contract is for the performance of services at a Government owned and operated laboratory or at a Government owned and contractor operated laboratory directed by the Government to fulfill the Government's obligations under a Cooperative Research and Development Agreement (CRADA) authorized by 15 U.S.C. 3710a, the contracting officer may use the clause with its Alternate V. This provision is an exercise of an agency's “exceptional circumstances” authority, and the contracting officer must therefore comply with 37 CFR 401.3(e) and 401.4.

(c) Insert a patent rights clause in accordance with the procedures at 27.303–2 if the solicitation or contract is made on behalf of another Government agency.

(d) Insert a patent rights clause in accordance with agency procedures if the solicitation or contract is for DoD, Department of Energy (DOE), or the National Aeronautics and Space Administration, and the contractor is other than a small business concern or nonprofit organization.

(e)(1) The contracting officer may insert the clause at 52.227–13, Patent Rights—Ownership by the Government, or a clause prescribed by agency supplemental regulations, in solicitations and contracts, including those for commercial products and

commercial services, except as provided in paragraph (e)(2) of this section, and after compliance with the applicable procedures in 27.303–1(a), if—

(i) The contractor is not located in the United States or does not have a place of business located in the United States or is subject to the control of a foreign government;

(ii) Exceptional circumstances apply, and the agency head determines that restriction or elimination of the right to retain title to any subject invention will better promote the policy and objectives of 35 U.S.C. chapter 18;

(iii) A Government authority authorized by statute or executive order to conduct foreign intelligence or counterintelligence activities determines that restriction or elimination of the right to retain any subject invention is necessary to protect the security of such activities; or

(iv) The contract includes the operation of a Government-owned, contractor-operated facility of DOE primarily dedicated to that Department's naval nuclear propulsion or weapons related programs.

(2) If the circumstances at paragraph (e)(1)(ii) or (iii) of this section apply in a contract with a small business concern or a nonprofit organization, use the clause at 52.227–11 with only those modifications necessary to address the exceptional circumstances and include in the modified clause greater rights determinations procedures equivalent to those at 52.227–13(b)(2).

(3) When using the clause at 52.227–13, Patent Rights—Ownership by the Government, the contracting officer may supplement the clause to require the contractor to—

(i) Furnish a copy of each subcontract containing a patent rights clause (but if a copy of a subcontract is furnished under another clause, do not request a duplicate under the patent rights clause);

(ii) Submit interim and final invention reports listing subject inventions and notifying the contracting officer of all subcontracts awarded for experimental, developmental, or research work;

(iii) Provide the filing date, serial number, title, patent number, and issue date for any patent application filed on any subject invention in any country or, upon specific request, copies of any patent application so identified; and

(iv) Submit periodic reports on the utilization of a subject invention.

(4) Use the clause at 52.227–13 with its Alternate I if—

(i) The Government must grant a foreign government a sublicense in

subject inventions pursuant to a treaty or executive agreement; or

(ii) At contract award, the agency head determines, that it would be in the national interest, to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement. If other rights are necessary to effectuate any treaty or agreement, modify Alternate I as appropriate.

(5) Use the clause at 52.227–13 with its Alternate II in the contract when necessary to effectuate an existing or future treaty or agreement.

(f) Insert the clause at 52.227–24, Patents—Reporting of Subject Inventions, in solicitations and contracts, including those for commercial products and commercial services, that include the clause at 52.227–11, Patent Rights—Ownership by the Contractor.

(g)(1) Insert the clause at 52.227–25, Patent Rights—Ownership by the Contractor (Large Business), instead of the clause at 52.227–11, in solicitations and contracts, including those for commercial products and commercial services, for experimental, developmental, or research work if—

(i) The contractor is other than a small business concern or nonprofit organization; and

(ii) No alternate patent rights clause is used in accordance with 27.302(c) or (e).

(2) Insert the clause with its Alternate I if—

(i) The acquisition of patent rights for the benefit of a foreign government is required under a treaty or executive agreement;

(ii) The agency head determines at the time of award that it would be in the national interest to acquire the right to sublicense to foreign governments or international organizations pursuant to any existing or future treaty or agreement; or

(iii) Other rights are necessary to effect a treaty or agreement, in which case Alternate I may be modified.

(3) Insert the clause with its Alternate II in long-term contracts if necessary to effectuate treaties or agreements to be entered into.

27.303 Procedures.

27.303–1 General.

(a) *Exceptions.* (1) Before using any of the exceptions under 27.302(e)(1) in a contract with a small business concern or a nonprofit organization and before using the exception of 27.302(e)(1)(ii) for any contractor, the agency must follow applicable procedures at 37 CFR 401.

(2) A small business concern or nonprofit organization is entitled to an

administrative review of the use of the exceptions at 27.302(e)(1)(i) through (e)(1)(iv) in accordance with agency procedures and 37 CFR part 401.

(b) *Greater rights determinations.*

Whenever the contract contains the clause at 52.227–13, Patent Rights—Ownership by the Government, or a patent rights clause modified pursuant to 27.302(e)(2), the contractor (or an employee-inventor of the contractor after consultation with the contractor) may request greater rights to an identified invention within the period specified in the clause. The contracting officer may grant requests for greater rights if the contracting officer determines that the interests of the United States and the general public will be better served. In making these determinations, the contracting officer must consider at least the following objectives (see 37 CFR 401.3(b)):

(1) Promoting the utilization of inventions arising from federally supported research and development.

(2) Ensuring that inventions are used in a manner to promote full and open competition and free enterprise without unduly encumbering future research and discovery.

(3) Promoting public availability of inventions made in the United States by United States industry and labor.

(4) Ensuring that the Government obtains sufficient rights in federally supported inventions to meet the needs of the Government and protect the public against nonuse or unreasonable use of inventions.

(c) *Retention of rights by inventor.* If the contractor elects not to retain title to a subject invention, the agency may consider and, after consultation with the contractor, grant requests for retention of rights by the inventor. Retention of rights by the inventor will be subject to the conditions in paragraphs (d) (except paragraphs (d)(1)(i)), (e)(4), (f), (g), and (h) of the clause at 52.227–11, Patent Rights—Ownership by the Contractor.

(d) *Government assignment to contractor of rights in Government employees' inventions.* When a Government employee is a co-inventor of an invention made under a contract with a small business concern or nonprofit organization, the agency employing the co-inventor may license or assign whatever rights it may acquire in the subject invention from its employee to the contractor, subject at least to the conditions of 35 U.S.C. 202–204.

(e) *Revocation or modification of contractor's minimum rights.* Before revoking or modifying the contractor's license, the contracting officer must furnish the contractor a written notice of

intention to revoke or modify the license. The agency must allow the contractor at least 30 days (or another time as may be authorized for good cause by the contracting officer) after the notice to show cause why the license should not be revoked or modified. The contractor has the right to appeal, in accordance with applicable regulations in 37 CFR part 404 and agency licensing regulations, any decisions concerning the revocation or modification.

(f) *Exercise of march-in rights.* When exercising march-in rights, agencies must follow the procedures set forth in 37 CFR 401.6.

(g) *Licenses and assignments under contracts with nonprofit organizations.* If the contractor is a nonprofit organization, paragraph (i) of the clause at 52.227–11 provides that certain contractor actions require agency approval.

27.303–2 Contracts placed by or for other Government agencies.

Apply the following procedures unless an interagency agreement provides otherwise:

(a) When a Government agency requests another Government agency award a contract on its behalf, the request should explain any special circumstances surrounding the contract and specify the patent rights clause. The clause should be selected and modified, if necessary, in accordance with the policies and procedures of this subpart. If, however, the request states that a clause of the requesting agency is required (*e.g.*, because of statutory requirements, a deviation, or exceptional circumstances), then use that clause rather than those of this subpart.

(1) If the request states that an agency clause is required and the work to be performed under the contract is not severable and is funded wholly or in part by the requesting agency, then use the requesting agency clause and no other patent rights clause in the contract.

(2) If the request states that an agency clause is required, and the work to be performed under the contract is severable, then apply the requesting agency clause only to the severable portion of the work. Apply the appropriate patent rights clause to the work for the awarding agency.

(3) If the request states that a requesting agency clause is not required in any resulting contract, then use the appropriate patent rights clause, if any.

(b) Any action requiring an agency determination, report, or deviation involved in the use of the requesting

agency's clause is the responsibility of the requesting agency unless the agencies agree otherwise. However, do not alter the requesting agency's clause without prior approval of the requesting agency.

(c) The requesting agency may require, and provide instructions regarding, the forwarding or handling of any invention disclosures or other reporting requirements of the specified clauses. Normally, the requesting agency is responsible for the administration of any subject inventions. Establish this responsibility before awarding any contracts.

27.303–3 Subcontracts.

(a) The policies and procedures in this subpart apply to all subcontracts at any tier.

(b) Whenever a prime contractor or a subcontractor considers including a particular clause in a subcontract inappropriate, or a subcontractor refuses to accept the clause, consult with counsel before resolving the matter.

(c) Contractors must not use their ability to award subcontracts as economic leverage to acquire rights for themselves in inventions resulting from subcontracts.

27.303–4 Appeals.

(a) The designated agency official must provide the contractor with a written statement of the basis, including any relevant facts, for taking any of the following actions:

(1) A refusal to grant an extension to the invention disclosure period under paragraph (c)(4) of the clause at 52.227–11;

(2) A demand for a conveyance of title to the Government;

(3) A refusal to grant a waiver of requirements in the patent rights clause related to Preferences for United States industry; or

(4) A refusal to approve an assignment under 27.303–1(g).

(b) Each agency may establish and publish procedures under which any of these actions may be appealed. These appeal procedures should include administrative due process procedures and standards for fact-finding. The resolution of any appeal must consider both the factual and legal basis for the action and its consistency with the policy and objectives of 35 U.S.C. 200–206 and 210.

(c) To the extent that any of the actions described in paragraph (a) of this section are subject to appeal under the Contract Disputes statute, the procedures under that statute will satisfy the requirements of paragraph (b).

27.304 Licensing background patent rights to third parties.

(a) A contract with a small business concern or nonprofit organization must not contain a provision allowing the Government to require the licensing to third parties of inventions owned by the contractor that are not subject inventions unless the agency head on a nondelegable basis approves and signs a written justification in accordance with paragraph (b) of this section. The agency head may exercise the authority only upon determining that the—

(1) Use of the invention by others is necessary for the practice of a subject invention or for the use of a work object of the contract; and

(2) Action is necessary to achieve the practical application of the subject invention or work object.

(b) Any determination will be on the record after an opportunity for a hearing, and the agency must notify the contractor of the determination by certified or registered mail. The notification must include a statement that the contractor must bring any action for judicial review of the determination within 60 days after the notification.

Subpart 27.4—Technical Data, Computer Software, Computer Software Documentation, and Associated Rights Related to Other Than Commercial Products and Commercial Services

27.400 Scope of subpart.

This subpart prescribes policies and procedures for the acquisition of other than commercial technical data, computer software, computer software documentation, and the rights to use, modify, reproduce, release, perform, display, or disclose such technical data and computer software.

27.401 Definitions.

As used in this subpart—

Commercial computer software means software developed or regularly used for nongovernmental purposes that—

(1) Has been sold, leased, or licensed to the public;

(2) Has been offered for sale, lease, or license to the public;

(3) Has not been offered, sold, leased, or licensed to the public but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of this contract; or

(4) Satisfies a criterion expressed in paragraph (1), (2), or (3) of this definition and would require only minor modification to meet the requirements of this contract.

Computer program means a set of instructions, rules, or routines recorded

in a form that is capable of causing a computer to perform a specific operation or series of operations.

Computer software means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer databases or computer software documentation.

Contractor means a contractor to include a contractor's subcontractors, suppliers, or potential subcontractors or suppliers at any tier.

Covered Government support contractor means a contractor under a contract, the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of a program or effort, rather than to directly furnish an end item or service to accomplish a program or effort, provided that the contractor—

(1) Is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

(2) Receives access to technical data or computer software for performance of a Government contract that contains the clause at 52.227–31, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

Detailed manufacturing or process data means technical data that describe the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.

Developed means—

(1) (Applicable to technical data other than computer software documentation.) An item, component, or process exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state of the art. To be considered “developed,”

the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market, nor must the item, component, or process be actually reduced to practice within the meaning of Title 35 of the United States Code;

(2) A computer program has been successfully operated in a computer and tested to the extent sufficient to demonstrate to reasonable persons skilled in the art that the program can reasonably be expected to perform its intended purpose;

(3) Computer software, other than computer programs, has been tested or analyzed to the extent sufficient to demonstrate to reasonable persons skilled in the art that the software can reasonably be expected to perform its intended purpose; or

(4) Computer software documentation the contractor must deliver under a contract has been written, in any medium, in sufficient detail to comply with requirements under that contract.

Developed exclusively at private expense means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a Government contract, or any combination thereof.

(1) Private expense determinations should be made at the lowest practicable level.

(2) Under fixed-price contracts, when total costs are greater than the firm-fixed-price or ceiling price of the contract, the additional costs necessary to complete development are not considered when determining whether development was at Government, private, or mixed expense.

Developed exclusively with Government funds means development was not accomplished exclusively or partially at private expense.

Developed with mixed funding means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a Government contract, and partially with costs charged directly to a Government contract.

Form, fit, and function data means technical data that describe the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

Generated means, with regard to technical data or computer software, first created in the performance of the contract.

Government purpose means any activity in which the United States

Government is a party, including cooperative agreements with international or multi-national defense organizations, or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data, computer software, or computer software documentation for commercial purposes or authorize others to do so.

Government purpose rights means the rights to—

(1) Use, modify, reproduce, release, perform, display, or disclose technical data, computer software, or computer software documentation within the Government without restriction; and

(2) Release or disclose technical data, computer software, or computer software documentation outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose that data or software for United States Government purposes.

Limited rights means the rights to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture, or authorize the technical data to be used by another party, except that the Government may reproduce, release, or disclose such data or authorize the use or reproduction of the data by persons outside the Government if—

(1) The reproduction, release, disclosure, or use is—

(i) Necessary for emergency repair and overhaul; or

(ii) A release or disclosure to—

(A) A covered Government support contractor in performance of its covered Government support contract for use, modification, reproduction, performance, display, or release or disclosure to a person authorized to receive limited rights technical data; or

(B) A foreign government, of technical data other than detailed manufacturing or process data, when use of such data by the foreign government is in the interest of the Government and is required for evaluational or informational purposes;

(2) The recipient of the technical data is subject to a prohibition on the further reproduction, release, disclosure, or use of the technical data; and

(3) The contractor or subcontractor asserting the limited rights restriction is notified of such reproduction, release, disclosure, or use.

Offeror means an offeror to include an offeror's subcontractors, suppliers, or potential subcontractors or suppliers at any tier.

Other than commercial computer software means software that does not qualify as commercial computer software under the definition of "commercial computer software" in this subpart.

Restricted rights apply only to other than commercial computer software and mean the Government's rights to—

(1) Use a computer program with one computer at one time. The program may not be accessed by more than one terminal or central processing unit or time shared unless otherwise permitted by contract;

(2) Transfer a computer program to another Government agency without the further permission of the Contractor if the transferor destroys all copies of the program and related computer software documentation in its possession and notifies the licensor of the transfer;

(3) Make a reasonable number of copies of the computer software required for the purposes of safekeeping (archive), backup, modification, or other activities authorized in paragraphs (1), (2), (4) and (5) of this definition;

(4) Modify computer software provided that the Government may—

(i) Use the modified software only as provided in paragraphs (1) and (3) of this definition; and

(ii) Not release or disclose the modified software except as provided in paragraphs (2) and (5) of this definition;

(5) Use, modify, reproduce, perform, display, or release or disclose the computer software, and permit contractors, subcontractors, or covered Government support contractors to do so, for purposes set forth in subparagraph (i) of this paragraph, subject to the conditions set forth in subparagraphs (ii) of this paragraph:

(i)(A) In performance of service contracts (see part 37), to diagnose and correct deficiencies, to modify the software to enable a computer program to be combined with, adapted to, or merged with other computer programs, or when necessary to respond to urgent situations, provided that the Government notifies the party which has granted restricted rights that any such release or disclosure to particular contractors or subcontractors was made;

(B) To perform emergency repairs or overhaul of items or components procured under this or a related

contract, when necessary to perform such repairs or overhaul; or

(C) For the management and oversight of a program or effort by a person authorized to receive restricted rights computer software, including in the performance of covered Government support contracts.

(ii)(A) Any contractor, subcontractor, or covered Government support contractor receiving access to the software for the purposes of subparagraphs (i) or (ii) of this paragraph must either be subject to the use and nondisclosure agreement at 27.402–7 or be performing a Government contract that contains the clause at 52.227–31, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends;

(B) The Government must not permit any recipient of the software under this paragraph to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (4) of this definition, for any other purpose; and

(C) Any use, modification, reproduction, performance, display, release, or disclosure of the computer software under this paragraph remains subject to the limitations in paragraphs (1) through (4) of this definition.

Small Business Innovation Research/Small Business Technology Transfer (SBIR/STTR) data means all technical data or computer software developed or generated in the performance of a phase I, II, or III SBIR/STTR contract or subcontract.

SBIR/STTR data protection period means the time period during which the Government is obligated to protect SBIR/STTR data against unauthorized use and disclosure in accordance with SBIR/STTR data rights. The SBIR/STTR data protection period begins on the date of award of the contract under which the SBIR/STTR data are developed or generated and ends 20 years after that date unless, after the award, the agency and the contractor negotiate for some other protection period for the SBIR/STTR data developed or generated under that contract.

Technical data means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management information, or information incidental to contract administration.

Unlimited rights means rights to use, modify, reproduce, perform, display, release, or disclose technical data, computer software, or computer software documentation in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so.

27.402 Other than commercial products, commercial services, commercial processes, commercial computer software, or commercial computer software documentation.

27.402–1 Policy.

(a) Government policy is to acquire only the technical data, computer software, and computer software documentation, and the associated rights, necessary to satisfy agency needs.

(b) Contracting officers must ensure that solicitations and contracts—

(1) Specify the technical data, computer software, and computer software documentation the contractor must deliver under a contract and delivery schedules for the data;

(2) Specify procedures for determining the acceptability of technical data, computer software, and computer software documentation;

(3) Specify separate line items, to the extent practicable, for the technical data, computer software, and computer software documentation the contractor must deliver under a contract and require offerors and contractors to price each deliverable data or computer software item separately; and

(4) Require offerors and contractors to identify, to the extent practicable, technical data and computer software they will furnish or deliver with restrictions on the Government's rights in the technical data or computer software.

(c) Do not require offerors, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish to the Government any rights in computer software developed at private expense or technical data related to items, components, or processes developed at private expense except for the data or the software identified at 27.402–5(a)(2), and (4) through (9).

(d) Do not prohibit offerors and contractors from furnishing or offering to furnish computer software, items, components, or processes developed at private expense solely because the Government's rights to use, modify, release, reproduce, perform, display, or disclose computer software or technical data related to those items may be restricted.

(e) Solicitations for major systems development contracts must not require

offerors to submit proposals that would permit the Government to competitively acquire items identical to items developed at private expense unless a determination is made at a level above the contracting officer. The determination must address the following:

(1) The offeror will not be able to satisfy program schedule or delivery requirements.

(2) The offeror's proposal to meet mobilization requirements does not satisfy mobilization needs.

(f) For acquisitions involving major weapon systems or subsystems of major weapon systems, the acquisition plan must address acquisition strategies that provide for technical data, computer software, computer software documentation, and the associated license rights.

(g) The Government's rights in a vessel design, and in any useful article embodying a vessel design, must be consistent with the Government's rights in technical data related to the design.

27.402-2 [Reserved]

27.402-3 Identification of restrictions on the Government's right to use, reproduce or disclose technical data or computer software.

(a)(1)(i) Offerors are required to identify to the contracting officer, prior to contract award, any technical data or computer software that the offeror asserts should be provided to the Government with restrictions on use, modification, reproduction, release or disclosure. Offerors are required to attach the notification and identification to their offer.

(ii)(A) An offeror's failure to submit the attachment or to complete it in accordance with the provision at 52.227-29, Identification and Assertion of Use, Release, or Disclosure Restrictions—

(1) Constitutes a minor informality within the meaning of part 14; or

(2) Provides reason to seek clarification within the meaning of part 15.

(B) Provide the offeror an opportunity to remedy the failure under the procedures in part 14 or 15. If the offeror does not correct the error, its offer will be ineligible for award.

(2)(i) Contracting officers may request information to enable the review and evaluation of any offeror-provided assertion. Resolve questions regarding the validity of asserted restrictions prior to contract award.

(ii) After award of the contract, use the procedures at 27.402-13 to evaluate an asserted restriction or asserted rights category.

(3) The Government may use information that offerors provide in response to the provision at 52.227-29 during source selection to evaluate the impact of restrictions on the Government's ability to use or disclose technical data or computer software. Do not—

(i) Prohibit offerors from offering products for which the offeror is entitled to provide the technical data or computer software with restrictions; or

(ii) Require offerors, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish rights in technical data or computer software except for the standard rights specified in the applicable clauses.

(4) Attach the successful offeror's assertions to the contract unless, in accordance with the procedures at 27.402-13, the parties have agreed that an asserted restriction is not justified. Validate that the contract attachment contains the same information regarding identification of the technical data, the asserted rights category, the basis for the assertion, and the name of the person asserting the restrictions that the offeror provided in response to the solicitation.

(5) Neither the contractor's pre- or post-award assertions, nor the fact that the attachment to the contract identifies certain assertions, determines the respective rights of the parties. As provided at 27.402-13, the Government has the right to review, verify, challenge and validate restrictive markings.

(b) After award of the contract, the contractor may make additional assertions under certain conditions. The contractor is required to make any additional assertions in accordance with the applicable clause.

27.402-4 License rights.

(a) *Grant of license.* (1)(i) The Government obtains rights in technical data, computer software, and computer software documentation, including a copyright license, under an irrevocable license granted to or obtained for the Government by the contractor. The contractor or licensor retains all rights in the data or software not granted to the Government.

(ii) For technical data related to items, components, or processes, the source of funds used to develop the item, component, or process generally determines the scope of the license.

(iii) When the technical data do not relate to items, components, or processes, the source of funds used to create the data determines the scope of the license.

(iv) For computer software licenses, the source of funds used to develop the

software generally determines the scope of the license.

(2) *Technical data and computer software.*

(i) *Development exclusively at private expense; limited rights and restricted rights.*

(A) Contractors or licensors may restrict the Government's rights to use, modify, release, reproduce, perform, display or disclose:

(1) Technical data related to items, components, or processes developed exclusively at private expense unless an exception at 27.402-5(a) applies; or

(2) Computer software developed exclusively at private expense, except as provided at 27.402-5(a)(12) through (15).

(B) The Government has a limited rights or restricted rights license in technical data or computer software described in paragraph (A).

(ii) *Development exclusively at Government expense; unlimited rights.*

(A) Contractors or licensors may not restrict the Government's rights in technical data related to items, components, processes developed exclusively at Government expense without the Government's approval.

(B) Contractors or licensors may not, without the Government's agreement, restrict the Government's rights in computer software developed exclusively with Government funds or in computer software documentation that is a required deliverable under a contract.

(C) The Government has an unlimited rights license in such technical data or computer software described in paragraphs (A) and (B).

(iii) *Development with mixed funding; government purpose rights.*

(A) When an item, component, or process is developed with mixed funding, except as provided at 27.402-5(a)(2), (a)(4) through (9), and (a)(11), the Government may use, modify, release, reproduce, perform, display or disclose the technical data related to such items, components, or processes within the Government without restriction but may release or disclose the data outside the Government only for government purposes.

(B) When computer software is developed with mixed funding, except as provided at 27.402-5(a)(12) through (15), the Government may use, modify, release, reproduce, perform, display or disclose the computer software within the Government without restriction but may release or disclose the computer software outside the Government only for government purposes.

(C) The Government has a government purpose rights license in such technical

data or computer software described in paragraphs (A) and (B).

(3) *Technical data that do not relate to items, components, or processes.* Technical data may be created during the performance of a contract for a conceptual design or similar effort that does not require the development, manufacture, construction, or production of items, components, or processes. The Government generally obtains unlimited rights in such data when the data were created exclusively with Government funds, government purpose rights when the data were created with mixed funding, and limited rights when the data were created exclusively at private expense.

(b) *Source of funds determination.* (1) Agencies should make the determination of the source of development funds for technical data related to items, components, or processes at any practical sub-item or subcomponent level or for any segregable portion of a process. Contractors may assert limited rights in a segregable sub-item, sub-component, or portion of a process which otherwise qualifies for limited rights under the clause at 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services.

(2) Agencies should make the determination of the source of funds used to develop computer software at the lowest practicable segregable portion of the software or documentation (e.g., a software sub-routine that performs a specific function). Contractors may assert restricted rights in a segregable portion of computer software which otherwise qualifies for restricted rights.

27.402–5 Government rights.

The standard license rights that a licensor grants to the Government are unlimited rights, government purpose rights, limited rights, or restricted rights. In unusual situations, the standard rights may not satisfy the Government's needs, or the Government may be willing to accept lesser rights in data or computer software in return for other consideration. In those cases, a special license may be negotiated. However, the licensor is not obligated to provide the Government greater rights, and the contracting officer is not required to accept lesser rights than the rights provided in the standard grant of license. The situations under which a particular grant of license applies are listed in paragraphs (a) through (d) of this section.

(a) *Unlimited rights.* The Government obtains unlimited rights in technical data, computer software, or computer software documentation that are—

(1) Technical data related to an item, component, or process which has been or will be developed exclusively with Government funds;

(2) Studies, analyses, test data, or similar data produced in the performance of a contract when the study, analysis, test, or similar work was specified as an element of performance;

(3) Created exclusively with Government funds in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes;

(4) Form, fit, and function data;

(5) Necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data);

(6) Corrections or changes to—

(i) Government-furnished technical data; or

(ii) Government-furnished computer software or computer software documentation;

(7) Technical data, computer software, or computer software documentation that—

(i) Is publicly available; or

(ii) Was previously released or disclosed by the contractor or subcontractor without restrictions on further use, release or disclosure other than a release or disclosure resulting from—

(A) The sale, transfer, or other assignment of interest in the technical data or computer software to another party; or

(B) The sale or transfer of some or all of a business entity or its assets to another party;

(8) Technical data, computer software, or computer software documentation in which the Government has obtained unlimited rights under another Government contract or as a result of negotiations; or

(9) Technical data, computer software, or computer software documentation furnished to the Government, under a Government contract or subcontract, with—

(i) Restricted rights in computer software, limited rights in technical data, or government purpose license rights and the restrictive conditions have expired; or

(ii) Government purpose rights and the contractor's exclusive right to use such technical data or computer software for commercial purposes has expired;

(10) Computer software developed exclusively with Government funds; or

(11) Computer software documentation the contractor must deliver under a Government contract.

(b) *Government purpose rights.* (1) The Government obtains government purpose rights in—

(i) Technical data related to items, components, or processes developed with mixed funding except when the Government is entitled to unlimited rights as provided in paragraphs (a)(2) and (a)(4) through (9) of this section; or

(ii) Technical data created with mixed funding in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes; or

(iii) Computer software developed with mixed funding.

(2) The period during which government purpose rights are effective is negotiable. A five year period is nominal. Either the Government or the contractor may request a different period.

(3) The government purpose rights period begins upon execution of the contract, subcontract, or similar contractual instrument that required the development. Upon expiration of the Government rights period, the Government has unlimited rights in the data or software including the right to authorize others to use the data or software for commercial purposes.

(4) During the government purpose rights period, the Government may not use, or authorize other persons to use, technical data or computer software marked with government purpose rights legends for commercial purposes. The Government will not release or disclose data or software in which it has government purpose rights to any person, or authorize others to do so, unless—

(i) Prior to release or disclosure, the intended recipient is subject to the use and nondisclosure agreement at 27.402–7; or

(ii) The intended recipient is a Government contractor receiving access to the data or software for performance of a Government contract that contains the clause at 52.227–31, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(5) When the Government will release or disclose technical data or computer software marked with government purpose rights legends to a contractor performing under a contract that does not include the clause at 52.227–31, modify the contract to include that clause prior to release or disclosure instead of requiring the contractor to

complete a use and nondisclosure agreement.

(6)(i) Agencies must establish procedures to prevent the release or disclosure of marked technical data or computer software with government purpose rights legends to entities that are not subject to use and disclosure restrictions.

(ii) Public announcements in the System for Award Management or other publications must provide notice of the use of nondisclosure requirements, when providing government purpose rights technical data or software to offerors, *e.g.*, under 27.402–5(c)(4).

(iii) Consider using class use and nondisclosure agreements (*e.g.*, agreements covering all solicitations received by the XYZ company within a reasonable period). Enter into class agreements at any time prior to release or disclosure of government purpose rights data or software. Documents transmitting government purpose rights data or software to persons under class agreements must identify the technical data or computer software subject to government purpose rights and the class agreement providing such data or software.

(c) *Limited rights.* (1) The Government obtains limited rights in technical data—

(i) Related to items, components, or processes developed exclusively at private expense except when the Government is entitled to unlimited rights as provided in paragraphs (a)(2) and (a)(4) through (9) of this section; or

(ii) Created exclusively at private expense in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.

(2) Do not use, release, or disclose data in which the Government has limited rights outside the Government without the permission of the contractor asserting the restriction except when it is—

(i) Necessary for emergency repair and overhaul;

(ii) To a covered Government support contractor; or

(iii) To a foreign government, other than detailed manufacturing or process data, when use, release, or disclosure is in the interest of the United States and is required for evaluational or informational purposes.

(3) The Government must notify the person asserting limited rights of its intent to release, disclose, or authorize others to use such data prior to release or disclosure of the data, except for emergency repair or overhaul. For emergency repair or overhaul, the

Government will make the notification as soon as practicable.

(4) If the person asserting limited rights permits the Government to release, disclose, or have others use the data subject to restrictions on further use, release, or disclosure, or for a release under paragraph (c)(2)(i), (ii), or (iii) of this section, the intended recipient must, prior to receiving the limited rights data, either—

(i) Complete the use and nondisclosure agreement at 27.402–7; or

(ii) Be performing under a Government contract that contains the clause at 52.227–31.

(d) *Restricted rights.* (1) The Government obtains restricted rights in other than commercial computer software that the contractor must deliver or otherwise provide to the Government under a contract and that was developed exclusively at private expense.

(2)(i) Contractors are not required to provide the Government additional rights in computer software delivered or otherwise provided to the Government with restricted rights.

(ii) When the Government has a need for additional rights, negotiate with the contractor to determine acceptable terms for transferring such rights. Any resulting license agreement, made part of the contract (see paragraph (e) of this section), must list or describe all software for which the contractor has granted the Government additional rights, and specify the additional rights granted.

(e) *Specifically negotiated license rights.* (1)(i) Negotiate specific licenses when the parties agree to modify the standard license rights granted to the Government or when the Government needs to obtain rights in data or software in which it does not have rights.

(ii) When negotiating to obtain, relinquish, or increase the Government's rights in technical data, consider the acquisition strategy for the item, component, or process, including logistics support and other factors relevant to a particular procurement.

(iii) When negotiating to obtain, relinquish, or increase the Government's rights in computer software, consider the planned software maintenance philosophy, anticipated time or user sharing requirements, and other factors relevant to a particular procurement.

(iv) The Government may accept lesser rights when it has unlimited or government purpose rights in data or software but may not accept less than limited rights or restricted rights in such data or software, respectively.

(v) The negotiated license rights must stipulate what rights the Government

has to release or disclose the data or software to other persons or to authorize others to use the data or software.

(vi) Identify all negotiated rights in a license agreement that are made part of the contract.

(2)(i) When the Government needs additional rights in data or software acquired with government purpose, limited rights, or restricted rights, negotiate with the contractor to determine acceptable terms for transferring such rights. Generally, conduct such negotiations only when—

(A) A need exists to disclose the data or software outside the Government; or

(B) The additional rights are required for competitive procurement and the anticipated savings through competition will likely exceed the acquisition cost of the additional rights.

(ii) Prior to negotiating for additional rights in limited rights data, consider alternatives such as—

(A) Using performance specifications and form, fit, and function data to acquire or develop functionally equivalent items, components, or processes;

(B) Obtaining a contractor's contractual commitment to qualify additional sources and maintain adequate competition among the sources; or

(C) Reverse engineering, or providing items from Government inventories to contractors who request the items to facilitate the development of equivalent items through reverse engineering.

27.402–6 Solicitation provisions and contract clauses.

(a)(1) Insert the clause at 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services, in solicitations and contracts, including those for commercial products and commercial services, when the contract requires delivery of technical data—

(i) Related to other than commercial products or commercial services; or

(ii) Related to commercial products or commercial services for which the Government will have paid for any portion of the development costs. For such contracts—

(A) The clause at 52.227–26 will govern the technical data related to any portion of a commercial product or commercial service that was developed in any part at Government expense; and

(B) The clause at 52.227–27 will govern the technical data related to any portion of a commercial product or commercial service that was developed exclusively at private expense.

(2) Do not use the clause at 52.227–26 when the only deliverable items are commercial products or commercial services developed exclusively at private expense, existing works, or special works.

(3) When contracting under the Small Business Innovation Research (SBIR) Program or the Small Business Technology Transfer (STTR) Program, see 27.403–4(a).

(b)(1) Insert the clause at 52.227–26 with its Alternate I in solicitations and contracts for research upon determining that public dissemination by the contractor would be—

(i) In the interest of the Government; and

(ii) Facilitated by the Government relinquishing its right to publish the work for sale, or to have others publish the work for sale on behalf of the Government.

(2) Insert the clause at 52.227–26 with its Alternate II in solicitations and contracts for the development or delivery of a vessel design or any useful article embodying a vessel design.

(c) Insert the clause at 52.227–26 in solicitations and contracts when the contract will require the successful offeror to deliver other than commercial computer software or other than commercial computer software documentation.

(d) Insert the clause at 52.227–31, Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends, in solicitations and contracts, including those for commercial products and commercial services, if the Government anticipates providing the contractor technical data marked with another contractor's restrictive legend for performance of its contract.

(e) Insert the provision at 52.227–33, Technical Data or Computer Software Previously Delivered to the Government, in solicitations, including those for commercial products and commercial services, when the resulting contract will require the contractor to deliver technical data.

(f) Insert the following provisions and clauses in solicitations and contracts that include the clause at 52.227–26:

(1) 52.227–28, Rights in Bid or Proposal Information.

(2) 52.227–29, Identification and Assertion of Use, Release, or Disclosure Restrictions.

(3) 52.227–34, Technical Data—Withholding of Payment.

(4) 52.227–35, Validation of Asserted Restrictions (paragraph (e) of the clause contains information that must be included in a challenge).

(g) Insert the clause at 52.227–32, Deferred Ordering of Technical Data or Computer Software, in solicitations and contracts, including those for commercial products and commercial services, when a potential need exists for technical data, computer software or computer software documentation, but a firm requirement for the particular data item is not established prior to contract award.

27.402–7 Use and nondisclosure agreement.

(a) Except as provided in paragraph (b) of this section, agencies may not provide technical data or computer software delivered to the Government with restrictions on use, modification, reproduction, release, performance, display, or disclosure to third parties, until the intended recipient completes and signs the use and nondisclosure agreement at paragraph (c) of this section.

(1) In an attachment to the use and nondisclosure agreement, the Government must stipulate the specific conditions under which an intended recipient will be authorized to use, modify, reproduce, release, perform, display, or disclose technical data or computer software subject to limited rights, restricted rights, or SBIR/STTR data rights.

(2) Modify paragraph (1)(d) of the use and nondisclosure agreement in paragraph (c) of this section to enter the conditions for an intended release, disclosure or authorized use of technical data or computer software subject to special license rights, consistent with the license requirements, governing the recipient's obligations regarding use, modification, reproduction, release, performance, display, or disclosure of the data or software.

(b) Requirements for use and nondisclosure agreements does not apply to Government contractors needing access to a third party's data or software for the performance of a Government contract that contains the clause at 52.227–31, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(c) The prescribed use and nondisclosure agreement is:

Use and NonDisclosure Agreement

The undersigned, _____ (Insert Name), an authorized representative of the (Insert Company Name), (which is hereinafter referred to as the "Recipient") requests the Government to provide the Recipient with technical data or computer software (hereinafter referred to as

"Data") in which the Government's use, modification, reproduction, release, performance, display or disclosure rights are restricted. Those Data are identified in an attachment to this Agreement. In consideration for receiving such Data, the Recipient agrees to use the Data strictly in accordance with this Agreement:

(1) The Recipient must—

(a) Use, modify, reproduce, release, perform, display, or disclose Data marked with government purpose rights or SBIR/STTR data rights legends (after expiration of the SBIR/STTR data protection period provided in the SBIR/STTR data rights legend) only for government purposes and must not do so for any commercial purpose. The Recipient must not release, perform, display, or disclose these Data, without the express written permission of the contractor whose name appears in the restrictive legend (the "Contractor"), to any person other than its subcontractors or suppliers, or prospective subcontractors or suppliers, who require these Data to submit offers for, or perform, contracts with the Recipient. The Recipient must require its subcontractors or suppliers, or prospective subcontractors or suppliers, to sign a use and nondisclosure agreement prior to disclosing or releasing these Data to such persons. Such agreement must be consistent with the terms of this agreement.

(b) Use, modify, reproduce, release, perform, display, or disclose technical data marked with limited rights legends or SBIR/STTR data rights legends only as specified in the attachment to this Agreement. Release, performance, display, or disclosure to other persons is not authorized unless specified in the attachment to this Agreement or expressly permitted in writing by the Contractor. The Recipient must promptly notify the Contractor of the execution of this Agreement and identify the Contractor's Data that has been or will be provided to the Recipient, the date and place the Data were or will be received, and the name and address of the Government office that has provided or will provide the Data.

(c) Use computer software marked with restricted rights or SBIR/STTR data rights legends only in performance of Contract Number [insert contract number(s)]. The recipient must not, for example, enhance, decompile, disassemble, or reverse engineer the software; time share, or use a computer program with more than one computer at a time. The recipient may not release, perform, display, or disclose such software to others unless expressly

permitted in writing by the licensor whose name appears in the restrictive legend. The Recipient must promptly notify the software licensor of the execution of this Agreement and identify the software that has been or will be provided to the Recipient, the date and place the software were or will be received, and the name and address of the Government office that has provided or will provide the software.

(d) Use, modify, reproduce, release, perform, display, or disclose Data marked with special license rights legends. *[To be completed by the contracting officer. See 27.402–7(a)(2). Omit if none of the data requested is marked with special license rights legends.]*

(2) The Recipient agrees to adopt or establish operating procedures and physical security measures designed to protect these Data from inadvertent release or disclosure to unauthorized third parties.

(3) The Recipient agrees to accept these Data “as is” without any Government representation as to suitability for intended use or warranty whatsoever. This disclaimer does not affect any obligation the Government may have regarding Data specified in a contract for the performance of that contract.

(4) The Recipient may enter into any agreement directly with the Contractor with respect to the use, modification, reproduction, release, performance, display, or disclosure of these Data.

(5) The Recipient agrees to indemnify and hold harmless the Government, its agents, and employees from every claim or liability, including attorneys’ fees, court costs, and expenses arising out of, or in any way related to, the misuse or unauthorized modification, reproduction, release, performance, display, or disclosure of Data received from the Government with restrictive legends by the Recipient or any person to whom the Recipient has released or disclosed the Data.

(6) The Recipient is executing this Agreement for the benefit of the Contractor. The Contractor is a third-party beneficiary of this Agreement who, in addition to any other rights it may have, is intended to have the rights of direct action against the Recipient or any other person to whom the Recipient has released or disclosed the Data, to seek damages from any breach of this Agreement or to otherwise enforce this Agreement.

(7) The Recipient agrees to destroy these Data, and all copies of the Data in its possession, no later than 30 days after the date shown in paragraph (8) of this Agreement, to have all persons to

whom it released the Data do so by that date, and to notify the Contractor that the Data have been destroyed.

(8) This Agreement is effective for the period commencing with the Recipient’s execution of this Agreement and ending on *(Insert Date)*. The obligations imposed by this Agreement survive the expiration or termination of the Agreement.

Recipient’s Business Name _____
By _____
Authorized Representative _____
Date _____
Representative’s Typed Name _____
and Title _____

(End of use and nondisclosure agreement)

27.402–8 Deferred ordering of technical data.

Order as necessary any technical data, computer software or computer software documentation generated in the performance of the contract or subcontract at any time until three years after acceptance of all items (other than technical data or computer software) under the contract or contract termination, whichever is later. See the clause at 52.227–32, Deferred Ordering of Technical Data or Computer Software.

27.402–9 Copyright.

(a) *Copyright license.* (1) Contractors are required to grant or obtain for the Government license rights permitting the Government to reproduce data, distribute copies of the data, software, or software documentation, publicly perform or display the data, software, or software documentation or, through the right to modify data, prepare derivative works. The extent to which the Government, and others acting on its behalf, may exercise these rights varies for each of the standard data rights licenses obtained under the contract. When negotiating non-standard license rights in technical data or computer software, negotiate the extent of the copyright license as a part of the negotiations for the data rights license. Do not negotiate a copyright license that provides less rights than the standard limited rights license in technical data or restricted rights license in computer software.

(2) Contractors are not permitted to incorporate a third party’s copyrighted data into a deliverable data or software item unless the contractor has obtained an appropriate license for the Government and, when applicable, others acting on the Government’s behalf. Grant approval to use third-party copyrighted data or software in which

the Government will not receive a copyright license only when the Government’s requirements cannot be satisfied without the third-party material or when the use of the third-party material will result in cost savings to the Government which outweigh the lack of a copyright license.

(b) *Copyright considerations—acquisition of existing and special works.* See 27.404 or 27.405 for copyright considerations when acquiring existing or special works that are not SBIR/STTR data.

27.402–10 Contractor identification and marking of technical data or computer software to be delivered with restrictive markings.

(a) *Contractor marking requirements.* Contractors are required to—

(1) Place restrictive markings on the data or software, provide instructions for the placement of the restrictive markings, and authorize the use of certain restrictive markings when restricting the Government’s rights in technical data or computer software; and

(2) Deliver, furnish, or otherwise provide to the Government any technical data or computer software in which the Government has previously obtained rights with the Government’s preexisting rights in that data or software, unless restrictions on the Government’s rights have expired. When restrictions still apply, the contractor is permitted to mark the data or software with the appropriate restrictive legend for which the data or software qualified.

(b) *Unmarked technical data.* (1) Presume technical data or computer software delivered or otherwise provided with unlimited rights under a contract without restrictive markings may be released or disclosed without restriction. To the extent practicable, if a contractor has requested permission (see paragraph (b)(2) of this section) to correct an inadvertent omission of markings, do not release or disclose the technical data or computer software pending evaluation of the request.

(2) A contractor may request permission to have appropriate legends placed on unmarked technical data or computer software at its expense. The request must be received by the contracting officer within 6 months following the furnishing or delivery of such data or software, or any extension of that time approved by the contracting officer. The person making the request must:

(i) Identify the technical data or computer software that should have been marked;

(ii) Demonstrate that the omission of the marking was inadvertent, and that the proposed marking is justified and conforms with the requirements for the marking of technical data or computer software contained in the contract; and

(iii) Acknowledge, in writing, that the Government has no liability with respect to any disclosure, reproduction, or use of the technical data or computer software made prior to the addition of the marking or resulting from the omission of the marking.

(3) Contracting officers should grant permission to mark only if the technical data or computer software was not distributed outside the Government or was distributed outside the Government with restrictions on further use or disclosure.

27.402–11 Contractor procedures and records.

(a) Contractors, and their subcontractors or suppliers that will deliver technical data or computer software with other than unlimited rights, are required to establish and follow written procedures to ensure that restrictive markings are used only when authorized and to maintain records to justify the validity of asserted restrictions on delivered data or software.

(b) Contractors are required to maintain sufficient records to justify the validity of restrictive markings on technical data or computer software the contractor must deliver under a Government contract.

27.402–12 Government right to establish conformity of markings.

(a) *Nonconforming markings.* (1) The marking requirements in the applicable clauses prescribe the content and format of authorized markings on technical data and computer software. All other markings are nonconforming markings. An authorized marking that is not in the form, or differs in substance, from the marking requirements in the clauses at 52.227–26 and 52.227–30 is also a nonconforming marking.

(2) Notify the contractor or offeror of technical data or computer software bearing nonconforming markings to provide that person an opportunity to correct or strike the nonconforming marking at that person's expense. If the contractor or offeror fails to correct the nonconformity and deliver the correctly marked data within 60 days following the person's receipt of the data or software, the contracting officer may correct or strike the nonconformity at that person's expense. Prior to correction, the Government may use the

data in accordance with the proper restrictive marking.

(b) *Unjustified markings.* (1) An unjustified marking is an authorized marking that does not accurately depict restrictions applicable to the Government's use, modification, reproduction, release, performance, display, or disclosure of the marked technical data or computer software. Accordingly, a limited rights legend placed on technical data related to items, components, or processes developed under a Government contract either exclusively at Government expense or with mixed funding (situations under which the Government obtains unlimited or government purpose rights) is an unjustified marking. Similarly, a restricted rights legend placed on computer software developed under a Government contract either exclusively at Government expense or with mixed funding is an unjustified marking.

(2) The contracting officer has the right to review and challenge the validity of unjustified markings. However, at any time during performance of a contract and notwithstanding existence of a challenge, the contracting officer and the person who has asserted a restrictive marking may agree that the restrictive marking is not justified. Upon such agreement, the contracting officer may either—

(i) Strike or correct the unjustified marking at that person's expense; or

(ii) Instruct the person asserting the restriction to correct the technical data or computer software at that person's expense. If the person fails to correct or strike the unjustified restriction and deliver the corrected data or software to the contracting officer within 60 days following this instruction, strike or correct the unjustified marking at that person's expense.

27.402–13 Government right to review, verify, challenge, and validate asserted restrictions.

(a) *General.* (1) An offeror's assertion of restrictions on the Government's rights to use, modify, reproduce, release, or disclose technical data or computer software do not, by themselves, determine the extent of the Government's rights in the technical data or computer software.

(2) Review asserted restrictions before acceptance of technical data and computer software deliverables under a contract.

(3) The contracting officer may challenge asserted restrictions when reasonable grounds exist to believe an assertion is not valid.

(b) *Pre-award considerations.* See 27.402–3(a) for guidance on pre-award review of asserted restrictions.

(c) *Challenge considerations and presumption.*

(1) *Requirements to initiate a challenge.* (i) Contracting officers must have reasonable grounds to challenge the validity of an asserted restriction. Before issuing a challenge to an asserted restriction, carefully consider all available information related to the assertion.

(ii) A need for additional license rights is not, by itself, a sufficient basis for requesting information concerning an asserted restriction.

(iii) Follow the procedures at 27.402–5(e) when the Government needs additional license rights but has no grounds to challenge an asserted restriction.

(2) *Commercial products and commercial services—presumption regarding development exclusively at private expense.*

(i) Presume that a commercial product or commercial service was developed exclusively at private expense whether or not a contractor or subcontractor submits a justification in response to a challenge notice. A presumption and procedures exist regarding validation of asserted restrictions for technical data related to commercial products or commercial services on the basis of development exclusively at private expense.

(ii) Do not challenge a contractor's assertion that a commercial product or commercial service was developed exclusively at private expense unless the Government can specifically state the reasonable grounds to question the validity of the assertion. The challenge notice must include sufficient information to demonstrate that the commercial product or commercial service was not developed exclusively at private expense. To sustain the challenge, provide information demonstrating that the commercial product or commercial service was not developed exclusively at private expense.

(iii) The challenge notice and all related correspondence are subject to handling procedures for classified information and controlled unclassified information.

(iv) A contractor's or subcontractor's failure to respond to the challenge notice cannot be the sole basis for issuing a final decision denying the validity of an asserted restriction.

(d) *Challenge and validation.*

(1) *Challenge period.* Review asserted restrictions before acceptance of technical data or computer software

deliverable under the contract. Challenge assertions within six years after final payment under the contract or six years after delivery of the data or software, whichever is later. There is no time limit for challenging restrictive markings if the technical data or computer software—

(i) Is publicly available without restrictions;

(ii) Has been provided to the United States without restriction;

(iii) Has been otherwise made available without restriction other than through a release or disclosure resulting from the sale, transfer, or other assignment of interest in the technical data or computer software to another party or the sale or transfer of some or all of a business entity or its assets to another party; or

(iv) Is the subject of a fraudulently asserted use or release restriction.

(2) Pre-challenge requests for information.

(i) Contracting officers may request the person asserting a restriction to furnish a written explanation of the facts and supporting documentation for the assertion in detail to enable the contracting officer to determine the basis of the restrictive markings. Request additional supporting documentation when the explanation does not, in the contracting officer's opinion, establish the validity of the assertion.

(ii) Consider challenging the assertion when—

(A) The person asserting the restriction fails to respond to the contracting officer's request for information or additional supporting documentation; or

(B) The information submitted, or any other available relevant information known to the contracting officer, does not justify the asserted restriction.

(3) Transacting matters directly with subcontractors. Contracting officers should permit, after obtaining the contractor's agreement, a subcontractor or supplier to transact challenge and validation matters directly with the Government when—

(i) A subcontractor's or supplier's business interests in its technical data or computer software would be compromised if the data were disclosed to a higher tier contractor;

(ii) The contractor is unlikely to respond in a timely manner to a challenge, and an untimely response would jeopardize a subcontractor's or suppliers right to assert restrictions; or

(iii) A subcontractor or supplier requests it.

(4) Challenge notice.

(i) Do not issue a challenge notice unless reasonable grounds exist to question the validity of an assertion. For commercial products or commercial services, also see paragraph (c)(2) of this section.

(ii) No requirement exists to request information under paragraph (d)(2) of this section before issuing a challenge.

(iii) Issue challenge notices, in writing, to the contractor or, after consideration of the situations described in paragraph (d)(3) of this section, the person asserting the restriction.

(5) Extension of response time. If the contractor submits a written request for additional time to prepare a response, the contracting officer will extend the time for response as appropriate, in accordance with paragraph (f)(2) of the clause at 52.227–35.

(6) Contracting officer's final decision. Issue a final decision for each challenged assertion, whether or not the contractor justified the assertion.

(i) *Failure to respond.* If the person asserting the restriction fails to respond to the challenge within 60 days or any extension of time the contracting officer granted, issue a final decision that the assertion is not justified as soon as practicable.

(ii) *Assertion justified.* If the assertion is determined to be justified based on the response to the challenge notice, issue the final decision sustaining the validity of the restriction. The contracting officer will issue this final decision within 60 days after receipt of the response to the challenge notice, or within a longer period that the contracting officer has notified the contractor or subcontractor that the Government will require. The contracting officer will provide notification of any longer period for issuance of a final decision within 60 days after receipt of the response to the challenge notice. The Contracting Officer will provide notification of any longer period for issuance of a final decision within 60 days after receipt of the response to the challenge notice. If the contractor made the asserted restriction subsequent to submitting its offer, then add the asserted restriction to the contract attachment.

(iii) *Assertion not justified.* If the assertion is determined not to be justified based on the information provided, issue a final decision. The decision must be issued within 60 days after receipt of the response to the challenge notice, or within a longer period that the contracting officer has notified the contractor or subcontractor that the Government will require. The Contracting Officer will provide notification of any longer period for

issuance of a final decision within 60 days after receipt of the response to the challenge notice. As provided in paragraph (h) of the clause, the Government is obligated to continue to respect the asserted restrictions through final disposition of any appeal unless the agency head notifies the person asserting the restriction that urgent or compelling circumstances dictate otherwise.

(7) Multiple challenges to an asserted restriction. When more than one contracting officer challenges an asserted restriction, the contracting officer who made the earliest challenge is responsible for coordinating the Government challenges. That contracting officer must consult with all other contracting officers making challenges, verify that all challenges apply to the same asserted restriction and, after consulting with the contractor, subcontractor, or supplier asserting the restriction, issue a schedule that provides that person a reasonable opportunity to respond to each challenge.

(8) Validation. Only a contracting officer's final decision, actions of an agency board of contract appeals, or a court of competent jurisdiction sustaining the validity of an asserted restriction, constitutes validation of the asserted restriction.

27.402–14 Conformity, acceptance, and warranty of technical data and computer software.

(a) *Conformity and acceptance.* (1) Solicitations and contracts requiring the delivery of technical data, including computer software documentation, must specify the requirements that the data must satisfy to be acceptable. Contracting officers, or their authorized representatives, are responsible for determining whether technical data tendered for acceptance conform to the contractual requirements.

(2) The clause at 52.227–34, Technical Data—Withholding of Payment, provides for withholding up to 10 percent of the contract price pending either correction or replacement of the nonconforming technical data, or negotiation of an equitable reduction in contract price. The amount subject to withholding may be expressed as a fixed dollar amount or as a percentage of the contract price. In either case, consider the relative value and importance of the data when determining the amount.

(3) Do not accept technical data that do not conform to the contractual requirements in all respects. Except for nonconforming restrictive markings (see paragraph (b)(4) of this section), require correction or replacement of

nonconforming data (or an equitable reduction in contract price when correction or replacement of the nonconforming data is not practicable or is not in the Government's interests) in accordance with—

(i) The provisions of a contract clause providing for inspection and acceptance of deliverables and remedies for nonconforming deliverables; or

(ii) The procedures at 46.407(c) through (g), if the contract does not contain an inspection clause providing remedies for nonconforming deliverables.

(4) Follow the procedures at 27.402–12(a)(2) if nonconforming markings are the sole reason technical data fail to conform to contractual requirements. The contracting officer may withhold an amount for payment, consistent with the terms of the clause at 52.227–34, pending correction of the nonconforming markings.

(5)(i) Specify, in solicitations and contracts requiring the delivery of computer software, requirements the software must satisfy to be acceptable under the contract.

(ii) Contracting officers, or their authorized representatives, are responsible for determining whether computer software tendered for acceptance conforms to the contractual requirements.

(iii) Except for nonconforming restrictive markings, do not accept software that does not conform in all respects to applicable contractual requirements. However, follow the procedures at 27.402–12(a) if nonconforming markings are the sole reason computer software tendered for acceptance fails to conform to contractual requirements.

(iv) Require correction or replacement of nonconforming software (or an equitable reduction in contract price when correction or replacement of the nonconforming data is not practicable or is not in the Government's interests) in accordance with—

(A) The provisions of a contract clause providing for inspection and acceptance of deliverables and remedies for nonconforming deliverables; or

(B) The procedures at 46.407(c) through (g), if the contract does not contain an inspection clause providing remedies for nonconforming deliverables.

(b) *Warranty.* (1) Consider the intended use of the technical data (including repair and maintenance) and the costs to obtain the warranty before deciding to obtain a data warranty (see part 46).

(2) The contracting officer must approve use of a computer software

warranty other than a weapon system warranty. Consider the factors at 46.703 when deciding whether to obtain a computer software warranty.

27.402–15 Subcontractor rights in technical data, computer software, or computer software documentation.

(a) Subcontractors and suppliers at all tiers should receive the same protection for their rights in technical data, computer software or computer software documentation as are provided to prime contractors.

(b) When a subcontractor or supplier exercises its right to transact validation matters directly with the Government, contracting officers must deal directly with such persons, as provided at 27.402–13(d)(3).

(c) Require prime contractors whose contracts include the following clauses to include those clauses, without modification except for appropriate identification of the parties, in contracts with subcontractors or suppliers, at all tiers, if furnishing technical data for other than commercial products or commercial services or other than commercial computer software in response to a Government requirement:

(1) 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services.

(2) 52.227–31, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(3) 52.227–33, Technical Data or Computer Software Previously Delivered to the Government.

(4) 52.227–35, Validation of Asserted Restrictions.

(d) Do not require, as a condition of award of any contract action, that a contractor compel its subcontractors or suppliers at any tier to relinquish rights in technical data or computer software. This limitation does not apply to the Government's license rights obtained under the clause at 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services.

27.402–16 Providing technical data, computer software, or computer software documentation to foreign governments, foreign contractors, or international organizations.

Technical data, computer software, or computer software documentation may be released or disclosed to foreign governments, foreign contractors, or international organizations only if release or disclosure is otherwise permitted both by Federal export

controls and other national security laws or regulations. Subject to such laws and regulations, the Government—

(a) May release or disclose technical data, computer software, or computer software documentation in which it has obtained unlimited rights to such foreign entities or authorize the use of such data or software by those entities; and

(b) May not release or disclose technical data, computer software, or computer software documentation that have asserted restrictions on use, release, or disclosure to foreign entities, or authorize the use of technical data, computer software, or computer software documentation by those entities, unless the intended recipient is subject to the same provisions as included in the use and nondisclosure agreement at 27.402–7 and the requirements of the clause at 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services.

27.403 Contracts under the Small Business Innovation Research Program and Small Business Technology Transfer Program.

27.403–1 Policy.

(a) Do not require an offeror, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish to the Government any rights in technical data related to items, components, or processes developed under a SBIR/STTR contract or any rights in computer software generated under a SBIR/STTR contract except for the standard rights identified at 27.403–2.

(b) Do not prohibit contractors and offerors from furnishing or offering to furnish items, components, or processes developed under a SBIR/STTR contract or computer software generated under a SBIR/STTR contract solely because the Government's rights to use, modify, release, reproduce, perform, display, or disclose such computer software or technical data related to those items, components, or processes may be restricted.

(c) Consistent with the guidance in this section, 27.402–3(a)(5), and other acquisition guidance applicable to SBIR/STTR solicitations, the Government may use information provided by offerors in response to a solicitation in the source selection process to evaluate the impact of proposed restrictions on the Government's ability to use or disclose technical data or computer software.

(d) SBIR/STTR data rights apply to SBIR/STTR data that are delivered, developed, or generated in the performance of a contract or agreement that is covered by SBIR/STTR policies, including contracts and subcontracts that include phase III work. Phase III work refers to work that derives from, extends, or completes an effort made under prior SBIR/STTR contracts or agreements, and is funded by sources other than SBIR/STTR programs.

(e) For SBIR/STTR data that is other than commercial technical data, and other than commercial computer software and computer software documentation, see—

(1) 27.402–9 for guidance on copyright licenses;

(2) 27.402–3 and 27.402–10 for guidance on contractor identification and marking of technical data and computer software to be delivered with restrictive markings;

(3) 27.402–11 for guidance on maintenance of contractor records; and

(4) 27.402–12 for guidance on nonconforming and unjustified markings.

27.403–2 Rights in SBIR or STTR data.

(a) The Government obtains the following standard license rights in SBIR/STTR data:

(1) Unlimited rights in the technical data and computer software listed in paragraph (c)(1) of the clause at 52.227–30, Rights in Other Than Commercial Technical Data and Other than Commercial Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program.

(2) SBIR/STTR data rights in all other technical data and computer software developed or generated under the phase I, II, or III SBIR/STTR contract or subcontract and marked with the SBIR/STTR data rights marking.

(i) SBIR/STTR data rights provide the Government limited rights in such technical data and restricted rights in such computer software during the SBIR/STTR data protection period commencing on the date of contract award and ending 20 years after that date unless, after award, the agency and the contractor negotiate for some other protection period for the SBIR/STTR data.

(ii) Upon expiration of the SBIR/STTR data protection period, the Government has government purpose rights in the SBIR/STTR data. These government purpose rights do not expire.

(b) During the SBIR/STTR data protection period, the Government may not release or disclose technical data or computer software subject to SBIR/

STTR data rights to any person except as authorized for limited rights technical data or restricted rights computer software, respectively.

(c) The Government and contractor or subcontractor may negotiate special license rights only after contract award. The Government must not condition contract award on the contractor or subcontractor negotiating or consenting to negotiate special license rights. Negotiation of special license rights is authorized only after contract award by mutual agreement of the parties.

(d) The Small Business Administration's SBIR and STTR Program Policy Directive (effective May 3, 2023) provides for special consideration regarding the handling (e.g., disclosure, reverse engineering) of prototypes generated under SBIR and STTR awards, to avoid effects that may appear to be inconsistent with the SBIR and STTR program objectives and to allow the SBIR/STTR awardee to retain rights in SBIR/STTR data during the SBIR/STTR data protection period.

(e) The clause at 52.227–30 specifies the Government's license rights in SBIR/STTR data. However, the following clauses or guidance specify the Government's license rights in any data that are not SBIR/STTR data:

(1) For technical data related to other than commercial products or commercial services or to any portion of a commercial product or commercial service that was developed in any part at Government expense, the clause at 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services, governs such technical data.

(2) For technical data related to any portion of a commercial product or commercial service developed exclusively at private expense, the clause at 52.227–27, Technical Data—Commercial Products and Commercial Services, governs such technical data.

(3) For other than commercial computer software or computer software documentation, the clause at 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services, governs such software and computer software documentation, in accordance with 27.402–6(c).

(4) For commercial computer software and computer software documentation, the license customarily provided to the public governs such software and documentation, in accordance with 27.502–2.

27.403–3 STTR program requirements.

(a) Before award of a contract under STTR program requirements offerors submit, as part of their proposal, a written agreement between the offeror and a research institution that allocates any rights in intellectual property and the offeror's written representation that the offeror is satisfied with the agreement. Review the agreement to ensure it does not conflict with the requirements of the solicitation or any right to carry out follow-on research. If such conflicts exist and cannot be resolved, the submitted proposal is not eligible for award.

(b) At contract award for STTR program requirements, attach to the contract the accepted written agreement and representation provided by the contractor pursuant to the provision at 52.227–36.

(c) After contract award, for any modification to the written agreement between the contractor and research institution, review the agreement and representation to ensure the modified agreement adheres to the requirements of 52.227–37. If acceptable, attach the modified agreement to the contract.

27.403–4 Solicitation provision and contract clauses.

(a)(1) Insert the clause at 52.227–30, Rights in Other Than Commercial Technical Data and Other than Commercial Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, in solicitations and contracts, including those for commercial products or commercial services, when SBIR/STTR data are delivered, developed, or generated during contract performance, and when any portion of contract performance is governed by SBIR or STTR policies (e.g., performance of one or more subcontracts qualifies as a phase III SBIR or STTR award). See 27.403–1(d) for guidance on contracts or subcontracts governed by SBIR or STTR policies.

(2) For the remainder of the technical data or computer software delivered, developed, or generated under the contract, see 27.402–6 for guidance on applicable clauses.

(b) See 27.402–6 for other applicable provisions in solicitations and clauses in solicitations and contracts that include the clause at 52.227–30.

(c)(1) Insert the provision at 52.227–36, Additional Preaward Requirements for Small Business Technology Transfer Program, in solicitations that contain the clause at 52.227–37.

(2) Insert the clause at 52.227–37, Additional Postaward Requirements for

Small Business Technology Transfer Program, in solicitations and contracts, including those for commercial products or commercial services, for acquisitions under the STTR program.

27.404 Contracts for the acquisition of existing works.

27.404–1 General.

(a) Existing works include motion pictures, television recordings, video recordings, and other audiovisual works in any medium; sound recordings in any medium; musical, dramatic, and literary works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; and works of a similar nature. Usually, these or similar works were not first created, developed, generated, originated, prepared, or produced under a Government contract. Therefore, the Government must obtain a license in the work if it intends to reproduce the work, distribute copies of the work, prepare derivative works, or perform or display the work publicly. When the Government is not responsible for the content of an existing work, it should require the copyright owner to indemnify the Government for liabilities that may arise out of the content, performance, use, or disclosure of that content.

(b)(1) Follow the procedures at 27.405 for special works that will be first created, developed, generated, originated, prepared, or produced under a Government contract and the Government—

(i) Needs to control distribution of the work; or

(ii) Has a specific need to obtain indemnity for liabilities that may arise out of the creation, content, performance, use, or disclosure of the work or from libelous or other unlawful material contained in the work.

(2) Follow the procedures at 27.402 when the Government does not need to control distribution of such works or obtain such indemnities.

27.404–2 Acquisition of existing works without modification.

(a) No specific contract clause governs the Government's rights in existing works. Negotiate contract terms related to use and distribution of existing works when—

(1) The existing works will be acquired without modification; and

(2) The Government requires the right to reproduce, prepare derivative works, or publicly perform or display the existing works; or

(3) The Government has a specific need to obtain indemnity for liabilities that may arise out of the content,

performance, use, or disclosure of such data.

(b) Negotiated terms should provide the Government, and others acting on its behalf, a paid-up, non-exclusive, irrevocable, world-wide license to reproduce, prepare derivative works and publicly perform or display the works called for by a contract and to authorize others to do so for government purposes.

(c) A contract clause is not required to acquire existing works such as books, magazines and periodicals, in any storage or retrieval medium, when the Government will not reproduce the books, magazines or periodicals, or prepare derivative works.

27.404–3 Acquisition of modified existing works.

Follow the procedures at 27.405 for solicitations and contracts for modified existing works.

27.405 Contracts for special works.

(a)(1) Contracts primarily for the production or compilation of works first produced, created, or generated in the performance of a contract (special works) for the Government's own use, must specifically address the Government's rights to use, disclose, modify, distribute, and reproduce the special works.

(2)(i) Contracts may include negotiated terms controlling contractor use and distribution of special works by obtaining an assignment of copyright or obtaining indemnity for liabilities that might arise out of the content, performance, or disclosure of special works.

(ii) Negotiated terms may specify the purposes and conditions (including time limitations) under which the contractor may use, release, or reproduce the special works other than for contract performance.

(iii) Such contract terms should not permit a contractor to incorporate into a special work any works copyrighted by others unless the contractor obtains the contracting officer's permission to do so and obtains for the Government a non-exclusive, paid up, world-wide license to make and distribute copies of that work, to prepare derivative works, to perform or display publicly any portion of the work, and to permit others to do so for government purposes.

(iv) Contracting officers should grant such permissions only when the Government's requirements cannot be satisfied unless the third-party work is included in the deliverable work.

(b) No specific contract clause governs the Government's rights in special

works. Negotiate contract terms regarding control of, use, and distribution of special works—

(1) When the Government must own or control copyright in all works first produced, created, or generated and which the contractor must deliver under a contract; or

(2) In addition to the clause at 52.227–26 when the Government must own or control copyright in a portion of a work first produced, created, or generated and which the contractor must deliver under a contract. The specific portion in which the Government must own or control copyright must be identified in a special contract requirement.

Subpart 27.5—Technical Data, Computer Software, Computer Software Documentation, and Associated Rights Related to Commercial Products and Commercial Services

27.500 Scope of subpart.

This subpart prescribes policies and procedures for the acquisition of technical data, computer software and computer software documentation related to commercial products, components, services, processes, and computer software, and the rights to use, modify, reproduce, release, perform, display, or disclose such data or software.

27.501 Definitions.

As used in this subpart—

Commercial computer software means software developed or regularly used for nongovernmental purposes that—

(1) Has been sold, leased, or licensed to the public;

(2) Has been offered for sale, lease, or license to the public;

(3) Has not been offered, sold, leased, or licensed to the public but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of this contract; or

(4) Satisfies a criterion expressed in paragraph (1), (2), or (3) of this definition and would require only minor modification to meet the requirements of this contract.

Computer software means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer databases or computer software documentation.

Contractor means a contractor to include a contractor's subcontractors, suppliers, or potential subcontractors or suppliers at any tier.

Covered Government support contractor means a contractor under a contract, the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of a program or effort, rather than to directly furnish an end item or service to accomplish a program or effort, provided that the contractor—

(1) Is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

(2) Receives access to technical data or computer software for performance of a Government contract that contains the clause at 52.227–31, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

Offeror means an offeror to include an offeror's subcontractors, suppliers, or potential subcontractors or suppliers at any tier.

Technical data means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management information, or information incidental to contract administration.

27.502 Commercial computer software and commercial computer software documentation.

27.502–1 Policy.

(a) Acquire commercial computer software or commercial computer software documentation under the licenses customarily provided to the public to the extent such licenses are consistent with Federal law and otherwise satisfy the Government's needs.

(b) Do not require offerors and contractors to—

(1) Furnish technical information related to commercial computer software or commercial computer software documentation that is not customarily provided to the public except for information documenting the specific modifications made at Government expense to such software or documentation to meet the requirements of a Government solicitation; or

(2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform,

display, or disclose commercial computer software or commercial computer software documentation except for a transfer of rights mutually agreed upon.

27.502–2 Rights in commercial computer software or commercial computer software documentation.

(a) The Government has the rights specified in the license under which the Government obtained the commercial computer software or commercial computer software documentation.

(b) No contract clause governs the Government's rights in commercial computer software or commercial computer software documentation.

(c) If the Government has a need for rights not conveyed under the license customarily provided to the public, negotiate with the contractor to determine acceptable terms for transferring such rights. Any resulting license agreement, made part of the contract, must list or describe all software and software documentation for which the contractor has granted the Government additional rights, and specify the additional rights granted.

27.503 Technical data related to commercial products, commercial components, commercial services, or commercial processes.

27.503–1 Policy.

(a) Government policy is to acquire only the technical data customarily provided to the public with a commercial product, commercial service, or commercial process, except technical data that—

(1) Are form, fit, and function data;

(2) Are required for repair or maintenance of commercial products or commercial processes, or for the proper installation, operating, or handling of a commercial product, either as a stand-alone unit or as a part of a system, when such data are not customarily provided to commercial users or the data provided to commercial users is not sufficient for agency purposes; or

(3) Describe the modifications made at Government expense to a commercial product, commercial service, or commercial process in order to meet the requirements of a Government solicitation.

(b) To encourage offerors and contractors to offer or use commercial products to satisfy agency requirements, do not require (except for the technical data described in paragraph (a) of this section) offerors, and contractors to—

(1) Furnish technical information related to commercial products, commercial services, or commercial

processes that is not customarily provided to the public; or

(2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose technical data related to commercial products, commercial services, or commercial processes except for a mutually agreed transfer of rights.

(c) The Government's rights in a vessel design, and in any useful article embodying a vessel design, must be consistent with the Government's rights in technical data related to the design.

27.503–2 Rights in technical data.

(a) The Government has specific license rights in technical data related to commercial products, commercial services, or commercial processes.

(1) The Government may use, modify, reproduce, release, perform, display, or disclose data only within the Government.

(2) The data may not be used to manufacture additional quantities of the commercial products and, except for emergency repair or overhaul and for covered Government support contractors, may not be released or disclosed to, or used by, third parties without the contractor's written permission.

(3) The restrictions stated at section 27.503–2(a)(1) and (2) do not apply to the technical data described in 27.503–1(a).

(b) If the Government requires additional rights, negotiate with the contractor to determine whether acceptable terms exist for transferring such rights. Any resulting license agreement, made part of the contract, must list or describe all technical data for which the contractor has granted the Government additional rights, and specify the additional rights granted

27.503–3 Government right to review, verify, challenge, and validate asserted restrictions.

Follow the procedures at 27.402–13 regarding the validation of asserted restrictions on technical data related to commercial products or commercial services.

27.503–4 Contract clauses.

(a)(1) Insert the clause at 52.227–27, Technical Data—Commercial Products and Commercial Services, in solicitations and contracts, including those for commercial products and commercial services, when the contract will require delivery of technical data related to commercial products, commercial components, commercial services, or commercial processes. See also paragraph (b) of this section.

(2) Insert the clause at 52.227–27 with its Alternate I in solicitations and contracts, including those for commercial products and commercial services, for the development or delivery of a vessel design or any useful article embodying a vessel design.

(b)(1) *Government development funding*. When the Government has paid for any portion of the development of a commercial product or commercial service, insert the clause at 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services, in addition to the clause at 52.227–27.

(2) *Applicability*. For technical data, the clause at 52.227–26 governs the technical data related to the Government-funded portions, and the clause at 52.227–27 governs the technical data related to the portions developed exclusively at private expense. These clauses do not apply to commercial computer software or to commercial software documentation.

(c) Insert the clause at 52.227–35, Validation of Asserted Restrictions on Technical Data, in solicitations and contracts that include the clause at 52.227–26 or the clause at 52.227–27.

PART 47—TRANSPORTATION

Sec.
47.000 Scope of part.
47.001 Definitions.
47.002 Applicability.

Subpart 47.1—General

47.101 Policies.
47.102 Transportation payment and audit regulation.
47.102–1 General.
47.102–2 Contract clause.
47.103 Government rate tenders under sections 10721 and 13712 of the Interstate Commerce Act (49 U.S.C. 10721 and 13712).
47.103–1 Government rate tender procedures.
47.103–2 Fixed-price contracts.
47.103–3 Cost-reimbursement contracts.
47.103–4 Contract clause.
47.103–5 Citation of Government rate tenders.

Subpart 47.2—Contracts for Transportation or for Transportation-Related Services

47.200 Scope of subpart.
47.201 Definitions.
47.202 Single-movement contracts.
47.203 Contract clauses, and special requirements.
47.203–1 Qualifications of offerors.
47.203–2 Description of shipment, origin, and destination.
47.203–3 Determination of weights.
47.203–4 Contractor responsibilities.
47.203–5 Rates and charges.
47.203–6 Liability and insurance.

47.203–7 Government responsibilities.
47.203–8 Annotation and distribution of shipping and billing documents.
47.203–9 Volume movements within the contiguous United States.
47.204 Report of shipment (REPSHIP).
47.204–1 Advance notice.
47.204–2 Contract clause.

Subpart 47.3—Transportation in Supply Contracts

47.300 Scope of subpart.
47.301 General.
47.301–1 Responsibilities of contracting officers.
47.301–2 Using the Defense Transportation System (DTS).
47.302 Place of delivery—f.o.b. point.
47.303 Standard delivery terms and contract clauses.
47.303–1 F.o.b. origin.

Authority: 41 U.S.C. 1121(b); 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

47.000 Scope of part.

(a) This part describes policies and procedures for—

(1) Applying transportation and traffic management considerations in the acquisition of supplies; and

(2) Acquiring transportation or transportation-related services by contract methods other than bills of lading, transportation requests, transportation warrants, and similar transportation forms.

(b) Acquire transportation and transportation services either subject to the FAR or using the bill of lading as the contract under 49 U.S.C. 10721 or 49 U.S.C. 13712. The FAR does not regulate acquisition of transportation or transportation-related services when the bill of lading is the contract, but this contract method is common and, therefore, section 47.103 provides guidance on this method.

47.001 Definitions.

As used in this part—

Bill of lading means a transportation document, used as a receipt of goods, as documentary evidence of title, for clearing customs, and generally used as a contract of carriage.

(1) Commercial bill of lading (CBL), unlike the Government bill of lading, is not an accountable transportation document.

(2) Government bill of lading (GBL) is an accountable transportation document, authorized and prepared by a Government official.

Carrier or commercial carrier means a common carrier or a contract carrier.

Common carrier means a person holding itself out to the general public to provide transportation for compensation.

Contract carrier means a person providing transportation for compensation under continuing agreements with one person or a limited number of persons.

Government rate tender means, under 49 U.S.C. 10721 and 13712, an offer by a common carrier to the United States at a rate below the regulated rate offered to the general public.

Household goods means, in accordance with 49 U.S.C. 13102, personal effects and property used or to be used in a dwelling, when a part of the equipment or supply of such dwelling, and similar property if the transportation of such effects or property is arranged and paid for by—

(1) The householder, except such term does not include property moving from a factory or store, other than property that the householder has purchased with the intent to use in his or her dwelling and is transported at the request of, and the transportation charges are paid to the carrier by, the householder; or

(2) Another party.

Noncontiguous domestic trade means transportation (except with regard to bulk cargo, forest products, recycled metal scrap, waste paper, and paper waste) subject to regulation by the Surface Transportation Board involving traffic originating in or destined to Alaska, Hawaii, or a territory or possession of the United States (see 49 U.S.C. 13102(17) and 13702).

Released or declared value means the assigned value of the cargo for reimbursement purposes, not necessarily the actual value of the cargo. Released value may be more or less than the actual value of the cargo. The released value is the maximum amount that could be recovered by the agency in the event of loss or damage for the shipments of freight and household goods.

47.002 Applicability.

All Government personnel concerned with the following activities must follow this part as applicable:

(a) Acquisition of supplies.

(b) Acquisition of transportation and transportation-related services.

(c) Transportation assistance and traffic management.

(d) Administration of transportation contracts, transportation-related services, and other contracts that involve transportation.

(e) Entering into and administering contracts under which payments are made from Government funds for—

(1) The transportation of supplies;

(2) Transportation-related services; or

(3) Transportation of contractor personnel and their personal belongings.

Subpart 47.1—General

47.101 Policies.

(a) For domestic shipments, authorize shipments on commercial bills of lading (CBL's). Government bills of lading (GBL's) may be used for international or noncontiguous domestic trade shipments or when otherwise authorized.

(b) The contract administration office (CAO) must ensure that instructions to contractors result in the most efficient and economical use of transportation services and equipment. Transportation personnel will assist and provide transportation management expertise to the CAO. The Federal Management Regulation at 41 CFR parts 102–117 and 102–118 provides specific responsibilities and details on transportation management. (For the Department of Defense (DoD), see DoD 4500.9–R, Defense Transportation Regulation.)

(c) Obtain traffic management advice and assistance when considering transportation factors required for—

- (1) Solicitations and awards;
- (2) Contract administration, modification, and termination; and
- (3) Transportation of property by the Government to and from contractors' plants.

(d)(1) The preferred method of transporting supplies for the Government is by commercial carriers. However, Government-owned, leased, or chartered vehicles, aircraft, and vessels may be used if—

- (i) They are available and not fully utilized,
- (ii) Their use will result in substantial economies, and
- (iii) Their use complies with all applicable statutes, agency policies and regulations.

(2) If the three circumstances listed in paragraph (d)(1) apply, then Government vehicles may be used for purposes such as—

- (i) Local transportation of supplies between Government installations;
- (ii) Pickup and delivery services that commercial carriers do not perform in connection with line-haul transportation;
- (iii) Transporting supplies to meet emergencies; and
- (iv) Accomplishing program objectives that cannot be attained by using commercial carriers.

(e) Agencies must not accord preferential treatment to any mode of transportation or to any particular

carrier either in awarding or administering contracts for the acquisition of supplies or in awarding contracts for the acquisition of transportation. (See subparts 47.2 and 47.3 for situations in which the contracting officer is permitted to use specific modes of transportation.)

(f) When a contract specifies delivery of supplies f.o.b. origin with transportation costs to be paid by the Government, the contractor must make shipments on bills of lading, or on other shipping documents prescribed by Military Surface Deployment and Distribution Command (SDDC) in the case of seavan containers, either at the direction of or furnished by the CAO or the appropriate agency transportation office.

47.102 Transportation payment and audit regulation.

47.102–1 General.

Pursuant to 31 U.S.C. 3726, each agency receiving a transportation invoice must verify its correctness through an audit. See 41 CFR 102–118 for audit requirements.

47.102–2 Contract clause.

Complete and insert the clause at 52.247–67, Submission of Transportation Documents for Audit, in solicitations and contracts when the Government expects to award a cost-reimbursement contract, and the contract, or a first-tier cost-reimbursement subcontract under it, will authorize reimbursement of transportation as a direct charge to the contract or subcontract. Do not include in solicitations/contracts for commercial products or commercial services.

47.103 Government rate tenders under sections 10721 and 13712 of the Interstate Commerce Act (49 U.S.C. 10721 and 13712).

(a) This section explains statutory authority for common carriers subject to the jurisdiction of the Surface Transportation Board, *i.e.*, motor carrier, water carrier, freight forwarder, rail carrier, to offer to transport persons or property for the account of the United States without charge or at “a rate reduced from the applicable commercial rate.” A carrier offers reduced rates in a Government rate tender. Additional information for civilian agencies is available in the Federal Management Regulation (41 CFR parts 102–117 and 102–118) and for DoD in the Defense Transportation Regulation (DoD 4500.9–R).

(b) Reduced rates offered in a Government rate tender are authorized for transportation provided by a rail carrier, for the movement of household

goods, and for movement by or with a water carrier in noncontiguous domestic trade.

(1) For Government rate tenders submitted by a rail carrier, a rate reduced from the applicable commercial rate is a rate reduced from a rate regulated by the Surface Transportation Board.

(2) For Government rate tenders submitted for the movement of household goods, “a rate reduced from the applicable commercial rate” is a rate reduced from a rate contained in a published tariff subject to regulation by the Surface Transportation Board.

(3) For Government rate tenders submitted for movement by or with a water carrier in noncontiguous domestic trade, “a rate reduced from the applicable commercial rate” is a rate reduced from a rate contained in a published tariff required to be filed with the Surface Transportation Board.

47.103–1 Government rate tender procedures.

(a) 49 U.S.C. 10721 and 13712 rates are published in Government rate tenders and apply to shipments moving for the account of the Government on—

(1) Commercial bills of lading endorsed to show that the Government is assigned, and will reimburse, total transportation charges (see the clause at 52.247–1, Commercial Bill of Lading Notations); and

(2) Government bills of lading.

(b) Agencies may negotiate with carriers for additional or revised 49 U.S.C. 10721 and 13712 rates. Only personnel authorized under agency procedures may negotiate such rates.

47.103–2 Fixed-price contracts.

(a) *F.o.b. destination.* 49 U.S.C. 10721 and 13712 rates do not apply to shipments under fixed-price f.o.b. destination contracts (delivered price).

(b) *F.o.b. origin.* The contracting officer may occasionally require the contractor to prepay the freight charges to a specific destination. In such cases, the contractor must use a commercial bill of lading, and the contractor must invoice the direct and actual transportation cost as a separate item. The clause at 52.247–1, Commercial Bill of Lading Notations, ensures that the Government in this type of arrangement obtains the benefit of 49 U.S.C. 10721 and 13712 rates.

47.103–3 Cost-reimbursement contracts.

(a) 49 U.S.C. 10721 and 13712 rates may apply to shipments other than those made by the Government if the total benefit accrues to the Government, *i.e.*, the Government pays the charges or

reimburses the party that initially assumed the freight charges. Therefore, 49 U.S.C. 10721 and 13712 rates may apply to shipments moving on commercial bills of lading in cost reimbursement contracts under which the transportation costs are direct and allowable costs under the cost principles of Part 31.

(b) 49 U.S.C. 10721 and 13712 rates may apply to the movement of household goods and personal effects of contractor employees who are relocated for the convenience and at the direction of the Government and whose total transportation costs are reimbursed by the Government.

(c) The clause at 52.247-1, Commercial Bill of Lading Notations, ensures that the Government receives the benefit of lower 49 U.S.C. 10721 and 13712 rates in cost-reimbursement contracts as described in paragraphs (a) and (b) of this section.

(d) Contracting officers must—

(1) Include in contracts a statement requiring the contractor to use carriers that offer acceptable service at reduced rates if available; and

(2) Ensure that contractors receive the name and location of the transportation officer designated to furnish support and guidance when using Government rate tenders.

47.103-4 Contract clause.

(a) Insert the clause at 52.247-1, Commercial Bill of Lading Notations, in solicitations and contracts, including those for commercial products and commercial services, when the contracts will be—

(1) Cost-reimbursement contracts, including those that may involve the movement of household goods (see 47.103-3(b)); or

(2) Fixed-price f.o.b. origin contracts if the acquisition value exceeds the simplified acquisition threshold (see 47.103-2(b) and 47.103-3).

(b) The contracting officer may insert the clause at 52.247-1, Commercial Bill of Lading Notations, in solicitations and contracts if the acquisition value is at or below the simplified acquisition threshold when the delivery terms will be f.o.b. origin.

47.103-5 Citation of Government rate tenders.

When 49 U.S.C. 10721 and 13712 rates apply, transportation offices or contractors, as appropriate, must identify the applicable Government rate tender by endorsement on bills of lading.

Subpart 47.2—Contracts for Transportation or for Transportation-Related Services

47.200 Scope of subpart.

(a) This subpart describes procedures for the acquisition by sealed bid or negotiated contracts of—

(1) Freight transportation (including local drayage) from rail, motor (including bus), domestic water (including inland, coastwise, and intercoastal) carriers, and from freight forwarders; and

(2) Transportation-related services including but not limited to stevedoring, storage, packing, marking, and ocean freight forwarding.

(b) Except as provided in paragraph (c) below, this subpart does not apply to—

(1) The acquisition of freight transportation from—

(i) Domestic or international air carriers (see subpart 47.4); and

(ii) International ocean carriers (see subpart 47.5);

(2) Freight transportation acquired by bills of lading;

(3) Household goods for which rates are negotiated under 49 U.S.C. 10721 and 13712. (These statutes do not apply in intrastate moves); or

(4) Contracts at or below the simplified acquisition threshold.

(c) With appropriate modifications, apply the procedures in this subpart as necessary to the acquisition of freight transportation from the carriers listed in paragraph (b)(1) above and passenger transportation from any carrier or mode.

(d) The procedures in this subpart apply to the transportation of household goods of persons being relocated at Government expense except when acquired—

(1) Under the commuted rate schedules as required in the Federal Travel Regulation (41 CFR Chapter 302);

(2) By the Department of Defense under DoD 4500.9-R, Defense Transportation Regulation; or

(3) Under 49 U.S.C. 10721 and 13712 rates. (These statutes do not apply in intrastate moves.)

47.201 Definitions.

As used in this subpart—

General freight means supplies, goods, and transportable property not encompassed in the definitions of household goods or office furniture.

Office furniture means furniture, equipment, fixtures, records, and other equipment and materials used in Government offices, hospitals, and similar establishments.

47.202 Single-movement contracts.

Contracting officers may award single-movement contracts for unique transportation services not otherwise available under carrier tariffs or covered by DoD or the General Services Administration contracts, e.g., special requirements at origin and/or destination.

47.203 Contract clauses, and special requirements.

47.203-1 Qualifications of offerors.

(a) Insert the clause at 52.247-2, Permits, Authorities, or Franchises, in solicitations and contracts, including those for commercial products and commercial services, when regulated transportation is involved except when a Federal office move is intrastate and the contracting officer determines that applying the requirement for holding or obtaining State authority to operate within the State is not in the Government's interest.

(b) Insert the clause at 52.247-5, Familiarization with Conditions, in solicitations and contracts, including those for commercial products and commercial services, for transportation or for transportation-related services to ensure that offerors become familiar with conditions under which and where the services will be performed.

47.203-2 Description of shipment, origin, and destination.

(a) Include in solicitations—

(1) Details regarding the location from which the freight is to be shipped;

(2) Details regarding delivery points;

(3) An inventory if the freight consists of nonbulk items;

(4) The freight classification description, which the transportation office should provide. If a freight classification description is not available, use a clear nontechnical description. Include additional details necessary to ensure that the prospective offerors have complete information about the freight, e.g., size, weight, hazardous material, whether packed for export, or unusual value; and

(5) The actual weight of the freight or a reasonably accurate estimate.

(b) Insert the clause at 52.247-8, Estimated Weights or Quantities Not Guaranteed, in solicitations and contracts, including those for commercial products and commercial services, for transportation or for transportation-related services when weights or quantities are estimated.

47.203-3 Determination of weights.

(a) Specify in the contract the method of determining the weight of shipments as appropriate for the kind of freight

involved and the type of service required.

(b) Insert the clause at 52.247–10, Net Weight—General Freight, in solicitations and contracts, including those for commercial products and commercial services, for transportation or for transportation-related services when the weight of shipments of freight other than household goods or office furniture is not known at the time of shipment and the contractor is responsible for determining the net weight of the shipments.

(c) Insert the clause at 52.247–11, Net Weight—Household Goods or Office Furniture, in solicitations and contracts, including those for commercial products and commercial services, for transportation or for transportation-related services when movements of Government employees' household goods or relocations of Government offices.

47.203–4 Contractor responsibilities.

(a) Specify in the solicitation and contract those service requirements that are not normal or typical transportation or transportation-related requirements.

(b) As necessary, specify in the solicitation and contract the type and size of equipment the contractor must furnish. Otherwise, state that the contractor must furnish clean and sound closed-type equipment of sufficient size to accommodate the shipment.

(c) Insert the clause at 52.247–13, Accessorial Services—Moving Contracts, in solicitations and contracts, including those for commercial products and commercial services, that involve the transportation of household goods or office furniture.

(d) Insert the clause at 52.247–15, Contractor Responsibility for Loading and Unloading, in solicitations and contracts, including those for commercial products and commercial services, for transportation or for transportation-related services when the contractor is responsible for loading and unloading shipments.

47.203–5 Rates and charges.

(a) Include in the solicitation a statement that the charges in the contract must not exceed the contractor's charges for the same service that is—

- (1) Available to the general public; or
- (2) Otherwise tendered to the Government.

(b) Include in the solicitation a tabulation listing each required service and the basis for the rate (price), *e.g.*, unit of weight or per work-hour, leaving sufficient space for offerors to insert the rates offered for each service.

(c) The following guidelines apply to the composition of a tabulation of transportation or of transportation-related services and their rate (price) bases:

(1) *Combination of pricing bases.* If a contract requires various types of services with different bases for assessing charges, show each service separately and the applicable basis for that service.

(2) *Hourly rate basis.* If charges are based on an hourly rate, state the method for charging for fractions of an hour, *e.g.*,—

- (i) A period of 30 minutes or less is charged at one-half the hourly rate; and
- (ii) The hourly rate applies to any portion of an hour that exceeds 30 minutes.

(3) *Shipments of varying weights.* If charges are based on weight and shipments will vary in weight, request rates on a graduated weight basis. Include a table of graduated weights for offerors to insert rates.

(4) *Multiple origins and/or destinations.* Specify whether rates are requested for each origin and/or each destination or for specific groups of origins and/or destinations.

(5) *Multiple shipments from one origin.* If multiple shipments will be tendered at one time to the contractor for delivery to two or more consignees at the same destination, request the rate applicable to the aggregate weight. If such shipments are for delivery to various destinations along the route between origin and last destination, request the rate applicable to the aggregate weight and a stopoff charge for each intermediate destination.

(6) *Additional services.* State the conditions for payment for any services in addition to those covered in the basic rate, *e.g.*, inside delivery.

(d) Insert the clause at 52.247–17, Charges, in solicitations and contracts, including those for commercial products or commercial services, for transportation or for transportation-related services.

(e) Insert the clause at 52.247–18, Multiple Shipments, in solicitations and contracts, including those for commercial products or commercial services, for transportation or for transportation-related services when multiple shipments are tendered at one time to the contractor for transportation from one origin to two or more consignees at the same destination.

(f) Insert the clause at 52.247–19, Stopping in Transit for Partial Unloading, in solicitations and contracts, including those for commercial products or commercial services, for transportation or for

transportation-related services when multiple shipments are tendered at one time to the contractor for transportation from one origin to two or more consignees along the route between origin and last destination.

47.203–6 Liability and insurance.

(a) Specify in the solicitation and contract—

(1) The contractor's liability for injury to persons or damage to property other than the freight being transported;

(2) The contractor's liability for loss of and/or damage to the freight being transported; and

(3) The amount of insurance the contractor must maintain.

(b) When the contractor's liability for loss of and/or damage to the freight being transported is not specified, the usual measure of liability as prescribed in section 11706 of the Interstate Commerce Act (49 U.S.C. 11706) applies.

(c) Insert the clause at 52.247–21, Contractor Liability for Personal Injury and/or Property Damage, in solicitations and contracts, including those for commercial products or commercial services, for transportation or for transportation-related services.

(d) Insert the clause at 52.247–22, Contractor Liability for Loss of and/or Damage to Freight other than Household Goods, in solicitations and contracts, including those for commercial products or commercial services, for the transportation of freight other than household goods.

(e) Insert the clause at 52.247–23, Contractor Liability for Loss of and/or Damage to Household Goods, in solicitations and contracts, including those for commercial products or commercial services, for the transportation of household goods, including the rate per pound appropriate to the situation.

(f) When freight is not shipped under rates subject to released or declared value, see 28.313(a) and the clause at 52.228–9, Cargo Insurance.

(g) When vehicular liability and/or general public liability insurance required by law are not sufficient for a contract, see 28.313(b) and the clause at 52.228–10, Vehicular and General Public Liability Insurance.

47.203–7 Government responsibilities.

State clearly the Government's responsibilities that have a direct bearing on the contractor's performance under the contract, *e.g.*, the Government's responsibility to notify the contractor in advance when hazardous materials are included in a shipment.

47.203–8 Annotation and distribution of shipping and billing documents.

State in detail the responsibilities of the contractor, the contracting agency, and, if appropriate, the consignee for the annotation and distribution of shipping and billing documents. See 41 CFR part 102–118, Transportation Payment and Audit.

47.203–9 Volume movements within the contiguous United States.

(a) For purposes of contract administration, a volume movement is—

(1) For DoD, the aggregate of freight shipments amounting to or exceeding 25 carloads, 25 truckloads, or 500,000 pounds, to move during the contract period from one origin point for delivery to one destination point or area; and

(2) For civilian agencies, 50 short tons (100,000 pounds) in the aggregate to move during the contract period from one origin point for delivery to one destination point or area.

(b) Transportation personnel assigned to or supporting the contract administration office, or appropriate agency personnel, must report planned and actual volume movements in accordance with agency regulations. DoD activities report to the Military Surface Deployment and Distribution Command (SDDC) under DoD 4500.9–R, Defense Transportation Regulation.

47.204 Report of shipment (REPSHIP).**47.204–1 Advance notice.**

Military and, as required, civilian agency, storage and distribution points, depots, and other receiving activities require advance notice of shipments en route from contractors' plants. Generally, this notification is required only for classified material; sensitive, controlled, and certain other protected material; explosives, and some other hazardous materials; selected shipments requiring movement control; or minimum carload or truckload shipments. It facilitates arrangements for transportation control, labor, space, and use of materials handling equipment at destination. Also, timely receipt of notices by the consignee transportation office precludes the incurring of demurrage and vehicle detention charges.

47.204–2 Contract clause.

Insert the clause at 52.247–68, Report of Shipment (REPSHIP), in solicitations and contracts, including those for commercial products or commercial services, requiring advance notice of shipment for safety or security reasons, or where the contract requires carload or

truckload shipments to DoD installations or to civilian agency facilities.

Subpart 47.3—Transportation in Supply Contracts**47.300 Scope of subpart.**

(a) This subpart describes policies and procedures for the application of transportation and traffic management considerations in the acquisition of supplies. The terms and conditions in this subpart apply to fixed-price contracts.

(b) If a special requirement exists for application of any of these terms and conditions to other types of contracts, *e.g.*, cost-reimbursement contracts, for which transportation arrangements are normally the responsibility of the contractor and transportation costs are allowable, then use the terms and conditions in this subpart as a guide for—

(1) Contract coverage of transportation; and

(2) Instructions to the contractor to minimize the ultimate transportation costs to the Government.

47.301 General.**47.301–1 Responsibilities of contracting officers.**

(a) Obtain from traffic management offices transportation factors required for—

(1) Solicitations and awards; and

(2) Contract administration, modification, and termination, including the movement of property by the Government to and from contractors' plants.

(b) Request transportation office participation especially before making an initial acquisition of supplies that are unusually large, heavy, high, wide, or long; have sensitive or dangerous characteristics; or lend themselves to containerized movements from the source. In determining total transportation charges, also consider additional costs arising from factors such as the use of special equipment, excess blocking and bracing material, or circuitous routing.

47.301–2 Using the Defense Transportation System (DTS).

(a) All military and civilian agencies shipping, or arranging for the acquisition and shipment by Government contractors, using military-controlled transport or through military transshipment facilities must follow Department of Defense (DoD) Regulation DoD 4500.9–R, Defense Transportation Regulation, Part II. This regulation establishes uniform procedures and

documents for the generation, documentation, communication, and use of transportation information, thus providing the capability for control of shipments moving in the DTS. DoD 4500.9–R Part II has been implemented on a world-wide basis.

(b) Contracting activities are responsible for—

(1) Ensuring that the requirements of DoD 4500.9–R Part II regulation are included in appropriate contracts for all applicable shipments; and

(2) Enforcing these requirements regarding shipments under their control. This includes requirements relating to documentation, marking, advance notification of shipment dates, and terminal clearances.

(c) Designate in contractual documents a contract administration office (see 42.202(a)) as the point of contact to whom the contractor will provide information necessary to—

(1) Effect DoD 4500.9–R Part II documentation and movement control, including air or water terminal shipment clearances; and

(2) Obtain data necessary for shipment marking and freight routing. Contractual documents must specify that the contractor must not ship directly to a military air or water port terminal without authorization from the designated contract administration office (see 47.305–4(e)).

47.302 Place of delivery-f.o.b. point.

(a) The policies and procedures in 47.304–1 and –2 govern the transportation of supplies from sources in the Contiguous United States (CONUS), except when identifiable costs, nature of the supplies (security, safety, or value), delivery requirements (premium modes of transport, escorts, transit arrangements, and tentative conditions), or other advantages, limitations, or requirements dictate otherwise. The policies and procedures in 47.304–3 govern the transportation of supplies from sources outside CONUS.

(b) Generally, solicit offers, and award contracts, with delivery terms on the basis prescribed in 47.304.

(c)(1) The delivery term must not dictate the place of performance of Government acquisition quality assurance actions or the place of acceptance, except that if acceptance is at destination, use f.o.b. destination (see 47.304–1(f)).

(2) The fact that transportation is f.o.b. destination does not necessitate changing the place of acceptance from origin to destination. Further, the fact that acceptance is at origin does not necessitate an f.o.b. origin delivery term. Providing for inspection and acceptance

at origin (if appropriate under 46.402), in conjunction with an f.o.b. destination term, might benefit both the Government and the contractor. Government acceptance of title at origin permits payment to the contractor, provided the invoice is supported either—

(i) By a copy of the signed commercial bill of lading (indicating the carrier's receipt of the supplies covered by the invoice for transportation to the destination specified in the contract); or

(ii) By other appropriate evidence of shipment to the destination for the contractor's account.

47.303 Standard delivery terms and contract clauses.

This section lists standard delivery terms and associated contract clauses. See 47.300(b) regarding applicability to cost reimbursement contracts.

47.303–1 F.o.b. origin.

(a) F.o.b. origin means free of expense to the Government delivered—

(1) On board the indicated type of conveyance of the carrier (or of the Government, if specified) at a designated point in the city, county, and State from which the shipment will be made and from which line-haul transportation service (as distinguished from switching, local drayage, or other terminal service) will begin;

(2) To, and placed on, the carrier's wharf (at shipside, within reach of the ship's loading tackle, when the shipping point is within a port area having water transportation service) or the carrier's freight station;

(3) To a U.S. Postal Service facility; or

(4) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372).

(b) Insert the clause at 52.247–29, F.o.b. Origin, in solicitations and contracts, other than those for commercial products or commercial services, when the delivery term is f.o.b. origin.

47.303–2 F.o.b. origin, contractor's facility.

(a) F.o.b. origin, contractor's facility means free of expense to the Government delivered on board the indicated type of conveyance of the carrier (or of the Government if specified) at the designated facility, on the named street or highway, in the city, county, and State from which the shipment will be made.

(b) Insert the clause at 52.247–30, F.o.b. Origin, Contractor's Facility, in

solicitations and contracts, other than those for commercial products or commercial services, when the delivery term is f.o.b. origin, contractor's facility.

47.303–3 F.o.b. origin, freight allowed.

(a) F.o.b. origin, freight allowed means—

(1) Free of expense to the Government delivered—

(i) On board the indicated type or conveyance of the carrier (or of the Government, if specified) at a designated point in the city, county, and State from which the shipments will be made and from which line-haul transportation service (as distinguished from switching, local drayage, or other terminal service) will begin;

(ii) To, and placed on, the carrier's wharf (at shipside, within reach of the ship's loading tackle, when the shipping point is within a port area having water transportation service) or the carrier's freight station;

(iii) To a U.S. Postal Service facility; or

(iv) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372); and

(2) An allowance for freight, based on applicable published tariff rates (or Government rate tenders) between the points specified in the contract, is deducted from the contract price.

(b) Insert the clause at 52.247–31, F.o.b. Origin, Freight Allowed, in solicitations and contracts, other than those for commercial products or commercial services, when the delivery term is f.o.b. origin, freight allowed.

47.303–4 F.o.b. origin, freight prepaid.

(a) F.o.b. origin, freight prepaid means—

(1) Free of expense to the Government delivered—

(i) On board the indicated type of conveyance of the carrier (or of the Government, if specified) at a designated point in the city, county, and State from which the shipments will be made and from which line-haul transportation service (as distinguished from switching, local drayage, or other terminal service) will begin;

(ii) To, and placed on, the carrier's wharf (at shipside, within reach of the ship's loading tackle, when the shipping point is within a port area having water transportation service) or the carrier's freight station;

(iii) To a U.S. Postal Service facility; or

(iv) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372); and

(2) The cost of transportation, ultimately the Government's obligation, is prepaid by the contractor to the point specified in the contract.

(b) Insert the clause at 52.247–32, F.o.b. Origin, Freight Prepaid, in solicitations and contracts, other than those for commercial products or commercial services, when the delivery term is f.o.b. origin, freight prepaid.

47.303–5 F.o.b. origin, with differentials.

(a) F.o.b. origin, with differentials means—

(1) Free of expense to the Government delivered—

(i) On board the indicated type of conveyance of the carrier (or of the Government, if specified) at a designated point in the city, county, and State from which the shipments will be made and from which line-haul transportation service (as distinguished from switching, local drayage, or other terminal service) will begin;

(ii) To, and placed on, the carrier's wharf (at shipside, within reach of the ship's loading tackle, when the shipping point is within a port area having water transportation service) or the carrier's freight station;

(iii) To a U.S. Postal Service facility; or

(iv) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372); and

(2) Differentials for mode of transportation, type of vehicle, or place of delivery as indicated in contractor's offer may be added to the contract price.

(b) Insert the clause at 52.247–33, F.o.b. Origin, with Differentials, in solicitations and contracts, other than those for commercial products or commercial services, when offerors are likely to include in f.o.b. origin offers a contingency to compensate for a possibly unfavorable routing condition by the Government at the time of shipment.

47.303–6 F.o.b. destination.

(a) F.o.b. destination means—

(1) Free of expense to the Government delivered, on board the carrier's conveyance, at a specified delivery

point where the consignee's facility (plant, warehouse, store, lot, or other location to which shipment can be made) is located; and

(2)(i) Supplies must be delivered to the destination consignee's wharf (if destination is a port city and supplies are for export), warehouse unloading platform, or receiving dock, at the expense of the contractor.

(ii) The Government will not be liable for any delivery, storage, demurrage, accessorial, or other charges involved before the actual delivery (or constructive placement as defined in carrier tariffs) of the supplies to the destination, unless such charges are caused by an act or order of the Government acting in its contractual capacity.

(iii) If rail carrier is used, supplies must be delivered to the specified unloading platform of the consignee.

(iv) If motor carrier (including "piggyback") is used, supplies must be delivered to truck tailgate at the unloading platform of the consignee, except when the supplies delivered meet the requirements of Item 568 of the National Motor Freight Classification for "heavy or bulky freight."

(v) When supplies meeting the requirements of the referenced Item 568 are delivered, unloading (including movement to the tailgate) must be performed by the consignee, with assistance from the truck driver, if requested.

(vi) If the contractor uses rail carrier or freight forwarder for less than carload shipments, the contractor must ensure that the carrier will furnish tailgate delivery when required, if transfer to truck is required to complete delivery to consignee.

(b) Insert the clause at 52.247-34, F.o.b. Destination, in solicitations and contracts, other than those for commercial products or commercial services, when the delivery term is f.o.b. destination.

47.303-7 F.o.b. destination, within consignee's premises.

(a) F.o.b. destination, within consignee's premises means free of expense to the Government delivered and laid down within the doors of the consignee's premises, including delivery to specific rooms within a building if so specified.

(b) Insert the clause at 52.247-35, F.o.b. Destination, within Consignee's Premises, in solicitations and contracts, other than those for commercial products or commercial services, when the delivery term is f.o.b. destination, within consignee's premises.

47.303-8 F.a.s. vessel, port of shipment.

(a) F.a.s. vessel, port of shipment means free of expense to the Government delivered alongside the ocean vessel and within reach of its loading tackle at the specified port of shipment.

(b) Insert the clause at 52.247-36, F.a.s. Vessel, Port of Shipment, in solicitations and contracts, other than those for commercial products or commercial services, when the delivery term is f.a.s. vessel, port of shipment.

47.303-9 F.o.b. vessel, port of shipment.

(a) F.o.b. vessel, port shipment means free of expense to the Government loaded, stowed, and trimmed on board the ocean vessel at the specified port of shipment.

(b) Insert the clause at 52.247-37, F.o.b. Vessel, Port of Shipment, in solicitations and contracts, other than those for commercial products or commercial services, when the delivery term is f.o.b. vessel, port of shipment.

47.303-10 F.o.b. inland carrier, point of exportation.

(a) F.o.b. inland carrier, point of exportation means free of expense to the Government, on board the conveyance of the inland carrier, delivered to the specified point of exportation.

(b) Insert the clause at 52.247-38, F.o.b. Inland Carrier, Point of Exportation, in solicitations and contracts, other than those for commercial products or commercial services, when the delivery term is f.o.b. inland carrier, point of exportation.

47.303-11 F.o.b. inland point, country of importation.

(a) F.o.b. inland point, country of importation means free of expense to the Government, on board the indicated type of conveyance of the carrier, delivered to the specified inland point where the consignee's facility is located.

(b) Insert the clause at 52.247-39, F.o.b. Inland Point, Country of Importation, in solicitations and contracts, other than those for commercial products or commercial services, when the delivery term is f.o.b. inland point, country of importation.

47.304 Determination of delivery terms.

47.304-1 General.

(a) In general, determine f.o.b. terms based on overall costs, considering the criteria in this section.

(b) Specify in solicitations whether offerors must submit offers f.o.b. origin, f.o.b. destination, or both, or whether offerors may choose the basis on which they make an offer. Consider the most advantageous delivery point, such as—

(1) F.o.b. origin, carrier's equipment, wharf, or specified freight station near contractor's plant; or

(2) F.o.b. destination.

(c) In determining whether f.o.b. origin or f.o.b. destination is more advantageous to the Government, consider the availability of lower freight rates, *i.e.*, Government rate tenders, to the Government for f.o.b. origin acquisitions. F.o.b. origin contracts also present other desirable traffic management features, in that they—

(1) Permit use of transit privileges (see 47.305-11);

(2) Permit diversions to new destinations without price adjustment for transportation (see 47.305-9);

(3) Facilitate use of special routings or types of equipment (*e.g.*, circuitous routing or oversize shipments) (see 47.305-12);

(4) Facilitate, if necessary, use of premium cost transportation and permit Government-controlled transportation;

(5) Permit negotiations for reduced freight rates (see 47.103-1(b)); and

(6) Permit use of small shipment consolidation stations.

(d) When destinations are tentative or unknown, specify in the solicitation f.o.b. origin only.

(e) When the size or quantity of supplies with confidential or higher security classification requires commercial transportation services, generally specify f.o.b. origin acquisitions.

(f) When acceptance must be at destination, specify in the solicitation f.o.b. destination only.

(g) Here follow examples of situations in which solicitations will normally be on an f.o.b. destination only basis as advantageous to the Government (see 47.305-3):

(1) Bulk supplies, such as coal, that require other than Government-owned or operated handling, storage, and loading facilities, are destined for shipment outside CONUS.

(2) Steel or other bulk construction products are destined for shipment outside CONUS.

(3) Supplies consist of forest products such as lumber.

(4) Perishable or medical supplies are subject to in-transit deterioration.

(5) Evaluation of f.o.b. origin offers will likely result in increased administrative lead time or administrative cost that would outweigh the potential advantages of an f.o.b. origin determination.

47.304-2 Shipments from CONUS for overseas delivery.

(a) When Government acquisitions involve shipments from CONUS to

overseas destinations, delivery f.o.b. origin may afford not only the economies of lower freight rates available to the Government within CONUS, but also flexibility for selection of—

- (1) The port of export; and
- (2) The ocean transportation providing the lowest overall cost to the Government.

(b)(1) Unless a valid reason exists to the contrary (see 47.304–4), make acquisition of supplies originating within CONUS for ultimate delivery to destinations outside CONUS on an f.o.b. origin basis. This policy applies to supplies and equipment shipped either directly to a port area for export or to a storage or holding area for subsequent forwarding to a port area for export.

(2) Solicitation of offers on other than an f.o.b. origin basis requires written justification.

(c) Export cargo involves considerations of operational and cost factors from the point of origin within CONUS to the overseas port destination. Determine the lowest cost of shipping only upon considering and comparing the various prospective landed costs, including inland, terminal, and ocean costs. Also, agencies may have export licensing privileges for shipments to foreign destinations. Obtain advice from the transportation officer to ensure full use of these privileges.

47.304–3 Shipments originating outside CONUS.

(a) Unless a valid reason exists to the contrary (see 47.304–4), make acquisition of supplies originating outside CONUS for ultimate delivery to destinations within CONUS or elsewhere, regardless of the quantity of the shipments, on either an f.o.b. origin or an f.o.b. destination basis, whichever is more advantageous to the Government.

(b) When developing acquisition documents, request the advice of the transportation officer to determine the best place of delivery, considering the possible use of Government transportation facilities, reduced rates available, special licensing or custom requirements, and availability of U.S.-flag shipping services between the points involved (see subpart 47.5).

47.304–4 Exceptions.

(a) Unusual conditions or circumstances might dictate the use of terms other than f.o.b. origin or f.o.b. destination. Such conditions or circumstances include, but are not limited to—

- (1) Transportation disabilities at origin or destination;

- (2) Mode of transportation required;
- (3) Availability of Government or commercial loading, unloading, or transshipment facilities;

- (4) Characteristics of the supplies;
- (5) Trade customs related to certain supplies;

- (6) Origins or destinations in Alaska and Hawaii; and

- (7) Program requirements.

(b) Obtain assistance from transportation officers before issuing solicitations when unusual conditions or circumstances exist that relate to f.o.b. terms.

47.305 Solicitation provisions, contract clauses, and transportation factors.

47.305–1 Solicitation requirements.

When the acquisition of supplies is on f.o.b. origin or f.o.b. destination delivery terms, include in solicitations a requirement that the offeror furnish the Government as much of the following data as is applicable to the particular acquisition:

- (a) Modes of transportation and, if rail transportation is used, names of rail carriers serving the offeror's facility.

- (b) The number of railroad cars, motor trucks, or other conveyances that can be loaded per day.

- (c) Type of packaging, *e.g.*, box, carton, crate, drum, bundle, skids, and when applicable, package number from the governing freight classification.

- (d) Number of units packed in one container.

- (e) Guaranteed maximum shipping weight; cubic measurement; and length, width, and height of each container.

- (f) Minimum size of each shipment.

- (g) Number of containers or units that can be loaded in a car, truck, or other conveyance of the size normally used (specify type and size) for the commodity.

- (h) Description of material in terms of the governing freight classification or tariff (or Government rate tender) under which lowest freight rates apply.

- (i) Benefits available to the Government under transit arrangements.

- (j) Other requirements as stated under specific section headings.

47.305–2 F.o.b. origin solicitations.

When preparing f.o.b. origin solicitations, see 47.303 for clause prescriptions. Include in supply solicitations that will or may result in f.o.b. origin contracts any requirements, information, provisions, and clauses concerning the following items:

- (a) Delivery in carload or truckload lots f.o.b. carrier's equipment, wharf, or freight station.

- (b) The requirement that the offeror furnish the following information with the offer:

- (1) Location of the offeror's actual shipping point(s) (street address, city, State, and ZIP code) from which supplies will be delivered to the Government.

- (2) Whether the offeror's shipping point has a private railroad siding, and the name of the rail carrier serving it.

- (3) When the offeror's shipping point does not have a private siding, the names and addresses of the nearest public rail siding and of the carrier serving it. This will enable transportation officers, when issuing routing instructions, to select the mode of transportation providing the required service at the lowest overall cost.

- (4) The quantity of supplies to be shipped from each shipping point.

- (c) When delivery is f.o.b. origin, contractor's facility, and the designated facility is not covered by the line-haul transportation rate, the charges required to deliver the shipment to the point where the line-haul rate is applicable.

- (d) When delivery is f.o.b. origin, freight allowed, the basis on which transportation charges will be allowed, including the origin and destination locations.

- (e) When the Government will accept only f.o.b. origin offers, a statement that the Government will reject as nonresponsive offers submitted on any other basis.

- (f) The methods of transportation used in evaluating offers, as applicable, to establish the cost of transportation between offeror's shipping point and the destination within the contiguous United States. Add this transportation cost to the offer price to determine the Government's overall cost. The Government normally uses land transportation by regulated common carriers between points in the 48 contiguous United States and the District of Columbia.

- (g)(1) When offerors are likely to include in f.o.b. origin offers a contingency to compensate for a possibly unfavorable routing condition by the Government at the time of shipment, the contracting officer may permit offerors to state in offers a reimbursable differential that represents the cost of bringing the supplies to any f.o.b. origin place of delivery the Government specifies at the time of shipment. See the clause at 52.247–33, F.o.b. Origin, with Differentials.

- (2) Here follow situations that might impose on the contractor a substantial cost above at plant or commercial shipping point prices because of Government-required routings:

- (i) The loading nature of the supplies, *e.g.*, wheeled vehicles.

(ii) Government-specified methods of shipment, *e.g.*, towaway, driveaway, tri-level vehicle, or rail car, that might increase the contractor's cost for bringing the supplies to, or loading and bracing the supplies at, the specified place of delivery.

(iii) The contractor's f.o.b. origin shipping point is a port city served by United States inland, coastwise, or intercoastal water transportation, and the contractor would incur additional costs to make delivery f.o.b. a wharf in that city to accommodate Government-specified water routing.

(iv) The contractor's plant lacks a private rail siding, and shipping by a Government-specified rail routing would require the contractor to deliver the supplies to a public siding or freight terminal and to load, brace, and install dunnage in rail cars.

47.305-3 F.o.b. destination solicitations.

(a) When preparing f.o.b. destination solicitations, see 47.303 for clause prescriptions.

(b) When the Government will accept only f.o.b. destination offers, state in the solicitation that the Government will reject as nonresponsive offers submitted on a basis other than f.o.b. destination.

(c) Insert the clause at 52.247-48, F.o.b. Destination—Evidence of Shipment, in solicitations and contracts, including those for commercial products or commercial services, when the solicitation or contract for supplies specifies f.o.b. destination.

47.305-4 Shipments to ports and air terminals.

(a) When acquiring supplies based on the delivery terms in 47.303-8 through 47.303-11, include in the solicitation a requirement that the offeror furnish the Government the following information:

(1) When the delivery term is f.a.s. vessel, port of shipment; f.o.b. vessel, port of shipment; or f.o.b. inland carrier, point of exportation, the offeror must furnish—

(i) A delivery schedule in number of units and/or long or short tons;

(ii) Maximum quantities available per shipment;

(iii) The quantity that can be made available for loading to vessel per running day of 24 hours (if acquisition involves a commodity to be shipped in bulk);

(iv) The minimum lead time required to make supplies available for loading to vessel; and

(v) The port and pier or other designation and, when applicable, the maximum draft of vessel (in feet) that can be accommodated.

(2) When the delivery term is f.o.b. inland point, country of importation, the offeror must furnish—

(i) A delivery schedule in number of units and/or long or short tons;

(ii) Maximum quantities available per shipment; and

(iii) Other data appropriate to shipment by air carrier.

(b) When acquiring supplies that originate within CONUS for known destinations outside CONUS, for transportation evaluation purposes, note in the solicitation the CONUS port of loading or point of exit (aerial or water) and the water port of debarkation that serves the overseas destination.

(c) The contracting officer may also, for evaluation purposes, list in the solicitation other CONUS ports compatible with the nature and quantity of the supplies, their destination, type of carrier required, and specified overseas delivery dates. This allows offerors that are geographically remote from the port that normally serves the overseas destination to offer competitive transportation costs.

(d) Unless logistics requirements limit the ports of loading to the ports listed in the solicitation, state in the solicitation that—

(1) Offerors may nominate additional ports (including ports in Alaska and Hawaii) more favorably located to their shipping points; and

(2) When evaluating offers, the Government will consider such additional ports that possess the capabilities of the listed ports, considering the type of supplies.

(e)(1) When the supplies will move in the DTS (see 47.301-2), specify in the contract that—

(i) A Transportation Control Movement Document (TCMD) must be sent to the appropriate DoD air or water clearance authority in accordance with DoD 4500.9-R, Defense Transportation Regulation, Part II, procedures for all shipments consigned to DoD air or water terminal transshipment points; and

(ii) An Export Release must be obtained for supplies to be transshipped via a water port of loading to overseas destinations, except for shipments for which an Export Release is not required, generally shipments of less than 10,000 pounds, (see DoD 4500.9-R Part II).

(2) Insert the clause at 52.247-52, Clearance and Documentation Requirements—Shipments to DoD Air or Water Terminal Transshipment Points, in solicitations and contracts, including those for commercial products or commercial services, when shipments will be consigned to DoD air or water terminal transshipment points.

(f) When a contract will not generate any shipments that require an Export Release, list in the solicitation only the DoD CONUS ports that serve the overseas destination, except that the contracting officer may limit the water ports listed when necessary to meet delivery or other requirements.

(g) Specify in the award the United States ports of loading that afford the lowest overall cost to the overseas destination.

(h) When supplies will originate outside CONUS to destinations either within or outside CONUS, use the appropriate f.o.b. term and include evaluation-of-offers information.

(i) In furtherance of the Cargo Preference Act of 1954 (46 U.S.C. 55305), to encourage and foster the American Merchant Marine, the port of delivery of supplies originating outside the United States and shipped by ocean vessel must derive from availability of United States-flag vessels between the ports involved, unless the acquiring activity has given other specific instructions. See subpart 47.5.

47.305-5 Quantity analysis, direct delivery, and reduction of crosshauling and backhauling.

(a) *Quantity analysis.*

(1) The requiring activity must consider the acquisition of carload or truckload quantities.

(2) When transporting additional quantities of the supplies will result in lower unit transportation costs (or a de minimus increase in total transportation costs), without impairing the program schedule, determine from the requiring activity whether a known requirement exists for additional quantities. This situation might arise, for example, when the activity could store the additional quantity for future use, or when multiple activities on the same transportation route or in the same geographical area could use or store the additional quantity.

(b) *Direct delivery.* When a requiring activity normally acquires supplies in large quantities for shipment to a central point and for subsequent distribution, to reduce the cost of transportation and handling, consider—

(1) Whether the quantities involved warrant scheduling direct delivery; and

(2) The feasibility of providing for direct delivery from the contractor to the using activity.

(c) *Crosshauling and backhauling.* Select distribution and transshipment facilities intermediate to origins and ultimate destinations to minimize crosshauling and backhauling, *i.e.*, the transportation of personal property of the same kind in opposite directions or

the return of the property to or through areas previously traversed in shipment.

47.305-6 Consolidation of small shipments and the use of stopoff privileges.

(a) *Consolidation of small shipments.* Consolidation of small shipments into larger lots frequently results in lower transportation costs. Therefore, the contracting officer, after consultation with the transportation office and the requiring activity, may revise the delivery schedules to provide for deliveries in larger quantities.

(b) *Stopping for partial unloading.* When feasible, consolidate schedules for delivery of supplies to multiple destinations. Direct the use of stopoff privileges permitted under carrier tariffs for partial unloading at one or more points directly en route between the point of origin and the last destination.

47.305-7 Commodity description and freight classification.

(a) Generally, the freight rate for supplies is based on the rating applicable to the freight classification description published in the National Motor Freight Classification (NMFC) (for carriers) and the Uniform Freight Classification (UFC) (for rail) filed with Federal and State regulatory bodies. Therefore, state in the solicitation a complete description of the commodity and the packing requirements to determine proper transportation charges for the evaluation of offers. If proper classification of supplies using freight classification tariffs is impracticable, or if doubt exists, then obtain the applicable freight classification from the transportation office. Additionally, offerors may provide an official freight classification description.

(b)(1) Insert the provision at 52.247-53, Freight Classification Description, in solicitations, including those for commercial products or commercial services, when the supplies are new to the supply system, nonstandard, or modifications of previously shipped items, and different freight classifications might apply.

(2) Alert the transportation officer to the possibility of negotiations for appropriate freight classification ratings and reasonable transportation rates.

(c) Include in the solicitation adequate descriptions of explosives and other dangerous supplies according to—

(1) The regular freight classification; and

(2) The hazardous material description and hazard class as shown in 49 CFR 172.101.

(d) Furnish the freight classification information developed in 47.305-7 to the contract administration office.

47.305-8 Packing, marking, and consignment instructions.

(a) Include in acquisition documents packing and marking requirements necessary to prevent deterioration of supplies and damages due to the hazards of shipping, handling, and storage, and, when appropriate, marking in accordance with the requirements of 49 CFR 172.300.

(b) Include in contracts complete consignment and marking instructions at the time the contract is awarded to ensure that supplies are delivered to proper destinations without delay. If complete consignment information is initially unknown, then issue amended delivery instructions under the Changes clause of the contract (see part 43) as soon as the information becomes known.

(c) As necessary to meet required delivery schedules, issue instructions by telephone or electronic means. Confirm telephonic instructions in writing, and confirm electronic instructions in the absence of confirmation of receipt.

(d) Marking and consignment instructions for military shipments must conform to the current issue of MIL-STD-129 (Military Standard Marking for Shipment and Storage) and other applicable DoD regulations. Mark shipments for civilian agencies as specified in Federal Standard 123, Marking for Domestic Shipment (Civil Agencies).

47.305-9 Options in shipment and delivery.

Although the clauses prescribed in subpart 43.2 allow certain changes regarding shipment and delivery, generally provide specifically for certain options in the solicitation. The Government may reserve the right to—

(a) Direct deliveries of all or part of the contract quantity to destinations or to consignees other than those specified in the solicitation and in the contract;

(b) Direct shipments in quantities requiring transportation rates different from those on which the contract price is based; and

(c) Direct shipments by a mode of transportation other than that stipulated in the solicitation and in the contract.

47.305-10 Delivery of Government-furnished property.

(a) When a solicitation contemplates Government-furnished property, and transportation costs to the Government factor in the evaluation of offers, include in the solicitation a clear description of the property, its location, and other information necessary for preparation of cost estimates.

(b) Describe any explosive and dangerous material according to—

(1) The regular freight classification; and

(2) The hazardous material description and hazard class as shown in 49 CFR 172.101.

47.305-11 Transit arrangements.

(a)(1) Transit arrangements permit the stopping of a carload or truckload shipment at a specific intermediate point en route to the final destination for storage, processing, or other purposes, as specified in carrier tariffs or rate tenders. A single through rate is charged from origin to final destination plus a transit or other related charge, rather than a more expensive combination of rates to and from the transit point.

(2) Consider possible benefits available to the Government using existing transit arrangements or through efforts to obtain additional transit privileges from the carriers. Restrict solicitations incorporating transit arrangements to f.o.b. origin offers, because f.o.b. destination offers can only include fixed overall delivered prices at first destination.

(3) Traffic management personnel must furnish information and analyses of situations in which transit arrangements might benefit the Government. The quantity awarded must entail sufficient tonnage to ensure the contractor can make carload/truckload shipments, and reasonable certainty should exist that carload/truckload quantities will ship upon request from the transit point.

(b) Insert the provision at 52.247-56, Transit Arrangements, in solicitations, including those for commercial products or commercial services, when benefits might accrue to the Government because transit arrangements might apply.

47.305-12 Mode of transportation.

Generally, do not specify in solicitations a particular mode of transportation or a particular carrier. If, however, a program requires particular types of carriers, then state in the solicitation that the Government will consider only offers involving the specified types of carriers. Obtain all specifications for mode, route, delivery, etc., from the transportation office.

47.305-13 Loading responsibilities of contractors.

(a)(1) Contractors are responsible for loading, blocking, and bracing carload shipments as specified in standards published by the Association of American Railroads.

(2) Insert the clause at 52.247-58, Loading, Blocking, and Bracing of

Freight Car Shipments, in solicitations and contracts, including those for commercial products or commercial services when supplies may be shipped in carload lots by rail.

(b) If the nature of the supplies, or safety, environmental, or transportability factors, require special methods for securing the supplies on the carrier's equipment, or if only a special mode of transportation or vehicle is appropriate, then include in solicitations detailed specifications coordinated with the transportation office.

Subpart 47.4—Air Transportation by U.S.-Flag Carriers

47.400 Scope of subpart.

This subpart describes policies and procedures for implementing 49 U.S.C. 40118, Government-financed air transportation, commonly known as the Fly America Act.

47.401 Definitions.

As used in this subpart—

Air freight forwarder means an indirect air carrier that is responsible for the transportation of property from the point of receipt to the point of destination, and it utilizes for the whole or any part of such transportation the services of a direct air carrier or its agent, or of another air freight forwarder.

Gateway airport abroad means the airport from which the traveler last embarks en route to the United States or at which the traveler first debarks incident to travel from the United States.

Gateway airport in the United States means the last U.S. airport from which the traveler's flight departs or the first U.S. airport at which the traveler's flight arrives.

International air transportation means transportation by air between a place in the United States and a place outside the United States or between two places both of which are outside the United States.

United States means the 50 States, the District of Columbia, and outlying areas of the United States.

U.S.-flag air carrier means an entity granted authority to provide air transportation in the form of a certificate of public convenience and necessity under 49 U.S.C. 41102.

47.402 Policy.

Under the Fly America Act, Federal employees and their dependents, consultants, contractors, grantees, and others must use, if available, U.S.-flag air carriers for U.S. Government-

financed international air travel and transportation of their personal effects or property.

47.403 Guidelines for implementation of the Fly America Act.

This section 47.403 reflects the Guidelines for Implementation of the Fly America Act (case number B-138942), issued by the Comptroller General of the United States on March 31, 1981.

47.403-1 Availability and unavailability of U.S.-flag air carrier service.

(a) If a U.S.-flag air carrier cannot provide the international air transportation needed or if use of U.S.-flag air carrier service would not accomplish an agency's mission, the agency may use a foreign-flag air carrier service as necessary.

(b) Consider a U.S.-flag air carrier service as available even though—

(1) A foreign-flag air carrier can provide comparable or a different kind of service at less cost;

(2) The agency or traveler prefers, or finds convenient, foreign-flag air carrier service; or

(3) Excess foreign currency is available to pay for foreign-flag air carrier service (unless U.S.-flag air carriers decline to accept excess or near excess foreign currencies for transportation payable only out of such monies).

(c) Except as provided in paragraph (a), use U.S.-flag air carrier service for U.S. Government-financed commercial foreign air travel if U.S.-flag air carrier service is available. In determining availability of a U.S.-flag air carrier, apply the following scheduling principles unless their application would result in the last or first leg of travel to or from the United States being performed by a foreign-flag air carrier:

(1) Use U.S.-flag air carrier service available at point of origin to destination or, in the absence of direct or through service, to the farthest interchange point on a usually traveled route.

(2) When a U.S.-flag air carrier does not serve an origin or interchange point, use foreign-flag air carrier service only to the nearest interchange point on a usually traveled route to connect with U.S.-flag air carrier service.

(3) When a U.S.-flag air carrier involuntarily reroutes the traveler via a foreign-flag air carrier, the traveler may use the foreign-flag air carrier notwithstanding the availability of alternative U.S.-flag air carrier service.

(d) For travel between a gateway airport in the United States and a gateway airport abroad, consider

passenger service by U.S.-flag air carrier unavailable if—

(1) The gateway airport abroad is the traveler's origin or destination airport, and use of U.S.-flag air carrier service would extend the time in a travel status, including delay at origin and accelerated arrival at destination, by at least 24 hours more than travel by a foreign-flag air carrier; or

(2)(i) The gateway airport abroad is an interchange point and use of U.S.-flag air carrier service would require the traveler to wait 6 hours or more to make connections at that point; or

(ii) Delayed departure from, or accelerated arrival at, the gateway airport in the United States would extend time in a travel status by at least 6 hours more than travel by a foreign-flag air carrier.

(e) The rules in paragraphs (a), (b), and (c) apply to travel between two points outside the United States, but do not consider passenger service by a U.S.-flag air carrier reasonably available if—

(1) Travel by a foreign-flag air carrier would eliminate two or more aircraft changes en route;

(2) One of the two points abroad is the gateway airport en route to or from the United States and the use of a U.S.-flag air carrier would extend the time in a travel status by at least 6 hours more than travel by a foreign-flag air carrier, including accelerated arrival at the overseas destination or delayed departure from the overseas origin, as well as delay at the gateway airport or other interchange point abroad; or

(3) The travel is not part of the trip to or from the United States and the use of a U.S.-flag air carrier would extend the time in a travel status by at least 6 hours more than travel by a foreign-flag air carrier including delay at origin, delay en route, and accelerated arrival at destination.

(f) For all short-distance travel under either paragraph (d) or paragraph (e), do not consider U.S. air carrier service available when the elapsed travel time on a scheduled flight from origin to destination airport by foreign-flag air carrier is 3 hours or less and service by a U.S.-flag air carrier would involve at least 6 hours of travel time.

47.403-2 Air transport agreements between the United States and foreign governments.

Nothing in the guidelines of the Comptroller General (see 47.403) precludes, and no penalty results from, use of a foreign-flag air carrier that provides transportation under an air transport agreement between the United States and a foreign government, the

terms of which are consistent with the international aviation policy goals at 49 U.S.C. 40101 and provide reciprocal rights and benefits.

47.403–3 Disallowance of expenditures.

(a)(1) Agencies must disallow expenditures for U.S. Government-financed commercial international air transportation on foreign-flag air carriers unless the contractor attaches to the

voucher a memorandum adequately explaining why—

(i) Service by U.S.-flag air carriers was not available; or

(ii) Use of foreign-flag air carriers was necessary.

(2) The contractor's use of a statement of unavailability similar to the one contained in the clause at 52.247–63, Preference for U.S.-Flag Air Carriers, satisfies this memorandum requirement.

(b) When the travel is by indirect route, or the traveler otherwise fails to use available U.S.-flag air carrier service, the amount disallowed against the traveler is based on the loss of revenues suffered by U.S.-flag air carriers. Use the following formula, which is prescribed and more fully explained in 56 Comp. Gen. 209 (1977), to calculate the amount disallowed:

$$\left(\left(\frac{a}{b} \right) \times c \right) - \left(\left(\frac{d}{e} \right) \times f \right)$$

a = Sum of U.S.-flag carrier segment mileage, authorized

b = Sum of all segment mileage, authorized

c = Fare payable by the Government

d = Sum of U.S.-flag carrier segment mileage, traveled

e = Sum of all segment mileage, traveled

f = Through fare paid

47.404 Air freight forwarders.

(a) Agencies may use air freight forwarders that are engaged in international air transportation (49 U.S.C. 40102(a)(23)) for U.S. Government-financed movements of property. The rule on disallowance of expenditures in 47.403–3(a) applies also to the air carriers used by these international air freight forwarders.

(b) Agency personnel must inform international air freight forwarders that to facilitate prompt payments of their bills, the forwarder must submit with their bills—

(1) A copy of the airway bill or manifest showing the air carriers used; and

(2) Justification for the use of foreign-flag air carriers similar to the one shown in the clause at 52.247–63, Preference for U.S.-Flag Air Carriers.

47.405 Contract clauses.

(a) Insert the clause at 52.247–63, Preference for U.S.-Flag Air Carriers, in solicitations and contracts, including those for commercial services, but excluding those for commercial products, when the possibility exists that performance of the contract will entail U.S. Government-financed international air transportation of personnel (and their personal effects) or property. This clause does not apply to contracts awarded using the simplified acquisition procedures in part 13 (see part 12).

(b) Insert the clause at 52.247–69, Reporting Requirement for U.S.-Flag Air Carriers Regarding Training to Prevent Human Trafficking, in solicitations and contracts, including those for commercial services, but excluding those for commercial products, with a U.S.-flag air carrier for the transportation by air of passengers. This clause does not apply to solicitations issued or contracts awarded by the Department of Defense.

Subpart 47.5—Ocean Transportation by U.S.-Flag Vessels

47.500 Scope of subpart.

(a) This subpart describes policy and procedures for giving preference to U.S.-flag vessels when transportation of supplies by ocean vessel is required.

(b) This subpart does not apply to the Department of Defense (DoD). Policy and procedures applicable to DoD appear in DFARS subpart 247.5.

47.501 Definitions.

As used in this subpart—

Dry bulk carrier means a vessel used primarily for the carriage of shipload lots of homogeneous unmarked nonliquid cargoes such as grain, coal, cement, and lumber.

Dry cargo liner means a vessel used for the carriage of heterogeneous marked cargoes in parcel lots. However, any cargo may be carried in these vessels, including part cargoes of dry bulk items or, when carried in deep tanks, bulk

liquids such as petroleum and vegetable oils.

Foreign-flag vessel means any vessel of foreign registry including vessels owned by U.S. citizens but registered in a nation other than the United States.

Government vessel means a vessel owned by the U.S. Government and operated directly by the Government or for the Government by an agent or contractor, including a privately owned U.S.-flag vessel under bareboat charter to the Government.

Privately owned U.S.-flag commercial vessel means a vessel (1) registered and operated under the laws of the United States, (2) used in commercial trade of the United States, (3) owned and operated by U.S. citizens, including a vessel under voyage or time charter to the Government, and (4) a Government-owned vessel under bareboat charter to, and operated by, U.S. citizens.

Tanker means a vessel used primarily for the carriage of bulk liquid cargoes such as liquid petroleum products, vegetable oils, and molasses.

U.S.-flag vessel when used independently means either a Government vessel or a privately owned U.S.-flag commercial vessel.

47.502 Policy.

(a) The Cargo Preference Act of 1954 (46 U.S.C. 55305) requires Government agencies acquiring, either within or outside the United States, supplies that might require ocean transportation to ensure that contractors transport at least

50 percent of the gross tonnage of these supplies (computed separately for dry bulk carriers, dry cargo liners, and tankers) on privately owned U.S.-flag commercial vessels. This requirement applies—

(1) To the extent that such vessels are available at rates that are fair and reasonable for U.S.-flag commercial vessels; and

(2) When the supplies are—

(i) Acquired for the account of the United States;

(ii) Furnished to, or for the account of, a foreign nation without provision for reimbursement;

(iii) Furnished for the account of a foreign nation in connection with which the United States advances funds or credits, or guarantees the convertibility of foreign currencies; or

(iv) Acquired with advance of funds, loans, or guaranties made by or on behalf of the United States.

(b) The Cargo Preference Act of 1904 (10 U.S.C. 2631) requires agencies buying supplies for the Department of Defense to use only U.S.-flag vessels for ocean transportation, unless those vessels are not available at fair and reasonable rates.

47.503 Applicability.

(a) Except as stated in paragraph (b) below and in 47.504, the Cargo Preference Acts of 1904 and 1954, described in 47.502, apply to the following cargoes:

(1) Supplies owned by the Government and in the possession of—

(i) The Government;

(ii) A contractor; or

(iii) A subcontractor at any tier.

(2) Supplies not owned by the Government at the time of shipment that the Government acquires for its own use and for which it requires subsequent delivery to a Government activity.

(3) Supplies not owned by the Government at the time of shipment that are to be transported for distribution to foreign assistance programs, but only if these supplies are not acquired or contracted for with local currency funds (see 47.504(b)).

(b) Government-owned supplies to be shipped commercially that are—

(1) In the possession of a department, a contractor, or a subcontractor at any tier; and

(2) For use of military departments must be transported exclusively in privately owned U.S.-flag commercial vessels if such vessels are available at rates that are fair and reasonable for U.S.-flag commercial vessels.

(c) The 50-percent requirement does not preclude use of privately owned U.S.-flag commercial vessels for

transportation of up to 100 percent of the cargo subject to the Cargo Preference Act of 1954.

47.504 Exceptions.

The policy and procedures in this subpart do not apply to the following:

(a) Shipments aboard vessels as required or authorized by law or treaty.

(b) Ocean transportation between foreign countries of supplies purchased with foreign currencies made available, or derived from funds that are made available, under the Foreign Assistance Act of 1961 (22 U.S.C. 2353).

(c) Shipments of classified supplies when the classification prohibits the use of non-Government vessels.

(d) Subcontracts for the acquisition of commercial products, including commercial components, or commercial services (see part 12). This exception does not apply to—

(1) Grants-in-aid shipments, such as agricultural and food-aid shipments;

(2) Shipments covered under 46 U.S.C. 55305, such as those generated by Export-Import Bank loans or guarantees;

(3) Subcontracts under—

(i) Government contracts or agreements for ocean transportation services; or

(ii) Construction contracts; or

(4) Shipments of commercial products that are—

(i) Items the contractor is reselling or distributing to the Government without adding value (see part 12). Generally, the contractor does not add value to the items when it subcontracts items for f.o.b. destination shipment; or

(ii) Shipped in direct support of U.S. military—

(A) Contingency operations;

(B) Exercises; or

(C) Forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations.

47.505 Procedure.

If the contractor notifies the contracting officer that a privately owned U.S.-flag commercial vessel is not available, then seek assistance from the transportation activity.

47.506 Contract clauses.

(a)(1) Insert the clause at 52.247–64, Preference for Privately Owned U.S.-Flag Commercial Vessels, in solicitations and contracts, including those for commercial products and commercial services, that may involve ocean transportation of supplies subject to the Cargo Preference Act of 1954. (For application of the Cargo Preference Act of 1954, see 47.502(a), 47.503(a), and 47.504.)

(2) If a statute or agency procedures require transportation of the supplies furnished under the contracts exclusively in privately owned U.S.-flag commercial vessels (see 47.502(b) and 47.503(b)), use the clause with its Alternate I.

(3) Except for contracts or agreements for ocean transportation services or construction contracts, use the clause with its Alternate II if any of the supplies to be transported are commercial products that are shipped in direct support of U.S. military—

(i) Contingency operations;

(ii) Exercises; or

(iii) Forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations.

(b) The contracting officer may, under agency procedures, insert in solicitations and contracts additional clauses concerning the vessels used.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 2. The authority citation for 48 CFR Part 52 continues to read as follows:

Authority: 41 U.S.C. 1121(b); 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

■ 3. Revise sections 52.209–1 through 52.209–7 to read as follows:

52.209–1 Qualification Requirements.

As prescribed in 9.206–2, insert the following clause:

Qualification Requirements (DATE)

(a) *Definition.* As used in this clause—

Qualification requirement means a Government requirement for testing or other quality assurance demonstration that must be completed before award.

(b) One or more qualification requirements apply to the supplies or services covered by this contract. For those supplies or services requiring qualification, whether the covered product or service is an end item under this contract or simply a component of an end item, the product, manufacturer, or source must have demonstrated that it meets the standards prescribed for qualification before award of this contract. The product, manufacturer, or source must be qualified at the time of award whether or not the name of the product, manufacturer, or source is actually included on a qualified products list, qualified manufacturers list, or qualified bidders list. Offerors should contact the agency activity designated below to obtain all requirements that they or their products or services, or their subcontractors or their products or services, must satisfy to become qualified and to arrange for an opportunity to demonstrate their abilities to meet the standards specified for qualification.

(Name) _____

(Address) _____

(c) If an offeror, manufacturer, source, product or service covered by a qualification requirement has already met the standards specified, the relevant information noted below should be provided, to the extent known.

Offeror's Name _____
 Manufacturer's Name _____
 Source's Name _____
 Item Name _____
 Service Identification _____
 Test Number _____

(d) Even though a product or service subject to a qualification requirement is not itself an end item under this contract, the product, manufacturer, or source must nevertheless be qualified at the time of award of this contract. This is necessary whether the Contractor or a subcontractor will ultimately provide the product or service in question. If, after award, the Contracting Officer discovers that an applicable qualification requirement was not in fact met at the time of award, the Contracting Officer may either terminate this contract for default or allow performance to continue if adequate consideration is offered and the action is determined to be otherwise in the Government's best interests.

(e) If an offeror, manufacturer, source, product or service has met the qualification requirement but is not yet on a qualified products list, qualified manufacturers list, or qualified bidders list, the offeror must submit evidence of qualification prior to award of this contract. Unless determined to be in the Government's interest, the Government will not delay contract award to permit an offeror to submit evidence of qualification.

(f) Any change in location or ownership of the plant where a previously qualified product or service was manufactured or performed requires reevaluation of the qualification. Similarly, any change in location or ownership of a previously qualified manufacturer or source requires reevaluation of the qualification. The reevaluation must be accomplished before the date of award.

(End of clause)

52.209-2 Prohibition on Contracting With Inverted Domestic Corporations—Representation.

As prescribed in 9.106-6(a), insert the following provision:

Prohibition on Contracting With Inverted Domestic Corporations—Representation (DATE)

(a) *Definitions.* As used in this clause—
Inverted domestic corporation means a foreign incorporated entity that meets the definition of an inverted domestic corporation under 6 U.S.C. 395(b), applied in accordance with the rules and definitions of 6 U.S.C. 395(c).

Subsidiary means an entity in which more than 50 percent of the entity is owned—

(1) Directly by a parent corporation; or
 (2) Through another subsidiary of a parent corporation.

(b) *Prohibition.* Government agencies are not permitted to use appropriated (or

otherwise made available) funds for contracts with either an inverted domestic corporation, or a subsidiary of an inverted domestic corporation, unless the exception at 9.106-3(b) applies or the requirement is waived in accordance with 9.106-5.

(c) *Representation.* The Offeror represents that—

(1) It ☐ is, ☐ is not an inverted domestic corporation; and

(2) It ☐ is, ☐ is not a subsidiary of an inverted domestic corporation.

(End of provision)

52.209-3 First Article Approval—Contractor Testing.

As prescribed in 9.308-1(a), insert the following clause:

First Article Approval—Contractor Testing (DATE)

[Contracting Officer inserts details]

(a) The Contractor must test _____ unit(s) of Lot/Item _____ as specified in this contract. At least _____ calendar days before the beginning of first article tests, the Contractor must notify the Contracting Officer, in writing, of the time and location of the testing so that the Government may witness the tests.

(b) The Contractor must submit the first article test report within _____ calendar days from the date of this contract to

[Contracting Officer to insert address of the Government activity to receive the report] marked "FIRST ARTICLE TEST REPORT: Contract No. _____, Lot/Item No. _____." Within _____ calendar days after the Government receives the test report, the Contracting Officer will notify the Contractor, in writing, of the conditional approval, approval, or disapproval of the first article. The notice of conditional approval or approval does not relieve the Contractor from complying with all requirements of the specifications and all other terms and conditions of this contract. A notice of conditional approval will state any further action required of the Contractor. A notice of disapproval will cite reasons for the disapproval.

(c) If the first article is disapproved, the Contractor, upon Government request, must repeat any or all first article tests. After each request for additional tests, the Contractor must make any necessary changes, modifications, or repairs to the first article or select another first article for testing. The Contractor must bear all costs related to these, including any and all costs for additional tests following a disapproval. The Contractor must then conduct the tests and deliver another report to the Government under the terms and conditions and within the time specified by the Government. The Government will take action on this report within the time specified in paragraph (b) above. The Government reserves the right to require an equitable adjustment of the contract price for any extension of the delivery schedule, or for any additional costs to the Government related to these tests.

(d) If the Contractor fails to deliver any first article report on time, or the Contracting Officer disapproves any first article, the

Contractor is deemed to have failed to make delivery within the meaning of the Default clause of this contract.

(e) Unless otherwise provided in the contract, and if the approved first article is not consumed or destroyed in testing, the Contractor may deliver the approved first article as part of the contract quantity if it meets all contract requirements for acceptance.

(f) If the Government does not act within the time specified in paragraph (b) or (c) above, the Contracting Officer will, upon timely written request from the Contractor, equitably adjust under the Changes clause of this contract the delivery or performance dates and/or the contract price, and any other contractual term affected by the delay.

(g) Before first article approval, the acquisition of materials or components for, or the commencement of production of, the balance of the contract quantity is at the sole risk of the Contractor. Before first article approval, the costs thereof are not allocable to this contract for (1) progress payments, or (2) termination settlements if the contract is terminated for the convenience of the Government.

(h) The Government may waive the requirement for first article approval test where the Offeror/Contractor delivered identical or similar supplies, and the Government accepted them. The offeror/contractor may request a waiver.

(End of clause)

Alternate I (DATE). As prescribed in 9.308-1(b), add the following paragraph (i) to the basic clause:

(i) The Contractor must produce both the first article and the production quantity at the same facility.

Alternate II (DATE). As prescribed in 9.308-1(c), substitute the following paragraph (g) for paragraph (g) of the basic clause:

(g) Before first article approval, the Contracting Officer may, by written authorization, authorize the Contractor to acquire specific materials or components or to commence production to the extent essential to meet the delivery schedules. Until the Government grants first article approval, only costs for the first article and costs incurred under this authorization are allocable to this contract for progress payments, or termination settlements if the contract is terminated for the convenience of the Government. If first article tests reveal deviations from contract requirements, the Contractor must, at the location designated by the Government, make the required changes or replace all items produced under this contract at no change in the contract price.

52.209-4 First Article Approval—Government Testing.

As prescribed in 9.308-2(a), insert the following clause:

First Article Approval—Government Testing (DATE)

[Contracting Officer to insert details]

(a) The Contractor must deliver _____ units(s) of Lot/Item within _____ calendar days from the date of this contract to the Government at _____ [insert name and address of the testing facility] for first article tests. The shipping documentation must contain this contract number and the Lot/Item identification. This contract elsewhere specifies the characteristics that the first article must meet and the testing.

(b) Within _____ calendar days after the Government receives the first article, the Contracting Officer will notify the Contractor, in writing, of the conditional approval, approval, or disapproval of the first article. The notice of conditional approval or approval does not relieve the Contractor from complying with all requirements of the specifications and all other terms and conditions of this contract. A notice of conditional approval will state any further action required of the Contractor. A notice of disapproval will cite reasons for the disapproval.

(c) If the Government disapproves the first article, the Contractor, upon Government request, must submit an additional first article for testing. After each request, the Contractor must make any necessary changes, modifications, or repairs to the first article or select another first article for testing. The Contractor must bear all costs related to these, including any and all costs for additional tests following a disapproval. The Contractor must furnish any additional first article to the Government under the terms and conditions and within the time the Government specifies. The Government will act on this first article within the time limit specified in paragraph (b) above. The Government reserves the right to require an equitable adjustment of the contract price for any extension of the delivery schedule or for any additional costs to the Government related to these tests.

(d) If the Contractor fails to deliver any first article on time, or the Contracting Officer disapproves any first article, the Contractor will have failed to make delivery within the meaning of the Default clause of this contract.

(e) Unless otherwise provided in the contract, the Contractor—

(1) May deliver the approved first article as a part of the contract quantity, provided it meets all contract requirements for acceptance and was not consumed or destroyed in testing; and

(2) Must remove and dispose of any first article from the Government test facility at the Contractor's expense.

(f) If the Government does not act within the time specified in paragraph (b) or (c) above, the Contracting Officer will, upon timely written request from the Contractor, equitably adjust under the Changes clause of this contract the delivery or performance dates, the contract price, or both, and any other contractual term affected by the delay.

(g) The Contractor is responsible for providing operating and maintenance

instructions, spare parts support, and repair of the first article during any first article test.

(h) Before first article approval, the acquisition of materials or components for, or the commencement of production of, the balance of the contract quantity is at the sole risk of the Contractor. Before first article approval, the costs thereof are not allocable to this contract for (1) progress payments or (2) termination settlements if the contract is terminated for the convenience of the Government.

(i) The Government may waive the requirement for first article approval test where the Offeror/Contractor has delivered identical or similar supplies, and the Government accepted them. The Offeror/Contractor may request a waiver.

(End of clause)

Alternate I (DATE). As prescribed in 9.308–2(b), add the following paragraph (j) to the basic clause:

(j) The Contractor must produce both the first article and the production quantity at the same facility.

Alternate II (DATE). As prescribed in 9.308–2(c), substitute the following paragraph (h) for paragraph (h) of the basic clause:

(h) Before first article approval, the Contracting Officer may, by written authorization, authorize the Contractor to acquire specific materials or components or to commence production to the extent essential to meet the delivery schedules. Until first article approval is granted, only costs for the first article and costs incurred under this authorization are allocable to this contract for progress payments or termination settlements if the contract is terminated for the convenience of the Government. If first article tests reveal deviations from contract requirements, the Contractor must, at the location designated by the Government, make the required changes or replace all items produced under this contract at no change in the contract price.

52.209–5 Certification Regarding Responsibility Matters.

As prescribed in 9.104–6(a), insert the following provision:

Certification Regarding Responsibility Matters (DATE)

(a)(1) The Offeror certifies, to the best of its knowledge and belief, that—

(i) The Offeror and/or any of its Principals—

(A) Are () are not () presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal agency;

(B) Have () have not (), within a three-year period preceding this offer, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public

(Federal, State, or local) contract or subcontract; violation of Federal or State antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property (if offeror checks “have”, the offeror must also see 52.209–7, if included in this solicitation);

(C) Are () are not () presently indicted for, or otherwise criminally or civilly charged by a governmental entity with, commission of any of the offenses enumerated in paragraph (a)(1)(i)(B) of this provision; and

(D) Have (), have not (), within a three-year period preceding this offer, been notified of any delinquent Federal taxes in an amount that exceeds the threshold at 9.104–4(a)(2) for which the liability remains unsatisfied. Federal taxes are considered delinquent if both of the following criteria apply:

(1) *The tax liability is finally determined.*

The liability is finally determined if it has been assessed. A liability is not finally determined if a pending administrative or judicial challenge remains. In the case of a judicial challenge to the liability, the liability is not finally determined until all judicial appeal rights have been exhausted.

(2) *The taxpayer is delinquent in making payment.* A taxpayer is delinquent if the taxpayer has failed to pay the tax liability when full payment was due and required. A taxpayer is not delinquent in cases where enforced collection action is precluded.

(ii) The Offeror has () has not (), within a 3-year period preceding this offer, had one or more contracts terminated for default by any Federal agency.

(2) Principal, for the purposes of this certification, means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a division or business segment; and similar positions).

(b) The Offeror must provide immediate written notice to the Contracting Officer if, at any time prior to contract award, the Offeror learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

(c) A certification that any of the items in paragraph (a) of this provision exists will not necessarily result in withholding of an award under this solicitation. However, the Government will consider the certification in connection with a determination of the Offeror's responsibility. Failure of the Offeror to furnish a certification or provide such additional information as requested by the Contracting Officer may render the Offeror nonresponsible.

(d) This provision does not require establishment of a system of records in order to render, in good faith, the certification required by paragraph (a). The knowledge and information of an Offeror is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

(e) The certification in paragraph (a) of this provision is a material representation of fact upon which reliance was placed when making award. If the Government later

determines that the Offeror knowingly rendered an erroneous certification, in addition to other remedies available to the Government, the Contracting Officer may terminate the contract resulting from this solicitation for default.

(End of provision)

52.209–6 Protecting the Government's Interest When Subcontracting with Contractors Debarred, Suspended, Proposed for Debarment, or Voluntarily Excluded.

As prescribed in 9.408(a), insert the following clause:

Protecting the Government's Interest When Subcontracting with Contractors Debarred, Suspended, Proposed for Debarment, or Voluntarily Excluded (DATE)

(a) *Restriction.* The Government suspends or debars Contractors to protect the Government's interests. Other than a subcontract for a commercially available off-the-shelf (COTS) item, the Contractor must not enter into any subcontract, in excess of the threshold specified in FAR 9.405–2(b) on the date of subcontract award, with a Contractor that is debarred, suspended, or proposed for debarment by any executive agency unless a compelling reason exists to do so.

(b) *Requirement.* The Contractor must require each proposed subcontractor whose subcontract will exceed the threshold specified in FAR 9.405–2(b) on the date of subcontract award, other than a subcontractor providing a commercially available off-the-shelf item, to disclose to the Contractor, in writing, whether as of the time of award of the subcontract, the subcontractor, or its principals, is or is not debarred, suspended, proposed for debarment, or voluntarily excluded by the Federal Government.

(c) *Notification.* A corporate officer or a designee of the Contractor must notify the Contracting Officer, in writing, before entering into a subcontract with a party (other than a subcontractor providing a commercially available off-the-shelf item) that is debarred, suspended, proposed for debarment, or voluntarily excluded (see FAR 9.404 for information on the System for Award Management (SAM) Exclusions). The notice must include the following:

- (1) The name of the subcontractor.
 - (2) The Contractor's knowledge of the reasons for the subcontractor being listed with an exclusion in SAM.
 - (3) The compelling reason(s) for doing business with the subcontractor notwithstanding its being listed with an exclusion in SAM.
 - (4) The systems and procedures the Contractor has established to ensure that it is fully protecting the Government's interests when dealing with such subcontractor in view of the specific basis for the party's debarment, suspension, proposed debarment, or voluntary exclusion.
- (d) *Subcontracts.* The Contractor must include the substance of this clause, including this paragraph (e), in subcontracts

under this contract, including those for commercial products (other than COTS items) and commercial services, if the value of the subcontract exceeds the threshold specified in FAR 9.408(a) on the date of subcontract award.

(End of clause)

Alternate I (DATE). As prescribed in 9.408(b), substitute the following paragraph (e) in place of paragraph (e) of the basic clause:

(d) *Subcontracts.* The Contractor must include the substance of this clause in first tier subcontracts under this contract, including those for commercial products (other than those for COTS items), if the value of the subcontract exceeds the threshold specified in FAR 9.408(a) on the date of subcontract award.

52.209–7 Information Regarding Responsibility Matters.

As prescribed at 9.104–6(b), insert the following provision:

Information Regarding Responsibility Matters (DATE)

(a) *Definitions.* As used in this provision—
Administrative proceeding means a non-judicial process that is adjudicatory in nature in order to make a determination of fault or liability (e.g., Securities and Exchange Commission Administrative Proceedings, Civilian Board of Contract Appeals Proceedings, and Armed Services Board of Contract Appeals Proceedings). This includes administrative proceedings at the Federal and State level but only in connection with performance of a Federal contract or grant. It does not include agency actions such as contract audits, site visits, corrective plans, or inspection of deliverables.

Federal contracts and grants with total value greater than \$10,000,000 means—

- (1) The total value of all current, active contracts and grants, including all priced options; and
- (2) The total value of all current, active orders including all priced options under indefinite-delivery, indefinite-quantity, 8(a), or requirements contracts (including task and delivery and multiple-award Schedules).

Principal means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a division or business segment; and similar positions).

(b) The Offeror [] has [] does not have current active Federal contracts and grants with total value greater than \$10,000,000.

(c) If the Offeror checked "has" in paragraph (b) of this provision, the Offeror represents, by submission of this offer, that the information it has entered in the integrity records in CPARS.gov is current, accurate, and complete as of the date of submission of this offer with regard to the following information:

- (1) Whether the Offeror, and/or any of its principals has or has not, within the last five years, in connection with the award to or

performance by the Offeror of a Federal contract or grant, been the subject of a proceeding, at the Federal or State level that resulted in any of the following dispositions:

- (i) In a criminal proceeding, a conviction.
- (ii) In a civil proceeding, a finding of fault and liability that results in the payment of a monetary fine, penalty, reimbursement, restitution, or damages of \$5,000 or more.
- (iii) In an administrative proceeding, a finding of fault and liability that results in—
 - (A) The payment of a monetary fine or penalty of \$5,000 or more; or
 - (B) The payment of a reimbursement, restitution, or damages in excess of \$100,000.
- (iv) In a criminal, civil, or administrative proceeding, a disposition of the matter by consent or compromise with an acknowledgment of fault by the Contractor if the proceeding could have led to any of the outcomes specified in paragraphs (c)(1)(i), (c)(1)(ii), or (c)(1)(iii) of this provision.

(2) If the Offeror has been involved in the last five years in any of the occurrences listed in (c)(1) of this provision, whether the Offeror has provided the requested information with regard to each occurrence.

(d) The Offeror must post the information in paragraphs (c)(1)(i) through (c)(1)(iv) of this provision in the integrity records in CPARS.gov.

(End of provision)

■ 4. Revise section 52.209–9 through 52.209–14 to read as follows:

52.209–9 Updates of Publicly Available Information Regarding Responsibility Matters.

As prescribed at 9.104–6(c), insert the following clause:

Updates of Publicly Available Information Regarding Responsibility Matters (DATE)

(a) The Contractor must update the information in the integrity records in the Contractor Performance Assessment Reporting System (CPARS) at CPARS.gov on a semi-annual basis, throughout the life of the contract.

(b) Information posted in the integrity records in CPARS.gov, except past performance reviews, will be publicly available (section 3010 of Pub. L. 111–212)(41 U.S.C. 2313). The integrity records consist of two segments—

(1) The non-public segment, into which Government officials and the Contractor post information, which can only be viewed by—

- (i) Government personnel and authorized users performing business on behalf of the Government; or
- (ii) The Contractor, when viewing data on itself; and

(2) The publicly-available segment in SAM.gov, to which data in the non-public segment of the integrity records in CPARS.gov is automatically transferred after a waiting period of 14 calendar days, except for—

- (i) Past performance reviews required by part 42; or
- (ii) Information that is withdrawn during the 14-calendar-day waiting period by the

Government official who posted it in accordance with paragraph (c)(1) of this clause.

(c) The Contractor will receive notification when the Government posts new information to the Contractor's record.

(1) If the Contractor asserts in writing within 7 calendar days, to the Government official who posted the information, that some of the information posted to the non-public segment of the integrity records in *CPARS.gov* is covered by a disclosure exemption under the Freedom of Information Act, the Government official who posted the information must within 7 calendar days remove the posting from the integrity records and resolve the issue in accordance with agency Freedom of Information procedures, prior to reposting the releasable information. The Contractor must cite FAR 52.209-9 and request removal within 7 calendar days of the posting to the integrity records in *CPARS.gov*.

(2) The Contractor will also have an opportunity to post comments regarding information that the Government has posted. The integrity records in *CPARS.gov* will retain the comments as long as the associated information is retained, *i.e.*, for a total period of 6 years. Contractor comments will remain a part of the record unless the Contractor revises them.

(End of clause)

52.209-10 Prohibition on Contracting with Inverted Domestic Corporations.

As prescribed in 9.106-6(b), insert the following clause:

Prohibition on Contracting With Inverted Domestic Corporations (DATE)

(a) *Definitions.* As used in this clause—
Inverted domestic corporation means a foreign incorporated entity that meets the definition of an inverted domestic corporation under 6 U.S.C. 395(b), applied in accordance with the rules and definitions of 6 U.S.C. 395(c).

Subsidiary means an entity in which more than 50 percent of the entity is owned—

- (1) Directly by a parent corporation; or
- (2) Through another subsidiary of a parent corporation.

(b) If the contractor reorganizes as an inverted domestic corporation or becomes a subsidiary of an inverted domestic corporation at any time during the period of performance of this contract, applicable law may prohibit the Government from paying for Contractor activities performed after the date when it becomes an inverted domestic corporation or subsidiary. The Government may seek any available remedies in the event the Contractor fails to perform in accordance with the terms and conditions of the contract as a result of Government action under this clause.

(c) Exceptions to this prohibition are located at 9.106-3.

(d) In the event the Contractor becomes either an inverted domestic corporation, or a subsidiary of an inverted domestic corporation during contract performance, the Contractor must give written notice to the Contracting Officer within 5 business days from the date of the inversion event.

(End of clause)

52.209-11 Representation by Corporations Regarding Delinquent Tax Liability or a Felony Conviction Under any Federal Law.

As prescribed in 9.104-6(d), insert the following provision:

Representation by Corporations Regarding Delinquent Tax Liability or a Felony Conviction Under any Federal Law (DATE)

(a) The Government will not enter into a contract with any corporation that—

(1) Has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability, where the awarding agency is aware of the unpaid tax liability, unless an agency has considered suspension or debarment of the corporation and made a determination that suspension or debarment is not necessary to protect the interests of the Government; or

(2) Was convicted of a felony criminal violation under any Federal law within the preceding 24 months, where the awarding agency is aware of the conviction, unless an agency has considered suspension or debarment of the corporation and made a determination that this action is not necessary to protect the interests of the Government.

(b) The Offeror represents that—

(1) It is ☐ is not ☐ a corporation that has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability; and

(2) It is ☐ is not ☐ a corporation that was convicted of a felony criminal violation under a Federal law within the preceding 24 months.

(End of provision)

52.209-12 Certification Regarding Tax Matters.

As prescribed in 9.104-6(e), insert the following provision:

Certification Regarding Tax Matters (DATE)

(a) This provision implements section 523 of Division B of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235), and similar provisions, if contained in subsequent appropriations acts.

(b) If the Offeror is proposing a total contract price that will exceed \$7 million (including options), the Offeror must certify that, to the best of its knowledge and belief, it—

(1) Has ☐ filed all Federal tax returns required during the three years preceding the certification;

(2) Has not ☐ been convicted of a criminal offense under the Internal Revenue Code of 1986; and

(3) Has not ☐ more than 90 days prior to certification, been notified of any unpaid Federal tax assessment for which the liability remains unsatisfied, unless the assessment is the subject of an installment agreement or offer in compromise that has been approved by the Internal Revenue Service and is not in default, or the assessment is the subject of a non-frivolous administrative or judicial proceeding.

(End of provision)

52.209-13 Violation of Arms Control Treaties or Agreements—Certification.

As prescribed in 9.107-5, insert the following provision:

Violation of Arms Control Treaties or Agreements—Certification (DATE)

(a) This provision does not apply to acquisitions at or below the simplified acquisition threshold or to acquisitions of commercial products and commercial services.

(b) *Certification.* [Offeror must check either (1) or (2).]

(1) The Offeror certifies that—

(i) It does not engage and has not engaged in any activity that contributed to or was a significant factor in the President's or Secretary of State's determination that a foreign country is in violation of its obligations undertaken in any arms control, nonproliferation, or disarmament agreement to which the United States is a party, or is not adhering to its arms control, nonproliferation, or disarmament commitments in which the United States is a participating state. The determinations are described in the most recent unclassified annual report provided to Congress pursuant to section 403 of the Arms Control and Disarmament Act (22 U.S.C. 2593a). The report is available at <https://www.state.gov/adherence-to-and-compliance-with-arms-control-nonproliferation-and-disarmament-agreements-and-commitments/>; and

(ii) No entity owned or controlled by the Offeror has engaged in any activity that contributed to or was a significant factor in the President's or Secretary of State's determination that a foreign country is in violation of its obligations undertaken in any arms control, nonproliferation, or disarmament agreement to which the United States is a party, or is not adhering to its arms control, nonproliferation, or disarmament commitments in which the United States is a participating state. The determinations are described in the most recent unclassified annual report provided to Congress pursuant to section 403 of the Arms Control and Disarmament Act (22 U.S.C. 2593a). The report is available at <https://www.state.gov/adherence-to-and-compliance-with-arms-control-nonproliferation-and-disarmament-agreements-and-commitments/>; or

(2) The Offeror is providing separate information with its offer in accordance with paragraph (d)(2) of this provision.

(c) *Procedures for reviewing the annual unclassified report (see paragraph (b)(1) of this provision).* For clarity, references to the report in this section refer to the entirety of the annual unclassified report, including any

separate reports that are incorporated by reference into the annual unclassified report.

(1) Check the table of contents of the annual unclassified report and the country section headings of the reports incorporated by reference to identify the foreign countries listed there. Determine whether the Offeror or any person owned or controlled by the Offeror may have engaged in any activity related to one or more of such foreign countries.

(2) If such activity might have occurred, review all findings in the report associated with those foreign countries to determine whether or not each such foreign country was determined to be in violation of its obligations undertaken in an arms control, nonproliferation, or disarmament agreement to which the United States is a party, or to be not adhering to its arms control, nonproliferation, or disarmament commitments in which the United States is a participating state. For clarity, in the annual report an explicit certification of non-compliance is equivalent to a determination of violation. However, the following statements in the annual report are not equivalent to a determination of violation:

- (i) An inability to certify compliance.
- (ii) An inability to conclude compliance.
- (iii) A statement about compliance concerns.

(3) If so, determine whether the Offeror or any person owned or controlled by the Offeror has engaged in any activity that contributed to or is a significant factor in the determination in the report that one or more of these foreign countries is in violation of its obligations undertaken in an arms control, nonproliferation, or disarmament agreement to which the United States is a party, or is not adhering to its arms control, nonproliferation, or disarmament commitments in which the United States is a participating state. Review the narrative for any such findings reflecting a determination of violation or non-adherence related to those foreign countries in the report, including the finding itself, and to the extent necessary, the conduct giving rise to the compliance or adherence concerns, the analysis of compliance or adherence concerns, and efforts to resolve compliance or adherence concerns.

(4) The Offeror may submit any questions regarding this report by email to NDAA1290Cert@state.gov. To the extent feasible, the Department of State will respond to such email inquiries within 3 business days.

(d) Do not submit an offer unless—

(1) A certification is provided in paragraph (b)(1) of this provision and submitted with the offer; or

(2) In accordance with paragraph (b)(2) of this provision, the Offeror provides with its offer information that the President of the United States has—

(i) Waived application under U.S.C. 2593e(d) or (e); or

(ii) Determined under 22 U.S.C. 2593e(g)(2) that the entity has ceased all activities for which measures were imposed under 22 U.S.C. 2593e(b).

(e) *Remedies*. The certification in paragraph (b)(1) of this provision is a

material representation of fact upon which reliance was placed when making award. If the Government later determines that the Offeror knowingly submitted a false certification, in addition to other remedies available to the Government, such as suspension or debarment, the Contracting Officer may terminate any contract resulting from the false certification.

(End of provision)

52.209–14 Reserve Officer Training Corps and Military Recruiting on Campus.

As prescribed in 9.108–5, insert the following clause:

Reserve Officer Training Corps and Military Recruiting on Campus (DATE)

(a) *Definitions*. As used in this clause—
Covered agency means—

- (1) The Department of Defense;
- (2) Any department or agency for which regular appropriations are made in a Department of Labor, Health and Human Services; and Education, and Related Agencies Appropriations Act;
- (3) The Department of Homeland Security;
- (4) The National Nuclear Security Administration of the Department of Energy;
- (5) The Department of Transportation; or
- (6) The Central Intelligence Agency.

Institution of higher education means an institution that meets the requirements of 20 U.S.C. 1001 and includes all sub-elements of such an institution.

(b) *Limitation on contract award*. Except as provided in paragraph (c) of this clause, an institution of higher education is ineligible for contract award if the Secretary of Defense determines that the institution has a policy or practice (regardless of when implemented) that prohibits or in effect prevents—

(1) The Secretary of a military department from maintaining, establishing, or operating a unit of the Senior Reserve Officer Training Corps (ROTC) at that institution (or any sub-element of that institution);

(2) A student at that institution (or any sub-element of that institution) from enrolling in a unit of the Senior ROTC at another institution of higher education;

(3) The Secretary of a military department or the Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting; or

(4) Military recruiters from accessing, for purposes of military recruiting, the following information pertaining to students (who are 17 years of age or older) enrolled at that institution:

- (i) Name, address, and telephone listings.
- (ii) Date and place of birth, educational level, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

(c) *Exception*. The limitation in paragraph (b) of this clause does not apply to an institution of higher education if the Secretary of Defense determines that—

(1) The institution has ceased the policy or practice described in paragraph (b) of this clause; or

(2) The institution has a long-standing policy of pacifism based on historical religious affiliation.

(d) Notwithstanding any other clause of this contract, if the Secretary of Defense determines that the institution has violated the contract in paragraph (b) of this clause—

(1) The institution will be ineligible for further payments under this and any other contracts with this agency and any other covered agency, except for contracts at or below the simplified acquisition threshold or contracts for the acquisition of commercial products and commercial services; and

(2) The Government will terminate this contract for default for the institution's material failure to comply with the terms and conditions of award.

(End of clause)

■ 5. Revise sections 52.227–1 through 52.227–6 to read as follows:

52.227–1 Authorization and Consent.

As prescribed in 27.201–2(a)(1), insert the following clause:

Authorization and Consent (DATE)

(a) *Authorization and consent*. The Government authorizes and consents to all use and manufacture, in performing this contract or any subcontract at any tier, of any invention described in and covered by a United States patent—

(1) Embodied in the structure or composition of any article the delivery of which is accepted by the Government under this contract; or

(2) Used in machinery, tools, or methods whose use necessarily results from compliance by the Contractor or a subcontractor with specifications or written provisions forming a part of this contract or compliance with specific written instructions given by the Contracting Officer directing the manner of performance. The entire liability to the Government for infringement of a United States patent is determined solely by the provisions of the indemnity clause, if any, included in this contract or any subcontract hereunder (including any lower-tier subcontract), and the Government assumes liability for all other infringement to the extent of the authorization and consent hereinabove granted.

(b) *Subcontracts*. The Contractor must include the substance of this clause, including this paragraph (b), in subcontracts, including those for commercial products and commercial services, that are expected to exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation (FAR) 2.101 on the date of subcontract award. However, omission of this clause from any subcontract, including those at or below the simplified acquisition threshold, as defined in FAR 2.101 on the date of subcontract award, does not affect this authorization and consent.

(End of clause)

Alternate 1 (DATE). As prescribed in 27.201–2(a)(2), substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) *Authorization and consent.* The Government authorizes and consents to all use and manufacture of any invention described in and covered by a United States patent in the performance of this contract or any subcontract at any tier.

Alternate II (DATE). As prescribed in 27.201–2(a)(3), substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) *Authorization and consent.* The Government authorizes and consents to all use and manufacture in the performance of any order at any tier or subcontract at any tier placed under this contract for communication services and facilities for which rates, charges, and tariffs are not established by a government regulatory body, of any invention described in and covered by a United States patent (1) embodied in the structure or composition of any article the delivery of which is accepted by the Government under this contract or (2) used in machinery, tools, or methods whose use necessarily results from compliance by the contractor or a subcontractor with specifications or written provisions forming a part of this contract or with specific written instructions given by the Contracting Officer directing the manner of performance.

52.227–2 Notice and Assistance Regarding Patent and Copyright Infringement.

As prescribed in 27.201–2(b), insert the following clause:

Notice And Assistance Regarding Patent and Copyright Infringement (DATE)

(a) *Notice.* The Contractor must report to the Contracting Officer, promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of this contract of which the Contractor has knowledge.

(b) *Assistance.* In the event of any claim or suit against the Government on account of any alleged patent or copyright infringement arising out of the performance of this contract or out of the use of any supplies furnished or work or services performed under this contract, the Contractor must furnish to the Government, when requested by the Contracting Officer, all evidence and information in the Contractor's possession pertaining to such claim or suit. The Contractor must provide such evidence and information at the expense of the Government except where the Contractor has agreed to indemnify the Government.

(c) *Subcontracts.* The Contractor must include the substance of this clause, including this paragraph (c), in subcontracts, including those for commercial products and commercial services, that are expected to exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation

(FAR) 2.101 on the date of subcontract award.

(End of clause)

52.227–3 Patent Indemnity.

As prescribed in 27.201–2(c)(1), insert the following clause:

Patent Indemnity (DATE)

(a) The Contractor must indemnify the Government and its officers, agents, and employees against liability, including costs, for infringement of any United States patent (except a patent issued upon an application that is now or may hereafter be withheld from issue pursuant to a Secrecy Order under 35 U.S.C. 181) arising out of the manufacture or delivery of supplies, the performance of services, or the construction, alteration, modification, or repair of real property (hereinafter referred to as *construction work*) under this contract, or out of the use or disposal by or for the account of the Government of such supplies or construction work.

(b) This indemnity does not apply unless the Government informed the Contractor as soon as practicable of the suit or action alleging such infringement and the Contractor has received such opportunity in accordance with applicable laws, rules, or regulations to participate in its defense. Further, this indemnity does not apply to—

(1) An infringement resulting from compliance with specific written instructions of the Contracting Officer directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of performance of the contract the Contractor does not normally use,

(2) An infringement resulting from addition to or change in supplies or components furnished or construction work performed that was made subsequent to delivery or performance; or

(3) A claimed infringement that is unreasonably settled without the consent of the Contractor, unless required by final decree of a court of competent jurisdiction.

(End of clause)

Alternate I (DATE). As prescribed in 27.201–2(c)(2), add the following paragraph (c) to the basic clause:

(c) This patent indemnification does not apply to the following items:

[Contracting Officer list and/or identify the items to be excluded from this indemnity.]

Alternate II (DATE). As prescribed in 27.201–2(c)(2), add the following paragraph (c) to the basic clause:

(c) This patent indemnification covers the following items: _____

[Contracting officer to list or identify the items to be included under this indemnity.]

Alternate III (DATE). As prescribed in 27.201–2(c)(3), add the following paragraph to the basic clause:

As to subcontracts at any tier for communication service, this clause

applies only to individual communication service authorizations over the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, issued under this contract and covering those communications services and facilities—

(1) That the Contractor has sold or offered for sale to the public,

(2) That can be provided over commercially available equipment; or

(3) That involve relatively minor modifications.

52.227–4 Patent Indemnity—Construction Contracts.

As prescribed in 27.201–2(d)(1), insert the following clause:

Patent Indemnity—Construction Contracts (DATE)

Except as otherwise provided, the Contractor must indemnify the Government and its officers, agents, and employees against liability, including costs and expenses, for infringement of any United States patent (except a patent issued upon an application that is now or may hereafter be withheld from issue pursuant to a Secrecy Order under 35 U.S.C. 181) arising out of performing this contract or out of the use or disposal by or for the account of the Government of supplies furnished or work performed under this contract.

(End of clause)

Alternate I (DATE). As prescribed in 27.201–2(d)(2), designate the first paragraph of the basic clause as paragraph (a) and add the following paragraph (b) to the basic clause:

(b) This patent indemnification does not apply to the following items: _____

[Contracting Officer list the items to be excluded.]

52.227–5 Waiver of Indemnity.

As prescribed in 27.201–2(e), insert the following clause:

Waiver of Indemnity (Date)

Any provision or clause of this contract to the contrary notwithstanding, the Government hereby authorizes and consents to the use and manufacture, solely in performing this contract, of any invention covered by the United States patents identified below and waives indemnification by the Contractor with respect to such patents: _____

[Contracting Officer identify the patents by number or by other means if more appropriate.]

(End of clause)

52.227–6 Royalty Information.

As prescribed in 27.202–1(a)(1), insert the following provision:

Royalty Information (DATE)

(a) *Cost or charges for royalties.* When the response to this solicitation contains costs or charges for royalties totaling more than \$250, the Offeror must include the following information in the response relating to each separate item of royalty or license fee:

- (1) Name and address of licensor.
 - (2) Date of license agreement.
 - (3) Patent numbers, patent application serial numbers, or other basis on which the royalty is payable.
 - (4) Brief description, including any part or model numbers of each contract item or component on which the royalty is payable.
 - (5) Percentage or dollar rate of royalty per unit.
 - (6) Unit price of contract item.
 - (7) Number of units.
 - (8) Total dollar amount of royalties.
- (b) *Copies of current licenses.* In addition, if specifically requested by the Contracting Officer before execution of the contract, the Offeror must furnish a copy of the current license agreement and an identification of applicable claims of specific patents.

(End of provision)

Alternate I (DATE). As prescribed in 27.202–1(a)(2), substitute the following for the introductory portion of paragraph (a) of the basic provision:

When the response to this solicitation covers charges for special construction or special assembly that contain costs or charges for royalties totaling more than \$250, the Offeror must include the following information in the response relating to each separate item of royalty or license fee: _____

52.227–7 [Removed and Reserved]

■ 6. Remove and reserve section 52.227–7.

■ 7. Revise section 52.227–9 through 52.227–11 to read as follows:

52.227–9 Refund of Royalties.

As prescribed in 27.202–1(c), insert the following clause:

Refund Of Royalties (DATE)

(a) *Contract price.* The contract price includes certain amounts for royalties payable by the Contractor or subcontractors or both, which amounts have been reported to the Contracting Officer.

(b) *Explanation of term.* The term *royalties* as used in this clause refers to any costs or charges in the nature of royalties, license fees, patent or license amortization costs, or the like, for the use of or for rights in patents and patent applications in connection with performing this contract or any subcontract hereunder.

(c) *Statement of royalties paid.* The Contractor must furnish to the Contracting Officer, before final payment under this contract, a statement of royalties paid or required to be paid in connection with performing this contract and subcontracts hereunder together with the reasons.

(d) *Compensation.* The Government will compensate the contractor for royalties

reported under paragraph (c) of this clause, only to the extent that the contract price includes such royalties, and the Contracting Officer determines such royalties to be properly chargeable to the Government and allocable to the contract. To the extent that the contract price includes any royalties that are not in fact paid by the Contractor or are determined by the Contracting Officer not to be properly chargeable to the Government and allocable to the contract, the Government will reduce the contract price. The Contractor must repay or credit the Government as the Contracting Officer directs.

(e) *Final contract price.* If, at any time within 3 years after final payment under this contract, the Contractor for any reason is relieved in whole or in part from the payment of the royalties included in the final contract price as adjusted pursuant to paragraph (d) of this clause, the Contractor must promptly notify the Contracting Officer of that fact and must reimburse the Government in a corresponding amount.

(f) *Subcontracts.* The Contractor must include the substance of this clause, including this paragraph (f), in subcontracts, other than those for commercial products or commercial services, for which the amount of royalties reported during negotiation of the subcontract exceeds \$250.

(End of clause)

52.227–10 Filing of Patent Applications—Classified Subject Matter.

As prescribed at 27.203–2, insert the following clause:

Filing Of Patent Applications—Classified Subject Matter (DATE)

(a) *Patent application.* Before filing or causing to be filed a patent application in the United States disclosing any subject matter of this contract classified *Secret* or higher, the Contractor must, citing the 30-day provision below, transmit the proposed application to the Contracting Officer. The Government will determine whether, for reasons of national security, the application should be placed under an order of secrecy, sealed in accordance with the provision of 35 U.S.C. 181–188, or the issuance of a patent otherwise delayed under pertinent United States statutes or regulations. The Contractor must observe any instructions of the Contracting Officer regarding the manner of delivery of the patent application to the United States Patent Office, but the Contractor will not be denied the right to file the application. If the Contracting Officer has not given any such instructions within 30 days from the date of mailing or other transmittal of the proposed application, the Contractor may file the application.

(b) *Order of secrecy.* Before filing a patent application in the United States disclosing any subject matter of this contract classified *Confidential*, the Contractor must furnish to the Contracting Officer a copy of the application for Government determination whether, for reasons of national security, the application should be placed under an order of secrecy or the issuance of a patent should be otherwise delayed under pertinent United States statutes or regulations.

(c) *Classified subject matter.* Where the subject matter of this contract is classified for reasons of security, the Contractor must not file, or cause to be filed, in any country other than in the United States as provided in paragraphs (a) and (b) of this clause, an application or registration for a patent containing any of the subject matter of this contract without first obtaining written approval of the Contracting Officer.

(d) *Security regulations.* When filing any patent application within the scope of this clause, the Contractor must observe all applicable security regulations covering the transmission of classified subject matter and must promptly furnish to the Contracting Officer the serial number, filing date, and name of the country of any such application. When transmitting the application to the United States Patent Office, the Contractor must by separate letter identify by agency and number the contract or contracts that require security classification markings to be placed on the application.

(e) *Subcontracts.* The Contractor must include the substance of this clause, including this paragraph (e), in subcontracts, including those for commercial products or commercial services, that cover or are likely to cover classified subject matter.

(End of clause)

52.227–11 Patent Rights—Ownership by the Contractor.

As prescribed in 27.302(b)(1), insert the following clause:

Patent Rights—Ownership by The Contractor (DATE)

(a) *Definitions.* As used in this clause—
Invention means any invention or discovery that is or may be patentable or otherwise protectable under title 35 of the U.S. Code, or any variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*)

Made means—

(1) When used in relation to any invention other than a plant variety, the conception or first actual reduction to practice of the invention; or

(2) When used in relation to a plant variety, that the Contractor has at least tentatively determined that the variety has been reproduced with recognized characteristics.

Nonprofit organization means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)), or any nonprofit scientific or educational organization qualified under a State nonprofit organization statute.

Practical application means to manufacture, in the case of a composition of product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

Subject invention means any invention of the Contractor made in the performance of work under this contract.

(b) *Contractor's rights.* (1) *Ownership.* The Contractor may retain ownership of each subject invention throughout the world in accordance with the provisions of this clause.

(2) *License.* (i) The Contractor retains a nonexclusive royalty-free license throughout the world in each subject invention to which the Government obtains title, unless the Contractor fails to disclose the invention within the times specified in paragraph (c) of this clause. The Contractor's license extends to any domestic subsidiaries and affiliates within the corporate structure of which the Contractor is a part, and it includes the right to grant sublicenses to the extent the Contractor was legally obligated to do so at contract award. The license is transferable only with the written approval of the agency, except when transferred to the successor of that part of the Contractor's business to which the invention pertains.

(ii) The agency may revoke or modify the Contractor's license to the extent necessary to achieve expeditious practical application of the subject invention in a particular country in accordance with the procedures in Federal Acquisition Regulation (FAR) 27.303-1(e).

(c) *Contractor's obligations.* (1) The Contractor must disclose in writing each subject invention to the Contracting Officer within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters. The disclosure must identify the inventor(s) and this contract under which the subject invention was made. It must be sufficiently complete in technical detail to convey a clear understanding of the subject invention. The disclosure must also identify any publication, on sale (*i.e.*, sale or offer for sale), or public use of the subject invention, or whether a manuscript describing the subject invention has been submitted for publication and, if so, whether it has been accepted for publication. In addition, after disclosure to the agency, the Contractor must promptly notify the Contracting Officer of the acceptance of any manuscript describing the subject invention for publication and any on sale or public use.

(2) The Contractor must elect in writing whether or not to retain ownership of any subject invention by notifying the Contracting Officer within 2 years of disclosure to the agency. However, in any case where publication, on sale, or public use has initiated the 1-year statutory period during which valid patent protection can be obtained in the United States, the agency may shorten the period for election of title to a date that is no more than 60 days prior to the end of the statutory period.

(3) The Contractor must file either a provisional or a nonprovisional patent application or a Plant Variety Protection Application on an elected subject invention within 1 year after election. However, in any case where a publication, on sale, or public use has initiated the 1-year statutory period during which valid patent protection can be obtained in the United States, the Contractor must file the application prior to the end of that statutory period. If the Contractor files a

provisional application, it must file a nonprovisional application within 10 months of the filing of the provisional application. The Contractor must file patent applications in additional countries or international patent offices within either 10 months of the first filed patent application (whether provisional or nonprovisional) or 6 months from the date permission is granted by the Commissioner of Patents to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) The Contractor may request extensions of time for disclosure, election, or filing under paragraphs (c)(1), (c)(2), and (c)(3) of this clause.

(d) *Government's rights.* (1) *Ownership.* The Contractor must assign to the agency, on written request, title to any subject invention—

(i) If the Contractor fails to disclose or elect ownership to the subject invention within the times specified in paragraph (c) of this clause, or elects not to retain ownership; provided, that the agency may request title only within 60 days after learning of the Contractor's failure to disclose or elect within the specified times.

(ii) In those countries in which the Contractor fails to file patent applications within the times specified in paragraph (c) of this clause; provided, however, that if the Contractor has filed a patent application in a country after the times specified in paragraph (c) of this clause, but prior to its receipt of the agency's written request, the Contractor continues to retain ownership in that country.

(iii) In any country in which the Contractor decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in reexamination or opposition proceeding on, a patent on a subject invention.

(2) *License.* If the Contractor retains ownership of any subject invention, the Government has a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on its behalf, the subject invention throughout the world.

(e) *Contractor action to protect the Government's interest.*

(1) The Contractor must execute or have executed and promptly deliver to the agency all instruments necessary to—

(i) Establish or confirm the rights the Government has throughout the world in those subject inventions in which the Contractor elects to retain ownership; and

(ii) Assign title to the agency when requested under paragraph (d) of this clause and to enable the Government to obtain patent protection and plant variety protection for that subject invention in any country.

(2) The Contractor must require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in the Contractor's format, each subject invention in order that the Contractor can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to

establish the Government's rights in the subject inventions. The disclosure format should require, as a minimum, the information required by paragraph (c)(1) of this clause. The Contractor must instruct such employees, through employee agreements or other suitable educational programs, as to the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(3) The Contractor must notify the Contracting Officer of any decisions not to file a nonprovisional patent application, continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than 30 days before the expiration of the response or filing period required by the relevant patent office.

(4) The Contractor must include, within the specification of any United States nonprovisional patent or plant variety protection application and any patent or plant variety protection certificate issuing thereon covering a subject invention, the following statement, "This invention was made with Government support under (identify the contract) awarded by (identify the agency). The Government has certain rights in the invention."

(f) *Reporting on utilization of subject inventions.* The Contractor must submit, on request, periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining utilization of the subject invention that are being made by the Contractor or its licensees or assignees. The reports must include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and other data and information as the agency may reasonably specify. The Contractor also must provide additional reports as may be requested by the agency in connection with any march-in proceeding undertaken by the agency in accordance with paragraph (h) of this clause. The Contractor also must mark any utilization report as confidential/proprietary to help prevent inadvertent release outside the Government. As required by 35 U.S.C. 202(c)(5), the agency will not disclose that information to persons outside the Government without the Contractor's permission.

(g) *Preference for United States industry.* Notwithstanding any other provision of this clause, neither the Contractor nor any assignee may grant to any person the exclusive right to use or sell any subject invention in the United States unless the person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for an agreement may be waived by the agency upon a showing by the Contractor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States, or that under the circumstances domestic manufacture is not commercially feasible.

(h) *March-in rights.* The Contractor acknowledges that, with respect to any subject invention in which it has retained ownership, the agency has the right to require licensing pursuant to 35 U.S.C. 203 and 210(c), and in accordance with the procedures in 37 CFR 401.6 and any supplemental regulations of the agency in effect on the date of contract award.

(i) *Special provisions for contracts with nonprofit organizations.* If the Contractor is a nonprofit organization, it must—

(1) Not assign rights to a subject invention in the United States without the written approval of the agency, except where an assignment is made to an organization that has as one of its primary functions the management of inventions, *provided*, that the assignee must be subject to the same provisions as the Contractor;

(2) Share royalties collected on a subject invention with the inventor, including Federal employee co-inventors (but through their agency if the agency deems it appropriate) when the subject invention is assigned in accordance with 35 U.S.C. 202(e) and 37 CFR 401.10;

(3) Use the balance of any royalties or income earned by the Contractor with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions for the support of scientific research or education; and

(4) Make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business concerns, and give a preference to a small business concern when licensing a subject invention if the Contractor determines that the small business concern has a plan or proposal for marketing the invention which, if executed, is equally as likely to bring the invention to practical application as any plans or proposals from applicants that are not small business concerns; *provided*, that the Contractor is also satisfied that the small business concern has the capability and resources to carry out its plan or proposal. The decision whether to give a preference in any specific case will be at the discretion of the Contractor.

(5) Allow the Secretary of Commerce to review the Contractor's licensing program and decisions regarding small business applicants, and negotiate changes to its licensing policies, procedures, or practices with the Secretary of Commerce when the Secretary's review discloses that the Contractor could take reasonable steps to more effectively implement the requirements of paragraph (i)(4) of this clause.

(j) *Communications.* [Complete according to agency instructions.]

(k) *Subcontracts.* (1) The Contractor must include the substance of this clause, including this paragraph (k), in subcontracts for experimental, developmental, or research work to be performed by a small business concern or nonprofit organization. Do not include the substance of this clause in subcontracts for commercial products or commercial services.

(2) The Contractor must include in all other subcontracts for experimental, developmental, or research work the

substance of the patent rights clause required by FAR subpart 27.3.

(3) At all tiers, the patent rights clause must be modified to identify the parties as follows: references to the Government are not changed, and the subcontractor has all rights and obligations of the Contractor in the clause. The Contractor must not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

(4) In subcontracts, at any tier, the agency, the subcontractor, and the Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and the agency with respect to the matters covered by the clause; provided, however, that nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes statute in connection with proceedings under paragraph (h) of this clause.

(End of clause)

Alternate I (DATE). As prescribed in 27.302(b)(3), add the following sentence at the end of paragraph (d)(2) of the basic clause:

The license must include the right of the Government to sublicense foreign governments, their nationals and international organizations pursuant to the following treaties or international agreements: _____*

[* *Contracting Officer complete with the names of applicable existing treaties or international agreements. The above language is not intended to apply to treaties or agreements that are in effect on the date of the award but are not listed.*]

Alternate II (DATE). As prescribed in 27.302(b)(4), add the following sentence at the end of paragraph (d)(2) of the basic clause:

The agency reserves the right to unilaterally amend this contract to identify specific treaties or international agreements entered into by the Government before or after the effective date of the contract and effectuate those license or other rights that are necessary for the Government to meet its obligations to foreign governments, their nationals, and international organizations under the treaties or international agreements with respect to subject inventions made after the date of the amendment.

Alternate III (DATE). As prescribed in 27.302(b)(5), substitute the following paragraph (i)(3) in place of paragraph (i)(3) of the basic clause:

(i)(3) After payment of patenting costs, licensing costs, payments to inventors, and other expenses incidental to the administration of subject inventions, the balance of any royalties or income earned and retained by the Contractor during any fiscal year on subject inventions under this or any

successor contract containing the same requirement, up to any amount equal to 5 percent of the budget of the facility for that fiscal year, must be used by the Contractor for the scientific research, development, and education consistent with the research and development mission and objectives of the facility, including activities that increase the licensing potential of other inventions of the facility. If the balance exceeds 5 percent, 75 percent of the excess above 5 percent must be paid by the Contractor to the Treasury of the United States and the remaining 25 percent must be used by the Contractor only for the same purposes as described above. To the extent it provides the most effective technology transfer, the licensing of subject inventions must be administered by Contractor employees on location at the facility.

Alternate IV (DATE). As prescribed in 27.302(b)(6), include the following paragraph (e)(5) in paragraph (e) of the basic clause:

(e)(5) The Contractor must establish and maintain active and effective procedures to ensure that subject inventions are promptly identified and timely disclosed, and it must submit a description of the procedures to the Contracting Officer so that the Contracting Officer may evaluate and determine their effectiveness.

Alternate V (DATE) As prescribed in 27.302(b)(7), include the following paragraph (d)(3) in paragraph (d) of the basic clause:

(d)(3) *CRADA licensing.* If the Contractor performs services at a Government owned and operated laboratory or at a Government owned and Contractor operated laboratory directed by the Government to fulfill the Government's obligations under a Cooperative Research and Development Agreement (CRADA) authorized by 15 U.S.C. 3710a, the Government may require the Contractor to negotiate an agreement with the CRADA collaborating party or parties regarding the allocation of rights to any subject invention the Contractor makes, solely or jointly, under the CRADA. The agreement must be negotiated prior to the Contractor undertaking the CRADA work or, with the permission of the Government, upon the identification of a subject invention. In the absence of such an agreement, the Contractor agrees to grant the collaborating party or parties an option for a license in its inventions of the same scope and terms set forth in the CRADA for inventions made by the Government.

■ 8. Revise section 52.227-13 to read as follows:

52.227–13 Patent Rights—Ownership by the Government.

As prescribed at 27.302(e), insert the following clause:

Patent Rights—Ownership by The Government (DATE)

(a) *Definitions.* As used in this clause—
Invention means any invention or discovery that is or may be patentable or otherwise protectable under title 35 of the U.S. Code or any variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*)

Made means—

(1) When used in relation to any invention other than a plant variety, means the conception or first actual reduction to practice of the invention; or

(2) When used in relation to a plant variety, means that the Contractor has at least tentatively determined that the variety has been reproduced with recognized characteristics.

Practical application, means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

Subject invention means any invention of the Contractor made in the performance of work under this contract.

(b) *Ownership*—(1) *Assignment to the Government.* The Contractor must assign to the Government title throughout the world to each subject invention, except to the extent that rights are retained under paragraphs (b)(2) and (d) of this clause.

(2) *Greater rights determinations.* (i) The Contractor, or an employee-inventor after consultation with the Contractor, may request greater rights than the nonexclusive license provided in paragraph (d) of this clause. The request for a greater rights must be submitted to the Contracting Officer at the time of the first disclosure of the subject invention pursuant to paragraph (e)(2) of this clause, or not later than 8 months thereafter, unless a longer period is authorized in writing by the Contracting Officer for good cause shown in writing by the Contractor. Each determination of greater rights under this contract is normally subject to paragraph (c) of this clause, and to the reservations and conditions deemed to be appropriate by the agency.

(ii) Upon request, the Contractor must provide the filing date, serial number and title, a copy of the patent application (including an English-language version if filed in a language other than English), and patent number and issue date for any subject invention in any country for which the Contractor has retained title.

(iii) Upon request, the Contractor must furnish the agency an irrevocable power to inspect and make copies of the patent application file.

(c) *Minimum rights acquired by the Government.* (1) Regarding each subject

invention to which the Contractor retains ownership, the Contractor agrees as follows:

(i) The Government has a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on its behalf, the subject invention throughout the world.

(ii) The agency has the right to require licensing pursuant to 35 U.S.C. 203 and 210(c) and in accordance with the procedures set forth in 37 CFR 401.6 and any supplemental regulations of the agency in effect on the date of the contract award.

(iii) Upon request, the Contractor must submit periodic reports no more frequently than annually on the utilization, or efforts to obtain utilization, of a subject invention by the Contractor or its licensees or assignees. The reports must include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and any other data and information as the agency may reasonably specify. The Contractor also must provide additional reports as may be requested by the agency in connection with any march-in proceedings undertaken by the agency in accordance with paragraph (c)(1)(ii) of this clause. To the extent data or information supplied under this section is considered by the Contractor, or its licensees, or assignees to be privileged and confidential and is so marked, the agency, to the extent permitted by law, will not disclose such information to persons outside the Government.

(iv) When licensing a subject invention, the Contractor must—

(A) Ensure that no royalties are charged on acquisitions involving Government funds, including funds derived through a Military Assistance Program of the Government or otherwise derived through the Government;

(B) Refund any amounts received as royalty charges on a subject invention in acquisitions for, or on behalf of, the Government;

(C) Provide for this refund in any instrument transferring rights in the subject invention to any party.

(v) When transferring rights in a subject invention, the Contractor must provide for the Government's rights set forth in paragraphs (c)(1)(i) through (c)(1)(iv) of this clause.

(2) Nothing contained in paragraph (c) of this clause grants the Government rights in any invention other than a subject invention.

(d) *Minimum rights to the Contractor.* (1) The Contractor is hereby granted a revocable, nonexclusive, paid-up license in each patent application filed in any country on a subject invention and any resulting patent in which the Government obtains title, unless the Contractor fails to disclose the subject invention within the times specified in paragraph (e)(2) of this clause. The Contractor's license extends to any of its domestic subsidiaries and affiliates within the corporate structure of which the Contractor is a part, and it includes the right to grant sublicenses to the extent the Contractor was legally obligated to do so at contract award. The license is transferable only with the written approval of the agency except when transferred to the successor of that part of the Contractor's business to which the subject invention pertains.

(2) The Contractor's license may be revoked or modified by the agency to the extent necessary to achieve expeditious practical application of the subject invention in a particular country in accordance with the procedures in Federal Acquisition Regulation (FAR) 27.303–1(e).

(3) When the Government elects not to apply for a patent in any foreign country, the Contractor retains rights in that foreign country to apply for a patent, subject to the Government's rights in paragraph (c)(1) of this clause.

(e) *Invention identification, disclosures, and reports.* (1) The Contractor must establish and maintain active and effective procedures to educate its employees to ensure that subject inventions are promptly identified and disclosed to Contractor personnel responsible for patent matters. The procedures must include the maintenance of laboratory notebooks or equivalent records and other records as are reasonably necessary to document the conception and/or the first actual reduction to practice of subject inventions. The procedures must also include the maintenance of records that show the procedures for identifying and disclosing subject inventions are followed. Upon request, the Contractor must furnish the Contracting Officer a description of these procedures for evaluation and for a determination as to their effectiveness.

(2) The Contractor must disclose in writing each subject invention to the Contracting Officer within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters or, if earlier, within 6 months after the Contractor becomes aware that a subject invention has been made, but in any event before any on sale (*i.e.*, sale or offer for sale), public use, or publication of the subject invention known to the Contractor. The disclosure must identify the contract under which the subject invention was made and the inventor(s). It must be sufficiently complete in technical detail to convey a clear understanding of the subject invention. The disclosure must also identify any publication, on sale, or public use of the subject invention and whether a manuscript describing the subject invention has been submitted for publication and, if so, whether it has been accepted for publication. In addition, after disclosure to the agency, the Contractor must promptly notify the Contracting Officer of the acceptance of any manuscript describing the subject invention for publication and any on sale or public use.

(3) The Contractor must furnish the Contracting Officer the following:

(i) Interim reports every 12 months (or a longer period as may be specified by the Contracting Officer) from the date of the contract, listing subject inventions during that period, and stating that all subject inventions have been disclosed (or that there are none) and that the procedures required by paragraph (e)(1) of this clause have been followed.

(ii) A final report, within 3 months after completion of the contracted work, listing all subject inventions or stating that there were none, and listing all subcontracts at any tier containing a patent rights clause or stating that there were none.

(4) The Contractor must require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in the Contractor's format each subject invention in order that the Contractor can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by paragraph (e)(2) of this clause. The Contractor must instruct such employees, through employee agreements or other suitable educational programs, as to the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(5) The Contractor agrees that the Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this clause.

(f) *Examination of records relating to inventions.* (1) The Contracting Officer or any authorized representative has, until 3 years after final payment under this contract, the right to examine any books (including laboratory notebooks), records, and documents of the Contractor relating to the conception or first actual reduction to practice of inventions in the same field of technology as the work under this contract to determine whether—

- (i) Any inventions are subject inventions;
- (ii) The Contractor has established and maintains the procedures required by paragraphs (e)(1) and (e)(4) of this clause; and
- (iii) The Contractor and its inventors have complied with the procedures.

(2) The Contractor must disclose to the Contracting Officer, for the determination of ownership rights, any unreported invention that the Contracting Officer believes may be a subject invention.

(3) Any examination of records under paragraph (f) of this clause will be subject to appropriate conditions to protect the confidentiality of the information involved.

(g) *Withholding of payment.* (This paragraph does not apply to subcontracts.) (1) Any time before final payment under this contract, the Contracting Officer may, in the Government's interest, withhold payment until a reserve not exceeding \$50,000 or 5 percent of the amount of this contract, whichever is less, will have been set aside if, in the Contracting Officer's opinion, the Contractor fails to—

- (i) Establish, maintain, and follow effective procedures for identifying and disclosing subject inventions pursuant to paragraph (e)(1) of this clause;

(ii) Disclose any subject invention pursuant to paragraph (e)(2) of this clause;

(iii) Deliver acceptable interim reports pursuant to paragraph (e)(3)(i) of this clause; or

(iv) Provide the information regarding subcontracts pursuant to paragraph (i)(4) of this clause.

(2) The Contracting Officer will withhold the reserve or balance until the Contracting

Officer has determined that the Contractor has rectified whatever deficiencies exist and has delivered all reports, disclosures, and other information required by this clause.

(3) The Contracting Officer will not make final payment under this contract before the Contractor delivers to the Contracting Officer, as required by this clause, all disclosures of subject inventions, an acceptable final report, and all due confirmatory instruments.

(4) The Contracting Officer may decrease or increase the sums withheld up to the maximum authorized. The Contracting Officer will not withhold any amount under this paragraph while the amount specified by this paragraph is being withheld under other provisions of the contract. The withholding of any amount or the subsequent payment does not result in a waiver of any Government rights.

(h) *Preference for United States industry.* Unless provided otherwise, neither the Contractor nor any assignee must grant to any person the exclusive right to use or sell any subject invention in the United States unless the person agrees that any products embodying the subject invention or produced using the subject invention will be manufactured substantially in the United States. However, in individual cases, the agency may waive the requirement upon a showing by the Contractor or assignee that—

(1) It made reasonable but unsuccessful efforts to grant licenses on similar terms to potential licensees that would likely have manufactured substantially in the United States; or

(2) Under the circumstances, domestic manufacture is not commercially feasible.

(i) *Subcontracts.* (1) The Contractor must include the substance of the patent rights clause required by FAR Subpart 27.3 in subcontracts, other than those for commercial products and commercial services, for experimental, developmental, or research work. The Contractor must modify the prescribed patent rights clause to identify the parties as follows: references to the Government are not changed, and the subcontractor has rights and obligations of the Contractor in the clause. The Contractor must not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

(2) In the event of a refusal by a prospective subcontractor to accept the clause, the Contractor—

(i) Must promptly submit a written notice to the Contracting Officer setting forth the subcontractor's reasons for such refusal and other pertinent information that may expedite disposition of the matter; and

(ii) Must not proceed with such subcontract without the written authorization of the Contracting Officer.

(3) In subcontracts at any tier, the agency, the subcontractor, and the Contractor agree that the mutual obligations of the parties created by the patent rights clause constitute a contract between the subcontractor and the agency with respect to those matters covered by this clause.

(4) The Contractor must promptly notify the Contracting Officer in writing upon the award of any subcontract at any tier containing a patent rights clause by

identifying the subcontractor, the applicable patent rights clause, the work to be performed under the subcontract, and the dates of award and estimated completion. Upon request of the Contracting Officer, the Contractor must furnish a copy of such subcontract and, no more frequently than annually, a listing of the subcontracts that have been awarded.

(End of clause)

Alternate I (DATE). As prescribed in 27.302(e)(4), add the following sentence at the end of paragraph (c)(1)(i) of the basic clause:

The license will include the right of the Government to sublicense foreign governments, their nationals, and international organizations pursuant to the following treaties or international agreements: _____ *

[* *Contracting Officer complete with the names of applicable existing treaties or international agreements. The above language is not intended to apply to treaties or agreements that are in effect on the date of the award but are not listed.*]

Alternate II (DATE). As prescribed in 27.302(e) (5), add the following sentence at the end of paragraph (c)(1)(i) of the basic clause:

The agency reserves the right to unilaterally amend this contract to identify specific treaties or international agreements entered into by the Government before or after the effective date of this contract, and effectuate those license or other rights that are necessary for the Government to meet its obligations to foreign governments, their nationals, and international organizations under treaties or international agreements with respect to subject inventions made after the date of the amendment.

52.227–14 through 52.227–23 [Removed and Reserved]

■ 9. Remove and reserve sections 52.227–14 through 52.227–23.

■ 10. Add sections 52.227–24 through 52.227–37 to read as follows:

52.227–24 Patents—Reporting of Subject Inventions.

As prescribed in 27.302(f), use the following clause:

Patents—Reporting of Subject Inventions (DATE)

The Contractor must furnish the Contracting Officer the following:

(a) Interim reports every twelve (12) months (or such longer period as may be specified by the Contracting Officer) from the date of the contract, listing subject inventions during that period and stating that all subject inventions have been disclosed or that there are no such inventions.

(b) A final report, within three (3) months after completion of the contracted work,

listing all subject inventions or stating that there were no such inventions.

(c) Upon request, the filing date, serial number and title, a copy of the patent application and patent number, and issue data for any subject invention for which the Contractor has retained title.

(d) Upon request, the Contractor must furnish the Government an irrevocable power to inspect and make copies of the patent application file.

(End of clause)

52.227–25 Patent Rights—Ownership by the Contractor (Large Business).

As prescribed in 27.302(g), use the following clause:

Patent Rights—Ownership by The Contractor (Large Business) (DATE)

(a) *Definitions.* As used in this clause—
Invention means—

(1) Any invention or discovery that is or may be patentable or otherwise protectable under Title 35 of the United States Code; or

(2) Any variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*).

Made—

(1) When used in relation to any invention other than a plant variety, means the conception or first actual reduction to practice of the invention; or

(2) When used in relation to a plant variety, means that the Contractor has at least tentatively determined that the variety has been reproduced with recognized characteristics.

Nonprofit organization means—

(1) A university or other institution of higher education;

(2) An organization of the type described in the Internal Revenue Code at 26 U.S.C. 501(c)(3) and exempt from taxation under 26 U.S.C. 501(a); or

(3) Any nonprofit scientific or educational organization qualified under a State nonprofit organization statute.

Practical application means—

(1)(i) To manufacture, in the case of a composition or product;

(ii) To practice, in the case of a process or method; or

(iii) To operate, in the case of a machine or system; and

(2) In each case, under such conditions as to establish that—

(i) The invention is being utilized; and

(ii) The benefits of the invention are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

Subject invention means any invention of the Contractor made in the performance of work under this contract.

(b) *Contractor's rights.* (1) *Ownership.* The Contractor may elect to retain ownership of each subject invention throughout the world in accordance with the provisions of this clause.

(2) *License.* (i) The Contractor must retain a nonexclusive royalty-free license throughout the world in each subject invention to which the Government obtains title, unless the Contractor fails to disclose

the invention within the times specified in paragraph (c) of this clause. The Contractor's license—

(A) Extends to any domestic subsidiaries and affiliates within the corporate structure of which the Contractor is a part;

(B) Includes the right to grant sublicenses to the extent the Contractor was legally obligated to do so at the time of contract award; and

(C) Is transferable only with the approval of the agency, except when transferred to the successor of that part of the Contractor's business to which the invention pertains.

(ii) The agency—

(A) May revoke or modify the Contractor's domestic license to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with 37 CFR part 404 and agency licensing regulations;

(B) Will not revoke the license in that field of use or the geographical areas in which the Contractor has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public; and

(C) May revoke or modify the license in any foreign country to the extent the Contractor, its licensees, or the domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

(iii) Before revoking or modifying the license, the agency—

(A) Will furnish the Contractor a written notice of its intention to revoke or modify the license; and

(B) Will allow the Contractor 30 days (or such other time as the funding agency may authorize for good cause shown by the Contractor) after the notice to show cause why the license should not be revoked or modified.

(iv) The Contractor has the right to appeal, in accordance with 37 CFR part 404 and agency regulations, concerning the licensing of Government-owned inventions, any decision concerning the revocation or modification of the license.

(c) *Contractor's obligations.* (1) The Contractor must—

(i) Disclose, in writing, each subject invention to the Contracting Officer within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters, or within 6 months after the Contractor first becomes aware that a subject invention has been made, whichever is earlier;

(ii) Include in the disclosure—

(A) The inventor(s) and the contract under which the invention was made;

(B) Sufficient technical detail to convey a clear understanding of the invention; and

(C) Any publication, on sale (*i.e.*, sale or offer for sale), or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication; and

(iii) After submission of the disclosure, promptly notify the Contracting Officer of the acceptance of any manuscript describing the invention for publication and of any on sale or public use.

(2) The Contractor must elect in writing whether or not to retain ownership of any subject invention by notifying the Contracting Officer at the time of disclosure or within 8 months of disclosure, as to those countries (including the United States) in which the Contractor will retain ownership. However, in any case where publication, on sale, or public use has initiated the 1-year statutory period during which valid patent protection can be obtained in the United States, the agency may shorten the period of election of title to a date that is no more than 60 days prior to the end of the statutory period.

(3) The Contractor must—

(i) File either a provisional or a nonprovisional patent application on an elected subject invention within 1 year after election, provided that in all cases the application is filed prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use;

(ii) File a nonprovisional application within 10 months of the filing of any provisional application; and

(iii) File patent applications in additional countries or international patent offices within either 10 months of the first filed patent application (whether provisional or nonprovisional) or 6 months from the date the Commissioner of Patents grants permission to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) The Contractor may request extensions of time for disclosure, election, or filing under paragraphs (c)(1), (2), and (3) of this clause. The Contracting Officer will normally grant the extension unless there is reason to believe the extension would prejudice the Government's interests.

(d) *Government's rights—*(1) *Ownership.* The Contractor must assign to the agency, upon written request, title to any subject invention—

(i) If the Contractor elects not to retain title to a subject invention;

(ii) If the Contractor fails to disclose or elect the subject invention within the times specified in paragraph (c) of this clause and the agency requests title within 60 days after learning of the Contractor's failure to report or elect within the specified times;

(iii) In those countries in which the Contractor fails to file patent applications within the times specified in paragraph (c) of this clause, provided that, if the Contractor has filed a patent application in a country after the times specified in paragraph (c) of this clause, but prior to its receipt of the written request of the agency, the Contractor must continue to retain ownership in that country; and

(iv) In any country in which the Contractor decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in reexamination or opposition proceeding on, a patent on a subject invention.

(2) *License.* If the Contractor retains ownership of any subject invention, the Government will have a nonexclusive, nontransferable, irrevocable, paid-up license

to practice, or have practiced for or on behalf of the United States, the subject invention throughout the world.

(e) *Contractor action to protect the Government's interest.* (1) The Contractor must execute or have executed and promptly deliver to the agency all instruments necessary to—

(i) Establish or confirm the rights the Government has throughout the world in those subject inventions in which the Contractor elects to retain ownership; and

(ii) Assign title to the agency when requested under paragraph (d)(1) of this clause and enable the Government to obtain patent protection for that subject invention in any country.

(2) The Contractor must—

(i) Require, by written agreement, its employees, other than clerical and nontechnical employees, to—

(A) Disclose each subject invention promptly in writing to personnel identified as responsible for the administration of patent matters, so that the Contractor can comply with the disclosure provisions in paragraph (c) of this clause; and

(B) Provide the disclosure in the Contractor's format, which should require, as a minimum, the information required by paragraph (c)(1) of this clause;

(ii) Instruct its employees, through employee agreements or other suitable educational programs, as to the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or statutory foreign bars; and

(iii) Execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions.

(3) The Contractor must notify the Contracting Officer of any decisions not to file a nonprovisional patent application, continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than 30 days before the expiration of the response or filing period required by the relevant patent office.

(4) The Contractor must include, within the specification of any United States nonprovisional patent application and any patent issuing thereon covering a subject invention, the following statement: "This invention was made with Government support under (identify the contract) awarded by (identify the agency). The Government has certain rights in this invention."

(5) The Contractor must—

(i) Establish and maintain active and effective procedures to ensure that subject inventions are promptly identified and disclosed to Contractor personnel responsible for patent matters;

(ii) Include in these procedures the maintenance of—

(A) Laboratory notebooks or equivalent records and other records as are reasonably necessary to document the conception and/or the first actual reduction to practice of subject inventions; and

(B) Records that show that the procedures for identifying and disclosing the inventions are followed; and

(iii) Upon request, furnish the Contracting Officer a description of these procedures for evaluation and for determination as to their effectiveness.

(6) The Contractor must, when licensing a subject invention, arrange to—

(i) Avoid royalty charges on acquisitions involving Government funds, including funds derived through the Government's Military Assistance Program or otherwise derived through the Government;

(ii) Refund any amounts received as royalty charges on the subject inventions in acquisitions for, or on behalf of, the Government; and

(iii) Provide for the refund in any instrument transferring rights in the invention to any party.

(7) The Contractor must furnish to the Contracting Officer the following:

(i) Interim reports every 12 months (or any longer period as may be specified by the Contracting Officer) from the date of the contract, listing subject inventions during that period and stating that all subject inventions have been disclosed or that there are no subject inventions.

(ii) A final report, within 3 months after completion of the contracted work, listing all subject inventions or stating that there were no subject inventions, and listing all subcontracts at any tier containing a patent rights clause or stating that there were no subcontracts.

(8)(i) The Contractor must promptly notify the Contracting Officer in writing upon the award of any subcontract at any tier containing a patent rights clause by identifying—

(A) The subcontractor;

(B) The applicable patent rights clause;

(C) The work to be performed under the subcontract; and

(D) The dates of award and estimated completion.

(ii) The Contractor must furnish, upon request, a copy of the subcontract, and no more frequently than annually, a listing of the subcontracts that have been awarded.

(9) In the event of a refusal by a prospective subcontractor to accept one of the clauses specified in paragraph (l)(1) of this clause, the Contractor—

(i) Must promptly submit a written notice to the Contracting Officer setting forth the subcontractor's reasons for the refusal and other pertinent information that may expedite disposition of the matter; and

(ii) Must not proceed with that subcontract without the written authorization of the Contracting Officer.

(10) The Contractor must provide to the Contracting Officer, upon request, the following information for any subject invention for which the Contractor has retained ownership:

(i) Filing date.

(ii) Serial number and title.

(iii) A copy of any patent application (including an English-language version if filed in a language other than English).

(iv) Patent number and issue date.

(11) The Contractor must furnish to the Government, upon request, an irrevocable power to inspect and make copies of any patent application file.

(f) *Reporting on utilization of subject inventions.* (1) The Contractor must—

(i) Submit upon request periodic reports no more frequently than annually on the utilization of a subject invention or on efforts in obtaining utilization of the subject invention that are being made by the Contractor or its licensees or assignees;

(ii) Include in the reports information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and other information as the agency may reasonably specify; and

(iii) Provide additional reports that the agency may request in connection with any march-in proceedings undertaken by the agency in accordance with paragraph (h) of this clause.

(2) To the extent permitted by law, the agency will not disclose the information provided under paragraph (f)(1) of this clause to persons outside the Government without the Contractor's permission, if the data or information is considered by the Contractor or its licensee or assignee to be "privileged and confidential" (see 5 U.S.C. 552(b)(4)) and is so marked.

(g) *Preference for United States industry.* Notwithstanding any other provision of this clause, the Contractor agrees that neither the Contractor nor any assignee will grant to any person the exclusive right to use or sell any subject invention in the United States unless the person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the agency may waive the requirement for an exclusive license agreement upon a showing by the Contractor or its assignee that—

(1) Reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States; or

(2) Under the circumstances, domestic manufacture is not commercially feasible.

(h) *March-in rights.* The Contractor acknowledges that, with respect to any subject invention in which it has retained ownership, the agency has the right to require licensing pursuant to 35 U.S.C. 203 and 210(c), 37 CFR 401.6, and any supplemental regulations of the agency in effect on the date of contract award.

(i) *Other inventions.* Nothing contained in this clause grants to the Government any rights with respect to any invention other than a subject invention.

(j) *Examination of records relating to inventions.* (1) The Contracting Officer or any authorized representative will, until 3 years after final payment under this contract, have the right to examine any books (including laboratory notebooks), records, and documents of the Contractor relating to the conception or first reduction to practice of inventions in the same field of technology as the work under this contract to determine whether—

(i) Any inventions are subject inventions;

(ii) The Contractor has established procedures required by paragraph (e)(5) of this clause; and

(iii) The Contractor and its inventors have complied with the procedures.

(2) If the Contracting Officer learns of an unreported Contractor invention that the Contracting Officer believes may be a subject invention, the Contractor is required to disclose the invention to the agency for a determination of ownership rights.

(3) Any examination of records under this paragraph (j) is subject to appropriate conditions to protect the confidentiality of the information involved.

(k) *Withholding of payment (this paragraph does not apply to subcontracts).* (1) Any time before final payment under this contract, the Contracting Officer may, in the Government's interest, withhold payment until a reserve not exceeding \$50,000 or 5 percent of the amount of the contract, whichever is less, is set aside if, in the Contracting Officer's opinion, the Contractor fails to—

(i) Establish, maintain, and follow effective procedures for identifying and disclosing subject inventions pursuant to paragraph (e)(5) of this clause;

(ii) Disclose any subject invention pursuant to paragraph (c)(1) of this clause;

(iii) Deliver acceptable interim reports pursuant to paragraph (e)(7)(i) of this clause; or

(iv) Provide the information regarding subcontracts pursuant to paragraph (e)(8) of this clause.

(2) The reserve or balance will be withheld until the Contracting Officer has determined that the Contractor has rectified whatever deficiencies exist and has delivered all reports, disclosures, and other information required by this clause.

(3) The Government will not make final payment under this contract before the Contractor delivers to the Contracting Officer—

(i) All disclosures of subject inventions required by paragraph (c)(1) of this clause;

(ii) An acceptable final report pursuant to paragraph (e)(7)(ii) of this clause; and

(iii) All past due confirmatory instruments.

(4) The Contracting Officer may decrease or increase the sums withheld up to the maximum authorized in paragraph (k)(1) of this clause. No amount will be withheld under this paragraph while the amount specified by this paragraph is being withheld under other provisions of the contract. The withholding of any amount or the subsequent payment thereof is not construed as a waiver of any Government right.

(l) *Subcontracts.* (1) The Contractor—

(i) Must include the substance of the Patent Rights-Ownership by the Contractor clause set forth at 52.227–11 of the Federal Acquisition Regulation (FAR), in subcontracts, including those for commercial products and commercial services, for experimental, developmental, or research work to be performed by a small business concern or nonprofit organization; and

(ii) Must include the substance of this clause, including this paragraph (l), in other subcontracts, including those for commercial products and commercial services, for experimental, developmental, or research work, unless a different patent rights clause is required by FAR 27.302.

(2) For subcontracts at any tier—

(i) The patents rights clause included in the subcontract must retain all references to the Government and must provide to the subcontractor all the rights and obligations provided to the Contractor in the clause. The Contractor must not, as consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions; and

(ii) The Government, the Contractor, and the subcontractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and the Government with respect to those matters covered by this clause. However, nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes statute in connection with proceedings under paragraph (h) of this clause.

(End of clause)

Alternate I (DATE). As prescribed in 27.302(g)(2), add the following paragraph (b)(2)(v) to the basic clause:

(v) The license must include the right of the Government to sublicense foreign governments, their nationals, and international organizations pursuant to the following treaties or international agreements: _____. [* *Contracting Officer to complete with the names of applicable existing treaties or international agreements. This paragraph is not intended to apply to treaties or agreements that are in effect on the date of the award but are not listed.*]

Alternate II (DATE). As prescribed in 27.302(g)(3), add the following paragraph (b)(2)(v) to the basic clause:

(v) The agency reserves the right to—

(A) Unilaterally amend this contract to identify specific treaties or international agreements entered into or to be entered into by the Government after the effective date of this contract; and

(B) Exercise those license or other rights that are necessary for the Government to meet its obligations to foreign governments, their nationals, and international organizations under any treaties or international agreement with respect to subject inventions made after the date of the amendment.

52.227–26 Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services.

As prescribed in 27.402–6(a) or (c), or 27.504–4(b)(1), use the following clause:

Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services (DATE)

(a) *Definitions.* As used in this clause—

Commercial computer software means software developed or regularly used for nongovernmental purposes that—

(1) Has been sold, leased, or licensed to the public;

(2) Has been offered for sale, lease, or license to the public;

(3) Has not been offered, sold, leased, or licensed to the public but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of this contract; or

(4) Satisfies a criterion expressed in paragraph (1), (2), or (3) of this definition and would require only minor modification to meet the requirements of this contract.

Computer database means a collection of data recorded in a form capable of being processed by a computer. The term does not include computer software.

Computer program means a set of instructions, rules, or routines recorded in a form that is capable of causing a computer to perform a specific operation or series of operations.

Computer software means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer databases or computer software documentation.

Covered Government support contractor means a contractor under a contract, the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of a program or effort, rather than to directly furnish an end item or service to accomplish a program or effort, provided that the contractor—

(1) Is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

(2) Receives access to technical data or computer software for performance of a Government contract that contains the clause at 52.227–31, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

Detailed manufacturing or process data means technical data that describe the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.

Developed means—

(1) (Applicable to technical data other than computer software documentation.) An item, component, or process exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as

intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state of the art. To be considered “developed,” the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market, nor must the item, component, or process be actually reduced to practice within the meaning of Title 35 of the United States Code;

(2) A computer program has been successfully operated in a computer and tested to the extent sufficient to demonstrate to reasonable persons skilled in the art that the program can reasonably be expected to perform its intended purpose;

(3) Computer software, other than computer programs, has been tested or analyzed to the extent sufficient to demonstrate to reasonable persons skilled in the art that the software can reasonably be expected to perform its intended purpose; or

(4) Computer software documentation the contractor must deliver under a contract has been written, in any medium, in sufficient detail to comply with requirements under that contract.

Developed exclusively at private expense means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a Government contract, or any combination thereof.

(1) Private expense determinations should be made at the lowest practicable level.

(2) Under fixed-price contracts, when total costs are greater than the firm-fixed-price or ceiling price of the contract, the additional development costs necessary to complete development are not considered when determining whether development was at Government, private, or mixed expense.

Developed exclusively with Government funds means development was not accomplished exclusively or partially at private expense.

Developed with mixed funding means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a Government contract, and partially with costs charged directly to a Government contract.

Form, fit, and function data means technical data that describe the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

Generated means, with regard to technical data or computer software, first created in the performance of this contract.

Government purpose means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations, or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data, computer

software, or computer software documentation for commercial purposes or authorize others to do so.

Government purpose rights means the rights to—

(1) Use, modify, reproduce, release, perform, display, or disclose technical data, computer software, or computer software documentation within the Government without restriction; and

(2) Release or disclose technical data, computer software, or computer software documentation outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose that data or software for United States Government purposes.

Limited rights means the rights to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture, or authorize the technical data to be used by another party, except that the Government may reproduce, release, or disclose such data or authorize the use or reproduction of the data by persons outside the Government if—

(1) The reproduction, release, disclosure, or use is—

(i) Necessary for emergency repair and overhaul; or

(ii) A release or disclosure to—

(A) A covered Government support contractor in performance of its covered Government support contract for use, modification, reproduction, performance, display, or release or disclosure to a person authorized to receive limited rights technical data; or

(B) A foreign government, of technical data other than detailed manufacturing or process data, when use of such data by the foreign government is in the interest of the Government and is required for evaluational or informational purposes;

(2) The recipient of the technical data is subject to a prohibition on the further reproduction, release, disclosure, or use of the technical data; and

(3) The contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, or use.

Minor modification means a modification that does not significantly alter the nongovernmental function or purpose of the software or is of the type customarily provided in the commercial marketplace.

Other than commercial computer software means software that does not qualify as commercial computer software under the definition of “commercial computer software” of this clause.

Restricted rights apply only to other than commercial computer software and mean the Government’s rights to—

(1) Use a computer program with one computer at one time. The program may not be accessed by more than one terminal or central processing unit or time shared unless otherwise permitted by this contract;

(2) Transfer a computer program to another Government agency without the further

permission of the Contractor if the transferor destroys all copies of the program and related computer software documentation in its possession and notifies the licensor of the transfer. Transferred programs remain subject to the provisions of this clause;

(3) Make a reasonable number of copies of the computer software required for the purposes of safekeeping (archive), backup, modification, or other activities authorized in paragraphs (1), (2), (4) and (5) of this definition;

(4) Modify computer software provided that the Government may—

(i) Use the modified software only as provided in paragraphs (1) and (3) of this definition; and

(ii) Not release or disclose the modified software except as provided in paragraphs (2) and (5) of this clause;

(5) Use, modify, reproduce, perform, display, or release or disclose the computer software, and permit contractors, subcontractors, or covered Government support contractors to do so, for purposes set forth in subparagraph (i) of this paragraph, subject to the conditions set forth in subparagraphs (ii) of this paragraph:

(i)(A) In performance of service contracts (see Federal Acquisition Regulation (FAR) 37.101), to diagnose and correct deficiencies, to modify the software to enable a computer program to be combined with, adapted to, or merged with other computer programs, or when necessary to respond to urgent situations, provided that the Government notifies the party which has granted restricted rights that any such release or disclosure to particular contractors or subcontractors was made;

(B) To perform emergency repairs or overhaul of items or components procured under this or a related contract, when necessary to perform such repairs or overhaul; or

(C) For the management and oversight of a program or effort by a person authorized to receive restricted rights computer software, including in the performance of covered Government support contracts.

(ii)(A) Any contractor, subcontractor, or covered Government support contractor receiving access to the software for the purposes of subparagraphs (i), (ii), or (iii) of this paragraph is subject to the use and nondisclosure agreement at 27.402–7 or be performing a Government contract that contains the clause at 52.227–31, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends;

(B) The Government must not permit any recipient of the software under this paragraph to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (4) of this definition, for any other purpose; and

(C) Any use, modification, reproduction, performance, display, release, or disclosure of the computer software under this paragraph remains subject to the limitations in paragraphs (1) through (4) of this definition.

Small Business Innovation Research/Small Business Technology Transfer (SBIR/STTR)

data means all technical data or computer software developed or generated in the performance of a phase I, II, or III SBIR/STTR contract or subcontract.

Technical data means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management information, or information incidental to contract administration.

Unlimited rights means rights to use, modify, reproduce, perform, display, release, or disclose technical data, computer software, or computer software documentation in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Applicability.* (1) Except as provided in paragraph (b)(2) of this clause—

(i) This clause governs all technical data related to other than commercial products or commercial services or to any portion of a commercial product or commercial service that was developed in any part at Government expense;

(ii) This clause governs all other than commercial computer software or other than commercial computer software documentation; and

(iii) The clause at FAR 52.227–27, Technical Data—Commercial Products and Commercial Services, governs the technical data related to any portion of a commercial product or commercial service that was developed exclusively at private expense.

(2) The clause at FAR 52.227–30, Rights in Other Than Commercial Technical Data and Other Than Commercial Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, governs technical data that are SBIR/STTR data.

(c) *Rights in technical data and computer software.* The Contractor grants or must obtain for the Government the following royalty free, worldwide, nonexclusive, irrevocable license rights:

(1) *Unlimited rights.* The Government has unlimited rights in technical data, computer software, or computer software documentation that are—

(i) Data related to an item, component, or process which has been or will be developed exclusively with Government funds;

(ii) Studies, analyses, test data, or similar data produced for this contract, when the study, analysis, test, or similar work was specified as an element of performance;

(iii) Technical data created exclusively with Government funds in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes;

(iv) Form, fit, and function data;

(v) Technical data necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data);

(vi) Government-furnished corrections or changes to—

(A) Technical data furnished to the Contractor by the Government; or

(B) Computer software or computer software documentation;

(vii) Data, computer software, or computer software documentation that is publicly available or previously released or disclosed by the Contractor or subcontractor without restrictions on further use, release or disclosure, other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the technical data to another party or the sale or transfer of some or all of a business entity or its assets to another party;

(viii) Data, computer software, or computer software documentation in which the Government has obtained unlimited rights under another Government contract or as a result of negotiations;

(ix) Data furnished to the Government, under this or any other Government contract or subcontract, with—

(A) Government purpose license rights or limited rights and the restrictive condition(s) has/have expired; or

(B) Government purpose rights and the Contractor's exclusive right to use such data for commercial purposes has expired; or

(x) Computer software developed exclusively with Government funds;

(xi) Computer software documentation the contractor must deliver under this contract; or

(xvii) Computer software or computer software documentation furnished to the Government, under this or any other Government contract or subcontract with—

(A) Restricted rights in computer software, limited rights in technical data, or government purpose license rights and the restrictive conditions have expired; or

(B) Government purpose rights and the Contractor's exclusive right to use such software or documentation for commercial purposes has expired.

(2) *Government purpose rights.* (i) The Government has government purpose rights for a 5-year period, or such other period as may be negotiated, in technical data or computer software—

(A) Related to items, components, or processes developed with mixed funding except when the Government is entitled to unlimited rights in such data or software as provided in paragraphs (c)(1)(ii), (c)(1)(iv) through (c)(1)(ix), and (c)(1)(xii) through (c)(1)(x)(v)(i) of this clause; or

(B) Created with mixed funding in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.

(ii) The 5-year period, or such other period as may have been negotiated, begins upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise that required development of the items, components, or processes, development of the computer software, or creation of the data described in paragraph (c)(2)(i)(B) of this clause. Upon expiration of the 5-year or other negotiated period, the Government has unlimited rights in the technical data or computer software.

(iii) The Government will not release or disclose technical data or computer software

in which it has government purpose rights unless—

(A) Prior to release or disclosure, the intended recipient completes the nondisclosure agreement at FAR 27.402–7; or

(B) The recipient is a Government contractor receiving access to the data or software for performance of a Government contract that contains the clause at FAR 52.227–31, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(iv) The Contractor has the exclusive right, including the right to license others, to use technical data or computer software in which the Government has obtained government purpose rights under this contract for any commercial purpose during the time period specified in the government purpose rights legend prescribed in paragraph (g)(3) of this clause.

(3) *Limited rights.* (i) Except as provided in paragraphs (c)(1)(ii) and (c)(1)(iv) through (c)(1)(ix) of this clause, the Government has limited rights in technical data—

(A) Related to items, components, or processes developed exclusively at private expense and marked with the limited rights legend prescribed in paragraph (g) of this clause; or

(B) Created exclusively at private expense in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.

(ii) The Government will require a recipient of limited rights data for emergency repair or overhaul to destroy the data and all copies in its possession promptly following completion of the emergency repair/overhaul and to notify the Contractor that the data have been destroyed.

(iii) The Contractor, its subcontractors, and suppliers are not required to provide the Government additional rights to use, modify, reproduce, release, perform, display, or disclose technical data furnished to the Government with limited rights. However, if the Government desires to obtain additional rights in technical data in which it has limited rights, the Contractor agrees to promptly enter into negotiations with the Contracting Officer to determine whether there are acceptable terms for transferring such rights. The Contractor must ensure that any resulting license agreement, made part of the contract, lists or describes all technical data for which the Government has been granted additional rights and specifies those additional rights.

(iv) The Contractor acknowledges that—

(A) The Government is authorized to release or disclose limited rights data to covered Government support contractors;

(B) The Government will notify the contractor of such release or disclosure;

(C) The Contractor or the party asserting restrictions in the limited rights legend may—

(1) Require each covered Government support contractor to enter into a nondisclosure agreement directly with the Contractor or the party asserting restrictions regarding use of the data; or

(2) Waive in writing the requirement for a nondisclosure agreement; and

(D) Any such nondisclosure agreement must address the restrictions on the covered Government support contractor's use of the limited rights data as set forth in the clause at FAR 52.227–31, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends. The nondisclosure agreement must not include any additional terms and conditions unless mutually agreed to by the parties to the nondisclosure agreement.

(4) *Restricted rights.* (i) The Government has restricted rights in other than commercial computer software the contractor must deliver, or that is otherwise provided, to the Government under this contract that was developed exclusively at private expense.

(ii) The Contractor, its subcontractors, or suppliers are not required to provide the Government additional rights in other than commercial computer software delivered or otherwise provided to the Government with restricted rights. However, if the Government desires to obtain additional rights in such software, the Contractor agrees to promptly enter into negotiations with the Contracting Officer to determine whether there are acceptable terms for transferring such rights. The Contractor must ensure that any resulting license agreement, made part of the contract, lists or describes all other than commercial computer software for which the Government has been granted additional rights and specifies those additional rights.

(iii) The Contractor acknowledges that—

(A) The Government is authorized to release or disclose restricted rights computer software to covered Government support contractors;

(B) The Government will notify the Contractor of such release or disclosure;

(C) The Contractor or the party asserting restrictions in the restricted rights legend may—

(1) Require each such covered Government support contractor to enter into a nondisclosure agreement directly with the Contractor or the party asserting restrictions regarding the use of the software; or

(2) Waive in writing the requirement for a nondisclosure agreement; and

(D) Any such nondisclosure agreement must address the restrictions on the covered

Government support contractor's use of the restricted rights software as set forth in the clause at FAR 52.227–31, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends. The nondisclosure agreement must not include any additional terms and conditions unless mutually agreed to by the parties to the nondisclosure agreement.

(5) *Specifically negotiated license rights.* The standard license rights granted to the Government under paragraphs (c)(1) through (c)(4) of this clause, including the period during which the Government has government purpose rights in technical data or computer software, may be modified by mutual agreement but must not provide the Government lesser rights than provided in the definition of “limited rights” or “restricted rights” of this clause. Any negotiated rights must be identified in a license agreement made part of this contract.

(6) *Prior government rights.* Technical data or computer software that will be delivered, furnished, or otherwise provided to the Government under this contract, in which the Government has previously obtained rights must be delivered, furnished, or provided with the preexisting rights, unless—

(i) The parties have agreed otherwise; or

(ii) The restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose the data or software have expired or no longer apply.

(7) *Release from liability.* The Contractor agrees to release the Government from liability for any authorized release or disclosure of technical data or computer software made in accordance with this clause or any negotiated license agreement. This release from liability for the Government also applies to releases or disclosures made by a third party who received the data or software from an authorized recipient. For any unauthorized use or disclosure by such third parties of technical data or computer software marked with restrictive legends, the Contractor agrees to seek relief solely from that party.

(d) *Contractor rights in technical data and computer software.* The Contractor retains all rights not granted to the Government.

(e) *Third-party copyrighted data and software.* The Contractor must not, without the written approval of the Contracting Officer, incorporate any copyrighted data or software in the technical data or computer software the Contractor must deliver under this contract unless the Contractor is the copyright owner or has obtained license rights for the Government of the appropriate scope set forth in paragraph (c) of this clause, and has affixed a statement of the license or licenses obtained on behalf of the Government and other persons to the data transmittal document.

(f) *Identification and delivery of data to be delivered with restrictions on use, release, or disclosure.* (1) This paragraph does not apply to restrictions based solely on copyright.

(2) Except as provided in paragraph (f)(3) of this clause, technical data or computer software that the Contractor asserts should be furnished to the Government with restrictions on use, release, or disclosure are identified in an attachment to this contract (the Attachment). The Contractor must not deliver any data or software with restrictive markings unless the data are listed on the Attachment.

(3) In addition to the assertions made in the Attachment, the Contractor may identify other assertions after award when based on new information or inadvertent omissions unless the inadvertent omissions would have materially affected the source selection decision. The Contractor must submit such identification and assertions to the Contracting Officer as soon as practicable prior to the scheduled date for delivery of the data or software, in the following format, and signed by an official authorized to contractually obligate the Contractor:

Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Technical Data or Computer Software

The Contractor asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following technical data or computer software should be restricted—

Technical data or computer software to be delivered with restrictions ¹	Basis for assertion ²	Asserted rights category ³	Name of person asserting restrictions ⁴
(LIST)	(LIST)	(LIST)	(LIST).

¹ If the assertion is applicable to items, components, or processes developed at private expense, identify both the data and each such item, component, or process.

² Generally, the development of an item, component, process, or computer software at private expense, either exclusively or partially, is the only basis for asserting restrictions on the Government's rights to use, release, or disclose computer software or technical data related to such items, components, or processes. Indicate whether development was exclusively or partially at private expense. If development was not at private expense, enter the specific reason for asserting that the Government's rights should be restricted.

³ Enter asserted rights category (e.g., rights in SBIR/STTR data generated under another contract, limited rights, restricted rights, or government purpose rights under this or a prior contract, or specifically negotiated licenses).

⁴ Corporation, individual, or other person, as appropriate.

Date
Printed Name and Title
Signature

(End of identification and assertion)

(4) When requested by the Contracting Officer, the Contractor must provide sufficient information to enable the Contracting Officer to evaluate the

Contractor's assertions. The Contracting Officer reserves the right to add the Contractor's assertions to the Attachment and validate any listed assertion, at a later date, in accordance with the procedures in the FAR 52.227–35, Validation of Asserted Restrictions, clause of this contract.

(g) *Marking requirements.* The Contractor, and its subcontractors or suppliers, may only assert restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software the Contractor must deliver under this contract by marking

the deliverable data or software subject to restriction. Except as provided in paragraph (g)(7) of this clause, only the following legends are authorized under this contract: the government purpose rights legend at paragraph (g)(3) of this clause; the limited rights legend at paragraph (g)(4) of this clause; the restricted rights legend at paragraph (g)(5) of this clause; the special license rights legend at paragraph (g)(6) of this clause; and a notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(1) *General marking instructions.* The Contractor, or its subcontractors or suppliers, must conspicuously and legibly mark the appropriate legend on all technical data or computer software that qualify for such markings. The authorized legends must be placed on the transmittal document or storage container and, for printed material, each page of the printed material containing technical data or computer software for which restrictions are asserted. When only portions of a page of printed material are subject to the asserted restrictions, such portions must be identified by circling, underscoring, with a note, or other appropriate identifier. Technical data or computer software transmitted directly from one computer or computer terminal to another must contain a notice of asserted restrictions. For software that will or might be used in combat or situations that simulate combat conditions, the contractor must not insert instructions that interfere with or delay the operation of computer software in order to display a restrictive rights legend or other license statement at any time prior to or during use of the computer software, or otherwise cause such interference or delay, unless the Contracting Officer's written permission to deliver such software has been obtained prior to delivery. Reproductions of technical data or computer software or any portions thereof subject to asserted restrictions must also reproduce the asserted restrictions.

(2) *Omitted markings.* (i) Technical data or computer software delivered or otherwise provided under this contract without restrictive markings will be presumed to have been delivered with unlimited rights. To the extent practicable, if the Contractor has requested permission (see paragraph (g)(2)(ii) of this clause) to correct an inadvertent omission of markings, the Contracting Officer will not release or disclose the technical data or computer software pending evaluation of the request.

(ii) The Contractor may request permission to have conforming and

justified restrictive markings placed on unmarked technical data or computer software at its expense. The request must be received by the Contracting Officer within 6 months following the furnishing or delivery of such technical data or computer software, or any extension of that time approved by the Contracting Officer. The Contractor must—

(A) Identify the technical data or computer software that should have been marked;

(B) Demonstrate that the omission of the marking was inadvertent, the proposed marking is justified and conforms with the requirements for the marking of technical data or computer software contained in this clause; and

(C) Acknowledge, in writing, that the Government has no liability with respect to any disclosure, reproduction, or use of the technical data or computer software made prior to the addition of the marking or resulting from the omission of the marking.

(3) *Government purpose rights markings.* Technical data or computer software delivered or otherwise furnished to the Government with government purpose rights must be marked as follows:

GOVERNMENT PURPOSE RIGHTS

Contract Number
Contractor Name
Contractor Address
Expiration Date

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data or computer software are restricted by the government purpose rights license in the FAR 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services, clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(4) *Limited rights markings.* Data delivered or otherwise furnished to the Government with limited rights must be marked as follows:

LIMITED RIGHTS

Contract Number
Contractor Name
Contractor Address

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by the limited rights

license in the FAR 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services, clause contained in the above identified contract. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such data must promptly notify the above named Contractor.

(End of legend)

(5) *Restricted rights markings.* Software delivered or otherwise furnished to the Government with restricted rights must be marked as follows:

RESTRICTED RIGHTS

Contract Number
Contractor Name
Contractor Address

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by the restricted rights license in the FAR 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services, clause contained in the above identified contract. Any reproduction of computer software or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such software must promptly notify the above named Contractor.

(End of legend)

(6) *Special license rights markings.* (i) Technical data or computer software in which the Government's rights stem from a specifically negotiated license must be marked as follows:

SPECIAL LICENSE RIGHTS

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these data or software are restricted by Contract Number [Insert contract number], License Number [Insert license identifier]. Any reproduction of technical data, computer software, or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(ii) For purposes of this clause, special licenses do not include government purpose license rights acquired under a prior contract (see paragraph (c)(5) of this clause).

(7) *Preexisting data or software markings.* If the terms of a prior contract or license permitted the Contractor to restrict the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software deliverable under this contract, and those restrictions are still applicable, the Contractor may mark such data or software with the appropriate restrictive legend for which the data or software qualified under the prior contract or license. The Contractor must follow the marking procedures in paragraph (g)(1) of this clause.

(h) *Contractor procedures and records.* Throughout performance of this contract, the Contractor and its subcontractors or suppliers that will deliver technical data or computer software with other than unlimited rights, must—

(1) Have, maintain, and follow written procedures sufficient to endure that restrictive markings are used only when authorized by the terms of this clause; and

(2) Maintain records sufficient to justify the validity of any restrictive markings on technical data or computer software delivered under this contract.

(i) *Removal of unjustified and nonconforming markings—*(1) *Unjustified technical data markings.* The rights and obligations of the parties regarding the validation of restrictive markings on technical data or computer software delivered or to be delivered under this contract are contained in the FAR 52.227–35, Validation of Asserted Restrictions, clause of this contract. Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may ignore or, at the Contractor's expense, correct or strike a marking if, in accordance with the procedures in the Validation of Asserted Restrictions clause of this contract, a restrictive marking is determined to be unjustified.

(2) *Nonconforming technical data or computer software markings.* A nonconforming marking is a marking placed on technical data or computer software delivered or otherwise furnished to the Government under this contract that is not in the format authorized by this contract. Correction of nonconforming markings is not subject to the FAR 52.227–35, Validation of Asserted Restrictions, clause of this contract. If the Contracting Officer notifies the Contractor of a nonconforming marking and the Contractor fails to remove or correct such marking within 60 days, the Government may ignore or, at the Contractor's expense, remove or correct any nonconforming marking.

(j) *Relation to patents.* Nothing contained in this clause implies a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(k) *Limitation on charges for rights in technical data, computer software, or computer software documentation.* (1) The Contractor must not charge to this contract any cost, including, but not limited to, license fees, royalties, or similar charges, for rights in technical data, computer software, or computer software documentation the Contractor must deliver under this contract when—

(i) The Government has acquired, by any means, the same or greater rights in the data or software; or

(ii) The data or software are available to the public without restrictions.

(2) The limitation in paragraph (k)(1) of this clause—

(i) Includes costs charged by a subcontractor or supplier, at any tier, or costs incurred by the Contractor to acquire rights in subcontractor or supplier technical data, computer software, or computer software documentation, if the subcontractor or supplier has been paid for such rights under any other Government contract or under a license conveying the rights to the Government; and

(ii) Does not include the reasonable costs of reproducing, handling, or mailing the documents or other media in which the technical data, computer software, or computer software documentation will be delivered.

(l) *Applicability to subcontractors or suppliers.*

(1) The Contractor must grant its subcontractors and suppliers the same rights afforded the Contractor under this clause.

(2)(i) Except as provided in paragraph (l)(2)(ii) of this clause, the Contractor must include this clause in any subcontract or contractual instrument under which technical data or computer software will be obtained from a subcontractor or supplier for delivery to the Government. This requirement applies to technical data or software related to other than commercial products or commercial services, or related to commercial products or commercial services developed in any part with Government funds. The Contractor must also require its subcontractors and suppliers to include this clause, without alteration except to identify the parties, in any contractual instrument under which technical data or computer software will be obtained from a subcontractor or supplier for delivery to the Government. This clause

will govern the technical data related to an other than commercial product or service or to any portion of a commercial product or commercial service that was developed in any part at Government expense, and the clause at 52.227–27 will govern the technical data related to any portion of a commercial item that was developed exclusively at private expense. No other clause must be used to expand or reduce the Government's, the Contractor's, or a higher-tier subcontractor's or supplier's rights in a subcontractor's or supplier's technical data, computer software, or computer software documentation.

(ii) The Contractor must use the clause at FAR 52.227–30, Rights in Other Than Commercial Technical Data and Other Than Commercial Computer Software-Small Business Innovation Research Program and Small Business Technology Transfer Program, to govern technical data, computer software, or computer software documentation that is SBIR/STTR data.

(3) Technical data, computer software, or computer software documentation a subcontractor or supplier must deliver must normally be delivered to the next higher-tier contractor, subcontractor, or supplier. However, when there is a requirement in the prime contract for data which may be submitted with other than unlimited rights by a subcontractor or supplier, then said subcontractor or supplier may fulfill its requirement by submitting such data or software directly to the Government, rather than through a higher-tier contractor, subcontractor, or supplier.

(4) The Contractor and higher-tier subcontractors or suppliers must not use the award of a contract as economic leverage to obtain rights in technical data, computer software, or computer software documentation from their subcontractors or suppliers.

(5) The Contractor must in no event use its obligation to recognize and protect subcontractor or supplier rights in technical data, computer software, or computer software documentation as an excuse for failing to satisfy its contractual obligations to the Government.

(End of clause)

Alternate I (DATE). As prescribed in 27.402–6(b)(1), add the following paragraph (m) to the basic clause:

(m) *Publication for sale.* (1) This paragraph only applies to technical data or computer software in which the Government has obtained unlimited rights or a license to make an unrestricted release of technical data or computer software.

(2) The Government will not publish a deliverable technical data or computer software item or items identified in this contract as being subject to paragraph (m) of this clause or authorize others to publish such data or software on its behalf if, prior to publication for sale by the Government and within 24 months following the date specified in this contract for delivery of such data or software or the removal of any national security or export control restrictions, whichever is later, the Contractor publishes that item or items for sale and promptly notifies the Contracting Officer of such publication(s). Any such publication must include a notice identifying the number of this contract and the Government's rights in the published data or software.

(3) This limitation on the Government's right to publish for sale continues as long as the data are reasonably available to the public for purchase.

Alternate II (DATE). As prescribed in 27.402–6(b)(2), add the following definition of “Vessel design” in alphabetical order to paragraph (a) and add paragraph (c)(7) to the basic clause:

(a) *Vessel design* means the design of a vessel, boat, or craft, and its components, including the hull, decks, superstructure, and the exterior surface shape of all external shipboard equipment and systems.

(c)(7) *Vessel designs.* For a vessel design (including a vessel design embodied in a useful article) that is developed or delivered under this contract, the Government has the right to make and have made any useful article that embodies the vessel design, to import the article, to sell the article, and to distribute the article for sale or to use the article in trade, to the same extent that the Government is granted rights in the technical data related to the vessel design.

52.227–27 Technical Data—Commercial Products and Commercial Services.

As prescribed in 27.503–4(a)(1), use the following clause:

Technical Data—Commercial Products and Commercial Services (DATE)

(a) *Definitions.* As used in this clause—

Commercial product and commercial service includes commercial components and commercial processes but does not include commercial computer software.

Covered Government support contractor means a contractor under a contract, the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of a program or effort (rather than to directly furnish an end

item or service to accomplish a program or effort), provided that the contractor—

(1) Is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

(2) Receives access to technical data or computer software for performance of a Government contract that contains the clause at 52.227–31, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

Form, fit, and function data means technical data that describe the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

Technical data means recorded information, regardless of the form or method of recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management information, or information incidental to contract administration.

(b) *Applicability.* This clause governs the technical data related to any portion of a commercial product or commercial service that was developed exclusively at private expense. If the commercial product or commercial service was developed in any part at Government expense—

(1) The clause at Federal Acquisition Regulation (FAR) 52.227–30, Rights in Other Than Commercial Technical Data and Other than Commercial Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, governs technical data that are generated during any portion of performance that is covered under the Small Business Innovation Research (SBIR) Program or Small Business Technology Transfer (STTR) Program; and

(2) The clause at FAR 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services, governs the technical data related to any portion of a commercial product or commercial service that was developed in any part at Government expense and is not covered under the SBIR or STTR program.

(c) *License.* (1) The Government has the unrestricted right to use, modify, reproduce, release, perform, display, or disclose technical data, and to permit others to do so, that—

(i) Have been provided to the Government or others without restrictions on use, modification, reproduction, release, or further disclosure other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the technical data to another party or the sale or transfer of some or all of a business entity or its assets to another party;

(ii) Are form, fit, and function data;

(iii) Are a correction or change to technical data furnished to the Contractor by the Government;

(iv) Are necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data); or

(v) Have been provided to the Government under a prior contract or licensing agreement through which the Government has acquired the rights to use, modify, reproduce, release, perform, display, or disclose the data without restrictions.

(2) Except as provided in paragraph (c)(1) of this clause, the Government may use, modify, reproduce, release, perform, display, or disclose technical data within the Government only. The Government will not—

(i) Use the technical data to manufacture additional quantities of the commercial products; or

(ii) Release, perform, display, disclose, or authorize use of the technical data outside the Government without the Contractor's written permission unless a release, disclosure, or permitted use is necessary for emergency repair or overhaul of the commercial products furnished under this contract, or for performance of work by covered Government support contractors.

(3) The Contractor acknowledges that—

(i) The Government is authorized to release or disclose technical data covered by paragraph (c)(2) of this clause to covered Government support contractors;

(ii) The Government will notify the Contractor of such release or disclosure;

(iii) The Contractor or the party asserting restrictions in a restrictive legend may—

(A) Require each such covered Government support contractor to enter into a nondisclosure agreement directly with the Contractor or the party asserting restrictions regarding the use of the data; or

(B) Waive in writing the requirement for a nondisclosure agreement; and

(iv) Any such nondisclosure agreement must address the restrictions on the covered Government support contractor's use of the data as set forth in the clause at FAR 52.227–31, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends. The nondisclosure agreement must not include any additional terms and conditions unless mutually agreed to by the parties to the nondisclosure agreement.

(d) *Additional license rights.* The Contractor, its subcontractors, and suppliers are not required to provide the Government additional rights to use, modify, reproduce, release, perform, display, or disclose technical data. However, if the Government desires to obtain additional rights in technical data, the Contractor agrees to promptly enter into negotiations with the Contracting Officer to determine whether there are acceptable terms for transferring such rights. The Contractor must ensure that any resulting special license agreement, made part of the contract, lists or describes all technical data for which the Government has been granted additional rights and specifies those additional rights.

(e) *Release from liability.* The Contractor agrees that the Government, and other persons to whom the Government may have released or disclosed technical data delivered or otherwise furnished under this contract, has no liability for any release or disclosure of technical data that are not marked to indicate that such data are licensed data subject to use, modification, reproduction, release, performance, display, or disclosure restrictions.

(f) *Subcontractors or suppliers.* (1) The Contractor must grant its subcontractors and suppliers the same rights afforded the Contractor under this clause.

(2) Whenever any technical data related to commercial products or commercial services developed in any part at private expense will be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor must use this clause in the subcontract or other contractual instrument, including subcontracts and other contractual instruments for commercial products or commercial services, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties. This clause will govern the technical data related to any portion of a commercial product or commercial service that was developed exclusively at private expense, and the Contractor must use the following clauses to govern the technical data related to any portion of a commercial product or commercial service that was developed in any part at Government expense:

(i) Use the clause at FAR 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services, to govern any technical data that are not generated during any portion of performance that is covered under the SBIR or STTR program.

(ii) Use the clause at FAR 52.227–30, Rights in Other Than Commercial Technical Data and Other than Commercial Computer Software-Small Business Innovation Research Program and Small Business Technology Transfer Program, to govern technical data that are generated during any portion of performance that is covered under the SBIR or STTR program.

(End of clause)

Alternate I (DATE). As prescribed in 27.503–4(a)(2), add the following definition of “Vessel design” in alphabetical order to paragraph (a) and add (c)(4) to the basic clause:

(a) *Vessel design* means the design of a vessel, boat, or craft, and its components, including the hull, decks, superstructure, and the exterior surface shape of all external shipboard equipment and systems.

(c)(4) *Vessel designs.* For a vessel design (including a vessel design embodied in a useful article) that is developed or delivered under this contract, the Government shall have the right to make and have made any useful article that embodies the vessel design, to import the article, to sell the article,

and to distribute the article for sale or to use the article in trade, to the same extent that the Government is granted rights in the technical data related to the vessel design.

52.227–28 Rights in Bid or Proposal Information.

As prescribed in 27.402–6(f)(1), use the following clause:

Rights In Bid or Proposal Information (DATE)

(a) *Definitions.* As used in this clause—*Computer software* is defined in—

(1) The 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services, clause of this contract; or

(2) If this is a contract awarded under the Small Business Innovation Research Program or Small Business Technology Transfer Program, the 52.227–30, Rights in Other Than Commercial Technical Data and Other than Commercial Computer Software-Small Business Innovation Research Program and Small Business Technology Transfer Program, clause of this contract.

Technical data is defined in—

(1) The 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services, clause of this contract; or

(2) If this is a contract awarded under the Small Business Innovation Research Program or Small Business Technology Transfer Program, the 52.227–30, Rights in Other Than Commercial Technical Data and Other than Commercial Computer Software-Small Business Innovation Research Program and Small Business Technology Transfer Program, clause of this contract.

(b) *Government rights before contract award.* By submission of its offer, the Offeror agrees that the Government—

(1) May reproduce the bid or proposal, or any portions thereof, to the extent necessary to evaluate the offer.

(2) Except as provided in paragraph (d) of this clause, will use information contained in the bid or proposal only for evaluation purposes and will not disclose, directly or indirectly, such information to any person including potential evaluators, unless that person has been authorized by the head of the agency, his or her designee, or the Contracting Officer to receive such information.

(c) *Government rights after contract award.* The Contractor agrees—

(1) Except as provided in paragraphs (c)(2), (d), and (e) of this clause, the Government has the rights to use, modify, reproduce, release, perform, display, or disclose information contained in the Contractor's bid or proposal within the Government. The Government will not release, perform, display, or disclose such information outside the Government without the Contractor's written permission.

(2) The Government's right to use, modify, reproduce, release, perform, display, or disclose information that is technical data or

computer software the Contractor must deliver under this contract are determined by the Federal Acquisition Regulation (FAR) 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services; or FAR 52.227–30, Rights in Other Than Commercial Technical Data and Other than Commercial Computer Software-Small Business Innovation Research Program and Small Business Technology Transfer Program, clause of this contract.

(d) *Government-furnished information.* The Government's rights with respect to Government-furnished technical data or computer software contained in the Contractor's bid or proposal are subject only to restrictions on use, modification, reproduction, release, performance, display, or disclosure, if any, imposed by the developer or licensor of such data or software.

(e) *Information available without restrictions.* The Government's rights to use, modify, reproduce, release, perform, display, or, disclose information contained in a bid or proposal, including technical data or computer software, and to permit others to do so, are not restricted in any manner if such information has been released or disclosed to the Government or to other persons without restrictions other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the information to another party or the sale or transfer of some or all of a business entity or its assets to another party.

(f) *Subcontracts.* The Contractor must include this clause in all subcontracts, including those for commercial products and commercial services, or similar contractual instruments, and require its subcontractors or suppliers to do so without alteration, except to identify the parties.

(End of clause)

52.227–29 Identification and Assertion of Use, Release, or Disclosure Restrictions.

As prescribed in 27.402–6(f)(2), use the following provision:

Identification and Assertion of Use, Release, or Disclosure Restrictions (DATE)

(a) *Definitions.* As used in this provision—*Computer software* is defined in—

(1) The 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services; or

(2) If this solicitation contemplates a contract under the Small Business Innovation Research Program or Small Business Technology Transfer Program, the 52.227–30, Rights in Other Than Commercial Technical Data and Other than Commercial Computer Software-Small Business Innovation Research Program and Small Business Technology Transfer Program, clause of this solicitation.

SBIR/STTR data is defined in the 52.227–30, Rights in Other Than Commercial Technical Data and Other than Commercial

Computer Software-Small Business Innovation Research Program and Small Business Technology Transfer Program, clause of this solicitation.

Technical data is defined in—

(1) The 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services, clause of this solicitation; or

(2) If this solicitation contemplates a contract under the Small Business Innovation Research Program or Small Business Technology Transfer Program, the 52.227–30, Rights in Other Than Commercial Technical Data and Other than Commercial Computer Software-Small Business Innovation Research Program and Small Business Technology Transfer Program, clause of this solicitation.

(b) The identification and assertion requirements in this provision apply only to

technical data, including computer software documentation, or computer software the Contractor must deliver with other than unlimited rights. For contracts to be awarded under the Small Business Innovation Research (SBIR) Program or Small Business Technology Transfer Program (STTR) Program, these requirements apply to SBIR/STTR data that will be generated under the resulting contract and will be delivered with SBIR/STTR data rights and to any other data that will be delivered with other than unlimited rights. Notification and identification are not required for restrictions based solely on copyright.

(c) Offers submitted in response to this solicitation must identify, to the extent known at the time an offer is submitted to the Government, the technical data or computer software that the Offeror, its subcontractors or suppliers, or potential subcontractors or suppliers, assert should be furnished to the

Government with restrictions on use, release, or disclosure.

(d) The Offeror's assertions, including the assertions of its subcontractors or suppliers or potential subcontractors or suppliers, must be submitted as an attachment to its offer in the following format, dated and signed by an official authorized to contractually obligate the Offeror:

Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Technical Data or Computer Software

The Offeror asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following technical data or computer software should be restricted:

Technical data or computer software to be delivered with restrictions ¹	Basis for assertion ²	Asserted rights category ³	Name of person asserting restrictions ⁴
(LIST) ⁵	(LIST)	(LIST)	(LIST).

¹For technical data (other than computer software documentation) related to items, components, or processes developed at private expense, identify both the deliverable technical data and each such item, component, or process. For computer software or computer software documentation identify the software or documentation.

²Generally, development at private expense, either exclusively or partially, is the only basis for asserting restrictions. For technical data, other than computer software documentation, development refers to development of the item, component, or process to which the data relate. The Government's rights in computer software documentation generally may not be restricted. For computer software, development refers to the software. Indicate whether development was accomplished exclusively or partially at private expense. If development was not accomplished at private expense, or for computer software documentation, enter the specific basis for asserting restrictions.

³Enter asserted rights category (e.g., government purpose license rights from a prior contract, rights in SBIR/STTR data generated under a contract resulting from this solicitation or under another contract, limited, restricted, or government purpose rights under a contract resulting from this solicitation or under a prior contract, or specially negotiated licenses).

⁴Corporation, individual, or other person, as appropriate.

⁵Enter "none" when all data or software will be submitted without restrictions.

Date _____
Printed Name and Title _____
Signature _____

(End of identification and assertion)

(e) An offeror's failure to submit, complete, or sign the notification and identification required by paragraph (d) of this provision with its offer may render the offer ineligible for award.

(f) If the Offeror is awarded a contract, the assertions identified in paragraph (d) of this provision will be listed in an attachment to that contract. Upon request by the Contracting Officer, the Offeror must provide sufficient information to enable the Contracting Officer to evaluate any listed assertion.

(End of provision)

52.227–30 Rights in Other Than Commercial Technical Data and Other than Commercial Computer Software-Small Business Innovation Research Program and Small Business Technology Transfer Program.

As prescribed in 27.403–4(a)(1), use the following clause:

Rights in Other Than Commercial Technical Data and Other Than Commercial Computer Software-Small Business Innovation Research Program and Small Business Technology Transfer Program (DATE)

(a) Definitions. As used in this clause—
Commercial computer software means software developed or regularly used for nongovernmental purposes that—

(1) Has been sold, leased, or licensed to the public;

(2) Has been offered for sale, lease, or license to the public;

(3) Has not been offered, sold, leased, or licensed to the public but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of this contract; or

(4) Satisfies a criterion expressed in paragraph (1), (2), or (3) of this definition and would require only minor modification to meet the requirements of this contract.

Computer database means a collection of recorded data in a form capable of being processed by a computer. The term does not include computer software.

Computer program means a set of instructions, rules, or routines, recorded in a form that is capable of causing a computer to perform a specific operation or series of operations.

Computer software means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, re-created, or recompiled. Computer software does not include computer databases or computer software documentation.

Covered Government support contractor means a contractor under a contract, the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of a program or effort (rather than to directly furnish an end item or service to accomplish a program or effort), provided that the contractor—

(1) Is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

(2) Receives access to the technical data or computer software for performance of a Government contract that contains the clause at 52.227–31, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

Detailed manufacturing or process data means technical data that describe the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.

Developed means—

(1) (Applicable to technical data other than computer software documentation.) An item, component, or process, exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state of the art. To be considered “developed,” the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market, nor must the item, component or process be actually reduced to practice within the meaning of Title 35 of the United States Code;

(2) A computer program has been successfully operated in a computer and tested to the extent sufficient to demonstrate to reasonable persons skilled in the art that the program can reasonably be expected to perform its intended purpose;

(3) Computer software, other than computer programs, has been tested or analyzed to the extent sufficient to demonstrate to reasonable persons skilled in the art that the software can reasonably be expected to perform its intended purpose; or

(4) Computer software documentation the Contractor must deliver under a contract has been written, in any medium, in sufficient detail to comply with requirements under that contract.

Developed exclusively at private expense means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.

(1) Private expense determinations should be made at the lowest practicable level.

(2) Under fixed-price contracts, when total costs are greater than the firm-fixed-price or ceiling price of the contract, the additional development costs necessary to complete development are not considered when determining whether development was at government, private, or mixed expense.

Developed exclusively with government funds means development was not accomplished exclusively or partially at private expense.

Developed with mixed funding means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract.

Form, fit, and function data means technical data that describe the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item,

component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

Generated means, with respect to technical data or computer software, first created in the performance of this contract.

Government purpose means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software for commercial purposes or authorize others to do so.

Government purpose rights means the rights to—

(1) Use, modify, reproduce, release, perform, display, or disclose technical data or computer software within the Government without restriction; and

(2) Release or disclose technical data or computer software outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose that data for United States Government purposes.

Limited rights means the rights to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture, or authorize the technical data to be used by another party, except that the Government may reproduce, release, or disclose such data or authorize the use or reproduction of the data by persons outside the Government if—

(1) The reproduction, release, disclosure, or use is—

(i) Necessary for emergency repair and overhaul; or

(ii) A release or disclosure to—

(A) A covered Government support contractor in performance of its covered Government support contracts for use, modification, reproduction, performance, display, or release or disclosure to a person authorized to receive limited rights technical data; or

(B) A foreign government, of technical data other than detailed manufacturing or process data, when use of such data by the foreign government is in the interest of the Government and is required for evaluational or informational purposes;

(2) The recipient of the technical data is subject to a prohibition on the further reproduction, release, disclosure, or use of the technical data; and

(3) The contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, or use.

Minor modification means a modification that does not significantly alter the nongovernmental function or purpose of computer software or is of the type

customarily provided in the commercial marketplace.

Other than commercial computer software means software that does not qualify as commercial computer software under the definition of “commercial computer software” of this clause.

Restricted rights apply only to other than commercial computer software and mean the Government’s rights to—

(1) Use a computer program with one computer at one time. The program may not be accessed by more than one terminal or central processing unit or time shared unless otherwise permitted by this contract;

(2) Transfer a computer program to another Government agency without the further permission of the Contractor if the transferor destroys all copies of the program and related computer software documentation in its possession and notifies the licensor of the transfer. Transferred programs remain subject to the provisions of this clause;

(3) Make a reasonable number of copies of the computer software required for the purposes of safekeeping (archive), backup, modification, or other activities authorized in paragraphs (1), (2), (4) and (5) of this definition;

(4) Modify computer software provided that the Government may—

(i) Use the modified software only as provided in paragraphs (1) and (3) of this definition; and

(ii) Not release or disclose the modified software except as provided in paragraphs (2) and (5) of this clause;

(5) Use, modify, reproduce, perform, display, or release or disclose the computer software, and permit contractors, subcontractors, or covered Government support contractors to do so, for purposes set forth in subparagraph (i) of this paragraph, subject to the conditions set forth in subparagraphs (ii) of this paragraph:

(i)(A) In performance of service contracts (see Federal Acquisition Regulation (FAR) 37.101), to diagnose and correct deficiencies, to modify the software to enable a computer program to be combined with, adapted to, or merged with other computer programs, or when necessary to respond to urgent situations, provided that the Government notifies the party which has granted restricted rights that any such release or disclosure to particular contractors or subcontractors was made;

(B) To perform emergency repairs or overhaul of items or components procured under this or a related contract, when necessary to perform such repairs or overhaul; or

(C) For the management and oversight of a program or effort by a person authorized to receive restricted rights computer software, including in the performance of covered Government support contracts.

(ii)(A) Any contractor, subcontractor, or covered Government support contractor receiving access to the software for the purposes of subparagraphs (i), (ii), or (iii) of this paragraph is subject to the use and nondisclosure agreement at 27.402–7 or be performing a Government contract that contains the clause at 52.227–31, Limitations on the Use or Disclosure of Government-

Furnished Information Marked with Restrictive Legends;

(B) The Government must not permit any recipient of the software under this paragraph to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (4) of this definition, for any other purpose; and

(C) Any use, modification, reproduction, performance, display, release, or disclosure of the computer software under this paragraph remains subject to the limitations in paragraphs (1) through (4) of this definition.

Small Business Innovation Research/Small Business Technology Transfer (SBIR/STTR) data means all technical data or computer software developed or generated in the performance of a phase I, II, or III SBIR/STTR contract or subcontract.

SBIR/STTR data protection period means the time period during which the Government is obligated to protect SBIR/STTR data against unauthorized use and disclosure in accordance with SBIR/STTR data rights. The SBIR/STTR data protection period begins on the date of award of the contract under which the SBIR/STTR data are developed or generated and ends 20 years after that date unless, after the award, the agency and the Contractor negotiate for some other protection period for the SBIR/STTR data developed or generated under that contract.

SBIR/STTR data rights means the Government's rights, during the SBIR/STTR data protection period, in SBIR/STTR data covered by paragraph (c)(5) of this clause, as follows:

(1) Limited rights in such SBIR/STTR technical data; and

(2) Restricted rights in such SBIR/STTR computer software.

Technical data means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management information, or information incidental to contract administration.

Unlimited rights means rights to use, modify, reproduce, release, perform, display, or disclose, technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Applicability.* This clause governs all SBIR/STTR data. For any data that are not SBIR/STTR data—

(1) The clause at FAR 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services, governs the technical data related to other than commercial products and commercial services or to any portion of a commercial product or commercial service that was developed in any part at Government expense, and the clause at FAR 52.227–27, Technical Data—Commercial Products and Commercial Services, governs the technical data related to any portion of

a commercial product or commercial service that was developed exclusively at private expense;

(2) The clause at FAR 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services, governs other than commercial computer software and other than commercial computer software documentation; and

(3) A license consistent with FAR 27.502 governs commercial computer software and commercial computer software documentation.

(c) *Rights in technical data and computer software.* The Contractor grants or must obtain for the Government the following royalty-free, worldwide, nonexclusive, irrevocable license rights in technical data or other than commercial computer software. The Contractor retains all rights not granted to the Government.

(1) *Unlimited rights.* The Government has unlimited rights in technical data or computer software, including such data generated under this contract, that are—

(i) Form, fit, and function data;

(ii) Necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data);

(iii) Corrections or changes to Government-furnished technical data or computer software;

(iv) Otherwise publicly available or have been released or disclosed by the Contractor or a subcontractor without restrictions on further use, release, or disclosure other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the technical data or computer software to another party or the sale or transfer of some or all of a business entity or its assets to another party;

(v) Technical data or computer software in which the Government has acquired previously unlimited rights under another Government contract or as a result of negotiations;

(vi) Technical data or computer software furnished to the Government, under this or any other Government contract or subcontract thereunder, with license rights for which all restrictive conditions on the Government have expired; and

(vii) Computer software documentation generated or the Contractor must deliver under this contract.

(2) *Government purpose rights.* (i) The Government has government purpose rights for the period specified in paragraph (c)(2)(ii) of this clause in data that are—

(A) Not SBIR/STTR data, and are—

(1) Technical data related to items, components, or processes developed with mixed funding, or are computer software developed with mixed funding, except when the Government is entitled to unlimited rights in such data as provided in paragraph (c)(1) of this clause;

(2) Created with mixed funding in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes; or

(B) SBIR/STTR data, upon expiration of the SBIR/STTR data protection period.

(ii)(A) For the non-SBIR/STTR data described in paragraph (c)(2)(i)(A) of this clause, the Government has government purpose rights for a period of 5 years, or such other period as may be negotiated. This period commences upon award of the contract, subcontract, letter contract (or similar contractual instrument), or contract modification (including a modification to exercise an option) that required development of the items, components, or processes, or creation of the data described in paragraph (c)(2)(i)(A)(2) of this clause. Upon expiration of the 5-year or other negotiated period, the Government will have unlimited rights in the data.

(B) For the SBIR/STTR data described in paragraph (c)(2)(i)(B) of this clause, the Government has government purpose rights perpetually. This Government purpose rights period commences upon the expiration of the SBIR/STTR data protection period.

(iii) The Government will not release or disclose data in which it has government purpose rights unless—

(A) Prior to release or disclosure, the intended recipient is subject to the nondisclosure agreement at FAR 27.402–7; or

(B) The recipient is a Government contractor receiving access to the data for performance of a Government contract that contains the clause at FAR 52.227–31, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(iv) The Contractor has the exclusive right, including the right to license others, to use technical data in which the Government has obtained government purpose rights under this contract for any commercial purpose during the time period specified in the government purpose rights marking prescribed in paragraph (g)(3) of this clause.

(3) *Limited rights.* The Government has limited rights in technical data that were not generated under this contract, are related to items, components, or processes developed exclusively at private expense, and are marked, in accordance with the marking instructions in paragraph (g)(1) of this clause, with the legend prescribed in paragraph (g)(4) of this clause.

(4) *Restricted rights in computer software.* The Government has restricted rights in other than commercial computer software the Contractor must deliver or otherwise furnished to the Government under this contract that was developed exclusively at private expense and was not generated under this contract.

(5) *SBIR/STTR data rights.* Except for technical data, including computer software documentation, or computer software in which the Government has unlimited rights under paragraph (c)(1) of this clause, the Government has SBIR/STTR data rights, during the SBIR/STTR data protection period of this contract, in all SBIR/STTR data developed or generated under this contract. This protection period is not extended by any subsequent SBIR/STTR contracts under which any portion of that SBIR/STTR data is used or delivered. The SBIR/STTR data protection period of any such subsequent SBIR/STTR contract applies only to the SBIR/STTR data that are developed or

generated under that subsequent contract. The SBIR/STTR data protection period is governed by the version of this clause that is incorporated in the contract under which the SBIR/STTR data are developed or generated. If the SBIR/STTR data were developed or generated under a contract that included a previous version of this clause, then the SBIR/STTR data protection period is governed by that previous version of this clause.

(6) *Specifically negotiated license rights.* After contract award, the standard license rights granted to the Government under paragraphs (c)(1) through (5) of this clause may be modified by mutual agreement to provide such rights as the parties consider appropriate but must not provide the Government lesser rights in technical data, including computer software documentation, than are enumerated in the definition of “limited rights” of this clause or lesser rights in computer software than are enumerated in the definition of “restricted rights” of this clause. Any rights so negotiated must be identified in a license agreement made part of this contract.

(7) *Prior government rights.* Technical data, including computer software documentation, or computer software that will be delivered, furnished, or otherwise provided to the Government under this contract, in which the Government has previously obtained rights must be delivered, furnished, or provided with the preexisting rights, unless—

- (i) The parties have agreed otherwise; or
- (ii) Any restrictions on the Government’s rights to use, modify, release, perform, display, or disclose the technical data or computer software have expired or no longer apply.

(8) *Release from liability.* The Contractor agrees to release the Government from liability for any authorized release or disclosure of technical data or computer software made in accordance with this clause or any negotiated license agreement. This release from liability for the Government also applies to releases or disclosures made by a third party who received the data or software

from an authorized recipient. For any unauthorized use or disclosure by such third parties of technical data or computer software marked with restrictive legends, the Contractor agrees to seek relief solely from that party.

(9) *Covered Government support contractors.* The Contractor acknowledges that—

(i) The Government is authorized to release or disclose limited rights technical data and restricted rights computer software to covered Government support contractors;

(ii) The Government will notify the Contractor of such release or disclosure;

(iii) The Contractor or the party asserting restrictions in a restrictive legend may—

(A) Require each such covered Government support contractor to enter into a nondisclosure agreement directly with the Contractor or the party asserting restrictions regarding the use of the data or software; or

(B) Waive in writing the requirement for a nondisclosure agreement; and

(iv) Any such nondisclosure agreement must address the restrictions on the covered Government support contractor’s use of the data or software as set forth in the clause at FAR 52.227–31, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends. The nondisclosure agreement must not include any additional terms and conditions unless mutually agreed to by the parties to the nondisclosure agreement.

(d) *Rights in derivative computer software or computer software documentation.* The Government retains its rights in the unchanged portions of any computer software or computer software documentation delivered under this contract that the Contractor uses to prepare, or includes in, derivative software or documentation.

(e) *Third-party copyrighted technical data and computer software.* The Contractor must not, without the written approval of the Contracting Officer, incorporate any copyrighted technical data, including computer software documentation, or computer software in the data or software the

Contractor must deliver under this contract unless the Contractor is the copyright owner or has obtained license rights for the Government of the appropriate scope set forth in paragraph (c) of this clause and, prior to delivery of such—

(1) Technical data, has affixed to the transmittal document a statement of the license rights obtained; or

(2) Computer software, has provided a statement of the license rights obtained in a form acceptable to the Contracting Officer.

(f) *Identification and delivery of technical data or computer software to be delivered with restrictions on use, release, or disclosure.* (1) This paragraph does not apply to restrictions based solely on copyright.

(2) Except as provided in paragraph (f)(3) of this clause, technical data or computer software that the Contractor asserts should be furnished to the Government with restrictions on use, release, or disclosure is identified in an attachment to this contract (the Attachment). The Contractor must not deliver any technical data or computer software with restrictive markings unless the technical data or computer software are listed on the Attachment.

(3) In addition to the assertions made in the Attachment, other assertions may be identified after award when based on new information or inadvertent omissions unless the inadvertent omissions would have materially affected the source selection decision. Such identification and assertion must be submitted to the Contracting Officer as soon as practicable prior to the scheduled date for delivery of the technical data or computer software, in the following format, and signed by an official authorized to contractually obligate the Contractor:

Identification and Assertion of Restrictions on the Government’s Use, Release, or Disclosure of Technical Data or Computer Software

The Contractor asserts for itself, or the persons identified below, that the Government’s rights to use, release, or disclose the following technical data or computer software should be restricted:

Technical data or computer software to be delivered with restrictions ¹	Basis for assertion ²	Asserted rights category ³	Name of person asserting restrictions ⁴
(LIST)	(LIST)	(LIST)	(LIST).

¹ If the assertion is applicable to items, components, or processes developed at private expense, identify both the technical data and each such item, component, or process.

² Generally, development at private expense, either exclusively or partially, is the only basis for asserting restrictions on the Government’s rights to use, release, or disclose technical data or computer software. Indicate whether development was exclusively or partially at private expense. If development was not at private expense, enter the specific reason for asserting that the Government’s rights should be restricted.

³ Enter asserted rights category (e.g., limited rights, restricted rights, or government purpose rights from a prior contract, SBIR/STTR data rights under this or another contract, or specifically negotiated licenses).

⁴ Corporation, individual, or other person, as appropriate.

Date
Printed Name and Title
Signature
(End of identification and assertion)
(4) When requested by the Contracting Officer, the Contractor must provide sufficient information to enable the Contracting Officer to evaluate the Contractor’s assertions. The Contracting Officer reserves the right to add the Contractor’s assertions to the Attachment and

validate any listed assertions, at a later date, in accordance with the procedures in the FAR 52.227–35, Validation of Asserted Restrictions, clause of this contract.
(g) *Marking requirements.* The Contractor, and its subcontractors or suppliers, may only assert restrictions on the Government’s rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software the Contractor must deliver under this contract by marking the

deliverable data or software subject to restriction. Except as provided in paragraph (g)(8) of this clause, only the following markings are authorized under this contract: the government purpose rights marking at paragraph (g)(3) of this clause; the limited rights legend at paragraph (g)(4) of this clause; the restricted rights legend at paragraph (g)(5) of this clause; the SBIR/STTR data rights legend at paragraph (g)(6) of this clause; or the special license rights

legend at paragraph (g)(7) of this clause; and a notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(1) *General marking instructions.* The Contractor, or its subcontractors or suppliers, must conspicuously and legibly mark the appropriate legend to all technical data and computer software that qualify for such markings. The authorized legends must be placed on the transmittal document or storage container and, for printed material, each page of the printed material containing technical data or computer software for which restrictions are asserted. When only portions of a page of printed material are subject to the asserted restrictions, such portions must be identified by circling, underscoring, with a note, or other appropriate identifier. Technical data or computer software transmitted directly from one computer or computer terminal to another must contain a notice of asserted restrictions. However, instructions that interfere with or delay the operation of computer software in order to display a restrictive rights legend or other license statement at any time prior to or during use of the computer software, or otherwise cause such interference or delay, must not be inserted in software that will or might be used in combat or situations that simulate combat conditions, unless the Contracting Officer's written permission to deliver such software has been obtained prior to delivery. Reproductions of technical data, computer software, or any portions thereof subject to asserted restrictions must also reproduce the asserted restrictions.

(2) *Omitted markings.* (i) Technical data, computer software, or computer software documentation delivered or otherwise provided under this contract without restrictive markings is presumed to have been delivered with unlimited rights. To the extent practicable, if the Contractor has requested permission (see paragraph (g)(2)(ii) of this clause) to correct an inadvertent omission of markings, the Contracting Officer will not release or disclose the technical data, software, or documentation pending evaluation of the request.

(ii) The Contractor may request permission to have conforming and justified restrictive markings placed on unmarked technical data, computer software, or computer software documentation at its expense. The request must be received by the Contracting Officer within 6 months following the furnishing or delivery of such technical data, software, or documentation, or any extension of that time approved by the Contracting Officer. The Contractor must—

(A) Identify the technical data, software, or documentation that should have been marked;

(B) Demonstrate that the omission of the marking was inadvertent, the proposed marking is justified and conforms with the requirements for the marking of technical data, computer software, or computer software documentation contained in this clause; and

(C) Acknowledge, in writing, that the Government has no liability with respect to any disclosure, reproduction, or use of the technical data, software, or documentation

made prior to the addition of the marking or resulting from the omission of the marking.

(3) *Government purpose rights markings.* Technical data or computer software delivered or otherwise furnished to the Government with government purpose rights must be marked as follows:

GOVERNMENT PURPOSE RIGHTS

Contract Number
Contractor Name
Contractor Address
Expiration Date

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data or computer software are restricted by the government purpose rights license in the FAR 52.227–30, Rights in Other Than Commercial Technical Data and Other than Commercial Computer Software-Small Business Innovation Research Program and Small Business Technology Transfer Program, clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of technical data or computer software or portions thereof marked with this restrictive marking must also reproduce the markings.

(End of legend)

(4) *Limited rights markings.* Technical data not generated under this contract that are related to items, components, or processes developed exclusively at private expense and delivered or otherwise furnished with limited rights must be marked as follows:

LIMITED RIGHTS

Contract Number
Contractor Name
Contractor Address

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by the limited rights license in the FAR 52.227–30, Rights in Other Than Commercial Technical Data and Other than Commercial Computer Software-Small Business Innovation Research Program and Small Business Technology Transfer Program, clause contained in the above identified contract. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such data must promptly notify the above named Contractor.

(End of legend)

(5) *Restricted rights markings.* Computer software delivered or otherwise furnished to the Government with restricted rights must be marked as follows:

RESTRICTED RIGHTS

Contract Number
Contractor Name
Contractor Address

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by the restricted rights license in the FAR 52.227–30, Rights in Other Than Commercial Technical Data and Other than Commercial Computer Software-Small Business Innovation Research Program and Small Business Technology Transfer Program, clause contained in the above identified

contract. Any reproduction of computer software or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such software must promptly notify the above named Contractor.

(End of legend)

(6) *SBIR/STTR data rights markings.* Except for technical data or computer software in which the Government has acquired unlimited rights under paragraph (c)(1) of this clause or negotiated special license rights as provided in paragraph (c)(6) of this clause, technical data or computer software generated under this contract must be marked as follows. The Contractor must enter the expiration date for the SBIR/STTR data protection period on the legend:

SBIR/STTR DATA RIGHTS

Contract Number
Contractor Name
Contractor Address
Expiration of SBIR/STTR Data Protection Period
Expiration of the Government Purpose Rights Period

The Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software marked with this legend are restricted during the period shown as provided in the SBIR/STTR data rights license in the FAR 52.227–30, Rights in Other Than Commercial Technical Data and Other than Commercial Computer Software-Small Business Innovation Research Program and Small Business Technology Transfer Program, clause contained in the above identified contract. After the SBIR/STTR data protection period expiration date shown above, the Government has perpetual government purpose rights as provided in the clause, unless otherwise indicated by the government purpose rights expiration date shown above. Any reproduction of technical data, computer software, or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(7) *Special license rights markings.* (i) Technical data or computer software in which the Government's rights stem from a specifically negotiated license must be marked as follows:

SPECIAL LICENSE RIGHTS

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this technical data or computer software are restricted by Contract Number [Insert contract number], License Number [Insert license identifier]. Any reproduction of technical data, computer software, or portions thereof marked with this marking must also reproduce the markings.

(End of legend)

(ii) For purposes of this clause, special licenses do not include government purpose license rights acquired under a prior contract (see paragraph (c)(7) of this clause).

(8) *Preexisting data markings.* If the terms of a prior contract or license permitted the Contractor to restrict the Government's rights

to use, modify, reproduce, release, perform, display, or disclose technical data or computer software, and those restrictions are still applicable, the Contractor may mark such data or software with the appropriate restrictive legend for which the data or software qualified under the prior contract or license. The Contractor must follow the marking procedures in paragraph (g)(1) of this clause.

(h) *Contractor procedures and records.* Throughout performance of this contract, the Contractor, and its subcontractors or suppliers that will deliver technical data or computer software with other than unlimited rights, must—

(1) Have, maintain, and follow written procedures sufficient to ensure that restrictive markings are used only when authorized by the terms of this clause; and

(2) Maintain records sufficient to justify the validity of any restrictive markings on technical data or computer software delivered under this contract.

(i) *Removal of unjustified and nonconforming markings.* (1) *Unjustified markings.* The rights and obligations of the parties regarding the validation of restrictive markings on technical data or computer software delivered or to be delivered under this contract are contained in the FAR 52.227–35, Validation of Asserted Restrictions, clause of this contract, respectively. Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may ignore or, at the Contractor's expense, correct or strike a marking if, in accordance with the applicable procedures of those clauses, a restrictive marking is determined to be unjustified.

(2) *Nonconforming markings.* A nonconforming marking is a marking placed on technical data or computer software delivered or otherwise furnished to the Government under this contract that is not in the format authorized by this contract. Correction of nonconforming markings is not subject to the FAR 52.227–35, Validation of Asserted Restrictions, clause of this contract. If the Contracting Officer notifies the Contractor of a nonconforming marking or markings and the Contractor fails to remove or correct such markings within 60 days, the Government may ignore or, at the Contractor's expense, remove or correct any nonconforming markings.

(j) *Relation to patents.* Nothing contained in this clause implies a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(k) *Limitation on charges for rights in technical data or computer software.* (1) The Contractor must not charge to this contract any cost, including but not limited to, license fees, royalties, or similar charges, for rights in technical data or computer software the Contractor must deliver under this contract when—

(i) The Government has acquired, by any means, the same or greater rights in the data or software; or

(ii) The data are available to the public without restrictions.

(2) The limitation in paragraph (k)(1) of this clause—

(i) Includes costs charged by a subcontractor or supplier, at any tier, or costs incurred by the Contractor to acquire rights in subcontractor or supplier technical data or computer software, if the subcontractor or supplier has been paid for such rights under any other Government contract or under a license conveying the rights to the Government; and

(ii) Does not include the reasonable costs of reproducing, handling, or mailing the documents or other media in which the technical data or computer software will be delivered.

(l) *Subcontractors or suppliers.* (1) The Contractor must grant its subcontractors and suppliers the same rights afforded the Contractor under this clause.

(2) The Contractor must include the following clauses in subcontracts, including those for commercial products or commercial services, or other contractual instrument, whenever any other than commercial technical data or computer software is to be obtained from a subcontractor or supplier for delivery to the Government under this contract, and, the Contractor must also require its subcontractors or suppliers do so, without alteration, except to identify the parties:

(i) Except as provided in paragraph (l)(2)(ii) of this clause, use this clause to govern SBIR/STTR data.

(ii) For data that are not SBIR/STTR data—

(A) Use the clause at 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services, to govern the technical data related to other than commercial products or commercial services or to any portion of a commercial product or commercial service that was developed in any part at Government expense, and use the clause at 52.227–27, Technical Data—Commercial Products and Commercial Services, to govern the technical data related to any portion of a commercial product or commercial service that was developed exclusively at private expense;

(B) Use the clause at 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services, to govern other than commercial computer software and computer software documentation; and

(C) Use the license under which the data are customarily provided to the public, in accordance with FAR 27.502, for commercial computer software and commercial computer software documentation.

(iii) No other clause must be used to expand or reduce the Government's, the Contractor's, or a higher tier subcontractor's or supplier's rights in a subcontractor's or supplier's technical data or computer software.

(3) Technical data the Contractor must deliver by a subcontractor or supplier must normally be delivered to the next higher tier contractor, subcontractor, or supplier. However, when there is a requirement in the prime contract for technical data which may be submitted with other than unlimited rights by a subcontractor or supplier, then

said subcontractor or supplier may fulfill its requirement by submitting such technical data directly to the Government, rather than through a higher tier contractor, subcontractor, or supplier.

(4) The Contractor and higher tier subcontractors or suppliers must not use their power to award contracts as economic leverage to obtain rights in technical data or computer software from their subcontractors or suppliers.

(5) The Contractor must in no event use its obligation to recognize and protect subcontractor or supplier rights in technical data or computer software as an excuse for failing to satisfy its contractual obligation to the Government.

(End of clause)

52.227–31 Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

As prescribed in 27.402–6(d), use the following clause:

Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends (DATE)

(a) *Definitions.* As used in this clause—

(1) For contracts in which the Government will furnish the Contractor with technical data, the terms covered *Government support contractor, limited rights, restricted rights,* and *Government purpose rights* are defined in the clause at 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services.

(2) For Small Business Innovation Research (SBIR) Program and Small Business Technology Transfer (STTR) Program contracts, the terms covered *Government support contractor, government purpose rights, limited rights, restricted rights,* and *SBIR/STTR data rights* are defined in the clause at 52.227–30, Rights in Other Than Commercial Technical Data and Other than Commercial Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program.

(b) *Government-furnished information.* Technical data or computer software provided to the Contractor as Government-furnished information (GFI) under this contract may be subject to restrictions on use, modification, reproduction, release, performance, display, or further disclosure.

(1) *GFI marked with limited rights, restricted rights, or SBIR/STTR data rights legends.* (i) The Contractor must use, modify, reproduce, perform, or display technical data received from the Government with limited rights legends, computer software received with restricted rights legends, or SBIR/STTR technical data or computer software received with SBIR/STTR data rights legends (during the SBIR/STTR data protection period) only in the performance of this contract. The Contractor must not, without the express written permission of the party whose name appears in the legend, release or disclose

such data or software to any unauthorized person.

(i) If the Contractor is a covered Government support contractor, the Contractor is also subject to the additional terms and conditions at paragraph (b)(5) of this clause.

(2) *GFI marked with government purpose rights legends.* The Contractor must use technical data or computer software received from the Government with government purpose rights legends for government purposes only. The Contractor must not, without the express written permission of the party whose name appears in the restrictive legend, use, modify, reproduce, release, perform, or display such data or software for any commercial purpose or disclose such data or software to a person other than its subcontractors, suppliers, or prospective subcontractors or suppliers, who require the data or software to submit offers for, or perform, contracts under this contract. Prior to disclosing the data or software, the Contractor must require the persons to whom disclosure will be made to complete and sign the nondisclosure agreement at Federal Acquisition Regulation (FAR) 27.402–7.

(3) *GFI marked with specially negotiated license rights legends.* (i) The Contractor must use, modify, reproduce, release, perform, or display technical data or computer software received from the Government with specially negotiated license legends only as permitted in the license. Such data or software may not be released or disclosed to other persons unless permitted by the license and, prior to release or disclosure, the intended recipient has completed the nondisclosure agreement at FAR 27.402–7. The Contractor must modify paragraph (1)(c) of the nondisclosure agreement to reflect the recipient's obligations regarding use, modification, reproduction, release, performance, display, and disclosure of the data or software.

(ii) If the Contractor is a covered Government support contractor, the Contractor may also be subject to some or all of the additional terms and conditions at paragraph (b)(5) of this clause, to the extent such terms and conditions are required by the specially negotiated license.

(4) *GFI technical data marked with commercial restrictive legends.* (i) The Contractor must use, modify, reproduce, perform, or display technical data that are or are related to a commercial product or commercial service and are received from the Government with a commercial restrictive legend (*i.e.*, marked to indicate that such data are subject to use, modification, reproduction, release, performance, display, or disclosure restrictions) only in the performance of this contract. The Contractor must not, without the express written permission of the party whose name appears in the legend, use the technical data to manufacture additional quantities of the commercial products or commercial services, or release or disclose such data to any unauthorized person.

(ii) If the Contractor is a covered Government support contractor, the Contractor is also subject to the additional terms and conditions at paragraph (b)(5) of this clause.

(5) *Covered Government support contractors.* If the Contractor is a covered Government support contractor receiving technical data or computer software marked with restrictive legends pursuant to paragraphs (b)(1)(ii), (b)(3)(ii), or (b)(4)(ii) of this clause, the Contractor further agrees and acknowledges that—

(i) The technical data or computer software will be accessed and used for the sole purpose of furnishing independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of the program or effort to which such technical data or computer software relates, as stated in this contract, and must not be used to compete for any Government or non-Government contract;

(ii) The Contractor must take all reasonable steps to protect the technical data or computer software against any unauthorized release or disclosure;

(iii) The Contractor must ensure that the party whose name appears in the legend is notified of the access or use within 30 days of the Contractor's access or use of such data or software;

(iv) The Contractor must enter into a nondisclosure agreement with the party whose name appears in the legend, if required to do so by that party, and that any such nondisclosure agreement will implement the restrictions on the Contractor's use of such data or software as set forth in this clause. The nondisclosure agreement must not include any additional terms and conditions unless mutually agreed to by the parties to the nondisclosure agreement; and

(v) That a breach of these obligations or restrictions may subject the Contractor to—

(A) Criminal, civil, administrative, and contractual actions in law and equity for penalties, damages, and other appropriate remedies by the United States; and

(B) Civil actions for damages and other appropriate remedies by the party whose name appears in the legend.

(c) *Indemnification and creation of third-party beneficiary rights.* The Contractor agrees—

(1) To indemnify and hold harmless the Government, its agents, and employees from every claim or liability, including attorneys fees, court costs, and expenses, arising out of, or in any way related to, the misuse or unauthorized modification, reproduction, release, performance, display, or disclosure of technical data or computer software received from the Government with restrictive legends by the Contractor or any person to whom the Contractor has released or disclosed such data or software; and

(2) That the party whose name appears on the restrictive legend, in addition to any other rights it may have, is a third-party beneficiary who has the right of direct action against the Contractor, or any person to whom the Contractor has released or disclosed such data or software, for the unauthorized duplication, release, or disclosure of technical data or computer software subject to restrictive legends.

(d) *Use and nondisclosure obligations.* The Contractor must ensure that its employees are

subject to use and nondisclosure obligations consistent with this clause prior to the employees being provided access to or use of any GFI covered by this clause.

(End of clause)

52.227–32 Deferred Ordering of Technical Data or Computer Software.

As prescribed at 27.402–6(g), use the following clause:

Deferred Ordering of Technical Data or Computer Software (DATE)

In addition to technical data or computer software the Contractor must deliver elsewhere in this contract, the Government may, at any time during the performance of this contract or within a period of three years after acceptance of all items (other than technical data or computer software) the Contractor must deliver under this contract or the termination of this contract, order any technical data or computer software generated in the performance of this contract or any of its subcontracts. When the technical data or computer software is ordered, the Contractor will be compensated for converting the data or computer software into the prescribed form, for reproduction and delivery. The Contractor's obligation to deliver technical data related to an item from a subcontractor expires three years after the Contractor accepts the final delivery of that item from that subcontractor. The Government's rights to use the data or computer software are pursuant to the clause at 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products or Commercial Services, of this contract.

(End of clause)

52.227–33 Technical Data or Computer Software Previously Delivered to the Government.

As prescribed in 27.402–6(e), use the following provision:

Technical Data or Computer Software Previously Delivered to The Government (DATE)

The Offeror must attach to its offer an identification of all documents or other media incorporating technical data or computer software it intends to deliver under this contract with other than unlimited rights that are identical or substantially similar to documents or other media that the Offeror has produced for, delivered to, or is obligated to deliver to the Government under any contract or subcontract. The attachment must identify, as applicable—

(a) The contract number under which the data or software were produced;

(b) The contract number under which, and the name and address of the organization to whom, the data or software were most recently delivered or will be delivered; and

(c) Any limitations on the Government's rights to use or disclose the data or software, including, when applicable, identification of the earliest date the limitations expire.

(End of provision)

52.227–34 Technical data—withholding of payment.

As prescribed at 27.402–6(f)(3), use the following clause:

Technical Data—Withholding of Payment (DATE)

(a) If technical data the Contractor must deliver under this contract is not delivered within the time specified by this contract or is deficient upon delivery (including having restrictive markings not identified in the list described in the clause at 52.227–26(f)(2) or 52.227–30(f)(2) of this contract), the Contracting Officer may until such data is accepted by the Government, withhold payment to the Contractor of ten percent (10%) of the total contract price or amount unless a lesser withholding is specified in the contract. Payments will not be withheld nor any other action taken pursuant to this paragraph when the Contractor's failure to make timely delivery or to deliver such data without deficiencies arises out of causes beyond the control and without the fault or negligence of the Contractor.

(b) The withholding of any amount or subsequent payment to the Contractor does not operate as a waiver of any rights accruing to the Government under this contract.

(End of clause)

52.227–35 Validation of Asserted Restrictions.

As prescribed in 27.402–6(f)(4) or 27.503–4(c), use the following clause:

Validation Of Asserted Restrictions (DATE)

(a) *Definitions.* The terms used in this clause are defined in the 52.227–26, Rights in Technical Data, Computer Software, and Computer Software Documentation—Other Than Commercial Products and Commercial Services, clause of this contract.

(b) *Technical data related to commercial products or commercial services—presumption regarding development exclusively at private expense.* For technical data related to commercial products or commercial services, the Contracting Officer will presume that the Contractor's or a subcontractor's asserted use or release restrictions with respect to a commercial product or commercial service are justified on the basis that the item was developed exclusively at private expense. The Contracting Officer will not issue a challenge unless there are reasonable grounds to question the validity of the assertion that the commercial item was developed exclusively at private expense.

(c) *Justification.* The Contractor or subcontractor at any tier is responsible for maintaining records sufficient to justify the validity of its asserted restrictions on the rights of the Government and others to use, duplicate, release, or disclose technical data or computer software delivered, required to be delivered, or otherwise provided to the Government under the contract or subcontract. Except as provided in paragraph

(b) of this clause, the Contractor or subcontractor must be prepared to furnish to the Contracting Officer a written justification for such asserted restrictions in response to a challenge under paragraph (e) of this clause.

(d) *Prechallenge request for information related to asserted restrictions on technical data.* (1) The Contracting Officer may request the Contractor or subcontractor to furnish a written explanation for any asserted restriction on the right of the United States or others to use, disclose, or release technical data. If, upon review of the explanation submitted, the Contracting Officer cannot determine the basis of the asserted restriction, the Contracting Officer may further request the Contractor or subcontractor to furnish additional information in the records of, or otherwise in the possession of or reasonably available to, the Contractor or subcontractor to justify the validity of any asserted restriction on technical data delivered, to be delivered, or otherwise provided to the Government under the contract or subcontract (e.g., a statement of facts accompanied with supporting documentation). The Contractor or subcontractor must submit such written data as requested by the Contracting Officer within the time required or such longer period as may be mutually agreed.

(2) If the Contracting Officer, after reviewing the written data furnished pursuant to paragraph (d)(1) of this clause, or any other available information related to the validity of an asserted restriction, determines that reasonable grounds exist to question the current validity of the asserted restriction and that continued adherence to the asserted restriction would make impracticable the subsequent competitive acquisition of the item or process to which the technical data relates, the Contracting Officer will follow the procedures in paragraph (f) of this clause.

(3) If the Contractor or subcontractor fails to respond to the Contracting Officer's request for information under paragraph (d)(1) of this clause, and the Contracting Officer determines that continued adherence to the asserted restriction would make impracticable the subsequent competitive acquisition of the item or process to which the technical data relates, the Contracting Officer may challenge the validity of the asserted restriction as described in paragraph (f) of this clause.

(e) *Prechallenge request for information related to assertion restrictions on computer software.* (1) The Contracting Officer may request the Contractor to provide sufficient information to enable the Contracting Officer to evaluate the Contractor's asserted restrictions. Such information must be based upon the records required by this clause or other information reasonably available to the Contractor.

(2) Based upon the information provided, if the—

(i) Contractor agrees that an asserted restriction is not valid, the Contracting Officer may—

(A) Strike or correct the unjustified marking at the Contractor's expense; or

(B) Return the computer software to the Contractor for correction at the Contractor's

expense. If the Contractor fails to correct or strike the unjustified marking and return the corrected software to the Contracting Officer within 60 days following receipt of the software, the Contracting Officer may correct or strike the marking at the Contractor's expense;

(ii) Contracting Officer concludes that the asserted restriction is appropriate for this contract, the Contracting Officer will so notify the Contractor in writing.

(3) The Contractor's failure to provide a timely response to a Contracting Officer's request for information or failure to provide sufficient information to enable the Contracting Officer to evaluate an asserted restriction constitutes reasonable grounds for questioning the validity of an asserted restriction.

(f) *Challenge.* (1) Notwithstanding any provision of this contract concerning inspection and acceptance, if the Contracting Officer determines that a challenge to the asserted restriction is warranted, the Contracting Officer will send a written challenge notice to the Contractor or subcontractor making the asserted restriction. The challenge notice and all related correspondence are subject to handling procedures for classified information and controlled unclassified information. Such challenge will—

(i) State the specific grounds for challenging the asserted restriction including, for technical data related to commercial products or commercial services, sufficient information to reasonably demonstrate that the commercial product or commercial service was not developed exclusively at private expense;

(ii) Require a response within 60 days justifying the assertion based upon records kept in accordance with paragraph (c) of this clause and providing sufficient evidence as to the current validity of the asserted restriction;

(iii) State that a Contracting Officer's final decision, issued pursuant to paragraph (h) of this clause, or action of a court of competent jurisdiction or Board of Contract Appeals that sustained the validity of an identical assertion made by the Contractor (or a licensee) sustaining the validity of a prior asserted restriction identical to the current asserted restriction, within the 3-year period preceding the current challenge, serves as justification for the current asserted restriction if the prior validated restriction was asserted by the same Contractor or subcontractor (or any licensee of such Contractor or subcontractor) to which such notice is being provided; and

(iv) State that failure to respond to the challenge notice may result in issuance of a final decision pursuant to paragraph (g) of this clause.

(2) The Contracting Officer will extend the time for response as appropriate if the Contractor or subcontractor submits a written request showing the need for additional time to prepare a response.

(3) The Contractor's or subcontractor's written response will be considered a claim within the meaning of the 41 U.S.C. 7101, Contract Disputes, and must be certified in the form prescribed at 33.207 of the Federal

Acquisition Regulation, regardless of dollar amount.

(4) A Contractor or subcontractor receiving challenges to the same asserted restrictions from more than one Contracting Officer must notify each Contracting Officer of the existence of more than one challenge. The notice must also state which Contracting Officer initiated the first in time unanswered challenge. The Contracting Officer initiating the first in time unanswered challenge after consultation with the Contractor or subcontractor and the other Contracting Officers, will formulate and distribute a schedule for responding to each of the challenge notices to all interested parties. The schedule will afford the Contractor or subcontractor a reasonable opportunity to respond to each challenge notice. All parties will be bound by this schedule.

(5) The Contracting Officer may request additional supporting documentation if, in the Contracting Officer's opinion, the Contractor's explanation does not provide sufficient evidence to justify the validity of the asserted restrictions. The Contractor agrees to promptly respond to the Contracting Officer's request for additional supporting documentation.

(6) Notwithstanding challenge by the Contracting Officer, the parties may agree on the disposition of an asserted restriction at any time prior to a Contracting Officer's final decision or, if the Contractor has appealed that decision, filed suit, or provided notice of an intent to file suit, at any time prior to a decision by a court of competent jurisdiction or Board of Contract Appeals.

(g) *Final decision when Contractor or subcontractor fails to respond.* Upon a failure of a Contractor or subcontractor to submit any response to the challenge notice or a request for additional information (under paragraphs (f)(1) and (f)(5) of this clause), the Contracting Officer will issue a final decision to the Contractor or subcontractor in accordance with the Disputes clause of this contract. In order to sustain the challenge for commercial products or commercial services, the Contracting Officer will provide information demonstrating that the commercial product or commercial service was not developed exclusively at private expense. This final decision will be issued as soon as possible after the expiration of the time period of paragraph (f)(1)(ii) or (f)(2) of this clause. Following issuance of the final decision, the Contracting Officer will comply with the procedures in paragraphs (h)(2)(ii) through (iv) of this clause.

(h) *Final decision when Contractor or subcontractor responds.* (1) If the Contracting Officer determines that the Contractor or subcontractor has justified the validity of the asserted restriction, the Contracting Officer will issue a final decision to the Contractor or subcontractor that sustains the validity of the asserted restriction and that states that the Government will continue to be bound by the asserted restriction. The Contracting Officer will issue this final decision within 60 days after receipt of the Contractor's or subcontractor's response to the challenge notice, or within such longer period that the Contracting Officer has notified the Contractor or subcontractor that the

Government will require. The Contracting Officer will provide notification of any longer period for issuance of a final decision within 60 days after receipt of the response to the challenge notice.

(2)(i) If the Contracting Officer determines that the validity of the asserted restriction is not justified, the Contracting Officer will issue a final decision to the Contractor or subcontractor in accordance with the Disputes clause of this contract. To sustain the challenge for technical data related to commercial products or commercial services, the Contracting Officer will provide information demonstrating that the commercial product or commercial service was not developed exclusively at private expense. Notwithstanding paragraph (e) of the Disputes clause, the final decision will be issued within 60 days after receipt of the Contractor's or subcontractor's response to the challenge notice, or within such longer period that the Contracting Officer has notified the Contractor or subcontractor that the Government will require. The notification of a longer period for issuance of a final decision will be made within 60 days after receipt of the response to the challenge notice.

(ii) The Government agrees that it will continue to be bound by the asserted restriction for a period of 90 days from the issuance of the Contracting Officer's final decision under paragraph (h)(2)(i) of this clause. The Contractor or subcontractor agrees that, if it intends to file suit in the United States Court of Federal Claims, it will provide a notice of intent to file suit to the Contracting Officer within 90 days from the issuance of the Contracting Officer's final decision under paragraph (h)(2)(i) of this clause. If the Contractor or subcontractor fails to appeal to an agency Board of Contract Appeals, file suit in an appropriate court, or provide a notice of intent to file suit in an appropriate court to the Contracting Officer within the 90-day period, the Government may cancel or ignore the restrictive markings that are based on the asserted restrictions, and the failure of the Contractor or subcontractor to take the required action constitutes agreement with such Government action.

(iii) The Government agrees that it will continue to be bound by the asserted restriction where a notice of intent to file suit in the United States Court of Federal Claims is provided to the Contracting Officer within 90 days from the issuance of the final decision under paragraph (h)(2)(i) of this clause. The Government will no longer be bound, and the Contractor or subcontractor agrees that the Government may strike or ignore the restrictive marking that is based on the asserted restriction, if the Contractor or subcontractor fails to file its suit within 1 year after issuance of the final decision. Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable basis, that urgent or compelling circumstances will not permit waiting for the filing of a suit in the United States Court of Federal Claims, the Contractor or subcontractor agrees that the agency may, following notice to the Contractor or subcontractor, authorize release or disclosure

of the technical data or computer software. The Government agrees not to release or disclose such technical data or computer software unless, prior to release or disclosure, the intended recipient is subject to the use and nondisclosure agreement at Federal Acquisition Regulation (FAR) 27.402–7, or is a Government contractor receiving access to the technical data or computer software for performance of a Government contract that contains the clause at FAR 52.227–31, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends. Such agency determination may be made at any time after issuance of the final decision and will not affect the Contractor's or subcontractor's right to damages against the United States where its asserted restrictions are ultimately upheld or to pursue other relief, if any, as may be provided by law.

(iv) The Government agrees that it will be bound by the asserted restrictions where an appeal or suit is filed pursuant to the Contract Disputes statute until final disposition by an agency Board of Contract Appeals or the United States Court of Federal Claims. Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable basis, following notice to the Contractor that urgent or compelling circumstances will not permit awaiting the decision by such Board of Contract Appeals or the United States Court of Federal Claims, the Contractor or subcontractor agrees that the agency may authorize release or disclosure of the technical data or computer software. The Government agrees not to release or disclose such technical data or computer software unless, prior to release or disclosure, the intended recipient is subject to the use and nondisclosure agreement at FAR 27.402–7, or is a Government contractor receiving access to the technical data or computer software for performance of a Government contract that contains the clause at FAR 52.227–31, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends. Such agency determination may be made at any time after issuance of the final decision and will not affect the Contractor's or subcontractor's right to damages against the United States where its asserted restrictions are ultimately upheld or to pursue other relief, if any, as may be provided by law.

(i) *Final disposition of appeal or suit.* (1) If the Contractor or subcontractor appeals or files suit and if, upon final disposition of the appeal or suit, the Contracting Officer's decision is sustained—

(i) The restrictive marking that is based on the asserted restriction on the technical data or computer software will be cancelled, corrected or ignored; and

(ii) If the asserted restriction is found not to be substantially justified, the Contractor or subcontractor, as appropriate, will be liable to the Government for payment of the cost to the Government of reviewing the asserted restriction and the fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Government in challenging the asserted restriction, unless special

circumstances would make such payment unjust.

(2) If the Contractor or subcontractor appeals or files suit and if, upon final disposition of the appeal or suit, the Contracting Officer's decision is not sustained—

(i) The Government will continue to be bound by the restrictive marking; and

(ii) The Government will be liable to the Contractor or subcontractor for payment of fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Contractor or subcontractor in defending the marking, if the challenge by the Government is found not to have been made in good faith.

(j) *Duration of right to challenge.* (1) The Government may review the validity of any restriction on technical data or computer software, delivered or that the Contractor must deliver under a contract, asserted by the Contractor or subcontractor. During the period within 6 years of final payment on a contract or within 6 years of delivery of the technical data or computer software to the Government, whichever is later, the Contracting Officer may review and make a written determination to challenge the restriction. The Government may, however, challenge a restriction on the release, disclosure, or use of technical data or computer software at any time if such technical data or computer software—

(i) Are publicly available;

(ii) Have been furnished to the United States without restriction;

(iii) Have been otherwise made available without restriction; or

(iv) Are the subject of a fraudulently asserted use or release restriction.

(2) Only the Contracting Officer's final decision resolving a formal challenge by sustaining the validity of a restrictive marking or actions of an agency Board of Contract Appeals or a court of competent jurisdiction that sustain the validity of an asserted restriction constitute "validation."

(k) *Decision not to challenge.* A decision by the Government, or a determination by the Contracting Officer, not to challenge the restrictive marking or asserted restriction does not constitute "validation."

(l) *Privity of contract.* The Contractor or subcontractor agrees that the Contracting Officer may transact matters under this clause directly with subcontractors at any tier that assert restrictions. However, this clause neither creates nor implies privity of contract between the Government and subcontractor.

(m) *Subcontracts.* The Contractor must include the substance of this clause in subcontracts, or other contractual instruments, including those for commercial products or commercial services, requiring the delivery of technical data or computer software. The clause may not be altered other than to identify the appropriate parties.

(End of clause)

52.227–36 Additional Preaward Requirements for Small Business Technology Transfer Program.

As prescribed in 27.403–4(c)(1), use the following provision:

Additional Preaward Requirements for Small Business Technology Transfer Program (DATE)

(a) *Definitions.* As used in this provision, the terms *research institution* and *United States* have the meaning given in the 52.227–37, Additional Postaward Requirements for Small Business Technology Transfer Program, clause of this solicitation.

(b) Offers submitted in response to this solicitation must include the following:

(1) The written agreement between the Offeror and a research institution, which must contain—

(i) A specific allocation of ownership, rights, and responsibilities for intellectual property (including inventions, patents, technical data, and computer software) resulting from the Small Business Technology Transfer (STTR) Program award;

(ii) Identification of which party to the written agreement may obtain United States or foreign patents or otherwise protect any inventions that result from a STTR award; and

(iii) No terms or conditions that conflict with the requirements of the clause at 52.227–30, Rights in Other Than Commercial Technical Data and Other than Commercial Computer Software-Small Business Innovation Research Program and Small Business Technology Transfer Program, or this provision, including the rights of the United States, the Offeror, and the research institution regarding intellectual property, and regarding any right to carry out follow-on research.

(2) The Offeror's written representation that—

(i) The Offeror is satisfied with its written agreement with the research institution; and

(ii) The written agreement does not conflict with the requirements of this solicitation.

(c) The Offeror must submit the written representation required by paragraph (b)(2) of this provision as an attachment to its offer, dated and signed by an official authorized to contractually obligate the Offeror.

(d) The Offeror's failure to submit the written agreement or written representation required by paragraph (b) of this provision with its offer may render the offer ineligible for award.

(e) If the Offeror is awarded a contract, the Contracting Officer will include the written agreement and written representation required by paragraph (b) of this provision in an attachment to that contract.

(End of provision)

52.227–37 Additional Postaward Requirements for Small Business Technology Transfer Program.

As prescribed in 27.403–4(c)(2), use the following clause:

Additional Postaward Requirements for Small Business Technology Transfer Program (DATE)

(a) *Definitions.* As used in this clause—
Research institution means an institution or entity that—

(1) Has a place of business located in the United States;

(2) Operates primarily within the United States or makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials, or labor; and

(3) Is either—

(i) A nonprofit institution that is owned and operated exclusively for scientific or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual (section 4(3) of the Stevenson-Wylder Technology Innovation Act of 1980); or

(ii) A federally-funded research or research and development center as identified by the National Science Foundation (<https://www.nsf.gov/statistics/ffrdclist/>) in accordance with the guidance at Federal Acquisition Regulation (FAR) 35.017.

United States means the 50 States and the District of Columbia, the territories and possessions of the Government, the Commonwealth of Puerto Rico, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.

(b) *Preaward submissions.* Attached to this contract are the following documents, submitted by the Contractor pursuant to FAR 52.227–36, Additional Preaward Requirements for Small Business Technology Transfer Program:

(1) The written agreement between the Contractor and a research institution.

(2) The Contractor's written representation that the Contractor is satisfied with that written agreement, which does not conflict with the clause at FAR 52.227–30, Rights in Other Than Commercial Technical Data and Other than Commercial Computer Software-Small Business Innovation Research Program and Small Business Technology Transfer Program, or this clause.

(c) *Postaward updates.* The Contractor must not allow any modification to its written agreement with the research institution, unless the written agreement, as modified, contains—

(1) A specific allocation of ownership, rights, and responsibilities for intellectual property (including inventions, patents, technical data, and computer software) resulting from performance of this contract;

(2) Identification of which party to the written agreement may obtain United States or foreign patents or otherwise protect any inventions that result from a Small Business Technology Transfer Program award;

(3) The Contractor's written, dated, and signed representation that—

(i) The Contractor is satisfied with its written agreement with the research institution, as modified; and

(ii) The written agreement, as modified, does not conflict with the clause at FAR 52.227–30, Rights in Other Than Commercial Technical Data and Other than Commercial Computer Software-Small Business Innovation Research Program and Small Business Technology Transfer Program, or this clause; and

(4) No terms and conditions that conflict with the clause at FAR 52.227–30, Rights in Other Than Commercial Technical Data and Other than Commercial Computer Software-Small Business Innovation Research Program and Small Business Technology Transfer

Program, or this clause, including the rights of the United States, the Contractor, and the research institution regarding intellectual property, and regarding any right to carry out follow-on research.

(d) *Submission of updated agreement.* Within 30 days of execution of the modified written agreement described in paragraph (b)(1) of this clause, the Contractor must submit a copy of that updated written agreement and the updated written representation described in paragraph (b)(2) of this clause to the Contracting Officer for review and attachment to this contract.

(End of clause)

■ 11. Revise sections 52.247–1 through 52.247–2 to read as follows:

52.247–1 Commercial Bill of Lading Notations.

As prescribed in 47.103–4, insert the following clause:

Commercial Bill of Lading Notations (DATE)

When the Contracting Officer authorizes supplies to be shipped on a commercial bill of lading and the Contractor will be reimbursed these transportation costs as direct allowable costs, the Contractor must ensure before shipment is made that the commercial shipping documents are annotated with either of the following notations, as appropriate:

(a) If the Government is shown as the consignor or the consignee, the Contractor must annotate as follows: “Transportation is for the _____ [name the specific agency] and the actual total transportation charges paid to the carrier(s) by the consignor or consignee are assignable to, and will be reimbursed by, the Government.”

(b) If the Government is not shown as the consignor or the consignee, the Contractor must annotate as follows: “Transportation is for the _____ [name the specific agency] and the actual total transportation charges paid to the carrier(s) by the consignor or consignee will be reimbursed by the Government, pursuant to cost-reimbursement contract No. _____. This may be confirmed by contacting _____ [Name and address of the contract administration office listed in the contract].”

(End of clause)

52.247–2 Permits, Authorities, or Franchises.

As prescribed in 47.203–1(a), insert the following clause:

Permits, Authorities, or Franchises (DATE)

(a) The offeror does ☐, does not ☐, hold authorization from the Federal Highway Administration (FHWA) or other cognizant regulatory body. If authorization is held, it is as follows:

(Name of regulatory body)

(Authorization No.)

(b) The offeror must furnish to the Government, if requested, copies of the authorization before moving the material under any contract awarded. In addition, the

offeror must, at the offeror's expense, obtain and maintain any permits, franchises, licenses, and other authorities issued by State and local governments.

(End of clause)

52.247–3 through 52.247–4 [Removed and Reserved]

■ 12. Remove and reserve sections

52.247–3 through 52.247–4.

■ 13. Revise section 52.247–5 to read as follows:

52.247–5 Familiarization with Conditions.

As prescribed in 47.203–1(b), insert the following clause:

Familiarization With Conditions (DATE)

The offeror must become familiar with all available information regarding difficulties that may be encountered and the conditions, including safety precautions, under which the work must be accomplished under the contract. The offeror is not relieved from assuming all responsibility for properly estimating the difficulties and the cost of performing the services required in this contract because the offeror failed to investigate the conditions or to become acquainted with all information concerning the services to be performed.

(End of clause)

52.247–6 through 52.247–7 [Removed and Reserved]

■ 14. Remove and reserve sections

52.247–6 through 52.247–7.

■ 15. Revise section 52.247–8 to read as follows:

52.247–8 Estimated Weights or Quantities Not Guaranteed.

As prescribed in 47.203–2(b), insert the following clause:

Estimated Weights or Quantities Not Guaranteed (DATE)

The estimated weights or quantities are not a guarantee of actual weights or quantities, because the Government does not guarantee any particular volume of traffic described in this contract. However, to the extent services are required as described in this contract, and in accordance with the terms of this contract, the Government will order these services from the Contractor.

(End of clause)

52.247–9 [Removed and Reserved]

■ 16. Remove and reserve section 52.247–9.

■ 17. Revise sections 52.247–10 through 52.247–11 to read as follows:

52.247–10 Net Weight-General Freight.

As prescribed in 47.203–3(b), insert the following clause:

Net Weight-General Freight (DATE)

(a) The net weight of the shipment is calculated by deducting the tare weight of the

vehicle (determined by having the empty vehicle with a full tank of fuel weighed by a certified weighmaster on a certified scale) from the gross weight of the vehicle (determined by having the loaded vehicle with a full tank of fuel weighed by a certified weighmaster on a certified scale).

(b) The Contractor must attach the original copies of the empty and loaded weight certificates to the invoice for services.

(End of clause)

52.247–11 Net Weight-Household Goods or Office Furniture.

As prescribed in 47.203–3(c), insert the following clause:

Net Weight-Household Goods or Office Furniture (DATE)

(a) *Net weight-full loads.* The net weight of the shipment is calculated by deducting the tare weight of the vehicle (determined by having a certified weighmaster weigh on a certified scale the empty vehicle with all blankets, pads, chains, dollies, hand trucks, and all other necessary equipment inside the vehicle) from the gross weight of the vehicle (determined by having a certified weighmaster weigh on a certified scale the fully loaded vehicle before arrival at destination).

(b) *Net weight-part loads.* The net weight of the first part load is calculated in the same manner as specified for a full load. The net weight of the second part load is calculated by using as the tare weight of the vehicle the gross weight of the vehicle containing the first part load and deducting this weight from the new gross weight (determined by having the loaded vehicle weighed again, in the same manner as specified for the full load). The same procedure applies to each succeeding part load.

(c) *Weight certificates.* The contractor must attach the original copy of each weight certificate to the invoice for services.

(End of clause)

52.247–12 [Removed and Reserved]

■ 18. Remove and reserve section 52.247–12.

■ 19. Revise section 52.247–13 to read as follows:

52.247–13 Accessorial Services-Moving Contracts.

As prescribed in 47.203–4(c), insert the following clause:

Accessorial Services—Moving Contracts (DATE)

(a) *Packing and/or crating and padding.* The Contractor must—

(1) Perform all of the packing and/or crating and padding necessary for the protection of the goods to be transported;

(2) Furnish packing containers, including, but not limited to, barrels, boxes, wardrobes, and cartons; all crating materials; and all padding materials and equipment;

(3) Furnish or cause to be furnished, when necessary, padding or other protective material for the interior of the buildings,

including elevators, from and to which the property will be moved under this contract; and

(4) Ensure that all containers and materials are clean and of quality sufficient for protection of the goods.

(b) *Disassembling and reassembling of property and servicing appliances.* The Contractor must disassemble property; e.g., beds and sectional bookcases, and prepare appliances; e.g., washers, driers, refrigerators, and audio-visual equipment, for shipment. The Contractor must reassemble the property and service the appliances upon delivery at the new location.

(c) *Unpacking and/or uncrating and placement of property.* The Contractor must unpack and/or uncrate all property that was packed and/or crated for movement under this contract. The Contractor must also place the property in the new location as instructed by the owner of the property or authorized representative, and it must remove all packing and similar or related material from the premises as the owner requests.

(End of clause)

52.247-14 [Removed and Reserved]

■ 20. Remove and reserve section 52.247-14.

■ 21. Revise section 52.247-15 to read as follows:

52.247-15 Contractor Responsibility for Loading and Unloading.

As prescribed in 47.203-4(d), insert the following clause:

Contractor Responsibility for Loading and Unloading (DATE)

(a)(1) Unless otherwise specified in this contract to cover store-door or inside delivery, the Contractor must load and unload shipments at no additional expense to the Government.

(2) The Government or its agent will place or receive freight at the tailgate of the Contractor's vehicle. Tailgate delivery, for purposes of this contract, is defined as that which enables a forklift truck or similar equipment, with operator only, to place or remove cargo from the tailgate of the Contractor's vehicle.

(b) If loading is the responsibility of the Contractor, the Contractor must perform all shoring, blocking, and bracing. The Contractor must provide dunnage at the Contractor's expense.

(End of clause)

52.247-16 [Removed and Reserved]

■ 22. Remove and reserve section 52.247-16.

■ 23. Revise sections 52.247-17 through 52.247-19 to read as follows:

52.247-17 Charges.

As prescribed in 47.203-5(d), insert the following clause:

Charges (DATE)

Charges under this contract must not exceed—

(a) The Contractor's lowest rate available to the general public; or

(b) Rates the Contractor otherwise tenders the Government for the same type of service.

(End of clause)

52.247-18 Multiple Shipments.

As prescribed in 47.203-5(e), insert the following clause:

Multiple Shipments (DATE)

When multiple shipments are tendered at one time to the Contractor for movement from one origin to multiple consignees at the same destination, the rate charged for each shipment must be the rate applicable to the aggregate weight.

(End of clause)

52.247-19 Stopping in Transit for Partial Unloading.

As prescribed in 47.203-5(f), insert the following clause:

Stopping in Transit for Partial Unloading (DATE)

When multiple shipments are tendered at one time to the Contractor for movement from one origin to two or more consignees along the route between the origin and the last destination, the rate charged must be the rate applicable to the aggregate weight, plus a charge of \$_____f for each shipment unloaded at an intermediate point en route to the last destination.

(End of clause)

52.247-20 [Removed and Reserved]

■ 24. Remove and reserve section 52.247-20.

■ 25. Revise sections 52.247-21 through 52.247-23 to read as follows:

52.247-21 Contractor Liability for Personal Injury and/or Property Damage.

As prescribed in 47.203-6(c), insert the following clause:

Contractor Liability for Personal Injury and/or Property Damage (DATE)

(a) The Contractor assumes responsibility for all damage or injury to persons or property occasioned through the use, maintenance, and operation of the Contractor's vehicles or other equipment by, or the action of, the Contractor or the Contractor's employees and agents.

(b) The Contractor, at the Contractor's expense, must maintain adequate public liability and property damage insurance during the continuance of this contract, insuring the Contractor against all claims for injury or damage.

(c) The Contractor must maintain Workers' Compensation and other legally required insurance with respect to the Contractor's own employees and agents.

(d) The Government will in no event be liable or responsible for damage or injury to any person or property occasioned through the use, maintenance, or operation of any vehicle or other equipment by, or the action

of, the Contractor or the Contractor's employees and agents in performing under this contract, and the Government must be indemnified and saved harmless against claims for damage or injury in such cases.

(End of clause)

52.247-22 Contractor Liability for Loss of and/or Damage to Freight other than Household Goods.

As prescribed in 47.203-6(d), insert the following clause:

Contractor Liability for Loss of and/or Damage to Freight Other Than Household Goods (DATE)

Except when loss and/or damage arises out of causes beyond the control and without the fault or negligence of the Contractor, the Contractor assumes full liability for any and all goods lost and/or damaged in the movement covered by this contract.

(End of clause)

52.247-23 Contractor Liability for Loss of and/or Damage to Household Goods.

As prescribed in 47.203-6(e), insert the following clause:

Contractor Liability for Loss of and/or Damage to Household Goods (DATE)

(a) Except when loss and/or damage arise out of causes beyond the control and without the fault or negligence of the Contractor, the Contractor is liable to the owner for the loss of and/or damage to any article while being—

(1) Packed, picked up, loaded, transported, delivered, unloaded, or unpacked;

(2) Stored in transit; or

(3) Serviced (appliances, etc.) by a third person hired by the Contractor to perform the servicing.

(b) The Contractor is liable for loss and/or damage discovered by the owner if written notice of such loss and/or damage is dispatched to the Contractor not later than 75 days following the date of delivery.

(c) The Contractor must indemnify the owner of the goods at a rate of \$_____p per pound per article.

(End of clause)

52.247-24 through 52.247-28 [Removed and Reserved]

■ 26. Remove and reserve sections 52.247-24 through 52.247-28.

■ 27. Revise sections 52.247-29 through 52.247-39 to read as follows:

52.247-29 F.o.b. Origin.

As prescribed in 47.303-1(b), insert the following clause:

F.o.b. Origin (DATE)

(a) The term "f.o.b. origin," as used in this clause, means free of expense to the Government delivered—

(1) On board the indicated type of conveyance of the carrier (or of the Government, if specified) at a designated point in the city, county, and State from which the shipment will be made and from

which line-haul transportation service (as distinguished from switching, local drayage, or other terminal service) will begin;

(2) To, and placed on, the carrier's wharf (at shipside, within reach of the ship's loading tackle, when the shipping point is within a port area having water transportation service) or the carrier's freight station;

(3) To a U.S. Postal Service facility; or

(4) If stated in the solicitation, to any Government designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372).

(b) The Contractor must—

(1)(i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment in conformance with carrier requirements to protect the goods and to ensure assessment of the lowest applicable transportation charge;

(2)(i) Order specified carrier equipment when requested by the Government; or

(ii) If not specified, order appropriate carrier equipment not in excess of capacity to accommodate shipment;

(3) Deliver the shipment in good order and condition to the carrier, and load, stow, trim, block, and/or brace carload or truckload shipment (when loaded by the Contractor) on or in the carrier's conveyance as required by carrier rules and regulations;

(4) Be responsible for any loss of and/or damage to the goods—

(i) Occurring before delivery to the carrier;

(ii) Resulting from improper packing and marking; or

(iii) Resulting from improper loading, stowing, trimming, blocking, and/or bracing of the shipment, if loaded by the Contractor on or in the carrier's conveyance;

(5) Complete the Government bill of lading supplied by the ordering agency or, when a Government bill of lading is not supplied, prepare a commercial bill of lading or other transportation receipt. The bill of lading must show—

(i) A description of the shipment in terms of the governing freight classification or tariff (or Government rate tender) under which lowest freight rates are applicable;

(ii) The seals affixed to the conveyance with their serial numbers or other identification;

(iii) Lengths and capacities of cars or trucks ordered and furnished;

(iv) Other pertinent information required to effect prompt delivery to the consignee, including name, delivery address, postal address and ZIP code of consignee, routing, etc.;

(v) Special instructions or annotations

requested by the ordering agency for commercial bills of lading; *e.g.*, "This shipment is the property of, and the freight charges paid to the carrier(s) will be reimbursed by, the Government"; and

(vi) The signature of the carrier's agent and the date the shipment is received by the carrier; and

(6) Distribute the copies of the bill of lading, or other transportation receipts, as directed by the ordering agency.

(c) These Contractor responsibilities are specified for performance at the plant or plants at which the supplies are to be finally inspected and accepted, unless the facilities for shipment by carrier's equipment are not available at the Contractor's plant, in which case the responsibilities must be performed f.o.b. the point or points in the same or nearest city where the specified carrier's facilities are available; subject, however, to the following qualifications:

(1) If the Contractor's shipping plant is in the State of Alaska or Hawaii, the Contractor must deliver the supplies listed for shipment outside Alaska or Hawaii to the port of loading in Alaska or Hawaii, respectively, as specified in the contract, at Contractor's expense, and to that extent the contract must be "f.o.b. destination."

(2) Notwithstanding paragraph (c)(1) of this clause, if the Contractor's shipping plant is in the State of Hawaii, and the contract requires delivery to be made by container service, the Contractor must deliver the supplies, at the Contractor's expense, to the container yard in the same or nearest city where seavan container service is available.

(End of clause)

52.247–30 F.o.b. Origin, Contractor's Facility.

As prescribed in 47.303–2(b), insert the following clause:

F.o.b., Contractor's Facility (DATE)

(a) The term "f.o.b. origin, contractor's facility," as used in this clause, means free of expense to the Government delivered on board the indicated type of conveyance of the carrier (or of the Government, if specified) at the designated facility, on the named street or highway, in the city, county, and State from which the shipment will be made.

(b) The Contractor must—

(1)(i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment in conformance with carrier requirements to protect the goods and to ensure assessment of the lowest applicable transportation charge;

(2)(i) Order specified carrier equipment when the Government requests it; or

(ii) If not specified, order appropriate carrier equipment not in excess of capacity to accommodate shipment;

(3) Deliver the shipment in good order and condition to the carrier, and load, stow, trim, block, and/or brace carload or truckload shipment (when loaded by the Contractor) on or in the carrier's conveyance as required by carrier rules and regulations;

(4) Be responsible for any loss of and/or damage to the goods—

(i) Occurring before delivery to the carrier;

(ii) Resulting from improper packing and marking; or

(iii) Resulting from improper loading, stowing, trimming, blocking, and/or bracing of the shipment, if loaded by the Contractor on or in the carrier's conveyance;

(5) Complete the Government bill of lading supplied by the ordering agency or, when a Government bill of lading is not supplied, prepare a commercial bill of lading or other

transportation receipt. The bill of lading shall show—

(i) A description of the shipment in terms of the governing freight classification or tariff (or Government rate tender) under which lowest freight rates are applicable;

(ii) The seals affixed to the conveyance with their serial numbers or other identification;

(iii) Lengths and capacities of cars or trucks ordered and furnished;

(iv) Other pertinent information required to effect prompt delivery to the consignee, including name, delivery address, postal address and ZIP code of consignee, routing, etc.;

(v) Special instructions or annotations requested by the ordering agency for bills of lading; *e.g.*, "This shipment is the property of, and the freight charges paid to the carrier(s) will be reimbursed by, the Government"; and

(vi) The signature of the carrier's agent and the date the shipment is received by the carrier; and

(6) Distribute the copies of the bill of lading, or other transportation receipts, as directed by the ordering agency.

(End of clause)

52.247–31 F.o.b. Origin, Freight Allowed.

As prescribed in 47.303–3(b), insert the following clause:

F.o.b. Origin, Freight Allowed (DATE)

(a) The term "f.o.b. origin, freight allowed," as used in this clause, means—

(1) Free of expense to the Government delivered—

(i) On board the indicated type of conveyance of the carrier (or of the Government, if specified) at a designated point in the city, county, and State from which the shipments will be made and from which line-haul transportation service (as distinguished from switching, local drayage, or other terminal service) will begin;

(ii) To, and placed on, the carrier's wharf (at shipside within reach of the ship's loading tackle when the shipping point is within a port area having water transportation service) or the carrier's freight station;

(iii) To a U.S. Postal Service facility; or

(iv) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372; and

(2) An allowance for freight, based on applicable published tariff rates (or Government rate tenders) between the points specified in the contract, is deducted from the contract price.

(b) The Contractor must—

(1)(i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment in conformance with carrier requirements to protect the goods and to ensure assessment of the lowest applicable transportation charge;

(2)(i) Order specified carrier equipment when the Government requests it; or

(ii) If not specified, order appropriate carrier equipment not in excess of capacity to accommodate shipment;

(3) Deliver the shipment in good order and condition to the carrier, and load, stow, trim, block, and/or brace carload or truckload shipment (when loaded by the Contractor) on or in the carrier's conveyance as required by carrier rules and regulations;

(4) Be responsible for any loss of and/or damage to the goods—

(i) Occurring before delivery to the carrier;

(ii) Resulting from improper packing and marking; or

(iii) Resulting from improper loading, stowing, trimming, blocking, and/or bracing of the shipment, if loaded by the Contractor on or in the carrier's conveyance;

(5) Complete the Government bill of lading supplied by the ordering agency, or when a Government bill of lading is not supplied, prepare a commercial bill of lading or other transportation receipt. The bill of lading must show—

(i) A description of the shipment in terms of the governing freight classification or tariff (or Government rate tender) under which lowest freight rates are applicable;

(ii) The seals affixed to the conveyance with their serial numbers or other identification;

(iii) Lengths and capacities of cars or trucks ordered and furnished;

(iv) Other pertinent information required to effect prompt delivery to the consignee, including name, delivery address, postal address and ZIP code of consignee, routing, etc.;

(v) Special instructions or annotations requested by the ordering agency for commercial bills of lading; *e.g.*, “This shipment is the property of, and the freight charges paid to the carrier(s) will be reimbursed by, the Government”; and

(vi) The signature of the carrier's agent and the date the shipment is received by the carrier; and

(6) Distribute the copies of the bill of lading, or other transportation receipts, as directed by the ordering agency.

(c) These Contractor responsibilities are specified for performance at the plant or plants at which the supplies are to be finally inspected and accepted, unless the facilities for shipment by carrier's equipment are not available at the Contractor's plant, in which case the responsibilities must be performed f.o.b. the point or points in the same or nearest city where the specified carrier's facilities are available; subject, however, to the following qualifications:

(1) If the Contractor's shipping plant is in the State of Alaska or Hawaii, the Contractor must deliver the supplies listed for shipment outside Alaska or Hawaii to the port of loading in Alaska or Hawaii, respectively, as specified in the contract, at Contractor's expense, and to that extent the contract will be “f.o.b. destination.”

(2) Notwithstanding paragraph (c)(1) of this clause, if the Contractor's shipping plant is in the State of Hawaii, and the contract requires delivery to be made by container service, the Contractor must deliver the supplies, at the Contractor's expense, to the container yard in the same or nearest city where seavan container service is available.

(End of clause)

52.247–32 F.o.b. Origin, Freight Prepaid.

As prescribed in 47.303–4(b), insert the following clause:

F.o.b. Origin, Freight Prepaid (DATE)

(a) The term “f.o.b. origin, freight prepaid,” as used in this clause, means—

(1) Free of expense to the Government delivered—

(i) On board the indicated type of conveyance of the carrier (or of the Government, if specified) at a designated point in the city, county, and State from which the shipments will be made and from which line-haul transportation service (as distinguished from switching, local drayage, or other terminal service) will begin;

(ii) To, and placed on, the carrier's wharf (at shipside, within reach of the ship's loading tackle, when the shipping point is within a port area having water transportation service) or the carrier's freight station;

(iii) To a U.S. Postal Service facility; or

(iv) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372); and

(2) The cost of transportation, ultimately the Government's obligation, is prepaid by the contractor to the point specified in the contract.

(b) The Contractor must—

(1)(i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment in conformance with carrier requirements to protect the goods and to ensure assessment of the lowest applicable transportation charge;

(2)(i) Order specified carrier equipment when the Government requests it; or

(ii) If not specified, order appropriate carrier equipment not in excess of capacity to accommodate shipment;

(3) Deliver the shipment in good order and condition to the carrier, and load, stow, trim, block, and/or brace carload or truckload shipment (when loaded by the Contractor) on or in the carrier's conveyance as required by carrier rules and regulations;

(4) Be responsible for any loss of and/or damage to the goods—

(i) Occurring before delivery to the carrier;

(ii) Resulting from improper packing or marking; or

(iii) Resulting from improper loading, stowing, trimming, blocking, and/or bracing of the shipment, if loaded by the Contractor on or in the carrier's conveyance;

(5) Prepare a bill of lading or other transportation receipt. The bill of lading must show—

(i) A description of the shipment in terms of the governing freight classification or tariff (or Government rate tender) under which lowest freight rates are applicable;

(ii) The seals affixed to the conveyance with their serial numbers or other identification;

(iii) Lengths and capacities of cars or trucks ordered and furnished;

(iv) Other pertinent information required to effect prompt delivery to the consignee, including name, delivery address, postal address and ZIP code of consignee, routing, etc.;

(v) Special instructions or annotations requested by the ordering agency for bills of lading; *e.g.*, “This shipment is the property of, and the freight charges paid to the carrier(s) will be reimbursed by, the Government”; and

(vi) The signature of the carrier's agent and the date the shipment is received by the carrier;

(6) Distribute the copies of the bill of lading, or other transportation receipts, as directed by the ordering agency; and

(7) Prepay all freight charges to the extent specified in the contract.

(c) These Contractor responsibilities are specified for performance at the plant or plants at which these supplies are to be finally inspected and accepted, unless the facilities for shipment by carrier's equipment are not available at the Contractor's plant, in which case the responsibilities must be performed f.o.b. the point or points in the same or nearest city where the specified carrier's facilities are available; subject, however, to the following qualifications:

(1) If the Contractor's shipping plant is in the State of Alaska or Hawaii, the Contractor must deliver the supplies listed for shipment outside Alaska or Hawaii to the port of loading in Alaska or Hawaii, respectively, as specified in the contract, at Contractor's expense, and to that extent the contract will be “f.o.b. destination.”

(2) Notwithstanding paragraph (c)(1) of this clause, if the Contractor's shipping plant is in the State of Hawaii, and the contract requires delivery to be made by container service, the Contractor must deliver the supplies, at the Contractor's expense, to the container yard in the same or nearest city where seavan container service is available.

(End of clause)

52.247–33 F.o.b. Origin, With Differentials.

As prescribed in 47.303–5(b), insert the following clause:

F.o.b. Origin, With Differentials (DATE)

(a) The term “f.o.b. origin, with differentials,” as used in this clause, means—

(1) Free of expense to the Government delivered—

(i) On board the indicated type of conveyance of the carrier (or of the Government, if specified) at a designated point in the city, county, and State from which the shipments will be made and from which line-haul transportation service (as distinguished from switching, local drayage, or other terminal service) will begin;

(ii) To, and placed on, the carrier's wharf (at shipside, within reach of the ship's loading tackle, when the shipping point is within a port area having water transportation service) or the carrier's freight station;

(iii) To a U.S. Postal Service facility; or

(iv) If stated in the solicitation, to any Government-designated point located within

the same city or commercial zone as the f.o.b. origin point specified in the contract (the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372); and

(2) Differentials for mode of transportation, type of vehicle, or place of delivery as indicated in Contractor's offer may be added to the contract price.

(b) The Contractor must—

(1)(i) Pack and mark the shipment to comply with contract specification; or

(ii) In the absence of specifications, prepare the shipment in conformance with carrier requirements to protect the goods and to ensure assessment of the lowest applicable transportation charge;

(2)(i) Order specified carrier equipment when the Government requests it; or

(ii) If not specified, order appropriate carrier equipment not in excess of capacity to accommodate shipment;

(3) Deliver the shipment in good order and condition to the carrier, and load, stow, trim, block, and/or brace carload or truckload shipment (when loaded by the Contractor) on or in the carrier's conveyance as required by carrier rules and regulations;

(4) Be responsible for any loss of and/or damage to the goods—

(i) Occurring before delivery to the carrier;

(ii) Resulting from improper packing and marking; or

(iii) Resulting from improper loading, stowing, trimming, blocking, and/or bracing of the shipment, if loaded by the Contractor on or in the carrier's conveyance;

(5) Complete the Government bill of lading supplied by the ordering agency or, when a Government bill of lading is not supplied, prepare a commercial bill of lading or other transportation receipt. The bill of lading must show—

(i) A description of the shipment in terms of the governing freight classification or tariff (or Government rate tender) under which lowest freight rates are applicable;

(ii) The seals affixed to the conveyance with their serial numbers or other identification;

(iii) Lengths and capacities of cars or trucks ordered and furnished;

(iv) Other pertinent information required to effect prompt delivery to the consignee, including name, delivery address, postal address and ZIP code of consignee, routing, etc.;

(v) Special instructions or annotations requested by the ordering agency for bills of lading; e.g., "This shipment is the property of, and the freight charges paid to the carrier will be reimbursed by, the Government"; and

(vi) The signature of the carrier's agent and the date the shipment is received by the carrier; and

(6) Distribute the copies of the bill of lading, or other transportation receipts, as directed by the ordering agency.

(c)(1) It may be advantageous to the offeror to submit f.o.b. origin prices that include only the lowest cost to the Contractor for loading of shipment at the Contractor's plant or most favorable shipping point. The cost beyond that plant or point of bringing the supplies to the place of delivery and the cost of loading, blocking, and bracing on the type

of vehicle specified by the Government at the time of shipment may exceed the offeror's lowest cost when the offeror ships for the offeror's account. Accordingly, the offeror may indicate differentials that may be added to the offered price. The offeror must express these differentials as a rate in cents for each 100 pounds (CWT) of the supplies for one or more of the options under this clause that the Government may specify at the time of shipment.

(2) The Government will consider these differential(s) in the evaluation of offers to determine the lowest overall cost to the Government. If, at the time of shipment, the Government specifies a mode of transportation, type of vehicle, or place of delivery for which the offeror has set forth a differential, the Contractor must include the total of such differential costs (the applicable differential multiplied by the actual weight) as a separate reimbursable item on the Contractor's invoice for the supplies.

(3) The Government will have the option of performing or arranging at its own expense any transportation from Contractor's shipping plant or point to carrier's facility at the time of shipment and, whenever this option is exercised, the Government will make no reimbursement based on a quoted differential.

(4) Offeror's differentials in cents for each 100 pounds for optional mode of transportation, types of vehicle, transportation within a mode, or place of delivery, specified by the Government at the time of shipment and not included in the f.o.b. origin price indicated in the Schedule by the offeror, are as follows:

_____ (carload, truckload, less-load,
_____ wharf, flatcar, driveaway, etc.)

(End of clause)

52.247–34 F.o.b. Destination.

As prescribed in 47.303–6(b), insert the following clause:

F.o.b. Destination (DATE)

(a) The term "f.o.b. destination," as used in this clause, means—

(1) Free of expense to the Government, on board the carrier's conveyance, at a specified delivery point where the consignee's facility (plant, warehouse, store, lot, or other location to which shipment can be made) is located; and

(2)(i) Supplies must be delivered to the destination consignee's wharf (if destination is a port city and supplies are for export), warehouse unloading platform, or receiving dock, at the expense of the Contractor.

(ii) The Government is not liable for any delivery, storage, demurrage, accessorial, or other charges involved before the actual delivery (or "constructive placement" as defined in carrier tariffs) of the supplies to the destination, unless such charges are caused by an act or order of the Government acting in its contractual capacity.

(iii)(A) If rail carrier is used, supplies must be delivered to the specified unloading platform of the consignee. If motor carrier (including "piggyback") is used, supplies must be delivered to truck tailgate at the unloading platform of the consignee, except

when the supplies delivered meet the requirements of Item 568 of the National Motor Freight Classification for "heavy or bulky freight."

(B) When supplies meeting the requirements of the referenced Item 568 are delivered, the consignee must perform any unloading (including movement to the tailgate), with assistance from the truck driver, if requested.

(C) If the contractor uses rail carrier or freight forwarder for less than carload shipments, the contractor must ensure that the carrier will furnish tailgate delivery, when required, if transfer to truck is required to complete delivery to consignee.

(b) The Contractor must—

(1)(i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment in conformance with carrier requirements;

(2) Prepare and distribute commercial bills of lading;

(3) Deliver the shipment in good order and condition to the point of delivery specified in the contract;

(4) Be responsible for any loss of and/or damage to the goods occurring before receipt of the shipment by the consignee at the delivery point specified in the contract;

(5) Furnish a delivery schedule and designate the mode of delivering carrier; and

(6) Pay and bear all charges to the specified point of delivery.

(End of clause)

52.247–35 F.o.b. Destination, Within Consignee's Premises.

As prescribed in 47.303–7(b), insert the following clause:

F.o.b. Destination, Within Consignee's Premises (DATE)

(a) The term "f.o.b. destination, within consignee's premises," as used in this clause, means free of expense to the Government delivered and laid down within the doors of the consignee's premises, including delivery to specific rooms within a building if so specified.

(b) The Contractor must—

(1)(i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment in conformance with carrier requirements;

(2) Prepare and distribute commercial bills of lading;

(3) Deliver the shipment in good order and condition to the point of delivery specified in the contract;

(4) Be responsible for any loss of and/or damage to the goods occurring before receipt of the shipment by the consignee at the delivery point specified in the contract;

(5) Furnish a delivery schedule and designate the mode of delivering carrier; and

(6) Pay and bear all charges to the specified point of delivery.

(End of clause)

52.247–36 F.a.s. Vessel, Port of Shipment.

As prescribed in 47.303–8(b), insert the following clause:

F.a.s. Vessel, Port Of Shipment (DATE)

(a) The term “f.a.s. vessel, port of shipment,” as used in this clause, means free of expense to the Government delivered alongside the ocean vessel and within reach of its loading tackle at the specified port of shipment.

(b) The Contractor must—

(1)(i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment for ocean transportation in conformance with carrier requirements to protect the goods and to ensure assessment of the lowest applicable transportation charge;

(2)(i) Deliver the shipment in good order and condition alongside the ocean vessel and within reach of its loading tackle, at the point of delivery and on the date or within the period specified in the contract; and

(ii) Pay and bear all applicable charges, including transportation costs, wharfage, handling, and heavy lift charges, if necessary, up to this point;

(3) Provide a clean dock or ship's receipt;

(4) Be responsible for any loss of and/or damage to the goods occurring before delivery of the shipment to the point specified in the contract; and

(5) At the Government's request and expense, assist obtaining the documents required for—

(i) Exportation; or

(ii) Importation at destination.

(End of clause)

52.247–37 F.o.b. Vessel, Port of Shipment.

As prescribed in 47.303–9(b), insert the following clause:

F.O.B. Vessel, Port of Shipment (DATE)

(a) The term “f.o.b. vessel, port of shipment,” as used in this clause, means free of expense to the Government loaded, stowed, and trimmed on board the ocean vessel at the specified port of shipment.

(b) The Contractor must—

(1)(i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment for ocean transportation in conformance with carrier requirements to protect the goods and to ensure assessment of the lowest applicable transportation charge;

(2)(i) Deliver the shipment on board the ocean vessel in good order and condition on the date or within the period fixed; and

(ii) Pay and bear all charges incurred in placing the shipment actually on board;

(3) Provide a clean ship's receipt or on-board ocean bill of lading;

(4) Be responsible for any loss of and/or damage to the goods occurring before delivery of the shipment on board the ocean vessel; and

(5) At the Government's request and expense, assist in obtaining the documents required for—

(i) Exportation; or

(ii) Importation at destination.

(End of clause)

52.247–38 F.o.b. Inland Carrier, Point of Exportation.

As prescribed in 47.303–10(b), insert the following clause:

F.O.B. Inland Carrier, Point of Exportation (DATE)

(a) The term “f.o.b. inland carrier, point of exportation,” as used in this clause, means free of expense to the Government, on board the conveyance of the inland carrier, delivered to the specified point of exportation.

(b) The Contractor must—

(1)(i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment for ocean transportation in conformance with carrier requirements to protect the goods and to ensure assessment of the lowest applicable transportation charge;

(2) Prepare and distribute commercial bills of lading or other transportation receipt;

(3)(i) Deliver the shipment in good order and condition in or on the conveyance of the carrier on the date or within the period specified; and

(ii) Pay and bear all applicable charges, including transportation costs, to the point of delivery specified in the contract;

(4) Be responsible for any loss of and/or damage to the goods occurring before delivery of the shipment to the point of delivery in the contract; and

(5) At the Government's request and expense, assist in obtaining the documents required for—

(i) Exportation; or

(ii) Importation at destination.

(End of clause)

52.247–39 F.o.b. Inland Point, Country of Importation.

As prescribed in 47.303–11(b), insert the following clause:

F.O.B. Inland Point, Country of Importation (DATE)

(a) The term “f.o.b. inland point, country of importation,” as used in this clause, means free of expense to the Government, on board the indicated type of conveyance of the carrier, delivered to the specified inland point where the consignee's facility is located.

(b) The Contractor must—

(1)(i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment for ocean transportation in conformance with carrier requirements to protect the goods;

(2)(i) Deliver, in or on the inland carrier's conveyance, the shipment in good order and condition to the specified inland point where the consignee's facility is located; and

(ii) Pay and bear all applicable charges incurred up to the point of delivery, including transportation costs; export, import, or other fees or taxes; costs of landing; wharfage costs; customs duties and

costs of certificates of origin; consular invoices; and other documents that may be required for importation; and

(3) Be responsible for any loss of and/or damage to the goods until their arrival on or in the carrier's conveyance at the specified inland point.

(End of clause)

52.247–40 through 52.247–47 [Removed and Reserved]

■ 28. Remove and reserve sections 52.247–40 through 52.247–47.

■ 29. Revise section 52.247–48 to read as follows:

52.247–48 F.o.b. Destination-Evidence of Shipment.

As prescribed in 47.305–3(c), insert the following clause:

F.O.B. Destination-Evidence of Shipment (DATE)

(a) If this contract is awarded on a free on board (f.o.b.) destination basis, the Contractor—

(1) Must not submit an invoice for payment until the supplies covered by the invoice have been shipped to the destination; and

(2) Must retain, and make available to the Government for review as necessary, the following evidence of shipment documentation for a period of 3 years after final payment under the contract:

(i) If transportation is accomplished by common carrier, a signed copy of the commercial bill of lading for the supplies covered by the Contractor's invoice, indicating the carrier's intent to ship the supplies to the destination specified in the contract.

(ii) If transportation is accomplished by parcel post, a copy of the certificate of mailing.

(iii) If transportation is accomplished by other than common carrier or parcel post, a copy of the delivery document showing receipt at the destination specified in the contract.

(b) The Contractor is not required to submit evidence of shipment documentation with its invoice.

(End of clause)

52.247–49 through 52.247–51 [Removed and Reserved]

■ 30. Remove and reserve sections 52.247–49 through 52.247–51.

■ 31. Revise sections 52.247–52 through 52.247–53 to read as follows:

52.247–52 Clearance and Documentation Requirements-Shipment to DoD Air or Water Terminal Transshipment Points.

As prescribed in 47.305–4(e)(2), insert the following clause:

Clearance and Documentation Requirements-Shipment to DoD Air or Water Terminal Transshipment Points (DATE)

All shipments to water or airports for transshipment to overseas destinations are

subject to the following requirements unless clearance and documentation requirements have been expressly delegated to the Contractor:

(a) At least 10 days before shipping cargo to a water port, the Contractor must obtain an Export Release from the Government transportation office for—

(1) Each shipment weighing 10,000 pounds or more; and

(2) Each shipment weighing less than 10,000 pounds; if the cargo either—

(i) Is classified TOP SECRET, SECRET, OR CONFIDENTIAL;

(ii) Will require exclusive use of a motor vehicle;

(iii) Will occupy full visible capacity of a railway car or motor vehicle;

(iv) Is less than a carload or truckload, but will be tendered as a carload or truckload; or

(v) Is to be shipped to an ammunition outloading port for water shipment; or

(3) Each shipment weighing less than 10,000 pounds if the cargo consists of—

(i) Narcotics;

(ii) Perishable biological material;

(iii) Vehicles to be offered for driveway service;

(iv) Explosives, ammunition, poisons or other dangerous articles classified as class 1, division 1.1, 1.2, 1.3, 1.4; class 2, division 2.3; and class 6, division 6.1; or

(v) Radioactive material, as defined in 49 CFR 173.403, class 7.

(b) The Contractor must not order railway cars or motor vehicles for loading until an Export Release has been received.

(c) If the Contracting Officer directs delivery within a shorter period than 10 days, the Contractor must advise the transportation office of the date on which the cargo will be ready for shipment.

(d) At least 5 days before shipping cargo to either a water port or an airport (regardless of the weight, security classification, or the commodity description), the Contractor must provide the Government transportation office the information shown in paragraph (e) below to permit preparation of a Transportation Control and Movement Document (TCMD).

(e) When applying for the Export Release in paragraph (a) above or when providing information for preparation of the TCMD in accordance with paragraph (d) above, the Contractor must furnish the—

(1) Proposed date or dates of shipment;

(2) Number and type of containers;

(3) Gross weight and cube of the shipment;

(4) Number of cars or trucks that will be involved;

(5) Transportation Control Number(s) (TCN) as required for marking under MIL-STD-129 or Federal Standard 123; and

(6) Proper shipping name as specified in 49 CFR 172.101 for all items classified as dangerous substances as required for marking under MIL-STD-129.

(f) The Contractor must annotate all movement documents (Government or commercial bills of lading or other delivery documents) with the—

(1) Transportation Control Number, Consignor Code of activity directing the shipment; *i.e.*, cognizant contract administration office, purchasing office when

contract administration has been retained, or a Contractor specifically delegated transportation responsibilities under DoD 4500.9–R, Defense Transportation Regulation, responsibilities in the contract, whichever is appropriate, Consignee Code, and Transportation Priority for each shipment unit;

(2) Export Release Number and valid shipping period, if stated (if expired, the Contractor shall request a renewal); and

(3) Cubic foot measurement of each shipment unit.

(g) All annotations on the movement documents must be made in the Description of Articles space except, on Government bills of lading the Export Release number and shipping period must be entered in the space entitled Route Order/Release No.

(h) The Contractor must (1) mail a copy of the bill of lading or other movement document to the transshipment point and (2) give a copy of the bill of lading or other movement document to the carrier for presentation to the transshipment point with delivery of the shipment.

(End of clause)

52.247–53 Freight Classification Description.

As prescribed in 47.305–7(b)(1), insert the following provision:

Freight Classification Description (DATE)

(a)(1) Offerors must state below the full Uniform Freight Classification (rail) description, or the National Motor Freight Classification description applicable to the supplies, that the offeror uses for commercial shipment.

(2) This description should include the packing of the commodity (box, crate, bundle, loose, setup, knocked down, compressed, unwrapped, etc.), the container material (fiberboard, wooden, etc.), unusual shipping dimensions, and other conditions affecting traffic descriptions.

(3) The Government will use these descriptions as well as other information available to determine the classification description most appropriate and advantageous to the Government.

(b) Offeror understands that shipments on any f.o.b. origin contract awarded, as a result of this solicitation, will conform with the shipping classification description the Government specifies, which may be different from the classification description furnished below.

For Freight Classification Purposes, Offeror Describes This Commodity as _____.

(End of provision)

52.247–55 [Removed and Reserved]

■ 32. Remove and reserve section 52.247–55.

■ 33. Revise section 52.247–56 to read as follows:

52.247–56 Transit Arrangements.

As prescribed in 47.305–11(b), insert the following provision:

Transit Arrangements (DATE)

In evaluating offers, the Government will use the lowest appropriate common carrier transportation costs, including offeror's through-transit rates and charges when applicable, from offeror's shipping points, via the transit point, to the ultimate destination.

Transit Point(s)—Destination(s)

(End of provision)

52.247–57 [Removed and Reserved]

■ 34. Remove and reserve section 52.247–57.

■ 35. Revise section 52.247–58 to read as follows:

52.247–58 Loading, Blocking, and Bracing of Freight Car Shipments.

As prescribed in 47.305–13(a)(2), insert the following clause:

Loading, Blocking, and Bracing of Freight Car Shipments (DATE)

(a) Upon receipt of shipping instructions, as provided in this contract, the Contractor must load, block and brace the supplies included in any carload shipment by rail in accordance with the standards published by the Association of American Railroads and effective at the time of shipment.

(b) For shipments for which the Association of American Railroads has published no such standards, the Contractor must load, block and brace any shipments in accordance with standards established by the shipper as evidenced by written acceptance of an authorized representative of the carrier.

(c) The Contractor is liable for payment of any damage to any supplies caused by the failure to load, block, and brace in accordance with acceptable standards set forth herein.

(d) A copy of the appropriate pamphlet of the Association of American Railroads may be obtained from that Association.

(End of clause)

52.247–59 through 52.247–62 [Removed and Reserved]

■ 36. Remove and reserve sections 52.247–59 through 52.247–62.

■ 37. Revise sections 52.247–63 through 52.247–64 to read as follows:

52.247–63 Preference for U.S.-Flag Air Carriers.

As prescribed in 47.405(a), insert the following clause:

Preference for U.S.-Flag Air Carriers (DATE)

(a) Definitions. As used in this clause—
International air transportation means transportation by air between a place in the United States and a place outside the United States or between two places both of which are outside the United States.

United States means the 50 States, the District of Columbia, and outlying areas.

U.S.-flag air carrier means an entity granted authority to provide air transportation in the form of a certificate of public convenience and necessity under 49 U.S.C. 41102.

(b) *U.S. Government-financed international air transportation.* 49 U.S.C. 40118, Government-financed air transportation (commonly referred to as the Fly America Act), requires that all Federal agencies and Government contractors and subcontractors use U.S.-flag air carriers for U.S. Government-financed international air transportation of personnel (and their personal effects) or property, to the extent that service by those carriers is available. It requires the General Services Administration to issue regulations that, in the absence of satisfactory proof of the necessity for foreign-flag air transportation, disallow expenditures from funds, appropriated or otherwise established for the account of the United States, for international air transportation secured aboard a foreign-flag air carrier if a U.S.-flag air carrier is available to provide such services.

(c) *Use of U.S.-flag carriers for international air transportation.* If available, the Contractor, in performing work under this contract, must use U.S.-flag carriers for international air transportation of personnel (and their personal effects) or property.

(d) *Statement of unavailability of U.S.-flag air carriers.* In the event that the Contractor selects a carrier other than a U.S.-flag air carrier for international air transportation, the Contractor must include a statement on vouchers involving such transportation essentially as follows:

Statement of Unavailability of U.S.-Flag Air Carriers

International air transportation of persons (and their personal effects) or property by U.S.-flag air carrier was not available or it was necessary to use foreign-flag air carrier service for the following reasons (see section 47.403 of the Federal Acquisition Regulation) [*State reasons:*]

(End of statement)

(e) *Subcontracts.* The Contractor must include the substance of this clause, including this paragraph (e), in subcontracts, including those for commercial services, but excluding those for commercial products, that may involve international air transportation.

(End of clause)

52.247-64 Preference for Privately Owned U.S.-Flag Commercial Vessels.

As prescribed in 47.506(a)(1), insert the following clause:

Preference For Privately Owned U.S.-Flag Commercial Vessels (DATE)

(a) Except as provided in paragraph (e) of this clause, the Cargo Preference Act of 1954 (46 U.S.C. 55305) requires that Federal departments and agencies must transport in privately owned U.S.-flag commercial vessels at least 50 percent of the gross tonnage of equipment, materials, or commodities that

may be transported in ocean vessels (computed separately for dry bulk carriers, dry cargo liners, and tankers). Such transportation must be accomplished when any equipment, materials, or commodities, located within or outside the United States, that may be transported by ocean vessel are—

(1) Acquired for a U.S. Government agency account;

(2) Furnished to, or for the account of, any foreign nation without provision for reimbursement;

(3) Furnished for the account of a foreign nation in connection with which the United States advances funds or credits, or guarantees the convertibility of foreign currencies; or

(4) Acquired with advance of funds, loans, or guaranties made by or on behalf of the United States.

(b) The Contractor must use privately owned U.S.-flag commercial vessels to ship at least 50 percent of the gross tonnage involved under this contract (computed separately for dry bulk carriers, dry cargo liners, and tankers) whenever shipping any equipment, materials, or commodities under the conditions set forth in paragraph (a) above, to the extent that such vessels are available at rates that are fair and reasonable for privately owned U.S.-flag commercial vessels.

(c)(1) The Contractor must submit one legible copy of a rated on-board ocean bill of lading for each shipment to both the Contracting Officer and the Office of Cargo Preference, Maritime Administration (MAR-590), 400 Seventh Street SW, Washington, DC 20590. Subcontractors must submit bills of lading through the Prime Contractor.

(2) The Contractor must furnish these bill of lading copies within 20 working days of the date of loading for shipments originating in the United States, or within 30 working days for shipments originating outside the United States. Each bill of lading copy must contain the following information:

- (i) Sponsoring U.S. Government agency.
- (ii) Name of vessel.
- (iii) Vessel flag of registry.
- (iv) Date of loading.
- (v) Port of loading.
- (vi) Port of final discharge.
- (vii) Description of commodity.
- (viii) Gross weight in pounds and cubic feet if available.
- (ix) Total ocean freight revenue in U.S. dollars.

(d) The Contractor must insert the substance of this clause, including this paragraph (d), in all subcontracts or purchase orders under this contract, except those described in paragraph (e)(4).

(e) The requirement in paragraph (a) does not apply to—

(1) Cargoes carried in vessels as required or authorized by law or treaty;

(2) Ocean transportation between foreign countries of supplies purchased with foreign currencies made available, or derived from funds that are made available, under the Foreign Assistance Act of 1961 (22 U.S.C. 2353);

(3) Shipments of classified supplies when the classification prohibits the use of non-Government vessels; and

(4) Subcontracts or purchase orders for the acquisition of commercial products or commercial services unless—

(i) This contract is—

(A) A contract or agreement for ocean transportation services; or

(B) A construction contract; or

(ii) The supplies being transported are—

(A) Items the Contractor is reselling or distributing to the Government without adding value. (Generally, the Contractor does not add value to the items when it subcontracts items for f.o.b. destination shipment); or

(B) Shipped in direct support of U.S. military—

(1) Contingency operations;

(2) Exercises; or

(3) Forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations.

(f) Guidance regarding fair and reasonable rates for privately owned U.S.-flag commercial vessels may be obtained from the Office of Costs and Rates, Maritime Administration, 400 Seventh Street SW, Washington, DC 20590, Phone: 202-366-4610.

(End of clause)

Alternate I (DATE). As prescribed in 47.506(a)(2), substitute the following paragraphs (a) and (b) for paragraphs (a) and (b) of the basic clause:

(a) Except as provided in paragraphs (b) and (e) of this clause, the Contractor must use privately owned U.S.-flag commercial vessels, and no others, in the ocean transportation of any supplies to be furnished under this contract.

(b) If such vessels are not available for timely shipment at rates that are fair and reasonable for privately owned U.S.-flag commercial vessels, the Contractor must notify the Contracting Officer and request (1) authorization to ship in foreign-flag vessels or (2) designation of available U.S.-flag vessels. If the Contracting Officer authorizes the Contractor in writing to ship the supplies in foreign-flag vessels, the contract price will be equitably adjusted to reflect the difference in costs of shipping the supplies in privately owned U.S.-flag commercial vessels and in foreign-flag vessels.

Alternate II (DATE). As prescribed in 47.506(a)(3), substitute the following paragraph (e) for paragraph (e) of the basic clause:

(e) The requirement in paragraph (a) does not apply to—

(1) Cargoes carried in vessels as required or authorized by law or treaty;

(2) Ocean transportation between foreign countries of supplies purchased with foreign currencies made available, or derived from funds that are made available, under the Foreign Assistance Act of 1961 (22 U.S.C. 2353); and

(3) Shipments of classified supplies when the classification prohibits the use of non-Government vessels.

(4) Subcontracts or purchase orders under this contract for the acquisition of commercial products or commercial services unless the supplies being transported are—

(i) Items the Contractor is reselling or distributing to the Government without adding value. (Generally, the Contractor does not add value to the items when it subcontracts items for f.o.b. destination shipment); or

(ii) Shipments in direct support of U.S. military—

(A) Contingency operations;

(B) Exercises; or

(C) Forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations. (*Note:* This contract requires shipment of commercial products in direct support of U.S. military contingency operations, exercises, or forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations.)

52.247–65 through 52.247–66 [Removed and Reserved]

■ 38. Remove and reserve sections 52.247–65 through 52.247–66.

■ 39. Revise sections 52.247–67 through 52.247–69 to read as follows:

52.247–67 Submission of Transportation Documents for Audit.

As prescribed in 47.102–2, insert the following clause:

Submission Of Transportation Documents for Audit (DATE)

(a) The Contractor must submit to the address identified below, for audit, transportation documents on which the United States will assume freight charges that were paid—

(1) By the Contractor under a cost-reimbursement contract; and

(2) By a first-tier subcontractor under a cost-reimbursement subcontract thereunder.

(b) Cost-reimbursement Contractors must only submit for audit those bills of lading with freight shipment charges exceeding \$100. Bills under \$100 shall be retained on-site by the Contractor and made available for on-site audits. This exception only applies to freight shipment bills and does not apply to bills and invoices for any other transportation services.

(c) Contractors must submit the above referenced transportation documents to—

(End of clause)

52.247–68 Report of Shipment (REPSHIP).

As prescribed in 47.204–2, insert the following clause:

Report Of Shipment (REPSHIP) (DATE)

(a) *Definition.* As used in this clause—
Domestic destination means—

(1) A destination within the contiguous United States; or

(2) If shipment originates in Alaska or Hawaii, a destination in Alaska or Hawaii, respectively.

(b) *Report of Shipment.* Unless otherwise directed by the Contracting Officer, the Contractor must—

(1) Send a prepaid notice of shipment to the consignee transportation officer—

(i) For all shipments of—

(A) Classified material, protected sensitive, and protected controlled material;

(B) Explosives and poisons, class 1, division 1.1, 1.2 and 1.3; class 2, division 2.3 and class 6, division 6.1;

(C) Radioactive materials requiring the use of a III bar label; or

(ii) When a truckload/carload shipment of supplies weighing 20,000 pounds or more, or a shipment of less weight that occupies the full visible capacity of a railway car or motor vehicle, is given to any carrier (common, contract, or private) for transportation to a domestic destination (other than a port for export);

(2) Transmits the notice by rapid means to be received by the consignee transportation officer at least 24 hours before the arrival of the shipment; and

(3) Send, to the receiving transportation officer, the bill of lading or letter or other document containing the following information and prominently identified as a “Report of Shipment” or “REPSHIP FOR T.O.”

REPSHIP FOR T.O. 2025 JUN 01
TRANSPORTATION OFFICER
DEFENSE DEPOT, MEMPHIS, TN.
SHIPPED YOUR DEPOT 2025 JUN 1 540
CTNS MENS COTTON TROUSERS, 30,240
LB, 1782 CUBE, VIA XX–YY *
IN CAR NO. XX 123456*—BL* * *—
C98000031* * * *

CONTRACT DLA _____ ETA* * * * *
JUNE 5 JONES & CO., JERSEY CITY, N.J.
* Name of rail carrier, trucker, or other carrier.

* * * Vehicle identification.

* * * Bill of lading.

* * * * * If not shipped by BL, identify lading document and state whether paid by contractor.

* * * * * Estimated time of arrival.

(End of clause)

52.247–69 Reporting Requirement for U.S.-Flag Air Carriers Regarding Training To Prevent Human Trafficking.

As prescribed in 47.405(b), insert the following clause:

Reporting Requirement for U.S.-Flag Air Carriers Regarding Training To Prevent Human Trafficking (DATE)

(a) *Definitions.* As used in this clause—

Human trafficking means “Severe forms of trafficking in persons” or “Sex trafficking.”

Severe forms of trafficking in persons means—

(1) Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

(2) The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Sex trafficking means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.

(b) *Annual reporting requirement.* (1) In accordance with 49 U.S.C. 40118(g), the Contractor must provide the annual report described in paragraph (b)(2) of this clause by October 30th, via email, to the following agencies:

(i) General Services Administration:

TraffickingPreventionReport@gsa.gov;

(ii) U.S. Department of Transportation:
trafficking@dot.gov;

(iii) Department of Labor: *AirCarrier-HTreports@dol.gov*;

(iv) Transportation Security Administration: *ics-ccht@tsa.dhs.gov*;

(v) U.S. Customs and Border Protection:
CLP@cbp.dhs.gov; and

(vi) DHS Center for Countering Human Trafficking: *Info@CCHT.dhs.gov*.

(2) The annual report must include information from the preceding Government fiscal year (October 1 through September 30) regarding—

(i) The number of personnel trained in the detection and reporting of potential human trafficking, including the training required under 49 U.S.C. 44734(a)(4);

(ii) The number of notifications of potential human trafficking victims received from staff or other passengers; and

(iii)(A) Whether the Contractor notified the Global Human Trafficking Hotline, another comparable hotline, or law enforcement at the relevant airport of the potential human trafficking victim for each such notification of potential human trafficking; and

(B) If the Contractor made a notification, the date the notification was made and the method of notification (e.g., text to Hotline, call to law enforcement).

(c) *Training.* In accordance with 49 U.S.C. 44734 and 44738, personnel trained in the detection and reporting of potential human trafficking should include the following:

(1) Flight attendants;

(2) Ticket counter agents;

(3) Gate agents; and

(4) Other air carrier workers whose jobs require regular interaction with passengers.

(End of clause)

[FR Doc. 2026–19159 Filed 9–17–26; 8:45 am]

BILLING CODE 6820–61–P

[To be filled in by Contracting Officer]



FEDERAL REGISTER

Vol. 91

Friday,

No. 180

September 18, 2026

Part VIII

The President

Presidential Determination No. 2026-23 of September 11, 2026—
Presidential Determination on Major Drug Transit or Major Illicit Drug
Producing Countries for Fiscal Year 2027

Presidential Documents

Title 3—

Presidential Determination No. 2026–23 of September 11, 2026

The President

Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2027

Memorandum for the Secretary of State

By the authority vested in me as President by the Constitution and the laws of the United States, including section 706(1) of the Foreign Relations Authorization Act, Fiscal Year 2003 (Public Law 107–228) (FRAA), I hereby identify the following countries as major drug transit or major illicit drug producing countries: Afghanistan, The Bahamas, Belize, Bolivia, Burma, the People's Republic of China (PRC), Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, India, Jamaica, Laos, Mexico, Nicaragua, Pakistan, Panama, Peru, and Venezuela.

A country's presence on the foregoing list is not necessarily a reflection of its government's counterdrug efforts or level of cooperation with the United States. Consistent with the statutory definition of a major drug transit or major illicit drug producing country set forth in sections 481(e)(2) and 481(e)(5) of the Foreign Assistance Act of 1961, as amended (Public Law 87–195) (FAA), the reason countries are placed on the list is the combination of geographic, commercial, and economic factors that allow drugs or precursor chemicals to be transited or produced, even if a government has engaged in robust and diligent narcotics control and law enforcement measures.

Pursuant to section 706(2)(A) of the FRAA, I hereby designate Afghanistan, Bolivia, Burma, and Colombia as having failed demonstrably during the previous 12 months to make substantial efforts to adhere to their obligations under international counternarcotics agreements and to take the counternarcotics measures required by section 489 of the FAA. Included with this determination are justifications for the designations of Afghanistan, Bolivia, Burma, and Colombia, as required by section 706(2)(B) of the FRAA. I have also determined, in accordance with the provisions of section 706(3)(A) of the FRAA, that United States assistance to Bolivia, Burma, and Colombia is vital to the national interests of the United States.

My Administration has made historic progress in protecting the American people from deadly drugs and vicious narcoterrorist organizations. Under my Administration, our southern border is the most sealed and secure in American history, thanks to the largest investments in border security and law enforcement in our Nation's history. After 4 years of open border chaos, seizures of fentanyl and other drugs being smuggled into the United States have been reduced by more than half, and drug overdose deaths have plunged. My Administration has saved tens of thousands of American lives from this scourge. The narcoterrorists responsible for this invasion are either dead, in jail, or living in fear knowing they will be next to face American justice. I have unleashed the strongest military in the history of the world to strike narcoterrorists wherever they threaten our country. Behind the might of the American military, my Administration has destroyed cartel infrastructure, shut down former trafficking highways across sea and land borders, and captured and killed hundreds of the most vicious narcoterrorists. Under the Americas Counter Cartel Coalition, an alliance with over a dozen countries in the Western Hemisphere, we have achieved historic results,

drastically reducing United States-bound drug flows and seizing billions of dollars of illicit cartel finances. United States law enforcement agencies are reporting record drug seizures, and our allies are extraditing more cartel bosses to the United States than ever before. We have inflicted unprecedented losses on our enemies, and we are just getting started.

While my Administration has successfully secured our borders from invasion, Canada and Mexico need to do far more to stop the flows of deadly drugs into our country. Fentanyl continues to be illicitly produced in clandestine Canadian labs, and precursor chemicals and synthetic drugs continue to enter the United States through Canada. Canada needs to take meaningful action to dismantle drug labs, strengthen supply chain security, and degrade criminal networks and Chinese gangs operating along our northern border. We recognize Mexican President Sheinbaum's administration for seizing greater volumes of drugs, dismantling clandestine laboratories, and deploying additional law enforcement and military resources to our shared border. Additionally, United States-Mexican security cooperation has helped eliminate some of the world's most notorious cartel bosses, including "El Mencho." However, Mexico must take additional action against the narcoterrorist organizations that dominate vast areas of its territory and continue to threaten the American people. Mexico needs to bolster supply chain integrity by soliciting greater private industry participation and significantly increasing inspections at its ports of entry. Additionally, Mexico's current investments in its security forces are insufficient to sustain and expand its campaigns against narcoterrorists, their finances, and their criminal networks. This includes exposing, arresting, and prosecuting the many corrupt public officials who have aided and abetted the cartels and betrayed their own country's security and sovereignty.

The drug threat to America extends beyond our northern and southern borders. The PRC continues to be the world's largest producer of many of the precursor chemicals used to illicitly produce fentanyl, methamphetamine, and other deadly synthetic drugs. I have raised this directly with State Chairman Xi Jinping, and in 2025, at my request, the PRC implemented new requirements for its companies to obtain licenses before exporting designated precursor chemicals to North America. However, criminals continue to find ways around these controls through the use of unregulated precursor chemicals. The PRC needs to take more aggressive action to effectively reduce the flow of these substances by scheduling additional chemical precursors and substances requested by the United States. This enhanced cooperation will enable timely prosecution of the criminals responsible for supplying drug traffickers with deadly precursor chemicals.

Other governments have taken measures to confront drug trafficking and narcoterrorism. Dramatic political changes in South America over the past year have created historic openings for United States cooperation with governments in the region. In Venezuela, thanks to my Administration's arrest and removal of former illegitimate dictator and drug trafficker Nicolas Maduro, we are already seeing the results of growing cooperation with the country's interim government against cartels, including the elimination of Tren de Aragua leader Nino Guerrero. Given the positive steps taken under interim President Deley Rodriguez, I have determined Venezuela should no longer be designated as having failed demonstrably to fulfill its drug control commitments. I expect to see continued, measurable progress from the interim government in dismantling narcoterrorist groups and stopping drug trafficking through Venezuela to the United States.

After decades of inept socialist governments, the United States welcomed the Bolivian people's democratic choice in the 2025 elections and the opportunity to open a new chapter in United States-Bolivia relations under President Rodrigo Paz. Cooperation between Bolivia and the United States has significantly expanded over the last year, and I welcome the resumption of law enforcement coordination between our governments to target illicit drug production and criminal networks. Bolivia's extradition of narcoterrorist

Sebastian Marset to the United States in March 2026 highlighted our growing friendship and cooperation and prevented one of our hemisphere's most notorious drug traffickers from shipping more drugs to American communities. However, the new government has not yet had sufficient time to reduce coca cultivation that increased under the previous government. Corruption in Bolivia continues to facilitate drug trafficking and impede investigations. If Bolivia can demonstrate progress in reducing illicit drug production in the coming year, and make substantive progress in tackling the endemic corruption weakening Bolivia, I will consider revisiting its status as having failed demonstrably to uphold its counterdrug commitments.

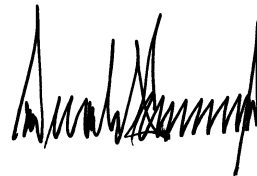
The people of Colombia made the courageous choice to elect Abelardo de la Espriella as President. He has pledged to lead an aggressive campaign against coca cultivation and cocaine production, which reached record levels under the failed socialist policies of his predecessor. Colombia is poised to resume its place as our foremost security partner in the hemisphere, and the country's military, police, prosecutors, and courts now finally have a worthy champion in President de la Espriella. If, as expected, Colombia makes progress on aggressive coca eradication and dismantling its narcoterrorist networks over the coming year, I will consider lifting the country's "failed demonstrably" status, which remains in place solely due to the incompetence and chaos produced by the previous far-left government in office throughout the bulk of the past year.

I welcome Prime Minister Narendra Modi and the Government of India's efforts to address illicit opium poppy cultivation and bolster supply chain integrity. I look forward to continued cooperation through the United States-India Drug Policy Framework. In Peru, I likewise welcome the commitment of new President Keiko Fujimori to work with the United States and other allies to destroy the criminals ailing Peru and reduce cocaine flows bound for the United States. I also applaud three of America's greatest allies in our hemisphere—Argentina, Ecuador, and El Salvador—for their leadership, resolve, and success in the fight against narcoterrorism.

While many governments in the Western Hemisphere are taking courageous action to reduce drug flows and eradicate cartels, the Government of Brazil has failed to confront the designated foreign terrorist organizations Primeiro Comando da Capital and Comando Vermelho, which have transformed Brazil into a hub for global cocaine flows. These Brazilian terrorist organizations are a growing threat to peace and security around the world, and Brazil's government urgently must take aggressive measures to confront and defeat them before they spread and grow. Unsurprisingly, for a socialist dictatorship, the illegitimate Ortego-Murillo regime in Nicaragua has failed to take sufficient action against drug trafficking and the complicity of regime actors in the drug trade.

In Burma, the military regime has made little discernible effort to crack down on its drug economy, making the country the world's largest source of opium poppy and one of the largest suppliers of methamphetamine. Despite the Taliban's announced opium poppy ban, Afghanistan continues to supply drug markets across the world, likely funding Islamist terrorism. For these reasons, I am once again designating Burma and Afghanistan as having failed demonstrably to uphold their drug control obligations given the serious threats to United States interests and international security.

You are authorized and directed to submit this determination, with the accompanying memoranda of justification, under section 706 of the FRAA, to the Congress, and to publish this determination in the *Federal Register*.

A handwritten signature in black ink, appearing to be a stylized name, possibly "Donald Trump", written in a cursive, somewhat jagged style.

THE WHITE HOUSE,
Washington, September 11, 2026

MEMORANDUM OF JUSTIFICATION FOR
PRESIDENTIAL DETERMINATION ON MAJOR DRUG TRANSIT OR MAJOR
ILLICIT DRUG PRODUCING COUNTRIES FOR FISCAL YEAR 2027

Section 706 of the Fiscal Year (FY) 2003 Foreign Relations Authorization Act requires the President to report annually to Congress by September 15 the countries he has determined to be major illicit drug producing or major drug transit countries (the "Majors List") if he intends to waive related foreign assistance restrictions (22 U.S.C. § 2291j-1(1)). The President must also designate any of the countries on the list that have "failed demonstrably, during the previous 12 months, to make substantial efforts" to adhere to obligations under international drug control agreements and to take specific drug control measures (22 U.S.C. § 2291j-1(2)).

In consultation with interagency partners, the following countries are designated as having failed demonstrably during the previous 12 months to make substantial efforts to adhere to obligations under international drug control agreements and to take specific drug control measures: Afghanistan, Bolivia, Burma, and Colombia.

AFGHANISTAN

Despite the Taliban's announced ban on poppy cultivation and drug trafficking, Afghanistan remains a production and trafficking hub for various drugs and plays an important role in the production and trafficking of methamphetamine. Limited progress in countering methamphetamine production, the flow of funds from drug trafficking to transnational criminal groups, and the role of some Taliban members in profiting from the drug trade continue to undermine the ban's impact.

Reports from neighboring countries indicate Afghan-origin drug trafficking continued over the past year, signaling both ongoing production and the trafficking of prior year stockpiles. The United Nations Office on Drugs and Crime (UNODC) has reported Afghan-sourced methamphetamine trafficking networks have effectively globalized, carving out expanding, highly resilient trafficking routes into the Middle East, Africa, and parts of Europe. Credible sources have assessed local Taliban commanders and factions participate in the country's drug economy, with some lower-level Taliban members directly facilitating or taxing the trade and allowing clandestine laboratories to operate in exchange for protection fees.

BOLIVIA

After years of weak political will to combat narco-trafficking under previous governments, President Rodrigo Paz Pereira assumed office in November 2025 and pledged to intensify efforts against the drug trade and criminal organizations. Paz announced plans to modernize the police, judiciary, and armed forces to restore public trust and combat systemic corruption. The United States strongly supports these efforts and is committed to supporting Bolivia in reforming its criminal justice institutions and reducing its illicit drug economy. Nevertheless, continued corruption within Bolivia's institutions protect and facilitate transnational drug trafficking, and Bolivia remains the third largest source of cocaine in the world according to UNODC.

For nearly 20 years, Bolivia's previous far-left governments under its Movement toward Socialism (MAS) party allowed transnational criminal networks to widely exploit the country's coca economy, legalized under its domestic laws, and become entrenched within the country. Judicial and prosecutorial weaknesses perpetuated impunity for mid- and upper-level traffickers and in many cases, have facilitated these crimes. While it is too early to evaluate the progress of President Paz's administration in reducing coca and cocaine supplies, the previous government allowed coca cultivation to increase by approximately 10 percent, to 34,000 hectares between 2023 and 2024. Coca eradication and cocaine interdiction efforts lagged in 2025 compared to 2024.

The United States encourages President Paz to sustain efforts to overcome the failed legacy of Bolivia's prior governments. Bolivian authorities must take action to investigate and prosecute drug-related criminal activity associated with transnational criminal organizations who profit from illegal coca markets that violate Bolivian law. The country's current government has taken aggressive early steps to arrest leaders of criminal organizations within the country and must continue these efforts to reverse the legacy of drug-fueled corruption under MAS governments.

Pursuant to Section 706 of the Foreign Relations Authorization Act of FY 2003, a national interest waiver has been granted to enable the continuation of U.S. programs that advance vital U.S. interests in Bolivia.

BURMA

Burma remained a major source of illicit methamphetamine and opiates in 2025, with production and trafficking thriving under the country's military regime. Opium poppy cultivation increased by 17 percent in 2025 according to UNODC, from 45,200 hectares in 2024 to approximately 53,100 hectares in 2025, reaching the highest level recorded in a decade. Burma remains the world's largest opium producer, accounting for roughly half of global supply. Seizures of methamphetamine and other drugs traced to Burma remained at record levels across Southeast Asia.

The military regime has not focused on counternarcotics and has curtailed cooperation with international actors on drug control and law enforcement. There has been little information available on arrests or other law enforcement actions over the past 12 months. Criminal activity by ethnic armed groups and military-affiliated militias remains outside of the jurisdiction of regime police and prosecutors. Pervasive corruption, weak oversight, and limited law enforcement capacity enable trafficking and production, especially in conflict-affected border areas. Anti-corruption and counternarcotics efforts remained inconsistent, largely reactive, and focused on low-level offenders rather than the most harmful organized crime networks. Political instability and conflict further hindered investigations and accountability for narcotics-related misconduct at all levels.

Pursuant to Section 706 of the Foreign Relations Authorization Act of FY 2003, a national interest waiver has been granted to enable the continuation of U.S. programs that advance vital U.S. interests in Burma.

COLOMBIA

Under former President Gustavo Petro's failed socialist policies, coca cultivation and potential cocaine production reached record levels, and crop substitution programs did not deliver meaningful results. The most recent UNODC data indicate that coca cultivation increased by 3 percent, reaching 261,000 hectares in 2024, up from 253,000 hectares in 2023. Forced eradication of coca plummeted under former President Petro, with only 8,051 hectares eradicated in 2025, following 9,403 hectares the year before. Additionally, Colombia has not demonstrated measurable and verifiable progress on its goal to transition

50,000 small coca farmers to licit economic activity. Limited progress on verified voluntary eradication in 2026 is too little and too late. Colombia's national police, armed forces, justice sector, and local law enforcement agencies continued to show bravery and professionalism, and, working with the United States and other international partners, seized a record 1,056 metric tons of cocaine and cocaine base in 2025. The scale of potential cocaine production in Colombia also hit record levels and vastly exceeded Colombia's interdiction efforts.

Colombia's election of President Abelardo de la Espriella represents a bold decision by the Colombian people to reverse this backsliding and restore Colombia to its place as a security lynchpin for South America and the Western Hemisphere. President de la Espriella has pledged to forcibly eradicate coca crops and defeat the narcoterrorist groups that have long plagued Colombia's security and sovereignty. The United States is fully committed to supporting his government's efforts and strengthening the longstanding security partnership between our countries.

Pursuant to Section 706 of the Foreign Relations Authorization Act of FY 2003, a national interest waiver has been granted to enable the continuation of U.S. programs that advance vital U.S. interests in Colombia.

Reader Aids

Federal Register

Vol. 91, No. 180

Friday, September 18, 2026

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations

General Information, indexes and other finding aids **202-741-6000**

Laws **741-6000**

Presidential Documents

Executive orders and proclamations **741-6000**

The United States Government Manual **741-6000**

Other Services

Electronic and on-line services (voice) **741-6020**

Privacy Act Compilation **741-6050**

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FEDERAL REGISTER PAGES AND DATE, SEPTEMBER

56001-56370	1
56371-56548	2
56549-56740	3
56741-57062	4
57063-57244	8
57245-57490	9
57491-57774	10
57775-58008	11
58009-58346	14
58347-58574	15
58575-58806	16
58807-59046	17
59047-59694	18

CFR PARTS AFFECTED DURING SEPTEMBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:

11060	57769
11061	58311
11062	58319
11063	58325
11064	58331
11065	58339
11066	58571

Executive Orders:

14422	56543
14423	56737
14424	57761
14425	57765
14426	58003
14427	58007

Administrative Orders:

Notices:

Notice of August 31, 2026	56547
Notice of September 8, 2026	57773
Notice of September 11, 2026	58805

Presidential

Determinations:

No. 2026-23 of September 11, 2026	59687
-----------------------------------	-------

5 CFR

302	58347
330	58363
332	58347
337	58347
1201	56549

Proposed Rules:

213	59076
302	59076
317	59076
359	59076
362	59076
412	58387
432	58387, 59076
550	59076
715	58387
731	59076
752	58387
890	58388
920	59076
930	59076

7 CFR

210	57245
215	57245
220	57245
225	57245
226	57245
761	56741
762	56741
763	56741
764	56741

765	56741
766	56741
767	56741
768	56741
770	56741
772	56741
773	56741
774	56741
1000	59047

Proposed Rules:

1210	57275
------	-------

8 CFR

101	57249
264	57249, 58575

Proposed Rules:

106	57516
204	57807
214	57807

9 CFR

Proposed Rules:

101-118	57828
123	57828
124	57828

10 CFR

72	56574
433	56371
435	56371
452	56001
460	59048

Proposed Rules:

30	57728
40	57728
50	57728
52	57728
53	57728
70	57728
72	57728

12 CFR

4	56004, 58009
208	58009
211	58009
305	56004
337	56022, 58009
347	58009

Proposed Rules:

4	56074
---	-------

14 CFR

39	56575, 56578, 56581, 56584, 57491, 57775, 57777, 57780, 57782, 58364, 58365, 58807, 58809, 58812, 58814, 59048, 59051
61	58014
71	56775, 57492, 58374, 59054, 59055
97	56587, 59056, 59057
234	56588

Proposed Rules:	874.....57502	56374, 56597, 56779, 57089,	64.....57454
21.....58029	876.....57504	57259, 57796, 58022, 58375,	73.....56605
39.....56081, 56377, 56601,	880.....57507	58377, 58611, 58821	
57275, 57278, 57281, 57516,	892.....57509, 58817	Proposed Rules:	
57519, 57521, 57829, 58034,	Proposed Rules:	117.....58832, 58833, 58835	48 CFR
58036, 58039, 58042, 58390,	573.....57531	328.....57284	3025.....59066
58613, 58823, 58826, 58829	22 CFR	36 CFR	3052.....59066
67.....56798	120.....58610, 59059	Proposed Rules:	9903.....56056, 56061
71.....56083, 56809, 56810,	121.....58610, 59063	4.....56095	9904.....56061
58392, 58394, 58396	123.....59059	294.....57841	Proposed Rules:
91.....58029	125.....59059	39 CFR	8.....59406
93.....56380	126.....57787, 59059	111.....56052	9.....59584
119.....58029	23 CFR	Proposed Rules:	12.....59406
15 CFR	658.....57789	111.....57301	13.....59406
Proposed Rules:	771.....56029	40 CFR	14.....59534
60.....57524	26 CFR	52.....57260, 57262, 58023	15.....59406
70.....57524	1.....57214	60.....58954	16.....59476
16 CFR	301.....57214	80.....56780	17.....59476
1500.....58817	Proposed Rules:	180.....58378	27.....59584
Proposed Rules:	1.....56811, 57832, 57968,	Proposed Rules:	28.....59534
318.....58398	58615	52.....57302, 58046	35.....59476
1263.....56604	301.....57968	60.....59002	36.....59534
17 CFR	28 CFR	62.....58053, 58054	38.....59406
Ch. I.....56593	27.....56049	120.....57284	44.....59406
50.....57063	29 CFR	122.....56819	47.....59584
165.....58576	2701.....57258	257.....57842, 58616	51.....59406
279.....56593	30 CFR	43 CFR	52.....59406, 59476, 59534,
Proposed Rules:	926.....56050	Proposed Rules:	59584
240.....56387, 56946	31 CFR	3130.....57091	49 CFR
249b.....56946	Ch. V.....57795	45 CFR	92.....57801
275.....57698	560.....57511	Proposed Rules:	98.....57801
19 CFR	582.....57791	211.....56826	264.....56029
Proposed Rules:	591.....57793	1390.....56826	367.....56063
141.....56408	594.....57794	46 CFR	571.....57265
142.....56408	599.....57794	502.....56053	622.....56029
143.....56408	1010.....56776	47 CFR	
163.....56408	Proposed Rules:	1.....56598, 57798, 58258	50 CFR
20 CFR	1010.....56085	2.....57798	17.....56783
404.....58593	33 CFR	54.....58027	32.....56290
416.....58593	100.....56596, 57512, 57795,	64.....57513	71.....56290
603.....58593	57796, 58610, 58819	Proposed Rules:	300.....58381
21 CFR	117.....56778, 57258	0.....57454	648.....57803, 57804
862.....57493	165.....56051, 56372, 56373,	1.....57454	660.....56599
870.....57495, 57498, 57500,		2.....57110	665.....58382
57785			679.....56072, 57274, 57805

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion

in today's **List of Public Laws**.

Last List September 15, 2026

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