FEDERAL REGISTER

Vol. 86 Thursday

No. 66 April 8, 2021

Pages 18171–18422

OFFICE OF THE FEDERAL REGISTER

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Publishing Office, is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.federalregister.gov.*

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge at *www.govinfo.gov*, a service of the U.S. Government Publishing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6:00 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 1, 1 (March 14, 1936) forward. For more information, contact the GPO Customer Contact Center, U.S. Government Publishing Office. Phone 202-512-1800 or 866-512-1800 (toll free). E-mail, *gpocusthelp.com.*

The annual subscription price for the **Federal Register** paper edition is $860 plus postage, or $929, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $330, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Publishing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 86 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Publishing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**
General online information	**202–512–1530; 1–888–293–6498**

Single copies/back copies:

Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800 (Toll-Free)**

FEDERAL AGENCIES

Subscriptions:

Assistance with Federal agency subscriptions:

Email	*FRSubscriptions@nara.gov*
Phone	**202–741–6000**

The Federal Register Printing Savings Act of 2017 (Pub. L. 115-120) placed restrictions on distribution of official printed copies of the daily **Federal Register** to members of Congress and Federal offices. Under this Act, the Director of the Government Publishing Office may not provide printed copies of the daily **Federal Register** unless a Member or other Federal office requests a specific issue or a subscription to the print edition. For more information on how to subscribe use the following website link: *https://www.gpo.gov/frsubs.*

Contents

Federal Register

Vol. 86, No. 66

Thursday, April 8, 2021

Separate Parts In This Issue

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.

To subscribe to the Federal Register Table of Contents electronic mailing list, go to https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new, enter your e-mail address, then follow the instructions to join, leave, or manage your subscription.

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.

Federal Register
Vol. 86, No. 66
Thursday, April 8, 2021

Presidential Documents

Title 3—

The President

Proclamation 10175 of April 5, 2021

National Public Health Week, 2021

By the President of the United States of America

A Proclamation

National Public Health Week has increased significance this year, as our Nation mourns the loss of more than half a million lives to COVID–19, and as we have come to recognize just how essential our public health efforts and public health workers truly are. Whether it is the scientists and researchers who developed life-saving vaccines in record time; or local leaders who have taken evidence-based action to keep their communities safe; or the staff and volunteers who have worked to slow the spread of the virus through testing, case investigation, and contact tracing; or the doctors, nurses, and clinicians who continue to provide around-the-clock care to those who have fallen ill, dedicated public health professionals on the front lines of our response to COVID–19 deserve our gratitude.

During National Public Health Week, we ask everyone to come together to help restore the health of our Nation. Every American can do their patriotic duty for their neighbors, their loved ones, and our country by continuing to wear masks as recommended by the Centers for Disease Control and Prevention, practicing physical distancing, getting the COVID–19 vaccine when it is their turn, and by expressing gratitude to public health professionals who are seeing us through this crisis and who are building a more robust, comprehensive, and equitable public health system for all.

While defeating the coronavirus is our top public health priority, our Nation must also focus on improving our overall health and wellbeing. Greater health is good for us all, and it will bolster our national resilience in the face of new and existing threats. The United States must prioritize and continually invest in our public health system to aggressively address health disparities that have been exposed and worsened by COVID–19. We must also address the environmental and climate factors—air and water pollution, extreme weather, and climate-related disaster events—that threaten public health in communities nationwide. The American Jobs Plan will help to achieve these goals, including by ensuring that children who live along highways and fence lines of industrial facilities will breathe easier because of significant investments in clean energy and infrastructure that promotes public health. Our Nation must also take commonsense steps to address the gun violence public health epidemic, including actions to counter the historic spike in homicides occurring in cities across the country and disproportionately affecting Black and brown Americans. Only by addressing the root causes of health inequity can we build a fairer, stronger, more dependable health system for all Americans.

My Administration is committed to investing in our public health system to not only defeat the pandemic, but also to build a stronger public health system that allows us to be ready for the next virus. The American Rescue Plan provides critical funding to increase the number of vaccination sites, which will help us get Americans vaccinated more quickly so that we can get back to our lives and loved ones. The law also invests in COVID–19 containment measures such as testing and contact tracing, funds our efforts to strengthen domestic supply chains for critical medical equipment, and makes health insurance more affordable and accessible for millions

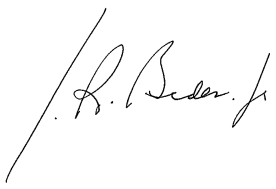
of Americans. Finally, the law invests in crucial measures like air quality monitoring, water and sewer infrastructure, and brownfield remediation so that Americans in every community can live in a healthy environment.

The American Rescue Plan does more than put checks in Americans' pockets—it provides assistance to help stabilize State, local, Tribal, and territorial budgets and keep vital public health services running. It provides the resources schools need to reopen safely, allowing students to return to the classroom and alleviating the negative health effects that come from isolation, changes in routines, and loss of learning. The American Rescue Plan will also mobilize a generation of future leaders to serve in an enhanced public health workforce, increasing our long-term public health capacity. This law also provides much-needed help to nearly 1,400 Community Health Centers that serve our most vulnerable populations, who are at the highest risk of infection and adverse outcomes from COVID–19.

As we continue working tirelessly to defeat the pandemic and build a stronger public health system for the future, I ask every American to mark National Public Health Week by remembering all those who give their time, expertise, and care—and even put their lives on the line—in service of a healthier, safer, and stronger America for all of us.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim April 5 through April 11, 2021, as National Public Health Week. I call on all citizens, government agencies, private businesses, non-profit organizations, and other groups to join in activities and take action to improve the health of our Nation.

IN WITNESS WHEREOF, I have hereunto set my hand this fifth day of April, in the year of our Lord two thousand twenty-one, and of the Independence of the United States of America the two hundred and forty-fifth.



[FR Doc. 2021–07338
Filed 4–7–21; 8:45 am]
Billing code 3295–F1–P

Rules and Regulations

Federal Register
Vol. 86, No. 66
Thursday, April 8, 2021

FEDERAL RESERVE SYSTEM

12 CFR Part 262

[Docket No. R–1725]

RIN 7100–AF96

Role of Supervisory Guidance

AGENCY: Board of Governors of the Federal Reserve System (Board).

ACTION: Final rule.

SUMMARY: The Board is adopting a final rule that codifies the Interagency Statement Clarifying the Role of Supervisory Guidance, issued by the Board, Office of the Comptroller of the Currency, Treasury (OCC), Federal Deposit Insurance Corporation (FDIC), National Credit Union Administration (NCUA), and Bureau of Consumer Financial Protection (Bureau) (collectively, the agencies) on September 11, 2018 (2018 Statement). By codifying the 2018 Statement, with amendments, the final rule confirms that the Board will continue to follow and respect the limits of administrative law in carrying out its supervisory responsibilities.

DATES: This final rule is effective on May 10, 2021.

FOR FURTHER INFORMATION CONTACT: Benjamin McDonough, Associate General Counsel, (202) 452–2036, Steve Bowne, Senior Counsel, (202) 452–3900, Christopher Callanan, Senior Counsel, (202) 452–3594, or Kelley O'Mara, Counsel, (202) 973–7497, Legal Division; Juan Climent, Assistant Director, (202) 872–7526; David Palmer, Lead Financial Institution and Policy Analyst, (202) 452–2904, or Jinai Holmes, Lead Financial Institution and Policy Analyst, (202) 452–2834, Division of Supervision and Regulation; Nicole Bynum, Deputy Director, (202) 728–5803, Jeremy Hochberg, Managing Counsel, (202) 452–6496, or Dana Miller, Senior Counsel, (202) 452–2751, Division of Consumer and Community Affairs; Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551. For users of Telecommunications Device for the Deaf (TDD), (202) 263–4869.

SUPPLEMENTARY INFORMATION:

I. Background

There are important distinctions between issuances by Federal agencies that serve to implement acts of Congress (known as ''regulations'' or ''legislative rules'') and non-binding supervisory guidance documents.[1] Regulations create binding legal obligations. Supervisory guidance can be used to ''advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power'' and does not create binding legal obligations.[2]

In recognition of the important distinction between rules and guidance, on September 11, 2018, the agencies issued the Interagency Statement Clarifying the Role of Supervisory Guidance (2018 Statement) to explain the role of supervisory guidance and describe the agencies' approaches to supervisory guidance.[3] As noted in the 2018 Statement, the agencies issue various types of supervisory guidance to their respective supervised institutions, including, but not limited to, interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions. Supervisory guidance outlines the agencies' supervisory expectations or priorities and articulates the agencies' general views regarding practices for a given subject area. Supervisory guidance often provides examples of practices that mitigate risks, or that the agencies generally consider to be consistent with safety-and-soundness standards or other applicable laws and regulations, including those designed to protect consumers.[4] The agencies noted in the 2018 Statement that supervised institutions at times request supervisory guidance and that guidance is important to provide clarity to these institutions, as well as supervisory staff, in a transparent way that helps to ensure consistency in the supervisory approach.[5]

The 2018 Statement restated existing law and reaffirmed the agencies' understanding that supervisory guidance does not create binding, enforceable legal obligations. The 2018 Statement reaffirmed that the agencies do not issue supervisory criticisms for ''violations'' of supervisory guidance and described the appropriate use of supervisory guidance by the agencies. In the 2018 Statement, the agencies also expressed their intention to (1) limit the use of numerical thresholds in guidance; (2) reduce the issuance of multiple supervisory guidance documents on the same topic; (3) continue efforts to make the role of supervisory guidance clear in communications to examiners and supervised institutions; and (4) encourage supervised institutions to discuss their concerns about supervisory guidance with their agency contact.

On November 5, 2018, the Board, OCC, FDIC, and Bureau each received a petition for a rulemaking (Petition), as permitted under the Administrative

[1] Regulations are commonly referred to as legislative rules because regulations have the ''force and effect of law.'' *Perez* v. *Mortgage Bankers Association,* 575 U.S. 92, 96 (2015) (citations omitted).

[2] *See Chrysler* v. *Brown,* 441 U.S. 281, 302 (1979) (quoting the Attorney General's Manual on the Administrative Procedure Act at 30 n.3 (1947) (Attorney General's Manual) and discussing the distinctions between regulations and general statements of policy, of which supervisory guidance is one form).

[3] *See https://www.federalreserve.gov/supervisionreg/srletters/sr1805a1.pdf.*

[4] While supervisory guidance offers guidance to the public on the Board's approach to supervision under statutes and regulations and safe and sound practices, the issuance of guidance is discretionary and is not a prerequisite to the Board's exercise of its statutory and regulatory authorities. This point reflects the fact that statutes and legislative rules, not statements of policy, set legal requirements.

[5] The Administrative Conference of the United States (ACUS) has recognized the important role of guidance documents and has stated that guidance can ''make agency decision-making more predictable and uniform and shield regulated parties from unequal treatment, unnecessary costs, and unnecessary risk, while promoting compliance with the law.'' ACUS, Recommendation 2017–5, *Agency Guidance Through Policy Statements* at 2 (adopted December 14, 2017), *available at https://www.acus.gov/recommendation/agency-guidance-through-policy-statements.* ACUS also suggests that ''policy statements are generally better [than legislative rules] for dealing with conditions of uncertainty and often for making agency policy accessible.'' *Id.* ACUS's reference to ''policy statements'' refers to the statutory text of the APA, which provides that notice and comment is not required for ''general statements of policy.'' The phrase ''general statements of policy'' has commonly been viewed by courts, agencies, and administrative law commentators as including a wide range of agency issuances, including guidance documents.

Procedure Act (APA),[6] requesting that the agencies codify the 2018 Statement.[7] The Petition argued that a rule on guidance is necessary to bind future agency leadership and staff to the 2018 Statement's terms. The Petition also suggested there are ambiguities in the 2018 Statement concerning how supervisory guidance is used in connection with matters requiring attention, matters requiring immediate attention (collectively, MRAs), as well as in connection with other supervisory actions that should be clarified through a rulemaking. Finally, the Petition called for the rulemaking to implement changes in the agencies' standards for issuing MRAs. Specifically, the Petition requested that the agencies limit the role of MRAs to addressing circumstances in which there is a violation of a statute, regulation, or order, or demonstrably unsafe or unsound practices.

II. The Proposed Rule and Comments Received

On November 5, 2020, the agencies issued a proposed rule (Proposed Rule or Proposal) that would have codified the 2018 Statement, with clarifying changes, as an appendix to proposed rule text.[8] The Proposed Rule would have superseded the 2018 Statement. The rule text would have provided that an amended version of the 2018 Statement is binding on each respective agency.

Clarification of the 2018 Statement

The Petition expressed support for the 2018 Statement and acknowledged that it addresses many issues of concern for the Petitioners relating to the use of supervisory guidance. The Petition expressed concern, however, that the 2018 Statement's reference to not basing ''criticisms'' on violations of supervisory guidance has led to confusion about whether MRAs are covered by the 2018 Statement. Accordingly, the agencies proposed to clarify in the Proposed Rule that the term ''criticize'' includes the issuance of MRAs and other supervisory criticisms, including those communicated through matters requiring board attention, documents of resolution, and supervisory recommendations (collectively, supervisory criticisms).[9] As such, the agencies reiterated that examiners will not base supervisory criticisms on a ''violation'' of or ''non-compliance with'' supervisory guidance.[10] The agencies noted that, in some situations, examiners may reference (including in writing) supervisory guidance to provide examples of safe and sound conduct, appropriate consumer protection and risk management practices, and other actions for addressing compliance with laws or regulations. The agencies also reiterated that they will not issue an enforcement action on the basis of a ''violation'' of or ''non-compliance'' with supervisory guidance. The Proposed Rule reflected these clarifications.[11]

The Petition requested further that these supervisory criticisms should not include ''generic'' or ''conclusory'' references to safety and soundness. The agencies agreed that supervisory criticisms should continue to be specific as to practices, operations, financial conditions, or other matters that could have a negative effect on the safety and soundness of the financial institution, could cause consumer harm, or could cause violations of laws, regulations, final agency orders, or other legally enforceable conditions. Accordingly, the agencies included language reflecting this practice in the Proposed Rule.

The Petition also suggested that MRAs, as well as memoranda of understanding, examination downgrades, and any other formal examination mandate or sanction, should be based only on a violation of a statute, regulation, or order, including a ''demonstrably unsafe or unsound practice.'' [12] As noted in the Proposed Rule, examiners take steps to identify deficient practices before they rise to violations of law or regulation or before they constitute unsafe or unsound banking practices. The agencies stated that they continue to believe that early identification of deficient practices serves the interest of the public and of supervised institutions. Early identification protects the safety and soundness of banks, promotes consumer protection, and reduces the costs and risk of deterioration of financial condition from deficient practices resulting in violations of laws or regulations, unsafe or unsound conditions, or unsafe or unsound banking practices. The Proposed Rule also noted that the agencies have different supervisory processes, including for issuing supervisory criticisms. For these reasons, the agencies did not propose revisions to their respective supervisory practices relating to supervisory criticisms.

The agencies also noted that the 2018 Statement was intended to focus on the appropriate use of supervisory guidance in the supervisory process, rather than the standards for supervisory criticisms. To address any confusion concerning the scope of the 2018 Statement, the Proposed Rule removed two sentences from the 2018 Statement concerning grounds for ''citations'' and the handling of deficiencies that do not constitute violations of law.[13]

---

[6] 5 U.S.C. 553(e).

[7] *See* Petition for Rulemaking on the Role of Supervisory Guidance, *available at https://bpi.com/wp-content/uploads/2018/11/BPI_PFR_on_Role_of_Supervisory_Guidance_Federal_Reserve.pdf.* The Petitioners did not submit a petition to the NCUA, which has no supervisory authority over the financial institutions that are represented by Petitioners. The NCUA chose to join the Proposed Rule on its own initiative. References in the preamble to ''agencies'' therefore include the NCUA.

[8] 85 FR 70512 (November 5, 2020).

[9] The agencies use different terms to refer to supervisory actions that are similar to MRAs and Matters Requiring Immediate Attention (MRIAs), including matters requiring board attention, documents of re solution, and supervisory recommendations.

[10] For the sake of clarification, one source of law among many that can serve as a basis for a supervisory criticism is the *Interagency Guidelines Establishing Standards for Safety and Soundness, see* 12 CFR part 30, appendix A, 12 CFR part 208, appendix D–1, and 12 CFR part 364, appendix A. These Interagency Guidelines were issued using notice and comment and pursuant to express statutory authority in 12 U.S.C. 1831p–1(d)(1) to adopt safety and soundness standards either by ''regulation or guideline.''

[11] The 2018 Statement contains the following sentence:

Examiners will not criticize a supervised financial institution for a ''violation'' of supervisory guidance.

2018 Statement at 2. As revised in the Proposed Rule, this sentence read as follows:

Examiners will not criticize *(including through the issuance of matters requiring attention, matters requiring immediate attention, matters requiring board attention, documents of resolution, and supervisory recommendations)* a supervised financial institution for, and agencies will not issue an enforcement action on the basis of, a ''violation'' of or ''non-compliance'' with supervisory guidance.

Proposed Rule (emphasis added). As discussed *infra* in footnote 13, the Proposed Rule also removed the sentences in the 2018 Statement that referred to ''citation,'' which the Petition suggested had been confusing. These sentences were also removed to clarify that the focus of the Proposed Rule related to the use of guidance, not the standards for MRAs.

[12] The Petition asserted that the federal banking agencies rely on 12 U.S.C. 1818(b)(1) when issuing MRAs based on safety-and-soundness matters. Through statutory examination and reporting authorities, Congress has conferred upon the agencies the authority to exercise visitorial powers with respect to supervised institutions. The Supreme Court has indicated support for a broad reading of the agencies' visitorial powers. *See, e.g., Cuomo* v. *Clearing House Assn L.L.C.,* 557 U.S. 519 (2009); *United States* v. *Gaubert,* 499 U.S. 315 (1991); and *United States* v. *Philadelphia Nat. Bank,* 374 U.S. 321 (1963). The visitorial powers facilitate early identification of supervisory concerns that may not rise to a violation of law, unsafe or unsound banking practice, or breach of fiduciary duty under 12 U.S.C. 1818.

[13] The following sentences from the 2018 Statement were not present in the Proposed Rule:

Rather, any citations will be for violations of law, regulation, or non-compliance with enforcement orders or other enforceable conditions. During examinations and other supervisory activities, examiners may identify unsafe or unsound

Comments on the Proposed Rule

A. Overview

The five agencies received approximately 30 unique comments concerning the Proposed Rule.[14] The Board discusses below those comments that are potentially relevant to the Board.[15] Commenters representing trade associations for banking institutions and other businesses, state bankers' associations, individual financial institutions, and one member of Congress expressed general support for the Proposed Rule. These commenters supported codification of the 2018 Statement and the reiteration by the agencies that guidance does not have the force of law and cannot give rise to binding, enforceable legal obligations. One of these commenters stated that the Proposal would serve the interests of consumers and competition by clarifying the law for institutions and potentially removing ambiguities that could deter the development of innovative products that serve consumers and business clients, without uncertainty regarding potential regulatory consequences. These commenters expressed strong support as well for the clarification in the Proposed Rule that the agencies will not criticize, including through the issuance of ''matters requiring attention,'' a supervised financial institution for a ''violation'' of, or ''non-compliance'' with, supervisory guidance.

One commenter agreed with the agencies that supervisory criticisms should not be limited to violation of statutes, regulations, or orders, including a ''demonstrable unsafe or unsound practice'' and that supervisory guidance remains a beneficial tool to communicate supervisory expectations to the industry. The commenter stated that the proactive identification of supervisory criticism or deficiencies that do not constitute violations of law facilitates forward-looking supervision, which helps address problems before they warrant a formal enforcement action. The commenter noted as well that supervisory guidance provides important insight to the industry and ensures consistency in the supervisory approach and that supervised institutions frequently request supervisory guidance. The commenter observed that the COVID–19 pandemic has amplified the requests for supervisory guidance and interpretation, and that it is apparent institutions want clarity and guidance from regulators.

Two commenters, both public interest advocacy groups, opposed the proposed rule, suggesting that codifying the 2018 Statement may undermine the important role that supervisory guidance can play by informing supervisory criticism, rather than merely clarifying that it will not serve as the basis for enforcement actions. One commenter stated that it is essential for agencies to have the prophylactic authority to base criticisms on imprudent bank practices that may not yet have ripened into violations of law or significant safety and soundness concerns. The commenter stated that this is particularly important with respect to large banks, where delay in addressing concerns could lead to a broader crisis. One commenter stated that the agencies have not explained the benefits that would result from the rule or demonstrated how the rule will promote safety and soundness or consumer protection. The commenter argued that supervision is different from other forms of regulation and requires supervisory discretion, which could be constrained by the rule. One of these commenters argued that the Proposal would send a signal that banking institutions have wider discretion to ignore supervisory guidance.

B. Scope of Rule

Several industry commenters requested that the Proposed Rule cover interpretive rules and clarify that interpretive rules do not have the force and effect of law. One commenter stated that the agencies should clarify whether they believe that interpretive rules can be binding. The commenter argued that, under established legal principles, interpretive rules can be binding on the agency that issues them but not on the public. Some commenters suggested that the agencies follow ACUS recommendations for issuing interpretive rules and that the agencies should clarify when particular guidance documents are (or are not) interpretive rules and allow the public to petition to change an interpretation. A number of commenters requested that the agencies expand the statement to address the standards that apply to MRAs and other supervisory criticisms, a suggestion made in the Petition.

C. Role of Guidance Documents

Several commenters recommended that the agencies clarify that the practices described in supervisory guidance are merely examples of conduct that may be consistent with statutory and regulatory compliance, not expectations that may form the basis for supervisory criticism. One commenter suggested that the agencies state that when agencies offer examples of safe and sound conduct, compliance with consumer protection standards, appropriate risk management practices, or acceptable practices through supervisory guidance or interpretive rules, the agencies will treat adherence to practices outlined in that supervisory guidance or interpretive rule as a safe harbor from supervisory criticism. One commenter also requested that the agencies make clear that guidance that goes through public comment, as well as any examples used in guidance, is not binding. The commenter also requested that the agencies affirm that they will apply statutory factors while processing applications and the Board not use SR Letter 14–2/CA Letter 14–1, ''Enhancing Transparency in the Federal Reserve's Applications Process'' (February 24, 2014) (SR 14–2/CA 14–1) to penalize less-than-satisfactory firms. This includes consideration of supervisory criticisms when processing applications for expansionary activity under SR 14–2/CA 14–1.

One commenter argued that guidance provides valuable information to supervisors about how their discretion should be exercised and therefore plays an important role in supervision. As an example, according to this commenter, 12 U.S.C. 1831p–1 and 12 U.S.C. 1818 recognize the discretionary power conferred on the Federal banking agencies,[16] which is separate from the power to issue regulations. The commenter noted that, pursuant to these statutes, regulators may issue cease and desist orders based on reasonable cause to believe that an institution has engaged, is engaging or is about to engage in an unsafe and unsound practice, separately and apart from whether the institution has technically violated a law or regulation. The commenter added that Congress entrusted the Federal banking agencies with the power to determine whether practices are unsafe and unsound and attempt to halt such practices through supervision, even if a specific case may

practices or other deficiencies in risk management, including compliance risk management, or other areas that do not constitute violations of law or regulation.

2018 Statement at 2. The agencies did not intend these deletions to indicate a change in supervisory policy.

[14] Of the comments received, some comments were not submitted to all agencies, and some comments were identical. Note that this total excludes comments that were directed at an unrelated rulemaking by the Financial Crimes Enforcement Network of the Department of the Treasury (FinCEN).

[15] This final rule does not specifically discuss those comments that are only potentially relevant to other agencies.

[16] The Federal banking agencies are the OCC, Board, and FDIC. 12 U.S.C. 1813.

not constitute a violation of a written law or regulation.

D. Supervisory Criticisms

Several commenters addressed supervisory criticisms and how they relate to guidance. These commenters suggested that supervisory criticisms should be specific as to practices, operations, financial conditions, or other matters that could have a negative effect. These commenters also suggested that MRAs, memoranda of understanding and any other formal written mandates or sanctions should be based only on a violation of a statute or regulation. Similarly, these commenters argued that there should be no references to guidance in written formal actions and that banking institutions should be reassured that they will not be criticized or cited for a violation of guidance when no law or regulation is cited. One commenter suggested that it would instead be appropriate to discuss supervisory guidance privately, rather than publicly, potentially during the pre-exam meetings or during examination exit meetings. Another commenter suggested that, while referencing guidance in supervisory criticism may be useful at times, agencies should provide safeguards to prevent such references from becoming the de facto basis for supervisory criticisms. One commenter stated that examiners also should not criticize community banks in their final written examination reports for not complying with ''best practices'' unless the criticism involves a violation of bank policy or regulation. The commenter added that industry best practices should be transparent enough and sufficiently known throughout the industry before being cited in an examination report. One commenter requested that examiners should not apply large bank practices to community banks that have a different, less complex and more conservative business model. One commenter asserted that MRAs should not be based on ''reputational risk,'' but rather on the underlying conduct giving rise to concerns and asked the agencies to address this in the final rule.

Commenters that opposed the Proposal did not support restricting supervisory criticism or sanctions to explicit violations of law or regulation. One commenter expressed concern that requiring supervisors to wait for an explicit violation of law before issuing criticism would effectively erase the line between supervision and enforcement. According to the commenter, it would eliminate the space for supervision as an intermediate practice of oversight and cooperative problem-solving between banks and the regulators who support and manage the banking system and would also clearly violate the intent of the law in 12 U.S.C. 1818(b). One commenter emphasized the importance of bank supervisors basing their criticisms on imprudent bank practices that may not yet have ripened into violations of laws or rules but which could undermine safety and soundness or pose harm to consumers if left unaddressed.

One commenter argued that the agencies should state clearly that guidance can and will be used by supervisors to inform their assessments of banks' practices; and that it may be cited as, and serve as the basis for, criticisms. According to the commenter, even under the legal principles described in the Proposal, it is permissible for guidance to be used as a set of standards that may indeed inform a criticism, provided that application of the guidance is used for corrective purposes, if not to support an enforcement action.

According to one commenter, the Proposal makes fine conceptual distinctions between, for example, issuing supervisory criticisms ''on the basis of'' guidance and issuing supervisory criticisms that make ''reference'' to supervisory guidance. The commenter suggested that is a distinction that it may be difficult for ''human beings to parse in practice.'' According to the commenter, a rule that makes such a distinction is likely to have a chilling effect on supervisors attempting to implement policy in the field. According to another commenter, the language allowing examiners to reference supervisory guidance to provide examples is too vague and threatens to marginalize the role of guidance and significantly reduce its usefulness in the process of issuing criticisms designed to correct deficient bank practices.

E. Legal Authority and Visitorial Powers

One commenter questioned the Federal banking agencies' reference in the Proposal to visitorial powers as an additional authority for early identification of supervisory concerns that may not rise to a violation of law, unsafe or unsound banking practice, or breach of fiduciary duty under 12 U.S.C. 1818.

F. Issuance and Management of Supervisory Guidance

Several commenters made suggestions about how the agencies should issue and manage supervisory guidance. Some commenters suggested that the agencies should delineate clearly between regulations and supervisory guidance. Commenters encouraged the agencies to regularly review, update, and potentially rescind outstanding guidance. One commenter suggested that the agencies rescind outstanding guidance that functions as rule, but has not gone through notice and comment. One commenter suggested that the agencies memorialize their intent to revisit and potentially rescind existing guidance, as well as limit multiple guidance documents on the same topic. Commenters suggested that supervisory guidance should be easy to find, readily available, online, and in a format that is user-friendly and searchable.

One commenter encouraged the agencies to issue principles-based guidance that avoids the kind of granularity that could be misconstrued as binding expectations. According to this commenter, the agencies can issue separate frequently asked questions with more detailed information, but should clearly identify these as non-binding illustrations. This commenter also encouraged the agencies to publish proposed guidance for comment when circumstances allow. Another commenter requested that the agencies issue all ''rules'' as defined by the APA through the notice-and-comment process.

One commenter expressed concern that the agencies will aim to reduce the issuance of multiple supervisory guidance documents and will thereby reduce the availability of guidance in circumstances where guidance would be valuable.

Responses to Comments

As stated in the Proposed Rule, the 2018 Statement was intended to focus on the appropriate use of supervisory guidance in the supervisory process, rather than the standards for supervisory criticisms. The standards for issuing MRAs or other supervisory actions were, therefore, outside the scope of this rulemaking. For this reason, and for reasons discussed earlier, the final rule does not address the standards for MRAs and other supervisory actions. Similarly, because the Board is not addressing its approach to supervisory criticism in the final rule, including any criticism related to reputation risk, the final rule does not address supervisory criticisms relating to ''reputation risk.''

With respect to the comments on coverage of interpretive rules, interpretive rules do not, alone, ''have the force and effect of law'' and must be rooted in, and derived from, a statute or

regulation.[17] While interpretive rules and supervisory guidance are similar interpretive rules and supervisory guidance are distinct under the APA and its jurisprudence and are generally issued for different purposes.[18] Interpretive rules are typically issued by an agency to advise the public of the agency's construction of the statutes and rules that it administers,[19] whereas general statements of policy, such as supervisory guidance, advise the public of how an agency intends to exercise its discretionary powers.[20] To this end, guidance generally reflects an agency's policy views, for example, on safe and sound risk management practices. On the other hand, interpretive rules generally resolve ambiguities regarding requirements imposed by statutes and regulations. Because supervisory guidance and interpretive rules have different characteristics and serve different purposes, the final rule will continue to cover supervisory guidance only.

With respect to the question of whether to adopt ACUS's procedures for allowing the public to request reconsideration or revision of an interpretive rule, this rulemaking, again, does not address interpretive rules. As such, the Board is not adding procedures for challenges to interpretive rules through this rulemaking.

In response to the comment that the agencies treat examples in guidance as ''safe harbors'' from supervisory criticism, the Board agrees that examples offered in supervisory guidance can provide insight about practices that, in general, may lead to safe and sound operation and compliance with regulations and statutes. The examples in guidance, however, are generalized. When an institution implements examples, examiners must consider the facts and circumstances of that institution in assessing the application of those examples. In addition, the underlying legal principle of supervisory guidance is that it does not create binding legal obligation for either the public or an agency. As such, the Board does not deem examples used in supervisory guidance to categorically establish safe harbors from supervisory criticism.

Although some commenters argued that the Proposal may undermine the important role that supervisory guidance can play in informing supervisory criticism and by serving to address conditions before those conditions lead to enforcement actions, the appropriate use of supervisory guidance can generate a more collaborative and constructive regulatory process that supports the safety and soundness and compliance of institutions, thereby diminishing the need for enforcement actions. As noted by ACUS, guidance can make agency decision-making more predictable and uniform and can promote compliance with the law. The final rule does not weaken the role of guidance in the supervisory process and the Board will continue to use guidance in a robust way to support the safety and soundness of banks and promote compliance.

Further, the Board does not agree with one commenter's assertion that the Proposal made an unclear distinction between, on the one hand, inappropriate supervisory criticism for a ''violation'' of or ''non-compliance'' with supervisory guidance, and, on the other hand, Board examiners' entirely appropriate use of supervisory guidance to reference examples of safe and sound conduct, appropriate consumer protection and risk management practices, and other actions for addressing compliance with laws or regulations. This approach appropriately implements the principle that institutions are not required to follow supervisory guidance in itself, but may find such guidance useful.

With respect to the comment that visitorial powers do not provide the Federal banking agencies with authority to issue MRAs or other supervisory criticisms, the Board disagrees. The Board's visitorial powers are well-established and rooted in its statutory examination and reporting mandates. The Supreme Court's decision in *Cuomo* v. *Clearing House Assn L.L.C.* explained that the visitation included the ''exercise of supervisory power.'' [21] The Court ruled, in accordance with its precedent on visitation, that the ''power to enforce the law exists separate and apart from the power of visitation.'' [22] While the *Cuomo* decision involved the question of which powers may be exercised by state governments with respect to national banks (and ruled that states could exercise law enforcement powers but could not exercise visitorial powers with respect to national banks), the decision did not dispute that the Federal banking agencies possess both these powers. The Court in *Cuomo* explained that visitorial powers entailed ''oversight'' and ''supervision,'' and quoted the Court's earlier decision in *Watters* v. *Wachovia Bank, N.A.,* explaining that visitorial powers entailed ''general supervision and control.'' [23] Accordingly, visitorial powers include the power to issue supervisory criticisms independent of the agencies' authority to enforce applicable laws or ensure safety and soundness. For these reasons, the Board reaffirms the statement in the preamble to the Proposed Rule that such visitorial powers have been conferred through statutory examination and reporting authorities, which facilitate the Board's identification of supervisory concerns that may not rise to a violation of law, unsafe or unsound practice, or breach of fiduciary duty under 12 U.S.C. 1818. The Board's statutory examination and reporting authorities pre-existed 12 U.S.C. 1818, which neither superseded nor replaced such authorities. The Board has been vested with various statutory examination and reporting authorities with respect to institutions under its supervision.[24]

In response to comments regarding the role of public comment for supervisory guidance, the Board notes that it has made clear through the 2018 Statement and in this final rule that

[17] *See Mortgage Bankers Association,* 575 U.S. at 96.

[18] Questions concerning the legal and supervisory nature of interpretive rules are case-specific and have engendered debate among courts and administrative law commentators. The Board takes no position in this rulemaking on those specific debates. *See, e.g.,* R. Levin, *Rulemaking and the Guidance Exemption,* 70 Admin. L. Rev. 263 (2018) (discussing the doctrinal differences concerning the status of interpretive rules under the APA); *see also* Nicholas R. Parillo, *Federal Agency Guidance and the Powder to Bind: An Empirical Study of Agencies and Industries,* 36 Yale J. Reg 165, 168 n.6 (2019) (''[w]hether interpretive rules are supposed to be nonbinding is a question subject to much confusion that is not fully settled''); *see also* ACUS, Recommendation 2019–1, *Agency Guidance Through Interpretive Rules* (Adopted June 13, 2019), *available at https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules* (noting that courts and commentators have different views on whether interpretive rules bind an agency and effectively bind the public through the deference given to agencies' interpretations of their own rules under *Auer* v. *Robbins,* 519 U.S. 452 (1997)).

[19] *Mortgage Bankers Association,* 575 U.S. at 97 (*citing Shalala* v. *Guernsey Memorial Hospital,* 514 U.S. 87, 99 (1995)); *accord* Attorney General's Manual at 30 n.3.

[20] *See Chrysler* v. *Brown,* 441 U.S. at 302 n.31 (quoting Attorney General's Manual at 30 n.3); *see also, e.g., American Mining Congress* v. *Mine Safety & Health Administration,* 995 F.2d 1106, 1112 (D.C. Cir. 1993) (outlining tests in the D.C. Circuit for assessing whether an agency issuance is an interpretive rule).

[21] *Cuomo* v. *Clearing House Assn. L.L.C.,* 557 U.S. 519, 536 (2009).

[22] *Id.* at 526–529 and 533.

[23] *Id.* at 528 (citing *Watters* v. *Wachovia Bank, N.A.,* 550 U.S. 1, 127 (2007)).

[24] The commenter's reading of the Federal banking agencies' examination and reporting authorities would assert that the Federal banking agencies may examine supervised institutions and require reports, but not make findings based on such examinations and reporting, unless the finding is sufficient to warrant a formal enforcement action under the standard set out in 12 U.S.C. 1818. This reading is inconsistent with the history of federal banking supervision, including as described in the cases cited in the Proposed Rule.

supervisory guidance (including guidance that goes through public comment) does not create binding, enforceable legal obligations. Rather, the Board in some instances issues supervisory guidance for comment in order to improve its understanding of an issue, gather information, or seek ways to achieve a supervisory objective most effectively. Similarly, examples that are included in supervisory guidance (including guidance that goes through public comment) are not binding on institutions. Rather, these examples are intended to be illustrative of ways a supervised institution may implement safe and sound practices, appropriate consumer protection, prudent risk management, or other actions in furtherance of compliance with laws or regulations. Relatedly, the Board does not agree with one comment that it should use notice-and-comment procedures, without exception, to issue all ''rules'' as defined by the APA, which would include supervisory guidance. Congress has established longstanding exceptions in the APA from the notice-and-comment process for certain rules, including for general statements of policy like supervisory guidance and for interpretive rules. As one court has explained, Congress intended to ''accommodate situations where the policies promoted by public participation in rulemaking are outweighed by the countervailing considerations of effectiveness, efficiency, expedition and reduction in expense.'' [25]

With respect to the commenter's request that the agencies affirm that they will apply statutory factors while processing applications, the Board affirms that the agency will continue to consider and apply all applicable statutory factors when processing applications. With respect to the commenter's request that the Board not use SR 14–2/CA 14–1 when processing applications, the Board notes that SR 14–2/CA 14–1 is intended to provide transparency into the Board's practices. Like all guidance documents, SR 14–2/CA 14–1 does not create binding obligations on the Board or external parties, and the Board evaluates each application individually on its merits based on the applicable statutory factors.

In response to the question raised by some commenters concerning potential confusion between supervisory guidance and interpretive rules, the Board notes that interpretive rules are outside the scope of the rulemaking. In addition, as stated earlier, interpretive rules do not, alone, ''have the force and effect of law'' and must be rooted in, and derived from, a statute or regulation. While interpretive rules and supervisory guidance are similar in lacking the force and effect of law, interpretive rules and supervisory guidance are distinct under the APA and its jurisprudence and are generally issued for different purposes. When the Board issues an interpretive rule, the fact that it is an interpretive rule is generally clear. In addition, these comments relate to clarity in drafting, rather than a matter that seems suitable for rulemaking.

In response to the two commenters opposing the Proposal, this final rule does not undermine any of the Board's safety and soundness or other authorities. Indeed, the final rule is designed to support the Board's ability to supervise institutions effectively. In addition, the question of the role of guidance has been one of interest to regulated parties and other stakeholders over the past few years. The Petition and the number of comments on the Proposal are a sign of this interest. As such, it will serve the public interest to reaffirm the appropriate role of supervisory guidance. There are inherent benefits to the supervisory process whenever institutions and examiners have a clear understanding of their roles, including how supervisory guidance can be used effectively within legal limits. Therefore, the Board is proceeding with the rule as proposed.

In response to the commenter expressing concern that language in the Statement on reducing multiple supervisory guidance documents on the same topic will limit the Board's ability to provide valuable guidance, the Board assures the commenter that this language will not inhibit the Board from issuing new supervisory guidance when appropriate.

Finally, the other comments related to other aspects of guidance or the supervisory process are not best addressed in this rulemaking.

III. The Final Rule

For the reasons discussed above, the final rule adopts the Proposed Rule without substantive changes. The final rule is specifically addressed to the Board and Board-supervised institutions. Although many of the comments were applicable to all of the agencies, some comments were specific to particular agencies or to groups of agencies. Having separate final rules has enabled agencies to better focus on explaining any agency-specific issues to their respective audiences of supervised institutions and agency employees.

IV. Administrative Law Matters

A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 [26] (PRA) states that no agency may conduct or sponsor, nor is the respondent required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The Board has reviewed this final rule and determined that it does not contain any information collection requirements subject to the PRA. Accordingly, no submissions to OMB will be made with respect to this final rule.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act [27] (RFA) generally requires that in connection with a final rulemaking, an agency prepare and make available for public comment a regulatory flexibility analysis describing the impact of the final rule on small entities. Under section 605(b) of the RFA, this analysis is not required if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a brief explanatory statement in the **Federal Register** along with its rule.

The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.[28] This final rule would apply to all Board-regulated entities, including bank holding companies, savings and loan holding companies, and state member banks.[29] This final rule would not

[25] *Am. Hosp. Ass'n* v. *Bowen,* 834 F.2d 1037, 1045 (D.C. Cir. 1987). The specific contours of these exceptions are the subject of an extensive body of case law.

[26] 44 U.S.C. 3501–3521.

[27] 5 U.S.C. 601, *et seq.*

[28] 5 U.S.C. 601–612.

[29] The Small Business Administration (SBA) has defined ''small entities'' to include banking organizations with total assets of $600 million or less that are independently owned or operated or owned by a holding company with less than or equal to $600 million in total assets. *See* 13 CFR 121.201. Effective August 19, 2019, the SBA revised the size standards for certain banking organizations to $600 million in total assets from $550 million in total assets. As of February 8, 2021, date, there were approximately 2,762 bank holding companies, 112 savings and loan holding companies, and 455 state member banks that would fit the SBA's current definition of small entity for purposes of the RFA. Consistent with the General Principles of Affiliation in 13 CFR 121.103, the Board counts the assets of all domestic and foreign affiliates when

impose any obligations on Board-regulated entities, and regulated entities would not need to take any action in response to this final rule. The Board certifies that the rule will not have a significant economic impact on a substantial number of small entities.[30]

C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act [31] requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Board has sought to present the final rule in a simple and straightforward manner and did not receive any comments on the use of plain language in the Proposed Rule.

D. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),[32] in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions (IDIs), each Federal banking agency must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.[33] The Board has determined that the final rule will not impose additional reporting, disclosure, or other requirements on IDIs; therefore, the requirements of the RCDRIA do not apply.

List of Subjects in 12 CFR Part 262

Administrative practice and procedure, Banks, banking, Federal Reserve System.

Authority and Issuance

For the reasons set forth in the preamble, the Board of Governors of the Federal Reserve System amends part 262 to 12 CFR chapter II as follows:

PART 262—RULES OF PROCEDURE

■ 1. The authority citation for part 262 is revised to read as follows:

Authority: 5 U.S.C. 552; 12 U.S.C. 248, 321, 325, 326, 483, 602, 611a, 625, 1467a, 1828(c), 1842, 1844, 1850a, 1867, 3105, 3106, 3108, 5361, 5368, 5467, and 5469.

■ 2. Section 262.7 is added to read as follows:

§ 262.7 Use of supervisory guidance.

(a) *Purpose.* The Board issues regulations and guidance as part of its supervisory function. This section reiterates the distinctions between regulations and guidance, as stated in the Statement Clarifying the Role of Supervisory Guidance (appendix A to this part) (Statement).

(b) *Implementation of the Statement Clarifying the Role of Supervisory Guidance.* The Statement describes the official policy of the Board with respect to the use of supervisory guidance in the supervisory process. The Statement is binding on the Board.

(c) *Rule of construction.* This section does not alter the legal status of guidelines authorized by statute, including but not limited to, 12 U.S.C. 1831p–1, to create binding legal obligations.

■ 3. Appendix A is added to read follows:

Appendix A to Part 262—Statement Clarifying the Role of Supervisory Guidance Statement Clarifying the Role of Supervisory Guidance

The Board is issuing this statement to explain the role of supervisory guidance and to describe the Board's approach to supervisory guidance.

Difference Between Supervisory Guidance and Laws or Regulations

The Board issues various types of supervisory guidance, including interagency statements, advisories, letters, policy statements, questions and answers, and frequently asked questions, to its supervised institutions. A law or regulation has the force and effect of law.[1] Unlike a law or regulation, supervisory guidance does not have the force and effect of law, and the Board does not take enforcement actions based on supervisory guidance. Rather, supervisory guidance outlines the Board's supervisory expectations or priorities and articulates the Board's general views regarding appropriate practices for a given subject area. Supervisory guidance often provides examples of practices that the Board generally considers consistent with safety-and-soundness standards or other applicable laws and regulations, including those designed to protect consumers. Supervised institutions at times request supervisory guidance, and such guidance is important to provide insight to industry, as well as supervisory staff, in a transparent way that helps to ensure consistency in the supervisory approach.

Ongoing Efforts To Clarify the Role of Supervisory Guidance

The Board is clarifying the following policies and practices related to supervisory guidance:

- The Board intends to limit the use of numerical thresholds or other ''bright-lines'' in describing expectations in supervisory guidance. Where numerical thresholds are used, the Board intends to clarify that the thresholds are exemplary only and not suggestive of requirements. The Board will continue to use numerical thresholds to tailor, and otherwise make clear, the applicability of supervisory guidance or programs to supervised institutions, and as required by statute.
- Examiners will not criticize (through the issuance of matters requiring attention), a supervised financial institution for, and the Board will not issue an enforcement action on the basis of, a ''violation'' of or ''non-compliance'' with supervisory guidance. In some situations, examiners may reference (including in writing) supervisory guidance to provide examples of safe and sound conduct, appropriate consumer protection and risk management practices, and other actions for addressing compliance with laws or regulations.
- Supervisory criticisms should continue to be specific as to practices, operations, financial conditions, or other matters that could have a negative effect on the safety and soundness of the financial institution, could cause consumer harm, or could cause violations of laws, regulations, final agency orders, or other legally enforceable conditions.
- The Board has at times sought, and may continue to seek, public comment on supervisory guidance. Seeking public comment on supervisory guidance does not mean that the guidance is intended to be a regulation or have the force and effect of law. The comment process helps the Board to improve its understanding of an issue, to gather information on institutions' risk management practices, or to seek ways to achieve a supervisory objective most effectively and with the least burden on institutions.
- The Board will aim to reduce the issuance of multiple supervisory guidance documents on the same topic and will generally limit such multiple issuances going forward.
- The Board will continue efforts to make the role of supervisory guidance clear in communications to examiners and to

determining if the Board should classify a Board-supervised institution as a small entity.

[30] 5 U.S.C. 605(b).

[31] Public Law 106–102, section 722, 113 Stat. 1338, 1471 (1999), 12 U.S.C. 4809.

[32] 12 U.S.C. 4802(a).

[33] 12 U.S.C. 4802.

[1] Government agencies issue regulations that generally have the force and effect of law. Such regulations generally take effect only after the agency proposes the regulation to the public and responds to comments on the proposal in a final rulemaking document.

supervised financial institutions and encourage supervised institutions with questions about this statement or any applicable supervisory guidance to discuss the questions with their appropriate agency contact.

By order of the Board of Governors of the Federal Reserve System.

Ann Misback,

Secretary of the Board.

[FR Doc. 2021–07146 Filed 4–7–21; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 360

RIN 3064–AF75

Securitization Safe Harbor Rule; Correction

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Correcting amendment.

SUMMARY: This document contains a correction to the final regulation related to the Securitization Safe Harbor Rule which was published in the **Federal Register** on March 4, 2020.

DATES: Effective on April 8, 2021.

FOR FURTHER INFORMATION CONTACT: F. Angus Tarpley III, Counsel, Receivership Policy Unit, Legal Division, (703) 562–2434, *ftarpley@FDIC.gov;* Phillip E. Sloan, Counsel, Receivership Policy Unit, Legal Division, (703) 562–6137, *psloan@fdic.gov;* Alys V. Brown, Honors Attorney, Strategic Planning & Operations Group, Legal Division, (202) 898–3565, *alybrown@fdic.gov.*

SUPPLEMENTARY INFORMATION:

Background

The final regulation that is the subject of this correction revised the FDIC's Securitization Safe Harbor Rule, which relates to the treatment of financial assets transferred in connection with a securitization transaction, in order to eliminate a requirement that the securitization documents require compliance with Regulation AB of the Securities and Exchange Commission in circumstances where Regulation AB by its terms would not apply to the issuance of obligations backed by such financial assets.

Need for Correction

As published, the final regulation contains an error in the **Federal Register** instructions to amend the list of authorities cited for 12 CFR part 360.

List of Subjects in 12 CFR Part 360

Banks, Banking, Bank deposit insurance, Holding companies, National banks, Participations, Reporting and recordkeeping requirements, Savings associations, Securitizations.

PART 360—[AMENDED]

■ For the reasons stated in the preamble, and under the authority of 12 U.S.C. 1819, the FDIC revises the authority citation for 12 CFR part 360 to read as follows:

Authority: 12 U.S.C. 1811 *et seq.,* 1817(b), 1818(a)(2), 1818(t), 1819(a) Seventh, Ninth, and Tenth, 1820(b)(3) and (4), 1820(g), 1821(d)(1), 1821(d)(10)(C), 1821(d)(11), 1821(e)(1), 1821(e)(8)(D)(i), 1821(f)(1), 1822(c), 1823(c)(4), and 1823(e)(2).

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on or about March 25, 2021.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2021–06724 Filed 4–7–21; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0266; Project Identifier MCAI–2021–00320–T; Amendment 39–21503; AD 2021–08–09]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Airbus SAS Model A330–323, –342, and –343 airplanes. This AD was prompted by the discovery of an erroneous value in some airplane data files that are used for performance computations in the airplane flight manual (AFM). This AD requires revising the existing AFM and applicable corresponding operational procedures, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD becomes effective April 23, 2021.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of April 23, 2021.

The FAA must receive comments on this AD by May 24, 2021.

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

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

For material incorporated by reference (IBR) in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this IBR material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0266.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0266; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Vladimir Ulyanov, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3229; email *Vladimir.Ulyanov@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2021–0071, dated March 12, 2021 (EASA AD 2021–0071) (also referred to as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for all Airbus SAS Model A330–323, –342, and –343 airplanes.

This AD was prompted by the discovery of an erroneous value in some airplane data files used for AFM performance computations. This erroneous value could result in the generation of an incorrect displacement drag in the take-off, accelerate-stop, and landing distance computations for particular situations. The FAA is issuing this AD to prevent these errors, which, in combination with one engine inoperative at takeoff, and with more than 50 mm dry snow at an airport within an AFM altitude between 8,000 and 12,500 feet, could lead to substantially reduced performance of the airplane and possible runway overrun, and consequent damage to the airplane and injury to occupants. See the MCAI for additional background information.

Related Service Information Under 1 CFR Part 51

EASA AD 2021–0071 specifies procedures for revising the existing AFM and applicable corresponding operational procedures to include a certification package with the corrected complementary performance data file incorporated into the performance database section. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

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

Requirements of This AD

This AD requires accomplishing the actions specified in EASA AD 2021–0071 described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD.

EASA AD 2021–0071 requires operators to ''inform all flight crews'' of revisions of the existing AFM, and thereafter to ''operate the aeroplane accordingly.'' However, this AD would not specifically require those actions as those actions are already required by FAA regulations. FAA regulations require operators to inform pilots of any changes to the existing AFM (*e.g.,* 14 CFR 121.137(a)(1)), and to ensure that pilots are familiar with the existing AFM (*e.g.,* 14 CFR 91.505). As with any other training requirement, training on the updated AFM content is tracked by the operators and recorded in each pilot's training record, which is available for the FAA to review. FAA regulations also require pilots to follow the procedures in the existing AFM including all updates. 14 CFR 91.9 requires that any person operating a civil aircraft comply with the operating limitations specified in the existing AFM. Therefore, including a requirement in this AD to operate the airplane according to the revised AFM would be redundant and unnecessary. Further, compliance with such a requirement in an AD would be impracticable to demonstrate or track on an ongoing basis; therefore, a requirement to operate the airplane in such a manner would be unenforceable.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2021–0071 is incorporated by reference in this final rule. This AD, therefore, requires compliance with EASA AD 2021–0071 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in the EASA AD. Service information specified in EASA AD 2021–0071 that is required for compliance with EASA AD 2021–0071 is available at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0266.

Justification for Immediate Adoption and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for ''good cause,'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without providing notice and seeking comment prior to issuance. Further, section 553(d) of the APA authorizes agencies to make rules effective in less than thirty days, upon a finding of good cause.

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies forgoing notice and comment prior to adoption of this rule because an erroneous value in some airplane data files used for AFM performance computations could result in the generation of an incorrect displacement drag, and under certain conditions could lead to substantially reduced performance of the airplane and possible runway overrun, and consequent damage to the airplane and injury to occupants. Accordingly, notice and opportunity for prior public comment are impracticable and contrary to the public interest pursuant to 5 U.S.C. 553(b)(3)(B).

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

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2021–0266; Project Identifier MCAI–2021–00320–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent to Vladimir Ulyanov, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3229; email *Vladimir.Ulyanov@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Regulatory Flexibility Act (RFA)

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

Costs of Compliance

The FAA estimates that this AD affects 33 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
5 work-hours × $85 per hour = $425	$0	$425	$14,025

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

(1) Is not a ''significant regulatory action'' under Executive Order 12866, and

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2021–08–09 Airbus SAS: Amendment 39–21503; Docket No. FAA–2021–0266; Project Identifier MCAI–2021–00320–T.

(a) Effective Date

This airworthiness directive (AD) becomes effective April 23, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Airbus SAS Model A330–323, A330–342, and A330–343 airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 34, Navigation.

(e) Reason

This AD was prompted by the discovery of an erroneous value in some airplane data files used for airplane flight manual (AFM) performance computations. The FAA is issuing this AD to prevent the generation of an incorrect displacement drag due to the erroneous value, which could lead to substantially reduced performance of the airplane and possible runway overrun, and consequent damage to the airplane and injury to occupants.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2021–0071, dated March 12, 2021 (EASA AD 2021–0071).

(h) Exceptions to EASA AD 2021–0071

(1) Where EASA AD 2021–0071 refers to its effective date, this AD requires using the effective date of this AD.

(2) Where paragraph (1) of EASA AD 2021–0071 specifies to ''implement the AFM CP,'' this AD requires revising the existing AFM and applicable corresponding operational procedures to include a certification package with the corrected complementary performance data file incorporated into the performance database section.

(3) Whereas paragraph (1) of EASA AD 2021–0071 specifies to ''inform all flight crews, and, thereafter, operate the aeroplane accordingly,'' this AD does not require those actions, which are already required by existing FAA operating regulations.

(4) The ''Remarks'' section of EASA AD 2021–0071 does not apply to this AD.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Large Aircraft Section, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures

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

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

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

(j) Related Information

For more information about this AD, contact Vladimir Ulyanov, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3229; email *Vladimir.Ulyanov@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2021–0071, dated March 12, 2021.

(ii) [Reserved]

(3) For EASA AD 2021–0071, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.*

(4) You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0266.

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

Issued on April 1, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–07288 Filed 4–6–21; 11:15 am]

BILLING CODE 4910–13–P

INTERNATIONAL TRADE COMMISSION

19 CFR Part 208

Implementing Rules for the United States-Mexico-Canada Agreement Implementation Act

AGENCY: United States International Trade Commission.

ACTION: Final rule.

SUMMARY: The United States International Trade Commission (Commission) is adopting as a final rule the interim rule published on July 10, 2020, with one amendment. The rule concerns the practices and procedures for investigations of United States-Mexico cross-border long-haul trucking services (cross-border long-haul trucking services) provided for in the United States-Mexico-Canada Agreement (USMCA) Implementation Act (the Act).

DATES: Effective May 10, 2021.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, United States International Trade Commission, telephone (202) 205–2000, or William Gearhart, Office of the General Counsel, United States International Trade Commission, telephone (202) 205–3091. Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its website at *https://www.usitc.gov.*

SUPPLEMENTARY INFORMATION: The preamble below is designed to assist readers in understanding the final rule. This preamble provides background information and a regulatory analysis of the rule.

The final rule and amendment are being promulgated in accordance with the Administrative Procedure Act (5 U.S.C. 553) (APA), and will be codified in 19 CFR part 208.

Background

Section 335 of the Tariff Act of 1930 (19 U.S.C. 1335) (Tariff Act) authorizes the Commission to adopt such reasonable procedures, rules, and regulations as it deems necessary to carry out its functions and duties. In addition, sections 103(b), 322(f), and 324(e) of the Act (19 U.S.C. 4513(b), 4572(f), and 4574(e), respectively) authorize the Commission to prescribe implementing regulations necessary or appropriate to carry out actions required or authorized by the Act.

The Commission is adopting as a final rule, with one clarifying change, the interim rule published in the **Federal Register** on July 10, 2020 (85 FR 41355), that governs rules of procedure for investigations of cross-border long-haul trucking services provided for in Subtitle C of Title III of the Act. Section 322 of the Act requires that the Commission undertake an investigation, upon filing of a petition or request, and make a determination as to whether a grant of authority has caused material harm or threatens material harm to U.S. suppliers of cross-border long-haul trucking services, and if affirmative, to recommend a remedy to the President. Additionally, Section 324 of the Act requires that the Commission, at the request of the President or an interested party, undertake an investigation and make a determination as to whether an extension of relief granted by the President is necessary to prevent or remedy material harm. The Act specifies certain procedures for such investigations, including who may file a petition or request such investigations, the holding of hearings and publication of notices regarding investigations, the timelines for such investigations and determinations, and the issuance of reports that include the determination, an explanation thereof, and any recommendation for relief.

The one minor change to the interim rule is to § 208.5(e)(1)(vi), which describes additional information and data to be provided in a petition for an investigation of long-haul cross-border trucking services. Paragraph (e)(1)(vi) of this section in the interim rule required that such petitions include ''pricing information,'' and the Commission now amends this to ''freight rates'' to clarify the type of pricing information necessary in petitions. The Commission makes no other amendments to the interim rule that it now adopts as final.

In its document announcing the interim rule at part 208 of the

Commission's regulations, the Commission invited members of the public to file written comments on the rule no later than 30 days after the day of publication; in this case, by August 10, 2020. The Commission received two sets of written comments from interested parties: One filed jointly by the Owner-Operator Independent Drivers Association and the International Brotherhood of Teamsters (OOIDA/Teamsters), and one filed by the Government of Mexico (Mexico). The Commission has carefully considered all comments that it received, and it provides responses to these comments in an analysis provided below. The Commission appreciates the time and effort of the commentators in preparing their submissions.

Procedure for Adopting the Amendment

The Commission ordinarily promulgates amendments to the Code of Federal Regulations in accordance with the notice-and-comment rulemaking procedure in section 553 of the APA (5 U.S.C. 553). That procedure entails publication of proposed rulemaking in the **Federal Register** that solicits public comments on the proposed amendments, consideration by the Commission of public comments on the contents of the amendments, and publication of the final amendments at least 30 days prior to their effective date.

In this instance, however, the Commission is amending its interim rule at 19 CFR part 208 on a final basis, effective 30 days after publication of this document. The Commission's authority to adopt final amendments without following all steps listed in section 553 of the APA is derived from section 335 of the Tariff Act (19 U.S.C. 1335), sections 103(b) and 322(f) of the Act (19 U.S.C. 4513(b) and 4572(f)), and section 553 of the APA (5 U.S.C. 553).

Section 553(b) of the APA allows an agency to dispense with publication of a notice of proposed rulemaking when the following circumstances exist: (1) The rules in question are interpretive rules, general statements of policy, or rules of agency organization, procedure or practice; or (2) the agency for good cause finds that notice and public comment on the rules are impracticable, unnecessary, or contrary to the public interest, and the agency incorporates that finding and the reasons therefor into the rules adopted by the agency.

In this instance, the Commission has determined that the requisite circumstances exist for dispensing with the notice and comment procedure that ordinarily precedes the amendment of Commission rules. For purposes of invoking the section 553(b)(3)(A) exemption from publishing a notice of proposed rulemaking that solicits public comment, the Commission finds that the amendment to part 208 is a technical clarification of an agency rule of procedure and practice. Moreover, the Commission finds under section 553(b)(3)(B) that prior notice and opportunity for comment are unnecessary. The amendment clarifies an aspect of the interim rule, the type of pricing data to be provided in petitions on long-haul cross-border trucking services, but it does not substantively alter those procedures already provided for in the interim rule. Given the lack of any substantive change and that parties have already been provided an opportunity to comment on the interim rule, we find that public comment on the amendment is unnecessary.

Regulatory Analysis of Proposed Amendments to the Commission's Rules

The Commission has determined that this final rule and amendment do not meet the criteria described in section 3(f) of Executive Order 12866 (58 FR 51735, October 4, 1993) and thus do not constitute a ''significant regulatory action'' for purposes of the Executive order.

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is inapplicable to this rulemaking because it is not one for which a notice of proposed rulemaking is required under 5 U.S.C. 553(b) or any other statute.

The final rule and amendment do not contain federalism implications warranting the preparation of a federalism summary impact statement pursuant to Executive Order 13132 (64 FR 43255, Aug. 4, 1999).

No actions are necessary under title II of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (2 U.S.C. 1531–1538) because the final rule and amendment will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year (adjusted annually for inflation), and will not significantly or uniquely affect small governments, as defined in 5 U.S.C. 601(5).

This final rule and amendment are not ''major rules'' as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). Moreover, they are exempt from the reporting requirements of that Act because they contain rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.

Overview of the Amendment to the Regulations

The final regulation contains one change from the interim rule. The Commission has determined to amend § 208.5(e)(1)(vi), which describes additional information to be provided in a petition for long-haul cross-border trucking services. The interim rule required that a petition include ''pricing information'' on long-haul cross-border trucking services. After further consideration, the Commission has determined to change this language to ''freight rates'' so as to specify the precise pricing information relevant to long-haul cross-border trucking services.

Section-by-Section Explanation of the Amendment, Comments Received, and Commission Response

Part 208—Investigations of United States-Mexico Cross-Border Long-Haul Trucking Services

Subpart B—Investigations Relating to Material Harm or Threat of Material Harm

Section 208.5

Section 208.5 lists the information required in a petition for cross-border long-haul trucking services. The Commission amends § 208.5(e)(1)(vi) to clarify that freight rates are the type of pricing information to be included in petitions.

Comments

In their comments, OOIDA/Teamsters encouraged the Commission to adopt its interim rule as a final rule. They noted that their constituent members are concerned by the potential economic and safety impact of Mexican-domiciled carriers operating in the United States, and they expressed the view that investigations by the Commission will provide useful information as well as possible remedies for such harmful effects. OOIDA/Teamsters further noted that allowing a sub-market to be defined in a variety of ways is necessary given the large and diverse nature of the U.S. trucking industry and the difficulty for its members in obtaining all relevant information for the entirety of the industry. OOIDA/Teamsters also agreed with the Commission's decision to dispense with notice-and-comment procedures in adopting the interim rules given the expediency necessary to implement procedures for investigations of cross-border long-haul trucking services.

In its comments, Mexico expressed its belief that certain provisions of the

interim rule are inconsistent with the United States' obligations under the USMCA. Specifically, Mexico argued that the definition of ''material harm'' at § 208.2(j) of the interim rule is inconsistent with the USMCA in two respects. First, Mexico expressed its view that this definition differs from that provided in USMCA, Annex II, footnote 1 by adding a provision for a significant loss of market share for a ''relevant sub-market.'' Second, Mexico objected to the interim rule's definition of injury to the relevant U.S. industry as being to ''cross-border long-haul trucking services'' rather than merely ''long-haul trucking services.'' In both instances, Mexico believes that these differences lower the threshold for material injury in a manner inconsistent with the USMCA.

Commission Response

The Commission has considered the comments of OOIDA/Teamsters that support the interim rules as published, and that OOIDA/Teamsters do not seek or request amendments to the interim rules.

Addressing Mexico's comments, the Commission notes that Mexico's objections are directed at language that mirrors the USMCA's implementing statute. While Mexico alleges that the interim rule's definition for material harm is inconsistent with the USMCA, the interim rule implements provisions of the Act rather than the USMCA, and the Commission adopts its definition of material harm directly from the Act. Section 321(9) of the Act defines material harm as ''a significant loss in the share of the United States market or relevant sub-market for cross-border long-haul trucking services held by persons of the United States,'' which is identical to the definition at § 208.2(j) of the interim rule. Similarly, section 321(5) of the Act also defines the relevant U.S. industry as ''cross-border long-haul trucking services.'' Because these definitions track and are consistent with the Act, we adopt the definition of material harm from the interim rule as a final rule without change.

List of Subjects in 19 CFR Part 208

Administrative practice and procedure, Trade agreements.

For the reasons stated in the preamble, the United States International Trade Commission adopts as final rule the interim rule adding 19 CFR part 208 that was published at 85 FR 41355, on July 10, 2020, with the following change:

PART 208—INVESTIGATIONS OF UNITED STATES-MEXICO CROSS-BORDER LONG-HAUL TRUCKING SERVICES

■ 1. The authority citation for part 208 continues to read as follows:

Authority: 19 U.S.C. 4574(e).

■ 2. Amend § 208.5 by revising paragraph (e)(i)(vi) to read as follows:

§ 208.5 Contents of petition.

* * * * *

(e) * * *

(1) * * *

(vi) Any other relevant information, including freight rates and any evidence of cross-border long-haul trucking services lost to persons of Mexico in the market as a whole or claimed specific sub-market.

* * * * *

By order of the Commission.

Issued: April 2, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–07181 Filed 4–7–21; 8:45 am]

BILLING CODE 7020–02–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 258

[EPA–RCRA–2021–0127; FRL–10021–26–Region 9]

Research, Development and Demonstration (RD&D) Rule for the Salt River Pima-Maricopa Indian Community Landfill RD&D Project

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection (EPA) is taking direct final action to approve revisions to the site-specific Research, Development and Demonstration rule for the Salt River Pima-Maricopa Indian Community (SRPMIC), Salt River Landfill Research, Development, and Demonstration Project in order to increase the maximum term for the site-specific rule from 12 to 21 years. EPA is also revising the site-specific rule to reflect a change in the division title for U.S. EPA Region 9, from the Waste Management Division to the Land, Chemicals and Redevelopment Division.

DATES: This rule is effective on June 7, 2021 without further notice, unless EPA receives adverse comment by May 10, 2021. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R9–2021–0127 at *http://www.regulations.gov,* or via email to *R9LandSubmit@epa.gov.* Due to COVID–19, we are not providing facsimile or regular mail options, which are not viable at this time. For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be removed or edited from *Regulations.gov*. For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information considered confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For EPA's full public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Steve Wall, EPA Region IX, (415) 972–3381, *wall.steve@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' or ''our'' refer to the EPA.

I. Why is EPA using a direct final rule?

EPA is publishing this rule without a prior proposed rule because we view this as a noncontroversial action and anticipate no adverse comment because the revisions to the site-specific rule merely conform the rule to the national rule regarding the total length of time that Research, Development and Demonstration (RD&D) projects may be permitted. Moreover, the 2016 RD&D rule was subjected to public notice and comment prior to promulgation. Also, the existing 12-year maximum term for the Salt River Landfill's operation as a bioreactor ends in March 2021, and further delay in extending the total term of the RD&D project would potentially result in economic and environmental harm, contrary to the mission of the

Agency. Thus, EPA has determined that there is good cause for issuing this direct rule final. However, in the ''Proposed Rules'' section of this issue of the **Federal Register**, we are publishing a separate document that will serve as the proposed rule to increase the maximum term for the site-specific rule from 12 to 21 years and to reflect a change in the division title for U.S. EPA Region 9, from the Waste Management Division to the Land, Chemicals and Redevelopment Division if adverse comments are received on this direct final rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, see the **ADDRESSES** section of this document.

If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this direct final rule will not take effect. We would address all public comments in any subsequent final rule based on the proposed rule.

II. Legal Authority for This Action

Under sections 1008, 2002, 4004, and 4010 of the Resource Conservation and Recovery Act of 1976 (RCRA) as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), EPA established revised minimum Federal criteria for Municipal Solid Waste Landfills (MSWLFs). Under RCRA section 4005, states are to develop permit programs for facilities that may receive household hazardous waste or waste from conditionally exempt small quantity generators, and EPA determines whether the program is adequate to ensure that facilities will comply with the revised criteria.

The MSWLF criteria are in the Code of Federal Regulations at 40 CFR part 258. These regulations are self-implementing and apply directly to owners and operators of MSWLFs. For many of these criteria, 40 CFR part 258 includes a flexible performance standard as an alternative to the self-implementing regulation; its use requires approval by the Director of an EPA-approved state.

Since EPA's approval of a state program does not extend to Indian country, owners and operators of MSWLF units located in Indian country cannot take advantage of the flexibilities available to those facilities outside Indian country. However, the EPA has the authority under sections 2002, 4004, and 4010 of RCRA to promulgate site-specific rules that may provide for use of alternative standards. See *Yankton Sioux Tribe* v. *EPA*, 950 F. Supp. 1471 (D.S.D. 1996); *Backcountry Against Dumps* v. *EPA*, 100 F.3d 147 (D.C. Cir. 1996). EPA has developed draft guidance on preparing a site-specific request to provide flexibility to owners or operators of MSWLFs in Indian country (Site-Specific Flexibility Requests for Municipal Solid Waste Landfills in Indian Country Draft Guidance, EPA530–R–97–016, August 1997).

In 2004, EPA issued a final rule at 40 CFR 258.4 amending the MSWLF criteria to allow for RD&D permits. 69 FR 13242, March 22, 2004. That rule allows for variances from specified criteria for a limited time. Specifically, the rule allows for the Director of an approved state to issue a time-limited RD&D permit for a new MSWLF unit, existing MSWLF unit, or lateral expansion, for which the owner or operator proposes to use innovative and new methods which vary from either or both of the following: (1) The run-on control systems at 40 CFR 258.26(a)(1); and/or (2) the liquids restrictions at 40 CFR 258.28(a), provided that the MSWLF unit has a leachate collection system designed and constructed to maintain less than a 30-centimeter depth of leachate on the liner. The rule also allows for the issuance of a time-limited RD&D permit for which innovative and new methods that vary from the final cover criteria at 40 CFR 258.60(a)(1) and (2) and (b)(1) are proposed for use, provided a demonstration is made that the infiltration of liquid through the alternative cover system will not cause contamination to groundwater or surface water, or cause leachate depth on the liner to exceed 30 centimeters. RD&D permits must include such terms and conditions at least as protective as the criteria for MSWLFs to assure protection of human health and the environment. EPA's RD&D rule stated that RD&D facilities in Indian country could be approved in a site-specific rule.

The 2004 RD&D rule included time limits whereby an RD&D permit cannot exceed three years and a renewal of an RD&D permit cannot exceed three years. Although multiple renewals of an RD&D permit can be issued, the 2004 RD&D rule included a total term for an RD&D permit, including renewals, of up to twelve years. In 2016, EPA revised the maximum permit term for MSWLF units operating under the RD&D permit program to allow the Director of an approved State to increase the number of permit renewals to six, for a total permit term of up to 21 years. 81 FR 28720, May 10, 2016.

In 2009, EPA approved an RD&D project at the Salt River Landfill, promulgating a site-specific rule at 40 CFR 258.42(a). 74 FR 11677, March 19, 2009. Periodic three-year extensions have allowed the continued operation of the Salt River Landfill as a bioreactor to the present. However, the 12-year term in the current rule, issued March 19, 2009, expires on March 19, 2021.

In addition, since the promulgation of the 2009 site-specific rule for the Salt River Landfill, the division title for U.S. EPA Region 9, Waste Management Division has been changed to the Land, Chemicals and Redevelopment Division.

A. What action is the Agency taking?

EPA is taking direct final action to revise 40 CFR 258.42(a) to allow operation of the Salt River Landfill consistent with the RD&D rule for a total of 21 years. However, a renewal of this authority must continue to be sought every three years. Each renewal request is subject to public notice and comment. No renewal may be for greater than three years and the overall period of operation may not exceed 21 years.

This action revises the overall term of the rule pertaining to SRPMIC's site-specific flexibility request to recirculate leachate and landfill gas condensate and add storm water and groundwater to the below grade portions of areas of the landfill known as Phases IIIB and IVA to increase the moisture content of the waste mass in these phases.

EPA is also revising its site-specific rule to reflect a change in the division title for U.S. EPA Region 9, from the Waste Management Division to the Land, Chemicals and Redevelopment Division.

B. What are the anticipated effects and benefits of this action?

The 2016 revision to the RD&D rule at 40 CFR 258.4(e)(1) articulated the anticipated effect of extending the overall period of operations of these units from 12 to 21 years. 81 FR at 28721. Based on that rulemaking, EPA has determined that the extension of the site-specific rule's total term will provide EPA the ability to issue renewals to the existing authority to operate this RD&D unit pursuant to this program for up to 21 years instead of 12 years. During this time, the EPA will continue to evaluate data from this facility. The SRPMIC is not expected to incur any significant costs due to this direct final rule. Based on the 2016 rulemaking, the annual costs for ongoing recordkeeping and reporting requirements are estimated at $2,410 per facility and seeking periodic three-year extensions to operate an RD&D unit

remains voluntary. This action does not impose any new regulatory burden. This action allows EPA to increase the number of extensions of the operational period for the Salt River Landfill's RD&D unit if the tribal owner/operator continues to choose to participate in this research program. Increasing the possible number of extensions of the RD&D unit's operational term may benefit the tribal owner/operator of RD&D units, assuming a projected increase in the rate of return for 21 years compared to 12 years, based on the findings in EPA's 2016 rulemaking. 81 FR at 28721.

The 2016 final rule also indicated that increasing the possible number of extensions of RD&D permit terms was expected to provide more time for the EPA to collect additional data on the approaches being taken under these RD&D permits. *Id.* With respect to the continued operation of the Salt River Landfill, the following potential benefits set forth in the 2016 rule's preamble are expected: Increased potential for revenue from the sale of landfill gas for use as a renewable source of fuel, accelerated production and capture of landfill gas for potential use as a renewable fuel, and accelerated stabilization and corresponding decreased post-closure care activities for facilities due to the accelerated decomposition of waste.

III. Statutory and Executive Order Reviews

Section 106 of the National Historic Preservation Act of 1966 (NHPA) requires Federal agencies to take into account the effects of their undertakings on historic properties and to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment. 36 CFR part 800. While EPA consulted with the SRPMIC, as well as the Ak-Chin Indian Community, the Fort McDowell Yavapai Nation, the Gila River Indian Community, the Hopi Tribe, the Pascua Yaqui Tribe, the Tohono O'odham Nation, the Yavapai-Apache Nation, and the Yavapai-Prescott Indian Tribe on the original site-specific flexibility rulemaking in 2009 (see 74 FR at 11679), EPA finds that this direct final action to extend the existing 12-year term of the authority to operate a bioreactor in accordance with EPA's RD&D Program to a 21-year term has ''no potential to cause effects'' on historic properties within the meaning of Section 106 of the NHPA.

In compliance with the Endangered Species Act, 16 U.S.C. 1536 *et seq.,* EPA performed a biological assessment for the project site. No known threatened, endangered or candidate species or their habitat exist on the site. Additionally, there are no ground disturbing surface activities associated with EPA's approval of an increase to the maximum period the Salt River Landfill RD&D project can operate units as bioreactor units. No impacts to listed species that may occur in in project area are anticipated.

Under Executive Order 12866, ''Regulatory Planning and Review,'' (58 FR 51735, October 4, 1993), this rule is not of general applicability and therefore is not a regulatory action subject to review by the Office of Management and Budget (OMB).

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) because it applies to a particular facility only.

Because this rule is of particular applicability relating to a particular facility, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), or to sections 202, 204, and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4). Because this rule will affect only a particular facility, it will not significantly or uniquely affect small governments, as specified in section 203 of UMRA.

Because this rule will affect only a particular facility, this direct final rule does not have federalism implications. 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, as specified in Executive Order 13132, ''Federalism,'' (64 FR 43255, August 10, 1999). Thus, Executive Order 13132 does not apply to this rule.

This rule also is not subject to Executive Order 13045, ''Protection of Children From Environmental Health Risks and Safety Risks,'' (62 FR 19885, April 23, 1997), because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. The basis for this belief is EPA's conservative analysis of the potential risks posed by SRPMIC's RD&D Program proposal and the controls and standards set forth in the application and incorporated by reference into the original site-specific rule at 40 CFR 258.42(a).

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

As required by section 3 of Executive Order 12988, ''Civil Justice Reform,'' (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct.

Executive Order 13175, entitled ''Consultation and Coordination With Indian Tribal Governments,'' (65 FR 67249, November 9, 2000), calls for EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' EPA has concluded that this action may have tribal implications because it is directly applicable to the owner and operator of the landfill, which is currently the SRPMIC. However, this direct final rule will neither impose substantial direct compliance costs on tribal governments, nor preempt Tribal law. This direct final rule to revise the maximum total term from up to 12 years to up to 21 years will affect only the SRPMIC's operation of their landfill on their own land.

On March 10, 2021, EPA offered consultation to the SRPMIC so as to give the Tribe a meaningful and timely opportunity to provide input into the extension of the total term of the rule from 12 years to 21 years. To the extent that SRPMIC accepts EPA's offer to consult on this action, the Agency will endeavor to undertake such consultation during the 30-day public comment period for this direct final rule.

With respect to the type of flexibility being afforded to SRPMIC under this direct final rule, E.O. 13175 does provide for agencies to review applications for flexibility ''with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.'' In formulating this direct final rule, the Region has been guided by the fundamental principles set forth in E.O. 13175 and has granted the SRPMIC the ''maximum administrative discretion possible'' within the standards set forth under the RD&D rule in accordance with E.O. 13175.

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) directs EPA to use voluntary consensus

standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards, (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The technical standards included in the original site-specific flexibility request were proposed by SRPMIC. Given EPA's obligations under E.O. 13175 (see above), the Agency applied the standards established by the Tribe. In addition, the Agency considered the Interstate Technology and Regulatory Council's February 2006 technical and regulatory guideline ''Characterization, Design, Construction, and Monitoring of Bioreactor Landfills.'' Nothing about this analysis has changed since the 2009 site-specific rule was promulgated nor does the extension of the total possible term of the RD&D unit's operations in accordance with the site-specific rule from 12 years to 21 years affect this analysis.

Congressional Review Act (CRA). This action is not subject to the CRA because the term ''rule'' as it is used in the CRA does not include ''any rule of particular applicability,'' such as a site-specific rule. See, 5 U.S.C. Section 804(3)(A).

Environmental Justice—Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and the accompanying presidential memorandum advising Federal agencies to identify and address, whenever feasible, disproportionately high and adverse human health or environmental effects on minority communities or low-income communities. The action will not adversely impact minorities or low-income communities.

Authority: Sections 1008, 2002, 4004, and 4010 of the Solid Waste Disposal Act, as amended, 42 U.S.C. Sections 6907, 6912, 6944, and 6949a. Delegation 8–54, Site-Specific Rules for Flexibility from Owners/Operators of Municipal Solid Waste Landfills (MSWLFs) in Indian Country, November 24, 2010. Regional Delegation R9–8–54, October 10, 2014.

List of Subjects in 40 CFR Part 258

Environmental protection, Municipal landfills, Reporting and recordkeeping requirements, Waste treatment and disposal.

Dated: March 26, 2021.

Steven Barhite,

Acting Director, Land, Chemicals and Redevelopment Division, Region IX.

For the reasons set forth in the preamble, 40 CFR part 258 is amended as follows:

PART 258—CRITERIA FOR MUNICIPAL SOLID WASTE LANDFILLS

■ 1. The authority citation for part 258 continues to read as follows:

Authority: 33 U.S.C. 1345(d) and (e); 42 U.S.C. 6902(a), 6907, 6912(a), 6944, 6945(c) and 6949a(c), 6981(a).

Subpart D—Design Criteria

■ 2. Revise § 258.42(a)(5) through (10) to read as follows:

§ 258.42 Approval of site-specific flexibility requests in Indian country.

(a) * * *

(5) The owner and/or operator shall submit reports to the Director of the Land, Chemicals and Redevelopment Division at EPA Region 9 as specified in ''Research, Development, and Demonstration Permit Application Salt River Landfill,'' dated September 24, 2007 and amended on April 8, 2008, including an annual report showing whether and to what extent the site is progressing in attaining project goals. The annual report will also include a summary of all monitoring and testing results, as specified in the application.

(6) The owner and/or operator may not operate the facility pursuant to the authority granted by this section if there is any deviation from the terms, conditions, and requirements of this section unless the operation of the facility will continue to conform to the standards set forth in § 258.4 and the owner and/or operator has obtained the prior written approval of the Director of the Land, Chemicals and Redevelopment Division at EPA Region 9 or the Director's designee to implement corrective measures or otherwise operate the facility subject to such deviation. The Director of the Land, Chemicals and Redevelopment Division or designee shall provide an opportunity for the public to comment on any significant deviation prior to providing written approval of the deviation.

(7) Paragraphs (a)(2), (3), (5), (6), and (9) of this section will terminate on March 19, 2024, unless the Director of the Land, Chemicals and Redevelopment Division at EPA Region 9 or the Director's designee renews this authority in writing. Any such renewal may extend the authority granted under paragraphs (a)(2), (3), (5), (6), and (9) of this section for up to an additional three years, and multiple renewals (up to a total of 21 years from March 19, 2009) may be provided. The Director of the Land, Chemicals and Redevelopment Division or designee shall provide an opportunity for the public to comment on any renewal request prior to providing written approval or disapproval of such request.

(8) In no event will the provisions of paragraph (a)(2), (3), (5), (6), or (9) of this section remain in effect after March 19, 2030, 21 years after the March 19, 2009 date of publication of the site-specific rule in this section. Upon termination of paragraphs (a)(2), (3), (5), (6), and (9) of this section, and except with respect to paragraphs (a)(1) and (4) of this section, the owner and/or operator shall return to compliance with the regulatory requirements which would have been in effect absent the flexibility provided through the site-specific rule in this section.

(9) In seeking any renewal of the authority granted under or other requirements of paragraphs (a)(2), (3), (5), and (6) of this section, the owner and/or operator shall provide a detailed assessment of the project showing the status with respect to achieving project goals, a list of problems and status with respect to problem resolutions, and any other requirements that the Director of the Land, Chemicals and Redevelopment Division at EPA Region 9 or the Director's designee has determined are necessary for the approval of any renewal and has communicated in writing to the owner and operator.

(10) The owner and/or operator's authority to operate the landfill in accordance with paragraphs (a)(2), (3), (5), (6), and (9) of this section shall terminate if the Director of the Land, Chemicals and Redevelopment Division at EPA Region 9 or the Director's designee determines that the overall goals of the project are not being attained, including protection of human health or the environment. Any such determination shall be communicated in writing to the owner and operator.

* * * * *

[FR Doc. 2021–06901 Filed 4–7–21; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2018–0094; FF09E21000 FXES11110900000 212]

RIN 1018–BD08

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Yellow Lance

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for the yellow lance (*Elliptio lanceolata*) under the Endangered Species Act of 1973 (Act), as amended. In total, approximately 319 river miles (mi) (514 kilometers (km)) fall within 11 units of critical habitat in Franklin, Granville, Halifax, Johnston, Nash, Vance, Wake, and Warren Counties, North Carolina; Brunswick, Craig, Culpeper, Dinwiddie, Fauquier, Louisa, Lunenburg, Madison, Nottoway, Orange, and Rappahannock Counties, Virginia; and Howard and Montgomery Counties, Maryland. This rule extends the Act's protections to the yellow lance's designated critical habitat.

DATES: This rule is effective May 10, 2021.

ADDRESSES: This final rule is available on the internet at *http://www.regulations.gov.* Comments and materials we received, as well as some supporting documentation we used in preparing this rule, are available for public inspection at *http://www.regulations.gov.*

The coordinates or plot points or both from which the maps are generated are included in the administrative record for this critical habitat designation and are available at *http://www.regulations.gov* at Docket No. FWS–R4–ES–2018–0094, or from the Raleigh Ecological Services Field Office (*https://www.fws.gov/raleigh*) (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information developed will also be available at the Fish and Wildlife Service website and Field Office identified below and at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Pete Benjamin, Field Supervisor, U.S. Fish and Wildlife Service, Raleigh Ecological Services Field Office, 551F Pylon Drive, Raleigh, NC 27606; telephone 919–856–4520. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under section 4(a)(3) of the Endangered Species Act of 1973 (Act), as amended, if we determine that a species is an endangered or threatened species, we must designate critical habitat to the maximum extent prudent and determinable. We published a final rule to list the yellow lance as a threatened species on April 3, 2018 (83 FR 14189). Designations of critical habitat can be completed only by issuing a rule.

Basis for our action. Section 3(5)(A) of the Act defines critical habitat as (i) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Section 4(b)(2) of the Act states that the Secretary must make the designation on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impacts of specifying any particular area as critical habitat. The critical habitat we are designating in this rule, consisting of 11 units comprising approximately 319 miles (514 kilometers) of streams and rivers, constitutes our current best assessment of the areas that meet the definition of critical habitat for the yellow lance.

Economic analysis. In accordance with section 4(b)(2) of the Act, we prepared an economic analysis of the impacts of designating critical habitat for the yellow lance. We published the announcement of, and solicited public comments on, the draft economic analysis (DEA; 85 FR 6856, February 6, 2020). Because we received no comments or new information on the DEA, we adopted the DEA as a final version.

Public comments. We considered all comments and information we received from the public during the comment period on the proposed designation of critical habitat for the yellow lance and the associated DEA (85 FR 6856; February 6, 2020).

Supporting Documents

As part of the process of listing the yellow lance, a species status assessment (SSA) team prepared an SSA report for the species. The SSA team was composed of Service biologists, in consultation with other species experts. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species. The SSA report underwent independent peer review by scientists with expertise in mussel biology, habitat management, and stressors (factors negatively affecting the species) to the species. Along with other information submitted during the process of listing the species, the SSA report is the primary source of information for this final designation. The SSA report and other materials relating to this rule can be found on the Service's Southeast Region website at *https://www.fws.gov/southeast/* and at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2018–0094.

Previous Federal Actions

On April 20, 2010, we were petitioned to list 404 aquatic species in the southeastern United States, including yellow lance. In response to the petition, we completed a 90-day finding on September 27, 2011 (76 FR 59836), in which we announced our finding that the petition contained substantial information that listing may be warranted for the yellow lance. On April 5, 2017, we published a proposed rule to list the yellow lance as a threatened species (82 FR 16559). On April 3, 2018, we published the final rule to list the species as a threatened species (83 FR 14189). On February 6, 2020, we published a proposed rule to designate critical habitat for the yellow lance (85 FR 6856). Please refer to the April 5, 2017, proposed listing rule for a discussion of earlier Federal actions regarding the yellow lance.

Summary of Comments and Recommendations

On February 6, 2020, we published in the **Federal Register** (85 FR 6856) a proposed rule to designate critical habitat for the yellow lance and to make available the associated DEA; the public comment period for that proposed rule was open for 60 days, ending April 6, 2020. During the open comment period, we received 23 public comments on the proposed rule; a majority of the comments supported the designation, none opposed the designation, and

some included suggestions on how we could refine or improve the designation. All substantive information provided to us during the comment period has been incorporated directly into this final rule or is addressed below.

(1) Comment: Two commenters recommended adding to the critical habitat designation. One commenter suggested that whole watersheds be considered for designation, indicating that protecting entire watersheds would improve genetic diversity and resiliency of yellow lance populations. Another commenter recommended including vegetative buffers in the designation, citing a study on the functions and recommended widths of riparian buffer zones: For erosion and sediment control, a width of 30 to 98 feet is recommended, and in the case of absorbing biocontaminants, nutrients, and pesticides, the width ranges are 30 or more feet, 49 to 164 feet, and 49 to 328 feet, respectively.

Our Response: Designation of an entire watershed, which we interpret to mean all streams and waterbodies within a watershed, would include areas that are not occupied by yellow lance, and areas that are not suitable habitat for the yellow lance. The Service has determined that unoccupied habitat is not essential for the conservation of the species. Further, many areas within a watershed are not suitable habitat, and therefore do not contain one or more of the physical or biological features essential to yellow lance conservation. In other words, these areas do not meet the definition of critical habitat. Similarly, while the Service recognizes in the SSA report the important contribution of riparian buffers to yellow lance habitat, these land areas surrounding streams do not meet the definition of critical habitat in that they are not specific areas occupied by the species that have one or more of the physical and biological features essential to yellow lance conservation. As an obligate aquatic species, freshwater mussels such as the yellow lance cannot survive in terrestrial riparian areas. Therefore, such areas are not considered in the designation of critical habitat.

(2) Comment: One commenter recommended that exclusion of human-made structures should be construed as narrowly as possible and should not allow the exclusion of undeveloped land because that land may share a parcel with otherwise-excluded pavement or human structures.

Our Response: The exclusion of human-made structures from the boundaries of the designated critical habitat was intended to apply only to the structures included in the Geographic Information Systems (GIS) shapefiles of the critical habitat and not to undeveloped land.

(3) Comment: One commenter suggested that the Service include in the economic analysis consideration of economic benefits of protecting yellow lance habitat, including ecosystem services, the protection of clean water, the reduced cost of water treatment for drinking water supplies, as well as public health benefits.

Our Response: As noted in the DEA, the primary intended benefit of critical habitat is to support the conservation of endangered and threatened species, such as the yellow lance. In order to quantify and monetize direct benefits of the designation, information would be needed to determine (1) the incremental change in the probability of yellow lance conservation expected to result from the critical habitat designation, and (2) the public's willingness to pay for such beneficial changes. The conclusion was that additional project modifications to avoid adverse modification of critical habitat for the yellow lance are not anticipated. Because of the uncertainties associated with monetary quantification of these benefits, we were not able to estimate the economic benefits of ecosystem services, such as clean water via mussel-based biofiltration treatment, or broad benefits of ecosystem services that flow from protected areas to human populations.

(4) Comment: One commenter noted that according to the SSA report, the yellow lance is dependent on attaching itself to minnows to successfully reach its adult stage. The commenter further noted that although it is likely true that the yellow lance is mostly being hindered by abiotic factors such as pollution and sedimentation, establishing a critical habitat for this mussel species should also address conditions necessary for the survival of its host species to ensure proper development of the yellow lance. The commenter stated that yellow lance's glochidia stage coincides with the spawning period of minnows—from late spring to mid-summer—and that minnows are obligate hosts for this species and require conservation consideration in order to ensure proper development of the yellow lance. The commenter then asked how this critical habitat can be tailored to also meet the needs of the yellow lance's obligate hosts.

Our Response: In this critical habitat designation, we identify the physical or biological features essential to yellow lance conservation, and, of those, we include two physical or biological factors that specifically mention the yellow lance's fish hosts: (1) Adequate flows, or a hydrologic flow regime (which includes the severity, frequency, duration, and seasonality of discharge over time), necessary to maintain benthic habitats where the yellow lance is found and to maintain connectivity of streams with the floodplain, allowing the exchange of nutrients and sediment for maintenance of the mussel's and fish host's habitat, food availability, spawning habitat for native fishes, and the ability for newly transformed juveniles to settle and become established in their habitats; and (2) the presence and abundance of fish hosts necessary for yellow lance recruitment. In addition, we identify another physical or biological feature essential to yellow lance conservation consisting of certain suitable substrates and connected instream habitats ''that support a diversity of freshwater mussels and native fish.'' Therefore, this critical habitat designation does address, in the context of the physical or biological features essential to yellow lance conservation, conditions necessary for the yellow lance's fish hosts.

(5) Comment: One commenter noted that compliance with the existing 15 federally enacted best management practices (BMPs) for Clean Water Act section 404(f)(1) exemption for established silviculture activities like crossing a water of the United States, as well as compliance with the North Carolina forestry practice guidelines (FPGs), and with any other applicable State-enacted riparian buffer rules, should be deemed as concurrent protection of critical habitat under the Act (16 U.S.C. 1531 *et seq.*).

Our Response: The Federal BMP under consideration states, ''The discharge shall not take, or jeopardize the continued existence of, a threatened or endangered species as defined under the Endangered Species Act, or adversely modify or destroy the critical habitat of such species.'' Therefore, this Federal BMP restates existing requirements of the Act. The North Carolina FPGs are Statewide, ''mandatory narrative rule standards that were developed to assure that forestry activities are conducted in a manner that protects water quality'' (NCFS 2018, p. 1). The Service recognizes that adherence to the FPG performance standards described under title 2 of the North Carolina Administrative Code at chapter 60, subchapter C, are considered by the North Carolina Forest Service to be compliance with the Federal BMP

mentioned above. Thus, compliance with FPGs will also protect critical habitat.

(6) Comment: One commenter recommended we provide Federal funds to support cooperative improvements to forest access infrastructure and other conservation management measures within the designated critical habitat watersheds. The commenter suggested that robust, recurring funding could go towards the following activities: (1) Increase the availability of portable, temporary bridgemats for loggers to use on stream crossings; (2) enhance cost-sharing of prompt and effective reforestation after timber harvests; (3) provide cost-shared assistance for landowners to remove/renovate/replace substandard, existing forest road stream crossings; (4) develop pre-harvest plans for landowners through technical assistance provided by a forester; (5) compensate landowners in exchange for installing legal protections of critical habitat riparian zones; and (6) provide targeted in-woods research, study, and/or monitoring.

Our Response: The Service is working with forestry partners to consider funding opportunities to advance the ideas suggested by the commenter.

(7) Comment: One commenter offered information about the conservation benefits provided to aquatic species on private, working forests and requested that the Service include several references for our consideration.

Our Response: We made several revisions to include new, relevant reference materials in the forestry discussion in the SSA report, where appropriate, in response to this comment. However, several of the references provided by the commenter were not specific to studies of the impacts or benefits of forestry management to freshwater mussels and, therefore, were not included in the SSA report.

(8) Comment: One commenter noted that silvicultural practices implemented with BMPs protect aquatic species and, because they are widely implemented, should not be viewed as ''special management''; the commenter recommended the Service instead recognize BMPs as routine practices. They also note that although there are limited data documenting relationships between BMPs and some individual aquatic and riparian species, there is a significant body of research confirming that BMPs contribute to water quality and riparian forest structure and provided many references to this effect.

Our Response: BMPs are ''management practices'' that are used to protect water quality during timber harvests and other forest management activities (National Association of State Foresters 2020, unpaginated). Because there are a variety of BMPs that may be implemented depending on the project in consideration, and because there can be a forestry management or harvest plan that details which BMPs will be implemented for that particular project, the use of them is considered ''management.'' The Act defines ''critical habitat'' as, in part, the specific areas within the geographical area occupied by the species which may require special management considerations. Forestry best ''management practices'' are considered to be management considerations needed for the habitat occupied by the yellow lance. Whether they are routine or not, there is a management strategy used when implementing BMPs; therefore, they can be considered ''special management considerations'' under the Act. The SSA report (Service 2019, p. 49) and the February 6, 2020, proposed rule (85 FR 6861) recognize that BMPs can protect water quality and habitat for aquatic species. However, as noted by the commenter, there are some species for which there are limited data documenting the relationships with BMPs, and even with the 43 references provided in the comment letter, there are no data presented that consider temporary or long-term effects of sedimentation on long-lived, sedentary freshwater mussel species such as the yellow lance.

(9) Comment: One commenter encourages the Service to modify the proposed rule's language to acknowledge that removing large areas of forested wetlands and riparian systems is not part of ongoing forest management, nor is it compatible with BMP guidelines. The commenter states that in making the above statements, the Service appears to rely on older sources of information that do not reflect contemporary forest management, or possibly sources describing practices in regions other than the eastern United States.

Our Response: The section of the proposed rule that the commenter refers to is Special Management Considerations or Protections (85 FR 6856, February 6, 2020, p. 85 FR 6861), which states that the features essential to the conservation of the yellow lance may require special management considerations or protections to reduce threats including ''improper forest management or silviculture activities that remove large areas of forested wetlands and riparian systems.'' The comment implies that the Service improperly characterized this as one of the threats against which the special considerations or protections are needed; therefore, in this rule, we have clarified that language. After reviewing studies within the range of yellow lance in Virginia noted by the commenter (Lakel et al. 2010, p. 541) and frequently asked questions on the North Carolina State Forest Service's website (NCFS 2020, unpaginated), the Service notes that clearcutting, or entirely removing all trees in a forested area (U.S. Forest Service 2020, unpaginated), is a preferred method of harvesting timber. To harvest sites, they are often clearcut, burned, and then replanted (Lakel et al. 2010, p. 541). The threat to yellow lance from this harvest practice is sedimentation from clearcuts near streams. Many of the watersheds occupied by yellow lance do not have mandatory buffer requirements to eliminate sedimentation, and, as noted above, there are no data for the temporary or long-term effects of residual sedimentation post-BMP implementation on freshwater mussels. As stated above, in response to this comment, we have revised relevant language in this rule to clarify that the threat is due to ''improper forest management or clearcuts within riparian areas.''

Summary of Changes From the Proposed Rule

This final rule incorporates one minor substantive change to our proposed rule (85 FR 6856; February 6, 2020) based on the comments we received and that are summarized above under Summary of Comments and Recommendations. We revised the language under Special Management Considerations or Protections to clarify that the features essential to the conservation of the yellow lance may require special management considerations or protections to reduce ''improper forest management or clearcuts within riparian areas.'' We made no other substantive changes from the proposed rule to this final rule.

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features;

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the Federal agency would be required to consult with the Service under section 7(a)(2) of the Act. However, even if the Service were to conclude that the proposed activity would result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement ''reasonable and prudent alternatives'' to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features within an area, we focus on the specific features that support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied by the species would be inadequate to ensure the conservation of the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and other information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available

information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Physical or Biological Features Essential to the Conservation of the Species

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas we will designate as critical habitat from within the geographical area occupied by the species at the time of listing, we consider the physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection. The regulations at 50 CFR 424.02 define ''physical or biological features essential to the conservation of the species'' as the features that occur in specific areas and that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. For example, physical features essential to the conservation of the species might include gravel of a particular size required for spawning, alkali soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic essential to support the life history of the species.

In considering whether features are essential to the conservation of the species, the Service may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

The yellow lance is a sand-loving species (Alderman 2003, p. 6) often found buried deep in clean, coarse to medium sand and sometimes migrating with shifting sands (NatureServe 2015, p. 6), although it has also been found in gravel substrates. Yellow lance adults require clear, flowing water with a temperature less than 35 degrees Celsius (°C) (95 degrees Fahrenheit (°F)) and a dissolved oxygen greater than 3 milligrams per liter (mg/L). Juveniles require very specific interstitial chemistry to complete that life stage: Low salinity (similar to 0.9 parts per thousand (ppt)), low ammonia (similar to 0.7 mg/L), low levels of copper and other contaminants, and dissolved oxygen greater than 1.3 mg/L. Most freshwater mussels, including the yellow lance, are found in aggregations (mussel beds) that vary in size and are often separated by stream reaches in which mussels are absent or rare (Vaughn 2012, p. 983). Genetic exchange occurs between and among mussel beds via sperm drift, host fish movement, and movement of mussels during high flow events.

The yellow lance is an omnivore that primarily filter feeds on a wide variety of microscopic particulate matter suspended in the water column, including phytoplankton, zooplankton, bacteria, detritus, and dissolved organic matter, and these food resources are closely tied to riparian area inputs to the stream (Haag 2012, p. 26). Like most freshwater mussels, they have a unique life cycle that relies on fish hosts for successful reproduction. Yellow lance larvae (glochidia) are obligate parasites of the gills, heads, or fins of fish; primary host species are members of the Cyprinidae family, including the white shiner (*Luxilus albeolus*) and pinewoods shiner (*Lythrurus matutinus*).

A thorough review of the life history and ecology of yellow lance is presented in the SSA report (Service 2019, entire), available on *http://www.regulations.gov* at Docket No. FWS–R4–ES–2018–0094.

Summary of Essential Physical or Biological Features

We derive the specific physical or biological features essential to yellow lance conservation from studies of the species' habitat, ecology, and life history as described above, and in the SSA report. We have determined that the following physical or biological features are essential to yellow lance conservation:

(1) Suitable substrates and connected instream habitats, characterized by geomorphically stable stream channels and banks (*i.e.,* channels that maintain lateral dimensions, longitudinal profiles, and sinuosity patterns over time without an aggrading or degrading bed elevation) with habitats that support a diversity of freshwater mussels and native fish (such as stable riffle-run-pool habitats that provide flow refuges consisting of silt-free gravel and coarse sand substrates).

(2) Adequate flows, or a hydrologic flow regime (which includes the severity, frequency, duration, and seasonality of discharge over time), necessary to maintain benthic habitats where the species is found and to maintain connectivity of streams with the floodplain, allowing the exchange of nutrients and sediment for maintenance of the mussel's and fish host's habitat, food availability, spawning habitat for native fishes, and the ability of newly transformed juveniles to settle and become established in their habitats.

(3) Water and sediment quality (including, but not limited to, conductivity, hardness, turbidity, temperature, pH, ammonia, heavy metals, and chemical constituents) necessary to sustain natural physiological processes for normal behavior, growth, and viability of all life stages.

(4) The presence and abundance of fish hosts necessary for yellow lance recruitment.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protection. Activities on the surrounding landscape and in riparian areas are closely tied to instream habitat, therefore special management considerations can be linked to activities on land that influence the stream and instream habitat. The features essential to yellow lance conservation may require special management considerations or protections to reduce the following threats: (1) Reduction in water quality, quantity, and resulting sedimentation as

a result of urbanization of the landscape, including (but not limited to) land conversion for urban and commercial use, infrastructure (roads, bridges, utilities), and urban water uses (water supply reservoirs, wastewater treatment, etc.); (2) nutrient pollution from agricultural activities that impact water quantity and quality; (3) significant alteration of water quality; (4) sedimentation from incompatible forest management or clearcuts in riparian areas; (5) culvert and pipe installations that create barriers to instream movement; (6) impacts from invasive species; (7) changes and shifts in seasonal precipitation patterns as a result of climate change; and (8) other watershed and floodplain disturbances that release sediments or nutrients into the water.

Management activities that could ameliorate these threats include, but are not limited to: Use of BMPs designed to reduce sedimentation, erosion, and bank side destruction; protection of riparian corridors and retention of sufficient canopy cover along banks; moderation of surface and ground water withdrawals to maintain natural flow regimes; increased use of stormwater management and reduction of stormwater flows into the systems; and reduction of other watershed and floodplain disturbances that release sediments, pollutants, or nutrients into the water.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. As discussed in more detail below, we are not designating any areas outside the geographical area occupied by the species at the time of listing because we have not identified any unoccupied areas that are essential for the conservation of the species.

The current distribution of the yellow lance is reduced from its historical distribution. We anticipate that recovery will require continued protection of existing populations and habitat, as well as ensuring there are adequate numbers of mussels in stable populations and that these populations occur over a wide geographic area. This strategy will help to ensure that catastrophic events, such as floods, which can cause excessive sedimentation, nutrients, and debris to disrupt stream ecology, cannot simultaneously affect all known populations. Rangewide recovery considerations, such as maintaining existing genetic diversity and striving for representation of all major portions of the species' current range, were considered in formulating this final critical habitat designation.

Sources of data for this final critical habitat include multiple databases maintained by universities and State agencies for North Carolina, Virginia, and Maryland, and numerous survey reports on streams throughout the species' range. Other sources of available information on habitat requirements for this species include studies conducted at occupied sites and published in peer-reviewed articles, agency reports, and data collected during monitoring efforts (Service 2019, entire).

Areas Occupied at the Time of Listing

This critical habitat designation does not include all streams known to have been occupied by the species historically; instead, it focuses on streams and rivers within the historical range that have also retained the necessary physical or biological features that will allow for the maintenance and expansion of existing populations and that were occupied at the time of listing. First, we identified stream channels that currently support yellow lance populations. In the SSA report, we define ''currently support'' as stream channels with observations of the species from 2005 to present. Due to the breadth and intensity of survey effort done for freshwater mussels throughout the known range of the species, it is reasonable to assume that streams with no positive surveys since 2005 should not be considered occupied for the purpose of our analysis.

Specific habitat areas were delineated based on Natural Heritage Element Occurrences (EOs) following NatureServe's occurrence delineation protocol for freshwater mussels (NatureServe 2018, unpaginated). These EOs provide habitat for yellow lance subpopulations and are large enough to be self-sustaining over time, despite fluctuations in local conditions. The EOs contain stream reaches with interconnected waters so that host fish containing yellow lance glochidia can move between areas, at least during certain flows or seasons. Based on this information, we consider the following streams in Maryland, Virginia, and North Carolina to have been occupied by the species at the time of listing: Patuxent River, Rappahannock Subbasin (including the Rappahannock River, South Run, Carter Run, Thumb Run, Hungry Run, and Great Run), Rapidan Subbasin (including the Rapidan River, Blue Run, and Marsh Run), South Anna River, Johns Creek, Nottoway Subbasin (including the Nottoway River, Crooked Creek, and Sturgeon Creek), Tar River, Sandy/Swift Creek, Fishing Creek Subbasin (including Fishing Creek, Shocco Creek, and Richneck Creek), Swift Creek, and Little River.

Areas Outside the Geographic Area Occupied at the Time of Listing

We are not designating any areas outside the geographical area occupied by the species at the time of listing because we did not find any unoccupied areas that are essential for the conservation of the species. The protection of stream segments within the seven currently existing populations (Patuxent, Rappahannock, York, James, Chowan, Tar, and Neuse), which are located across the physiographic representation of the range, would sufficiently reduce the risk of extinction. Improving the resiliency of populations in the currently occupied streams will increase viability to the point that the protections of the Act are no longer necessary.

Critical Habitat Maps

When determining critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features necessary for yellow lance. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this rule have been excluded by text in the rule and are not included for designation as critical habitat. Therefore, a Federal action involving these lands would not trigger section 7 consultation under the Act with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

The critical habitat designation is defined by the maps, as modified by any accompanying regulatory text, presented at the end of this document under **REGULATION PROMULGATION**. We include more detailed information on the boundaries of the critical habitat designation in the discussion of

individual units below. We will make the GIS shapefiles on which each map is based available to the public at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2018–0094, at *http://www.fws.gov/southeast.*

Final Critical Habitat Designation

We are designating approximately 319 river mi (514 km) in 11 units in North Carolina, Virginia, and Maryland as critical habitat for the yellow lance. All of the units were occupied by the species at the time of listing and contain some or all of the physical and biological features that are essential to support life-history processes of the species. These critical habitat areas, described below, constitute our current best assessment of areas that meet the definition of critical habitat for yellow lance. The table below shows the name, land ownership of the riparian areas surrounding the units, and approximate river miles of the designated units for yellow lance. Because all streambeds are navigable waters, the actual critical habitat units are all owned by the State where they occur. The riparian land adjacent to the critical habitat is 83 percent private lands, 11 percent conservation lands and easements, and 6 percent State lands.

TABLE OF CRITICAL HABITAT UNITS FOR THE YELLOW LANCE

Critical habitat unit	Riparian ownership surrounding units	River miles (kilometers)
1. PR1—Patuxent River	State; Private	10 (16)
2. RR1—Rappahannock Subbasin	Private; Easements	44 (71)
3. RR2—Rapidan Subbasin	Private; Easements	9 (14)
4. YR1—South Anna River	Private; Easements	8 (13)
5. JR1—Johns Creek	Private; George Washington and Jefferson National Forest	14 (23)
6. CR1—Nottoway Subbasin	Private; Easements	41 (66)
7. TR1—Tar River	Private; Easements	91 (146)
8. TR2—Sandy/Swift Creek	Private; State; Easements	31 (50)
9. TR3—Fishing Creek Subbasin	Private; State; Easements	37 (60)
10. NR1—Swift Creek	Private; Easements	24 (39)
11. NR2—Little River	Private; Easements	10 (16)
Total		319 (514)

Note: Area sizes may not sum due to rounding.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for yellow lance, below.

Patuxent Population

Unit 1: PR1—Patuxent River

Unit 1 consists of approximately 10 river mi (16.1 km), including 3 mi (4.8 km) of the Patuxent River and 7 mi (11.3 km) of the Hawlings River, in Montgomery and Howard Counties, Maryland. The riparian land adjacent to Patuxent River is primarily located in Patuxent River State Park (90 percent), with some parcels privately owned (10 percent); the riparian land surrounding the Hawlings River is predominantly conservation parcels (97 percent) including State, county, and Maryland National Capital Parks Planning (MD NCPP) park land, and some privately owned parcels (3 percent).

Special management considerations or protection may be required to address excess nutrients, sediment, and pollutants that enter the rivers and serve as indicators of other forms of pollution such as bacteria and toxins, all of which reduce water quality for the species. Primary sources of these types of pollution result from urbanization and include wastewater, stormwater runoff, and fertilizers. Portions of the upper Patuxent River watershed were listed in 2011 as impaired for aquatic life and wildlife due to total suspended solids, and in 2014 due to chlorides and sulfates (MDE 2016, unpaginated). There are 146 non-major National Pollutant Discharge Elimination System (NPDES) discharges and three major (including Maryland City Water Reclamation Facility (WRF) and Bowie Wastewater Treatment Plant (WWTP)) NPDES discharges in the management unit. The Patuxent River is also fragmented by two water supply reservoirs, one with dual use as a hydroelectric facility. Given the urban stormwater and nonpoint source pollution identified as contributing to water quality issues in this unit, special management considerations related to developed areas including riparian buffer restoration, reduced surface and groundwater withdrawals, stormwater retrofits, eliminating direct stormwater discharges, increasing open space in the watershed, and implementing highest levels of wastewater treatment practicable will benefit the species' habitat in this unit.

Rappahannock Population

Unit 2: RR1—Rappahannock Subbasin

Unit 2 consists of approximately 44 river mi (70.8 km) of Rappahannock Subbasin, including 1.7 mi (2.7 km) in Hungry Run, 7.9 mi (12.7 km) in Thumb Run, 5.9 mi (9.5 km) in South Run/Carter Run, 2.7 mi (4.3 km) in Great Run, and 25.8 mi (41.6 km) in Rappahannock River in Rappahannock, Fauquier, and Culpeper Counties, Virginia. The riparian land adjacent to this unit is primarily privately owned (72 percent), with some conservation parcels (28 percent).

Special management considerations or protection may be required to address excess nutrients, sediment, and pollutants that enter the river and serve as indicators of other forms of pollution such as bacteria and toxins, all of which impact water quality for the species. Sources of these types of pollution include wastewater, agricultural runoff, stormwater runoff, and septic systems. Approximately 77 miles (123.9 km) of the Rappahannock River watershed are impaired for aquatic life. Impairment is indicated by low benthic-macroinvertebrate bioassessment scores, pH and temperature issues, and *Escherichia coli* (*E. coli*); several of these can be attributed to septic systems or nonpoint source runoff into streams. There are 93 non-major NPDES discharges and 11 major NPDES discharges, including several city and package WWTPs, within this unit. Special management considerations for riparian buffer restoration, agricultural BMPs, stormwater retrofits, maintenance of forested buffers, and implementing highest levels of wastewater treatment practicable will benefit the habitat for the species in this unit.

Unit 3: RR2—Rapidan Subbasin

Unit 3 consists of approximately 9 river mi (14.5 km) of Rapidan Subbasin, including 1.2 mi (1.9 km) in Marsh Run, 3.1 mi (5.0 km) in Blue Run, and 4.7 mi (7.6 km) in the Rapidan River in Madison and Orange Counties, Virginia. The riparian land adjacent to this unit is privately owned (57 percent) and conservation parcels (43 percent).

Special management considerations or protection may be required to address excess nutrients, sediment, and pollutants that enter the river and serve as indicators of other forms of pollution such as bacteria and toxins, all of which reduce water quality for the species (see discussion for Unit 2, above). Special management considerations for riparian buffer restoration, agricultural BMPs, stormwater retrofits, maintenance of forested buffers, and implementing highest levels of wastewater treatment practicable will benefit the habitat for the species in this unit.

York Population

Unit 4: YR1—South Anna River

Unit 4 consists of approximately 8 river mi (12.9 km) of the South Anna River in Louisa County, Virginia. The riparian land adjacent to this unit is primarily privately owned (92 percent), with some conservation parcels (8 percent).

Special management considerations or protection may be required to address excess nutrients, sediment, and pollutants that enter the river and serve as indicators of other forms of pollution such as bacteria and toxins, all of which impact water quality for the species. Sources of these types of pollution include wastewater, agricultural runoff, stormwater runoff, and septic systems. Based on 2012 data, 13 stream reaches, totaling approximately 44 miles (70.8 km), are impaired for aquatic life in the Po River and South Anna River watersheds. Impairment is indicated by low benthic-macroinvertebrate bioassessment scores, low dissolved oxygen, pH, and *E. coli.* There are 50 non-major NPDES discharges in the basin, and one major discharge, the Ashland WWTP. Special management considerations for riparian buffer restoration, agricultural BMPs, stormwater retrofits, maintenance of forested buffers, and implementing highest levels of wastewater treatment practicable will benefit the habitat for the species in this unit.

James Population

Unit 5: JR1—Johns Creek

Unit 5 consists of approximately 14 river mi (22.5 km) of the Johns Creek in Craig County, Virginia. The riparian land adjacent to this unit is primarily private, with some federally owned land as part of George Washington and Jefferson National Forest.

Special management considerations or protection may be required to address excess nutrients, sediment, and pollutants, which enter the creek and serve as indicators of other forms of pollution such as bacteria and toxins, all of which impact water quality for the species. Sources of these types of pollution are wastewater, agricultural runoff, and urban stormwater runoff. National Forest lands surround most of the Johns Creek watershed; protections and management of these lands will likely enable habitat conditions (water quality, water quantity/flow, instream substrate, and connectivity) to remain high into the future (Service 2019, entire). Targeted species restoration in conjunction with current associated-species restoration efforts in Johns, Dicks, and Little Oregon Creeks within the Craig Creek Subbasin will likely improve the yellow lance's resiliency in these areas. Maintenance of forested buffer conditions is essential to retaining high-quality instream habitat in this unit.

Chowan Population

Unit 6: CR1—Nottoway Subbasin

Unit 6 consists of approximately 41 river mi (66 km) of Nottoway Subbasin, including 1.4 mi (2.3 km) in Crooked Creek, 3.3 mi (5.3 km) in Sturgeon Creek, and 36.3 mi (58.4 km) in the Nottoway River in Nottoway, Lunenburg, Brunswick, and Dinwiddie Counties, Virginia. The designation begins upstream of VA49 and ends at its confluence with Sturgeon Creek. The riparian land adjacent to this unit is primarily privately owned (64 percent), although Fort Pickett Military Reservation, which is exempted from this critical habitat designation, also has frontage on the Nottoway River (33 percent; see Exemptions, below), and there are some conservation parcels (3 percent).

Special management considerations or protection may be required within this unit to address a variety of threats. In the past decade, the Nottoway River suffered from several seasonal drought events, which not only caused low dissolved oxygen conditions but also decreased food delivery because of minimal flows. In addition, these conditions led to increased predation rates on potential host fishes that were concentrated into low-flow refugia (*e.g.,* pools). Urban stormwater and nonpoint source pollution have been identified as contributing to water quality issues in this unit. Additional threats to this unit include oil and gas pipeline projects that propose to cross streams at locations where the species occurs, with special management recommendations of alternate routes for oil and gas pipelines, or directional boring for those projects. Special management considerations for riparian buffer restoration, reduced surface and groundwater withdrawals, and stormwater retrofits will benefit the habitat in this unit. Additional special management considerations or protection may be required within this unit to address low water levels as a result of water withdrawals and drought.

Tar Population

Unit 7: TR1—Tar River

Unit 7 consists of approximately 91 river mi (146.5 km) of the Tar River, including 4.4 mi (7.1 km) in Ruin Creek, 11.9 mi (19.2 km) in Tabbs Creek, 6.8 mi (10.9 km) in Crooked Creek, and 67.9 mi (109.3 km) in the Tar River in Granville, Vance, Franklin, and Nash Counties, North Carolina. The riparian land adjacent to this unit is almost all privately owned (98 percent), with a few conservation parcels (2 percent).

Special management considerations or protection may be required within this unit to address a variety of threats. Excessive amounts of nitrogen and phosphorus run off the land, or are discharged, into the waters, causing excessive growth of vegetation and leading to extremely low levels of dissolved oxygen. Based on 2014 data, seven stream reaches totaling approximately 38 miles (61.1 km) are impaired in this basin. Indicators of impairment are low dissolved oxygen and low benthic-macroinvertebrate assessment scores, and the entire basin is classified as Nutrient Sensitive Waters (NCDEQ 2016, pp. 115–117). There are 102 non-major NPDES discharges, including several package WWTPs and biosolids facilities, and 3 major NPDES discharges (Oxford WWTP, Louisburg WWTP, and Franklin County WWTP) in this unit; with expansion of these facilities, or addition of new wastewater discharges, an additional threat to habitat exists in this unit. Special management focused on agricultural BMPs, implementing highest levels of wastewater treatment practicable, maintenance of forested buffers, and connection of protected riparian corridors will benefit habitat for the species in this unit.

Unit 8: TR2—Sandy/Swift Creek

Unit 8 consists of approximately 31 river mi (50 km) of Sandy/Swift Creek in Vance, Warren, Halifax, Franklin, and Nash Counties, North Carolina. The riparian land adjacent to this unit is primarily privately owned (92 percent), with the rest in either conservation easements (2.5 percent) or State Game Land parcels (4.6 percent).

Special management considerations or protection may be required within this unit to address a variety of threats. Excessive amounts of nitrogen and phosphorus run off the land, or are discharged, into the waters, causing excessive growth of vegetation and leading to extremely low levels of dissolved oxygen; one stream reach totaling approximately 5 miles (8 km) is impaired in this unit. Special management focused on agricultural BMPs, maintenance of forested buffers, and connection of protected riparian corridors will benefit habitat for the species in this unit.

Unit 9: TR3—Fishing Creek Subbasin

Unit 9 consists of approximately 37 river mi (59.5 km) of Fishing Creek Subbasin, including 1.6 mi (2.6 km) in Richneck Creek, 8.0 mi (12.9 km) in Shocco Creek, and 27.4 mi (44 km) in Fishing Creek in Vance, Warren, Halifax, Franklin, and Nash Counties, North Carolina. The riparian land adjacent to this unit is primarily in private ownership (85 percent), with some State Game Land parcels (12 percent) and conservation easements (3 percent).

Special management considerations or protection may be required within this unit to address a variety of threats. Excessive amounts of nitrogen and phosphorus run off the land, or are discharged, into the waters, causing excessive growth of vegetation and leading to extremely low levels of dissolved oxygen. Special management focused on agricultural BMPs, maintenance of forested buffers, and connection of protected riparian corridors will benefit habitat for the species in this unit.

Neuse Population

Unit 10: NR1—Swift Creek

Unit 10 consists of approximately 24 river mi (38.6 km) of the Swift Creek in Wake and Johnston Counties, North Carolina. The riparian land adjacent to this unit is almost entirely privately owned (99.5 percent), with one conservation parcel (0.5 percent).

Special management considerations or protection may be required within this unit to address a variety of threats. Large quantities of nutrients (especially nitrogen) contributed by fertilizers and animal waste washed from lawns, urban developed areas, and farm fields are impacting aquatic ecosystems in this unit. There are several permitted point source discharges of wastewater. Development is also impacting several areas along Swift Creek.

All of Swift Creek is rated ''impaired'' by the North Carolina Division of Water Resources. Many factors contribute to this designation, including low benthic-macroinvertebrate assessment scores, low pH, poor fish community scores, low dissolved oxygen, polychlorinated biphenyls, copper, and zinc. Many non-major and one major (Dempsey Benton Water Treatment Plant) permitted discharges occur in this unit. Special management related to developed areas, including using the best available wastewater treatment technologies, retrofitting stormwater systems, eliminating direct stormwater discharges, increasing open space in the watershed, and maintaining connected riparian corridors, will be important to maintain habitat in this unit.

Unit 11: NR2—Little River

Unit 11 consists of approximately 10 river mi (16.1 km) of the Little River in Johnston County, North Carolina. The riparian land adjacent to this unit is almost entirely privately owned (99.5 percent), with one conservation parcel (0.5 percent).

Special management considerations or protection may be required within this unit to address a variety of threats. Four stream reaches totaling approximately 17 miles are impaired in the Little River. The designation of impairment is based primarily on low benthic-macroinvertebrate assessment scores, low pH, and low dissolved oxygen. There are 32 non-major and no major NPDES discharges in this unit. Special management considerations in this unit include retrofitting stormwater systems, eliminating direct stormwater discharges, increasing and protecting existing open space, and maintaining connected riparian corridors.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species listed under the Act or result in the destruction or adverse modification of critical habitat.

We published a final regulation with a revised definition of destruction or adverse modification on August 27, 2019 (84 FR 44976). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal agency actions within the species' habitat that may require conference or consultation or both include management and any other landscape-altering activities on Federal lands administered by the Service, Army National Guard, U.S. Forest Service, and National Park Service; issuance of section 404 Clean Water Act permits by the U.S. Army Corps of Engineers; and construction and maintenance of roads or highways by the Federal Highway Administration. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency, do not require section 7 consultation.

Compliance with the requirements of section 7(a)(2), is documented through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to

adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 set forth requirements for Federal agencies to reinitiate formal consultation on previously reviewed actions. These requirements apply when the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law) and, subsequent to the previous consultation, we have listed a new species or designated critical habitat that may be affected by the Federal action, or the action has been modified in a manner that affects the species or critical habitat in a way not considered in the previous consultation. In such situations, Federal agencies sometimes may need to request reinitiation of consultation with us, but the regulations also specify some exceptions to the requirement to reinitiate consultation on specific land management plans after subsequently listing a new species or designating new critical habitat. See the regulations for a description of those exceptions.

Application of the ''Destruction or Adverse Modification'' Standard

The key factor related to the destruction or adverse modification determination is whether implementation of the proposed Federal action directly or indirectly alters the designated critical habitat in a way that appreciably diminishes the value of the critical habitat as a whole for the conservation of the listed species. As discussed above, the role of critical habitat is to support physical or biological features essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may violate 7(a)(2) of the Act by destroying or adversely modifying such designation, or that may be affected by such designation.

Activities that the Services may, during a consultation under section 7(a)(2) of the Act, find are likely to destroy or adversely modify critical habitat include, but are not limited to:

(1) Actions that would alter the minimum flow or the existing flow regime. Such activities could include, but are not limited to, impoundment, channelization, water diversion, water withdrawal, and hydropower generation. These activities could eliminate or reduce the habitat necessary for the growth and reproduction of yellow lance and/or its fish host by decreasing or altering flows to levels that would adversely affect their ability to complete their life cycles.

(2) Actions that would significantly alter water chemistry or temperature. Such activities could include, but are not limited to, release of chemicals (including pharmaceuticals, metals, and salts), biological pollutants, or heated effluents into the surface water or connected groundwater at a point source or by dispersed release (non-point source). These activities could alter water conditions to levels that are beyond the tolerances of yellow lance and/or its fish host and result in direct or cumulative adverse effects to these individuals and their life cycles.

(3) Actions that would significantly increase sediment deposition within the stream channel. Such activities could include, but are not limited to, excessive sedimentation from livestock grazing, road construction, channel alteration, timber harvest, off-road vehicle use, and other watershed and floodplain disturbances. These activities could eliminate or reduce the habitat necessary for the growth and reproduction of yellow lance and/or its fish host by increasing the sediment deposition to levels that would adversely affect their ability to complete their life cycles.

(4) Actions that would significantly increase the filamentous algal community within the stream channel. Such activities could include, but are not limited to, release of nutrients into the surface water or connected groundwater at a point source or by dispersed release (non-point source). These activities can result in excessive filamentous algae filling streams and reducing habitat for the yellow lance and/or its fish host, degrading water quality during algal decay, and decreasing oxygen levels at night from algal respiration to levels below the tolerances of the mussel and/or its fish host. Algae can also directly compete with mussel offspring by covering the sediment, which prevents the glochidia from settling into the sediment.

(5) Actions that would significantly alter channel morphology or geometry. Such activities could include, but are not limited to, channelization, impoundment, road and bridge construction, mining, dredging, oil and gas pipeline crossings, and destruction of riparian vegetation. These activities may lead to changes in water flows and levels that would degrade or eliminate the mussel, its fish host, and/or their habitats. These actions can also lead to increased sedimentation and degradation in water quality to levels that are beyond the tolerances of yellow lance and/or its fish host.

(6) Actions that result in the introduction, spread, or augmentation of nonnative aquatic species in occupied stream segments, or in stream segments that are hydrologically connected to occupied stream segments, even if those segments are occasionally intermittent, or introduction of other species that compete with or prey on the yellow lance. Possible actions could include, but are not limited to, stocking of nonnative fishes, stocking of sport fish, or other related actions. These activities can introduce parasites or disease to fish hosts; result in direct predation; or affect the growth, reproduction, and survival of yellow lance.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the

military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that the Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

We consult with the military on the development and implementation of INRMPs for installations with listed species. We analyzed INRMPs developed by military installations located within the range of the critical habitat designation for yellow lance to determine if they meet the criteria for exemption from critical habitat under section 4(a)(3) of the Act.

We have identified one area within the critical habitat designation that consists of Department of Defense lands with a completed, Service-approved INRMP. The Army National Guard—Maneuver Training Center Fort Pickett (Fort Pickett) is located on 41,000 acres in three counties in southeastern Virginia: Nottoway, Brunswick, and Dinwiddie. Fort Pickett is on federally owned land, is managed by the Virginia Army National Guard, and is subject to all Federal laws and regulations. The Fort Pickett INRMP covers fiscal years 2017–2021, updated every five years, and serves as the principal management plan governing all natural resource activities on the installation. Among the goals and objectives listed in the INRMP is habitat management for rare, threatened, and endangered species, and the yellow lance is included in this plan. Management actions and elements that will benefit the yellow lance and its habitat include managing soil erosion and sedimentation; maintaining and improving riparian, forest, and stream habitats; enforcing stream and wetland protection zones; improving water quality; and conducting public outreach and education.

Fourteen miles (22.5 km) of Unit 6 (CR1—Nottoway Subbasin) are located within the area covered by this INRMP. Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that the identified streams are subject to the INRMP and that conservation efforts identified in the INRMP will provide a benefit to the yellow lance. Therefore, streams within this installation are exempt from critical habitat designation under section 4(a)(3) of the Act. We are not including approximately 14 river miles (22.5 km) of habitat in this critical habitat designation because of this exemption.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor. On December 18, 2020, we published a final rule in the **Federal Register** (85 FR 82376) revising portions of our regulations pertaining to exclusions of critical habitat. These final regulations became effective on January 19, 2021 and apply to critical habitat rules for which a proposed rule was published after January 19, 2021. Consequently, these new regulations do not apply to this final rule.

The first sentence in section 4(b)(2) of the Act requires that we take into consideration the economic, national security, or other relevant impacts of designating any particular area as critical habitat. We describe below the process that we undertook for taking into consideration each category of impacts and our analyses of the relevant impacts.

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. In order to consider economic impacts of a designation, we prepared an incremental effects memorandum (IEM) and screening analysis which, together with our narrative and interpretation of effects, constitute our final economic analysis (FEA) of the critical habitat designation and related factors (IEc 2018, entire). We made the analysis, dated September 28, 2018, available for public review from February 6, 2020, through April 6, 2020. The DEA addressed probable economic impacts of critical habitat for the yellow lance. Following the close of the comment period, we reviewed and evaluated all information submitted during the comment period that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation. Additional information relevant to the probable incremental economic impacts of critical habitat designation for the yellow lance is summarized below and available in the screening analysis for the yellow lance (IEc 2018, entire), available at *http://www.regulations.gov.*

The final critical habitat designation for yellow lance totals approximately 319 river mi (514 km) in 11 units as critical habitat in North Carolina, Virginia, and Maryland, all occupied at the time of listing. In these areas, any actions that may affect critical habitat would also affect the species, and it is unlikely that any additional conservation efforts would be recommended to address the adverse modification standard over and above those recommended as necessary to avoid jeopardizing the continued existence of yellow lance. Therefore, even though some analysis of the impacts of the action of critical habitat may be necessary, and this additional analysis will require costs in time and resources by both the Federal action agency and the Service, it is believed that, in most circumstances, these costs would predominantly be administrative in nature and would not be significant.

The probable incremental economic impacts of the yellow lance critical habitat designation are expected to be limited to additional administrative effort, as well as minor costs of conservation efforts resulting from a small number of future section 7 consultations. This low level of impacts is anticipated because, given that the critical habitat is occupied by the species, actions that may adversely modify the critical habitat would also likely jeopardize the continued existence of the species; as a result, other than administrative costs, incremental economic impacts of critical habitat designation over and above impacts from consulting for jeopardy are unlikely.

We do not expect any additional consultations resulting from the designation of critical habitat. The total annual incremental costs of critical habitat designation are anticipated to be the additional resources expended in a maximum of 102 section 7 consultations annually at a cost of less than $240,000 per year. Accordingly, we conclude that this final designation does not reach the threshold of ''significant'' under E.O. 12866.

Exclusions Based on Economic Impacts

As discussed above, we considered the economic impacts of the critical habitat designation, and the Secretary is not exercising their discretion to exclude any areas from this designation of critical habitat for the yellow lance based on economic impacts. A copy of the IEM and screening analysis with supporting documents may be obtained by contacting the Raleigh Ecological Services Field Office (see **ADDRESSES**) or by downloading from the internet at *http://www.regulations.gov.*

Exclusions Based on Impacts on National Security and Homeland Security

Section 4(a)(3)(B)(i) of the Act (see Exemptions, above) may not cover all Department of Defense (DoD) lands or areas that pose potential national-security concerns (*e.g.,* a DoD installation that is in the process of revising its INRMP for a newly listed species or a species previously not covered). If a particular area is not covered under section 4(a)(3)(B)(i), national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of ''critical habitat.'' Nevertheless, when designating critical habitat under section 4(b)(2), the Service must consider impacts on national security, including homeland security, on lands or areas not covered by section 4(a)(3)(B)(i). Accordingly, we will always consider for exclusion from the designation areas for which DoD, Department of Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns. We have determined that, other than the land exempted under section 4(a)(3)(B)(i) of the Act based upon the existence of an approved INRMP (see Exemptions, above), the lands within the designation of critical habitat for yellow lance are not owned or managed by DoD or DHS, and, therefore, we anticipate no impact on national security. Consequently, we did not exclude any areas from the final designation based on impacts on national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors including whether there are permitted conservation plans covering the species in the area such as habitat conservation plans (HCPs), safe harbor agreements, or candidate conservation agreements with assurances, or whether there are nonpermitted conservation agreements and partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at the existence of Tribal conservation plans and partnerships, and consider the government-to-government relationship of the United States with Tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this final rule, we determined that there are currently no permitted conservation plans or other nonpermitted conservation agreements or partnerships for the yellow lance, and the final critical habitat designation does not include any Tribal lands or trust resources. We anticipate no impact on Tribal lands, partnerships, or permitted or nonpermitted plans or agreements from this critical habitat designation. Accordingly, we did not exclude any areas from the final designation based on other relevant impacts.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB) will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order (E.O.) 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business,

special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine whether potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

Under the RFA, as amended, and as understood in light of recent court decisions, Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself and, therefore, are not required to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies will be directly regulated by this designation. There is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities will be directly regulated by this rulemaking, the Service certifies that this critical habitat designation will not have a significant economic impact on a substantial number of small entities and a regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB has provided guidance for implementing this E.O. that outlines nine outcomes that may constitute ''a significant adverse effect'' when compared to not taking the regulatory action under consideration. The economic analysis finds that none of these criteria is relevant to this analysis. Thus, based on information in the economic analysis, energy-related impacts associated with yellow lance conservation activities within critical habitat are not expected. As such, the designation of critical habitat is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments because most of the lands adjacent to the streams being designated as critical habitat are owned by private landowners. These entities do not fit the definition of ''small governmental jurisdiction.'' The riparian habitat owned by Federal, State, or local governments that we are designating as critical habitat in this rule are either lands managed for conservation or lands already developed. Consequently, we do not believe that the critical habitat designation will significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for yellow lance in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures, or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that

would destroy or adversely modify critical habitat. A takings implications assessment has been completed and concludes that this designation of critical habitat for yellow lance does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of the critical habitat designation with, the appropriate State resource agencies. We did not receive comments from the States. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the rule does not have substantial direct effects either on the State, or on the relationship between the Federal Government and the State, or on the distribution of powers and responsibilities among the various levels of government. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist these local governments in long-range planning (because these local governments no longer have to wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) will be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this rule identifies the elements of physical or biological features essential to the conservation of the species. The designated areas of critical habitat are presented on maps, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We have identified no Tribal interests that will be affected by this rule.

References Cited

A complete list of references cited in this rule is available on the internet at *http://www.regulations.gov* and upon request from the Raleigh Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this rule are the staff members of the U.S. Fish and Wildlife Service Species Assessment Team and Raleigh Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. Amend § 17.11(h) by revising the entry for ''Lance, yellow'' under CLAMS in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	*
CLAMS				
*	*	*	*	*
Lance, yellow	*Elliptio lanceolata*	Wherever found	T	83 FR 14189, 4/3/2018; 50 CFR 17.95(f).CH
*	*	*	*	*

■ 3. Amend § 17.95(f) by adding, immediately following the entry for ''Rabbitsfoot (*Quadrula cylindrica cylindrica*),'' an entry for ''Yellow Lance (*Elliptio lanceolata*)'' to read as set forth below:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(f) *Clams and Snails.*

* * * * *

Yellow Lance (*Elliptio lanceolata*)

(1) Critical habitat units are depicted for Franklin, Granville, Halifax, Johnston, Nash, Vance, Wake, and Warren Counties, North Carolina; Brunswick, Craig, Culpeper, Dinwiddie, Fauquier, Louisa, Lunenburg, Madison, Nottoway, Orange, and Rappahannock Counties, Virginia; and Howard and Montgomery Counties, Maryland, on the maps in this entry.

(2) Within these areas, the physical or biological features essential to yellow lance conservation consist of the following components:

(i) Suitable substrates and connected instream habitats, characterized by geomorphically stable stream channels and banks (*i.e.,* channels that maintain lateral dimensions, longitudinal profiles, and sinuosity patterns over time without an aggrading or degrading bed elevation) with habitats that support a diversity of freshwater mussel and native fish (such as stable riffle-run-pool habitats that provide flow refuges consisting of silt-free gravel and coarse sand substrates).

(ii) Adequate flows, or a hydrologic flow regime (which includes the severity, frequency, duration, and seasonality of discharge over time), necessary to maintain benthic habitats where the species is found and to maintain connectivity of streams with the floodplain, allowing the exchange of nutrients and sediment for maintenance of the mussel's and fish host's habitat, food availability, spawning habitat for native fishes, and the ability for newly transformed juveniles to settle and become established in their habitats.

(iii) Water and sediment quality (including, but not limited to, conductivity, hardness, turbidity, temperature, pH, ammonia, heavy metals, and chemical constituents) necessary to sustain natural physiological processes for normal behavior, growth, and viability of all life stages.

(iv) The presence and abundance of fish hosts necessary for yellow lance recruitment.

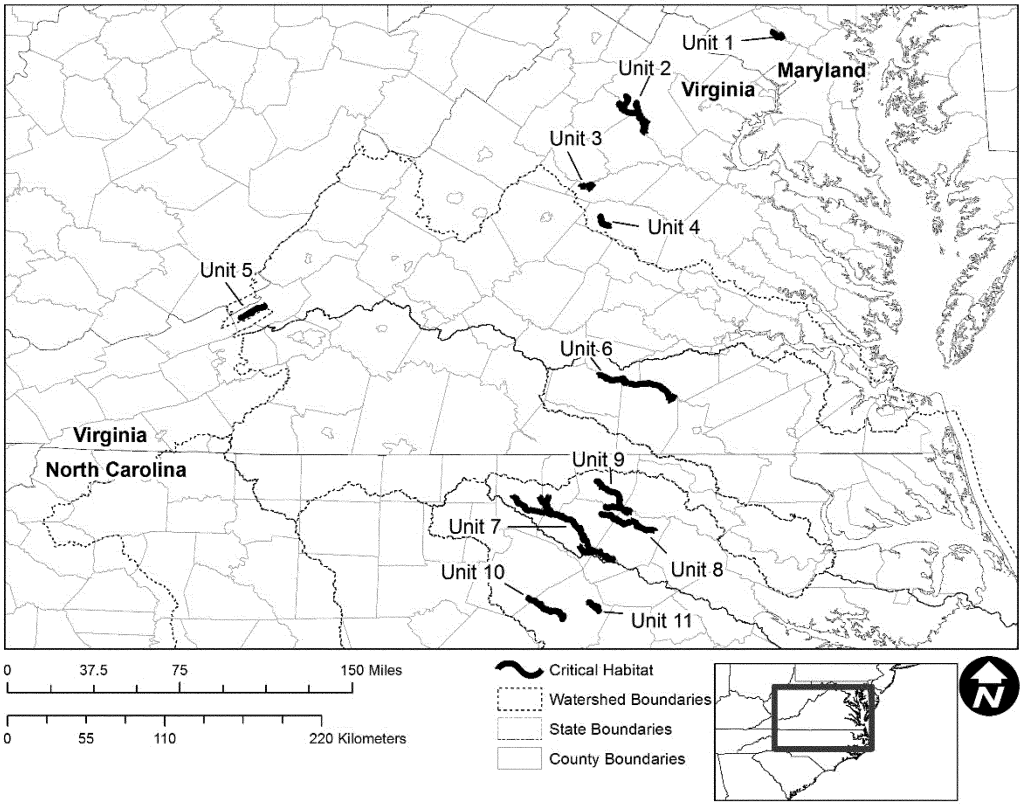
(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on May 10, 2021.

(4) *Critical habitat map units.* Data layers defining map units were created by overlaying Natural Heritage Element Occurrence data and U.S. Geological Survey (USGS) hydrologic data for stream reaches. The hydrologic data used in the critical habitat maps were extracted from the USGS 1:1M scale nationwide hydrologic layer (*https://nationalmap.gov/small_scale/mld/1nethyd.html*) with a projection of EPSG:4269–NAD83 Geographic. The North Carolina, Virginia, and Maryland Natural Heritage program species presence data were used to select specific stream segments for inclusion in the critical habitat layer. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2018–0094 and at the Raleigh Ecological Services Field Office. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) *Note:* Index map follows:

BILLING CODE 4333–15–P

Index Map of Critical Habitat Units for Yellow Lance

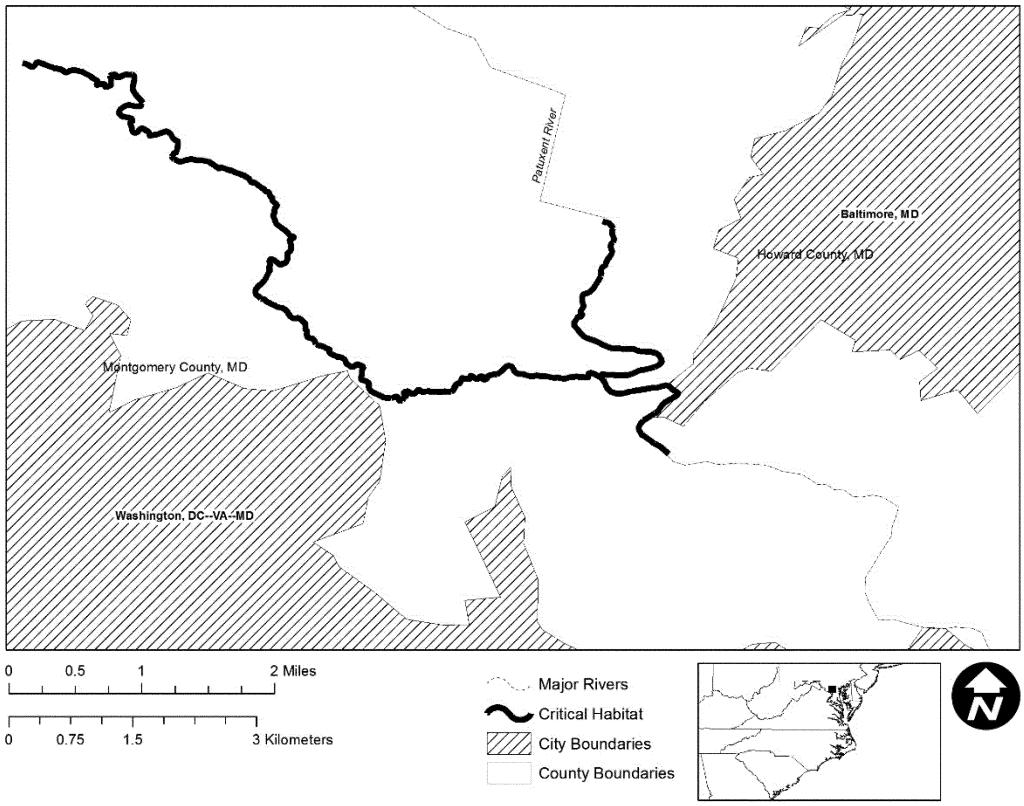


(6) Unit 1: PR1—Patuxent River, Montgomery and Howard Counties, Maryland.

(i) This unit consists of approximately 10 river miles (16.1 kilometers (km)) of occupied habitat, including 3 miles (4.8 km) of the Patuxent River and 7 miles (11.3 km) of the Hawlings River. Unit 1 includes stream habitat up to bank full height.

(ii) Map of Unit 1 follows:

Map of Unit 1 - Patuxent River Critical Habitat Unit for Yellow Lance

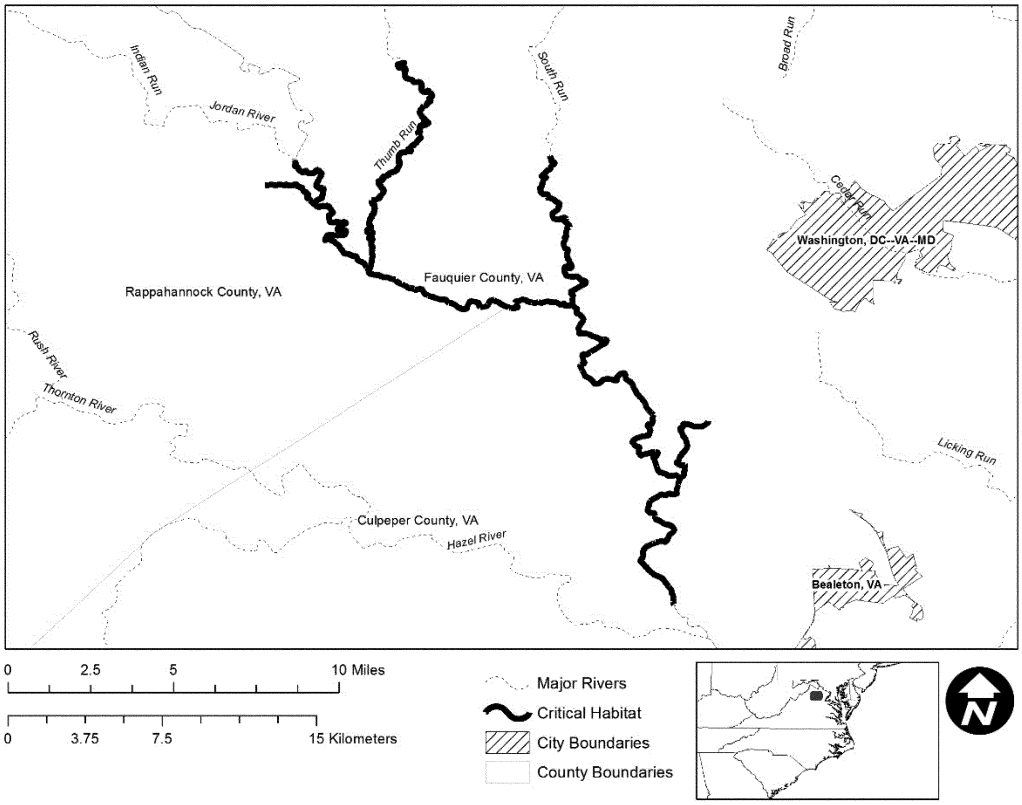


(7) Unit 2: RR1—Rappahannock Subbasin, Rappahannock, Fauquier, and Culpeper Counties, Virginia.

(i) This unit consists of approximately 44 river miles (70.8 km) of occupied habitat in the Rappahannock Subbasin, including 1.7 miles (2.7 km) in Hungry Run, 7.9 miles (12.7 km) in Thumb Run, 5.9 miles (9.5 km) in South Run/Carter Run, 2.7 miles (4.3 km) in Great Run, and 25.8 miles (41.6 km) in Rappahannock River. Unit 2 includes stream habitat up to bank full height.

(ii) Map of Unit 2 follows:

Map of Unit 2 - Rappahannock Subbasin Critical Habitat Unit for Yellow Lance

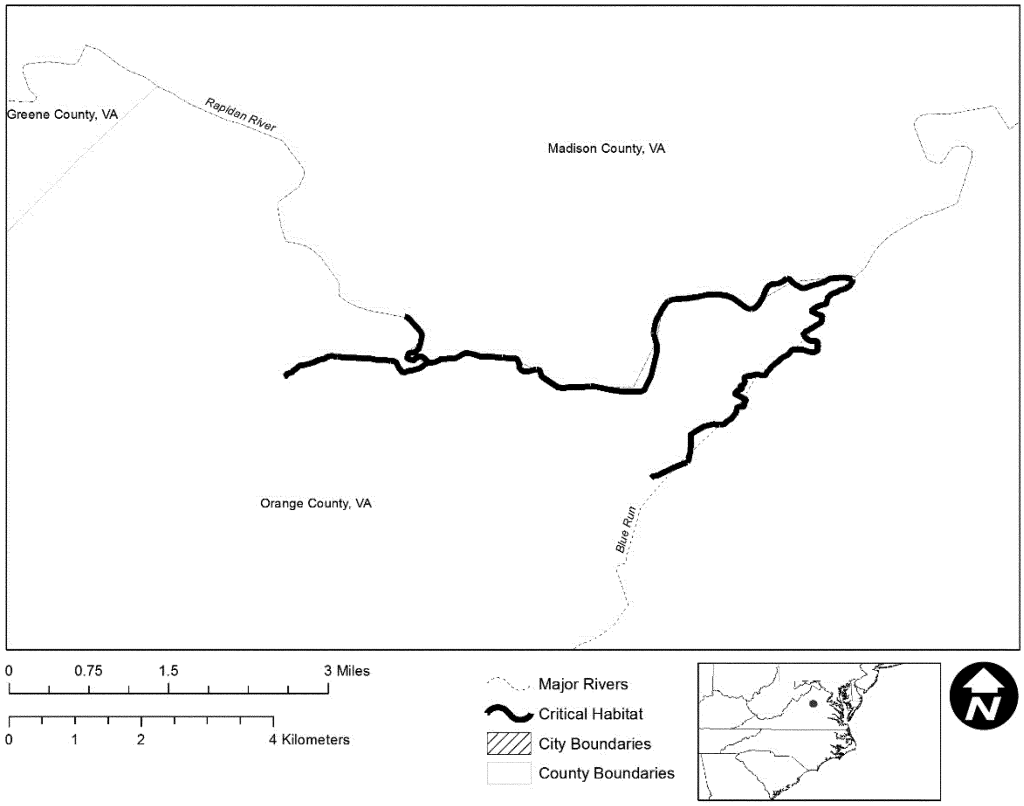


(8) Unit 3: RR2—Rapidan Subbasin, Madison and Orange Counties, Virginia.

(i) This unit consists of 9 river miles (14.5 km) of occupied habitat in the Rapidan Subbasin, including 1.2 miles (1.9 km) in Marsh Run, 3.1 miles (5.0 km) in Blue Run, and 4.7 miles (7.6 km) in the Rapidan River. Unit 3 includes stream habitat up to bank full height.

(ii) Map of Unit 3 follows:

Map of Unit 3 - Rapidan Subbasin Critical Habitat Unit for Yellow Lance

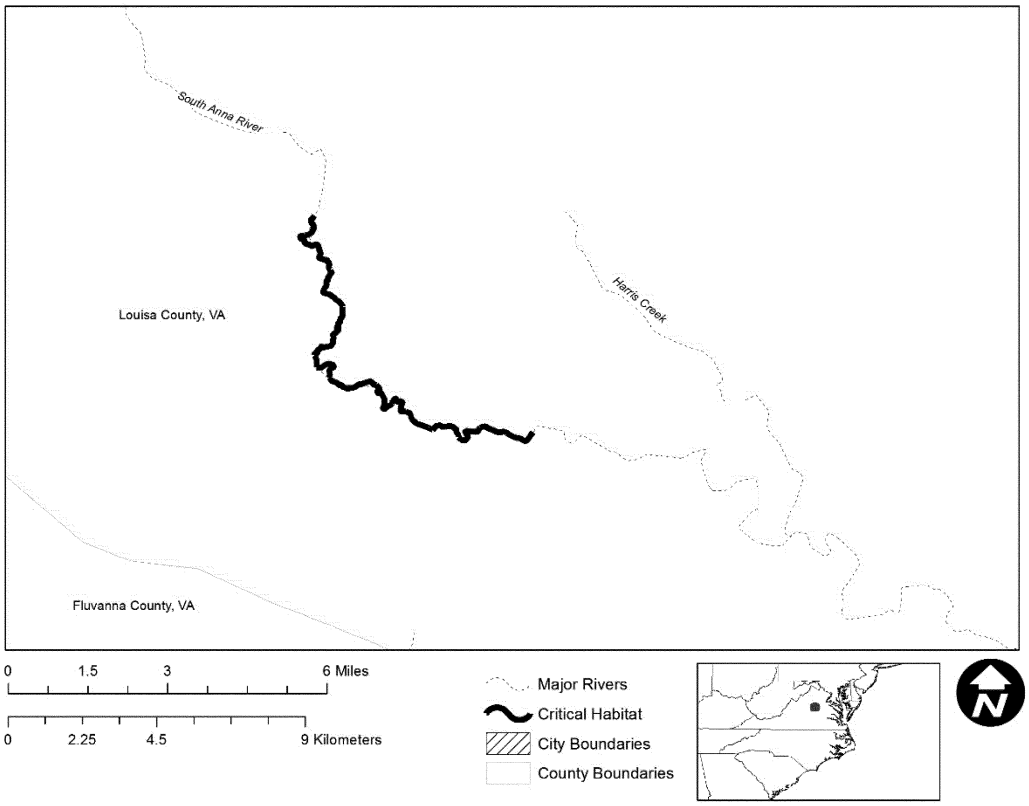


(9) Unit 4: YR1—South Anna River, Louisa County, Virginia.

(i) This unit consists of approximately 8 river miles (12.9 km) of occupied habitat in the South Anna River. Unit 4 includes stream habitat up to bank full height.

(ii) Map of Unit 4 follows:

Map of Unit 4 - South Anna River Critical Habitat Unit for Yellow Lance

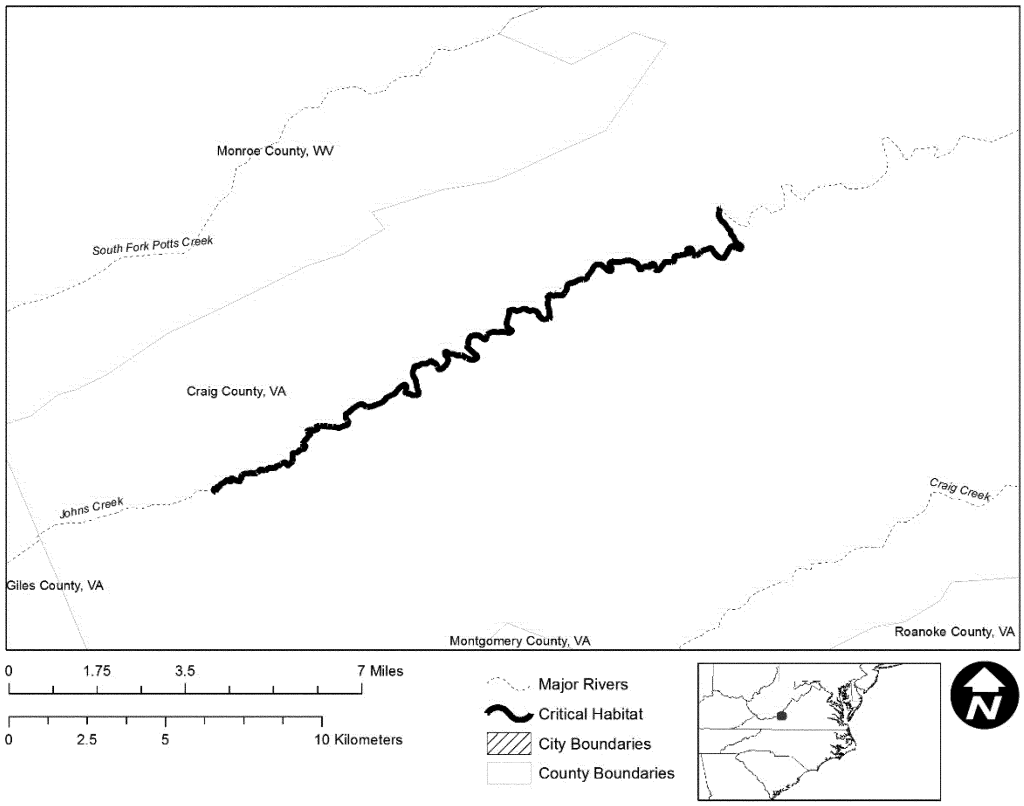


(10) Unit 5: JR1—Johns Creek, Craig County, Virginia.

(i) This unit consists of approximately 14 river miles (22.5 km) of occupied habitat in the Johns Creek. Unit 5 includes stream habitat up to bank full height.

(ii) Map of Unit 5 follows:

Map of Unit 5 - Johns Creek Critical Habitat Unit for Yellow Lance

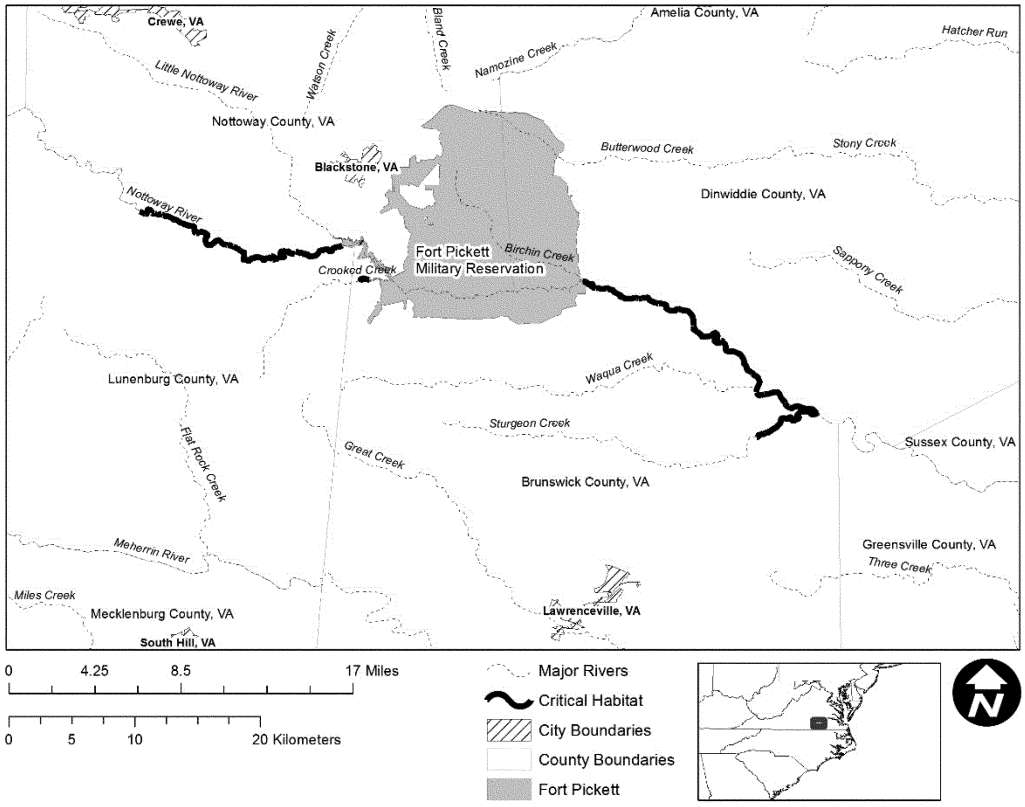


(11) Unit 6: CR1—Nottoway Subbasin, Nottoway, Lunenburg, Brunswick, and Dinwiddie Counties, Virginia.

(i) This unit consists of approximately 41 river miles (66 km) of occupied habitat in the Nottoway Subbasin, including 1.4 miles (2.3 km) in Crooked Creek, 3.3 miles (5.3 km) in Sturgeon Creek, and 36.3 miles (58.4 km) in the Nottoway River. Unit 6 includes stream habitat up to bank full height.

(ii) Map of Unit 6 follows:

Map of Unit 6 - Nottoway Subbasin Critical Habitat Unit for Yellow Lance

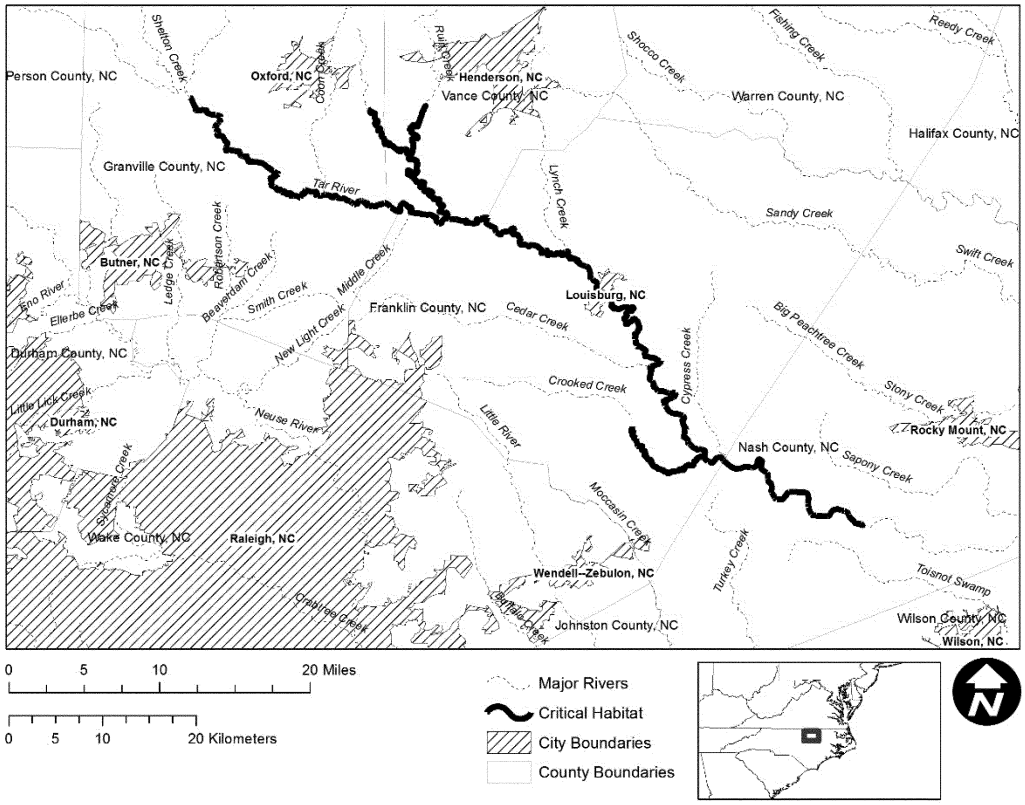


(12) Unit 7: TR1—Tar River, Granville, Vance, Franklin, and Nash Counties, North Carolina.

(i) This unit consists of approximately 91 river miles (146.5 km) of occupied habitat in the Tar River, including 4.4 miles (7.1 km) in Ruin Creek, 11.9 miles (19.2 km) in Tabbs Creek, 6.8 miles (10.9 km) in Crooked Creek, and 67.9 miles (109.3 km) in the Tar River. Unit 7 includes stream habitat up to bank full height.

(ii) Map of Unit 7 follows:

Map of Unit 7 -Tar River Critical Habitat Unit for Yellow Lance

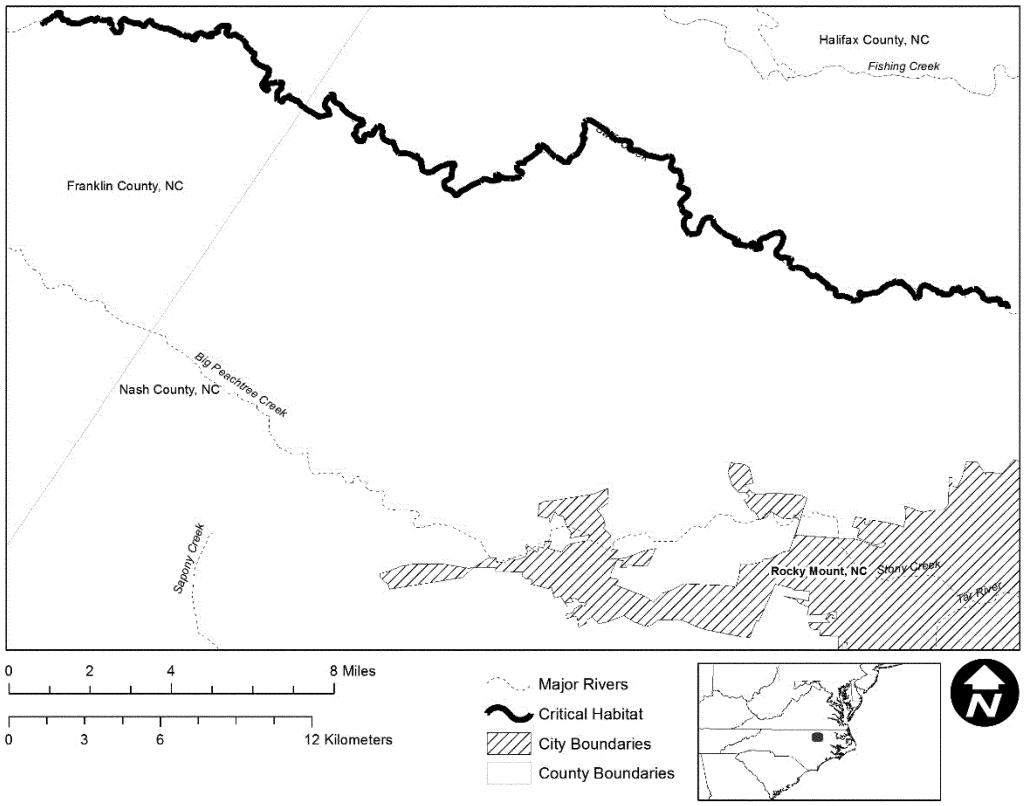


(13) Unit 8: TR2—Sandy/Swift Creek, Vance, Warren, Halifax, Franklin, and Nash Counties, North Carolina.

(i) This unit consists of 31 river miles (50 km) of occupied habitat in the Sandy and Swift Creeks. Unit 8 includes stream habitat up to bank full height.

(ii) Map of Unit 8 follows:

Map of Unit 8 - Sandy/Swift Creek Critical Habitat Unit for Yellow Lance

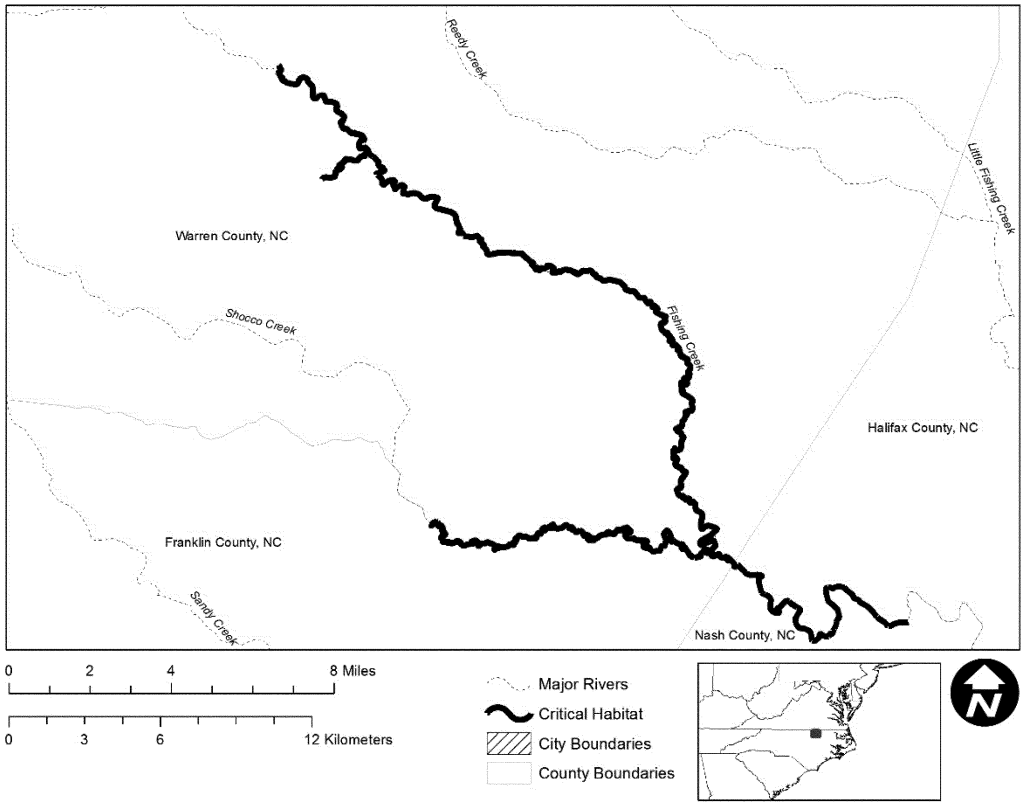


(14) Unit 9: TR3—Fishing Creek Subbasin, Vance, Warren, Halifax, Franklin, and Nash Counties, North Carolina.

(i) This unit consists of approximately 37 river miles (59.5 km) of occupied habitat in the Fishing Creek Subbasin, including 1.6 miles (2.6 km) in Richneck Creek, 8.0 miles (12.9 km) in Shocco Creek, and 27.4 miles (44 km) in Fishing Creek. Unit 9 includes stream habitat up to bank full height.

(ii) Map of Unit 9 follows:

Map of Unit 9 - Fishing Creek Subbasin Critical Habitat Unit for Yellow Lance

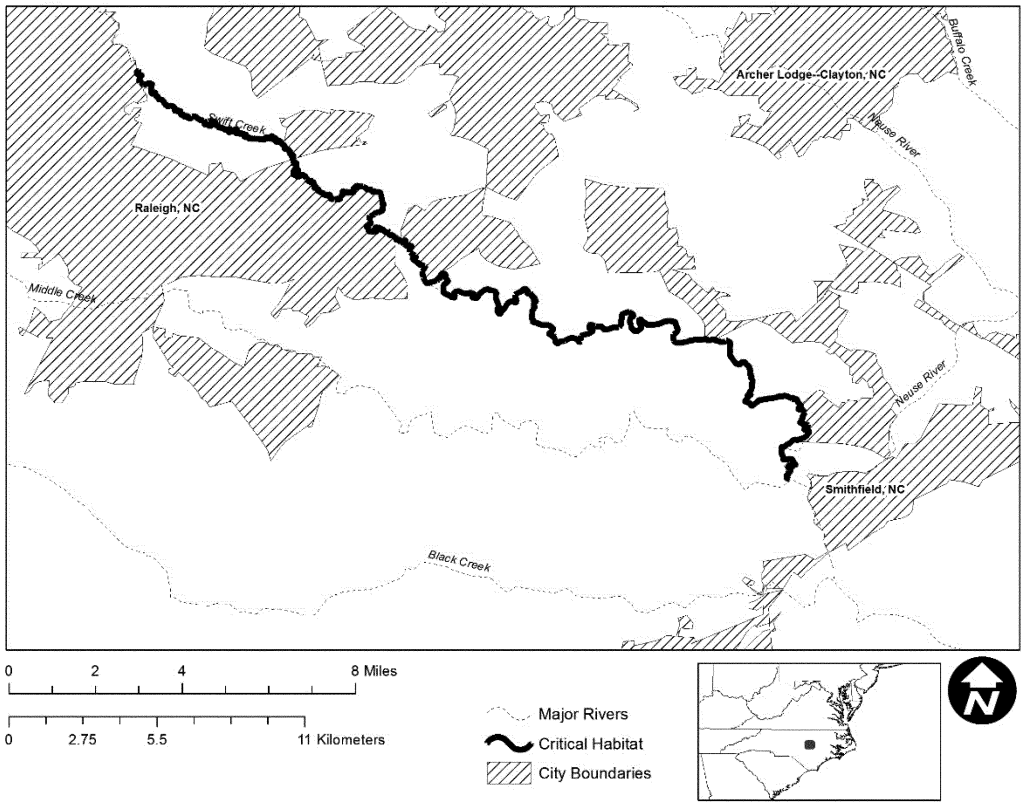


(15) Unit 10: NR1—Swift Creek, Wake and Johnston Counties, North Carolina.

(i) This unit consists of approximately 24 river miles (38.6 km) of occupied habitat in the Swift Creek. Unit 10 includes stream habitat up to bank full height.

(ii) Map of Unit 10 follows:

Map of Unit 10 - Swift Creek Critical Habitat Unit for Yellow Lance

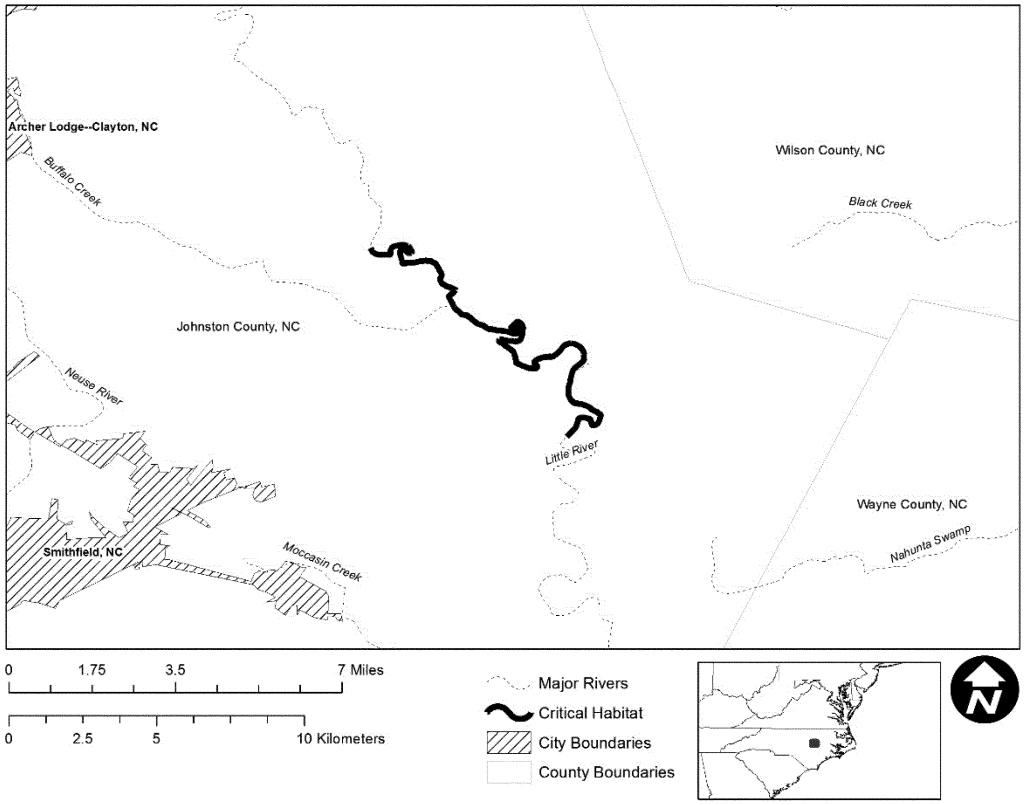


(16) Unit 11: NR2—Little River, Johnston County, North Carolina.

(i) This unit consists of approximately 10 river miles (16.1 km) of occupied habitat in the Little River. Unit 11 includes stream habitat up to bank full height.

(ii) Map of Unit 11 follows:

Map of Unit 11 - Little River Critical Habitat Unit for Yellow Lance



* * * * *

Martha Williams,

Principal Deputy Director, Exercising the Delegated Authority of the Director, U.S. Fish and Wildlife Service.

[FR Doc. 2021–06736 Filed 4–7–21; 8:45 am]

BILLING CODE 4333–15–C

Proposed Rules

Federal Register
Vol. 86, No. 66
Thursday, April 8, 2021

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 932

[Doc. No. AMS–SC–20–0102; SC21–932–1 PR]

Olives Grown in California; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement a recommendation from the California Olive Committee (Committee) to increase the assessment rate established for the 2021 and subsequent fiscal years. The proposed assessment rate would remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Comments must be received by May 24, 2021.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposed rule. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; or internet: *https://www.regulations.gov.* Comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *https://www.regulations.gov.* All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Bianca Bertrand, Management and Program Analyst, California Marketing Field Office, or Andrew Hatch, Deputy Director, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (559) 356–8202 or emails: *BiancaM.Bertrand@usda.gov* or *Andrew.Hatch@usda.gov.*

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, or email: *Richard.Lower@usda.gov.*

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, proposes to amend regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposed rule is issued under Marketing Agreement and Order No. 932, as amended (7 CFR part 932), regulating the handling of olives grown in California. Part 932 (referred to as the ''Order'') is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.'' The Committee locally administers the Order and is comprised of producers and handlers of olives operating within the production area.

The Department of Agriculture (USDA) is issuing this proposed rule in conformance with Executive Orders 13563 and 13175. This proposed rule falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Order now in effect, California olive handlers are subject to assessments. Funds to administer the Order are derived from such assessments. It is intended that the assessment rate would be applicable to all assessable olives for the 2021 fiscal year and continue until amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such a handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of the entry of the ruling.

This proposed rule would increase the assessment rate from $15.00 per ton of assessable olives, the rate that was established for the 2020 and subsequent fiscal years, to $30.00 per ton of assessable olives for the 2021 and subsequent fiscal years.

The Order authorizes the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members are familiar with the Committee's needs and with the costs of goods and services in their local area and are able to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting and all directly affected persons have an opportunity to participate and provide input.

For the 2020 and subsequent fiscal years, the Committee recommended, and USDA approved, an assessment rate of $15.00 per ton of assessable olives. That assessment rate continues in effect from fiscal year to fiscal year unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on December 8, 2020, and unanimously recommended expenditures of $1,151,832, and an assessment rate of $30.00 per ton of assessable olives handled for the 2021 and subsequent fiscal years. In comparison, last year's budgeted expenditures were $1,035,406. The proposed assessment rate of $30.00 is $15.00 higher than the rate currently in effect. Handlers received 23,193 tons of assessable olives for the 2020 crop year. This is substantially less than the volume for the 2019 crop year, which was 81,689 tons of assessable olives.

The Committee recommended increasing the assessment rate due to the smaller crop. The proposed

assessment rate and funds from the reserve would cover the Committee's budgeted expenses for the 2021 fiscal year. Funds in the reserve are expected to remain within the Order's requirement of no more than approximately one fiscal year's budgeted expenses.

The Order has both a fiscal year and a crop year that are independent of each other. The crop year is a 12-month period that begins on August 1 of each year and ends on July 31 of the following year. The fiscal year is the 12-month period that begins on January 1 and ends on December 31 of each year.

Olives are an alternate-bearing crop, with a small crop followed by a large crop. For the Committee, the actual crop year receipts, along with the proposed budget, are used to determine the assessment rate for the following fiscal year. The Committee expects fluctuations in the assessment rate, given the alternate-bearing characteristics of olives.

The major expenditures recommended by the Committee for the 2021 fiscal year include $531,300 for general administration expenses, $48,000 for inspection expenses, $334,532 for research, and $238,000 for marketing expenses. Budgeted expenses for these items for the 2020 fiscal year were $631,300, $55,000, $225,606, and $123,500 respectively.

The Committee derived the recommended assessment rate by considering anticipated fiscal year expenses, actual olive tonnage received by handlers during the 2020 crop year, and the amount of funds available in the authorized reserve. Income derived from handler assessments, calculated at $695,790 (23,193 tons assessable olives multiplied by $30.00 assessment rate), along with funds from the Committee's authorized reserve of $456,042, would be adequate to cover budgeted expenses of $1,151,832.

The assessment rate proposed in this rule would continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate would be in effect for an indefinite period, the Committee will continue to meet prior to or during each fiscal year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA would evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Committee's 2021 fiscal year budget, and those for subsequent fiscal years, would be reviewed and, as appropriate, approved by USDA.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this proposed rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 800 producers of olives in the production area and two handlers subject to the regulation under the Order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts of less than $1,000,000, and small agricultural service firms have been defined as those whose annual receipts are less than $30,000,000 (13 CFR 121.201).

According to the National Agricultural Statistics Service (NASS), the national average producer price for olives for the 2020 crop year was $791.00 per ton, and total assessable volume for the 2020 crop year was 23,193 tons. The total 2020 value of the olive crop was $18,345,663 (23,193 tons times $791.00 per ton). Dividing the crop value by the estimated number of producers (800) yields an estimated average receipt per producer of $22,932, which classifies all olive producers as small agricultural producers.

Based on information from the Committee regarding the volume handled by each handler, neither handler can be classified as a small agricultural service firm.

As noted above, the average price received per ton by producers in the preceding crop year was $791.00 per ton of assessable olives. Given the total crop received by handlers of 23,193 tons, the total producer revenue is expected to be $18,345,663. The total assessment revenue is expected to be $695,790 (23,193 tons times $30.00 per ton). Thus, the total assessment revenue compared to total producer revenue is 0.038 percent.

This proposal would increase the assessment rate collected from handlers for the 2021 and subsequent fiscal years from $15.00 to $30.00 per ton of assessable olives. The Committee unanimously recommended 2021 expenditures of $1,151,832 and an assessment rate of $30.00 per ton of assessable olives. The proposed assessment rate of $30.00 per ton of assessable olives is $15.00 higher than the current rate. The volume of assessable olives from the 2020 fiscal year is 23,193 tons. Thus, the $30.00 per ton assessment rate would provide $695,790 in assessment income (23,193 tons assessable olives multiplied by $30.00 assessment rate). Income derived from handler assessments, along with funds from the Committee's authorized reserve, would be adequate to cover budgeted expenses for the 2021 fiscal year.

The major expenditures recommended by the Committee for the 2021 fiscal year include $531,300 for general administration expenses, $48,000 for inspection expenses, $334,532 for research, and $238,000 for marketing expenses. Budgeted expenses for these items in the 2020 fiscal year were $631,300, $55,000, $225,606, and $123,500 respectively.

The Committee recommended increasing the assessment rate to provide adequate income to cover the Committee's budgeted expenses for the 2021 fiscal year while maintaining its financial reserve within the requirements of the Order.

Prior to arriving at this budget and assessment rate recommendation, the Committee received information from its Executive, Marketing, and Research subcommittees. At each subcommittee meeting, the members discussed various alternatives to both the assessment rate and the programs under their purview. The subcommittees deliberated the alternatives relative to their needs and the costs of the programs they oversee. The Research subcommittee, for example, discussed the production research proposals, their relative values, whether the costs associated with each project was appropriate, whether the project was appropriate in scale, and whether the project met the industry's needs. These types of deliberations are part of the annual discussion held by each subcommittee. The subcommittees then report their conclusions and recommendations to the Committee.

Given all the information available to the Committee and its own deliberations, the Committee makes a recommendation to USDA on the assessment rate and the proposed budget.

This proposed rule would increase the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, these costs would be offset by the benefits derived by the operation of the Order.

The various subcommittees' meetings and the Committee's meeting were widely publicized throughout the California olive industry. All interested persons were invited to attend the meetings and encouraged to participate in any deliberations on all issues. Like all meetings, the subcommittee meetings held on November 5, 2020, and the full Committee meeting held on December 8, 2020, were public meetings and all entities, both large and small, were able to express views on this issue. Interested persons are invited to submit comments on this proposed rule, including the regulatory and information collection impacts of this action on small businesses.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by the OMB and assigned OMB No. 0581–0178, Vegetable and Specialty Crops. No changes in those requirements would be necessary as a result of this proposed rule. Should any changes become necessary, they would be submitted to OMB for approval.

This proposed rule would not impose any additional reporting or recordkeeping requirements on either small or large California olive handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

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

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this proposed rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *https://www.ams.usda.gov/rules-regulations/moa/small-businesses.* Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 45-day comment period is provided to allow interested persons to respond to this proposed rule. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 932

Marketing agreements, Olives, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 932 is proposed to be amended as follows:

PART 932—OLIVES GROWN IN CALIFORNIA.

■ 1. The authority citation for 7 CFR part 932 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 932.230 is revised to read as follows:

§ 932.230 Assessment rate.

On and after January 1, 2021, an assessment rate of $30.00 per ton is established for California olives.

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2021–07218 Filed 4–7–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0267; Project Identifier 2017–SW–110–AD]

RIN 2120–AA64

Airworthiness Directives; Bell Textron Canada Limited (Type Certificate Previously Held by Bell Helicopter Textron Canada Limited) Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for Bell Textron Canada Limited (type certificate previously held by Bell Helicopter Textron Canada Limited) (Bell) Model 429 helicopters. This proposed AD was prompted by the identification of certain parts needing life limits and certification maintenance requirement (CMR) tasks. This proposed AD would require establishing life limits and CMR tasks for various parts. Depending on the results of the CMR tasks, this proposed AD would require corrective action. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by May 24, 2021.

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

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

For service information identified in this proposed rule, contact Bell Textron Canada Limited, 12,800 Rue de l'Avenir, Mirabel, Quebec J7J1R4; telephone (450) 437–2862 or (800) 363–8023; fax (450) 433–0272; or at *https://www.bellcustomer.com.* You may review this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0267; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the Transport Canada AD, any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Matt Fuller, AD Program Manager, General Aviation & Rotorcraft Unit, Airworthiness Products Section, Operational Safety Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5110; email *matthew.fuller@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or

arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2021–0267; Project Identifier 2017–SW–110–AD'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *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 NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Matt Fuller, AD Program Manager, General Aviation & Rotorcraft Unit, Airworthiness Products Section, Operational Safety Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5110; email *matthew.fuller@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

Transport Canada, which is the aviation authority of Canada, has issued Canadian AD CF–2017–16, dated May 17, 2017, to correct an unsafe condition for Bell Model 429 helicopters, serial numbers 57001 and subsequent. Transport Canada advises that Bell has established life limits and CMR tasks for various parts and accordingly revised Chapter 4—Airworthiness Limitations Schedule of Bell Helicopter 429 Maintenance Manual BHT–429–MM–1 to Revision 26, dated September 9, 2016 (BHT–429–MM–1). Transport Canada states that failure to replace life-limited parts or perform CMR tasks as specified could result in an unsafe condition.

Accordingly, the Transport Canada AD requires updating the maintenance schedule for the parts affected with the airworthiness life limits and CMR tasks in Revision 26 of BHT–429–MM–1.

FAA's Determination

These helicopters have been approved by the aviation authority of Canada and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with Canada, Transport Canada, its technical representative, has notified the FAA of the unsafe condition described in its AD. The FAA is proposing this AD after evaluating all known relevant information and determining that the unsafe condition described previously is likely to exist or develop on other helicopters of the same type design.

Related Service Information

The FAA reviewed Chapter 4—Airworthiness Limitations Schedule of BHT–429–MM–1. This service information specifies airworthiness life limits, inspection intervals, and CMR requirements for parts installed on Model 429 helicopters. Revision 26 of this service information establishes life limits for a certain part-numbered tail rotor flapping outboard bearing and hoist kit cartridge cable cutter and CMR requirements for a certain part-numbered wheeled landing gear system, float/life raft kit, and hoist kit.

Additionally, the FAA reviewed Chapter 96–47—600-Pound External Hoist Electrical System—Operational Check, of Bell 429 Maintenance Manual Supplement For 600-Pound External Hoist Kit, BHT–429–MMS–4, Revision 1, dated March 14, 2014. This service information specifies inspection procedures and corrective action for various components of the hoist system.

Lastly, the FAA reviewed Testing and Fault Isolation, pages 101–117/118, Cleaning, pages 401–405/406, and Scheduled Maintenance, pages 609–611/612, of Goodrich Rescue Hoist System Component Maintenance Manual 25–00–38–1, dated July 15, 2009, for rescue hoist assembly part number 44316–12–102. This service information specifies maintenance procedures and lists replacement parts for this part-numbered Goodrich rescue hoist assembly.

Proposed AD Requirements in This NPRM

This proposed AD would require establishing a life limit for certain part-numbered tail rotor outboard flapping bearings and a certain part-numbered hoist kit cable cutter cartridge. This proposed AD would also require establishing recurring CMR tasks for a certain part-numbered wheeled landing gear system, float/life raft kit, and hoist kit. Depending on the results of the CMR tasks, this proposed AD would also require corrective action.

Differences Between This Proposed AD and the Transport Canada AD

This proposed AD would require corrective action for failed CMR tasks, whereas the Transport Canada AD does not. The Transport Canada AD requires accomplishing an operational check of the hoist cable anti-foul assembly daily after the last flight, whereas this proposed AD would require this action before the first flight of the day involving a hoist operation instead.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 110 helicopters of U.S. Registry. Labor costs are estimated at $85 per work-hour. Based on these numbers, the FAA estimates the following costs in order to comply with this proposed AD.

Replacing a tail rotor outboard flapping bearing would take about 4 work-hours and parts would cost about $7,500 for an estimated cost of $7,840 per helicopter and $862,400 for the U.S. fleet, per replacement cycle. Replacing a hoist kit cable cutter cartridge would take about 3 work-hours and parts would cost about $5,200 for an estimated cost of $5,455 per helicopter and $600,050 for the U.S. fleet, per replacement cycle.

Performing a functional check of the wheeled landing gear system would take about 4 work-hours for an estimated cost of $340 per helicopter and $37,400 for the U.S. fleet, per cycle. Performing a functional check of the float/life raft kit would take about 2 work-hours for an estimated cost of $170 per helicopter and $18,700 for the U.S. fleet, per cycle.

Performing an operational check of the hoist kit cable anti-foul assembly would take about 2 work-hours for an estimated cost of $170 per helicopter and $18,700 for the U.S. fleet, per cycle. Cleaning, visually inspecting, and lubricating the rescue hoist cable would take about 2 work-hours for an estimated cost of $170 per helicopter and $18,700 for the U.S. fleet, per cycle. Performing an operational check of the

hoist kit speed limit switches and the electrical system would take about 0.5 work-hour for an estimated cost of $43 per helicopter and $4,730 for the U.S. fleet, per cycle. Performing a functional check of the cable cutter cartridge electrical system would take about 3 work-hours for an estimated cost of $255 per helicopter and $28,050 for the U.S. fleet, per cycle.

The FAA has no way of determining the estimated costs to do allowable repairs based on the results of the CMR tasks. If required, replacing the float/life raft would take about 2 work-hours and parts would cost about $5,000 for an estimated cost of $5,170. Replacing the anti-foul assembly would take about 3 work-hours and parts would cost about $1,500 for an estimated cost of $1,755. Replacing a rescue hoist cable would take about 3 work-hours and parts would cost about $3,150 for an estimated cost of $3,405. Overhauling a rescue hoist assembly would cost about $83,000 and it would take about 8 work-hours to remove and reinstall the hoist for a labor cost of $680, for a total estimated cost of $83,680 per helicopter, per overhaul cycle. Alternatively, replacing a hoist would take about 8 work-hours and parts would cost about $200,000 for an estimated cost of $200,680 per helicopter, per replacement cycle.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed, I certify this proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Would not affect intrastate aviation in Alaska, and

(3) Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Bell Textron Canada Limited (Type Certificate Previously Held by Bell Helicopter Textron Canada Limited): Docket No. FAA–2021–0267; Project Identifier 2017–SW–110–AD.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by May 24, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bell Textron Canada Limited (type certificate previously held by Bell Helicopter Textron Canada Limited) Model 429 helicopters, certificated in any category, serial numbers 57001 and subsequent.

(d) Subject

Joint Aircraft Service Component (JASC) Code: 3200, Landing Gear Systems, and 2560, Emergency Equipment.

(e) Unsafe Condition

This AD was prompted by parts remaining in service beyond their fatigue life or beyond maintenance intervals required by the certification maintenance requirements (CMRs) of the Instructions for Continued Airworthiness. The FAA is issuing this AD to prevent failure of a part, which could result in loss of control of the helicopter.

(f) Compliance

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

(g) Required Actions

(1) Before further flight after the effective date of this AD, remove from service any part that has reached or exceeded its life limit as follows. Thereafter, remove from service each part on or before reaching its life limit as follows:

(i) Tail rotor outboard flapping bearing part number (P/N) 429–312–103–117 and 429–312–103–119: 15,000 total hours time-in-service (TIS).

(ii) Hoist kit cable cutter cartridge P/N 42315–281: 5 years since date of manufacture.

(2) Before further flight after the effective date of this AD, perform the following CMR tasks for any part that has reached or exceeded its CMR interval as follows. Thereafter, perform the following CMR tasks for each part on or before reaching its CMR interval as follows:

Note 1 to paragraph (g)(2): Chapter 4—Airworthiness Limitations Schedule of Bell Helicopter 429 Maintenance Manual BHT–429–MM–1 to Revision 26, dated September 9, 2016, contains additional information about the CMR tasks.

(i) Wheeled Landing Gear System P/N 429–705–001–101: 800 hours TIS or 1 year, whichever occurs first, perform a functional check of the Emergency Gear Release. If the functional check fails, before further flight, repair in accordance with FAA-approved procedures.

(ii) Float/Life Raft Kit P/N 429–706–069–101: 1,600 hours TIS, perform a functional check of the float/life raft kit electrical system to determine if there are any dormant failures including: Manual inflation switch, water immersion switch, auto-activation relay, manual activation relay, raft activation relay, test activation relay, and the fuse disc elements. If there is a failure, before next flight over water, replace the float/life raft.

(iii) Hoist Kit P/N 429–706–001–101:

(A) Before the first flight of the day involving a hoist operation, perform an operational check of the hoist cable anti-foul assembly. If the operational check fails, before next flight involving a hoist operation, repair or replace the anti-foul assembly.

(B) 3 hoist operating hours, clean, visually inspect the rescue hoist cable for damage, which may be indicated by a broken wire, kink, bird caging, flattened area, abrasion, or necking. If there is any damage, before further flight, replace the rescue hoist cable. If there is no damage, before further flight, lubricate the rescue hoist cable. For purposes of this AD, hoist operating hours are counted anytime the hoist motor is operating.

Note 2 to paragraph (g)(2)(iii)(B): Bell Helicopter service information refers to hoist operating hours as hoisting hours.

(C) 800 hours TIS or 1 year, whichever occurs first, perform an operational check of the speed limit switches and perform an operational check of the 600-pound external hoist electrical system to inspect operation of the HOIST HOT caution light. If an

operational check fails, before next flight involving a hoist operation, repair in accordance with FAA-approved procedures or replace the hoist.

(D) 2,200 hours TIS or 111 hoist operating hours, whichever occurs first, perform a functional check of the cable cutter cartridge electrical system to inspect for correct functioning of the cable cutter switches (hoist pendant, pilot cyclic, and copilot cyclic) and associated wiring. If a functional check fails, before next flight involving a hoist operation, repair in accordance with FAA-approved procedures or replace the hoist.

(E) 111 hoist operating hours, overhaul or replace the hoist.

(h) Alternative Methods of Compliance (AMOCs)

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

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

(i) Related Information

(1) For more information about this AD, contact Matt Fuller, AD Program Manager, General Aviation & Rotorcraft Unit, Airworthiness Products Section, Operational Safety Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5110; email *matthew.fuller@faa.gov.*

(2) For service information identified in this AD, contact Bell Textron Canada Limited, 12,800 Rue de l'Avenir, Mirabel, Quebec J7J1R4; telephone (450) 437–2862 or (800) 363–8023; fax (450) 433–0272; or at *https://www.bellcustomer.com.* You may review this referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

(3) The subject of this AD is addressed in Transport Canada AD CF–2017–16, dated May 17, 2017. You may view the Transport Canada AD on the internet at *https://www.regulations.gov* in the AD Docket.

Issued on April 2, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–07184 Filed 4–7–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0265; Project Identifier MCAI–2020–01541–R]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters Deutschland GmbH (AHD) Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for Airbus Helicopters Deutschland GmbH (AHD) Model MBB–BK117 C–2 and MBB–BK117 D–2 helicopters. This proposed AD was prompted by a report of increased control force in the collective axis. This proposed AD would require repetitive visual inspections of the main rotor actuator (MRA), as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference (IBR). The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by May 24, 2021.

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

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

For material that is proposed for IBR in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this material on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0265.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0265; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Katherine Venegas, Aviation Safety Engineer, Los Angeles ACO Branch, FAA, 3960 Paramount Blvd., Lakewood, California 90712; telephone (562) 627–5353; email *katherine.venegas@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2021–0265; Project Identifier MCAI–2020–01541–R'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *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 proposal.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each

page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Katherine Venegas, Aviation Safety Engineer, Los Angeles ACO Branch, FAA, 3960 Paramount Blvd., Lakewood, California 90712; telephone (562) 627–5353; email *katherine.venegas@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2018–0283, dated December 20, 2018 (EASA AD 2018–0283), to correct an unsafe condition for AHD Model MBB–BK117 C–2 and MBB–BK117 D–2 helicopters. EASA later issued EASA AD 2020–0257, dated November 17, 2020 (EASA AD 2020–0257), to supersede EASA AD 2018–0283.

This proposed AD was prompted by a report of increased control force in the collective axis on an AHD Model EC135 helicopter. Subsequent inspections determined that a nut on a piston of the MRA had cracked and separated from the piston rod. Due to design similarity, Model MBB–BK117 C–2 and MBB–BK117 D–2 helicopters are also affected by this unsafe condition. The FAA is proposing this AD to prevent failure of the MRA and subsequent loss of control of the helicopter. See the EASA AD for additional background information.

Related Service Information Under 1 CFR Part 51

EASA AD 2020–0257 describes procedures for a repetitive visual inspection of the MRA and depending on the results, replacing the affected parts.

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

FAA's Determination and Requirements of This Proposed AD

These products have been approved by the aviation authority of another country, and are approved for operation in the United States. Pursuant to the bilateral agreement with the State of Design Authority, the FAA has been notified of the unsafe condition described in the EASA AD referenced above. The FAA is proposing this AD after evaluating all the relevant information and determining the unsafe condition described previously is likely to exist or develop in other products of these same type designs.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in EASA AD 2020–0257 described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this proposed AD and except as discussed under ''Differences Between this Proposed AD and the EASA AD.''

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2020–0257 will be incorporated by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2020–0257 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in the EASA AD. Service information specified in EASA AD 2020–0257 that is required for compliance with EASA AD 2020–0257 will be available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0265 after the FAA final rule is published.

Differences Between This Proposed AD and the EASA AD

The EASA AD requires contacting Airbus Helicopters or replacing an affected part, whereas this proposed AD would require performing the corrective action in accordance with FAA-approved procedures or removing the affected parts from service instead. The service information referenced in the EASA AD refers to calendar time when specifying the compliance time for the inspections, whereas this proposed AD uses hours time-in-service. The EASA AD allows a tolerance to the compliance times, whereas this proposed AD would not. The EASA AD does not specify a compliance time for the reporting requirements; this proposed AD would require performing the reporting action within 30 days after the effective date of this AD.

Interim Action

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

Costs of Compliance

The FAA estimates that this AD affects 216 helicopters of U.S. Registry. Labor rates are estimated at $85 per work-hour. Based on these numbers, the FAA estimates that operators may incur the following costs in order to comply with this proposed AD.

Inspecting the nuts on the MRA pistons would take about 1 work-hour for an estimated cost of $85 per helicopter and $18,360 for the U.S. fleet, per inspection cycle.

Replacing the MRA would take about 7 work-hours and parts would cost $286,554 for an estimated cost of $287,149 per helicopter.

Repairing the MRA would take up to about 8 work hours and parts would cost about $110 for an estimated cost of up to $790 per MRA.

If required, reporting information would take about 1 work-hour for an estimated cost of $85 per instance.

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB control number. The control number for the collection of information required by this proposed AD is 2120–0056. The paperwork cost associated with this proposed AD has been detailed in the Costs of Compliance section of this document and includes time for reviewing instructions, as well as completing and reviewing the collection of information. Therefore, all reporting associated with this proposed AD is mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to Information Collection Clearance Officer, Federal Aviation Administration, 10101

Hillwood Parkway, Fort Worth, TX 76177–1524.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Will not affect intrastate aviation in Alaska, and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus Helicopters Deutschland GmbH (AHD): Docket No. FAA–2021–0265; Project Identifier MCAI–2020–01541–R.

(a) Comments Due Date

The FAA must receive comments by May 24, 2021.

(b) Affected Airworthiness Directives (ADs)

None.

(c) Applicability

This AD applies to all Airbus Helicopters Deutschland GmbH (AHD) Model MBB–BK117 C–2 and MBB–BK117 D–2 helicopters, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code: 6710, Main Rotor Control.

(e) Reason

This AD was prompted by a report of increased control force in the collective axis. The FAA is issuing this AD to prevent failure of the main rotor actuator and subsequent loss of control of the helicopter.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2020–0257, dated November 17, 2020 (EASA AD 2020–0257).

(h) Exceptions to EASA AD 2020–0257

(1) Where EASA AD 2020–0257 refers to its effective date, this AD requires using the effective date of this AD.

(2) Where Note 1 of EASA AD 2020–0257 specifies a tolerance of 3 months may be applied to the initial threshold and to the repetitive inspection interval, this AD does not allow this tolerance.

(3) Where paragraph (2) of EASA AD 2020–0257 specifies contacting Airbus Helicopters, this AD requires performing the corrective action in accordance with FAA-approved procedures.

(4) Where paragraph (3) of EASA AD 2020–0257 specifies an alternative method to comply with the requirements of paragraph (2) of EASA AD 2020–0257 by replacing an affected part, this AD requires removing an affected part from service as an alternative method.

(5) Where paragraph (1) of EASA AD 2020–0257 specifies a compliance time for the initial inspection of ''before an affected part exceeds 12 months since new, or since last overhaul, or within 3 months after the effective date of this AD, whichever occurs later'' and repetitive inspections at intervals not to exceed 12 months, this AD requires a compliance time for the initial inspection of before an affected part exceeds 319 total hours time-in-service (TIS), or within 319 hours TIS after the date of the last overhaul, or within 80 hours TIS after the effective date of this AD, whichever occurs later, and repetitive inspections at intervals not to exceed 319 hours TIS.

(6) Although the service information referenced in EASA AD 2020–0257 does not specify a compliance time for the reporting requirement, this AD requires the reporting action to be performed within 30 days after the effective date of this AD.

(7) The ''Remarks'' section of EASA AD 2020–0257 does not apply to this AD.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the International Validation Branch, send it to the attention of the person identified in paragraph (j)(2) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.*

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

(j) Related Information

(1) For EASA AD 2020–0257, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu*. You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu*. You may view this material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0265.

(2) For more information about this AD, contact Katherine Venegas, Aviation Safety Engineer, Los Angeles ACO Branch, FAA, 3960 Paramount Blvd., Lakewood, California 90712; telephone (562) 627–5353; email *katherine.venegas@faa.gov.*

Issued on April 1, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–07127 Filed 4–7–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2019–0952]

RIN 1625–AA01

Anchorage Regulations; Special Anchorages Areas Within the First Coast Guard District

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to revise the notes for its First Coast Guard District special anchorage area regulations and to remove language from the text of four of these regulations because those provisions are inconsistent with simply designating the location of a special anchorage area. These existing notes and regulatory text provisions, which contain obsolete and duplicative language, would be replaced with a note in a new section we are adding that would apply to all special anchorage area regulations in the First Coast Guard District. The note would advise interested persons that state and local regulations may apply and that they should contact other authorities, such as the local harbormaster, to ensure compliance with any such applicable regulations. These changes are primarily editorial in nature and are intended to clarify and update First Coast Guard District special anchorage area regulations. This proposed rule would not create, remove, or change any previously established special anchorage areas in the First Coast Guard District.

DATES: Comments and related material must be received by the Coast Guard on or before June 7, 2021.

ADDRESSES: You may submit comments identified by docket number USCG–2019–0952 using the Federal eRulemaking Portal at *http://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, contact Mr. Craig Lapiejko, Waterways Management at First Coast Guard District, telephone 617–223–8351, email *craig.d.lapiejko@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
OMB Office of Management and Budget
SAA Special Anchorage Area
§ Section
U.S.C. United States Code

II. Background, Purpose, and Legal Basis

The First Coast Guard District has received a request to remove the note in 33 CFR 110.32—Hingham Harbor, Hingham, Massachusetts. This regulation with its note was added to 33 CFR part 110 soon after the Coast Guard was given authority for Federal anchorage regulations more than 50 years ago.

In 1967, as part of the creation of the Department of Transportation and the government restructuring that followed, authority for federal anchorage regulations was transferred from the U.S. Army Corps of Engineers to the Coast Guard as reflected in a rule published December 12, 1967 (32 FR 17726). We have made a copy of this rule available in the docket along with other rulemaking documents we reference that were published before 1995. At the time of transfer, the Coast Guard adopted the special anchorage area (SAA) regulations that were previously in effect. The regulations for SAAs located in the First Coast Guard District were moved from 33 CFR part 202 to 33 CFR 110.2 through 110.60. During the transfer of the SAA regulations from the U.S. Army Corps of Engineers to the Coast Guard we did not focus on the notes to these regulations. Over the ensuing 50 years, the SAAs within the First Coast Guard District, 33 CFR 110.2 through 110.60, have been amended numerous times as SAAs were added, amended, or removed.

In a rule published August 3, 1968 (33 FR 11079), the Coast Guard added § 110.32 to 33 CFR part 110 which created five separate SAAs in Hingham Harbor, MA. That regulation was issued in response to a request from the Chairman of the Board of Selectmen of Hingham, MA. The note in that regulation said that:

- These areas will be principally used by yachts and other recreational craft.
- Temporary floats or buoys for marking anchors will be allowed in the areas but fixed piles or stakes may not be placed.
- The anchoring of vessels and the placing of moorings in these areas will be under the jurisdiction of the local Harbor Master.

In a 1988 notice of proposed rulemaking (NPRM)(53 FR 7949, 7950, Mar. 11, 1988), among other proposed changes, the Coast Guard proposed to remove notes from SAA regulations including the note for 33 CFR 110.32—Hingham Harbor, Hingham, Massachusetts. Later in 1988, the Coast Guard published a supplemental NPRM (53 FR 48935, Dec. 5, 1988) to both expand its suggested revisions and address comments on the NPRM. Then in 1995, citing both the lapse of time since proposals in 1988 and the lack of resources to complete the rulemaking, the Coast Guard terminated that rulemaking (60 FR 2364, Jan. 9, 1995).

In response to the 2019 request to remove the note for § 110.32, we decided to adopt the sound reasoning given in 1988 to remove both that note and notes for all other regulations for SAAs in the First Coast Guard District. In the 1988 supplemental NPRM (53 FR 48935, Dec. 5, 1988), we stated that the Coast Guard does not regulate vessel activities within SAAs as it does in anchorage grounds, and that the only effect of designating a SAA under the authority of 33 U.S.C. 2071 is that vessels under 20 meters in length (65 feet) anchored in these areas do not have to exhibit the lights and shapes or sound signals required by Rules 30 and 35 of the Inland Rules.[1] We also noted in the supplemental NPRM (53 FR 48935, Dec. 5, 1988) that other vessel activity within these SAAs may be regulated by local authorities as long as the local regulations do not conflict with Federal regulations which may be promulgated under other statutory authority. Earlier that year, in the NPRM (53 FR 7949, 7950, Mar. 11, 1988), we noted that inclusion of references to state or local ordinances in part 110 is not desirable because it makes it appear as though the Coast Guard has incorporated these ordinances into the Federal regulations.

This proposed rule is being issued under authority in 33 U.S.C. 2071. That authority has been delegated to the Coast Guard by Department of Homeland Security Delegation No. 0170.1, and to District Commanders by 33 CFR 1.05–1(e).

III. Discussion of Proposed Rule

This proposed rule would remove existing notes in regulations for SAAs in the First Coast Guard District and remove the regulatory provisions in § 110.25, § 110.29, § 110.50d, and § 110.60 that do not designate the location of SAAs. Additionally, we would add § 110.3, entitled, ''First Coast Guard District Special Anchorage Areas.'' Its text would identify SAA

[1] Currently these two rules may be found in 33 CFR 83.30 and 83.35.

regulations for the First Coast Guard District (§ 110.4 through § 110.60) and its note would advise those planning to use a SAA in the First District that state ordinances, local ordinances, or both, may apply to those anchoring there and that the local harbormaster is often the best source of information about any such ordinances. These ordinances may involve, for example, compliance with direction from the local harbormaster when placing or using moorings within the anchorage.

These changes are primarily editorial in nature and are intended to clarify and update the notes in this part. This rule does not create, remove, or change any SAA. Vessels less than 65 feet in length, when at anchor in these SAAs, are not required to sound signals or display anchorage lights or shapes when at anchor.

This proposed rule would remove notes from the following sections in 33 CFR part 110 that designate SAAs in the First Coast Guard District:

§ 110.4, Penobscot Bay, Maine.
§ 110.5, Casco Bay, Maine.
§ 110.6, Portland Harbor, Portland, Maine (between Little Diamond Island and Great Diamond Island).
§ 110.8, Lake Champlain, New York and Vermont.
§ 110.26, Marblehead Harbor, Marblehead, Massachusetts.
§ 110.29, Boston Inner Harbor, Massachusetts.
§ 110.30, Boston Harbor, Massachusetts.
§ 110.31, Hull Bay and Allerton Harbor at Hull, Massachusetts.
§ 110.32, Hingham Harbor, Hingham, Massachusetts.
§ 110.37, Sesuit Harbor, Dennis, Massachusetts.
§ 110.38, Edgartown Harbor, Massachusetts.
§ 110.45a, Mattapoisett Harbor, Mattapoisett, Massachusetts.
§ 110.50, Stonington Harbor, Connecticut.
§ 110.50a, Fishers Island Sound, Stonington, Connecticut.
§ 110.50b, Mystic Harbor, Groton and Stonington, Connecticut.
§ 110.50c, Mumford Cove, Groton, Connecticut.
§ 110.51, Groton, Connecticut.
§ 110.52, Thames River, New London, Connecticut.
§ 110.53, Niantic, Connecticut.
§ 110.55, Connecticut River, Connecticut.
§ 110.55a, Five Mile River, Norwalk and Darien, Connecticut.
§ 110.55b, Connecticut River, Old Saybrook, Connecticut.
§ 110.56, Noroton Harbor, Darien, Connecticut.
§ 110.58, Cos Cob Harbor, Greenwich, Connecticut.
§ 110.59, Eastern Long Island, New York.
§ 110.60, Captain of the Port, New York.

For a specific listing of the notes being removed, please review the proposed regulatory text at the end of this NPRM.

Additionally, this proposed rule would remove regulatory text from four CFR sections because that text is inconsistent with simply designating the location of a SAA. In § 110.25, Salem Sound, Massachusetts, we propose to remove the last two sentences of paragraph (c). In § 110.29, Boston Inner Harbor, Massachusetts, we propose to remove paragraph (d)(2). In § 110.50d, Mystic Harbor, Noank, Connecticut, we propose to remove paragraph (b). Finally, in § 110.60, Captain of the Port, New York; we would remove paragraphs (c)(13)(i), (d)(7)(i), and (d)(9)(i).

IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive Orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive Orders and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This NPRM has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

These changes are primarily editorial in nature and are intended to clarify and update notes for First Coast Guard District SAA regulations and to remove regulatory text in four CFR sections that is not needed to designate the location of SAAs. This proposed rule would not create, remove, or change any previously established SAAs in the First Coast Guard District.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. We reach this conclusion based on the reasons stated in section IV.A above.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132 (Federalism), if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this proposed rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this proposed rule has implications for federalism or Indian tribes, please call or email the person

listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a state, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01 and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule would remove existing notes in regulations for SAAs in the First Coast Guard District and remove regulatory text in four CFR sections that is not needed to designate the location of SAAs. These existing notes and provisions in regulatory text, would be replaced with a note in a newly added section that would apply to all SAA regulations in the First Coast Guard District. The note would advise those planning to use a SAA in the First Coast Guard District that state ordinances, local ordinances, or both, may apply to those anchoring there and that the local harbormaster is often the best source of information about any such ordinances. Normally such actions are categorically excluded from further review under paragraph A3 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A preliminary Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

Documents mentioned in this NPRM as being available in the docket, and all public comments, will be in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 110

Marine safety, Navigation (water), Reporting and record keeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 110 as follows:

PART 110—ANCHORAGE REGULATIONS

■ 1. The authority citation for part 110 continues to read as follows:

Authority: 33 U.S.C. 471, 2071; 46 U.S.C. 70034; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 110.3 to read as follows:

§ 110.3 First Coast Guard District Special Anchorage Areas.

Regulations designating special anchorage areas in the First Coast Guard District appear in § 110.4 through § 110.60.

Note to § 110.3: Those planning to use these special anchorage areas are advised that state ordinances, local ordinances, or both, may apply. The local harbormaster is often the best source of information about any such ordinances.

§ 110.4 [Amended]

■ 3. In § 110.4, remove the notes to paragraph (a), (b), (c) and (d)

§ 110.5 [Amended]

■ 4. In § 110.5, remove the notes following paragraphs (a–1), (d), (e) and (f).

§ 110.6 [Amended]

■ 5. In § 110.6, remove the note for the section.

§ 110.8 [Amended]

■ 6. In § 110.8, remove the notes following paragraphs (c–2) and (i).

§ 110.25 [Amended]

■ 7. In § 110.25, remove the last two sentences in paragraph (c).

§ 110.26 [Amended]

■ 8. In § 110.26, remove the note for the section.

§ 110.29 [Amended]

■ 9. In § 110.29, redesignate paragraph (d)(1) as paragraph (d), remove paragraph (d)(2), and remove the note to paragraph (d).

§ 110.30 [Amended]

■ 10. In § 110.30, remove the notes to paragraphs (b), (h), (k) through (q).

§ 110.31 [Amended]

■ 11. In § 110.31, remove the note for the section.

§ 110.32 [Amended]

■ 12. In § 110.32, remove the note for the section.

§ 110.37 [Amended]

■ 13. In § 110.37, remove the note for the section.

§ 110.38 [Amended]

■ 14. In § 110.38, remove the note for the section.

§ 110.45a [Amended]

■ 15. In § 110.45a, remove the note for the section.

§ 110.50 [Amended]

■ 16. In § 110.50, remove the note for the section.

§ 110.50a [Amended]

■ 17. In § 110.50a, remove the note for the section.

§ 110.50b [Amended]

■ 18. In § 110.50b, remove the note for the section.

§ 110.50c [Amended]

■ 19. In § 110.50c, remove the note for the section.

§ 110.50d [Amended]

■ 20. In § 110.50d, redesignate paragraph (a) as an undesignated paragraph and remove paragraph (b).

§ 110.51 [Amended]

■ 21. In § 110.51, remove the note for the section.

§ 110.52 [Amended]

■ 22. In § 110.52, remove the note for the section.

§ 110.53 [Amended]

■ 23. In § 110.53, remove the note for the section.

§ 110.55 [Amended]

■ 24. In § 110.55, remove the notes following paragraph (b), (c), (e), (e–1), (e–2) and (g).

§ 110.55a [Amended]

■ 25. In § 110.55a, remove the note for the section.

§ 110.55b [Amended]

■ 26. In § 110.55b, remove the note for the section.

§ 110.56 [Amended]

■ 27. In § 110.56, remove the note for the section.

§ 110.58 [Amended]

■ 28. In § 110.58, remove the note for the section.

§ 110.59 [Amended]

■ 29. In § 110.59, remove the note following paragraph (g).

§ 110.60 [Amended]

■ 30. In § 110.60, remove the notes to paragraphs (a)(2) and (13); (b)(5) and (6); (c)(3); (5) and (6); (d)(2), and (5), and remove paragraphs (c)(13)(i) and (ii), (d)(7)(i) and (ii), and (d)(9)(i) and (ii).

Dated: March 22, 2021.

T.G. Allan Jr.,

Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.

[FR Doc. 2021–06487 Filed 4–7–21; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA–R09–OAR–2021–0148; FRL–10022–15–Region 9]

Designation of Areas for Air Quality Planning Purposes; California; San Diego County Ozone Nonattainment Area; Reclassification to Severe

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Under the Clean Air Act (CAA or Act), the Environmental Protection Agency (EPA) is proposing to approve a request from the State of California to reclassify the San Diego County ozone nonattainment area from ''Serious'' to ''Severe'' for the 2008 ozone National Ambient Air Quality Standards (NAAQS) and from ''Moderate'' to ''Severe'' for the 2015 ozone NAAQS. Following consultation with tribes, the EPA is also proposing to reclassify in the same manner as state land, reservation areas of Indian country and any other area of Indian country within it where the EPA or a tribe has demonstrated that the tribe has jurisdiction located within the boundaries of the San Diego County ozone nonattainment area. Upon final reclassification of the San Diego County ozone nonattainment area as a Severe area for the 2008 and 2015 ozone NAAQS, the applicable attainment dates would be as expeditious as practicable but no later than July 20, 2027, for the 2008 ozone NAAQS, and August 3, 2033, for the 2015 ozone NAAQS. With respect to Severe state implementation plan (SIP) element submittal dates that have passed, the EPA is proposing to establish a deadline of no later than 12 months from the effective date of reclassification for submittal of revisions to the San Diego County portion of the California SIP to meet additional requirements for Severe ozone nonattainment areas to the extent that such revisions have not already been submitted.

DATES: Any comments on this proposal must arrive by May 10, 2021.

ADDRESSES: Submit your comments, identified by Docket ID number EPA–R09–OAR–2021–0148, at *http://www.regulations.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, or if you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: T. Khoi Nguyen, Air Planning Office (AIR–2), EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105, (415) 947–4120, or by email at *nguyen.thien@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' and ''our'' refer to the EPA.

Table of Contents

I. Reclassification as Severe Nonattainment and Severe Area SIP Requirements

A. Reclassification as Severe and Applicable Attainment Dates

Effective July 20, 2012, the EPA designated and classified the San Diego County nonattainment area in California under the CAA as ''Marginal'' nonattainment for the 2008 ozone NAAQS.[1] The San Diego County ozone nonattainment area included 18 tribal reservations located within the geographic boundary of the county. Our classification of San Diego County as a Marginal ozone nonattainment area established a requirement that the area attain the 2008 ozone NAAQS as expeditiously as practicable, but no later than three years from the date of designation as nonattainment, *i.e.,* July 20, 2015. In May 2016, the EPA determined that San Diego County failed to attain the 2008 ozone NAAQS by the Marginal attainment date and

[1] 77 FR 30088 (May 21, 2012). The 2008 ozone NAAQS is 0.075 parts per million (ppm), daily maximum 8-hour average. The 2008 ozone NAAQS is met at an ambient air quality monitoring site when the 3-year average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to 0.075 ppm. See 40 CFR 50.15.

reclassified the area from Marginal to Moderate, with an attainment date of not later than July 20, 2018.[2] In August 2019, the EPA determined that San Diego County failed to attain the 2008 ozone NAAQS by the Moderate attainment date, and reclassified the area from Moderate to Serious, with an attainment date of not later than July 20, 2021.[3]

Additionally, effective August 3, 2018, the EPA designated and classified the San Diego County nonattainment area in California under the CAA as ''Moderate'' nonattainment for the 2015 ozone NAAQS.[4] Consistent with the area designation for the 2008 ozone NAAQS, the San Diego County ozone nonattainment area for the 2015 ozone NAAQS included 18 tribal reservations located within the geographic boundary of the county. Our classification of San Diego County as a Moderate ozone nonattainment area established a requirement that the area attain the 2015 ozone NAAQS as expeditiously as practicable, but no later than six years from the date of designation as nonattainment, *i.e.,* August 3, 2024.

On January 12, 2021, the California Air Resources Board (CARB) submitted a request to the EPA seeking a voluntary reclassification of San Diego County.[5] CARB requested that the EPA reclassify San Diego County from Serious to Severe for the 2008 ozone NAAQS and from Moderate to Severe for the 2015 ozone NAAQS.[6] The State requested reclassification to Severe, rather than Serious, based on air quality modeling results that demonstrate that the most expeditious attainment dates for ozone corresponded with the attainment dates for areas classified as Severe for the 2008 and 2015 ozone NAAQS.

We are proposing to approve CARB's reclassification request under section 181(b)(3) of the Act, which provides for ''voluntary reclassification'' because the plain language of section 181(b)(3) mandates that we approve such a request. Upon final reclassification, the applicable attainment dates will be as expeditiously as practicable, but no later than fifteen years from the date of designation as nonattainment, *i.e.,* July 20, 2027 for the 2008 ozone NAAQS and August 3, 2033 for the 2015 ozone NAAQS.

B. Clean Air Act Requirements for Severe Ozone Nonattainment Area Plans

1. Severe Area Plan Requirements

Under CAA section 182(d), an attainment plan for a Severe area must include the elements required for a Serious area as well as additional plan elements for a Severe area. Where applicable, the plan elements should reflect the reduction of the major source threshold under section 182(d) to 25 tons per year for a Severe area. The requirements for a Severe area plan include, but are not limited to: (1) Base year emissions inventory (CAA sections 172(c)(3) and 182(a)(1)); (2) an emissions statement rule (CAA section 182(a)(3)(B)); (3) New Source Review (NSR) (CAA sections 172(c)(5), 173, 182(a)(2)(C), 182(d) and 182(d)(2)); (4) additional reasonably available control technology (RACT) rules to address sources subject to the lower Severe area major source threshold (CAA section 182(b)(2)); (5) reasonably available control measures (RACM) (CAA section 172(c)(1)); (6) attainment demonstration (CAA sections 172(c)(1) and 182(c)(2)(A)); (7) a reasonable further progress (RFP) demonstration showing ozone precursor reductions of at least 3 percent per year until the attainment date (CAA sections 172(c)(2), 182(b)(1), 182(c)(2)(B)); (8) contingency measures (CAA sections 172(c)(9) and 182(c)(9)); (9) vehicle inspection & maintenance (CAA section 182(c)(3)); (10) Clean Fuels Fleet program (CAA sections 182(c)(4)(A) and 246); (11) enhanced ambient air monitoring (CAA section 182(c)(1)); (12) transportation control strategies and measures to offset emissions increases from vehicle miles traveled (CAA section 182(d)(1)(A)); and (13) CAA Section 185 Fee Program (CAA sections 182(d)(3) and 185).

As noted previously, on January 12, 2021, CARB submitted a request to the EPA seeking a voluntary reclassification of the San Diego County ozone nonattainment area from Serious to Severe for the 2008 ozone NAAQS and from Moderate to Severe for the 2015 ozone NAAQS. In addition to this request, the State also submitted, as a revision to the San Diego County portion of the California SIP, the plan adopted by the San Diego County Air Pollution Control District (SDCAPCD or ''District'') intended to address all the applicable requirements for the 2008 and 2015 ozone NAAQS for the San Diego County ozone nonattainment area as a Severe ozone nonattainment area, other than RACT and the Section 185 Fee Program.[7] On December 29, 2020, CARB submitted a SIP revision intended to address the Severe Area RACT requirement for the San Diego County ozone nonattainment area for the 2008 and 2015 ozone NAAQS.[8]

We have reviewed the two SIP revisions submitted by CARB to address the Severe area requirements for the San Diego County ozone nonattainment area for the 2008 and 2015 ozone NAAQS (other than the Section 185 Fee Program) and find that the revisions address the applicable requirements.[9] However, we have not yet determined that either SIP submittal is complete under CAA section 110(k)(1)(B), and thus, we are proposing a schedule for submittal (as described in detail below) of SIP revisions to address applicable SIP requirements if, and to the extent, we ultimately find the two SIP revisions incomplete. For the Section 185 Fee Program in San Diego County, if the area is reclassified to Severe, the applicable SIP submittal deadline would be July 20, 2022, for the 2008 ozone NAAQS and August 3, 2028, for the 2015 ozone NAAQS.[10]

For areas initially designated Severe, the CAA and the EPA's ozone SIP Requirements Rules (SRR) for the 2008 and 2015 ozone NAAQS[11] generally provide, depending on the element, up to four years from the date of designation to submit the required SIP elements to the EPA. The statutory deadline for all SIP submissions for areas initially designated as Severe for the 2008 ozone NAAQS was July 20, 2016 (excluding the Section 185 Fee Program). The statutory deadlines for SIP submissions for areas initially designated as Severe for the 2015 ozone NAAQS vary from two to four years

[2] 81 FR 26697 (May 4, 2016).

[3] 84 FR 44238 (August 23, 2019).

[4] 83 FR 25776 (June 4, 2018). The 2015 ozone NAAQS is 0.070 ppm, daily maximum 8-hour average. The 2015 ozone NAAQS is met at an ambient air quality monitoring site when the 3-year average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to 0.070 ppm. See 40 CFR 50.19.5

[5] Letter dated January 8, 2021, from Richard W. Corey, Executive Officer, CARB, to John Busterud, Regional Administrator, EPA Region IX (submitted electronically January 12, 2021).

[6] Throughout this document, we use ''Severe'' as the terminology for the proposed classification, referring to Severe areas that have 15 years to attain the ozone standards. If the proposed action is finalized, the ozone area designation tables in 40 CFR part 81 will specify ''Severe-15'' to distinguish the classification from ''Severe-17''.

[7] SDCAPCD, ''2020 Plan for Attaining the National Ambient Air Quality Standards for Ozone in San Diego County'' (October 2020).

[8] Letter dated December 28, 2020, from Richard W. Corey, Executive Officer, CARB, to John W. Busterud, Regional Administrator, EPA Region IX (submitted electronically December 29, 2020), with attachments, including SDCAPCD's 2020 Reasonably Available Control Technology Demonstration for the National Ambient Air Quality Standards for Ozone in San Diego County (October 2020).

[9] See EPA Region IX, Memorandum to File EPA–R09–OAR–2021–0148, dated March 19, 2021 for our review of the San Diego County 2020 ozone plan.

[10] See 40 CFR 51.1117 and 40 CFR 51.1317.

[11] The EPA promulgated the SRR for the 2008 and 2015 ozone NAAQS at 40 CFR part 52, subpart AA and subpart CC, respectively.

(excluding the Section 185 Fee Program). The RFP and attainment demonstrations, among other SIP elements, for the 2015 ozone NAAQS are due on August 3, 2022.

Under its general CAA section 301(a) authority and with respect to all SIP requirements for which the SIP submittal deadlines have passed, the EPA is proposing to establish a new deadline of 12 months from the effective date of the final action for this reclassification for the State to submit SIP revisions addressing the Severe area requirements for San Diego County for the 2008 ozone NAAQS if, and to the extent that, the EPA finds the two SIP revisions that have already been submitted are incomplete. This timeframe is consistent with how the EPA has established SIP submission deadlines under CAA section 182(i) for ozone areas reclassified by operation of law under CAA section 181(b)(2).[12] The EPA has also considered that for pollutants other than ozone, the CAA provides 12 months for states to submit revised attainment demonstrations when an area fails to attain by its attainment date.[13] This timeframe generally allows for the time necessary for states and local air districts to finish reviews of available control measures, adopt revisions to necessary attainment strategies, address other SIP requirements, and complete the public notice process necessary to adopt and submit timely SIP revisions.

To the extent SIP revisions are required to address Severe area requirements for which the SIP submittal deadlines have not passed, the deadlines from our SRRs for the 2008 and 2015 ozone NAAQS would continue to apply. For instance, upon final reclassification, the August 3, 2022 deadline[14] would continue to apply for the RFP and attainment demonstrations for the 2015 ozone NAAQS, if the EPA finds the relevant SIP revision already submitted are incomplete.[15] In addition, as noted previously, the Section 185 Fee Program SIP submittal would be due July 20, 2022, for the 2008 ozone NAAQS and August 3, 2028, for the 2015 ozone NAAQS.

2. NSR and Title V Program Revisions

Typically, when we reclassify or approve a reclassification request to a higher ozone classification, the state must amend its NSR rules to reflect the lower NSR major source thresholds and higher NSR offset ratio corresponding to the higher classification. However, with respect to the San Diego County ozone nonattainment area, the District will not be required to amend its NSR rules upon reclassification to Severe because the version of the rules that the District adopted in 2019 and that the EPA approved in 2020 already include the Severe area major source thresholds and offset ratios.[16] Such thresholds and ratios will apply upon the effective date of the reclassification to Severe.[17] The District must also make any changes in its title V operating permits program for San Diego County necessary to reflect the change in the major source threshold to 25 tons per year for Severe areas. The rationale for the EPA's deadline of one year from the effective date of the final reclassification action is discussed in Section I.B.1.

3. Federal Reformulated Gasoline

Typically, effective one year after the reclassification of any ozone nonattainment area as a Severe ozone nonattainment area, such Severe area shall also be a ''covered area'' for purposes of reformulated gasoline (RFG).[18] San Diego County is already a covered area for RFG, and as such, the use of RFG is currently required under the mobile source requirements in title II of the CAA and the implementing regulations at 40 CFR part 80, subpart D.[19] RFG is gasoline blended to burn more cleanly than conventional gasoline and to reduce emissions of smog-forming and toxic pollutants in the air. California gasoline (California Phase III Reformulated Gasoline or ''CaRFG3'') can also be used to satisfy federal RFG requirements because the EPA has approved CaRFG3 as an equivalent fuel formulation under CAA section 211(k)(4)(B). The RFG requirement will continue to apply within San Diego County upon reclassification to Severe.

II. Reclassification of Areas of Indian Country

Because the State of California does not have jurisdiction over Indian country geographically located within the borders of the state, CARB's request to reclassify the San Diego County nonattainment area does not apply to Indian country under the jurisdiction of the tribes identified in 40 CFR 81.305. The EPA implements federal CAA programs, including reclassifications, in this area of Indian country consistent with our discretionary authority under sections 301(a) and 301(d)(4) of the CAA.

When the EPA designated San Diego County as nonattainment for the 2008 and 2015 ozone NAAQS, we included 18 federally recognized Tribal Nation reservations within the boundaries of the nonattainment area. These reservations include: Barona Group of Capitan Grande of Mission Indians of the Barona Reservation, Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, Capitan Grande Band of Diegueno Mission Indians of California,[20] Ewiiaapaayp Band of Kumeyaay Indians, Iipay Nation of Santa Ysabel, Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, Jamul Indian Village of California, La Jolla Band of Luiseno Indians, La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, Los Coyotes Band of Cahuilla and Cupeno Indians, Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, Pala Band of Mission Indians, Pauma Band of Luiseno Mission Indians of the Pauma and Yuima Reservation, Rincon Band of Luiseno Mission Indians of the Rincon Reservation, San Pasqual Band

[12] See, *e.g.,* 85 FR 2311 (January 15, 2020) (Coachella Valley, California reclassification to Extreme for the 1997 ozone NAAQS); 75 FR 79302 (Dec. 20, 2010) (Dallas-Ft. Worth, Texas, reclassification to Serious for the 1997 ozone NAAQS); 69 FR 16483 (March 30, 2004) (Beaumont-Port Arthur, Texas, reclassification to Serious for the 1979 1-hour ozone NAAQS); 68 FR 4836 (Jan. 30, 2003) (St. Louis, Missouri, reclassification to Serious for the 1979 1-hour ozone NAAQS).

[13] See CAA section 179(d)(1) (providing 12 months for a state to submit a new attainment demonstration after a determination that the area failed to attain by its attainment date).

[14] 40 CFR 51.1308(b).

[15] With respect to implementation of RACT controls in reclassified areas, implementation is required as expeditiously as practicable, but no later than the start of the attainment year ozone season associated with the area's new attainment deadline, or January 1 of the third year after the associated SIP revision submittal deadline, whichever is earlier; or the deadline established by the Administrator in the final action issuing the area reclassification. See 40 CFR 51.1312(a)(3)(ii). In this instance, implementation of RACT would be required as expeditiously as practicable but no later than January 1, 2025, assuming that the final reclassification action is effective in calendar year 2021.

[16] We took final limited approval and limited disapproval of District Rules 20.1–20.4 (adopted by the District on June 26, 2019) at 85 FR 57727 (September 16, 2020). The basis for the limited disapproval was unrelated to the major source thresholds or offset ratios.

[17] See District Rule 20.1 (New Source Review—General Provisions), paragraphs (c)(29) (''Federal Major Modification'') and (c)(30) (''Federal Major Stationary Source''); and District Rule 20.3 (New Source Review—Major Stationary Sources and PSD Stationary Sources), paragraph (d)(5)(ii) (Emissions Offsets).

[18] See CAA section 211(k)(10)(D).

[19] See 40 CFR 80.70(b).

[20] The Capitan Grande Reservation is jointly controlled by the Barona Group of Capitan Grande Band of Mission Indians and Viejas Group of Capitan Grande Band of Mission Indians. Therefore, in our action, we refer to 18 tribal reservations within the San Diego County nonattainment area and 17 tribal governments.

of Diegueno Mission Indians of California, Sycuan Band of the Kumeyaay Nation, and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation.

The EPA contacted tribal officials to invite government-to-government consultation on this rulemaking.[21] Under the EPA's Consultation Policy, the EPA consults on a government-to-government basis with federally recognized tribal governments when the EPA's actions and decisions may affect tribal interests.[22] At the request of a few tribes, on January 22, 2021, the EPA held an informational meeting on the reclassification request.[23] Three tribes—the La Jolla Band of Luiseno Indians, Ewiiaapaayp Band of Kumeyaay Indians, and Campo Band of Diegueno Mission Indians of the Campo Indian Reservation—requested government-to-government consultation. We provide summaries of the consultation meetings in memoranda included in the docket for this rulemaking.

We have considered the relevance of our proposal to reclassify the San Diego nonattainment area as Severe nonattainment for the 2008 and 2015 ozone standards for each tribe located within San Diego County in conjunction with the concerns raised by tribes during government-to-government consultations. We believe that the same facts and circumstances that support the proposal for the non-Indian country lands also support the proposal for reservation areas of Indian country [24] and any other areas of Indian country where the EPA or a tribe has demonstrated that the tribe has jurisdiction located within San Diego County. The EPA implements federal CAA programs, including reclassifications, in this area of Indian country consistent with our discretionary authority under sections 301(a) and 301(d)(4) of the CAA. Accordingly, the EPA is therefore proposing to reclassify areas of Indian country geographically located in the San Diego County nonattainment area as Severe for the 2008 and 2015 ozone NAAQS.

Ground-level ozone pollution is formed from the reaction of volatile organic compounds (VOC) and oxides of nitrogen (NO_X) in the presence of sunlight. These two pollutants, referred to as ozone precursors, are emitted by many types of sources, including on-and off-road motor vehicles and engines, power plants and industrial facilities, and smaller area sources such as lawn and garden equipment and paints. Scientific evidence indicates that adverse public health effects occur following exposure to ozone, particularly in children and adults with lung disease. Breathing air containing ozone can reduce lung function and inflame airways, which can increase respiratory symptoms and aggravate asthma or other lung diseases.[25]

Ground-level ozone continues to be a pervasive pollution problem in areas throughout the United States. Ozone and precursor pollutants that cause ozone can be transported throughout a nonattainment area. Therefore, boundaries for nonattainment areas are drawn to encompass both areas with direct sources of pollution as well as nearby areas in the same airshed in which ozone can be transported. Initial classifications of nonattainment areas are coterminous with, that is, they match exactly, their boundaries. The EPA believes this approach best ensures public health protection from the adverse effects of ozone pollution. Therefore, it is generally counterproductive from an air quality and planning perspective to have a different classification for a land area located within the boundaries of a nonattainment area, such as the areas of Indian country contained in the ozone nonattainment areas at issue here.

Uniformity of classification throughout a nonattainment area is a guiding principle and premise when an area is being reclassified. In this particular case, we are proposing to reclassify the San Diego County nonattainment area and note that the State's reclassification request is based on modeling results that show that a longer timeframe is necessary to attain each ozone standard for the San Diego County nonattainment area. The longer timeframes will provide the time necessary to realize full implementation of the stationary and mobile source regulations contained in the District's attainment plan.[26]

The EPA has carefully considered the views expressed by the Tribes during the consultation process. Although we heard from Tribes their concerns about or opposition to the State's request to reclassify the San Diego nonattainment area, the EPA does not have discretion to deny the State's voluntary reclassification request.[27] We also heard concerns from Tribes that air quality on tribal lands is not accurately represented by the existing regulatory monitors, including Alpine, the design value monitor in the San Diego nonattainment area.

The La Jolla Tribe indicated that they operate a nonregulatory informational monitor, and that the informational monitor shows ozone levels that exceed the NAAQS. This information supports reclassifying the La Jolla Reservation along with the rest of the San Diego ozone nonattainment area. The Campo and Ewiiaapaayp Tribes indicated that the air quality on their reservation is pristine and meets the ozone standards, and they expressed concerns about the nonattainment classification for their respective reservations.

Absent monitoring data or an attainment demonstration, the EPA is relying on our previous analysis, such as the five-factor analysis, that supported our initial nonattainment designation for San Diego County, including areas of Indian country, for the 2008 ozone NAAQS, as well as information in the State's reclassification request, as support for inclusion of the reservations of the Campo and Ewiiaapaayp Tribes in the proposed reclassification action. The EPA included our five-factor analysis for the Campo, Ewiiaapaayp, and La Jolla tribes in the Technical Support Documents or Responses to Comments for the 2008 ozone NAAQS.[28] Several studies have shown ozone transport from the South Coast air basin and the western portions of San Diego County

[21] The consultation letters are included in the docket for this action.

[22] The EPA's Consultation Policy is available at *https://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes.*

[23] The informational meeting slides and notes are included in the docket for this action.

[24] ''Indian country'' as defined at 18 U.S.C. 1151 refers to: ''(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.''

[25] ''Fact Sheet—2008 Final Revisions to the National Ambient Air Quality Standards for Ozone'' dated March 2008.

[26] SDCAPCD, ''2020 Plan for Attaining the National Ambient Air Quality Standards for Ozone in San Diego'' County (October 2020), page 2.

[27] CAA section 181(b)(3) provides states with the ability to request voluntary reclassification, and the EPA does not have discretion to deny a voluntary reclassification request from a state.

[28] The EPA's analysis for including the La Jolla Reservation and the Campo Reservation within the nonattainment area are detailed in the EPA's Technical Support Document (TSD) for the 2008 ozone NAAQS designations and was also used to support the 2015 ozone designations. The TSD is available at *https://www.regulations.gov/document/EPA-HQ-OAR-2017-0548-0068.* The EPA's analysis for the Ewiiaapaayp Reservation is detailed in the Response to Comments for the 2008 ozone NAAQS and is available at *https://www.regulations.gov/document/EPA-R04-OAR-2018-0142-0042.*

can impact the inland areas of San Diego County.[29] The EPA therefore found that transport of ozone and its precursors is prevalent within San Diego County, and from adjacent nonattainment areas. We also previously reviewed modeling performed in the 2007 8-hour ozone attainment plan for San Diego County that shows that the inland tribal reservations experience similar air quality as the surrounding inland areas.[30] The EPA also concluded that the reservations for the Campo, Ewiiaapaayp, and La Jolla tribes do not have any geographical or topographical barriers that would prevent air pollution transport from the surrounding San Diego County nonattainment area.[31] We indicated that although the terrain is complex, there are no topographic barriers. Therefore, violations of the eight-hour ozone standard, which are measured and modeled throughout the nonattainment areas, as well as shared meteorological conditions within the nonattainment area indicate that the tribal areas experience similar ozone concentrations. Additionally, the State's reclassification request indicates that although air quality in the region has improved substantially, and is projected to continue to improve, air quality modeling performed by CARB concludes that a longer timeframe is necessary for the entire nonattainment area to attain each ozone standard.[32]

The EPA recognizes that the Ewiiaapaayp Tribe has submitted letters requesting an error correction for the Tribe's designation as part of the San Diego ozone nonattainment area for the 2008 and 2015 ozone NAAQS and a redesignation as a Class I area and participation in the Prevention of Significant Deterioration (PSD) program.[33] An error correction, redesignation as a Class I area, and the PSD program are all outside the narrow scope of this proposed reclassification action, and therefore the EPA will be reviewing these requests separately and taking action, as appropriate in the future.

In light of the considerations outlined above that support retention of a uniformly-classified ozone nonattainment area, and our proposal to approve the State's voluntary reclassification request, we propose to reclassify the entire San Diego nonattainment area, including reservation areas of Indian country and any other area of Indian country located within it where the EPA or a tribe has demonstrated that the tribe has jurisdiction, as Severe nonattainment for both the 2008 and 2015 ozone NAAQS.

The EPA specifically solicits additional comment on this proposed rule from tribal officials. We note that although eligible tribes may seek EPA approval of relevant tribal programs under the CAA, none of the affected tribes would be required to submit an implementation plan as a result of this reclassification.

III. Summary of Proposed Action and Request for Public Comment

Pursuant to CAA section 181(b)(3), we are proposing to grant CARB's request to reclassify the San Diego County ozone nonattainment area from Serious to Severe for the 2008 ozone NAAQS and from Moderate to Severe for the 2015 ozone NAAQS. With respect to Severe SIP element submittal dates that have passed, the EPA is proposing to establish a deadline of no later than 12 months from the effective date of reclassification for submittal of revisions to the San Diego County portion of the California SIP to meet additional requirements for Severe ozone nonattainment areas to the extent that such revisions have not already been submitted. With respect to the Section 185 Fee Program, upon reclassification to Severe, the deadline for submittal would be July 20, 2022, for the 2008 ozone NAAQS and August 3, 2028, for the 2015 ozone NAAQS pursuant to the EPA's ozone SRRs. Upon reclassification, the new attainment dates for the San Diego County ozone nonattainment area would be as expeditiously as practicable, but no later than July 20, 2027, for the 2008 ozone NAAQS and August 3, 2033, for the 2015 ozone NAAQS.

In addition, the EPA is proposing to reclassify reservation areas of Indian country and any other area of Indian country where the EPA or a tribe has demonstrated that the tribe has jurisdiction within the San Diego County nonattainment area as Severe nonattainment for the 2008 and 2015 ozone NAAQS. Although eligible tribes may seek the EPA's approval of relevant tribal programs under the CAA, none of the affected tribes would be required to submit an implementation plan as a result of this reclassification.

We will accept comments from the public on these proposals for the next 30 days. The deadline and instructions for submission of comments are provided in the **DATES** and **ADDRESSES** sections at the beginning of this preamble.

IV. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a ''significant regulatory action'' and therefore is not subject to Executive Order 12866. With respect to lands under state jurisdiction, voluntary reclassifications under CAA section 181(b)(3) of the CAA are based solely upon requests by the state, and the EPA is required under the CAA to grant them. These actions do not, in and of themselves, impose any new requirements on any sectors of the economy. In addition, because the statutory requirements are clearly defined with respect to the differently classified areas, and because those requirements are automatically triggered by reclassification, reclassification does not impose a materially adverse impact under Executive Order 12866. With respect to Indian country, reclassifications do not establish deadlines for air quality plans or plan revisions. For these reasons, this proposed action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001).

In addition, I certify that this proposed rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), and that this proposed rule does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), because the EPA is required to grant requests by states for

[29] The EPA previously provided the list of studies on pages 10 and 12 of the TSD for the 2008 ozone NAAQS designations. See also Attachment M of the SDCAPCD's ''2020 Plan for Attaining the National Ambient Air Quality Standards for Ozone in San Diego County'' (October 2020) for a description of prior studies (page M–16) and more details on the meteorological conditions in the nonattainment area.

[30] See pages 10 and 12 of the TSD for the 2008 ozone NAAQS designations.

[31] For the La Jolla Tribe, see page 11 of the TSD for the 2008 ozone NAAQS designations. For the Campo Tribe, see page 14. For the Ewiiaapaayp Tribe, see page 86 of the Response to Comments for the 2008 ozone NAAQS.

[32] See page 2 of the SDCAPCD's ''2020 Plan for Attaining the National Ambient Air Quality Standards for Ozone in San Diego County'' (October 2020). The District's modeling demonstration is provided in Chapter 4.3 and Attachments K and L.

[33] Letter dated February 16, 2021, from Robert Pinto, Sr., Tribal Chairman, Ewiiaapaayp Band of Kumeyaay Indians, to T. Khoi Nguyen, EPA Region IX. Additionally, see letter dated February 26, 2021, from Robert Pinto, Sr., Tribal Chairman, Ewiiaapaayp Band of Kumeyaay Indians, to T. Khoi Nguyen, EPA Region IX following up on the Class I and PSD request.

voluntary reclassifications and such reclassifications in and of themselves do not impose any federal intergovernmental mandate, and because tribes are not subject to implementation plan submittal deadlines that apply to states as a result of reclassifications.

Executive Order 13175 (65 FR 67249, November 9, 2000) requires the EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal Implications'' are defined in section 1(a) of the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' Several Indian tribes have areas of Indian country located within the boundary of the San Diego County ozone nonattainment areas.

The EPA implements federal CAA programs, including reclassifications, in these areas of Indian country consistent with our discretionary authority under sections 301(a) and 301(d)(4) of the CAA. The EPA has concluded that this proposed rule might have tribal implications for the purposes of E.O. 13175 but would not impose substantial direct costs upon the tribes, nor would it preempt Tribal law. This proposed rule does affect implementation of new source review for new or modified major stationary sources proposed to be located in the areas of Indian country proposed for reclassification, and might affect projects proposed in these areas that require Federal permits, approvals, or funding. Such projects are subject to the requirements of the EPA's General Conformity rule, and federal permits, approvals, or funding for the projects may be more difficult to obtain because of the lower de minimis thresholds triggered by reclassification.

Given the potential implications, the EPA contacted tribal officials early in the process of developing this proposed rule to provide an opportunity to have meaningful and timely input into its development. On December 11, 2020, we sent letters to leaders of the 17 tribal governments representing 18 areas of Indian country in the nonattainment area offering government-to-government consultation and seeking input on how we could best communicate with the tribes on this rulemaking effort. On January 12, 2021, we received a response from one tribe requesting a webinar on this matter on behalf of a few tribes. We held this informational webinar on January 22, 2021. Additionally, we received responses from three tribes requesting formal government-to-government consultation. The consultation letters and the information and notes from the webinar and the three government-to-government consultations are included in the docket for this action. The EPA has carefully considered the views expressed by the Tribes.

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. This proposed reclassification action relates to ozone, a pollutant that is regional in nature, and is not the type of action that could result in the types of local impacts addressed in Executive Order 12898.

This proposed action also does not have federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, nor on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This proposed action does not alter the relationship or the distribution of power and responsibilities established in the CAA.

This proposed rule also is not subject to Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because the EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation.

Reclassification actions do not involve technical standards and thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This proposed rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, Intergovernmental relations, National parks, Ozone, Wilderness areas.

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

Dated: April 2, 2021.

Deborah Jordan,

Acting Regional Administrator, Region IX.

[FR Doc. 2021–07223 Filed 4–7–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 152

[EPA–HQ–OPP–2020–0537; FRL–10016–29]

RIN 2070–AK55

Pesticides; Modification to the Minimum Risk Pesticide Listing Program and Other Exemptions Under FIFRA Section 25(b)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Environmental Protection Agency (EPA) is soliciting public comments and suggestions about the petition process for exemptions regarding pesticides from registration and other requirements under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), where the pesticides are determined to be of a character unnecessary to be subject to regulation under FIFRA. The Agency is considering streamlining the petition process and revisions to how the Agency evaluates the potential minimum risk active and inert substances, factors used in classes of exemptions, state implementation of the minimum risk program and the need for any future exemptions or modifications to current exemptions. EPA is also requesting comment on whether the Agency should consider amending existing exemptions or adding new classes of pesticidal substances for exemption, such as peat when used in septic filtration systems.

DATES: Comments must be received on or before July 7, 2021.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2020–0537, through the Federal eRulemaking Portal at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI)

or other information whose disclosure is restricted by statute.

Due to public health concerns related to COVID–19, the EPA Docket Center and Reading Room are closed to the public with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Charles Smith, Acting Director Biopesticide and Pollution Prevention Division, (7509P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (703) 305–0291; email address: *BPPDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

You may be affected by this action if you manufacture, distribute, sell, or use minimum risk pesticide products. EPA has promulgated several exemptions for pesticide products of a character not requiring regulation under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). These exemptions are codified in 40 CFR 152.25. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, rather it provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Pesticide and other agricultural chemical manufacturers (NAICS codes 325320 and 325311), as well as other manufacturers in similar industries such as animal feed (NAICS code 311119), cosmetics (NAICS code 325620), and soap and detergents (NAICS code 325611).
- Manufacturers who may also be distributors of these products, which includes farm supplies merchant wholesalers (NAICS code 424910), drug and druggists merchant wholesalers (NAICS code 424210), and motor vehicle supplies and new parts merchant wholesalers (NAICS code 423120).
- Retailers of minimum risk pesticide products (some of which may also be manufacturers), which includes nursery, garden center, and farm supply stores (NAICS code 444220), outdoor power equipment stores (NAICS code 444210), and supermarkets (NAICS code 445110).
- Users of minimum risk pesticide products, including the public in general, as well as exterminating and pest control services (NAICS code 561710), landscaping services (NAICS code 561730), sports, and recreation institutions (NAICS code 611620), and child daycare services (NAICS code 624410). Many of these companies also manufacture minimum risk pesticide products.
- Government establishments engaged in regulation, licensing, and inspection (NAICS code 926150).
- Sewage treatment facilities collecting, treating, and disposing waste through sewer systems or sewage treatment facilities, (NAICS code 221320).
- Site Preparation Contractors NAICS code 238910; and septic tank pumping and cleaning services (NAICS 562991).

If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What is the Agency's authority for this action?

This advance notice of proposed rulemaking (ANPR) is issued under the authority of FIFRA, 7 U.S.C. 136 *et seq.,* particularly FIFRA sections 3 and 25. Exemptions to the requirements of FIFRA are issued under the authority of FIFRA section 25(b). Eligible products may be exempt from, among other things, registration requirements under FIFRA section 3.

C. What action is the Agency taking?

EPA is considering whether regulatory and policy changes are needed to improve the exemption provisions in order to make the implementation of the process and evaluation of the exemption provisions more efficient. This ANPR initiates the rulemaking process by specifically soliciting public comments and suggestions about the petition process for exemptions regarding pesticides from registration and other requirements under FIFRA section 25(b), where the pesticides are determined to be of a character unnecessary to be subject to regulation under FIFRA. The Agency is considering streamlining the petition process and revisions to how the Agency evaluates the potential minimum risk active and inert substances, factors used in classes of exemptions, state implementation of the minimum risk program and the need for any future exemptions or modifications to current exemptions. EPA is also requesting comment on whether the Agency should consider amending existing exemptions or adding new classes of pesticidal substances for exemption, such as peat when used in septic filtration systems.

This ANPR asks the public to provide input on specific questions about the petition process and the evaluation of potential minimum risk active and inert substances, factors used in classes of exemptions listed at 40 CFR 152.25, state implementation of the minimum risk program and the need for any future exemptions or modifications to current exemptions. EPA is assessing whether changes to the exemption process could improve efficiency and enhance opportunities for reducing regulatory requirements.

EPA regulations at 40 CFR 152.20 provide certain exemptions for pesticides adequately regulated by another Federal agencies. 40 CFR 152.30 provides exemptions for pesticides that are context-specific (*e.g.,* pesticides distributed or sold under an emergency exemption under FIFRA section 18); the exemptions in 40 CFR 152.30 are not limited to specific pesticides. Because the exemptions in 40 CFR 152.20 and 152.30 are in general not based on risk analysis of individual pesticides, they are not the subject of this ANPR.

D. What are the incremental economic impacts of this action?

This ANPR does not impose or propose any requirements, and instead seeks comments and suggestions that will help the Agency identify, develop and consider improvements to the FIFRA section 25(b) petition process and related requirements. If EPA decides to propose changes to the regulations, it will conduct the appropriate assessments of the costs and benefits of those changes and provide opportunities for public comment.

E. What should I consider as I prepare my comments for EPA?

1. Submitting CBI. Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

II. Request for Comment

EPA invites public suggestions for improving the exemption provisions in order to make the implementation of the process and evaluation of the exemption provisions more efficient. EPA is particularly interested in public feedback on the questions posed in this document regarding the implementation and evaluation of the exemption provisions of the Minimum Risk Pesticide Listing Program and the other exemptions codified at 40 CFR 152.25. Please provide EPA with your thoughts as well as a rationale supporting your suggestions. If you can, provide examples or describe situations. Commenters are encouraged to present any data or information that should be considered by EPA during the program review, and is particularly interested in information regarding the impacts of exemptions, both in terms of costs and costs savings. For instructions on how to submit comments see Unit I.E. and the **ADDRESSES** section of this document.

III. Background

A. Brief Summary of the EPA's Use of the Authority in FIFRA Section 25(b)

Under FIFRA section 25(b)(2), EPA may exempt from the requirements of FIFRA any pesticide that is ''of a character unnecessary to be subject to [FIFRA].'' Pursuant to this authority, in 1988 (53 FR 15952, May 4, 1988) (FRL–3266–9b), EPA promulgated 40 CFR 152.25(a) through (e) which provided the initial determinations that certain classes of pesticides would be exempt from FIFRA regulation. The classes include Treated articles or substances (40 CFR 152.25(a)), Pheromones and pheromone traps (40 CFR 152.25(b)), Preservatives for biological specimens (40 CFR 152.25(c), Vitamin hormone products (40 CFR 152.25(d)) and Foods (40 CFR 152.25(e)). The final rule was amended in 1994 (59 FR 2751, January 19, 1994) (FRL–4744–6) to include Natural Cedar (40 CFR 152.25(f)).

In 1996, EPA promulgated 40 CFR 152.25(g), which exempted from FIFRA any pesticide product consisting solely of specified ingredients that EPA determined to pose minimum risk to humans and the environment (61 FR 8876, March 6, 1996) (FRL–4984–8). This provision was later redesignated as 40 CFR 152.25(f) (66 FR 64759, December 14, 2001) (FRL–6752–1). In 2001, EPA also moved provisions related to vitamin hormone products to 40 CFR 152.6(f) (66 FR 64759, December 14, 2001) (FRL–6752–1). The exemption provision in what is now 40 CFR 152.25(f) was the start of the Minimum Risk Pesticide Listing Program, which covers the listing of active and inert ingredients as minimum risk substances that are available for use in minimum risk pesticide products. Currently, forty-four active ingredient substances and two hundred and eighty-seven inert ingredient substances, as well as commonly consumed food commodities, animal feed items, and edible fats and oils as described in 40 CFR 180.950 (a), (b) and (c), respectively, are included in the Minimum Risk Pesticide Listing Program.

The Minimum Risk Pesticide Listing Program (152.25(f)) has been amended several times over the years. The last amendment was in 2015 when EPA issued a final rulemaking entitled, Pesticides; Revisions to Minimum Risk Exemption (80 FR 80660) (FRL–9934–44) December 28, 2015). The 2015 amendment improved the clarity and transparency of the minimum risk exemption by codifying the inert ingredients list and by adding specific chemical identifiers, where available, for all eligible active and inert ingredients. The 2015 rule also modified the labeling requirements for the exemption to require products to list ingredients on the label with a designated label display name and to provide the producer's contact information on the product label. The specific chemical identifiers and the labeling changes were intended to make it easier for manufacturers, the public, and Federal, state, and tribal inspectors to determine the specific chemical substances that are permitted in minimum risk pesticide products and provide more consistent information for consumers.

In the March 1996 final rule, EPA wrote that ''In developing its list of exempted substances, EPA applied certain factors. Consideration was given to such factors as: (1) Whether the pesticidal substance is widely available to the general public for other uses; (2) If it is a common food or constituent of a common food; (3) If it has a nontoxic mode of action; (4) If it is recognized by the Food and Drug Administration (FDA) as safe; (5) If there is no information showing significant adverse effects; (6) If its use pattern will result in significant exposure, and (7) If it is likely to be persistent in the environment.'' (61 FR 8876, March 6, 1996) (FRL–4984–8).

B. Environmental Justice

Under EPA policy, environmental justice is ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' See *https://www.epa.gov/environmentaljustice.* In addition, Executive Order 12989 (59 FR 7629, February 16, 1994) directs agencies, to the greatest extent practicable and permitted by law, to identify and address, as appropriate, disproportionately high and adverse human health or environmental effects of its actions on minority and low-income populations. EPA has not identified any such disproportionate effects from this action as specified in Executive Order 12898. This ANPR solicits comments from the public regarding pesticide exemptions under FIFRA and does not propose specific actions or regulatory changes. Comments from the public are a precursor to possible future action; before the development of regulatory options have been considered. The exemptions about which EPA is soliciting comment are intended to reduce the regulatory burden for pesticides with minimal impact on all communities, including low-income and minority populations. The Agency welcomes public input on the consideration of environmental justice concerns in the context of the issues raised in this ANPR. If and when the Agency proposes regulatory options regarding exemptions under FIFRA or the related procedures, EPA will seek additional input from the public, as appropriate.

C. Petition Process and Rulemaking

Under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.,* the public can petition EPA ask the Agency to consider whether a new substance should be added to the list of active ingredients eligible for the minimum risk pesticide listing exemption in 40 CFR 152.25(f)(1) or the list of inert ingredients in 40 CFR 152.25(f)(2). EPA reviews the petition and may grant or deny the petition request. If the Agency decision is to grant the petition, EPA would generally publish in the **Federal Register** a proposed rule (also known as a Notice of Proposed Rulemaking or NPRM). Supporting documents for a proposed rule are made available in the corresponding official docket created for the rulemaking and available through the Federal eRulemaking Portal at *http://www.regulations.gov.* Once the

proposed rule publishes, the public has an opportunity to provide comments. EPA considers the comments received on the proposed rule, addressing comments and making revisions to the proposed revisions based on those comments, and issues a final rule. The rulemaking record is updated when the final rule publishes in the **Federal Register** and the regulatory provisions are codified in Title 40 of the Code of Federal Regulations (CFR). Petitions are considered by EPA on a case-by-case basis.

EPA invites the public to comment on the petition process and how it relates to the Minimum Risk Pesticide Program.

1. Do you have any suggestions for improving the processes for initiating a review of a substance or for implementing a decision that a substance may be used or may no longer be used in a minimum risk pesticide process? Please explain how changes could increase efficiencies.

2. Given the identified minimum risk characteristics of these products and anticipated low impacts on communities, are current approaches effective for seeking input from the public and stakeholders, including State local, Tribal, and territorial officials, scientists, labor unions, environmental advocates, and environmental justice organizations? Are there particular approaches that are more or less effective?

D. Evaluation of Minimum Risk Pesticide Ingredients

As described in Unit III.B., the public can petition EPA under the APA to request that the Agency consider whether a substance should be added to the list of active or inert ingredients eligible for inclusion in minimum risk pesticide products. To determine whether to grant or deny that petition, EPA applies the risk assessment factors described in the March 1996 final rule, as well as additional factors currently relevant to pesticide risk assessment. The risk factors from March 1996 include: (1) Whether the pesticidal substance is widely available to the general public for other uses; (2) If it is a common food or constituent of a common food; (3) If it has a nontoxic mode of action; (4) If it is recognized by the Food and Drug Administration (FDA) as safe; (5) If there is no information showing significant adverse effects; (6) If its use pattern will result in significant exposure, and (7) If it is likely to be persistent in the environment.

Currently, the EPA's pesticide registration risk assessment process considers the original seven factors described in the previous paragraph as part of a weight-of-the evidence approach, but also routinely considers the following additional six factors to determine whether the substance in question: (1) Is likely to have carcinogenic or endocrine disruptor properties; (2) Is likely to cause human health developmental, reproductive, mutagenic, or neurotoxicity issues; (3) Is a known allergen or a known allergenic source or a potential allergen; (4) Is associated with developmental toxicity/adverse effects to mammals, birds, aquatic organisms, insects, plants; (5) Produces or could produce toxic degradates; and (6) Has the potential to be contaminated with toxic or allergenic impurities.

Environmental justice and pollution prevention directives will continue to be a part of the regulatory planning process for the Minimum Risk Pesticide Listing Program.

EPA invites the public to comment on the factors described in this unit that are used to evaluate substances for consideration under the Minimum Risk Pesticide Listing Program.

1. Considering the previous discussion, should the factors discussed above be considered in determining whether a substance should be exempted from FIFRA regulation via the minimum risk exemption?

2. How would these other factors be weighed in a minimum risk determination?

3. Are there other polices, that EPA should consider in determining whether a substance should be exempt from FIFRA regulation via the Minimum Risk Pesticide Listing Program? For example, should EPA consider additional environmental justice and pollution prevention policies?

4. When considering products that are a ''minimum risk'' to public health and the environment, should the product also be considered to be of low impact to all communities, including low-income and minority populations? Please explain why or why not.

E. Exempted Classes of Pesticides

In addition to substances that may be formulated into pesticide products, the regulations at 40 CFR 152.25 exempt several classes of pesticides from registration under FIFRA due to their unique and specific character. For example, under 40 CFR 152.25(b), pheromones need not be registered under FIFRA if, for example, they are formulated into traps. The pheromone compound itself must either be naturally produced by an arthropod or a synthetically produced compound which is identical or substantially similar to the naturally produced pheromone with only slight variations to the compound as allowed by the regulation (40 CFR 152.25(b)(2) or (3)). EPA has determined that such products pose little risk to humans or the environment, as exposure is expected to be low and not likely distinguishable from the highest levels encountered naturally on days of heavy arthropod presence.

Another category, under 40 CFR 152.25(e), exempts from FIFRA registration products consisting only of natural cedar in certain forms (blocks, chips, shavings, needles, etc.), if the natural cedar meets certain criteria. To be eligible for this exemption, the product must be natural cedar or cedarwood and the product must not be treated, combined, or impregnated with any additional substances. Labeling claims for natural cedar or cedar wood products must be limited to specific arthropods or must exclude ticks if any general term such as ''arthropods,'' ''insects,'' ''bugs,'' or any other broad inclusive term, is used. Excluded from exemption are products formulated with cedarwood oil, a form of cedar more likely to be involved in accidental exposure via the eye, dermal or oral routes. For pests of significant public health importance, such as ticks, efficacy data and other registration data needs to be evaluated to ensure protection of human health and the environment.

In some situations, an exemption like those codified in 40 CFR 152.25(a) through (e) may be preferable to a listing under the Minimum Risk Pesticides Listing Program in 40 CFR 152.25(f). A minimum risk exemption would include all uses of a product consisting of eligible ingredients, provided that the labeling and other generic requirements are met. Other exemptions are more targeted as to the nature of the use, even as they are in some cases more general with respect to what ingredients are included. EPA believes that exemptions like those codified in 40 CFR 152.25(a) through (e) may be more appropriate for situations where the exemption sought is narrowly tailored to a specific use pattern or where the pesticide functions via complex chemical processes that do not lend themselves to identification and listing of active and inert ingredients.

As these examples show, EPA has exempted some minimum risks products with pesticidal properties and uses from FIFRA regulation separately from the list of minimum risk pesticide ingredients. These include, like cedar, unrefined natural products that lack a specific formulation and products with

a specific form or application, such as pheromone traps. One example of an unrefined natural product which currently lacks a specific formulation is peat. Peat is an accumulation of partially decomposed organic material found in peatlands or bogs, and has uses as fuel, in gardening, and in certain types of septic filtration systems. While the use of peat in septic systems may be intended for a pesticidal (antimicrobial) purpose, it has been suggested that registration of such uses may not be necessary to carry out the purposes of FIFRA. In the context of this ANPR, EPA is interested in comments about whether there may be criteria that could address such circumstances or if EPA should consider proposing the creation of an exemption from FIFRA registration for the specific use of peat in septic filtration systems. In considering such an exemption, because of the public health and environmental interests at stake, should EPA also consider which label and labeling claims might be considered false or misleading for these systems (*i.e.,* they could not be marketed to perform controls that they cannot be shown to achieve), and whether such circumstances warrant the consideration of any other limitations on the exemption from FIFRA registration.

EPA invites the public to comment on the following questions on the current classes of pesticide exemptions found in 40 CFR 152.25 or on other aspects of the Minimum Risk Pesticides Listing Program.

1. EPA broadly requests comment on the utility, clarity, functioning, and implementation of the provisions in 40 CFR 152.25.

2. Are there other pesticidal substances or systems, like peat as mentioned above, that EPA should consider adding as a new class at 40 CFR 152.25 for exemption from registration under FIFRA? How do these other pesticidal substances or systems meet the existing factors?

3. What other factors should EPA consider in determining whether a category or class of products should be exempted from FIFRA regulation? Please explain how these other factors should be weighed in a determination.

4. When considering whether a category or class of products are a ''minimum risk'' to public health and the environment, should the category or class of products also be considered as being of low impact to all communities, including low-income and minority populations? Are there other factors that the Agency should consider?

F. Minimum Risk Pesticide Program Exemption

Currently, to be eligible for the minimum risk exemption, a pesticide product must meet the following conditions:

Condition 1: The product's active ingredients must all be listed in 40 CFR 152.25(f)(1).

Condition 2: The product's inert ingredients may only be those that are:

- Listed in Table 2 of 40 CFR 152.25(f)(2)(iv); or
- A commonly consumed food commodity, animal feed item, or edible fat and oils as described in 40 CFR 180.950(a) through (c) as given in 40 CFR 152.25(f)(2)(i) through (iii).

Condition 3: All the ingredients (both active and inert) must be listed on the label. The active ingredient(s) must be listed by the label display name in 40 CFR 152.25(f)(1) and their percentage by weight in the product.

Condition 4: The product must not bear claims to control or to mitigate microorganisms that pose a threat to human health or claims to control insects or rodents carrying specific diseases.

Condition 5: The name of the producer or the company for whom the product was produced, and the company's contact information must be displayed prominently on the product label.

Condition 6: The label cannot include any false or misleading statements.

A pesticide product that meets all these conditions is exempt from federal regulation under FIFRA. EPA does not review products that claim to meet the criteria set by 40 CFR 152.25(f), and companies do not report such products to EPA. However, states may enforce and often have their own requirements regarding minimum risk products. In 2019, a majority of states required products that are exempt from federal regulation under 40 CFR 152.25(f) to adhere to some form of state regulation, varying from a simple fee to complete state registration.

The states have reported that the regulation of federally exempt products has presented some challenges for the states. EPA's previous response to the state concerns prompted the 2015 rule change to the federal program. The 2015 amendment codified the inert ingredients list by adding specific chemical identifiers, where available, for all eligible active and inert ingredients. The 2015 rule also modified the labeling requirements for the exemption to require products to list ingredients on the label with a designated label display name and provide the producer's contact information.

EPA invites the public to comment on the following questions on the Minimum Risk Pesticide Listing Program or the minimum risk exemptions and solicits comments on other aspects of the Minimum Risk Pesticide Listing Program.

1. Have the changes to the federal program in the 2015 rule, which provided specific chemical identifiers and the labeling changes, made it easier for manufacturers, the public, and Federal, state, and tribal inspectors to identify specific chemicals used in minimum risk pesticide products?

2. Are there state challenges to implementing the minimum risk program? Can EPA address those challenges with changes to its program? Do states have suggestions for improvements to the program?

IV. Next Steps

EPA intends to review all the comments and information received in response to this ANPR, as well as previously collected and assembled information, to help determine whether to propose any additions or modifications to the Minimum Risk Pesticide Listing Program or related policies and to the class exemptions or the other provisions at 40 CFR 152.25. In addition to comments received in response to this ANPR, EPA may seek additional information from states, industry or other stakeholders. Should EPA decide to move forward with changes to the program, the next step would be to identify, develop and evaluate specific options for amending the current regulations in 40 CFR 152.25, and issue a proposed rule for public review and comment. During the development of the proposed rule, the Agency may also engage stakeholders or provide other opportunities to comment on EPA's proposal.

IV. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011).

B. Other Regulatory Assessment Requirements

Because this action does not impose or propose any requirements, and instead seeks comments and suggestions for the Agency to consider in possibly developing a subsequent proposed rule, the various other review requirements in statutes and Executive Orders that apply when an agency impose requirements do not apply to this ANPR. Should EPA subsequently determine to pursue a rulemaking, EPA will address the statutes and Executive Orders as applicable to that rulemaking.

As part of your comments on this ANPR, please include any comments or information that you believe could help the Agency assess the potential impact of a subsequent regulatory action with regard to the following:

Potential economic impacts on small entities pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

Potential applicability of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (15 U.S.C. 272 note);

Potential environmental health or safety effects on children pursuant to Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997);

Potential human health or environmental effects on minority or low-income populations pursuant to Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994); and

Potential impacts to state and local governments or tribal governments.

The Agency will consider such comments during the development of a subsequent rulemaking as it takes appropriate steps to address any applicable requirements.

List of Subjects in 40 CFR Part 152

Environmental protection, Exemptions from pesticide regulation, Minimum risk pesticides.

Michael S. Regan,

Administrator.

[FR Doc. 2021–07033 Filed 4–7–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 258

[EPA–R9–RCRA–2021–0127; FRL–10021–27–Region 9]

Research, Development and Demonstration (RD&D) Rule for the Salt River Pima-Maricopa Indian Community Landfill RD&D Project

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve revisions to the site-specific Research, Development and Demonstration rule for the Salt River Pima-Maricopa Indian Community (SRPMIC), Salt River Landfill Research, Development and Demonstration Project in order to increase the maximum term for the site-specific rule from 12 to 21 years and also revise the site-specific rule to reflect a change in the division title for U.S. EPA Region 9, from the Waste Management Division to the Land, Chemicals and Redevelopment Division. In the ''Rules and Regulations'' section of this **Federal Register**, EPA is taking parallel action in a direct final rule without a prior proposed rule to revise the site-specific rule to allow operation of the Salt River Landfill Research, Development and Demonstration Project for a total of 21 years and to revise the site-specific rule to reflect a change in the division title for U.S. EPA Region 9, from the Waste Management Division to the Land, Chemicals and Redevelopment Division. If we receive no adverse comment, we will take no further action on this proposed rule.

DATES: Written comments must be received by May 10, 2021.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R9–RCRA–2021–0127 at *http://www.regulations.gov,* or via email to *R9LandSubmit@epa.gov.* Due to COVID–19, we are not providing facsimile or regular mail options, because those are not viable at this time. For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be removed or edited from *Regulations.gov*. For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Steve Wall, EPA Region IX, (415) 972–3381, *wall.steve@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' or ''our'' refer to the EPA.

I. Why is EPA issuing this proposed rule?

This document proposes to approve of revisions to the Research, Development and Demonstration (RD&D) Rule for the Salt River Pima-Maricopa Indian Community Landfill RD&D Project to extend the total project period from 12 years to 21 years. We are also proposing to revise the site-specific rule for this Project to reflect a change in the division title for U.S. EPA Region 9, from the Waste Management Division to the Land, Chemicals and Redevelopment Division. We have also published a parallel direct final rule without a prior proposed rule to revise the site-specific rule to allow operation of the Salt River Landfill for a total of 21 years so as to conform the site-specific flexibility rule for this Indian country facility to the 2016 national RD&D rule. The direct final rule will also revise the site-specific rule to reflect the change in the division title for U.S. EPA Region 9, from the Waste Management Division to the Land, Chemicals and Redevelopment Division. The direct final rule is being published in the ''Rules and Regulations'' section of this **Federal Register** because we view this as a noncontroversial action and anticipate no adverse comment. We have explained our reasons for this action in the preamble to the direct final rule.

If we receive no adverse comment, we will not take further action on this proposed rule. If we receive adverse comment, we will withdraw the direct final rule and it will not take effect. We would address all public comments in

any subsequent final decision based on this proposed rule.

We do not intend to institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information, please see the information provided in the **ADDRESSES** section of this document.

II. Legal Authority for This Proposal

Under sections 1008, 2002, 4004, and 4010 of the Resource Conservation and Recovery Act of 1976 (RCRA) as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), EPA established revised minimum Federal criteria for Municipal Solid Waste Landfills (MSWLFs).

The MSWLF criteria are in the Code of Federal Regulations at 40 CFR part 258. These regulations are self-implementing and apply directly to owners and operators of MSWLFs. For many of these criteria, 40 CFR part 258 includes a flexible performance standard as an alternative to the self-implementing regulation; its use requires approval by the Director of an EPA-approved state.

Since EPA's approval of a state program does not extend to Indian country, owners and operators of MSWLF units located in Indian country cannot take advantage of the flexibilities available to those facilities subject to an approved state program. However, the EPA has the authority under sections 2002, 4004, and 4010 of RCRA to promulgate site-specific rules that may provide for use of alternative standards. See *Yankton Sioux Tribe* v. *EPA,* 950 F. Supp. 1471 (D.S.D. 1996); *Backcountry Against Dumps* v. *EPA,* 100 F.3d 147 (D.C. Cir. 1996). EPA has developed draft guidance on preparing a site-specific request to provide flexibility to owners or operators of MSWLFs in Indian country (Site-Specific Flexibility Requests for Municipal Solid Waste Landfills in Indian Country Draft Guidance, EPA530–R–97–016, August 1997).

In 2004, EPA issued a final rule at 40 CFR 258.4 amending the municipal solid waste landfill criteria to allow for RD&D permits. 69 FR 13242, March 22, 2004. The 2004 rule allows for variances from specified criteria for a limited time. Specifically, the rule allows for the Director of an approved state to issue a time-limited RD&D permit for a new MSWLF unit, existing MSWLF unit, or lateral expansion, for which the owner or operator proposes to use innovative and new methods which vary from either or both of the following: (1) The run-on control systems at 40 CFR 258.26(a)(1); and/or (2) the liquids restrictions at 40 CFR 258.28(a), provided that the MSWLF unit has a leachate collection system designed and constructed to maintain less than a 30-centimeter depth of leachate on the liner. The rule also allows for the issuance of a time-limited RD&D permit for which the owner or operator proposes to use innovative and new methods that vary from the final cover criteria at 40 CFR 258.60(a)(1) and (2), and (b)(1), provided that the owner or operator demonstrates that the infiltration of liquid through the alternative cover system will not cause contamination to groundwater or surface water, or cause leachate depth on the liner to exceed 30 centimeters. RD&D permits must include such terms and conditions at least as protective as the criteria for MSWLFs to assure protection of human health and the environment. In adopting the RD&D rule, EPA stated that RD&D facilities in Indian country could be approved in a site-specific rule.

The 2004 RD&D Rule included time limits such that an RD&D permit cannot exceed three years and a renewal of an RD&D permit cannot exceed three years. Although multiple renewals of an RD&D permit can be issued, the 2004 RD&D rule included a total term for an RD&D permit, including renewals, of up to twelve years. In 2016, EPA promulgated a final rule to revise the maximum permit term for MSWLF units operating under the RD&D permit program (at 40 CFR 258.4(e)) to allow the Director of an approved State to increase the number of permit renewals to six, for a total permit term of up to 21 years. 81 FR 28720, May 10, 2016. See also 80 FR 70180, November 13, 2015.

III. Background

In 2009, EPA made a final determination to approve an RD&D project at the Salt River Landfill, promulgating a site-specific rule at 40 CFR 258.42(a). 74 FR 11677, March 19, 2009. Periodic three-year extensions have allowed the continued operation of the Salt River Landfill as a bioreactor to the present. However, the 12-year total term in the current rule, issued March 19, 2009, expires on March 19, 2021.

IV. What action is the Agency proposing today?

EPA is proposing to revise 40 CFR 258.42(a) to allow operation of the Salt River Landfill RD&D unit, consistent with the RD&D rule at 40 CFR 258.4(e), for a total of up to 21 years. However, upon the effective date of these proposed revisions, a renewal of this authority must continue to be sought every three years. Each renewal request would also be subject to public notice and comment. No renewal could be granted for a period greater than three years and the overall period of operation would not exceed twenty-one years. EPA is also proposing technical corrections to its site-specific rule to reflect a change in the division title for U.S. EPA Region 9, from the Waste Management Division to the Land, Chemicals and Redevelopment Division.

This action proposes a revision of the overall term of the site-specific rule pertaining to SRPMIC's site-specific flexibility request to: (1) To operate Phase VI as an anaerobic bioreactor by recirculating leachate and landfill gas condensate, and adding storm water and groundwater to the below grade portions of Phase VI; and (2) recirculate leachate and landfill gas condensate and add storm water and groundwater to the below grade portions of areas of the landfill known as Phases IIIB and IVA to increase the moisture content of the waste mass in these phases.

The 2016 revision to the national RD&D rule at 40 CFR 258.4(e)(1) articulated the anticipated effect of extending the overall period of operations of these units from 12 to 21 years. 81 FR at 28721. Based on that rulemaking, EPA has determined that the extension of the site-specific rule's total term, if finalized, would provide EPA the ability to issue renewals to the existing authority to operate this RD&D unit pursuant to this program for up to 21 years instead of 12 years. During this time, the EPA would continue to evaluate data from this facility. In addition, the SRPMIC would not be expected to incur significant new costs as a result of these proposed revisions. Based on the 2016 rulemaking, the annual costs for ongoing recordkeeping and reporting requirements are estimated at $2,410 per facility and seeking periodic extensions of the authority to operate an RD&D unit remains voluntary. This proposed action would not impose any new regulatory burden. This proposed rule would allow EPA to increase the number of extensions of the operational period for the Salt River Landfill's RD&D unit if, the tribal owner/operator continues to choose to participate in this research program. Increasing the possible number of extensions of the RD&D unit's operational term may benefit the tribal owner/operator of RD&D units, assuming a projected increase in the rate of return for 21 years compared to 12 years, based on the findings in EPA's 2016 rulemaking. 81 FR at 28721.

The 2016 final rule also indicated that increasing the possible number of extensions of RD&D permit terms was

expected to provide more time for the EPA to collect additional data on the approaches being taken under these RD&D permits. *Id.* With respect to the continued operation of the Salt River Landfill, the proposed rule would be expected to have the following potential benefits set forth in the 2016 rule's preamble: Increased potential for revenue from the sale of landfill gas for use as a renewable source of fuel, accelerated production and capture of landfill gas for potential use as a renewable fuel, and accelerated stabilization and corresponding decreased post-closure care activities for facilities due to the accelerated decomposition of waste.

V. Statutory and Executive Order Reviews

Section 106 of the National Historic Preservation Act of 1966 (NHPA) requires Federal agencies to take into account the effects of their undertakings on historic properties and to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment. 36 CFR part 800. While EPA consulted with the SRPMIC, as well as the Ak-Chin Indian Community, the Fort McDowell Yavapai Nation, the Gila River Indian Community, the Hopi Tribe, the Pascua Yaqui Tribe, the Tohono O'odham Nation, the Yavapai-Apache Nation, and the Yavapai-Prescott Indian Tribe on the original site-specific flexibility rulemaking in 2009 (*see* 74 FR at 11679), EPA finds that this proposal to extend the existing 12-year term of the authority to operate a bioreactor in accordance with EPA's RD&D Program to a 21-year term, if finalized, will have ''no potential to cause effects'' on historic properties within the meaning of Section 106 of the NHPA.

In compliance with the Endangered Species Act, 16 U.S.C. 1536 *et seq.,* EPA performed a biological assessment for the project site. No known threatened, endangered or candidate species or their habitat exist on the site. Additionally, there are no ground disturbing surface activities associated with EPA's approval of an increase to the maximum period the Salt River Landfill RD&D project can operate units as bioreactor units. No impacts to listed species that may occur in the project area are anticipated.

Under Executive Order 12866, ''Regulatory Planning and Review,'' (58 FR 51735, October 4, 1993), this proposed rule is not of general applicability and therefore is not a regulatory action subject to review by the Office of Management and Budget (OMB).

This proposed rule would not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (*44 U.S.C. 3501 et seq.*) because it would apply to a particular facility only.

Because this proposed rule is of particular applicability relating to a particular facility, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (*5 U.S.C. 601 et seq.*), or to sections 202, 204, and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4). Because this proposed rule would affect only a particular facility, it would not significantly or uniquely affect small governments, as specified in section 203 of UMRA.

Because this proposed rule will affect only a particular facility, it does not have federalism implications. Nor will this proposed rule have any substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, ''Federalism,'' (64 FR 43255, August 10, 1999). Thus, Executive Order 13132 does not apply to this proposed rule.

This proposed rule also is not subject to Executive Order 13045, ''Protection of Children From Environmental Health Risks and Safety Risks,'' (62 FR 19885, April 23, 1997), because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this proposed action present a disproportionate risk to children. The basis for this belief is EPA's conservative analysis of the potential risks posed by SRPMIC's RD&D Program and the controls and standards set forth in the application and incorporated by reference into the original site-specific rule at 40 CFR 258.42(a).

This proposed rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' (66 FR 28355 May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

As required by section 3 of Executive Order 12988, ''Civil Justice Reform,'' (61 FR 4729, February 7, 1996), in issuing this proposed rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct.

Executive Order 13175, entitled ''Consultation and Coordination With Indian Tribal Governments,'' (65 FR 67249, November 9, 2000), calls for EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' EPA has concluded that this proposed action may have tribal implications because it is directly applicable to the owner and/or operator of the landfill, which is currently the SRPMIC. However, this proposed rule will neither impose substantial direct compliance costs on tribal governments, nor preempt Tribal law. This proposed rule to revise the maximum total term from up to 12 years to up to 21 years will affect only the SRPMIC's operation of their landfill on their own land.

On March 10, 2021, EPA offered consultation to the SRPMIC so as to give the Tribe a meaningful and timely opportunity to provide input into the extension of the total term of the rule from 12 years to 21 years. To the extent that SRPMIC accepts EPA's offer to consult on this action, the Agency will endeavor to undertake such consultation during the 30-day public comment period for this direct final rule.

With respect to the type of flexibility being afforded to SRPMIC under this proposed rule, E.O. 13175 does provide for agencies to review applications for flexibility ''with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.'' In formulating this proposed rule, the Region has been guided by the fundamental principles set forth in E.O. 13175 and has granted the SRPMIC the ''maximum administrative discretion possible'' within the standards set forth under the RD&D rule in accordance with E.O. 13175.

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (*15 U.S.C. 272* note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards, (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The technical standards included in the original site-specific flexibility request were proposed by SRPMIC. Given EPA's obligations under

E.O. 13175 (see above), the Agency applied the standards established by the Tribe. In addition, the Agency considered the Interstate Technology and Regulatory Council's February 2006 technical and regulatory guideline, ''Characterization, Design, Construction, and Monitoring of Bioreactor Landfills.'' Nothing about this analysis has changed since the 2009 site-specific rule was promulgated nor does the proposed extension of the total possible term of the RD&D unit's operations in accordance with the site-specific rule from 12 years to 21 years affect this analysis.

Congressional Review Act (CRA). This action is not subject to the CRA because the term ''rule'' as it is used in the CRA does not include ''any rule of particular applicability,'' such as a site-specific rule. See, 5 U.S.C. Section 804(3)(A).

Environmental Justice—Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and the accompanying presidential memorandum advising Federal agencies to identify and address, whenever feasible, disproportionately high and adverse human health or environmental effects on minority communities or low-income communities. The action will not adversely impact minorities or low-income communities.

Authority: Sections 1008, 2002, 4004, and 4010 of the Solid Waste Disposal Act, as amended, 42 U.S.C. Sections 6907, 6912, 6944, and 6949a. Delegation 8–54, Site-Specific Rules for Flexibility from Owners/Operators of Municipal Solid Waste Landfills (MSWLFs) in Indian Country, November 24, 2010. Regional Delegation R9–8–54, October 10, 2014.

List of Subjects in 40 CFR Part 258

Environmental protection, Municipal landfills, Reporting and recordkeeping requirements, Waste treatment and disposal.

Dated: March 26, 2021.

Steven Barhite,

Acting Director, Land, Chemicals and Redevelopment Division, Region IX.

For the reasons set forth in the preamble, the EPA proposes to amend 40 CFR part 258 as follows:

PART 258—CRITERIA FOR MUNICIPAL SOLID WASTE LANDFILLS

■ 1. The authority citation for part 258 continues to read as follows:

Authority: 33 U.S.C. 1345(d) and (e); 42 U.S.C. 6902(a), 6907, 6912(a), 6944, 6945(c) and 6949a(c), 6981(a).

Subpart D—Design Criteria

■ 2. Revise § 258.42 paragraphs (a)(5) through (10) to read as follows:

§ 258.42 Approval of site-specific flexibility requests in Indian country.

(a) * * *

(5) The owner and/or operator shall submit reports to the Director of the Land, Chemicals and Redevelopment Division at EPA Region 9 as specified in ''Research, Development, and Demonstration Permit Application Salt River Landfill,'' dated September 24, 2007 and amended on April 8, 2008, including an annual report showing whether and to what extent the site is progressing in attaining project goals. The annual report will also include a summary of all monitoring and testing results, as specified in the application.

(6) The owner and/or operator may not operate the facility pursuant to the authority granted by this section if there is any deviation from the terms, conditions, and requirements of this section unless the operation of the facility will continue to conform to the standards set forth in § 258.4 and the owner and/or operator has obtained the prior written approval of the Director of the Land, Chemicals and Redevelopment Division at EPA Region 9 or the Director's designee to implement corrective measures or otherwise operate the facility subject to such deviation. The Director of the Land, Chemicals and Redevelopment Division or designee shall provide an opportunity for the public to comment on any significant deviation prior to providing written approval of the deviation.

(7) Paragraphs (a)(2), (3), (5), (6) and (9) of this section will terminate on March 19, 2024, unless the Director of the Land, Chemicals and Redevelopment Division at EPA Region 9 or the Director's designee renews this authority in writing. Any such renewal may extend the authority granted under paragraphs (a)(2), (3), (5), (6) and (9) of this section for up to an additional three years, and multiple renewals (up to a total of 21 years from March 19, 2009) may be provided. The Director of the Land, Chemicals and Redevelopment Division or designee shall provide an opportunity for the public to comment on any renewal request prior to providing written approval or disapproval of such request.

(8) In no event will the provisions of paragraphs (a)(2), (3), (5), (6) or (9) of this section remain in effect after March 19, 2030, 21 years after the March 19, 2009 date of publication of the site-specific rule in this section. Upon termination of paragraphs (a)(2), (3), (5), (6) and (9) of this section, and except with respect to paragraphs (a)(1) and (4) of this section, the owner and/or operator shall return to compliance with the regulatory requirements which would have been in effect absent the flexibility provided through the site-specific rule in this section.

(9) In seeking any renewal of the authority granted under or other requirements of paragraphs (a)(2), (3), (5) and (6) of this section, the owner and/or operator shall provide a detailed assessment of the project showing the status with respect to achieving project goals, a list of problems and status with respect to problem resolutions, and any other requirements that the Director of the Land, Chemicals and Redevelopment Division at EPA Region 9 or the Director's designee has determined are necessary for the approval of any renewal and has communicated in writing to the owner and operator.

(10) The owner and/or operator's authority to operate the landfill in accordance with paragraphs (a)(2), (3), (5), (6) and (9) of this section shall terminate if the Director of the Land, Chemicals and Redevelopment Division at EPA Region 9 or the Director's designee determines that the overall goals of the project are not being attained, including protection of human health or the environment. Any such determination shall be communicated in writing to the owner and operator.

[FR Doc. 2021–06902 Filed 4–7–21; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

46 CFR Part 520

[Docket No. 21–03]

RIN 3072–AC86

Carrier Automated Tariffs

AGENCY: Federal Maritime Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Federal Maritime Commission (Commission) has identified inconsistencies in the manner in which different carriers are interpreting and applying certain aspects of the Commission's rules. This Advance Notice of Proposed Rulemaking (ANPRM) will facilitate a fuller understanding of these issues prior to the Commission potentially proposing regulatory changes to its tariff regulations. The Commission observes that carriers are charging widely varying

fees and imposing varying minimum requirements for access to common carrier tariffs. The Commission seeks information regarding the impact of such fees and minimum requirements on public access to common carrier rules, rates, practices and charges in published tariffs and whether existing fees or requirements are unreasonable. Additionally, certain non-vessel-operating common carriers (NVOCCs) are applying what are commonly known as ''pass-through charges'' inconsistently under common carrier tariffs, and the Commission seeks to gain a broader understanding and information from industry stakeholders, including NVOCCs and vessel-operating common carriers (VOCCs).

DATES: Submit comments on or before June 7, 2021.

ADDRESSES: You may submit comments, identified by Docket No. 21–03, by the following methods:

- *Email: secretary@fmc.gov.* For comments, include in the subject line: ''Docket No. 21–03, Comments on Carrier Automated Tariffs Rulemaking.'' Comments should be attached to the email as a Microsoft Word or text-searchable PDF document.

Instructions: For detailed instructions on submitting comments, including requesting confidential treatment of comments, and additional information on the rulemaking process, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to the Commission's website unless the commenter has requested confidential treatment.

Docket: For access to the docket to read background documents or comments received, go to the Commission's Electronic Reading Room at: *https://www2.fmc.gov/readingroom/proceeding/21-03/.*

FOR FURTHER INFORMATION CONTACT: Rachel E. Dickon, Secretary; Phone: (202) 523–5725; Email: *secretary@fmc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Shipping Act of 1984, as amended (46 U.S.C. 40101–41309) (Shipping Act or Act) requires that common carriers (*i.e.,* VOCCs and NVOCCs) and conferences keep open for public inspection in an automated tariff system, their tariffs showing all rates, charges, classifications, rules and practices, and to make those tariffs available electronically to any person without time, quantity, or other limitation. 46 U.S.C. 40501(c). The Act charges the Commission with establishing requirements for the accuracy and accessibility of all private automated systems used to provide tariff information to the public. § 40501(g)(1). The Act also provides that a reasonable fee may be charged for such access, except that Federal agencies may not be charged a fee. § 40501(c).

Pursuant to the Commission's *Plan for Regulatory Review of Existing FMC Rules,* the Commission's regulations at 46 CFR part 520, *Carrier Automated Tariffs,* are currently under review.[1] As part of this initiative, two issues have been identified that would benefit from receiving clarifying information from industry participants and other supply chain stakeholders. Accordingly, the Commission is seeking comment regarding: (1) Tariff access fees and minimum access requirements; and (2) pass-through charges prior to potentially moving forward with a proposed rulemaking.

II. Request for Comment

A. Tariff Access Fees

Before the passage of the Ocean Shipping Reform Act of 1998 (OSRA), which became effective May 1, 1999, carrier and conference tariffs were filed with the Commission through the Commission's Automated Tariff Filing and Information system. OSRA eliminated the requirement that tariffs be filed with the Commission, and instead, directed carriers and conferences to publish tariffs in carrier automated tariff systems. The Commission promulgated implementing regulations reflecting this change effective May 1, 1999, in FMC Docket No. 98–29, *Carrier Automated Tariff Systems.*[2] Once carriers and conferences deployed their carrier automated tariff systems, the Commission began receiving informal complaints regarding certain tariff access fees and minimum subscription requirements that potential tariff users believed were excessive. As a result, on May 9, 2000, the Commission initiated FMC Docket No. 00–07, *Advance Notice of Proposed Rulemaking Concerning Public Access Charges to Carrier Automated Tariffs and Tariff Systems Under the Ocean Shipping Reform Act of 1998,* to determine whether certain tariff access charges and monthly subscription requirements might limit the public's ability to access tariffs and tariff systems, and sought public comment to address the reasonableness of tariff access charges. Based on an assessment of the comments received in response to Docket No. 00–07, the Commission determined that promulgating a proposed rule on tariff access charges and their reasonableness was not necessary. The Commission did, however, issue a Circular Letter to provide guidance to common carriers, conferences, and tariff publishers with respect to the issue of reasonable fees, and subsequently discontinued the proceeding.[3] In relevant part, Circular Letter No. 00–2 read:

> The Commission has not promulgated regulations governing tariff access charges. However, it appears that ''a reasonable charge'' for access should recover only costs and expenses incurred by carriers in making their tariffs accessible to the public, and should not recover the costs and expenses associated with:
>
> (1) Developing or publishing a tariff/essential terms publication;
>
> (2) Providing access to federal agencies;
>
> (3) Providing access to the publishing carrier's employees or agents or to a publishing conference's employees or its members' employees or agents; or
>
> (4) Developing any other function or service for possible use by a carrier's or conference's employees or agents, as the case may be.

Any subscription fees assessed should also be consistent with these criteria.

While the foregoing relates to the Commission's experience at the inception of carrier automated tariff systems in 1999, more recent experience indicates that some tariff access fees may be so high that they effectively prevent tariff users from reviewing certain carrier tariffs, particularly those with substantial minimum charges, such as $1,000 or $1,500.[4] This can be an issue, not only for shippers who primarily ship cargo under tariff rates, but also for shippers using service contracts. Once the shipper's minimum quantity commitment under the service contract has been fulfilled, the carrier often rates subsequent shipments under its tariff rates, For this reason, shippers may have a need to access tariffs to determine the applicable rate for their cargo once the volume commitment for their service contract has been fulfilled. The unimpeded access to tariffs is also

[1] See *Plan for Regulatory Review of Existing FMC Rules,* updated November 23, 2020, at *https://www.fmc.gov/wp-content/uploads/2020/11/RegulatoryReformPlan.pdf.*

[2] *See* Final Rule and Interim Final Rule, *Carrier Automated Tariff Systems,* 64 FR 11218 (March 8, 1999).

[3] *See* FMC Docket No. 00–07 (Proceeding Discontinued, July 11, 2001) at *https://www2.fmc.gov/readingroom/proceeding/00-07/. See also* Circular Letter No. 00–2, *Charges for Access to Tariffs and Tariff Systems* (October 6, 2000) at *https://www.fmc.gov/about-the-fmc/circulars/.*

[4] Fee range based on information reported to Commission staff when contacted periodically by users for guidance and assistance with tariff access.

imperative during periods of rate volatility, to ensure the shipper is aware of the most current applicable rates.

The Commission notes, however, that many major VOCCs and NVOCCs that self-publish tariffs provide access free of charge. While for such carriers, it is customary to request a user to register for tariff access by providing contact information and creating a Login/Username and Password. Once this has been accomplished, free access has generally been granted. For those carriers that do not provide tariff access free of charge, access fees appear to vary widely, with some carriers charging what appear to be excessive fees. This may indicate that, contrary to guidance provided by the Commission in Circular Letter 00–2, some carriers are not relating charges only to the actual costs of providing public access to tariff systems.

For the foregoing reasons, the Commission is concerned that the level of some tariff access fees may impair the public's ability to access the information in carrier tariffs. Accordingly, the Commission seeks responses to the following questions, as well as any additional information related to the public's experience with tariff access fees.

1. Do you agree or disagree with the Commission's guidance found in Circular Letter 00–2, that '' 'a reasonable charge' for access should recover only costs and expenses incurred by carriers in making their tariffs accessible to the public''? In your response, please provide examples of potential other costs that should be included or excluded in an access fee, and why.

2. In your experience, do you believe the carriers you do business with are charging tariff access fees that only recover the costs and expenses incurred in making tariffs accessible to the public? If not, please provide examples where this may not be the case.

3. Are you inhibited from accessing common carrier tariffs because of tariff access fees or tariff access processes?

In your response, where possible, please include the carrier name, tariff number and title, tariff publisher (if applicable), and access fees for any tariffs you believe have excessive fees or unreasonable access requirements.

B. Pass-Through Charges

The Commission has become aware of disparate industry interpretations of the types of charges that may be ''passed through'' to shippers without markup (not to exceed the charge the common carrier incurs) in connection with shipments moving under common carrier tariffs, particularly by NVOCCs. While the Commission's tariff regulations do not define so called ''pass-through charges,'' such charges are referenced in 46 CFR 520.8, *Effective Dates,* which specifies the types of tariff amendments that may become effective immediately upon tariff publication. More specifically, § 520.8(b)(4) provides that amendments may take effect upon publication that make changes in charges for terminal services, canal tolls, additional charges, or other provisions not under the control of the common carriers or conferences, which merely acts as a collection agent for such charges and the agency making such changes does so without notifying the tariff owner.

Historically, we understand VOCCs have relied on this provision to make changes to port charges, governmental charges, and other similar charges beyond their control effective upon publication in their tariffs. In contrast, NVOCCs have varied widely in the types of charges they have attempted to charge to shippers pursuant to § 520.8(b)(4) when applying tariff rates, particularly with respect to VOCC charges and surcharges. The Commission has encountered narrow interpretations by NVOCCs of the types of VOCC charges that can be passed through without markup, but more commonly, broader interpretations by NVOCCs have been seen, including the pass-through of all VOCC charges and surcharges, as well as VOCC General Rate Increases (GRIs).

In this regard, some NVOCCs appear to be conflating the Commission's tariff regulations with the Commission's 2018 rulemaking that expanded the flexibility of NVOCC Negotiated Rate Arrangements (NRAs) and NVOCC Service Arrangements (NSAs).[5] NVOCCs using NRAs are exempt from the general tariff publication requirements in 46 U.S.C. 40501 and many of the corresponding regulations in 46 CFR part 520. 46 CFR 532.2. Unlike common carriers subject to the tariff requirements in 46 U.S.C. 40501 and 46 CFR part 520, NVOCCs using NRAs must describe the applicable pass-through charges in either the NRA or rules tariff but need not specify the amount of those charges. 46 CFR 532.5(d)(2). Rather ''[f]or any pass-through charge for which a specific amount is not included in the NRA or the rules tariff, the NVOCC may only invoice the shipper for charges the NVOCC incurs, with no markup.'' 46 CFR 532.5(d)(2)(iv). For NVOCC NRAs, the Commission provided greater flexibility by further stating that ''[t]he Commission is removing the prohibition on the pass-through of ocean carrier GRIs in order to increase efficiency and flexibility within the NRA framework.'' 83 FR 34780, 34787 (July 23, 2018).

The current tariff regulations permit common carriers to apply changes to any governmental or non-governmental charge beyond the carrier's control (*e.g.,* terminal handling charges or canal tolls) effective on publication. 46 CFR 520.8(b)(4). But the Commission does not view VOCC GRIs as falling within this provision. A GRI is an adjustment to the base freight rate rather than a surcharge and may not become effective immediately on publication under § 520.8(b)(4). While the Commission has treated VOCC GRIs as pass-through charges under the NVOCC NRA exemption from tariff rate publication, there is no corresponding provision in the Commission's regulations for cargo moving under tariffs. VOCCs and NVOCCs are common carriers in their relationship with their shippers. Therefore, like VOCCs, NVOCCs must also publish GRIs in their tariffs and provide 30 days' notice of the increase to their shippers, as required by the Commission's regulation at 46 CFR 520.8(a)(1). Additionally, common carriers, which include NVOCCs, must include in their tariffs all rates and charges, including the charges described in 46 CFR 520.8(b)(4). 46 CFR 520.3.

The Commission is concerned that the widely varying interpretations and inappropriate application of so-called pass-through charges under common carrier tariffs may result in harm to shippers. The practice of some carriers to incorrectly pass-through charges could deny the shipper full transparency regarding the total freight charges that will apply to a shipment, as well as deprive the shipper of advance notice of any increase in those charges. The Commission, therefore, seeks responses to the following questions, as well as any additional information related to the public's experience with pass-through charges.

1. For an ocean common carrier (VOCC), what are the typical charges that are not under its control and for which the ocean common carrier merely acts as a collection agent?

2. For an ocean common carrier (VOCC), how does its tariff specify or address those charges for which it merely acts as a collection agent?

3. For an NVOCC, what are the typical charges that are not under its control and for which the NVOCC merely acts as a collection agent?

4. For an NVOCC, how does its tariff specify or address those charges for which it merely acts as a collection agent?

5. How do common carriers communicate to shippers that the so-

[5] *See* Final Rule in FMC Docket No. 17–10, *Amendments to Regulations Governing NVOCC Negotiated Rate Arrangements and NVOCC Service Arrangements,* 83 FR 34780 (July 23, 2018).

called pass-through charges are for the account of shippers?

6. How can shippers be assured that common carriers collect pass-through charges without adding any mark-up?

In your response, where possible, please include the carrier name(s) and the relevant tariff provisions.

III. Public Participation

How do I prepare and submit comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the docket, please include the docket number of this document in your comments.

You may submit your comments via email to the email address listed above under **ADDRESSES**. Please include the docket number associated with this notice and the subject matter in the subject line of the email. Comments should be attached to the email as a Microsoft Word or text-searchable PDF document.

How do I submit confidential business information?

The Commission will provide confidential treatment for identified confidential information to the extent allowed by law. If your comments contain confidential information, you must submit the following by email to the address listed above under **ADDRESSES**:

- A transmittal letter requesting confidential treatment that identifies the specific information in the comments for which protection is sought and demonstrates that the information is a trade secret or other confidential research, development, or commercial information.
- A confidential copy of your comments, consisting of the complete filing with a cover page marked ''Confidential-Restricted,'' and the confidential material clearly marked on each page.
- A public version of your comments with the confidential information excluded. The public version must state ''Public Version—confidential materials excluded'' on the cover page and on each affected page and must clearly indicate any information withheld.

Will the Commission consider late comments?

The Commission will consider all comments received before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments received after that date.

How can I read comments submitted by other people?

You may read the comments received by the Commission at the Commission's Electronic Reading Room at the addresses listed above under **ADDRESSES**.

In addition to soliciting the comments of regulated entities, the shipping public and supply chain stakeholders, the Commission encourages any interested party to comment on these questions and any experience they have related to these two issues.

By the Commission.

Rachel E. Dickon,

Secretary.

[FR Doc. 2021–06128 Filed 4–7–21; 8:45 am]

BILLING CODE 6730–02–P

Notices

Federal Register
Vol. 86, No. 66
Thursday, April 8, 2021

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.

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Kentucky Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Kentucky Advisory Committee (Committee) will hold a meeting via tele-conference on Wednesday, April 21, 2021, at 12:00 p.m. Eastern Time for the purpose of reviewing the draft report on bail reform in Kentucky.

DATES: The meeting will be held on Wednesday, April 21, 2021, at 12:00 p.m. Eastern Time.

Public Call Information

Join online: *https://tinyurl.com/ded8evtz.*

FOR FURTHER INFORMATION CONTACT: Barbara Delaviez at *bdelaviez@usccr.gov* or (202) 539–8246.

SUPPLEMENTARY INFORMATION: Members of the public can listen to the discussion. This meeting is available to the public through the above listed toll-free number. An open comment period will be provided to allow members of the public to make a statement as time allows. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Barbara Delaviez at *bdelaviez@usccr.gov* in the Regional Program Unit Office/Advisory Committee Management Unit. Persons who desire additional information may contact the Regional Programs Unit Office at 202–539–8246.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available via *https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzlBAAQ* under the Commission on Civil Rights, Kentucky Advisory Committee link. Persons interested in the work of this Committee are also directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Unit office at the above email or phone number.

Agenda

1. Roll Call
2. Edit Report
3. Next Steps
4. Public Comment
5. Adjourn

Dated: April 5, 2021.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2021–07252 Filed 4–7–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–26–2021]

Approval of Subzone Status; Celgene Corporation; Warren and Summit, New Jersey

On February 10, 2021, the Executive Secretary of the Foreign-Trade Zones (FTZ) Board docketed an application submitted by the Port Authority of New York and New Jersey, grantee of FTZ 49, requesting subzone status subject to the existing activation limit of FTZ 49, on behalf of Celgene Corporation, in Warren and Summit, New Jersey.

The application was processed in accordance with the FTZ Act and Regulations, including notice in the **Federal Register** inviting public comment (86 FR 9908–9909, February 17, 2021). The FTZ staff examiner reviewed the application and determined that it meets the criteria for approval. Pursuant to the authority delegated to the FTZ Board Executive Secretary (15 CFR Sec. 400.36(f)), the application to establish Subzone 49U was approved on April 5, 2021, subject to the FTZ Act and the Board's regulations, including Section 400.13, and further subject to FTZ 49's 2,000-acre activation limit.

Dated: April 5, 2021.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2021–07242 Filed 4–7–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA918]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Portsmouth Naval Shipyard Dry Dock 1 Modification and Expansion

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

ACTION: Notice; proposed incidental harassment authorization; request for comments on proposed authorization and possible renewal.

SUMMARY: NMFS has received a request from the U.S. Navy (Navy) for authorization to take marine mammals incidental to Portsmouth Naval Shipyard Dry Dock 1 modification and expansion in Kittery, Maine. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS is

also requesting comments on a possible one-time, one-year renewal that could be issued under certain circumstances and if all requirements are met, as described in Request for Public Comments at the end of this notice. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorizations and agency responses will be summarized in the final notice of our decision.

DATES: Comments and information must be received no later than May 10, 2021.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service and should be sent by electronic mail to *ITP.esch@noaa.gov.*

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments, including all attachments, must not exceed a 25-megabyte file size. All comments received are a part of the public record and will generally be posted online at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Carter Esch, Office of Protected Resources, NMFS, (301) 427–8421. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an IHA) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHA with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which NMFS has not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA qualifies to be categorically excluded from further NEPA review.

NMFS will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

Summary of Request

On October 22, 2020, NMFS received a request from the Navy for an IHA to take marine mammals incidental to modification and expansion of Dry Dock 1 at Portsmouth Naval Shipyard in Kittery, Maine. The Navy submitted revised versions of the application on December 30, 2020, and January 19 and February 11, 2021. The application was deemed adequate and complete on February 19, 2021. The Navy's request is for take of harbor porpoises, harbor seals, gray seals, harp seals, and hooded seals by Level B harassment and Level A harassment. Neither the Navy nor NMFS expects serious injury or mortality to result from this activity; therefore, an IHA is appropriate.

NMFS previously issued three IHAs to the Navy for waterfront improvement work, in 2017 (81 FR 85525; November 28, 2016), 2018 (83 FR 3318; January 24, 2018), 2019 (84 FR 24476, May 28, 2019), and a renewal of the 2019 IHA (86 FR 14598; March 17, 2021). As required, the applicant provided monitoring reports (available at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities*) which confirm that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted. This proposed IHA (if issued) would cover the second year of a larger 5-year project, for which the Navy also intends to request take authorization for subsequent dock modification and expansion at the Portsmouth Naval Shipyard.

Description of Proposed Activity

Overview

The purpose of the proposed action is to modernize and maximize dry dock capabilities for performing current and future missions efficiently and with maximum flexibility. The Navy plans to modify and expand Dry Dock 1 (DD1) at the Portsmouth Naval Shipyard (PNSY) by constructing two new dry docking positions capable of servicing Virginia class submarines within the super flood basin of the dry dock.

The in-water portion of the dock modification and expansion work includes:

- Construction of the west closure wall;
- Construction of entrance structure closure walls; and
- Bedrock excavation.

Construction activities that could affect marine mammals are limited to in-water pile driving and removal activities, rock drilling, and underwater blasting.

Dates and Duration

In-water construction activities are expected to begin in spring 2021, with an estimated total of 29 days for pile

driving and pile removal, 130 days for drilling of blast charge holes, and 130 days of blasting for bedrock excavation, for a total of 289 construction days. Some of these activities would occur on the same day, resulting in 159 total construction days over 12 months. All in-water construction work will be limited to daylight hours, with the exception of pre-dawn (beginning no earlier than 3:00 a.m.) drilling of blast charge holes; drilling would not occur from sunset to pre-dawn.

Specific Geographic Region

The Shipyard is located in the Piscataqua River in Kittery, Maine. The Piscataqua River originates at the boundary of Dover, New Hampshire, and Elliot, Maine. The river flows in a southeasterly direction for 21 kilometers (km) before entering Portsmouth Harbor and emptying into the Atlantic Ocean. The lower Piscataqua River is part of the Great Bay Estuary system and varies in width and depth. Many large and small islands break up the straight-line flow of the river as it continues toward the Atlantic Ocean. Seavey Island, the location of the proposed action, is located in the lower Piscataqua River approximately 500 meters (m) from its southwest bank, 200 m from its north bank, and approximately 4 km upstream from the mouth of the river.

A map of the Portsmouth Naval Shipyard dock expansion action area is provided in Figure 1 below; additional maps are available in Figures 1–1 to 1–6 in the IHA application.

Water depths in the proposed project area range from 6.4 to 11.9 m, while water depths in the lower Piscataqua River near the proposed project area range from 4.5 m in the shallowest areas to 21 m in the deepest areas. The river is approximately 1 km wide near the proposed project area, measured from the Kittery shoreline north of Wattlebury Island to the Portsmouth shoreline west of Peirce Island. The furthest direct line of sight from the proposed project area would be 1.3 km to the southeast and 0.4 km to the northwest.

BILLING CODE 3510–22–P

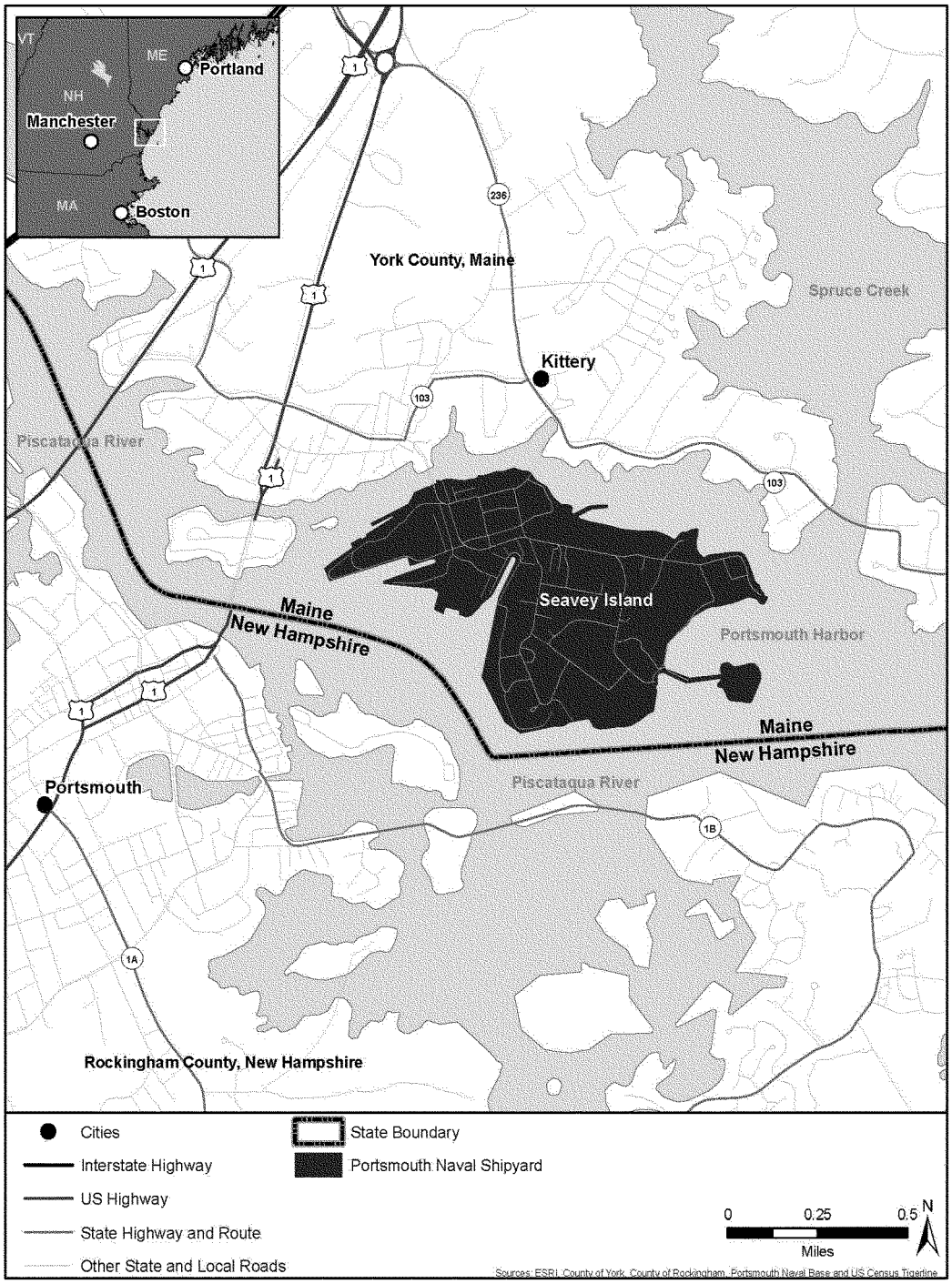


Figure 1. Site Location Map for Portsmouth Naval Ship Yard

BILLING CODE 3510–22–C

Detailed Description of Specific Activity

Under the proposed action, the expansion and modification would occur as multiple construction projects. Prior to the start of construction, the entrance to DD1would be dredged to previously permitted maintenance dredge limits. This dredging effort is required to support the projects; additional project-related dredging would occur intermittently throughout the proposed action. Since dredging and disposal activities would be slow-moving and generate continuous noise similar to other ongoing sources of industrial noise at PNSY, NMFS does not consider its effects as likely to rise to the level of take of marine mammals; therefore, these activities are not discussed further in this document.

The proposed 2021 through 2022 construction activities include pile driving (vibratory and impact), rock drilling, and blasting associated with construction of the super flood basin. The action would take place in and adjacent to DD1 in the Controlled Industrial Area (CIA) that occupies the

western extent of the Portsmouth Naval Shipyard.

Construction of the super flood basin phasing would be required to minimize impacts on critical dry dock operations. Six notional construction phases were identified of which the first three were completed under previous IHAs (84 FR 24476, May 28, 2019; 86 FR 10545, February 22, 2021). Phases 4, 5, and 6 would occur under this proposed IHA. This phasing schedule could change due to fleet mission requirements and boat schedules. The first phase of construction occurred when a boat was present and was limited to site reconnaissance, field measurements, contractor submittals and general mobilization activities. Phase 2 included construction of the southern closure wall and caisson seat foundation, Berth 1 and Berth 11 (A and B) improvements, DD1 utility improvements, and dredging. Phase 3 includes construction of the temporary blast wall and completion of the caisson seat foundation, which comprise the entirety of activities to be completed under the renewal IHA. Phases 4 through 6, considered here, would include construction of the west closure wall and entrance structure closure walls, as well as bedrock excavation.

The super flood basin would be created in front of the entrance of DD1 by constructing closure walls that span from Berth 1 to Berth 11. The super flood basin would operate like a navigation lock-type structure: Artificially raising the elevation of the water within the basin and dry dock above the tidally controlled river in order to lift the submarines to an elevation where they can be safely transferred into the dry dock without the use of buoyancy assist tanks. Located between Berths 1 and 11, the super flood basin would extend approximately 177 m from the existing outer seat of the dry dock (approximately 53 m beyond the waterside end of Berth 1), and would consist of three primary components: South closure wall, west closure wall, and entrance structure. Construction of the south closure wall was completed under the initial 2019 IHA, with only in-water construction for the west closure wall and the entrance structure scheduled to occur under the IHA proposed here.

The west closure wall would consist of a cellular sheet pile wall with one full cell and a second partial cell. The cells would be filled with crushed stone fill and have a paved access way as a cap. Approximately 160, Z-shaped piles would be installed to construct the west closure wall. The closure wall would be connected to the entrance structure and existing Berth 11 structures, and would be in place for the remainder of the in-water construction activities.

The entrance (*i.e.,* caisson seat) will be constructed under the renewal IHA, including installation of six temporary dolphins, comprised of 12, 30-inch (in) diameter steel pipe piles, to assist with float-in and placement of the caisson seat. Under this proposed IHA, the temporary dolphins would be removed using vibratory extraction once installation of the caisson seat is completed under the renewal IHA (installation will be complete prior to initiation of the construction activities that are the subject of this proposed IHA).

The Navy plans to remove approximately 16,056 cubic meters (m^3) of sediment and 9,939 m^3 of bedrock from the closure wall and Berth 11 face to support increased flexibility within the basin (see Figure 1–5 in the IHA application for more details). The current bedrock elevation at this location would limit submarine and tug movements within the super flood basin. While the super flood basin would be operational without bedrock removal, removing the bedrock would allow the Shipyard additional operational flexibility for using Berth 11 while other aspects of the project are under construction. In addition, the added depth would increase ship clearances resulting in reduced sediment disturbance from boat propellers during docking operations.

Bedrock would be removed by drilling and confined blasting methods, which involves drilling holes in the bedrock, placing the charges in the holes, and then stemming the charges. A barge-mounted rotary action drill would be used to bore into the bedrock to excavate the 4.5-inch diameter holes where the blasting charges would be placed. The drill would operate within a casing that would temporarily contain sediments disturbed during drilling. Air would be injected into the casing to lift sediments during drilling, providing a buffer to sound entering the water column. Charge holes would be approximately 3 to 11 m deep, depending on the depth of the rock that needs to be removed. Stemming is the packing of inert material, such as gravel, sand, or drill cuttings, on top of the charge to the top of the borehole, which confines the pressure and gasses created by the explosive. Confined blasting activities using stemmed charges would occur during an approximately 10 month window when DD1 is expected to be empty. It is anticipated that there would be approximately 130 blasting days, with one or two blast events (*i.e.,* the detonation of multiple charges in sequence with a small delay between the detonations of each individual charge) each day. Production blasting would utilize a maximum of 120 pounds (lbs) of explosives per charge. Depending on the rate of drilling achieved, 5 (minimum) to 30 (maximum) holes would be detonated per blast event. Each charge would be detonated with an approximately 8-millisecond (ms) delay. Therefore, each blast event would only last a total duration of approximately 0.24 seconds (sec) for a 30-hole detonation. A bubble curtain will be deployed across the entrance to the basin during all blast events to reduce acoustics impacts outside of the blasting area. The Navy has not yet determined the exact configuration (single or double bubble curtain) that will be utilized.

Blasting activities include the Navy's requirement to construct a temporary blast wall across the opening of the existing DD1, which will be completed under the renewal IHA prior to the construction activities described here. Following the completion of blasting activities, the blast wall would be removed by underwater torch cutting. Neither NMFS not the Navy anticipate take associated with removal of the blast wall; therefore, this activity is not discussed further.

Overall, the construction work is estimated to take approximately 12 months to complete. The number of construction days (289) does not account for the fact that blast-hole drilling and pile driving would occur concurrently. The proposed schedule, including overlapping activities, is anticipated to reduce the number of actual construction days from 289 days to 159 total days. However, as a conservative measure, construction days are accounted for as consecutive rather than concurrent activities in take estimates (see Estimated Take section).

A summary of in-water pile driving activity is provided in Table 1. In addition, a total of 1,580, 4.5-in blast charge holes would be drilled at a rate of 12 holes per day over 130 days. The Navy is proposing one to two blast events per day, with a maximum of six blast events per week; a total of 150 blast events would occur over 130 days.

TABLE 1—SUMMARY OF IN-WATER PILE DRIVING ACTIVITIES

Pile purpose	Pile type	Pile size (inch)	Pile drive method	Total piles	Piles/day	Work days
West closure wall template	Steel pipe	30	Vibratory	13 installed 13 removed	3 3	5 5
West closure wall construction	Flat-webbed steel sheet	18	Vibratory Impact	160	12	13
Entrance structure temporary guide dolphin removal	Steel pipe	30	Vibratory	12	8	2
Entrance structure closure wall construction	Steel sheet	28	Vibratory Impact	44	12	4
Total				242		29

Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see Proposed Mitigation and Proposed Monitoring and Reporting).

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of the potentially affected species. Additional information regarding population trends and threats may be found in NMFS's Stock Assessment Reports (SARs; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS's website (*https://www.fisheries.noaa.gov/find-species*).

Table 2 lists all species with expected potential for occurrence in the Piscataqua River in Kittery, Maine, and summarizes information related to the population or stock, including regulatory status under the MMPA and ESA and potential biological removal (PBR), where known. For taxonomy, NMFS follows Committee on Taxonomy (2020). PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS's SARs). While no mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS's stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS's U.S. Atlantic Marine Mammal SARs. All values presented in Table 2 are the most recent available at the time of publication and are available in the final 2019 SARs (Hayes *et al.,* 2020) and draft 2020 SARs, available online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/draft-marine-mammal-stock-assessment-reports*).

TABLE 2—MARINE MAMMALS WITH POTENTIAL PRESENCE WITHIN THE PROPOSED PROJECT AREA

Common name	Scientific name	Stock	ESA/MMPA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]
Order Cetartiodactyla—Cetacea—Superfamily Odontoceti (toothed whales)						
Family Phocoenidae (porpoises):						
Harbor porpoise	*Phocoena phocoena*	Gulf of Maine/Bay of Fundy	-; N	95,543 (0.31; 74,034; 2016).	851	217
Order Carnivora—Superfamily Pinnipedia						
Family Phocidae (earless seals):						
Harbor seal	*Phoca vitulina*	Western North Atlantic	-; N	75,834 (0.15, 66,884; 2012).	2,006	350
Gray seal	*Halichoerus grypus*	Western North Atlantic	-; N	27,131 [4] (0.19; 23,158; 2016).	1,389	4,729
Harp seal	*Pagophilus groenlandicus*	Western North Atlantic	-; N	Unknown (NA, NA)	unk	232,422
Hooded seal	*Cystophora cristata*	Western North Atlantic	-; N	Unknown (NA, NA)	unk	1,680

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region#reports.* CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance.

[3] These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

[4] NMFS stock abundance estimate applies to U.S. population only, actual stock abundance is approximately 505,000. The PBR value presented is in relation to the U.S. population, whereas the annual M/SI value is for the entire stock.

All species that could potentially occur in the proposed action area are included in Table 2. More detailed descriptions of marine mammals in the PNSY project area are provided below.

Harbor Porpoise

Harbor porpoises occur from the coastline to deep waters (>1,800 meters (m); Westgate *et al.* 1998), although the majority of the population is found over the continental shelf (Hayes *et al.,* 2020). In the project area, only the Gulf of Maine/Bay of Fundy stock of harbor porpoise may be present. This stock is found in U.S. and Canadian Atlantic waters and is concentrated in the northern Gulf of Maine and southern Bay of Fundy region, generally in waters less than 150 m deep (Waring *et al.,* 2016).

Marine mammal monitoring was conducted during the Berth 11 Waterfront Improvements project from April 2017 through December 2017 (Cianbro 2018a) and through June 2018 (Cianbro 2018b). Harbor porpoises were observed traveling quickly through the river channel and past the proposed project area. A total of 5 harbor porpoises was sighted between April 2017 and June 2018. One harbor porpoise was sighted during the first year of expansion and modification of DD1.

Harbor Seal

The harbor seal is found in all nearshore waters of the North Atlantic and North Pacific Oceans and adjoining seas above about 30° N (Burns, 2009). In the western North Atlantic, harbor seals are distributed from the eastern Canadian Arctic and Greenland south to southern New England and New York, and occasionally to the Carolinas (Hayes *et al.,* 2020). Haulout and pupping sites are located off Manomet, MA and the Isles of Shoals, ME (Waring *et al.,* 2016).

Harbor seals are the most abundant pinniped in the Piscataqua River. They were commonly observed within the proposed project area between the months of April 2017 and June 2018 during the Berth 11 Waterfront Improvements project (Cianbro 2018a, 2018b). The primary behaviors observed during monitoring were milling (diving), swimming, and traveling during nearly 60 percent, 29 percent and 12 percent of observations, respectively (Cianbro 2018a). Marine mammal surveys were conducted for one day of each month in 2017 (NAVFAC Mid-Atlantic 2018); harbor seals were commonly observed near the project area throughout the year, and did not show any seasonality in their presence. A total of 721 (including repeated sightings of individuals) sightings of 658 harbor seals were documented from May through December during the first year of monitoring of construction activities for the expansion and modification of DD1 (Navy 2020). As anticipated, no harbor seal pups were observed during the surveys or monitoring, as known pupping sites are north of the Maine-New Hampshire border (Waring *et al.,* 2016).

Gray Seal

There are three major populations of gray seals found in the world; eastern Canada (western North Atlantic stock), northwestern Europe and the Baltic Sea. Gray seals in the project area belong to the western North Atlantic stock. The range for this stock is from New Jersey to Labrador. Current population trends show that gray seal abundance is likely increasing in the U.S. Atlantic Exclusive Economic Zone (EEZ) (Hayes *et al.,* 2020). Although the rate of increase is unknown, surveys conducted since their arrival in the 1980s indicate a steady increase in abundance in both Maine and Massachusetts (Hayes *et al.,* 2018). It is believed that recolonization by Canadian gray seals is the source of the U.S. population (Hayes *et al.,* 2018).

Twenty-four gray seals were observed within the proposed project area between the months of April and December 2017 (Cianbro 2018a), two during the months of January through June 2018 (Cianbro 2018b), and 12 during a monitoring period from January 2018 through January 2019 (Navy 2019). The primary behavior observed during surveys was milling at just over 60 percent of the time followed by swimming within and traveling through the proposed project area. Only approximately 5 percent of the time were gray seals observed foraging (Cianbro 2018a). Monthly one-day marine mammal surveys also took place during 2017 and 2018, during which six and three sightings of gray seal were recorded, respectively (NAVFAC Mid-Atlantic 2018). Forty-seven (including repeated sighting of individuals) observations of 34 individual gray seals were documented from May through December 2020 during the first year of construction activities for expansion and modification of DD1 (Navy 2020). No gray seal pups were observed during the surveys or monitoring, given known pupping sites for gray seals (like harbor seals) are north of the Maine-New Hampshire border (Waring *et al.,* 2016).

Hooded Seal

Hooded seals are also members of the true seal family (*Phocidae*) and are generally found in deeper waters or on drifting pack ice. The world population of hooded seals has been divided into three stocks, which coincide with specific breeding areas, as follows: (1) Northwest Atlantic, (2) Greenland Sea, and (3) White Sea (Waring *et al.,* 2020). The hooded seal is a highly migratory species, and its range can extend from the Canadian arctic to Puerto Rico. In U.S. waters, the species has an increasing presence in the coastal waters between Maine and Florida (Waring *et al.,* 2019). In the U.S., they are considered members of the western North Atlantic stock and generally occur in New England waters from January through May and further south in the summer and fall seasons (Waring *et al.,* 2019).

Population abundance of hooded seals in the western North Atlantic is derived from pup production estimates, which are developed from whelping pack surveys. The most recent population estimate in the western North Atlantic was derived in 2005. There have been no recent surveys conducted or population estimates developed for this species. The 2005 best population estimate for hooded seals is 593,500 individuals, with a minimum population estimate of 543,549 individuals (Waring *et al.,* 2019). Currently, not enough data are available to determine what percentage of this estimate may represent the population within U.S. waters. Hooded seals have been observed in the Piscataqua River; however, they are not as abundant as the more commonly observed harbor seal. Anecdotal sighting information indicates that two hooded seals were observed near the Shipyard in August 2009, but no other observations have been recorded (NAVFAC Mid-Atlantic 2018). Hooded seals were not observed in the proposed project area during marine mammal monitoring or survey events that took place in 2017, 2018, and 2020 (Cianbro 2018a, b; NAVFAC Mid-Atlantic 2018, 2019b, Navy 2019, Stantec 2020).

Harp Seal

The harp seal is a highly migratory species, its range extending throughout the Arctic and North Atlantic Oceans. The world's harp seal population is separated into three stocks, based on associations with specific locations of pagophilic breeding activities: (1) Off eastern Canada, (2) on the West Ice off eastern Greenland, and (3) in the White Sea off the coast of Russia. The largest stock, which includes two herds that breed either off the coast of Newfoundland/Labrador or near the Magdelan Islands in the Gulf of St.

Lawrence, is equivalent to the western North Atlantic stock. The best estimate of abundance for western North Atlantic harp seals, based on the last survey (in 2012) is 7.4 million, with a minimum estimate of 6.9 million (Waring *et al.,* 2020). In U.S. waters, the species has an increasing presence since the 1990s, evidenced by increasing numbers of sightings and strandings in the coastal waters between Maine and New Jersey (Waring *et al.,* 2020). Harp seals that occur in the United States are considered members of the western North Atlantic stock and generally occur in New England waters from January through May (Waring *et al.,* 2020).

Harp seals have been observed in the Piscataqua River; however, they are not as abundant as the more commonly observed harbor seal. The most recent harp seal sightings in the river were of two single seals on separate days in mid-May 2020 (Stantec 2020). The last harp seal sighting prior to these observations was in 2016 (NAVFAC Mid-Atlantic 2016).

Unusual Mortality Events (UMEs)

Since July 2018, elevated numbers of harbor seal and gray seal mortalities have occurred across Maine, New Hampshire and Massachusetts. This event has been declared a UME. Additionally, stranded seals have shown clinical signs as far south as Virginia, although not in elevated number; therefore, the UME investigation now encompasses all seal strandings from Maine to Virginia. Full or partial necropsy examinations have been conducted on some of the seals and samples have been collected for testing. Based on tests conducted thus far, the main pathogen found in the seals is phocine distemper virus. NMFS is performing additional testing to identify any other factors that may be involved in this UME. Lastly, ice seals (harp and hooded seals) have also started stranding with clinical signs, although not in elevated numbers, and those two seal species have also been added to the UME investigation discussed above. Information on this UME is available online at: *www.fisheries.noaa.gov/new-england-mid-atlantic/marine-life-distress/2018-2020-pinniped-unusual-mortality-event-along.*

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 3.

TABLE 3—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information. Five marine mammal species (one cetacean and four pinniped (all phocid) species) have the reasonable potential to co-occur with the proposed survey activities. Please refer to Table 2. The only cetacean species that may be present, the harbor porpoise, is classified as a high-frequency cetacean.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

This section includes a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The Estimated Take section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis and Determination section considers the content of this section, the Estimated Take section, and the Proposed Mitigation section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks.

Description of Sound

Sound travels in waves, the basic components of which are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per unit of time and is measured in hertz (Hz) or cycles per second. Wavelength is the distance between two peaks of a sound wave; lower frequency sounds

have longer wavelengths than higher frequency sounds. Amplitude is the height of the sound pressure wave or the 'loudness' of a sound and is typically measured using the dB scale. A dB is the ratio between a measured pressure (with sound) and a reference pressure (sound at a constant pressure, established by scientific standards). It is a logarithmic unit that accounts for large variations in amplitude; therefore, relatively small changes in dB ratings correspond to large changes in sound pressure. When referring to sound pressure levels (SPLs) (the sound force per unit area), sound is referenced in the context of underwater sound pressure to one microPascal (μPa). One pascal is the pressure resulting from a force of one newton exerted over an area of one square meter. The source level (SL) represents the sound level at a distance of 1 m from the source (referenced to 1 μPa). The received level is the sound level at the listener's position. Note that all underwater sound levels in this document are referenced to a pressure of 1 μPa and all airborne sound levels in this document are referenced to a pressure of 20 μPa.

Root mean square (rms) is the quadratic mean sound pressure over the duration of an impulse. Rms is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick 1983). Rms accounts for both positive and negative values; squaring the pressures makes all values positive so that they may be accounted for in the summation of pressure levels (Hastings and Popper 2005). This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units than by peak pressures.

When underwater objects vibrate or activity occurs, sound-pressure waves are created. These waves alternately compress and decompress the water as the sound wave travels. Underwater sound waves radiate in all directions away from the source (similar to ripples on the surface of a pond), except in cases where the source is directional. The compressions and decompressions associated with sound waves are detected as changes in pressure by aquatic life and man-made sound receptors such as hydrophones.

Even in the absence of sound from the specified activity, the underwater environment is typically loud due to ambient sound. Ambient sound is defined as environmental background sound levels lacking a single source or point (Richardson *et al.,* 1995), and the sound level of a region is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* waves, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic sound (*e.g.,* vessels, dredging, aircraft, construction). A number of sources contribute to ambient sound, including the following (Richardson *et al.,* 1995):

- *Wind and waves:* The complex interactions between wind and water surface, including processes such as breaking waves and wave-induced bubble oscillations and cavitation, are a main source of naturally occurring ambient noise for frequencies between 200 Hz and 50 kilohertz (kHz) (Mitson 1995). In general, ambient sound levels tend to increase with increasing wind speed and wave height. Surf noise becomes important near shore, with measurements collected at a distance of 8.5 km from shore showing an increase of 10 dB in the 100 to 700 Hz band during heavy surf conditions;
- *Precipitation:* Sound from rain and hail impacting the water surface can become an important component of total noise at frequencies above 500 Hz, and possibly down to 100 Hz during quiet times;
- *Biological:* Marine mammals can contribute significantly to ambient noise levels, as can some fish and shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz; and
- *Anthropogenic:* Sources of ambient noise related to human activity include transportation (surface vessels and aircraft), dredging and construction, oil and gas drilling and production, seismic surveys, sonar, explosions, and ocean acoustic studies. Shipping noise typically dominates the total ambient noise for frequencies between 20 and 300 Hz. In general, the frequencies of anthropogenic sounds are below 1 kHz and, if higher frequency sound levels are created, they attenuate rapidly (Richardson *et al.,* 1995). Sound from identifiable anthropogenic sources other than the activity of interest (*e.g.,* a passing vessel) is sometimes termed background sound, as opposed to ambient sound.

The sum of the various natural and anthropogenic sound sources at any given location and time—which comprise ''ambient'' or ''background'' sound—depends not only on the source levels (as determined by current weather conditions and levels of biological and shipping activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.,* 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals.

Description of Sounds Sources

In-water construction activities associated with the project would include impact and vibratory pile installation and removal, drilling, and blasting. The sounds produced by these activities fall into one of two general sound types: Impulsive and non-impulsive (defined below). The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.,* Ward 1997 in Southall *et al.,* 2007). Please see Southall *et al.* (2007) for an in-depth discussion of these concepts.

Impulsive sound sources (*e.g.,* explosions, gunshots, sonic booms, impact pile driving) produce signals that are brief (typically considered to be less than one second), broadband, atonal transients (ANSI 1986; Harris 1998; NIOSH 1998; ISO 2003; ANSI 2005) and occur either as isolated events or repeated in some succession. Impulsive sounds are all characterized by a relatively rapid rise from ambient pressure to a maximal pressure value followed by a rapid decay period that may include a period of diminishing, oscillating maximal and minimal pressures, and generally have an increased capacity to induce physical injury as compared with sounds that lack these features.

Non-impulsive sounds can be tonal, narrowband, or broadband, brief or prolonged, and may be either continuous or non-continuous (ANSI 1995; NIOSH 1998). Some of these non-impulsive sounds can be transient signals of short duration but without the essential properties of impulses (*e.g.,* rapid rise time). Examples of non-impulsive sounds include those produced by vessels, aircraft, machinery operations such as drilling or dredging, vibratory pile driving, and active sonar systems. The duration of such sounds,

as received at a distance, can be greatly extended in a highly reverberant environment.

Acoustic Impacts

Anthropogenic sounds cover a broad range of frequencies and sound levels and can have a range of highly variable impacts on marine life, from none or minor to potentially severe responses, depending on received levels, duration of exposure, behavioral context, and various other factors. The potential effects of underwater sound from active acoustic sources can potentially result in one or more of the following; temporary or permanent hearing impairment, non-auditory physical or physiological effects, behavioral disturbance, stress, and masking (Richardson *et al.,* 1995; Gordon *et al.,* 2004; Nowacek *et al.,* 2007; Southall *et al.,* 2007; Gotz *et al.,* 2009). The degree of effect is intrinsically related to the signal characteristics, received level, distance from the source, and duration of the sound exposure. In general, sudden, high level sounds can cause hearing loss, as can longer exposures to lower level sounds. Temporary or permanent loss of hearing will occur almost exclusively for noise within an animal's hearing range. Specific manifestations of acoustic effects are first described before providing discussion specific to the Navy's construction activities.

Richardson *et al.* (1995) described zones of increasing intensity of effect that might be expected to occur, in relation to distance from a source and assuming that the signal is within an animal's hearing range. The first zone is the area within which the acoustic signal would be audible (potentially perceived) to the animal, but not strong enough to elicit any overt behavioral or physiological response. The next zone corresponds with the area where the signal is audible to the animal and of sufficient intensity to elicit behavioral or physiological responsiveness. Third is a zone within which, for signals of high intensity, the received level is sufficient to potentially cause discomfort or tissue damage to auditory or other systems. Overlaying these zones to a certain extent is the area within which masking (*i.e.,* when a sound interferes with or masks the ability of an animal to detect a signal of interest that is above the absolute hearing threshold) may occur; the masking zone may be highly variable in size.

The potential for more severe effects (*i.e.,* permanent hearing impairment, certain non-auditory physical or physiological effects) is considered here, although NMFS does not expect that there is a reasonable likelihood that the Navy's activities may result in such effects (see below for further discussion). Marine mammals exposed to high-intensity sound, or to lower-intensity sound for prolonged periods, can experience hearing threshold shift (TS), which is the loss of hearing sensitivity at certain frequency ranges (Kastak *et al.,* 1999; Schlundt *et al.,* 2000; Finneran *et al.,* 2003, 2005). TS can be permanent (PTS), in which case the loss of hearing sensitivity is not fully recoverable, or temporary (TTS), in which case the animal's hearing threshold would recover over time (Southall *et al.,* 2007). Repeated sound exposure that leads to TTS could cause PTS. In severe cases of PTS, there can be total or partial deafness, while in most cases the animal has an impaired ability to hear sounds in specific frequency ranges (Kryter 1985).

When PTS occurs, there is physical damage to the sound receptors in the ear (*i.e.,* tissue damage), whereas TTS represents primarily tissue fatigue and is reversible (Southall *et al.,* 2007). In addition, other investigators have suggested that TTS is within the normal bounds of physiological variability and tolerance and does not represent physical injury (*e.g.,* Ward 1997). Therefore, NMFS does not consider TTS to constitute auditory injury.

Relationships between TTS and PTS thresholds have not been studied in marine mammals—PTS data exists only for a single harbor seal (Kastak *et al.,* 2008)—but are assumed to be similar to those in humans and other terrestrial mammals. PTS typically occurs at exposure levels at least several dB above that which induces mild TTS: A 40-dB threshold shift approximates PTS onset; *e.g.,* Kryter *et al.,* 1966; Miller, 1974), whereas a 6-dB threshold shift) approximates TTS onset (*e.g.,* Southall *et al.,* 2007). Based on data from terrestrial mammals, a precautionary assumption is that the PTS thresholds for impulsive sounds (such as bombs) are at least 6 dB higher than the TTS threshold on a peak-pressure basis and PTS cumulative sound exposure level thresholds are 15 to 20 dB higher than TTS cumulative sound exposure level thresholds (Southall *et al.,* 2007). Given the higher level of sound or longer exposure duration necessary to cause PTS as compared with TTS, it is considerably less likely that PTS could occur.

TTS is the mildest form of hearing impairment that can occur during exposure to sound (Kryter 1985). While experiencing TTS, the hearing threshold rises, and a sound must be at a higher level in order to be heard. In terrestrial and marine mammals, TTS can last from minutes or hours to days (in cases of strong TTS). In many cases, hearing sensitivity recovers rapidly after exposure to the sound ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals.

Marine mammal hearing plays a critical role in communication with conspecifics, and interpretation of environmental cues for purposes such as predator avoidance and prey capture. Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious. For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that occurs during a time where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during a time when communication is critical for successful mother/calf interactions could have more serious impacts.

Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin (*Tursiops truncatus*), beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless porpoise (*Neophocoena asiaeorientalis*) and three species of pinnipeds (northern elephant seal (*Mirounga angustirostris*), harbor seal, and California sea lion (*Zalophus californianus*)) exposed to a limited number of sound sources (*i.e.,* mostly tones and octave-band noise) in laboratory settings (*e.g.,* Finneran *et al.,* 2002; Nachtigall *et al.,* 2004; Kastak *et al.,* 2005; Lucke *et al.,* 2009). In general, harbor seals (Kastak *et al.,* 2005; Kastelein *et al.,* 2012a) and harbor porpoises (Lucke *et al.,* 2009; Kastelein *et al.,* 2012b) have a lower TTS onset than other measured pinniped or cetacean species. Additionally, the existing marine mammal TTS data come from a limited number of individuals within these species. There are no data available on noise-induced hearing loss for mysticetes. For summaries of data on TTS in marine mammals or for further discussion of TTS onset thresholds, please see Southall *et al.* (2007) and Finneran and Jenkins (2012).

In addition to PTS and TTS, there is a potential for non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to high level underwater sound or as a secondary effect of extreme behavioral reactions (*e.g.,* change in dive profile as a result

of an avoidance reaction) caused by exposure to sound. These impacts can include neurological effects, bubble formation, resonance effects, and other types of organ or tissue damage (Cox *et al.,* 2006; Southall *et al.,* 2007; Zimmer and Tyack 2007). The Navy's activities involve the use of explosives, which has been associated with these types of effects. The underwater explosion will send a shock wave and blast noise through the water, release gaseous by-products, create an oscillating bubble, and cause a plume of water to shoot up from the water surface. The shock wave and blast noise are of most concern to marine animals. The effects of an underwater explosion on a marine mammal depends on many factors, including the size, type, and depth of both the animal and the explosive charge; the depth of the water column; and the standoff distance between the charge and the animal, as well as the sound propagation properties of the environment. Potential impacts can range from brief effects (such as behavioral disturbance), tactile perception, physical discomfort, slight injury of the internal organs and the auditory system, to death of the animal (Yelverton *et al.,* 1973; DoN, 2001). Non-lethal injury includes slight injury to internal organs and the auditory system; however, delayed lethality can be a result of individual or cumulative sublethal injuries (DoN, 2001). Immediate lethal injury would be a result of massive combined trauma to internal organs as a direct result of proximity to the point of detonation (DoN 2001). Generally, the higher the level of impulse and pressure level exposure, the more severe the impact to an individual.

Injuries resulting from a shock wave take place at boundaries between tissues of different density. Different velocities are imparted to tissues of different densities, and this can lead to their physical disruption. Blast effects are greatest at the gas-liquid interface (Landsberg 2000). Gas-containing organs, particularly the lungs and gastrointestinal (GI) tract, are especially susceptible (Goertner 1982; Hill 1978; Yelverton *et al.,* 1973). In addition, gas-containing organs including the nasal sacs, larynx, pharynx, trachea, and lungs may be damaged by compression/expansion caused by the oscillations of the blast gas bubble. Intestinal walls can bruise or rupture, with subsequent hemorrhage and escape of gut contents into the body cavity. Less severe GI tract injuries include contusions, petechiae (small red or purple spots caused by bleeding in the skin), and slight hemorrhaging (Yelverton *et al.,* 1973).

Because the ears are the most sensitive to pressure, they are the organs most sensitive to injury (Ketten 2000). Sound-related damage associated with blast noise can be theoretically distinct from injury from the shock wave, particularly farther from the explosion. If an animal is able to hear a noise, at some level it can damage its hearing by causing decreased sensitivity (Ketten 1995). Sound-related trauma can be lethal or sub-lethal. Lethal impacts are those that result in immediate death or serious debilitation in or near an intense source and are not, technically, pure acoustic trauma (Ketten 1995). Sub-lethal impacts include hearing loss, which is caused by exposures to perceptible sounds. Severe damage (from the shock wave) to the ears includes tympanic membrane rupture, fracture of the ossicles, damage to the cochlea, hemorrhage, and cerebrospinal fluid leakage into the middle ear. Moderate injury implies partial hearing loss due to tympanic membrane rupture and blood in the middle ear. Permanent hearing loss also can occur when the hair cells are damaged by one very loud event, as well as by prolonged exposure to a loud noise or chronic exposure to noise. The level of impact from blasts depends on both an animal's location and, at outer zones, on its sensitivity to the residual noise (Ketten 1995).

The above discussion concerning underwater explosions only pertains to open water detonations in a free field without mitigation. Therefore, given the proposed monitoring and mitigation measures discussed below, the Navy's blasting events are not likely to have injury or mortality effects on marine mammals in the project vicinity. Instead, NMFS considers that the Navy's blasts are most likely to cause behavioral harassment and may cause TTS or, in some cases PTS, in a few individual marine mammals, as discussed below.

Behavioral Effects

Behavioral disturbance may include a variety of effects, including subtle changes in behavior (*e.g.,* minor or brief avoidance of an area or changes in vocalizations), more conspicuous changes in similar behavioral activities, and more sustained and/or potentially severe reactions, such as displacement from or abandonment of high-quality habitat. Behavioral responses to sound are highly variable and context-specific and any reactions depend on numerous intrinsic and extrinsic factors (*e.g.,* species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day), as well as the interplay between factors (*e.g.,* Richardson *et al.,* 1995; Wartzok *et al.,* 2003; Southall *et al.,* 2007; Weilgart, 2007; Archer *et al.,* 2010). Behavioral reactions can vary not only among individuals but also within an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.,* 2012), and can vary depending on characteristics associated with the sound source (*e.g.,* whether it is moving or stationary, number of sources, distance from the source). Please see Appendices B–C of Southall *et al.* (2007) for a review of studies involving marine mammal behavioral responses to sound.

Habituation can occur when an animal's response to a stimulus wanes with repeated exposure, usually in the absence of unpleasant associated events (Wartzok *et al.,* 2003). Animals are most likely to habituate to sounds that are predictable and unvarying. It is important to note that habituation is appropriately considered as a ''progressive reduction in response to stimuli that are perceived as neither aversive nor beneficial,'' rather than as, more generally, moderation in response to human disturbance (Bejder *et al.,* 2009). The opposite process is sensitization, when an unpleasant experience leads to subsequent responses, often in the form of avoidance, at a lower level of exposure. As noted, behavioral state may affect the type of response. For example, animals that are resting may show greater behavioral change in response to disturbing sound levels than animals that are highly motivated to remain in an area for feeding (Richardson *et al.,* 1995; NRC 2003; Wartzok *et al.,* 2003). Controlled experiments with captive marine mammals have showed pronounced behavioral reactions, including avoidance of loud sound sources (Ridgway *et al.,* 1997; Finneran *et al.,* 2003). Observed responses of wild marine mammals to loud-impulsive sound sources (typically seismic airguns or acoustic harassment devices) have been varied but often consist of avoidance behavior or other behavioral changes suggesting discomfort (Morton and Symonds 2002; see also Richardson *et al.,* 1995; Nowacek *et al.,* 2007).

Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal. If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the

impacts of the change are unlikely to be significant to the individual, let alone the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (*e.g.,* Lusseau and Bejder 2007; Weilgart 2007; NRC 2005). This highlights the importance of assessing the context of the acoustic effects alongside the received levels anticipated. Severity of effects from a response to an acoustic stimuli can likely vary based on the context in which the stimuli was received, particularly if it occurred during a biologically sensitive temporal or spatial point in the life history of the animal. There are broad categories of potential response, described in greater detail here, that include alteration of dive behavior, alteration of foraging behavior, effects to breathing, interference with or alteration of vocalization, avoidance, and flight.

Changes in dive behavior can vary widely, and may consist of increased or decreased dive times and surface intervals as well as changes in the rates of ascent and descent during a dive (*e.g.,* Frankel and Clark 2000; Costa *et al.,* 2003; Ng and Leung 2003; Nowacek *et al.,* 2004; Goldbogen *et al.,* 2013a,b). Variations in dive behavior may reflect interruptions in biologically significant activities (*e.g.,* foraging) or they may be of little biological significance. The impact of an alteration to dive behavior resulting from an acoustic exposure depends on what the animal is doing at the time of the exposure and the type and magnitude of the response.

Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the appearance of secondary indicators (*e.g.,* bubble nets or sediment plumes), or changes in dive behavior. As for other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in response in any given circumstance (*e.g.,* Croll *et al.,* 2001; Nowacek *et al.,* 2004; Madsen *et al.,* 2006; Yazvenko *et al.,* 2007). A determination of whether foraging disruptions incur fitness consequences would require information on or estimates of the energetic requirements of the affected individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal.

Variations in respiration naturally vary with different behaviors and alterations to breathing rate as a function of acoustic exposure can be expected to co-occur with other behavioral reactions, such as a flight response or an alteration in diving. However, respiration rates in and of themselves may be representative of annoyance or an acute stress response. Various studies have shown that respiration rates may either be unaffected or could increase, depending on the species and signal characteristics, again highlighting the importance in understanding species differences in the tolerance of underwater noise when determining the potential for impacts resulting from anthropogenic sound exposure (*e.g.,* Kastelein *et al.,* 2001, 2005b, 2006; Gailey *et al.,* 2007).

Marine mammals vocalize for different purposes and across multiple modes, such as whistling, echolocation click production, calling, and singing. Changes in vocalization behavior in response to anthropogenic noise can occur for any of these modes and may result from a need to compete with an increase in background noise or may reflect increased vigilance or a startle response. For example, in the presence of potentially masking signals, humpback whales and killer whales have been observed to increase the length of their songs (Miller *et al.,* 2000; Fristrup *et al.,* 2003; Foote *et al.,* 2004), while right whales (*Eubalaena glacialis*) have been observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks *et al.,* 2007b). In some cases, animals may cease sound production during production of aversive signals (Bowles *et al.,* 1994).

Avoidance is the displacement of an individual from an area or migration path because of the presence of a sound or other stressors, and is one of the most obvious manifestations of disturbance in marine mammals (Richardson *et al.,* 1995). For example, gray whales (Eschrictius robustus) are known to change direction—deflecting from customary migratory paths—in order to avoid noise from seismic surveys (Malme *et al.,* 1984). Avoidance may be short-term, with animals returning to the area once the noise has ceased (*e.g.,* Bowles *et al.,* 1994; Goold, 1996; Stone *et al.,* 2000; Morton and Symonds, 2002; Gailey *et al.,* 2007). Longer-term displacement is possible, however, which may lead to changes in abundance or distribution patterns of the affected species in the affected region if habituation to the presence of the sound does not occur (*e.g.,* Blackwell *et al.,* 2004; Bejder *et al.,* 2006; Teilmann *et al.,* 2006).

A flight response is a dramatic change in normal movement to a directed and rapid movement away from the perceived location of a sound source. The flight response differs from other avoidance responses in the intensity of the response (*e.g.,* directed movement, rate of travel). Relatively little information on flight responses of marine mammals to anthropogenic signals exist, although observations of flight responses to the presence of predators have occurred (Connor and Heithaus 1996). The result of a flight response could range from brief, temporary exertion and displacement from the area where the signal provokes flight to, in extreme cases, marine mammal strandings (Evans and England 2001). However, it should be noted that response to a perceived predator does not necessarily invoke flight (Ford and Reeves 2008), and whether individuals are solitary or in groups may influence the response.

Behavioral disturbance can also impact marine mammals in more subtle ways. Increased vigilance may result in costs related to diversion of focus and attention (*i.e.,* when a response consists of increased vigilance, it may come at the cost of decreased attention to other critical behaviors such as foraging or resting). These effects have generally not been demonstrated for marine mammals, but studies involving fish and terrestrial animals have shown that increased vigilance may substantially reduce feeding rates (*e.g.,* Beauchamp and Livoreil 1997; Fritz *et al.,* 2002; Purser and Radford 2011). In addition, chronic disturbance can cause population declines through reduction of fitness (*e.g.,* decline in body condition) and subsequent reduction in reproductive success, survival, or both (*e.g.,* Harrington and Veitch, 1992; Daan *et al.,* 1996; Bradshaw *et al.,* 1998). However, Ridgway *et al.* (2006) reported that increased vigilance in bottlenose dolphins exposed to sound over a 5 day period did not cause any sleep deprivation or stress effects.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hour cycle). Disruption of such functions resulting from reactions to stressors such as sound exposure are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or

survival (Southall *et al.,* 2007). Note that there is a difference between multi-day substantive behavioral reactions and multi-day anthropogenic activities. For example, just because an activity lasts for multiple days does not necessarily mean that individual animals are either exposed to activity-related stressors for multiple days or, further, exposed in a manner resulting in sustained multi-day substantive behavioral responses.

Stress Response

An animal's perception of a threat may be sufficient to trigger stress responses consisting of some combination of behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses (*e.g.,* Seyle 1950; Moberg 2000). In many cases, an animal's first and sometimes most economical (in terms of energetic costs) response is behavioral avoidance of the potential stressor. Autonomic nervous system responses to stress typically involve changes in heart rate, blood pressure, and gastrointestinal activity. These responses have a relatively short duration and may or may not have a significant long-term effect on an animal's fitness.

Neuroendocrine stress responses often involve the hypothalamus-pituitary-adrenal system. Virtually all neuroendocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction, altered metabolism, reduced immune competence, and behavioral disturbance (*e.g.,* Moberg 1987; Blecha 2000). Increases in the circulation of glucocorticoids are also equated with stress (Romano *et al.,* 2004).

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and ''distress'' is the cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose serious fitness consequences. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other functions. This state of distress will last until the animal replenishes its energetic reserves sufficient to restore normal function.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses are well studied through controlled experiments and for both laboratory and free-ranging animals (*e.g.,* Holberton *et al.,* 1996; Hood *et al.,* 1998; Jessop *et al.,* 2003; Krausman *et al.,* 2004; Lankford *et al.,* 2005). Stress responses due to exposure to anthropogenic sounds or other stressors and their effects on marine mammals have also been reviewed (Fair and Becker 2000; Romano *et al.,* 2002b) and, more rarely, studied in wild populations (*e.g.,* Romano *et al.,* 2002a). For example, Rolland *et al.* (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales. These and other studies lead to a reasonable expectation that some marine mammals will experience physiological stress responses upon exposure to acoustic stressors and that it is possible that some of these would be classified as ''distress.'' In addition, any animal experiencing TTS would likely also experience stress responses (NRC, 2003).

Acoustic Effects, Underwater

The effects of sounds from the Navy's proposed activities might include one or more of the following: Temporary or permanent hearing impairment, non-auditory physical or physiological effects, behavioral disturbance, and masking (Richardson *et al.,* 1995; Gordon *et al.,* 2003; Nowacek *et al.,* 2007; Southall *et al.,* 2007). The effects of pile driving, drilling, and blasting on marine mammals are dependent on several factors, including the type and depth of the animal; the pile size and type, and the intensity and duration of the pile driving, drilling, or blasting sound; the substrate; the standoff distance between the pile and the animal; and the sound propagation properties of the environment. Impacts to marine mammals from pile driving, drilling, and blasting activities are expected to result primarily from acoustic propagation pathways. As such, the degree of effect is intrinsically related to the frequency, received level, and duration of the sound exposure, which are in turn influenced by the distance between the animal and the source. The further away from the source, the less intense the exposure should be. The substrate and depth of the habitat affect the sound propagation properties of the environment. In addition, substrates that are soft (*e.g.,* mud) would absorb or attenuate the sound more readily than hard substrates (*e.g.,* rock), which may reflect the acoustic wave. Soft porous substrates would also likely require less time to install or extract a pile, and possibly less forceful equipment, which would ultimately decrease the intensity of the acoustic source.

In the absence of mitigation, impacts to marine species could be expected to include physiological and behavioral responses to the acoustic signature (Viada *et al.,* 2008). Potential impacts from impulsive sound sources like blasting can range in severity from effects such as behavioral disturbance to temporary or permanent hearing impairment (Yelverton *et al.,* 1973). Due to the characteristics of the sounds involved in the project, behavioral disturbance is the most likely effect from the proposed activity. Marine mammals exposed to high intensity sound repeatedly or for prolonged periods can experience hearing threshold shifts. PTS constitutes injury, but TTS does not (Southall *et al.,* 2007). Due to the use mitigation measures discussed in detail in the Proposed Mitigation section, it is unlikely but possible that PTS or TTS could occur from blasting. Neither NMFS nor the Navy anticipates non-auditory injuries of marine mammals as a result of the proposed construction activities.

Disturbance Reactions

With pile removal as well as drilling activities, it is likely that the onset of sound sources could result in temporary, short-term changes in an animal's typical behavior and/or avoidance of the affected area. These behavioral changes may include (Richardson *et al.,* 1995): Changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where sound sources are located; and/or flight responses (*e.g.,* pinnipeds flushing into water from haulouts or rookeries). Pinnipeds may increase their haul-out time, possibly to avoid in-water disturbance (Thorson and Reyff 2006). If a marine mammal responds to a stimulus by changing its behavior (*e.g.,* through relatively minor changes in locomotion direction/speed or vocalization behavior), the response may or may not constitute taking at the individual level, and is unlikely to affect the stock or the species as a whole. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on animals, and if so potentially on the stock or

species, could potentially be significant (*e.g.,* Lusseau and Bejder 2007; Weilgart 2007).

The biological significance of many of these behavioral disturbances is difficult to predict, especially if the detected disturbances appear minor. However, the consequences of behavioral modification could be biologically significant if the change affects growth, survival, or reproduction. Significant behavioral modifications that could potentially lead to effects on growth, survival, or reproduction include:

- Drastic changes in diving/surfacing patterns (such as those thought to cause beaked whale stranding due to exposure to military mid-frequency tactical sonar);
- Longer-term habitat abandonment due to loss of desirable acoustic environment; and
- Longer-term cessation of feeding or social interaction.

The onset of behavioral disturbance from anthropogenic sound depends on both external factors (characteristics of sound sources and their paths) and the specific characteristics of the receiving animals (hearing, motivation, experience, demography) and is difficult to predict (Southall *et al.,* 2007).

Auditory Masking

Sound can disrupt behavior through masking, or interfering with, an animal's ability to detect, recognize, or discriminate between acoustic signals of interest (*e.g.,* those used for intraspecific communication and social interactions, prey detection, predator avoidance, navigation) (Richardson *et al.,* 1995). Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity, and may occur whether the sound is natural (*e.g.,* snapping shrimp, wind, waves, precipitation) or anthropogenic (*e.g.,* shipping, sonar, seismic exploration) in origin. The ability of a noise source to mask biologically important sounds depends on the characteristics of both the noise source and the signal of interest (*e.g.,* signal-to-noise ratio, temporal variability, direction), in relation to each other and to an animal's hearing abilities (*e.g.,* sensitivity, frequency range, critical ratios, frequency discrimination, directional discrimination, age or TTS hearing loss), and existing ambient noise and propagation conditions.

Under certain circumstances, marine mammals experiencing significant masking could also be impaired from maximizing their performance fitness in survival and reproduction. Therefore, when the coincident (masking) sound is man-made, it may be considered harassment when disrupting or altering critical behaviors. It is important to distinguish TTS and PTS, which persist after the sound exposure, from masking, which occurs during the sound exposure. Because masking (without resulting in TS) is not associated with abnormal physiological function, it is not considered a physiological effect, but rather a potential behavioral effect.

The frequency range of the potentially masking sound is important in determining any potential behavioral impacts. For example, low-frequency signals may have less effect on high-frequency echolocation sounds produced by odontocetes but are more likely to affect detection of mysticete communication calls and other potentially important natural sounds such as those produced by surf and some prey species. The masking of communication signals by anthropogenic noise may be considered as a reduction in the communication space of animals (*e.g.,* Clark *et al.,* 2009) and may result in energetic or other costs as animals change their vocalization behavior (*e.g.,* Miller *et al.,* 2000; Foote *et al.,* 2004; Parks *et al.,* 2007b; Di Iorio and Clark 2009; Holt *et al.,* 2009). Masking can be reduced in situations where the signal and noise come from different directions (Richardson *et al.,* 1995), through amplitude modulation of the signal, or through other compensatory behaviors (Houser and Moore 2014). Masking can be tested directly in captive species (*e.g.,* Erbe 2008), but in wild populations it must be either modeled or inferred from evidence of masking compensation. There are few studies addressing real-world masking sounds likely to be experienced by marine mammals in the wild (*e.g.,* Branstetter *et al.,* 2013).

Masking affects both senders and receivers of acoustic signals and can potentially have long-term chronic effects on marine mammals at the population level as well as at the individual level. Low-frequency ambient sound levels have increased by as much as 20 dB (more than three times in terms of SPL) in the world's ocean from pre-industrial periods, with most of the increase from distant commercial shipping (Hildebrand 2009). All anthropogenic sound sources, but especially chronic and lower-frequency signals (*e.g.,* from vessel traffic), contribute to elevated ambient sound levels, thus intensifying masking.

Potential Effects on Marine Mammal Habitat

Water quality—Temporary and localized reduction in water quality will occur as a result of in-water construction activities. Most of this effect will occur during the installation of piles and blasting when bottom sediments are disturbed. Effects to turbidity and sedimentation are expected to be short-term, minor, and localized. Currents are strong in the area and, therefore, suspended sediments in the water column should dissipate and quickly return to background levels. Following the completion of sediment-disturbing activities, the turbidity levels are expected to return to normal ambient levels following the end of construction. Turbidity within the water column has the potential to reduce the level of oxygen in the water and irritate the gills of prey fish species in the proposed project area. However, turbidity plumes associated with the project would be temporary and localized, and fish in the proposed project area would be able to move away from and avoid the areas where plumes may occur. It is expected that the impacts on prey fish species from turbidity and, therefore, on marine mammals, would be minimal and temporary. In general, the area likely impacted by the project is relatively small compared to the available habitat in Great Bay Estuary, and there is no biologically important area for marine mammals that could be affected. As a result, activity at the project site would be inconsequential in terms of its effects on marine mammal foraging.

Effects to Prey—Sound may affect marine mammals through impacts on the abundance, behavior, or distribution of prey species (*e.g.,* crustaceans, cephalopods, fish, zooplankton). Marine mammal prey varies by species, season, and location and, for some, is not well documented. Studies regarding the effects of noise on known marine mammal prey are described here.

Fish utilize the soundscape and components of sound in their environment to perform important functions such as foraging, predator avoidance, mating, and spawning (*e.g.,* Zelick *et al.,* 1999; Fay, 2009). Depending on their hearing anatomy and peripheral sensory structures, which vary among species, fishes hear sounds using pressure and particle motion sensitivity capabilities and detect the motion of surrounding water (Fay *et al.,* 2008). The potential effects of noise on fishes depends on the overlapping frequency range, distance from the sound source, water depth of

exposure, and species-specific hearing sensitivity, anatomy, and physiology. Key impacts to fishes may include behavioral responses, hearing damage, barotrauma (pressure-related injuries), and mortality.

Fish react to sounds which are especially strong and/or intermittent low-frequency sounds, and behavioral responses such as flight or avoidance are the most likely effects. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. The reaction of fish to noise depends on the physiological state of the fish, past exposures, motivation (*e.g.,* feeding, spawning, migration), and other environmental factors. Hastings and Popper (2005) identified several studies that suggest fish may relocate to avoid certain areas of sound energy. Additional studies have documented effects of pile driving on fish, although several are based on studies in support of large, multiyear bridge construction projects (*e.g.,* Scholik and Yan, 2001, 2002; Popper and Hastings, 2009). Several studies have demonstrated that impulse sounds might affect the distribution and behavior of some fishes, potentially impacting foraging opportunities or increasing energetic costs (*e.g.,* Fewtrell and McCauley, 2012; Pearson *et al.,* 1992; Skalski *et al.,* 1992; Santulli *et al.,* 1999; Paxton *et al.,* 2017). However, some studies have shown no or slight reaction to impulse sounds (*e.g.,* Pena *et al.,* 2013; Wardle *et al.,* 2001; Jorgenson and Gyselman, 2009; Cott *et al.,* 2012). More commonly, though, the impacts of noise on fish are temporary.

SPLs of sufficient strength have been known to cause injury to fish and fish mortality. However, in most fish species, hair cells in the ear continuously regenerate and loss of auditory function likely is restored when damaged cells are replaced with new cells. Halvorsen *et al.* (2012a) showed that a TTS of 4–6 dB was recoverable within 24 hours for one species. Impacts would be most severe when the individual fish is close to the source and when the duration of exposure is long. Injury caused by barotrauma can range from slight to severe and can cause death, and is most likely for fish with swim bladders. Barotrauma injuries have been documented during controlled exposure to impact pile driving (Halvorsen *et al.,* 2012b; Casper *et al.,* 2013).

Construction activities would produce continuous (*i.e.,* vibratory pile driving and removal, and drilling) and impulsive (*i.e.,* impact pile driving and blasting) sounds. The duration of impact pile driving for the proposed project would be limited to the final stage of installation (''proofing'') after the pile has been driven as close as practicable to the design depth with a vibratory driver. Vibratory pile driving and drilling would possibly elicit behavioral reactions from fish, such as temporary avoidance of the area, but are unlikely to cause injuries to fish or have persistent effects on local fish populations. The duration of fish avoidance of this area after pile driving and drilling stop is unknown, but a return to normal recruitment, distribution and behavior is anticipated. While impacts from blasting to fish are more severe, including barotrauma and mortality, the blast will last less than one second for each blast event, making the duration of this acoustic impact short term. In addition, it should be noted that the area in question is low-quality habitat since it is already highly developed and experiences a high level of anthropogenic noise from normal Shipyard operations and other vessel traffic. In general, impacts on marine mammal prey species are expected to be minor and temporary.

Construction may have temporary impacts on benthic invertebrate species, another marine mammal prey source. Direct benthic habitat loss would result with the permanent loss of approximately 3.5 acres of benthic habitat from construction of the super flood basin. However, the areas to be permanently removed are beneath and adjacent to the existing berths along the Shipyard's industrial waterfront and are regularly disturbed as part of the construction dredging to maintain safe navigational depths at the berths. Further, vessel activity at the berths creates minor disturbances of benthic habitats (*e.g.,* vessel propeller wakes) during waterfront operations. Therefore, impacts of the proposed project are not likely to have adverse effects on marine mammal foraging habitat in the proposed project area.

All marine mammal species using habitat near the proposed project area are primarily transiting the area; no known foraging or haulout areas are located within 1.5 miles of the proposed project area. The most likely impacts on marine mammal habitat for the project are from underwater noise, bedrock removal, turbidity, and potential effects on the food supply. However, it is not expected that any of these impacts would be significant.

Estimated Take

This section provides an estimate of the number of incidental takes proposed for authorization through this IHA, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would primarily be by Level B harassment, as noise generated from in-water pile driving (vibratory and impact), drilling, and blasting has the potential to result in disruption of behavioral patterns for individual marine mammals. The use of the explosive source (*i.e.,* blasting) for a very short period each day has the potential to result in TTS. The primary relevant mitigation measure is avoiding blasting when any marine mammal is observed in the PTS zones. While this measure should avoid all take by Level A harassment, NMFS is authorizing takes by Level A harassment to account for the possibility that marine mammals escape observation in the PTS zone. Additionally, the distances to thresholds for slight lung injury for harbor porpoises (5 m) and phocids (9 m) are small enough that the mitigation and monitoring measures are expected to minimize the potential for such taking to the extent practicable. Therefore the potential for non-auditory physical injury is considered discountable, and all takes by Level A harassment are expected to occur due to PTS.

As described previously, no mortality is anticipated or proposed to be authorized for these activities. The method by which take is estimated is described below.

Generally speaking, NMFS estimates take by considering: (1) Acoustic thresholds above which NMFS believes marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) and the number of days of activities. NMFS notes that while these basic factors can contribute to a basic calculation to provide an initial prediction of takes, additional information that can qualitatively

inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, the factors considered here are described in more detail and present the proposed take estimate.

Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment). Thresholds have also been developed to identify the pressure levels above which animals may incur different types of tissue damage from exposure to pressure waves from explosive detonations.

Level B Harassment for non-explosive sources—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source (*e.g.,* frequency, predictability, duty cycle), the environment (*e.g.,* bathymetry), and the receiving animals (hearing, motivation, experience, demography, behavioral context) and can be difficult to predict (Southall *et al.,* 2007, Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a factor that is both predictable and measurable for most activities, NMFS uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS predicts that marine mammals are likely to be behaviorally harassed in a manner NMFS considers Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 dB re 1 µPa (rms) for continuous (*e.g.,* vibratory pile-driving, drilling) and above 160 dB re 1 µPa (rms) for impulsive and/or intermittent (*e.g.,* impact pile driving) sources.

Level A harassment for non-explosive sources—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). As mentioned previously, the Navy's Portsmouth Naval Shipyard modification and expansion includes the use of impulsive (*i.e.,* impact pile driving) and non-impulsive (*i.e.,* drilling, vibratory pile driving) sources.

These thresholds are provided in Table 4. The references, analysis, and methodology used in the development of the thresholds are described in NMFS' 2018 Technical Guidance, which may be accessed at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 4—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset acoustic thresholds * (received level)	
	Impulsive	Non-impulsive
High-Frequency (HF) Cetaceans	*Cell 5:* $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB	*Cell 6:* $L_{E,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 7:* $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	*Cell 8:* $L_{E,PW,24h}$: 201 dB.

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

Note: Peak sound pressure (L_{pk}) has a reference value of 1µPa, and cumulative sound exposure level (L_E) has a reference value of 1µPa^{2}s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript "flat" is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (HF cetaceans and PW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Explosive sources—Based on the best available science, NMFS uses the acoustic and pressure thresholds indicated in Table 5 to predict the onset of behavioral harassment, PTS, non-auditory impacts, and mortality. Because of the nature of blasting, there is no established Level B behavioral harassment threshold associated with the activity, but TTS, which is a form of Level B harassment take, may occur. The behavioral threshold used in analyses for multiple explosive events is determined relative to (5 dB less than) the TTS onset threshold (DoN 2017). The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2018 Technical Guidance, which may be accessed at: *http://www.nmfs.noaa.gov/pr/acoustics/guidelines.htm.*

TABLE 5—EXPLOSIVE ACOUSTIC AND PRESSURE THRESHOLDS FOR MARINE MAMMALS

Group	Level B harassment		Level A harassment	Non-auditory		Mortality
	Behavioral (multiple detonations)	TTS	PTS	Gastro-intestinal tract	Lung	
High-Frequency (HF) Cetaceans.	135 dB SEL	140 dB SEL or 196 dB SPL_{pk}.	155 dB SEL or 202 dB SPL_{pk}.	237 dB SPL_{pk}.	39.1M$^{1/3}$ (1+[D/10.081])$^{1/2}$ Pa-sec. where: M = mass of the animals in kg; D = depth of animal in m	91.4M$^{1/3}$ (1+[D/10.081])$^{1/2}$ Pa-sec where: M = mass of the animals in kg; D = depth of animal in m.

TABLE 5—EXPLOSIVE ACOUSTIC AND PRESSURE THRESHOLDS FOR MARINE MAMMALS—Continued

Group	Level B harassment		Level A harassment	Non-auditory		Mortality
	Behavioral (multiple detonations)	TTS	PTS	Gastro-intestinal tract	Lung	
Phocid Pinnipeds (PW) (Underwater).	165 dB SEL	170 dB SEL or 212 dB SPL_{pk}.	185 dB SEL or 218 dB SPL_{pk}.			

Ensonified Area

The operational and environmental parameters of the activity that will feed into identifying the area ensonified above the acoustic thresholds are described below.

Source Levels

The project includes impact pile driving, vibratory pile driving and pile removal, drilling, and blasting. Source levels of pile driving activities are based on reviews of measurements of the same or similar types and dimensions of piles available in the literature. Based on this review, the sources levels in Table 6 are assumed for the pile driving and drilling underwater noise produced by construction activities.

TABLE 6—SUMMARY OF IN-WATER PILE DRIVING SOURCE LEVELS

[at 10 m from source]

Pile type	Installation/extraction method	Pile diameter (inch)	SPL_{pk}, dB re 1 µPa	SPL_{rms}, dB re 1 µPa	SEL, dB re 1 μPa^2-s
Z-shaped steel sheet [1] [3]	Vibratory	28	NA	167	167
	Impact	28	211	196	181
Flat-webbed steel sheet [1] [3]	Vibratory	18	NA	163	163
	Impact	18	205	190	180
Steel pipe [2]	Vibratory	30	NA	167	167
Blast holes [4]	Drilling	4.5	NA	166.2	166.2

Key: dB = decibels; NA = Not applicable; dB re 1 µPa = dB referenced to a pressure of 1 micropascal, measures underwater SPL. dB re 1 µPa2-s = dB referenced to a pressure of 1 micropascal squared per second, measures underwater SEL.

[1] = A proxy value for 28-inch sheet piles could not be found for impact and vibratory driving so the proxy for a 30-inch steel pipe pile has been used. A proxy value for 18-inch flat-webbed sheet piles could not be found for impact and vibratory driving so the proxy for a 24-inch Z-shaped sheet pile has been used (NAVFAC MIDLANT 2019a).

Sources: Navy 2015 [2]; CALTRANS 2015 [3]; Denes *et al,* 2016.

The proxy source level for drilling of blast-charge holes is derived from Denes *et al.* (2016), which reports sound pressure levels measured during rock socket drilling at Kodiak Ferry Terminal in Alaska. The size of the blast-charge holes considered here (4.5-inch) is much smaller than the size of the drilled holes (24-inch) in Denes *et al.* (2016), making the use of 166.2 dB re 1µPa conservative.

There are no data on sound source levels from explosives used under circumstances identical to the proposed activity (*e.g.,* charge composition and weight, bathymetry, substrate composition, and the dimensions of holes for stemmed charge placement). Therefore, the Navy made approximations by reference to mathematical models that have been empirically validated, under roughly comparable circumstances, to estimate source levels both in terms of absolute peak sound pressure level (SPL in units of dB re 1µPa) and sound exposure level (SEL in units of dB re 1μPa^2-s) (Table 7). The peak source level calculation of a confined blast follows Cole's (1948) equation and a regression curve from the Miami Harbor Deepening Project (Hempen *et al.* 2007), using a distance of 2.4 m and a weight of 120 lbs for a single charge. Based on this approach, the peak source level for the proposed project is estimated to be 257 dB re 1 µPa for a 120 lb charge. Following Urick (1983), the Navy estimated the SEL for 30, 120 pound charges at 1 m by first calculating the instantaneous pressure following the onset of a shock wave, as a relationship between peak pressure and time. Blasting operations would involve detonating 120 pounds up to 30 times in rapid succession, with a split second delay between each detonation. Without specific information regarding the layout of the charges, the modeling assumes a grid of 2.4 m by 2.4 m charges for the majority of the superflood basin, and 1.5 m by 1.8 m for the rows closest to Berth 11. Due to time and spatial separation of each single charge by a distance of 2.4 m, the accumulation of acoustic energy is added sequentially, assuming the transmission loss follows cylindrical spreading within the matrix of charges. Using this approach for multiple confined charges, the modeled source SEL for 30, 120 pound charges at 1 m is estimated to be 227 dB re 1μPa^2-s. Please see the Navy's IHA application for more details regarding these calculations.

TABLE 7—BLASTING SOURCE LEVELS

Explosive charge	SPL_{pk}, (dB re 1 µPa)	SEL (dB re 1 μPa^2-s)
30 x 120 lb charge	257	227

These source levels for pile driving, drilling, and blasting are used to estimate the Level A harassment and Level B harassment zones. For all construction activities, cumulative SEL values are used to calculate distances to

the Level A harassment thresholds using the NMFS acoustic guidance (NMFS 2018) because they were larger than the values calculated against the SPLpeak criteria.

The Level B harassment distances for construction activities are calculated using geometric spreading with the source levels provided in Tables 6 and 7.

Ensonified areas (A) are calculated using the following equation.

$$A = \pi R^2 \quad (1)$$

where R is the harassment distance.

However, the maximum distance from the source is capped due to landmass interception in the surrounding area. For this reason, the maximum area that could be ensonified by noise from construction activities is an estimated 0.418 km^2 (0.16 square miles). Therefore, all harassment zones that are larger than 0.418 km^2 are corrected to this maximum value. The maximum ensonified area for blasting is smaller (0.335 km^2) because, prior to the removal of bedrock, a portion of the west closure wall will be installed, providing an additional boundary between noise produced within the superflood basin and the surrounding environment.

When the original NMFS Technical Guidance (2016) was published, in recognition of the fact that the ensonified area/volume could be more technically challenging to predict because of the duration component in the new thresholds, NMFS developed a User Spreadsheet that includes tools to help predict a simple isopleth that can be used in conjunction with marine mammal density or occurrence to help predict takes. NMFS notes that because of some of the assumptions included in the methods used for these tools, NMFS anticipates that isopleths produced are typically going to be overestimates of some degree, which may result in some degree of overestimate of Level A harassment take. However, these tools offer the best way to predict appropriate isopleths when more sophisticated 3D modeling methods are not available, and NMFS continues to develop ways to quantitatively refine these tools, and will qualitatively address the output where appropriate. For stationary sources such as in-water vibratory and impact pile driving, NMFS User Spreadsheet predicts the closest distance at which, if a marine mammal remained at that distance the entire duration of the activity, it would not incur PTS. The Level A harassment areas are calculated using the same Equation (1), with corrections to reflect the largest possible area of 0.418 km^2 if the calculation value was larger.

The modeled distances to Level A harassment and Level B harassment isopleths for the marine mammal species likely to be affected by the proposed activities are provided in Tables 8 and 9. As discussed above, the only marine mammals that could occur in the vicinity of the project area are harbor porpoise (high-frequency cetacean) and four species of true seals (phocid).

TABLE 8—DISTANCES AND AREAS OF HARASSMENT ZONES FOR PILE DRIVING AND DRILLING *

Activity	Pile size, type, and rate	Number of days	Level A harassment				Level B harassment	
			HF cetacean		Phocid		Dist. (m)	Area (m^2)
			Dist. (m)	Area (m^2)	Dist. (m)	Area (m^2)		
Impulsive								
Construct west closure wall ..	18″ flat-webbed sheet pile (12 pile/day).	13	1,763	418	792	380	1,000	405
Entrance structure closure walls.	28″ Z-shaped sheet pile (12 pile/day).	4	2,056	418	923	395	2,512	418
Non-impulsive								
Construct west closure wall ..	18″ flat-webbed sheet pile (13 pile/day).	13	13.7	0.556	5.6	0.098	7,356	418
Install west closure wall template.	30″ steel pipe pile (3 pile/day).	5	10.1	0.319	4.1	0.053	13,594	418
Remove west closure wall template.	30″ steel pipe pile (3 pile/day).	5	10.1	0.319	4.1	0.053	13,594	418
Remove temporary dolphins	30″ steel pipe pile (8 pile/day).	2	66.1	10.7	27.2	2.0	46,416	418
Entrance structure closure walls.	28″ Z-shaped sheet pile (12 pile/day).	4	25.4	1.75	10.4	0.338	13,594	418
Bedrock drilling for blast charges.	4.5″ (1,580 holes)	130	7	0.153	4.3	0.058	12,023	418

* 418 m^2 is the maximum ensonified area in the project area due to landmass interception of sound propagation.

TABLE 9—DISTANCES AND AREAS OF HARASSMENT ZONES FOR BLASTING*

Blasting events and charge	Blasting days	Level A (PTS onset) harassment		Level B (behavioral) harassment		Non-auditory injury
		Harbor porpoise distance to 155 dB SEL_{cum} threshold/area of ZOI	Phocids distance to 185 dB SEL_{cum} threshold/area of ZOI	Harbor porpoise distance to 135 dB SEL_{cum} threshold/area of ZOI	Phocids distance to 165 dB SEL_{cum} threshold/area of ZOI	Phocid/harbor porpoise distance to 243 dB peak pressure threshold/area of ZOI
5–30 blasts per event, 120-lb charge per blast event, 150 blast events.	130 (1–2 events/day)	1,007 m/335 m^2	110 m/9.78 m^2	2,131 m/335 m^2	577 m/276.36 m^2	5 m/0.08 m^2.

* 335 m^2 is the maximum ensonified area in the project area due to landmass interception of sound propagation.

Marine Mammal Occurrence

Marine mammal density estimates for the harbor porpoise, harbor seal, and gray seal are based on marine mammal monitoring observations during 2017 and 2018 (CIANBRO 2018a,b). Density values were calculated from visual sightings of all marine mammals divided by the monitoring days (a total of 154 days) and the total ensonified area in which the sightings occurred in the 2017 and 2018 activities (0.8401 km^2). Details used for calculations are provided in Table 10 and described below.

TABLE 10—MARINE MAMMAL SIGHTINGS AND RESULTING DENSITY IN THE VICINITY OF PORTSMOUTH NAVAL SHIPYARD PROJECT AREA

Species	2017 sighting (96 days)	2018 sighting (58 days)	Total sighting	Density (animal/day/ km^2)
Harbor porpoise	3	2	5	0.04
Harbor seal	199	122	321	2.48
Gray seal	24	2	26	0.20

Hooded and harp seals are much rarer than the harbor and gray seals in the Piscataqua River, and no density information for these two species is available. To date, marine mammal monitoring for the Berth 11 Waterfront Improvements Construction project has not recorded a sighting of a hooded or harp seal in the project area (Cianbro 2018ab; NAVFAC Mid-Atlantic 2018, 2019b; Navy 2019; Stantec 2020); however, two harp seals were observed outside of Berth 11 pile-driving activities, one on May 12, 2020 and one on May 14, 2020 (Stantec 2020). The Navy requested authorization of take for these two species and NMFS is acting on that request.

Take Calculation and Estimation

The approach by which the information provided above is brought together to produce a quantitative take estimate is described here.

For marine mammals with known density information (*i.e.,* harbor porpoise, harbor seal, and gray seal), estimated harassment take numbers are calculated using the following equation:

Estimated take = animal density × ensonified area × operating days (2)

However, in consideration of the prevalence of seals in the project area and in accordance with the approach utilized in IHAs previously issued to the Navy for expansion and modification of DD1, NMFS has determined that it is appropriate to increase the number of proposed harbor seal and gray seal Level B behavioral harassment takes. Proposed harbor seal Level B behavioral harassment takes have been adjusted upwards by multiplying the average number of harbor seals sighted per day from May through December 2020 (721 sightings divided by 150 days of monitoring, or 5 harbor seals/day) by the number of proposed actual construction days (159), resulting in 795 proposed Level B behavioral harassment takes. Gray seal proposed Level B harassment takes have been increased utilizing the same approach (47 sightings divided by 150 days of monitoring, or 0.31 gray seals/day), resulting in 50 Level B behavioral harassment takes.

NMFS authorized one Level B harassment take per month each of a hooded seal and a harp seal for the Berth 11 Waterfront Improvements Construction project in both 2018 and 2019. The Navy is requesting authorization of one Level B harassment take each of hooded seal and harp seal per month of construction from January through May when these species may occur (Total of 5 Level B harassment takes for each species).

A summary of estimated and proposed takes is presented in Table 11. Non-auditory take estimates were zero for all species and are, therefore, not included in Table 11.

BILLING CODE 3510–22–P

Table 11. Estimated and proposed takes of marine mammals.

Marine Mammals	Underwater Vibratory Pile-driving and Drilling Criteria (*e.g.*, non-impulsive/continuous sounds)			Underwater Impact Pile-driving and Blasting Criteria (*e.g.*, impulsive sounds)					Estimated total takes	Proposed total takes	Percent population (%)
	Level A (PTS onset) Threshold 173 dB Harbor Porpoise	Level A (PTS onset) Threshold 201 dB Seals	Level B (Behavioral) Harassment Threshold 120 dB[2] RMS	Level A (PTS onset) Threshold 155 dB[1] SEL Harbor Porpoise	Level A (PTS onset) 185 dB SEL Seals	Level B (Behavioral) Harassment Threshold 160 dB[2] RMS	Level B (Behavioral) Harassment Threshold 135 dB[1] SELcum Harbor Porpoise	Level B (Behavioral) Harassment Threshold 165 dB[1] SELcum Seals			
Harbor porpoise	0	NA	2	2	NA	0	2	NA	6	6	0.00
Harbor seal	NA	0	164	NA	22	0	NA	83	269	817	3.01
Gray seal	NA	0	13	NA	2	0	NA	6	21	52	0.00
Hooded seal	NA	0	5	NA	0	0	NA	0	5	5	0.00
Harp seal	NA	0	5	NA	0	0	NA	0	5	5	0.00

[1] dB re 1 μPa[2]-s.
[2] dB re 1μPa RMS.

BILLING CODE 3510–22–C

Proposed Mitigation

In order to issue an IHA under Section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses. NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, NMFS carefully considers two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

In addition to the measures described later in this section, the Navy will employ the following standard mitigation measures:

- The Navy must employ Protected Species Observers (PSOs), establish monitoring locations, and monitor the project area to the maximum extent possible based on the required number of PSOs, required monitoring locations, and environmental conditions;
- Monitoring must take place from 30 minutes prior to initiation of construction activities through 30 minutes post-completion of construction activities;
- The Navy must conduct a briefing between construction supervisors and crews and the marine mammal monitoring team prior to the start of construction, and when new personnel join the work, to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures;
- For in-water and over-water heavy machinery work, if a marine mammal comes within 10 m, operations shall cease and vessels shall reduce speed to the minimum level required to maintain steerage and safe working conditions;
- With the exception of pre-dawn drilling, work may only occur during daylight hours, when visual monitoring of marine mammals can be conducted;
- For those marine mammals for which take has not been requested, pile removal, drilling, and blasting will shut down immediately when the animals are sighted approaching the harassment zones;
- If take reaches the authorized limit for an authorized species, activity for which take is authorized will be stopped as these species approach the Level B harassment zone to avoid additional take;
- Blasting would not begin until at least one sheet pile face of the west closure wall has been installed; and
- A bubble curtain would be installed across the DD1 entrance openings to mitigate underwater noise impacts outside of the basin during pre-dawn drilling of blast-charge holes, and blasting events.

The following measures would apply to the Navy's mitigation requirements:

Monitoring Harassment Zones—Before the commencement of in-water construction activities (*i.e.,* impact pile driving, vibratory pile driving and pile removal, drilling, and blasting), harassment zones must be established for purposes of monitoring. Monitoring zones enable observers to be aware of and communicate the presence of marine mammals in the project area outside of the shutdown zone (see below) and thus prepare for a potential cease of activity should the animal enter the shutdown zone. All Level B harassment monitoring zones for the proposed activities are equivalent to the maximum ensonified zone, adjusted for landmass interception, or 0.418 km^2 (0.16 square miles). Similarly, harassment monitoring zones must be established for the PTS isopleths associated with each functional hearing group.

Shutdown Zones—The Navy will implement shutdown zones for all pile driving and extraction, drilling, and blasting activities. The purpose of a shutdown is to prevent some undesirable outcome, such as auditory injury or severe behavioral disturbance of sensitive species, by halting the activity. If a marine mammal is observed entering or within the respective shutdown zone (Table 12) after a construction activity has begun, the PSO will request a temporary cessation of the construction activity. On days when multiple activities are occurring concurrently, the largest shutdown zone between/among the activities will be implemented. The shutdown zone for blasting would be the entire region of influence (ROI), equivalent to the maximum ensonified zone adjusted for landmass interception (0.418 km^2). If shutdown zones are obscured by fog or poor lighting conditions, pile-driving and blasting will not be initiated until the entire shutdown zones are visible.

Although drilling activities may occur during pre-dawn hours in order to maintain the project schedule, the shutdown distance for drilling is small (10 m) and will likely be entirely visible for monitoring despite visibility limitations during this timeframe. As mentioned previously, drilling will not occur between sunset and pre-dawn hours.

Shutdown zones typically vary based on the activity type and marine mammal hearing group. A summary of the shutdown zones is provided in Table 12.

TABLE 12—SHUTDOWN ZONES DISTANCES FOR VARIOUS PILE DRIVING ACTIVITIES AND MARINE MAMMAL HEARING GROUPS

Pile type, size & driving method	Shutdown distance (m)	
	HF cetacean	Phocid
Vibratory drive 30-inch steel pipe piles	70	30
Vibratory extraction 30-inch steel pipe piles	70	30
Impact drive 28-inch steel sheet piles	110	50
Vibratory drive 28-inch steel sheet piles	25	10
Impact drive 18-inch sheet piles	110	50
Vibratory drive 18-inch sheet piles	15	10
Drilling 4.5-inch blast charge holes	10	10
Blasting 120 lb. charge	Entire ROI [1]	Entire ROI

[1] Region of influence (ROI) is the maximum ensonified area (0.418 km^2).

Pre-start Clearance Monitoring—Prior to the start of daily in-water construction activity, or whenever a break in pile driving/removal or drilling of 30 minutes or longer occurs, PSOs will observe the shutdown zones for a period of 30 minutes. The shutdown zone will be considered cleared when a marine mammal has not been observed within the zone for that 30-minute period. If a marine mammal is observed within the shutdown zone, no construction activity, including soft-start (see below), can proceed until the animal has voluntarily left the zone or has not been observed for 15 minutes. When a marine mammal for which Level B harassment take is authorized is present in the Level B harassment zone, activities may begin. If the entire Level B harassment zone is not visible at the start of construction, pile driving activities can begin. If work ceases for more than 30 minutes, the pre-activity monitoring of the shutdown zones will commence.

Soft Start—The use of a soft start procedure is believed to provide additional protection to marine mammals by warning marine mammals or providing them with a chance to leave the area prior to the hammer operating at full capacity, and typically involves a requirement to initiate sound from the hammer at reduced energy followed by a waiting period. The Navy will provide an initial set of strikes from the impact hammer at reduced energy, followed by a 30 second waiting period, and then two subsequent sets. NMFS notes that it is difficult to specify the reduction in energy for any given hammer because of variation across drivers and, for impact hammers, the actual number of strikes at reduced energy will vary because operating the hammer at less than full power results in ''bouncing'' of the hammer as it strikes the pile, resulting in multiple ''strikes''. Soft start will be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer.

Based on our evaluation of the required measures, NMFS has preliminarily determined that the prescribed mitigation measures provide the means effecting the least practicable adverse impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an IHA for an activity, Section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and
- Mitigation and monitoring effectiveness.

Proposed Monitoring Measures

The Navy shall employ trained PSOs to conduct marine mammal monitoring for its PNSY modification and expansion project. The purposes of marine mammal monitoring are to implement mitigation measures and learn more about impacts to marine mammals from the Navy's construction activities.

Protected Species Observer Qualifications

NMFS-approved PSOs shall meet the following requirements:

1. Independent observers (*i.e.,* not construction personnel) are required;
2. At least one observer must have prior experience working as an observer;
3. Other observers may substitute education (undergraduate degree in biological science or related field) or training for experience;
4. Where a team of three or more observers are required, one observer should be designated as lead observer or monitoring coordinator. The lead

observer must have prior experience working as an observer; and

5. NMFS will require submission and approval of observer curricula vitae.

Marine Mammal Monitoring Protocols

The Navy will monitor all Level A harassment zones and Level B harassment zones before, during, and after pile driving activities. The Marine Mammal Monitoring Plan would include the following procedures:

- At least two (3) PSOs shall be posted to monitor marine mammals during in-water pile driving and pile removal, blasting, and drilling;
- PSOs will be primarily located at the best vantage point(s) in order to properly see the entire shutdown zone(s) and zones associated with behavioral impact thresholds;
- PSOs must record all observations of marine mammals, regardless of distance from the construction activity;
- During all observation periods, PSOs will use high-magnification (25X), as well as standard handheld (7X) binoculars, and the naked eye to search continuously for marine mammals;
- Monitoring distances will be measured with range finders. Distances to animals will be based on the best estimate of the PSO, relative to known distances to objects in the vicinity of the PSO;
- Pile driving, drilling, and blasting will only take place when the shutdown zones are visible and can be adequately monitored. If conditions (*e.g.,* fog) prevent the visual detection of marine mammals, activities with the potential to result in Level A harassment shall not be initiated. If such conditions arise after the activity has begun, blasting and impact pile driving would be halted but drilling and vibratory pile driving or extraction would be allowed to continue;

Information Collection:

PSOs shall collect the following information during marine mammal monitoring:

- PSO locations during monitoring
- Date and time that monitored activity begins and ends for each day conducted (monitoring period);
- Construction activities occurring during each daily observation period, including how many and what type of piles driven, number of blast holes drilled, and number or blast events;
- Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly); including Beaufort sea state and any other relevant weather conditions, including cloud cover, fog, sun glare, and estimated observable distance;
- For each marine mammal sighting:
- Name of PSO who sighted the animal(s) and PSO location and activity at time of sighting;
- Time of sighting;
- Species, numbers, and, if possible, sex and age class of marine mammals;
- Description of any observable marine mammal behavior patterns, including bearing and direction of travel and distance from construction activity;
- Location, distance, and bearing from pile driving, drilling, and blasting activities to marine mammals and distance from the marine mammals to the observation point; and
- Animal's closet point of approach and estimated amount of time that the animals remained in the Level B harassment zone; and
- Detailed information about implementation of any mitigation (*e.g.,* shutdowns or delays), a description of specific actions that ensued, and resulting changes in behavior of the animal(s), if any.

Hydroacoustic Monitoring

The Navy must conduct hydroacoustic monitoring of in-water construction activities, including the installation of (10) Z-shaped sheet piles for both impact and vibratory pile driving, (4) steel piles for vibratory pile driving, (10) blasting event, and (10) blast-charge hole drilling events.

Reporting Measures

The Navy is required to submit a draft monitoring report (including all PSO data sheets and/or raw sighting data) within 90 days after completion of the construction work or the expiration of the IHA (if issued), whichever comes earlier. If Navy intends to request a renewal of the IHA (if issued) in a subsequent year, a monitoring report should be submitted no less than 60 days before the expiration of the current IHA (if issued). This report would detail the monitoring protocol, summarize the data recorded during monitoring, and estimate the number of marine mammals that may have been harassed. The acoustic monitoring report must contain the informational elements described in the hydroacoustic monitoring plan. NMFS would have an opportunity to provide comments on the report, and if NMFS has comments, The Navy would address the comments and submit a final report to NMFS within 30 days.

In addition, NMFS would require the Navy to notify NMFS' Office of Protected Resources and NMFS' Greater Atlantic Stranding Coordinator within 48 hours of sighting an injured or dead marine mammal in the construction site. The Navy shall provide NMFS and the Stranding Network with the species or description of the animal(s), the condition of the animal(s) (including carcass condition, if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available).

In the event that the Navy finds an injured or dead marine mammal that is not in the construction area, the Navy would report the same information as listed above to NMFS as soon as operationally feasible.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.,* intensity, duration), the context of any responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. NMFS also assesses the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS's implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

Pile driving, drilling, and blasting activities associated with the proposed project, as described previously, have the potential to disturb or temporarily displace marine mammals. The specified activities may result in take, in the form of Level A harassment (potential injury; from impact pile driving or blasting) or Level B harassment (potential behavioral disturbance or TTS) from underwater sounds generated from pile driving

(impact and vibratory), drilling and blasting. Potential takes could occur if individual marine mammals are present in the ensonified zone when pile driving, drilling, or blasting activities are occurring.

To avoid repetition, this introductory discussion of our analysis applies to all of the species listed in Table 2, given that the anticipated effects of the Navy's PNSY modification and expansion construction project activities on marine mammals are expected to be relatively similar in nature. There is no information about the nature or severity of the impacts, or the size, status, or structure of any species or stock that would lead to a different analysis by species for this activity, or else species-specific factors would be identified and analyzed.

Although some individual harbor porpoises and harbor and gray seals are estimated to experience Level A harassment in the form of PTS if they remain within the impact pile driving Level A harassment zone for an entire day, or are present within the Level A harassment zone during a blasting event, the degree of injury is expected to be mild and is not likely to affect the reproduction or survival of the individual animals. It is expected that, if hearing impairments occurs as a result of impact pile driving or blasting, most likely the affected animal would lose a few dB in its hearing sensitivity, which in most cases is not likely to affect its survival and recruitment. Hearing impairment that might occur for these individual animals would be limited to the dominant frequency of the noise sources, *i.e.,* in the low-frequency region below 2 kHz. Nevertheless, as for all marine mammal species, it is anticipated that, in general, these pinnipeds will avoid areas where sound levels could cause hearing impairment. Therefore it is not likely that an animal would stay in an area with intense noise that could cause severe levels of hearing damage.

Under the majority of the circumstances, anticipated takes are expected to be limited to short-term Level B behavioral harassment or TTS. Marine mammals present in the vicinity of the action area and taken by Level B harassment would most likely show overt brief disturbance (startle reaction) from blasting events and avoidance of the area impacted by elevated noise levels during pile driving (and removal). Given the limited estimated number of predicted incidents of Level A harassment and Level B harassment and the limited, short-term nature of the responses by the individuals, the impacts of the estimated take cannot be reasonably expected to, and are not reasonably likely to, rise to the level that they would adversely affect the species considered here at the population level, through effects on annual rates of recruitment or survival. There are no known important habitats, such as rookeries or haulouts, in the vicinity of the Navy's proposed PNSY DD1 modification and expansion construction project. The project also is not expected to have significant adverse effects on affected marine mammals' habitat, including prey, as analyzed in detail in the Potential Effects of Specified Activities on Marine Mammals and their Habitat section.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No mortality is anticipated or authorized;
- Some individual marine mammals might experience a mild level of PTS, but the degree of PTS is not expected to affect their survival;
- Most adverse effects to marine mammals are likely to be temporary behavioral harassment or TTS; and
- No biologically important area is present in or near the proposed construction area.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under section 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is less than one third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

NMFS proposes to authorize incidental take of 5 marine mammal stocks. The total amount of taking proposed for authorization is three percent or less for all five of these stocks, (Table 11).

Based on the analysis contained herein of the proposed activity (including the prescribed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act (ESA)

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to the Navy for the taking of marine mammals incidental to modification and expansion of the Portsmouth Naval Shipyard Dry Dock 1 in Kittery, Maine, effective for one year from the date of issuance, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

Request for Public Comments

NMFS requests comment on these analyses, the proposed authorization, and any other aspect of this Notice of Proposed IHA for the proposed issuance of an IHA to the Navy for the taking of marine mammals incidental to modification and expansion of the Portsmouth Naval Shipyard Dry Dock 1 in Kittery, Maine, effective for one year from the date of issuance. NMFS also requests comment on the potential for a renewal of this proposed IHA as described in the paragraph below.

Please include with your comments any supporting data or literature citations to help inform NMFS' final decision on the request for MMPA authorization.

On a case-by-case basis, NMFS may issue a one-time, 1-year IHA renewal with an expedited public comment period (15 days) when: (1) Another year of identical or nearly identical activities as described in the Specified Activities section is planned or (2) the activities would not be completed by the time the IHA expires and a second IHA would allow for completion of the activities beyond that described in the *Dates and Duration* section, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to expiration of the current IHA;
- The request for renewal must include the following:

(1) An explanation that the activities to be conducted under the proposed renewal are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take because only a subset of the initially analyzed activities remain to be completed under the renewal); and

(2) A preliminary monitoring report showing the results of the required impacts of a scale or nature not previously analyzed or authorized;

- Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

Dated: March 29, 2021.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2021–06782 Filed 4–7–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA995]

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Notice, extension of comment period.

SUMMARY: NMFS is extending the public comment period for the Notice of Intent (NoI) to prepare the Western Oregon State Forests Habitat Conservation Plan (WOSF HCP) Environmental Impact Statement (EIS). We, NMFS, intend to prepare an EIS, in accordance with the requirements of the National Environmental Policy Act (NEPA), to analyze the potential impacts on the human (biological, physical, social, and economic) environment caused by the WOSF HCP and a range of reasonable alternatives. The primary purpose of the comment period is to engage Federal, Tribal, State, and local governments and the public in the identification of issues and concerns, potential impacts, and reasonable alternatives to the proposed action that meet the purpose and need for consideration in the draft EIS.

DATES: The original NoI issued on March 8, 2021 (86 FR 13337), provided for a comment period to end on Wednesday, April 7, 2021. The comment period is now extended 14 days and will close Wednesday, April 21, 2021. Comments must be received at the appropriate address (see **ADDRESSES**) no later than 11:59 p.m. Eastern time on April 21, 2021. Comments received after this date may not be accepted. Comments submitted prior to this announcement do not need to be resubmitted as a result of the extension of the comment period.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2021–0019, by Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2021–0019 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.

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 a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Michelle McMullin, NMFS, 541–957–3378, *Michelle.McMullin@noaa.gov.* Additional information can be found on the project website: *https://www.fisheries.noaa.gov/action/notice-intent-prepare-environmental-impact-statement-western-oregon-state-forest-habitat.* In addition to this **Federal Register** notice, NMFS will post a notice of the extension on its website and will send an email to interested parties.

SUPPLEMENTARY INFORMATION: The WOSF HCP is being prepared in support of a request for Endangered Species Act (ESA) incidental take permits (ITPs) authorizing incidental take of covered species by covered activities. The applicant for the ITPs is the Oregon Department of Forestry (ODF). Under the proposed action, NMFS and USFWS would approve the WOSF HCP and issue ITPs with 70-year permit terms to the ODF for incidental take of covered species from covered activities in the plan area.

The primary purpose of the scoping process is for the public to assist NMFS in developing the EIS. NMFS requests that the comments be specific. In particular, we request information regarding: Any science that is relevant and not yet incorporated, any interpretation of science that is different than what is presented; significant issues; identification of impacts that are not fully off-set; review and input regarding monitoring; possible alternatives that meet the purpose and need; effects or impacts to the human environment from the proposed action or alternatives; and potential terms and conditions that may minimize adverse effects, including time or area restrictions or both to reduce environmental impacts.

We are using this process to seek alternatives, which may include, but are not limited to variation in the length of the permit term; adding or removing some of the covered species; the level of take allowed; the level, location, or type of minimization, mitigation, or monitoring provided under the HCP; the scope of covered activities; the location, amount or type of conservation, or similar aspects of the permit conditions. Further information is contained in the NoI (86 FR 13337).

Authority: 42 U.S.C. 4321 *et seq.;* 40 CFR 1500–1508; and Companion Manual for NOAA Administrative Order 216–6A.

Dated: April 2, 2021.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2021–07189 Filed 4–6–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Department of the Air Force

Record of Decision for the United States Air Force Special Use Airspace Optimization at Holloman Air Force Base Environmental Impact Statement

AGENCY: Department of the Air Force, DoD.

ACTION: Notice of availability of record of decision.

SUMMARY: On March 29, 2021, the Department of the Air Force (DAF) signed the Record of Decision (ROD) for the Special Use Airspace Optimization at Holloman Air Force Base Environmental Impact Statement.

ADDRESSES: Ms. Robin Divine, AFCEC/CZN, 2261 Hughes Avenue, Suite 155, JBSA—Lackland Air Force Base, Texas 78236–9853, (210) 925–2730; *robin.divine@us.af.mil.*

SUPPLEMENTARY INFORMATION: The Department of the Air Force has decided to expand the lateral and vertical boundaries of the existing Talon Military Operations Area (MOA) and associated Air Traffic Control Assigned Airspace (ATCAA) in eastern New Mexico. The expanded MOA/ATCAA will support training for pilots stationed at Holloman Air Force Base.

The DAF decision documented in the ROD was based on matters discussed in the Final Environmental Impact Statement, inputs from the cooperating agencies, Native American Tribes, members of the public, and regulatory agencies, and other relevant factors. The Final Environmental Impact Statement was made available to the public on February 5, 2021 through a Notice of Availability in the **Federal Register** (Volume 86, Number 23, page 8356) with a waiting period that ended on March 8, 2021.

Authority: This Notice of Availability is published pursuant to the regulations (40 CFR part 1506.6) implementing the provisions of the National Environmental Policy Act (42 U.S.C. 4321, *et seq.*) and the Air Force's Environmental Impact Analysis Process (32 CFR parts 989.21(b) and 989.24(b)(7)).

Adriane Paris,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2021–07187 Filed 4–7–21; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Personnel Development To Improve Services and Results for Children With Disabilities—Preparation of Special Education, Early Intervention, and Related Services Leadership Personnel

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for new awards for fiscal year (FY) 2021 for Personnel Development to Improve Services and Results for Children with Disabilities—Preparation of Special Education, Early Intervention, and Related Services Leadership Personnel, Assistance Listing Number 84.325D. This notice relates to the approved information collection under OMB control number 1820–0028.

DATES:

Applications Available: April 8, 2021.

Deadline for Transmittal of Applications: June 7, 2021.

Deadline for Intergovernmental Review: August 6, 2021.

Pre-Application Webinar Information: No later than April 13, 2021, the Office of Special Education and Rehabilitative Services (OSERS) will post pre-recorded informational webinars designed to provide technical assistance to interested applicants. The webinars may be found at *www2.ed.gov/fund/grant/apply/osep/new-osep-grants.html.*

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768), and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf.*

FOR FURTHER INFORMATION CONTACT: Celia Rosenquist, U.S. Department of Education, 400 Maryland Avenue SW, Room 5158, Potomac Center Plaza, Washington, DC 20202–5076. Telephone: (202) 245–7373. Email: *Celia.Rosenquist@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purposes of this program are to (1) help address State-identified needs for personnel preparation in special education, early intervention, related services, and regular education to work with children, including infants and toddlers, with disabilities; and (2) ensure that those personnel have the necessary skills and knowledge, derived from practices that have been determined through scientifically based research and experience, to be successful in serving those children.

Priorities: This competition includes two absolute priorities and two competitive preference priorities. In accordance with 34 CFR 75.105(b)(2)(v), the absolute priorities and competitive preference priorities are from allowable activities specified in the statute (see sections 662 and 681 of the Individuals with Disabilities Education Act (IDEA); 20 U.S.C. 1462 and 1481).

Absolute Priorities: For FY 2021 and any subsequent year in which we make awards from the list of unfunded applications from this competition, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3), we consider only applications that meet either Absolute Priority 1 or Absolute Priority 2. Applicants may apply under both absolute priorities but must submit separate applications if they do so.

These priorities are:

Absolute Priority 1—Preparation of Special Education, Early Intervention, and Related Services Faculty.

Background:

The purpose of this priority is to support existing doctoral degree programs that prepare special education, early intervention, and related services personnel who are well-qualified for, and can act effectively in, leadership positions as researchers and preparers of special education, early intervention, and related services personnel in institutions of higher education (IHEs). There is a well-documented need for leadership personnel to fill faculty positions within IHEs in special education, early intervention, and related services (Castillo et al., 2014; Montrosse & Young, 2012; Robb et al., 2012; Smith et al., 2011; Smith et al., 2010; Woods & Snyder, 2009). These leaders conduct

research to increase the knowledge of effective interventions and services for children, including infants and toddlers, and youth with disabilities. These leaders also teach practices supported by evidence to future special education, early intervention, related services, and regular education professionals who will work in a variety of educational settings and provide services directly to these children (deBettencourt et al., 2016; Robb et al., 2012; Smith et al., 2010; West & Hardman, 2012). Shortages in these leadership positions limit the field's capacity to generate new knowledge of effective interventions and to prepare future professionals to improve outcomes for children with disabilities (Smith et al., 2011).

Leadership personnel in IHEs play an essential role in promoting high expectations for each child with a disability and provide, or prepare others to provide, effective interventions and services that improve outcomes for children, including infants, toddlers, and youth with disabilities. In addition to preparing future special education, early intervention, related services, and regular education professionals, future faculty at IHEs will also play a critical role in attracting diverse and qualilifed individuals to the teaching profession and in providing future educators in preparation programs with experiences in various roles in the field that would provide them with practical knowledge and resources for their future career in education (Billingsley et al., 2020; Brownell et al., 2020). Critical competencies for special education, early intervention, and related services faculty vary depending on the type and the requirements of the preparation program but can include, for example, skills needed for postsecondary instruction, research, administration, policy development, professional practice, the use of technologies to support in-person and remote teaching and student learning, and leadership. However, all leadership personnel need to promote high expectations and have current knowledge of effective interventions and services that improve outcomes for children with disabilities, including high-need children with disabilities. This knowledge should be applicable to children served in a variety of educational settings (*e.g.,* urban or rural public schools, including charter schools) or early childhood and early intervention settings (*e.g.,* home, community-based, Early Head Start and Head Start, child care, or public and private preschools). The interventions and services must include those that improve early childhood, educational, and employment outcomes.

Priority:

The purpose of this priority is to support existing doctoral degree programs that prepare special education, early intervention, and related services personnel at the doctoral degree level who are well qualified for, and can act effectively in, faculty positions in IHEs as researchers and preparers of personnel.

This priority will provide support to help address identified needs for personnel with the knowledge and skills to establish and meet high expectations for each child with a disability. Programs must culminate in a doctoral degree, which may include a Doctor of Education (Ed.D.) degree. Applicants must plan to recruit and enroll the proposed number of scholars in the application within the first 12 months of the project period or demonstrate that scholars enrolled after the first 12 months can complete the program by the end of the proposed project period.

Note: Project periods under this priority may be up to 60 months. Projects should be designed to ensure that all proposed scholars successfully complete the program within 60 months of the start of the project. The Secretary may reduce continuation awards for any project in which scholars are not on track to complete the program by the end of that period.

To be considered for funding under this absolute priority, program applicants must meet the application requirements contained in the priority. All projects funded under this absolute priority also must meet the programmatic and administrative requirements specified in the priority.

Note: Preparation programs that lead to clinical doctoral degrees in related services (*e.g.,* a Doctor of Audiology degree or Doctor of Physical Therapy degree) are not included in this priority. These types of preparation programs are eligible to apply for funding under the Personnel Preparation in Special Education, Early Intervention, and Related Services priority (84.325K) that the Office of Special Education Programs (OSEP) intends to fund in FY 2021.

To meet the requirements of this priority, an applicant must—

(a) Demonstrate, in the narrative section of the application under ''Significance,'' how—

(1) The project addresses the need for leadership personnel to promote high expectations and provide, or prepare others to provide, effective interventions and services that improve outcomes for children with disabilities, including high-need children with disabilities.[1] To address this requirement, the applicant must present—

(i) Appropriate and applicable data (*e.g.,* national, State) demonstrating the need for the leadership personnel the applicant proposes to prepare; and

(ii) Data demonstrating the success of the doctoral program to date in producing faculty in special education, early intervention, or related services, such as: The professional accomplishments of program graduates (*e.g.,* public service, awards, or publications) that demonstrate their leadership in special education, early intervention, or related services; the average amount of time it takes for program graduates to complete the program; the number of program graduates and the percentage of scholars who enroll who graduate; and the percentage of program graduates finding employment directly related to their preparation; and

Note: Data on the success of a doctoral program should be no older than five years prior to the start date of the project proposed in the application. When reporting percentages, the denominator (*i.e.,* the total number of scholars or program graduates) must be provided.

(2) Scholar competencies to be acquired in the program relate to knowledge and skills needed by the leadership personnel the applicant proposes to prepare. To address this requirement, the applicant must—

(i) Identify the competencies needed by leadership personnel in order to provide, or prepare others to provide, effective interventions and services, including through distance education, that improve outcomes for children with disabilities, including high-need children with disabilities; and

(ii) Provide the conceptual framework of the leadership preparation program, including any empirical support, that will promote the acquisition of the identified competencies needed by leadership personnel.

(b) Demonstrate, in the narrative section of the application under ''Quality of project services,'' how—

(1) The applicant will recruit and retain high-quality scholars [2]

[1] For purposes of this priority, ''high-need children with disabilities'' refers to children or students (ages birth through 21, depending on the State) who are eligible for services under IDEA, and who may be at risk of educational failure or otherwise in need of special assistance or support because they: (1) Are living in poverty, (2) are English learners, (3) are academically far below grade level, (4) have left school before receiving a regular high school diploma, (5) are at risk of not graduating with a regular high school diploma on time, (6) are homeless, (7) are in foster care, or (8) have been incarcerated.

[2] For the purposes of this priority, ''scholar'' is limited to an individual who (a) is pursuing a doctoral degree related to special education, early

participating in the project and ensure equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. To meet this requirement, the narrative must describe—

(i) The selection criteria the applicant will use to identify high-quality applicants for admission in the program;

(ii) The recruitment strategies the applicant will use to attract high-quality applicants, including specific recruitment strategies targeting high-quality applicants from traditionally underrepresented groups, including underrepresented people of color, individuals with disabilities, and nontraditional scholars (*e.g.,* returning military); and

(iii) The approach the applicant will use to help all scholars, including individuals with disabilities, complete the program within the proposed project period; and

(2) The project is designed to promote the acquisition of the competencies needed by leadership personnel to promote high expectations and provide, or prepare others to provide, effective interventions and services that improve outcomes for children with disabilities, including high-need children with disabilities. To address this requirement, the applicant must—

(i) Describe how the components of the project, such as coursework, internship experiences, research requirements, and other opportunities provided to scholars, will enable the scholars to acquire the competencies needed by leadership personnel the applicant proposes to prepare;

(ii) Describe how the components of the project are integrated in order to support the acquisition and enhancement of the identified competencies needed by leadership personnel the applicant proposes to prepare;

(iii) Describe how the components of the project prepare scholars to promote high expectations and to provide, or prepare others to provide, effective interventions and services that improve outcomes for children with disabilities, including high-need children with disabilities, in a variety of educational or early childhood and early intervention settings, including in-person and remote settings;

(iv) Demonstrate, through a letter of support from a public, parochial, or private partnering agency, school, or program, that it will provide scholars with a high-quality internship experience in a high-need local educational agency (LEA),[3] a high-poverty school,[4] a school implementing a comprehensive support and improvement plan,[5] a school implementing a targeted support and improvement plan [6] for children with disabilities, a State educational agency (SEA), an early childhood and early intervention program located within the geographical boundaries of a high-need LEA, or an early childhood and early intervention program located within the geographical boundaries of an LEA serving the highest percentage of schools identified for comprehensive support and improvement or implementing targeted support and improvement plans in the State;

(v) Describe how the project will partner with diverse stakeholders to inform project components;

(vi) Describe how the project will use resources, as appropriate, available through technical assistance centers, which may include centers funded by the Department;

(vii) Describe the approach that faculty members will use to mentor or otherwise support scholars with the goal of helping them acquire competencies needed by leadership personnel and advancing their careers in special education, early intervention, or related services;

(viii) Describe how the components of the project will promote the acquisition of scholars' critical leadership skills, including communication, networking, and collaboration; and

(ix) Describe how the components of the project will promote the acquisition of scholars' knowledge of strategies and approaches in attracting, preparing, and retaining future educators who will work with and provide services to children with disabilities.

(c) Demonstrate, in the narrative section of the application under ''Quality of the project evaluation,'' how the applicant will—

(1) Evaluate how well the goals or objectives of the proposed leadership project have been met. The applicant must describe the outcomes to be measured for both the project and the scholars, particularly the acquisition of scholars' competencies; and the evaluation methodologies to be employed, including proposed instruments, data collection methods, and possible analyses;

(2) Collect, analyze, and use data on current scholars and scholars who graduate from the program to improve the proposed program on an ongoing basis; and

(3) Report the evaluation results to OSEP in the applicant's annual and final performance reports.

(d) Demonstrate, in the narrative under ''Required Project Assurances'' or appendices as directed, that the following program requirements are met. The applicant must—

(1) Include in appendix B of the application—

(i) Course syllabi for all coursework in the major and any required coursework for a minor;

(ii) Course syllabi for all research methods, evaluation methods, or data analysis courses required by the degree program and elective research methods, evaluation methods, or data analysis courses that have been completed by more than one scholar enrolled in the program in the last five years; and

(iii) For new coursework, proposed syllabi;

(2) Ensure that the proposed number of scholars will be recruited and enrolled into the program within the first 12 months of the project period or demonstrate that scholars enrolled after the first 12 months can graduate from the program by the end of the proposed project period. The described scholar recruitment strategies, including recruitment of individuals with disabilities, the program components

intervention, or related services; (b) receives scholarship assistance as authorized under section 662 of IDEA (34 CFR 304.3(g)); and (c) will be able to be employed in a position that serves children with disabilities for at least 51 percent of their time or case load. See *https://pdp.ed.gov/OSEP/Home/Regulation* for more information.

[3] For the purposes of this priority, ''high-need LEA'' means an LEA (a) that serves not fewer than 10,000 children from families with incomes below the poverty line; or (b) for which not less than 20 percent of the children served by the LEA are from families with incomes below the poverty line.

[4] For the purposes of this priority, ''high-poverty school'' means a school in which at least 50 percent of students are from low-income families as determined using one of the measures of poverty specified under section 1113(a)(5) of the Elementary and Secondary Education Act of 1965, as amended (ESEA). For middle and high schools, eligibility may be calculated on the basis of comparable data from feeder schools. Eligibility as a high-poverty school is determined on the basis of the most currently available data.

[5] For the purposes of this priority, a ''school implementing a comprehensive support and improvement plan'' is a school identified for comprehensive support and improvement by the State under section 1111(c)(4)(D) of the ESEA that includes (a) not less than the lowest-performing five percent of all schools receiving funds under Title I, Part A of the ESEA; (b) all public high schools in the State failing to graduate one-third or more of their students; and (c) public schools in the State described under section 1111(d)(3)(A)(i)(II) of the ESEA.

[6] For the purposes of this priority, a ''school implementing a targeted support and improvement plan'' means a school identified for targeted support and improvement by a State that has developed and is implementing a school-level targeted support and improvement plan to improve student outcomes based on the indicators in the statewide accountability system as defined in section 1111(d)(2) of the ESEA.

and their sequence, and proposed budget must be consistent with this requirement;

(3) Ensure that efforts to recruit a diverse range of scholars, including diversity of race, ethnicity, or national origin, are consistent with applicable law. For instance, grantees may engage in focused outreach and recruitment to increase the diversity of the applicant pool prior to the selection of scholars;

(4) Ensure that the project will meet the requirements in 34 CFR 304.23, particularly those related to (i) informing all scholarship recipients of their service obligation commitment; and (ii) disbursing scholarships. Failure by a grantee to properly meet these requirements is a violation of the grant award that may result in sanctions, including the grantee being liable for returning any misused funds to the Department;

(5) Ensure that prior approval from the OSEP project officer will be obtained before admitting additional scholars beyond the number of scholars proposed in the application and before transferring a scholar to another preparation program funded by OSEP;

(6) Ensure that the project will meet the statutory requirements in section 662(e) through (h) of IDEA;

(7) Ensure that at least 65 percent of the total award over the project period (*i.e.,* up to 5 years) will be used for scholar support;

(8) Ensure that the IHE will not require scholars enrolled in the program to work (*e.g.,* as graduate assistants) as a condition of receiving support (*e.g.,* tuition, stipends) from the proposed project, unless the work is specifically related to the acquisition of scholars' competencies or the requirements for completion of their personnel preparation program. This prohibition on work as a condition of receiving support does not apply to the service obligation requirements in section 662(h) of IDEA;

(9) Ensure that the project will be operated in a manner consistent with nondiscrimination requirements contained in the U.S. Constitution and the Federal civil rights laws;

(10) Ensure that a revised project budget will be submitted to OSEP should the project not be able to recruit and enroll the proposed number of scholars that can graduate from the program by the end of the project period;

(11) Ensure that the budget includes attendance by the project director at a three-day project directors' meeting in Washington, DC, or virtually, during each year of the project. The budget may also provide for the attendance of scholars at the same three-day project directors' meetings in Washington, DC, or virtually;

(12) Ensure that the project director, key personnel, and scholars will actively participate in the cross-project collaboration, advanced trainings, and cross-site learning opportunities (*e.g.,* webinars, briefings) supported by OSEP. This network is intended to promote opportunities for participants to share resources and generate new knowledge by addressing topics of common interest to participants across projects including Department priorities and needs in the field;

(13) Ensure that if the project maintains a website, it will be of high quality, with an easy-to-navigate design that meets government or industry-recognized standards for accessibility;

(14) Ensure that annual progress toward meeting project goals is posted on the project website;

(15) Ensure that scholar accomplishments (*e.g.,* public service, awards, publications) will be reported in annual and final performance reports; and

(16) Ensure that annual data will be submitted on each scholar who receives grant support (OMB Control Number 1820–0686). The primary purposes of the data collection are to track the service obligation fulfillment of scholars who receive funds from OSEP grants and to collect data for program performance measure reporting under the Government Performance and Results Act of 1993 (GPRA). Applicants are encouraged to visit the Personnel Development Program Data Collection System (DCS) website at *https://pdp.ed.gov/osep* for further information about this data collection requirement. Typically, data collection begins in January of each year, and grantees are notified by email about the data collection period for their grant, although grantees may submit data as needed, year-round. This data collection must be submitted electronically by the grantee and does not supplant the annual grant performance report required of each grantee for continuation funding (see 34 CFR 75.590). Data collection includes the submission of a signed, completed Pre-Scholarship Agreement and Exit Certification for each scholar funded under an OSEP grant (see paragraph (d)(4) of this priority).

Absolute Priority 2—Preparation of Special Education and Early Intervention Administrators.

Background:

The purpose of this priority is to support existing doctoral degree programs that prepare special education or early intervention personnel who are well-qualified for, and can act effectively in, leadership positions in public school systems, such as SEAs, charter management organizations (CMOs), charter school authorizers, lead agencies (LAs), LEAs, early intervention services programs (EIS programs), or schools. Shortages of leadership personnel at State and local agencies to fill special education and early intervention administrator positions have been noted (Bellamy & Iwaszuk, 2017; Billingsley et al., 2014). The turnover rate for leaders in State and local agencies has also increased substantially over the past decade, which impacts the ongoing efforts at the State and local levels to improve educational practices (NCSI, 2018a; NCSI, 2018b). These administrators supervise and evaluate the implementation of instructional programs to make sure that State or local agencies are meeting the needs of children with disabilities. Administrators also ensure that schools and programs meet Federal, State, and local requirements for special education, early intervention, and related services (Billingsley et al., 2014; Bruns et al., 2017; Boscardin & Lashley, 2018).

Special education and early intervention administrators play an essential role in promoting high expectations for each child with a disability and supervising the provision of effective interventions and services that improve outcomes for children, including infants, toddlers, and youth with disabilities. In addition to supervising the provision of effective interventions and services that improve outcomes for children, special education or early intervention administrators also play a critical role in attracting diverse and qualilifed educators and implementing strategies to retain effective educators (Billingsley & Bettini, 2019). Critical competencies for special education or early intervention administrators vary depending on the type of leadership personnel and the requirements of the preparation program but can include, for example, skills needed for implementing special education policies and laws, administration and supervision, organizational and system change, program planning and implementation, evaluation of educational programs, technology implementation for in-person and remote instruction, and collaboration with stakeholders (Boscardin & Lashley, 2018; Bruns et al., 2017).

However, all leadership personnel need to promote high expectations and

have current knowledge of effective interventions and services that improve outcomes for children with disabilities, including high-need children with disabilities. This knowledge should be applicable to children served in a variety of educational settings (*e.g.,* urban or rural public schools, including charter schools) or early childhood and early intervention settings (*e.g.,* home, community-based, Early Head Start and Head Start, child care, or public and private preschools). The interventions and services must include those that improve early childhood, educational, and employment outcomes.

Priority:

The purpose of this priority is to support existing doctoral degree programs that prepare special education or early intervention personnel to work as administrators in public school systems such as SEAs, CMOs, charter school authorizers, LAs, LEAs, private school networks, parochial schools, EIS programs, or schools in positions such as SEA special education administrators, LEA or regional special education directors, school-based special education directors, preschool coordinators, and early intervention coordinators.

This priority will provide support to help address identified needs for personnel with the knowledge and skills to establish and meet high expectations for each child with a disability. Doctoral programs in educational administration that include a focus on special education are eligible under this priority. Programs must culminate in a doctoral degree, which may include a Doctor of Education (Ed.D.) degree. The preparation of school principals is not included under this priority. Under this priority, applicants may propose projects that enroll scholars who are concurrently employed (*e.g.,* as special education teachers) while enrolled in the program. Applicants must plan to recruit and enroll the proposed number of scholars in the application within the first 12 months of the project period or demonstrate that scholars enrolled after the first 12 months can complete the program by the end of the proposed project period.

Note: Project periods under this priority may be up to 60 months. Projects should be designed to ensure that all proposed scholars successfully complete the program within 60 months of the start of the project. The Secretary may reduce continuation awards for any projects in which scholars are not on track to complete the program by the end of that period.

To be considered for funding under this absolute priority, all applicants must meet all of the application requirements contained in the priority. All projects funded under this absolute priority also must meet all of the programmatic and administrative requirements specified in the priority.

To meet the requirements of this priority, an applicant must—

(a) Demonstrate, in the narrative section of the application under ''Significance,'' how—

(1) The project addresses the need for leadership personnel to promote high expectations and supervise the provision of effective interventions and services that improve outcomes for children with disabilities, including high-need children with disabilities.[7] To address this requirement, the applicant must present—

(i) Appropriate and applicable data (*e.g.,* State, region, district, local) demonstrating the need for the special education or early intervention administrators the applicant proposes to prepare; and

(ii) Data demonstrating the success of the doctoral program to date in producing special education or early intervention administrators, such as: The professional accomplishments of program graduates (*e.g.,* public service, awards) that demonstrate their leadership in special education or early intervention; the average amount of time it takes for program graduates to complete the program; the number of program graduates; and the percentage of program graduates finding employment directly related to their preparation; and

Note: Data on the success of a doctoral program should be no older than five years prior to the start date of the project proposed in the application. When reporting percentages, the denominator (*i.e.,* the total number of scholars or program graduates) must be provided.

(2) Scholar competencies to be acquired in the program relate to knowledge and skills needed by the leadership personnel the applicant proposes to prepare. To address this requirement, the applicant must—

(i) Identify the competencies needed by leadership personnel to supervise the provision of effective interventions and services, including through distance education, that improve outcomes for children with disabilities, including high-need children with disabilities; and

(ii) Provide the conceptual framework of the leadership preparation program, including any empirical support, that will promote the acquisition of the identified competencies needed by leadership personnel.

(b) Demonstrate, in the narrative section of the application under ''Quality of project services,'' how—

(1) The applicant will recruit and retain high-quality scholars[8] participating in the project and ensure equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. To meet this requirement, the narrative must describe—

(i) The selection criteria the applicant will use to identify high-quality applicants for admission in the program;

(ii) The recruitment strategies the applicant will use to attract high-quality applicants, including specific recruitment strategies targeting high-quality applicants from traditionally underrepresented groups, including underrepresented people of color, individuals with disabilities, and nontraditional scholars (*e.g.,* returning military); and

(iii) The approach the applicant will use to help all scholars, including individuals with disabilities, complete the program during the proposed project period; and

(2) The project is designed to promote the acquisition of the competencies needed by leadership personnel to promote high expectations and supervise the provision of effective interventions and services that improve outcomes for children with disabilities, including high-need children with disabilities. To address this requirement, the applicant must—

(i) Describe how the components of the project, such as coursework, work-based experiences aligned with project components (*e.g.,* internships, current employment), program evaluation, and other opportunities provided to scholars, will enable the scholars to acquire the competencies needed by

[7] For purposes of this priority, ''high-need children with disabilities'' refers to children or students (ages birth through 21, depending on the State) who are eligible for services under IDEA, and who may be at risk of educational failure or otherwise in need of special assistance or support because they: (1) Are living in poverty, (2) are English learners, (3) are academically far below grade level, (4) have left school before receiving a regular high school diploma, (5) are at risk of not graduating with a regular high school diploma on time, (6) are homeless, (7) are in foster care, or (8) have been incarcerated.

[8] For the purposes of this priority, ''scholar'' is limited to an individual who (a) is pursuing a doctoral degree related to special education, early intervention, or related services; (b) receives scholarship assistance as authorized under section 662 of IDEA (34 CFR 304.3(g)); and (c) will be able to be employed in a position that serves children with disabilities for either 51 percent of their time or case load. See *https://pdp.ed.gov/OSEP/Home/Regulation* for more information.

leadership personnel the applicant proposes to prepare;

(ii) Describe how the components of the project are integrated in order to support the acquisition and enhancement of the identified competencies needed by leadership personnel the applicant proposes to prepare;

(iii) Describe how the components of the project prepare scholars to promote high expectations and to supervise the provision of effective interventions and services that improve outcomes for children with disabilities, including high-need children with disabilities, in a variety of educational or early childhood and early intervention settings, including in-person and remote settings;

(iv) Demonstrate, through a letter of support from a public, parochial, or private partnering agency, school, or program, that it will provide scholars with a high-quality internship experience in a high-need LEA,[9] a high-poverty school,[10] a school implementing a comprehensive support and improvement plan,[11] a school implementing a targeted support and improvement plan [12] for children with disabilities, an SEA, an early childhood and early intervention program located within the geographical boundaries of a high-need LEA, or an early childhood and early intervention program located within the geographical boundaries of an LEA serving the highest percentage of schools identified for comprehensive support and improvement or implementing targeted support and improvement plans in the State;

(v) Describe how the project will partner with diverse stakeholders to inform project components;

(vi) Describe how the project will use resources, as appropriate, available through technical assistance centers, which may include centers funded by the Department;

(vii) Describe the approach that faculty members will use to mentor or otherwise support scholars, including scholars who are pursuing a degree on a part-time basis or are concurrently employed on a full-time basis, with the goal of helping them acquire competencies needed by leadership personnel and advancing their careers in special education or early intervention administration;

(viii) Describe how the components of the project will promote the acquisition of scholars' critical leadership skills, including communication, networking, and collaboration; and

(ix) Describe how the components of the project will promote the acquisition of scholars' knowledge of strategies and approaches in attracting, preparing, and retaining qualified educators, particularly educators from underrepresented backgrounds, who will work with and provide services to children with disabilities.

(c) Demonstrate, in the narrative section of the application under ''Quality of the project evaluation,'' how the applicant will—

(1) Evaluate how well the goals or objectives of the proposed leadership project have been met. The applicant must describe the outcomes to be measured for both the project and the scholars, particularly the acquisition of scholars' competencies; and the evaluation methodologies to be employed, including proposed instruments, data collection methods, and possible analyses;

(2) Collect, analyze, and use data on current scholars and scholars who graduate from the program to improve the proposed program on an ongoing basis; and

(3) Report the evaluation results to OSEP in the applicant's annual and final performance reports.

(d) Demonstrate, in the narrative under ''Required Project Assurances'' or appendices as directed, that the following program requirements are met. The applicant must—

(1) Include in appendix B of the application—

(i) Course syllabi for all coursework in the major and any required coursework for a minor;

(ii) Course syllabi for all evaluation methods or data analysis courses required by the degree program and for all elective evaluation methods or data analysis courses that have been completed by more than one scholar enrolled in the program in the last five years; and

(iii) For new coursework, proposed syllabi;

(2) Ensure that the proposed number of scholars will be recruited into the program within the first 12 months of the project period or demonstrate that scholars enrolled after the first 12 months can graduate from the program by the end of the proposed project period. The described scholar recruitment strategies, including recruitment of individuals with disabilities, the program components and their sequence, and proposed budget must be consistent with this requirement;

(3) Ensure that efforts to recruit a diverse range of scholars, including diversity of race, ethnicity, or national origin, are consistent with applicable law. For instance, grantees may engage in focused outreach and recruitment to increase the diversity of the applicant pool prior to the selection of scholars;

(4) Ensure that the project will meet the requirements in 34 CFR 304.23, particularly those related to (i) informing all scholarship recipients of their service obligation commitment; and (ii) disbursing scholarships. Failure by a grantee to properly meet these requirements is a violation of the grant award that may result in sanctions, including the grantee being liable for returning any misused funds to the Department;

(5) Ensure that prior approval from the OSEP project officer will be obtained before admitting additional scholars beyond the number of scholars proposed in the application and before transferring a scholar to another preparation program funded by OSEP;

(6) Ensure that the project will meet the statutory requirements in section 662(e) through (h) of IDEA;

(7) Ensure that at least 65 percent of the total award over the project period (*i.e.,* up to 5 years) will be used for scholar support;

(8) Ensure that the IHE will not require scholars enrolled in the program to work (*e.g.,* as graduate assistants) as a condition of receiving support (*e.g.,* tuition, stipends) from the proposed project, unless the work is specifically related to the acquisition of scholars' competencies or the requirements for

[9] For the purposes of this priority, ''high-need LEA'' means an LEA (a) that serves not fewer than 10,000 children from families with incomes below the poverty line; or (b) for which not less than 20 percent of the children served by the LEA are from families with incomes below the poverty line.

[10] For the purposes of this priority, ''high-poverty school'' means a school in which at least 50 percent of students are from low-income families as determined using one of the measures of poverty specified under section 1113(a)(5) of the ESEA. For middle and high schools, eligibility may be calculated on the basis of comparable data from feeder schools. Eligibility as a high-poverty school is determined on the basis of the most currently available data.

[11] For the purposes of this priority, a ''school implementing a comprehensive support and improvement plan'' is a school identified for comprehensive support and improvement by the State under section 1111(c)(4)(D) of the ESEA that includes (a) not less than the lowest-performing five percent of all schools receiving funds under Title I, Part A of the ESEA; (b) all public high schools in the State failing to graduate one-third or more of their students; and (c) public schools in the State described under section 1111(d)(3)(A)(i)(II) of the ESEA.

[12] For the purposes of this priority, a ''school implementing a targeted support and improvement plan'' means a school identified for targeted support and improvement by a State that has developed and is implementing a school-level targeted support and improvement plan to improve student outcomes based on the indicators in the statewide accountability system as defined in section 1111(d)(2) of the ESEA.

completion of their personnel preparation program. This prohibition on work as a condition of receiving support does not apply to the service obligation requirements in section 662(h) of IDEA;

(9) Ensure that the project will be operated in a manner consistent with nondiscrimination requirements contained in the U.S. Constitution and the Federal civil rights laws;

(10) Ensure that a revised project budget will be submitted to OSEP should the project not be able to recruit and enroll the proposed number of scholars that can graduate from the program by the end of the project period;

(11) Ensure that the budget includes attendance by the project director at a three-day project directors' meeting in Washington, DC, or virtually, during each year of the project. The budget may also provide for the attendance of scholars at the same three-day project directors' meetings in Washington, DC, or virtually;

(12) Ensure that the project director, key personnel, and scholars will actively participate in the cross-project collaboration, advanced trainings, and cross-site learning opportunities (*e.g.,* webinars, briefings) supported by OSEP. This network is intended to promote opportunities for participants to share resources and generate new knowledge by addressing topics of common interest to participants across projects including Department priorities and needs in the field;

(13) Ensure that if the project maintains a website, it will be of high quality, with an easy-to-navigate design, that meets government or industry-recognized standards for accessibility;

(14) Ensure that annual progress toward meeting project goals is posted on the project website;

(15) Ensure that scholar accomplishments (*e.g.,* public service, awards, program implementation demonstrating improved child outcomes) will be reported in annual and final performance reports; and

(16) Ensure that annual data will be submitted on each scholar who receives grant support (OMB Control Number 1820–0686). The primary purposes of the data collection are to track the service obligation fulfillment of scholars who receive funds from OSEP grants and to collect data for program performance measure reporting under the Government Performance and Results Act of 1993 (GPRA). Applicants are encouraged to visit the Personnel Development Program Data Collection System (DCS) website at *https://pdp.ed.gov/osep* for further information about this data collection requirement. Typically, data collection begins in January of each year, and grantees are notified by email about the data collection period for their grant, although grantees may submit data as needed, year-round. This data collection must be submitted electronically by the grantee and does not supplant the annual grant performance report required of each grantee for continuation funding (see 34 CFR 75.590). Data collection includes the submission of a signed, completed Pre-Scholarship Agreement and Exit Certification for each scholar funded under an OSEP grant (see paragraph (d)(4) of this priority).

Competitive Preference Priorities: Within Absolute Priorities 1 and 2, we give competitive preference to applications that address Competitive Preference Priorities 1 and 2. Under 34 CFR 75.105(c)(2)(i), we award an additional 3 points to an application that meets Competitive Preference Priority 1 and an additional 3 points to an application that meets Competitive Preference Priority 2. The total maximum points we may award an application that chooses to address all of the competitive preference priorities is 6. Applicants should indicate in the abstract which competitive preference priorities are addressed.

These priorities are:

Competitive Preference Priority 1 (0 or 3 points).

Research has recognized a number of contributing factors to a scholar's acquisition of competencies and success in doctoral programs including developing and enhancing professional networks and collaborative learning opportunities (Douglas, 2020; Sverdlik et al., 2018). Further, networks are viewed as integral to leadership development and critical to addressing complex problems (Cullen-Lester et al., 2017; Hoppe & Reinelt, 2010). However, it has been noted that doctoral programs have often not paid sufficient attention to these factors (Douglas, 2020).

An application that proposes a partnership consisting of two or three IHEs in a high-need area of leadership shortages. To meet the competitive preference priority, a project must—

(a) Establish a partnership comprised of two or three IHEs with existing doctoral programs that prepare scholars to work as doctoral-level leaders in the high-need area proposed;

(b) Address in the project narrative the high-need area (*e.g.,* early childhood behavior, secondary transition, or special education administration) in which the partnership proposes to prepare scholars;

(c) Address in the project narrative how the opportunities provided to scholars through the partnership activities will promote the competencies needed by leaders the project proposes to prepare;

(d) Address in the project narrative how the partnership is designed to ensure that scholars have opportunities to work with faculty and scholars at each IHE participating in the partnership on activities that will promote the competencies needed by leaders the project proposes to prepare; and

(e) Address in the project narrative how policies, procedures, standards, and fiscal management of the partnership will be established.

Note: For additional information regarding group applications, refer to 34 CFR 75.127, 75.128, and 75.129.

Note: Partnerships of two or three IHEs must be structured so that either (1) each participating IHE in the partnerhip must have a doctoral program that enrolls and supports scholars; or (2) one IHE enrolls scholars in the doctoral program but scholars are required to take coursework and other program components (*e.g.,* teaching, reasearh) at each participating IHE in the partnership as part of the doctoral program requirements.

Competitive Preference Priority 2 (0 or 3 points).

(a) Under this priority, an applicant must demonstrate that the applicant has not had an active discretionary grant under the program from which it seeks funds, including through membership in a group application submitted in accordance with 34 CFR 75.127–75.129, in the last five years before the deadline date for submission of applications under the program.

(b) For the purpose of this priority, a grant or contract is active until the end of the grant's or contract's project or funding period, including any extensions of those periods that extend the grantee's or contractor's authority to obligate funds.

References:

Bellamy, T., & Iwaszuk, W. (2017, October). Responding to the need for new local special education administrators: A case study. CEEDAR Center. *https://ceedar.education.ufl.edu/wp-content/uploads/2018/02/Case-Study-SPED-10-29-17.pdf.*

Billingsley, B., & Bettini, E. (2019). Special education teacher attrition and retention: A review of the literature. *Review of Educational Research, 89*(5), 697–744. *https://doi.org/10.3102/0034654319862495.*

Billingsley, B., Bettini, E., Mathews, H.M., & McLeskey, J. (2020). Improving working conditions to support special educators' effectiveness: A call for leadership.

Teacher Education and Special Education, 43(1), 7–27.
Billingsley, B.S., Crockett, J., & Kamman, M.L. (2014). Recruiting and retaining teachers and administrators in special education. In P.T. Sindelar, E.D. McCray, M.T. Brownell, & B. Lignugaris/Kraft (Eds.), *Handbook of research on special education teacher preparation* (pp. 94–112). Routledge.
Boscardin, M.L., & Lashley, C.L. (2018). Expanding the leadership framework to support socially just special education policy, preparation, and standards. In J.B. Crockett, B.S. Billingsley, & M.L. Boscardin (Eds.), *The handbook of leadership and administration for special education.* Routledge.
Brownell, M.T., Jones, N.D., Sohn, H., & Stark, K. (2020). Improving teaching quality for students with disabilities: Establishing a warrant for teacher education practice. *Teacher Education and Special Education, 43*(1), 28–444.
Bruns, D.A., LaRocco, D.J., Sharp, O.L., & Sopko, K.M. (2017). Leadership competencies in U.S. early intervention/early childhood special education service systems: A national survey. *Infants and Young Children, 30*(4), 304–319.
Castillo, J.M., Curtis, M.J., & Tan, S.Y. (2014). Personnel needs in school psychology: A 10-year follow-up study on predicted personnel shortages. *Psychology in the Schools, 51*(8), 832–849.
deBettencourt, L.U., Hoover, J.J., Rude, H.A., & Taylor, S.S. (2016). Preparing special education higher education faculty: The influence of contemporary education issues and policy recommendations. *Teacher Education and Special Education, 39*(2), 121–133.
Cullen-Lester, K.L., Maupin, C.K., & Carter, D.R. (2017). Incorporating social networks in leadership development: A conceptual model and evaluation of research and practice. *The Leadership Quarterly, 28*(1), 130–152.
Douglas, A.S. (2020). Engaging doctoral students in networking opportunities: A relational approach to doctoral study. *Teaching in Higher Education. https://doi.org/10.1080/13562517.2020.1808611.*
Hoppe, B., & Reinelt, C. (2010). Social network analysis and the evaluation of leadership networks. *The Leadership Quarterly, 21*(4), 600–619.
Montrosse, B.E., & Young, C.J. (2012). Market demand for special education faculty. *Teacher Education and Special Education, 35*(2), 140–153.
National Center for Systemic Improvement (NCSI). (2018a). *Leadership turnover: The impact on State special education systems. https://ncsi-library.wested.org/resources/250.*
National Center for Systemic Improvement (NCSI). (2018b). *Leadership turnover: The impact on State early intervention systems. https://ncsi-library.wested.org/resources/200.*
Robb, S.M., Smith, D.D., & Montrosse, B.E. (2012). A context of the demand for special education faculty: A study of special education teacher preparation programs. *Teacher Education and Special Education, 35*(2), 128–139.
Smith, D.D., Montrosse, B.E., Robb, S.M., Tyler, N.C., & Young, C. (2011). *Assessing trends in leadership: Special education's capacity to produce a highly qualified workforce.* Claremont Graduate University. *https://files.eric.ed.gov/fulltext/ED537788.pdf.*
Smith, D.D., Robb, S.M., West, J., & Tyler, N.C. (2010). The changing education landscape: How special education leadership preparation can make a difference for teachers and their students with disabilities. *Teacher Education and Special Education, 33*(1), 25–43.
Sverdlik, A., Hall, N.C., McAlpine, L., & Hubbard, K. (2018). The Ph.D. experience: A review of the factors influencing doctoral students' completion, achievement, and well-being. *International Journal of Doctoral Studies, 13,* 361–388.
West, J.E., & Hardman, H.L. (2012). Averting current and future special education faculty shortages: Policy implications and recommendations. *Teacher Education and Special Education, 35*(2), 154–160.
Woods, J., & Snyder, P. (2009). Interdisciplinary doctoral leadership training in early intervention. *Infants & Young Children, 22*(1), 32–34.

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (APA) (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed priorities and requirements. Section 681(d) of IDEA, however, makes the public comment requirements of the APA inapplicable to the priorities in this notice.

Program Authority: 20 U.S.C. 1462 and 1481.

Note: Projects will be awarded and must be operated in a manner consistent with the nondiscrimination requirements contained in Federal civil rights laws.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The regulations for this program in 34 CFR part 304.

Note: The regulations in 34 CFR part 86 apply to IHEs only.

II. Award Information

Type of Award: Discretionary grants.

Note: In accordance with 34 CFR 75.200(b)(4), the Department may award a cooperative agreement under this program if the Secretary determines that substantial involvement between the Department and the recipient is necessary to carry out a collaborative project.

Estimated Available Funds: $4,750,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2022 from the list of unfunded applications from this competition.

Estimated Range of Awards: $225,000–$250,000 per year for an individual IHE; $450,000–$500,000 per year for a two-IHE group application; and $675,000–$750,000 for a three-IHE group application.

Estimated Average Size of Awards: $237,500 per year for an individual IHE; $475,000 per year for a two-IHE group application; and $712,500 per year for a three-IHE group application.

Maximum Award: For a single budget period of 12 months, we will not make an award exceeding: For an individual IHE, $250,000; for a two-IHE group application, $500,000; and, for a three-IHE group application, $750,000.

Estimated Number of Awards: Up to 19 awards for individual IHEs. OSEP intends to fund in FY 2021 at least 13 high-quality individual IHE applications meeting the requirements under Absolute Priority 1 and 6 high-quality individual IHE applications meeting the requirements under Absolute Priority 2. However, the total number of awards may change depending on the number of group application awards under each absolute priority.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* IHEs and private nonprofit organizations.

Note: If you are a nonprofit organization, under 34 CFR 75.51, you may demonstrate your nonprofit status by providing: (1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code; (2) a statement from a State taxing body or the State attorney general certifying that the organization is a nonprofit organization operating within the State and that no part of its net earnings may lawfully benefit any private shareholder or individual; (3) a certified copy of the applicant's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the applicant; or (4) any

item described above if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

2. a. *Cost Sharing or Matching:* Cost sharing or matching is not required for this competition.

b. *Indirect Cost Rate Information:* This program uses a training indirect cost rate. This limits indirect cost reimbursement to an entity's actual indirect costs, as determined in its negotiated indirect cost rate agreement, or eight percent of a modified total direct cost base, whichever amount is less. For more information regarding training indirect cost rates, see 34 CFR 75.562. For more information regarding indirect costs, or to obtain a negotiated indirect cost rate, please see *www2.ed.gov/about/offices/list/ocfo/intro.html.*

c. *Administrative Cost Limitation:* This program does not include any program-specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform to Cost Principles described in 2 CFR part 200 subpart E of the Uniform Guidance.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application. Under 34 CFR 75.708(e), a grantee may contract for supplies, equipment, and other services in accordance with 2 CFR part 200.

4. *Other General Requirements:*

a. Recipients of funding under this competition must make positive efforts to employ and advance in employment qualified individuals with disabilities (see section 606 of IDEA).

b. Applicants for, and recipients of, funding must, with respect to the aspects of their proposed project relating to Absolute Priority 1 or 2, involve individuals with disabilities, or parents of individuals with disabilities ages birth through 26, in planning, implementing, and evaluating the project (see section 682(a)(1)(A) of IDEA).

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768), and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf,* which contain requirements and information on how to submit an application.

2. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

3. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

4. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 50 pages and (2) use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double-space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, reference citations, and captions, as well as all text in charts, tables, figures, graphs, and screen shots.
- Use a font that is 12 point or larger.
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; or the abstract (follow the guidance provided in the application package for completing the abstract), the table of contents, the list of priority requirements, the resumes, the reference list, the letters of support, or the appendices. However, the recommended page limit does apply to all of the application narrative, including all text in charts, tables, figures, graphs, and screen shots.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and are as follows:

(a) *Significance (10 points).*

(1) The Secretary considers the significance of the proposed project.

(2) In determining the significance of the proposed project, the Secretary considers the following factors:

(i) The extent to which the proposed project will prepare personnel for fields in which shortages have been demonstrated;

(ii) The importance or magnitude of the results or outcomes likely to be attained by the proposed project; and

(iii) The extent to which there is a conceptual framework underlying the proposed research or demonstration activities and the quality of that framework.

(b) *Quality of project services (45 points).*

(1) The Secretary considers the quality of the services to be provided by the proposed project.

(2) In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers the following factors:

(i) The extent to which the training or professional development services to be provided by the proposed project are of sufficient quality, intensity, and duration to lead to improvements in practice among the recipients of those services;

(ii) The extent to which the proposed activities constitute a coherent, sustained program of training in the field; and

(iii) The extent to which the services to be provided by the proposed project reflect up-to-date knowledge from research and effective practice.

(c) *Quality of project evaluation (25 points).*

(1) The Secretary considers the quality of the evaluation to be conducted of the proposed project.

(2) In determining the quality of the evaluation, the Secretary considers the following factors:

(i) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project;

(ii) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable;

(iii) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible; and

(iv) The extent to which the methods of evaluation will provide timely guidance for quality assurance.

(d) *Quality of the management plan and adequacy of resources (20 points).*

(1) The Secretary considers the quality of the management plan and the adequacy of resources for the proposed project.

(2) In determining the quality of the management plan and the adequacy of resources, the Secretary considers the following factors:

(i) The qualifications, including relevant training and experience, of key project personnel;

(ii) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks;

(iii) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project;

(iv) The adequacy of support, including facilities, equipment, supplies, and other resources, from the applicant organization or the lead applicant organization; and

(v) The extent to which the budget is adequate to support the proposed project.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Additional Review and Selection Process Factors:* In the past, the Department has had difficulty finding peer reviewers for certain competitions because so many individuals who are eligible to serve as peer reviewers have conflicts of interest. The standing panel requirements under section 682(b) of IDEA also have placed additional constraints on the availability of reviewers. Therefore, the Department has determined that for some discretionary grant competitions, applications may be separated into two or more groups and ranked and selected for funding within specific groups. This procedure will make it easier for the Department to find peer reviewers by ensuring that greater numbers of individuals who are eligible to serve as reviewers for any particular group of applicants will not have conflicts of interest. It also will increase the quality, independence, and fairness of the review process, while permitting panel members to review applications under discretionary grant competitions for which they also have submitted applications.

4. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.206, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 200.208, the Secretary may impose specific conditions, and under 2 CFR 3474.10, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

5. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.206(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

6. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with—

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115–232) (2 CFR 200.216);

(c) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(d) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination

plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

5. *Performance Measures:* For the purposes of the Government Performance and Results Act of 1993 (GPRA) and reporting under 34 CFR 75.110, the Department has established a set of performance measures, including long-term measures, that are designed to yield information on the quality of the Personnel Development to Improve Services and Results for Children with Disabilities program. These measures include: (1) The percentage of preparation programs that incorporate scientifically or evidence-based [13] practices into their curricula; (2) the percentage of scholars completing preparation programs who are knowledgeable and skilled in evidence-based practices for children with disabilities; (3) the percentage of scholars who exit preparation programs prior to completion due to poor academic performance; (4) the percentage of scholars completing preparation programs who are working in the area(s) in which they were prepared upon program completion; (5) the Federal cost per scholar who completed the preparation program; (6) the percentage of scholars who completed the preparation program and are employed in high-need districts; and (7) the percentage of scholars who completed the preparation program and who are rated effective by their employers.

In addition, the Department will gather information on the following outcome measures: (1) The percentage of scholars who completed the preparation program and are employed in the field of special education for at least two years; (2) the number and percentage of scholars proposed by the grantee in their application that were actually enrolled and making satisfactory academic progress in the current academic year; and (3) the number and percentage of enrolled scholars who are on track to complete the training program by the end of the project's original grant period.

Grantees may be asked to participate in assessing and providing information on these aspects of program quality.

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: Whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

David Cantrell,

Deputy Director, Office of Special Education Programs, Delegated the authority to perform the functions and duties of the Assistant Secretary for the Office of Special Education and Rehabilitative Services.

[FR Doc. 2021–07261 Filed 4–7–21; 8:45 am]

BILLING CODE 4000–01–P

[13] For the purposes of this performance measure, ''evidence-based'' means, at a minimum, evidence that demonstrates a rationale (as defined in 34 CFR 77.1), where a key project component included in the project's logic model is informed by research or evaluation findings that suggest the project component is likely to improve relevant outcomes.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC21–13–000]

Commission Information Collection Activities (FERC–725l); 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, the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the currently approved information collection, FERC 725L (Mandatory Reliability Standards for the Bulk-Power System: MOD Reliability Standards).

DATES: Comments on the collection of information are due June 7, 2021.

ADDRESSES: You may submit copies of your comments (identified by Docket No. IC21–13–000) by one of the following methods:

Electronic filing through *http://www.ferc.gov,* is preferred.

- *Electronic Filing:* Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.
- For those unable to file electronically, comments may be filed by USPS mail or by hand (including courier) delivery:

○ *Mail via U.S. Postal Service Only:* Addressed to: Federal Energy Regulatory Commission, Secretary of the

Commission, 888 First Street NE, Washington, DC 20426.

○ *Hand (Including Courier) Delivery:* Deliver to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at: *http://www.ferc.gov.* For user assistance, contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at (866) 208–3676 (toll-free).

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *http://www.ferc.gov.*

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by email at *DataClearance@FERC.gov,* telephone at (202) 502–8663.

SUPPLEMENTARY INFORMATION:

Title: FERC–725L, Mandatory Reliability Standards for the Bulk-Power System: MOD Reliability Standards.

OMB Control No.: 1902–0261.

Type of Request: Three-year extension of the FERC–725L information collection requirements with no changes to the reporting requirements.

Abstract: MOD Reliability Standards ensure that generators remain in operation during specified voltage and frequency excursions, properly coordinate protective relays and generator voltage regulator controls, and ensure that generator models accurately reflect the generator's capabilities and equipment performance.

On May 30, 2013, the North American Electric Reliability Corporation (NERC) filed a petition explaining that the reliability of the Bulk-Power System benefits from ''good quality simulation models of power system equipment,'' [2] and that ''model validation ensures the proper performance of the control systems and validates the computer models used for stability analysis.'' NERC further stated that the Reliability Standards will enhance reliability because the tests performed to obtain model data may reveal latent defects that could cause ''inappropriate unit response during system disturbances.'' [2] Subsequently, on March 20, 2014,[1] the Commission approved Reliability Standards MOD–025–2, MOD–026–1, and MOD–027–1. These Standards were intended to address generator verifications needed to support Bulk-Power System reliability that would also ensure that accurate data is verified and made available for planning simulations.[2]

On May 1, 2014,[3] the Commission approved Reliability Standards MOD–032–1 and MOD–033–2. These Standards were to address ''system-level modeling data and validation requirements necessary for developing planning models and the Interconnection-wide cases that are integral to analyzing the reliability of the Bulk-Power System''.

MOD–025–2, MOD–026–1, MOD–027–1, MOD–031–3, MOD–032–1 and MOD–033–2 are all currently approved within the FERC–725L information collection. The reporting requirements associated with each standard will not change as a result of this extension request.

Type of Respondents: NERC-registered entities including generator owners, transmission planners, planning authorities, balancing authorities, resource planners, transmission service providers, reliability coordinators, and transmission operators.[4]

Estimate of Annual Burden: [5] The Commission estimates the annual public reporting burden [6] and cost for the information collection as:

RD20–4

- Elimination of the burden associated with the load-serving entity (LSE) function in Requirement R1 of proposed Reliability Standard MOD–031–3.[7] The NERC petition states as the load-serving entity is no longer a NERC registration category, NERC proposes to remove this entity from the applicability section of proposed Reliability Standard MOD–031–3 and remove reference to this entity in Requirement R1, Part 1.1, where it is listed as an ''Applicable Entity'' for purposes of Requirements R2 and R4.[8] Additionally, NERC proposes to strike the term ''Planning Authority'' from the applicability section of the standard and the explanatory text that follows. The preferred terminology for the responsible entity that coordinates and integrates transmission facilities and service plans, resource plans, and protection systems is ''Planning Coordinator.'' [9] This is a terminology change and will not result in a change in burden.

- Modification of the term ''Planning Authority'' to ''Planning Coordinator'' in proposed Reliability Standard MOD–033–2.[10] In the petition, NERC proposes to strike the term ''Planning Authority'' from the applicability section of the standard and the explanatory text that follows. The proposed change is intended to promote consistent use of ''Planning Coordinator'' throughout the Reliability Standards.[11] This is a terminology change and will not result in a change in burden.

- Reliability Standard MOD–031–3 (Demand and Energy Data).

- Reliability Standard MOD–033–2 (Steady-State and Dynamic System Model Validation).

[1] Final Rule in Docket No. RM13–16–000.

[2] NERC Petition for Approval of Five Proposed Reliability Standards MOD–025–2, MOD–026–1, MOD–027–1, PRC–019–1, and PRC–024–1 submitted to FERC on 5/30/2013.

[3] Order in Docket No. RD14–5–000.

[4] In subsequent portions of this notice, the following acronyms will be used: PA = Planning Authority, GO = Generator Owner, TP = Transmission Planner, BA = Balancing Authority, RP = Resource Planner, TSP = Transmission Service Provider, RC = Reliability Coordinator, TOP = Transmission Operator.

[5] ''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, reference 5 Code of Federal Regulations 1320.3.

[6] Each of the five MOD standards in the FERC–725L information collection previously contained ''one-time'' components to their respondent burden. These one-time burden categories consisted primarily of activities related to establishing industry practices and developing data validation procedures tailored toward these reliability standards and their reporting requirements. None of the one-time burdens apply any longer, so they are being removed from the FERC–725L information collection.

[7] The burden associated with the current version of this standard, MOD–031–2, is included in FERC–725L.

[8] Standards Alignment with Registration Petition at 10.

[9] Standards Alignment with Registration Petition at 10.

[10] The burden associated with the current version of this standard, MOD–033–1, is included in FERC–725L.

[11] Standards Alignment with Registration Petition at 11.

PROPOSED CHANGES TO BURDEN DUE TO DOCKET NO. RD20–4–000 ADJUSTMENTS AND CLARIFICATIONS [1]

Reliability standard & requirements	Number of respondents & type of entity (1)	Annual number of responses per respondent (2)	Annual number of responses (1) * (2) = (3)	Average burden hrs. per response (4)	Total annual burden hours (3) * (4) = (5)
RD20–4 Net Changes to FERC–725L, OMB Control No. 1902–0261					
MOD–031–3 (Demand and Energy Data) Develop summary in accordance w/R1, Subparts 1.5.4 and 1.5.5.—program decrease & adjustment/clarification [12].	–561 (DP, LSE, TP & BA) ...	1	–561	8	–4,488
MOD–031–3 (Demand and Energy Data) Develop data request in accordance w/R1 and R3 & Evidence Retention—adjustment/clarification [13].	113 (PC & BA)	1	113	8	904
MOD–031–3 (Demand and Energy Data) Develop and provide data in accordance w/R2 and R4 & Evidence Retention—adjustment/clarification [12].	381 (TP, BA & DP)	1	381	8	3,048
MOD–033–2 (Steady-State Dynamic System Model Validation) R2 Data Submittal [for R2]—adjustment.	–14 (RC & TOP) [14]	1	–14	8	–112
MOD–033–2 (Steady-State Dynamic System Model Validation), R1–R2, Evidence Retention, adjustment.	–14 (PC, RC & TOP) [15]	1	–14	1	–14
Net Changes for FERC–725L due to RD20–4.	.....	.....	–95 (net reduction) ...	.....	–662 (net reduction).

[1] The adjustments, due to normal industry fluctuations, are based on figures in the NERC registry as of April 10, 2020.

MOD–025–2 (VERIFICATION AND DATA REPORTING OF GENERATOR REAL AND REACTIVE POWER CAPABILITY AND SYNCHRONOUS CONDENSER REACTIVE POWER CAPABILITY)

	Number of respondents [16] (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden & cost per response (4)	Total annual burden hours & total annual cost (3) * (4) = (5)	Cost per respondent ($) (5) ÷ (1)
Attachment 2	1003 (GO)	1	1003	6 hrs.; $502.02 [17]	6,018 hrs.; $503,526.06	502.02
Evidence Retention	1003 (GO)	1	1003	1 hr.; $34.79 [18]	1003 hrs.; $34,894.07	34.79
Total	.....	.....	.....	.....	7,021 hrs.; $538,420.07.	

MOD–026–1 (VERIFICATION OF MODELS AND DATA FOR GENERATOR EXCITATION CONTROL SYSTEM OR PLANT VOLT/VARIANCE CONTROL FUNCTIONS)

	Number of respondents (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden & cost per response (4)	Total annual burden hours & total annual cost (3) * (4) = (5)	Cost per respondent ($) (5) ÷ (1)
Instructions for obtaining excitation control system or plant voltage/variance control function model.	201 (TP)	1	201	8 hrs.; $669.36 [17]	1,608 hrs.; $134,541.36 ..	669.36

[12] The estimates reflect a program decrease of 63 de-registered LSEs (and corresponding program decrease of 504 hrs.) related to Docket No. RD20–4–000, and an adjustment/clarification (decrease) of 498 DPs, TPs, and BAs (and corresponding decrease of 3,984 hrs.), not related to Docket No. RD20–4–000. The updated number of 381 DPs, TPs and BAs is listed in a new row clarifying their applicability with Requirements R2 and R4. Requirement R2 requires applicable entities to develop and provide data pursuant with Requirement R1.

[13] The 113 PCs and BAs were originally estimated in FERC–725A due to Order No. 693. However, the estimates and descriptions were not clearly spelled out, so we are clarifying them. [Some of this burden may still be in FERC–725A (and double counted temporarily).]

[14] The estimate is changing to 174 (from 188) due to normal industry fluctuation.

[15] The estimate is changing to 188 (from 194) due to normal industry fluctuation.

[16] The number of respondents for MOD–025–2/MOD–026–1/MOD–027–1/MOD–31–3/MOD–032–/MOD–033–2 are from the NERC compliance registry February 5, 2021.

[17] This wage figure uses the average hourly wage (plus benefits) for electrical engineers (Occupation Code: 17–2071, $70.19/hour) and managers (Occupation Code: 11–0000, $97.15/hour) obtained from the Bureau of Labor Statistics (BLS) (from *https://www.bls.gov/oes/current/naics2_22.htm*). The average used the following calculation: [$70.19/hour + $97.15/hour] ÷ 2 = $83.67/hour.

[18] The estimate uses the hourly average wage (plus benefits) for file clerks obtained from the Bureau of Labor Statistics: $34.79/hour (BLS Occupation Code: 43–4071).

MOD–026–1 (VERIFICATION OF MODELS AND DATA FOR GENERATOR EXCITATION CONTROL SYSTEM OR PLANT VOLT/VARIANCE CONTROL FUNCTIONS)—Continued

	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)
Documentation on generator verification.	501 (GO)[i]	1	501	8 hrs.; $669.36[17]	4,008 hrs.; $335,349.36 ..	669.36
Evidence Retention	668 (GO and TOP)	1	668	1 hr.; $34.79[18]	668 hrs.; $23,239.72	34.79
Total					6,284 hrs.; $493,130.44.	

MOD–027–1 (VERIFICATION OF MODELS AND DATA FOR TURBINE/GOVERNOR AND LOAD CONTROL OR ACTIVE POWER/FREQUENCY CONTROL FUNCTIONS)

	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)
Instructions for obtaining excitation control system or plant voltage/variance control function model.	201 (TP)	1	201	8 hrs.; $669.36[17]	1,608 hrs.; $134,541.36 ..	669.36
Documentation on generator verification.	501 (GO)[19]	1	501	8 hrs.; $669.36[17]	4,008 hrs.; $335,349.36 ..	669.36
Evidence Retention	668 (GO and TP)	1	668	1 hr.; $34.79[18]	668 hrs.; $23,239.72	34.79
Total					6,284 hrs.; $493,130.44.	

MOD–031–3 (FORMERLY MOD–031–2) (DEMAND AND ENERGY DATA), INCLUDED IN FERC–725L

Reliability standard MOD–031–3	Number and type of respondents	Annual number of responses per respondent	Total number of responses	Avg. burden & cost per response[20]	Total annual burden hours & total annual cost	Cost per respondent
	(1)	(2)	(1) * (2) = (3)	(4)	(3) * (4) = (5)	(5) ÷ (1)
(On-going) Develop summary in accordance with Requirement R1, Subparts 1.5.4 and 1.5.5.	616 (DP, TP and/or BA).	1	616	8 hrs.; $561.52	4,928 hrs.; $345,896.32 ..	561.52
MOD–031–3 Net Changes in RD20–4 (in the first table above).			–67		–536 hrs.; $37,621.84.	
New Total for MOD–031–3 for Renewal.			549		4,392 hrs.; $308,274.48.	

MOD–032–1 (VERIFICATION OF MODELS AND DATA FOR TURBINE/GOVERNOR AND LOAD CONTROL OR ACTIVE POWER/FREQUENCY CONTROL FUNCTIONS)

	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)
Data Submittal	1,418 (BA, GO, PA/PC, RP, TO, TP, and TSP).	1	1,418	8 hrs.; $561.52[20]	11,344 hrs.; $796,235.36 ..	561.52

[19] It is estimated that the applicable numbers of generator owner respondents used to calculate the public reporting burden for these standards MOD–026–1, MOD–027–1, MOD–032–1 and MOD–033–1 is half of total numbers of GO (501=1003/2) due to the higher applicability threshold for those Reliability Standards.

[20] The estimate uses the average hourly wage (plus benefits) of $70.19/hour for electrical engineers (Occupation Code: 17–2071) from the Bureau of Labor Statistics.

MOD–032–1 (VERIFICATION OF MODELS AND DATA FOR TURBINE/GOVERNOR AND LOAD CONTROL OR ACTIVE POWER/FREQUENCY CONTROL FUNCTIONS)—Continued

	Number of respondents (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden & cost per response (4)	Total annual burden hours & total annual cost (3) * (4) = (5)	Cost per respondent ($) (5) ÷ (1)
Evidence Retention	1,418 (BA, GO, PA/PC, RP, TO, TP, and TSP).	1	1,418	1 hr.; $34.79 [18]	1,418 hrs.; $49,332.22	34.79
Total					12,762 hrs.; $998,484.70.	

MOD–033–2 (FORMERLY MOD–033–1) (STEADY-STATE AND DYNAMICS SYSTEM MODEL VALIDATION)

	Number of respondents (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden & cost per response (4)	Total annual burden hours & total annual cost (3) * (4) = (5)	Cost per respondent ($) (5) ÷ (1)
Data Submittal	178 (RC and TOP)	1	178	8 hrs.; $669.36	1,424 hrs.; $119,146.08	669.36
Evidence Retention	243 (PA/PC, RC, and TOP).	1	243	1 hr.; $34.79 [18]	243 hrs.; $8,453.97	34.79
MOD–033–2 Net Changes in RD20–4 (in the first table above).			–28		–126.	
New Total for MOD–033–2 Renewal.			393		1,541 hrs.; $128,935.47.	

The total annual estimated burden and cost for the FERC–725L information collection is 38,724 hours and $2,960,375.60 respectively.

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: April 4, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–07226 Filed 4–7–21; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[10022–37–Region 1]

Notice of Availability of Draft NPDES Small Wastewater Treatment Facility General Permits in Massachusetts and New Hampshire

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Availability of Draft NPDES General Permits MAG580000 and NHG580000.

SUMMARY: The Director of the Water Division, U.S. Environmental Protection Agency—Region 1 (EPA), is providing a Notice of Availability for the Draft National Pollutant Discharge Elimination System (NPDES) Small Wastewater Treatment Facility General Permit (WWTF GP) for discharges to certain waters of the Commonwealth of Massachusetts and the State of New Hampshire. This Draft NPDES WWTF GP (''Draft General Permit'') establishes effluent limitations and requirements, effluent and ambient monitoring requirements, reporting requirements, and standard conditions for 66 eligible facilities currently covered by either the existing General Permit or individual NPDES permits (see Attachment E of the Draft General Permit for a list of eligible WWTFs; 34 in Massachusetts and 32 in New Hampshire). The Draft General Permit is available on EPA Region 1's website at *https://www.epa.gov/npdes-permits/region-1-draft-small-wastewater-treatment-facilities-general-permit.* The Fact Sheet for the Draft General Permit sets forth principal facts and the significant factual, legal, methodological, and policy questions considered in the development of the Draft General Permit and is also available at this website.

DATES: Public comments must be received by May 10, 2021.

ADDRESSES: Written comments on the Draft General Permit may be mailed to U.S. EPA Region 1, Water Division, Attn: Michael Cobb, 5 Post Office Square, Suite 100, Mail Code 06–1, Boston, Massachusetts 02109–3912, or sent via email to: *Cobb.Michael@epa.gov.* Due to the COVID–19 National Emergency, if comments are submitted in hard copy form, please also email a copy to the EPA contact above.

FOR FURTHER INFORMATION CONTACT: Additional information concerning the Draft General Permit may be obtained from Michael Cobb, U.S. EPA Region 1, Water Division, 5 Post Office Square, Suite 100, Mail Code 06–1, Boston, MA 02109–3912; telephone: 617–918–1369; email: *Cobb.Michael@epa.gov.* Following U.S. Centers for Disease Control and Prevention (CDC) and U.S. Office of Personnel Management (OPM) guidance and specific state guidelines impacting our regional offices, EPA's workforce has been directed to telework to help prevent transmission of the

coronavirus. While in this workforce telework status, there are practical limitations on the ability of Agency personnel to allow the public to review the administrative record in person at the EPA Boston office. However, any electronically available documents that are part of the administrative record can be requested from the EPA contact above.

SUPPLEMENTARY INFORMATION:

Public Comment Information: Interested persons may submit written comments on the Draft General Permit to EPA Region 1 at the address listed above. In reaching a final decision on this Draft General Permit, the Regional Administrator will respond to all significant comments and make responses available to the public on EPA Region 1's website. All comments must be postmarked or delivered by the close of the public comment period.

General Information: The Draft General Permit includes effluent limitations and requirements for eligible facilities based on technology and/or water quality considerations of the unique discharges from these facilities. The effluent limits established in the Draft General Permit ensure that the surface water quality standards of the receiving water(s) will be attained and/or maintained.

Obtaining Authorization: To obtain coverage under the General Permit, facilities meeting the eligibility requirements outlined in Part I of this General Permit may submit a notice of intent (NOI) in accordance with Part V of this General Permit and 40 CFR 122.28(b)(2)(i) & (ii). The contents of the NOI shall include at a minimum, the legal name and address of the owner or operator, the facility name and address, type of facility or discharges, the receiving stream(s) and be signed by the operator in accordance with the signatory requirements of 40 CFR 122.22. Alternately, based on 40 CFR 122.28(b)(2)(vi), the Director may notify a discharger that it is covered by a general permit, even if the discharger has not submitted an NOI to be covered. EPA has determined that the facilities identified in Attachment E of the Draft General Permit all meet the eligibility requirements for coverage under the Draft General Permit and may be authorized to discharge under the General Permit by this type of notification.

Other Legal Requirements: Endangered Species Act (ESA): In accordance with the ESA, EPA has updated the provisions and necessary actions and documentation related to potential impacts to endangered species from WWTFs seeking coverage under the Draft General Permit. Concurrently with the public notice of the Draft General Permit, EPA has initiated an informal consultation with the National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NOAA Fisheries) under ESA section 7, through the submission of a letter and biological assessment (BA) summarizing the results of EPA's assessment of the potential effects to endangered and threatened species and their critical habitats under NOAA Fisheries jurisdiction as a result of EPA's issuance of the Draft General Permit. In this document, EPA has made a preliminary determination that the proposed issuance of the Draft General Permit is not likely to adversely affect the shortnose sturgeon, Atlantic sturgeon, or designated critical habitat for Atlantic sturgeon, as well as coastal protected whales and sea turtles and the North Atlantic right whale critical habitat. EPA has requested that NOAA Fisheries review this submittal and inform EPA whether it concurs with this preliminary finding.

In addition, EPA has initiated an informal consultation with the U.S. Fish and Wildlife Service (USFWS) under ESA section 7, through the submission of a letter and biological assessment (BA) summarizing the results of EPA's assessment of the potential effects to endangered and threatened species and their critical habitats under USFWS jurisdiction as a result of EPA's issuance of the Draft General Permit. In this document, EPA has made a preliminary determination that the proposed issuance of the Draft General Permit is not likely to adversely affect the dwarf wedgemussel. EPA has requested that USFWS review this submittal and inform EPA whether it concurs with this preliminary finding. EPA has completed an informal consultation with USFWS regarding the threatened northern long-eared bat, as activities conducted as part of the WWTF GP are consistent with activities analyzed in the USFWS January 5, 2016, Programmatic Biological Opinion (PBO).

Essential Fish Habitat (EFH): Under the 1996 Amendments (Pub. L. 104–267) to the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.* (1998)), EPA is required to consult with NOAA Fisheries if EPA's actions or proposed actions that it funds, permits or undertakes ''may adversely impact any essential fish habitat.'' 16 U.S.C. 1855(b). In the Fact Sheet accompanying the Draft General Permit, EPA notes that the general permit action minimizes adverse effects to aquatic organisms, including those with designated EFH in the receiving waters. EFH species associated with the receiving waters of facilities covered by the Draft General Permit may include Atlantic salmon as well as the life stages of a number of coastal EFH designated species, along with two habitat areas of particular concern. EPA has made the determination that additional mitigation is not warranted under Section 305(b)(2) of the Magnuson-Stevens Act and has provided this determination to NOAA Fisheries for their review.

National Historic Preservation Act (NHPA): Facilities which adversely affect properties listed or eligible for listing in the National Registry of Historic Places under the NHPA are not authorized to discharge under the Draft General Permit. Based on the nature and location of the discharges, EPA has determined that all facilities eligible for authorization under the Draft General Permit do not have the potential to affect a property that is either listed or eligible for listing on the National Register of Historic Places.

Coastal Zone Management Act (CZMA): The CZMA, 16 U.S.C. 1451 *et seq.,* and its implementing regulations (15 CFR part 930) require a determination that any federally licensed activity affecting the coastal zone with an approved Coastal Zone Management Program (CZMP) is consistent with the CZMA. Concurrent with the public notice of the Draft General Permit, EPA will request that both the Executive Office of Environmental Affairs, MA CZM, and the Federal Consistency Officer, New Hampshire Coastal Program, provide a consistency concurrence that the proposed Draft General Permit is consistent with the MA and NH CZMPs.

Authority: This action is being taken under the Clean Water Act, 33 U.S.C. 1251 *et seq.*

Deborah Szaro,

Acting Regional Administrator, EPA Region 1.

[FR Doc. 2021–07219 Filed 4–7–21; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

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

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes

and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington DC 20551–0001, not later than May 10, 2021.

A. Federal Reserve Bank of Kansas City (Porcia Block, Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Foote Financial Services, LLC, Hoxie, Kansas;* to acquire Stanley Bank, Overland Park, Kansas.

Board of Governors of the Federal Reserve System, April 5, 2021.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2021–07253 Filed 4–7–21; 8:45 am]

BILLING CODE P

FEDERAL TRADE COMMISSION

[File No. 192 3088]

BASF SE and DIEM Labs; Analysis of Proposed Consent Orders 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 or deceptive acts or practices. The attached Analysis of Proposed Consent Orders to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent orders—embodied in the consent agreements—that would settle these allegations.

DATES: Comments must be received on or before May 10, 2021.

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 ''BASF SE; File No. 192 3088'' 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, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Janet Evans (202–326–2125), Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, 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 consent orders 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 thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreements and the allegations in the complaint. An electronic copy of the full text of the consent agreement packages 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 May 10, 2021. Write ''BASF SE; File No. 192 3088'' 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.

Due to the COVID–19 public health emergency and the agency's heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the *https://www.regulations.gov* website.

If you prefer to file your comment on paper, write ''BASF SE; File No. 192 3088'' on your comment and on the envelope, and mail it to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

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 in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the 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 the FTC website at *http://www.ftc.gov* to read this Notice and the news release describing the proposed settlement. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before May 10, 2021. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

Analysis of Proposed Consent Orders To Aid Public Comment

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an agreement containing a consent order with BASF SE and BASF Corporation (''BASF Respondents''). It also has accepted, subject to final approval, an agreement containing a consent order with DIEM Labs, LLC, and others (''DIEM Respondents''). The proposed consent orders have been placed on the public record for 30 days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the agreements and the comments received, and will decide whether it should withdraw from one or both of the agreements and take appropriate actions, or make final the agreements' proposed orders.

This matter involves Respondents' advertising for Hepaxa and Hepaxa PD capsules containing omega-3 fatty acids. The Commission's proposed complaint alleges that advertising for the Hepaxa products represented that Hepaxa reduces liver fat in most adults with Nonalcoholic Fatty Liver Disease (''NAFLD'') within six months, and that Hepaxa PD reduces liver fat in most children with NAFLD within six months. The complaint further alleges that Respondents' advertising represented that tests prove that Hepaxa reduces liver fat in adults with NAFLD and that tests prove that Hepaxa PD reduces liver fat in children with NAFLD. According to the proposed complaint, these claims are false or misleading, or were not substantiated at the time the representations were made, in violation of Sections 5 and 12 of the FTC Act.

The proposed orders include injunctive relief that prohibits these alleged violations and fences in similar and related conduct. The proposed orders against the BASF Respondents and DIEM Respondents are substantially similar. In both orders, ''Covered Products'' is defined as Hepaxa, Hepaxa PD, and any other Dietary Supplement, Food, or Drug that contains one or more omega-3 fatty acids or is promoted by a Respondent or its subsidiary to benefit cardiac, metabolic, or hepatic health or functions, including the prevention, mitigation, treatment, or cure of any disease of such systems.

Part I of the orders prohibits Respondents from making any representation that a Covered Product reduces liver fat in adults or children with Non-alcoholic Fatty Liver Disease (NAFLD), or cures, mitigates, or treats any disease, including but not limited to liver disease, unless the representation is nonmisleading, including that, at the time such representation is made, they possess and rely upon competent and reliable scientific evidence that substantiates that the representation is true.

For purposes of Part I, competent and reliable scientific evidence must consist of human clinical testing of the covered product, or of an essentially equivalent product, that is sufficient in quality and quantity based on standards generally accepted by experts in the relevant disease, condition, or function to which the representation relates, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. Such testing must be: (1) Randomized, double-blind, and placebo-controlled; and (2) conducted by researchers qualified by training and experience to conduct such testing.

Part II prohibits Respondents from making any representation, other than representations covered under Part I, about the health benefits, performance, efficacy, safety, or side effects of any covered product, unless the representation is non-misleading, and, at the time of making such representation, they possess and rely upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted by experts in the relevant disease, condition, or function to which the representation relates, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.

For purposes of Part II, ''competent and reliable scientific evidence'' means tests, analyses, research, or studies that (1) have been conducted and evaluated in an objective manner by experts in the relevant disease, condition, or function to which the representation relates; (2) that are generally accepted by such experts to yield accurate and reliable results; and (3) that are randomized, double-blind, and placebo-controlled human clinical testing of the covered product, or of an essentially equivalent product, when such experts would generally require such human clinical testing to substantiate that the representation is true.

Part III prohibits misrepresentations about tests and studies. Part IV provides Respondents a safe harbor for making claims approved by the Food and Drug Administration (''FDA''). Part V requires that, with regard to any human clinical test or study upon which Respondents rely to substantiate any claim covered by the orders, Respondents must secure and preserve all underlying or supporting data and documents generally accepted by experts in the field as relevant to an assessment of a test.

Part VI provides for monetary relief, and Part VII describes the procedures and legal rights related those payments. Together, Respondents are paying the full amount of consumer injury, $416,914.00. DIEM Order Part VIII requires the company to provide sufficient customer information to enable the Commission to efficiently administer consumer redress to purchasers of Hepaxa and Hepaxa PD.

DIEM Order Part IX and BASF Order Part VIII require Respondents to submit acknowledgments of receipts of the order. DIEM Order Part X and BASF Order Part IX require the filing of compliance reports with the Commission, including notification to the Commission of bankruptcy filings or changes in corporate structure that might affect compliance obligations. DIEM Order Part XI and BASF Order Part X contain recordkeeping requirements. DIEM Order Part XII and BASF Order XI contain other requirements related to the Commission's monitoring of Respondents' order compliance. Finally, DIEM Order Part XIII and BASF Order Part XII state that the orders will remain in effect for 20 years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the orders, and it is not intended to constitute an official interpretation of the complaint or orders, or to modify the orders' terms in any way.

By direction of the Commission.

April J. Tabor,

Secretary.

[FR Doc. 2021–07217 Filed 4–7–21; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Aging and Disability Resource Center/No Wrong Door System COVID–19 Vaccine Access Supplemental Funding

Announcement Type: Initial.

Statutory Authority: The statutory authority for grants under this funding opportunity is contained in Title II of the Older Americans Act of 1965 (OAA) [as amended through P.L. 116–131] (42 U.S.C. 3012). Title II Section 202b(8), the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, and the Coronavirus Response and Relief Supplemental Appropriations Act, 2021. The Centers for Disease Control and Prevention has the authority under Section 301 of the Public Health Service Act and Division M, Consolidated Appropriations Act, 2021, Public Law 116–260.

Catalog of Federal Domestic Assistance (CFDA) Number: 93.048.

DATES: The deadline for submission of the supplemental funding request is 11:59 p.m. EST April 9, 2021.

I. Funding Opportunity Description

This funding opportunity is to support a new effort to get the nation's most vulnerable and at-risk seniors and people with disabilities vaccinated. Among some of the hardest to reach are seniors and people with disabilities who are unable to leave their home without assistance or are homebound, are socially isolated, live independently but are medically fragile, or have cognitive impairments. These individuals are at particular risk because they may depend on people coming into their homes to provide services, including personal care assistance. To assist in getting these particularly vulnerable and at-risk older adults and people with disabilities vaccinated, the Biden-Harris Administration has announced new funding to reach these important communities. The Administration for Community Living, in partnership with the Centers for Disease Control and Prevention, provides this supplemental funding opportunity specifically for current Aging and Disability Resource Center (ADRC)/No Wrong Door (NWD) COVID–19 CARES Act funding grantees.

Use of Funds

These grants will provide assistance with scheduling vaccine appointments, transportation to vaccine sites, direct support services needed to attend vaccine appointments, connection to in-home vaccination options, and education about the importance of receiving the vaccine to older adults and people with disabilities. In addition, these grants will enable the aging and disability networks to identify people who are unable to independently travel to vaccination sites and to provide technical assistance to local health departments on improving access to vaccines for people with disabilities and older adults.

This funding is specific to vaccine access support and is encouraged to support all ADRC/NWD partner agencies and community based organizations who may be able to reach the most at-risk individuals. Grantees are strongly encouraged to partner and coordinate with state and local agencies for this effort.

Expected activities to be performed under this funding opportunity include:

- Public outreach and education about COVID–19 vaccinations (*e.g.* public announcements, targeted marketing push, sharing information on ADRC/NWD website) including ways to address vaccination hesitancy.
- Individual outreach and awareness (*e.g.,* direct calls or in-person visits to individuals who may be eligible).
- Vaccine registration support, including through statewide websites, 211 or in-person.
- Transportation assistance to and from vaccination sites, including support during wait times at the vaccination site.
- Support for unique vaccine distribution methods including arranging for in-home vaccinations for individuals enrolled in state funded long term services and supports (LTSS) programs who may have difficultly leaving the home.
- Addressing accessibility needs at vaccination sites or post vaccination recovery needs (*e.g.,* coordinating with AT programs.)

Key requirements for grantees under this emergency FOA will include:

- Grantees are expected to regularly participate in updates or touchpoints with all ADRC/NWD partners and sub-grantees to discuss progress, challenges, and potential solutions related to vaccination access for older adults and people with disabilities.
- Grantees will report to ACL on a semi-annual basis on challenges and successes that have been experienced by all partners and sub-grantees and will share ideas and receive technical assistance to address challenges.
- Grantees will submit annual progress reports on the activities conducted, challenges, successes, and lessons learned and provide a written summary.
- Grantees are expected to spend funds in reasonable timeframe. Grantees who have not drawn funds from the initial ADRC–COVID grant must explain how they will spend this supplemental funding in a prudent manner.

II. Award Information

1. Funding Instrument Type

These grants are discretionary, supplemental grants, authorized by the Centers for Disease Control and Prevention under Section 301 of the Public Health Service Act and Division M, Consolidated Appropriations Act, 2021, Public Law 116–260 and appropriated through the Coronavirus Response and Relief Supplemental Appropriations Act of 2021.

2. Anticipated Total Priority Area Funding per Budget Period

The total available funding for this opportunity is $26,000,000. ACL intends to make available, under this program announcement, supplemental awards to ADRC–COVID grantees. The period of performance for these grants during which grant activities must occur is estimated to be April 1, 2021 and is projected to end on September 30, 2022. ADRC–COVID grantees are eligible to apply for and receive the amount of funding in the table below:

State/territory	Available amount
AK	$159,812
AL	395,251
AR	238,292
AS	159,812
AZ	578,369
CA	1,572,442
CM	159,812
CO	395,251
CT	238,292
DC	159,812
DE	159,812
FL	1,572,442
GA	892,287
GU	159,812
HI	159,812
IA	238,292
ID	159,812
IL	892,287
IN	578,369
KS	238,292
KY	395,251
LA	395,251
MA	578,369
MD	395,251
ME	159,812

State/territory	Available amount
MI	892,287
MN	395,251
MO	578,369
MS	238,292
MT	159,812
NC	892,287
ND	159,812
NE	159,812
NH	159,812
NJ	578,369
NM	238,292
NV	238,292
NY	1,572,442
OH	892,287
OK	395,251
OR	395,251
PA	1,572,442
PR	395,251
RI	159,812
SC	395,251
TN	578,369
TX	1,572,442
UT	238,292
VA	578,369
VT	159,812
WA	578,369
WI	395,251
WV	238,292
WY	159,812

III. Eligibility Criteria and Other Requirements

1. Eligible Applicants for this award are existing ADRC/NWD COVID–19 CARES Act grantees that received funding on April 1, 2020.

2. Cost Sharing or Matching is not required.

3. Grantees must submit a project narrative through an online form and complete an application in GrantSolutions. Submission instructions will be shared by the ACL Project Officer. The online application form is as follows:

ADRC/NWD COVID–19 Vaccine Access Supplemental Funding Project Narrative

Current Need

1. Briefly describe how your state/territory's ADRC/NWD System is involved in increasing access to COVID–19 vaccines and how these supplemental funds will support these activities. Please also share any quantitative data (*i.e.* increased number of volunteers by X number of individuals, dedicated X number of staff for vaccine rollout activities only, increased staff hours by X amount, increase in X number of calls, etc.) or anecdotal stories that demonstrate increase in demand for services and support due to vaccine-related needs (*e.g.,* education and outreach, scheduling vaccine appointments).

Use of Funds

2. How many ADRC/NWD entities, or sub-grantees, will be supported by this funding?

2a. Please indicate the number of anticipated ADRC/NWD entities or sub-grantees by organization type. If an entity/sub-grantee falls into more than organization type, please use your judgement to select the most appropriate.

☐ AAA
☐ ADRC
☐ Advocacy partner
☐ Assistive Technology (AT)
☐ CIL/ILC
☐ Other Disability partner
☐ Traumatic Brain Injury (TBI) partners
☐ Veteran or Military partner organizations
☐ Other CBO
☐ Other Local Government partner
☐ Tribal Partner
☐ University Partner
☐ Other (please explain)

3. Please select all of the following ways the supplemental funding will be used.

☐ Public outreach and education (*e.g.* public announcements, targeted marketing push, sharing information on ADRC/NWD website)
☐ Individual outreach and awareness (*e.g.,* direct calls or in-person visits to individuals who may be eligible)
☐ Vaccine registration, including through statewide websites, 211 or in-person
☐ Transportation
☐ Vaccine distribution site
☐ Addressing accessibility needs (*e.g.,* by coordinating with AT programs)
☐ Other, please describe

4. Do you anticipate this supplemental funding meeting demand in any of the following areas?

☐ Increasing number of volunteers
☐ Increasing number of staff for vaccine access activities only
☐ Increasing staff hours
☐ Increasing call volume
☐ Increasing marketing activities (*i.e.* developing outreach and education materials, flyers, hosting virtual townhalls, radio spots, infomercials, etc.)
☐ Other (please explain)

5. Which of the following state-level partners do you plan to coordinate with for vaccine access activities?

☐ Developmental Disabilities Councils
☐ State Department or Division of Disabilities
☐ State Assistive Technology Act Programs
☐ State health department
☐ State Labor and Workforce Development agency
☐ State Transportation agency
☐ State Medicaid Agency
☐ State Departments supporting Military or Veteran programs
☐ University Centers for Excellence in Developmental Disabilities (UCEDDs)
☐ Other (please explain)

6. Which of the following local partners do you plan to coordinate with for vaccine access activities?

☐ Area Agencies on Aging (AAAs)
☐ Aging and Disability Resource Centers (ADRCs)
☐ Home health agencies
☐ Health Plans
☐ Local health departments
☐ Local transportation providers
☐ Housing and Urban Development Service Coordinators
☐ Residential providers
☐ Employment centers
☐ Faith-based organizations
☐ Centers for Independent Living (CILs)
☐ Other Disability partner
☐ Advocacy partners
☐ Traumatic Brain Injury (TBI) partners
☐ Tribal partners
☐ Other local government partner
☐ Other community based organizations (CBOs)
☐ Other (please explain)

Demographics/Population Reach

7. Include a projection for number of people served, by demographic, with vaccine access support through this supplemental funding:

☐ Individuals Age 60+
☐ Individuals Aged 21 to 59
☐ Individuals Age 20 and below
☐ Individuals with any type of disabilities
☐ Individuals enrolled in state funded long term services and supports (LTSS) programs who may have difficultly leaving the home

Technical Assistance Needs

8. In which of the following vaccine-related technical assistance support do you anticipate needing?

☐ Support in coordinating with public health departments or other state/local partners and agencies
☐ Addressing staff capacity and time to meet demand
☐ Support for recruiting volunteers to support staff
☐ Reaching people in priority groups for vaccine access)
☐ Reaching minority and underserved communities
☐ Addressing lack of access to transportation services
☐ Addressing vaccine hesitancy through education and other outreach strategies

☐ Other, please explain

4. DUNS Number

All grant applicants must obtain and keep current a D–U–N–S number from Dun and Bradstreet. It is a nine-digit identification number, which provides unique identifiers of single business entities. The D–U–N–S number can be obtained from: *https://iupdate.dnb.com/iUpdate/viewiUpdateHome.htm.*

5. Intergovernmental Review

Executive Order 12372, Intergovernmental Review of Federal Programs, is not applicable to these grant applications.

IV. Submission Information

1. Instructions for completing the application will be available from the ACL Project Officer.

2. Submission Dates and Times.

To receive consideration, applications must be submitted by 11:59 p.m. Eastern Time on April 09, 2021, through *www.GrantSolutions.gov.*

VII. Agency Contacts

Direct inquiries regarding programmatic issues to:

Ami Patel
Phone: 202.795.7376
Email: Ami.Patel@acl.hhs.gov

Dated: April 2, 2021.

Alison Barkoff,

Acting Administrator and Assistant Secretary for Aging.

[FR Doc. 2021–07208 Filed 4–7–21; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group; Gene and Drug Delivery Systems Study Section.

Date: June 7–8, 2021.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jain Krotz, Ph.D., Scientific Review Officer, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, (240) 672–8670, *jain.krotz@nih.gov.*

Name of Committee: Risk, Prevention and Health Behavior Integrated Review Group; Biobehavioral Medicine and Health Outcomes Study Section.

Date: June 7–8, 2021.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Mark A. Vosvick, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3110, Bethesda, MD 20892, (301) 402–4128, *mark.vosvick@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: April 5, 2021.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–07250 Filed 4–7–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Recruitment and Retention for Alzheimer's Disease Diversity Genetic Cohorts in The Adsp (Readd-Adsp).

Date: May 13, 2021.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

Contact Person: Rajasri Roy, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Building 2W200, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 496–6477, *rajasri.roy@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–07249 Filed 4–7–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Bone-Muscle Signaling.

Date: April 28, 2021.

Time: 12:30 p.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

Contact Person: Nijaguna Prasad, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Gateway Building, Suite 2W200, Bethesda, MD 20892, (301) 496–9667, *nijaguna.prasad@nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel; Clinical Trials R01.

Date: June 2, 2021.

Time: 10:30 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

Contact Person: Anita H. Undale, MD, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Building, Suite 2W200, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 827–7428, *anita.undale@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: April 2, 2021.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–07220 Filed 4–7–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Alzheimer's Disease Genomics.

Date: May 24, 2021.

Time: 1:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

Contact Person: Greg Bissonette, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Gateway Building, Suite 2W200, Bethesda, MD 20892, 301–402–1622, *bissonettegb@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–07248 Filed 4–7–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; COVID and Aging.

Date: June 28, 2021.

Time: 11:30 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

Contact Person: Anita H. Undale, MD, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Building, Suite 2W200, 7201 Wisconsin Avenue, Bethesda, MD 20892, 301–827–7428, *anita.undale@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–07251 Filed 4–7–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The cooperative agreement applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the cooperative agreement applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Advancing Translational Sciences Special Emphasis Panel; CTSA Review.

Date: April 29, 2021.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate cooperative agreement applications.

Place: National Center for Advancing Translational Sciences, National Institutes of Health, 6701 Democracy Boulevard, Room 1074, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Victor Henriquez, Ph.D., Scientific Review Officer, Office of Scientific Director, National Center for Advancing Translational Sciences, National Institutes of Health, 6701 Democracy Boulevard, Room 1074, Bethesda, MD 20892–4878, (301) 435–0813, *henriquv@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.350, B—Cooperative Agreements; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: April 2, 2021.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–07221 Filed 4–7–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Intent To Request Extension From OMB of One Current Public Collection of Information: Military Severely Injured Joint Support Operations Center (MSIJSOC) and Travel Protocol Office (TPO) Programs

AGENCY: Transportation Security Administration, DHS.

ACTION: 60-Day notice.

SUMMARY: The Transportation Security Administration (TSA) invites public comment on one currently approved Information Collection Request (ICR), Office of Management and Budget (OMB) control number 1652–0069, abstracted below that we will submit to OMB for an extension in compliance with the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. The collection involves the submission of travel information to TSA to provide wounded warriors, severely injured military personnel, and certain other travelers with assistance through the airport security screening process.

DATES: Send your comments by June 7, 2021.

ADDRESSES: Comments may be emailed to *TSAPRA@dhs.gov* or delivered to the TSA PRA Officer, Information Technology (IT), TSA–11, Transportation Security Administration, 6595 Springfield Center Drive, Springfield, VA 20598–6011.

FOR FURTHER INFORMATION CONTACT: Christina A. Walsh at the above address, or by telephone (571) 227–2062.

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The ICR documentation will be made available at *http://www.reginfo.gov* upon its submission to OMB. Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

OMB Control Number 1652–0069; Military Severely Injured Joint Support Operations Center (MSIJSOC) and Travel Protocol Office (TPO) Programs. TSA established the MSIJSOC and the TPO programs to support and facilitate the movement of wounded warriors, severely injured military personnel, veterans, and other travelers requiring an escort through the airport security screening process. The MSIJSOC and TPO programs are available at commercial airports within the continental United States and its territories.

The MSIJSOC program works with passengers who are wounded warriors, severely injured military members, and veterans. Once flight arrangements are made with the airlines, the traveler, his or her family, or other representative may contact the TSA Cares Hotline no later than 72 hours prior to their scheduled flight time with the details of the itinerary. TSA will collect the traveler's name, travel itinerary (flight departure and arrival information), and a point-of-contact's mobile phone number. Once TSA collects this information, TSA Cares will contact MSIJSOC, where the staff will vet the request via the appropriate Wounded Warrior Care Coordinator to verify the eligibility for an escort of a wounded warrior, severely injured military member, or veteran. After verifying eligibility, the MSIJSOC will contact the respective TSA official at the appropriate airport for action.

Additionally, the TPO program facilitates the movement of foreign dignitaries, accredited Ambassadors to the United States, and others who may require an escort through the airport security screening process. These travelers may contact the TPO office by submitting a request for travel support via telephone. Travelers and their points-of-contact should submit their travel support requests no later than 72 hours prior to the respective scheduled flight to allow TSA to make timely notification regarding the travel. TSA will collect the traveler's name, travel itinerary (flight departure and arrival information), and a point-of-contact's mobile phone number.

The estimated annual burden for this collection is 136.5 hours. The estimated number of annual respondents is 1,638 with each response taking approximately 0.08333 hours (1,638 × 0.08333).

Dated: April 2, 2021.

Christina A. Walsh

TSA Paperwork Reduction Act Officer, Information Technology.

[FR Doc. 2021–07190 Filed 4–7–21; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Intent To Request Revision From OMB of One Current Public Collection of Information: Critical Facility Information of the Top 100 Most Critical Pipelines

AGENCY: Transportation Security Administration, DHS.

ACTION: 60-Day notice.

SUMMARY: The Transportation Security Administration (TSA) invites public comment on one currently approved Information Collection Request (ICR), Office of Management and Budget (OMB) control number 1652–0050, abstracted below that we will submit to OMB for a revision in compliance with the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. In accordance with the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), which required TSA to develop and implement a plan to inspect critical pipeline systems, TSA is seeking to continue its collection of critical facility security information.

DATES: Send your comments by June 7, 2021.

ADDRESSES: Comments may be emailed to *TSAPRA@dhs.gov* or delivered to the TSA PRA Officer, Information Technology (IT), TSA–11, Transportation Security Administration, 6595 Springfield Center Drive, Springfield, VA 20598–6011.

FOR FURTHER INFORMATION CONTACT: Christina A. Walsh at the above address, or by telephone (571) 227–2062.

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information

unless it displays a valid OMB control number. The ICR documentation will be available at *http://www.reginfo.gov* upon its submission to OMB. Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

OMB Control Number 1652–0050; Critical Facility Information of the Top 100 Most Critical Pipelines: The 9/11 Act specifically tasked TSA to develop and implement a plan for reviewing the pipeline security plans and inspecting the critical facilities of the 100 most critical pipeline systems.[1] Pipeline operators have determined which facilities qualify as critical facilities based on guidance and criteria set forth in the TSA Pipeline Security Guidelines published in April 2011 and revised in April 2018. To execute the 9/11 Act mandate, TSA visits critical pipeline facilities and collects site-specific information from pipeline operators on facility security policies, procedures, and physical security measures.

TSA is seeking OMB approval to continue to collect facility security information during the site visits using a Critical Facility Security Review (CFSR) form. The CFSR will look at individual pipeline facility security measures and procedures.[2] This collection is voluntary. Information collected from the reviews will be analyzed and used to determine strengths and weaknesses at the nation's critical pipeline facilities, areas to target for risk reduction strategies, pipeline industry implementation of the voluntary guidelines, and the potential need for regulations in accordance with the 9/11 Act provision previously cited.

TSA is also seeking OMB approval to continue its follow up procedure with pipeline operators on their implementation of security improvements and recommendations made during facility visits. During critical facility visits, TSA documents and provides recommendations to improve the security posture of the facility. TSA intends to continue to follow up with pipeline operators via email on their status toward implementation of the recommendations made during the critical facility visits. The follow up will be conducted at intervals of 6, 12, and 18 months after the facility visit.

TSA is revising the information collection to align the CFSR question set with the revised Pipeline Security Guidelines, and to capture additional criticality criteria. As a result, the question set has been edited by removing, adding and rewriting several questions, to meet the Pipeline Security Guidelines and criticality needs. Further, TSA is moving the collection instrument from a PDF format to an Excel Workbook format.

The information provided by operators for each information collection is Sensitive Security Information (SSI), and it will be protected in accordance with procedures meeting the transmission, handling, and storage requirements of SSI set forth in 49 CFR parts 15 and 1520.

The annual burden for the approval of the information collection related to the CFSR form is estimated to be 320 hours. TSA will conduct a maximum of 80 facility reviews each year, with each review taking approximately 4 hours (80×4).

The annual burden for the approval of the information collection related to the follow up on the recommendations made to facility operators is estimated to be 480 hours. TSA estimates each operator will spend approximately 2 hours to submit a response to TSA regarding its voluntary implementation of security recommendations made during each critical facility visit. If a maximum of 80 critical facilities are reviewed each year, and TSA follows up with each facility operator every 6, 12, and 18 months following the visit, the total annual burden is 4800 ($80 \times 2 \times 3$) hours.

The estimated number of respondents will be 80. The total estimated burden is 800 hours annually, 320 hours for the CFSR form, plus 480 hours for the recommendations follow-up procedure.

Dated: April 2, 2021.

Christina A. Walsh,

TSA Paperwork Reduction Act Officer, Information Technology.

[FR Doc. 2021–07191 Filed 4–7–21; 8:45 am]

BILLING CODE 9110–05–P

[1] *See* sec. 1557 of the 9/11 Act (Pub. L. 110–53, 121 Stat. 266, 475, Aug. 3, 2007), codified at 6 U.S.C. 1207.

[2] The CFSR differs from a Corporate Security Review (CSR) conducted by TSA in another pipeline information collection that looks at corporate or company-wide security management plans and practices. *See* OMB Control No. 1652–0056 at *https://www.reginfo.gov* for the PRA approval of information collection for pipeline CSRs.

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Intent To Request Extension From OMB of One Current Public Collection of Information: Law Enforcement Officer Flying Armed Training

AGENCY: Transportation Security Administration, DHS.

ACTION: 60-Day notice.

SUMMARY: The Transportation Security Administration (TSA) invites public comment on one currently approved Information Collection Request (ICR), Office of Management and Budget (OMB) control number 1652–0034, abstracted below that we will submit to OMB for an extension in compliance with the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. The collection involves the Federal Air Marshal Service (FAMS) maintenance of a database of all Federal, State, and local law enforcement agencies that have received the Law Enforcement Officer (LEO) Flying Armed Training course.

DATES: Send your comments by June 7, 2021.

ADDRESSES: Comments may be emailed to *TSAPRA@tsa.dhs.gov* or delivered to the TSA PRA Officer, Information Technology (IT), TSA–11, Transportation Security Administration, 6595 Springfield Center Drive, Springfield, VA 20598–6011.

FOR FURTHER INFORMATION CONTACT: Christina A. Walsh at the above address, or by telephone (571) 227–2062.

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The ICR documentation will be available at *http://www.reginfo.gov* upon its submission to OMB. Therefore, in preparation for OMB review and approval of the following information

collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

OMB Control Number 1652–0034; Law Enforcement Officer Flying Armed Training. TSA is requesting approval for the extension of the collection of this information to comply with 49 CFR 1544.219, which requires Federal LEOs; full-time territorial, tribal, municipal, county, or state LEOs who are direct employees of government agencies; and authorized railroad police officers to complete the LEO Flying Armed Training course in order to fly armed. The course is a non-tactical overview of the conditions under which an officer may fly armed and the required conduct and duties of the LEO while flying armed. This information collection permits TSA to collect identifying information from law enforcement agencies requesting the LEO Flying Armed Training course materials.

The process begins when a representative from a law enforcement agency electronically requests the LEO Flying Armed Training course material via the TSA Flying While Armed website (*https://www.tsa.gov/travel/law-enforcement*). The fillable form, which is submitted to TSA electronically, must contain: Full name of the officer, title, phone number, email address, employing department, work address, supervisor's name, supervisor's title, supervisor's contact information, the agency's originating agency identifier, an affirmation that the officer meets the requirements set forth in 49 CFR 1544.219, and a brief narrative detailing the agency's operational need for its officers to fly armed. Once the fillable form is completed, TSA, receives a notification via email. TSA vets the request to ensure that all of the required information has been submitted and that the agency has a current operational need for its officers to fly armed. If TSA determines that the requesting agency's officer meets the standard set forth in 49 CFR 1544.219, TSA will electronically send a non-disclosure agreement (NDA) to the requesting agency for the agency's LEOFA instructor to sign. Once TSA receives the signed NDA, TSA will electronically send the LEO Flying Armed Training course materials to the requesting agency. TSA keeps an electronic record of each agency that has received LEO Flying Armed Training course material, including a point of contact for that agency. If an issue arises during the screening and verification process regarding the authenticity of an agency that requests training materials, training materials will not be supplied until that issue has either been confirmed or resolved, and a record of such determination regarding authenticity is maintained.

Upon completion of the training, the LEO who has been authorized by his or her agency to fly armed presents his or her credentials and other required documentation at the airport in order to fly armed. A Transportation Security Officer verifies all pertinent information onsite. Based on current data, TSA estimates there are approximately 2,000 respondents on an annual basis. Each agency spends approximately 5 minutes to provide the information TSA needs to confirm the law enforcement agency is eligible to receive the training. This amounts to 2000 agencies multiplied by 5 minutes, which equals 166.6 hours (2000 agencies × 5 min = 10,000 min [166.6 hrs.]), for a total annual hour burden of 167 hours.

Dated: April 2, 2021.

Christina A. Walsh,

TSA Paperwork Reduction Act Officer, Information Technology.

[FR Doc. 2021–07192 Filed 4–7–21; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket No. TSA–2003–14610]

Intent To Request Revision From OMB of One Current Public Collection of Information: Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Driver's License

AGENCY: Transportation Security Administration, DHS.

ACTION: 60-Day notice.

SUMMARY: The Transportation Security Administration (TSA) invites public comment on one currently approved Information Collection Request (ICR), Office of Management and Budget (OMB) control number 1652–0027, abstracted below that we will submit to OMB for a revision in compliance with the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. The collection involves a driver's voluntary submission of biometric and biographic information for TSA's security threat assessment (STA) in order to obtain the hazardous materials endorsement (HME) on a commercial driver's license (CDL) issued by States and the District of Columbia.

DATES: Send your comments by June 7, 2021.

ADDRESSES: Comments may be emailed to *TSAPRA@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 *http://www.reginfo.gov* upon its submission to OMB. Therefore, in preparation for OMB review and approval of the following information collection, TSA is inviting 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 1652–0027; Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Driver's License, 49 CFR

part 1572. TSA is requesting a revision of the currently approved ICR. The currently approved ICR supports implementation of 49 U.S.C. 5103a,[1] which mandates that no State or the District of Columbia may issue an HME on a CDL unless TSA has first determined that the driver is not a threat to transportation security.

TSA's implementing regulations (codified at 49 CFR part 1572) describe the procedures, standards, and eligibility criteria for STAs of individuals seeking to obtain, renew, or transfer an HME on a CDL. To conduct the STA for the HME, States (or a TSA-designated agent in States that elect to have TSA perform the collection of information) must collect additional information beyond that already collected for the purpose of HME applications (which occur approximately once every five years). The driver is required to submit an application that includes personal information including driver's legal name; current and previous mailing addresses; date of birth; gender; height, weight, eye, and hair color; city, state, and country of birth; social security number (optional); immigration status; mental incapacity; criminal history; and biometrics, such as fingerprints.

States or the TSA agent must also submit whether the driver is a new applicant or applying to renew or transfer the HME. This information is necessary for TSA to forecast driver retention, transfer rate, and drop rate to help improve customer service and reduce program costs. This information also may be necessary to provide comparability with other Federal background checks, including the Transportation Workers Identification Credential (TWIC®).

In addition, the ICR includes the collection of information to expand enrollment options and the potential use of biographic and biometric (*e.g.,* fingerprints, iris scans, and/or photo) information for additional comparability determinations. States have the option to permit TWIC holders to obtain an HME without completing a new STA, and applicants in States that allow comparability pay a reduced fee to obtain the HME. TSA may also use the information to determine whether the driver with a valid HME is eligible to participate in TSA's expedited screening program for air travel, the TSA PreCheck® Application Program. As of April 2020, unexpired HME drivers who meet the eligibility requirements for TSA PreCheck may use their CDL number and two digit State code (*e.g.,* NY1234567 for a New York CDL) in the appropriate known traveler number field of an airline reservation to obtain expedited screening eligibility.[2]

When the STA is complete, TSA makes a final determination on eligibility for the HME and notifies applicants of its decision. Most applicants will receive notification from TSA within two to three weeks of the submission of their completed applications. If initially deemed ineligible by TSA, applicants will have an opportunity to apply for an appeal or waiver. Applicants must submit an application for appeal or waiver within 60 days of issuance of TSA's notification on eligibility. If an application for appeal or waiver is not received by TSA within the specified amount of time, the agency may make a final determination to deny eligibility.

TSA is revising the collection to reflect the implementation of an online renewal or re-enrollment capability for those applicants. Active HME holders will be able to renew online before their STA expires; HME holders who have a recently expired STA will be able to re-enroll online. Approximately 60 percent of active HME holders enroll to renew their HME when it expires every five years. Online HME renewals will reduce the applicant's cost and hour burden by avoiding visiting a TSA enrollment center for the renewal of a STA. Also, TSA is revising the collection to reflect the subscription of HME holders, in States serviced by TSA's enrollment contractor, in the Federal Bureau of Investigation's (FBI) Rap Back Service. Once an individual is enrolled in Rap Back, TSA will not be required to collect new biometric fingerprints from the individual every five years or collect a fee from the individual for the submission of fingerprints to the FBI. The implementation of Rap Back recurrent criminal history vetting for HME holders will mitigate certain security risks posed by individuals who commit a disqualifying offense after their STA is completed and the HME is issued. Due to the reduced cost of the online enrollment transaction and elimination of the fingerprint fee, the renewal fee for an HME STA will decrease.

The currently approved ICR also includes an optional survey to gather information regarding the driver's overall customer satisfaction with the service TSA's enrollment provider provides in the TSA-agent states. The survey currently is administered in-person at the conclusion of the enrollment process. TSA is revising the collection to allow the survey to be administered at the conclusion of the enrollment process via hyperlink sent to the applicant's email address, where available. The survey will also be sent to those applicants who use the online renewal process, where applicable. Please note that the optional survey is used only in States serviced by TSA's designated enrollment contractor.

TSA estimates an annualized 247,952 respondents will apply for an HME, and that the application and STA process will involve 259,253 annualized hours. The applicant fee remains $86.50, which covers TSA's program costs, TSA's enrollment vendor's costs, and the FBI fee for the criminal history records check. For applicants in States that allow comparability, the reduced fee remains $67.00.

Dated: April 2, 2021.

Christina A. Walsh,

TSA Paperwork Reduction Act Officer, Information Technology.

[FR Doc. 2021–07193 Filed 4–7–21; 8:45 am]

BILLING CODE 9110–05–P

[1] Which codified sec. 1012 of Public Law 107–56 (115 Stat. 272, 396, Oct. 26, 2001), Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001.

[2] Transportation Security Administration. (2020, July 8.) *Active TWIC® and HME holders can use their credentials to obtain TSA PreCheck™* [Press release]. Retrieved from *https://www.tsa.gov/news/press/releases/2020/07/08/active-twicr-and-hme-holders-can-use-their-credentials-obtain-tsa.*

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NERO–GATE–31614; PPNEGATEB0, PPMVSCS1Z.Y00000]

Gateway National Recreation Area Fort Hancock 21st Century Advisory Committee Notice of Public Meeting

AGENCY: National Park Service, Interior.

ACTION: Meeting notice.

SUMMARY: In accordance with the Federal Advisory Committee Act of 1972, the National Park Service (NPS) is hereby giving notice that the Gateway National Recreation Area Fort Hancock 21st Century Advisory Committee (Committee) will meet as indicated below.

DATES: The virtual meeting will take place on Friday, April 23, 2021. The meeting will begin at 9:00 a.m. until 1:30 p.m., with a public comment period at 11:15 a.m. to 12:00 p.m. (EASTERN), with advance registration required.

FOR FURTHER INFORMATION CONTACT: This will be a virtual meeting. Anyone interested in attending and would like

to provide an oral comment should contact Daphne Yun, Acting Public Affairs Officer, Gateway National Recreation Area, 210 New York Avenue, Staten Island, New York 10305, or by telephone (718) 815–3651, or by email *daphne_yun@nps.gov.*

SUPPLEMENTARY INFORMATION: The Committee was established on April 18, 2012, by authority of the Secretary of the Interior (Secretary) under 54 U.S.C. 100906 and is regulated by the Federal Advisory Committee Act. The Committee provides advice to the Secretary, through the Director of the NPS, on matters relating to the Fort Hancock Historic District of Gateway National Recreation Area. All meetings are open to the public.

Purpose of the Meeting: The Committee will be briefed on park and leasing updates including the concept of residential leasing in national parks and how the pandemic has affected the park. The final agenda will be posted on the Committee's website at *https://www.forthancock21.org.* The website includes meeting minutes from all prior meetings.

Interested persons may present, either orally or through written comments, information for the Committee to consider during the public meeting. Written comments will be accepted prior to, during, or after the meeting. Members of the public may submit written comments by mailing them to Daphne Yun, Acting Public Affairs Officer, Gateway National Recreation Area, 210 New York Avenue, Staten Island, New York 10305, or by email *daphne_yun@nps.gov.*

Due to time constraints during the meeting, the Committee is unable to read written public comments submitted into the record. Depending on the number of persons wishing to comment and the time available, time allotted for individual oral comments may be limited. All comments will be made part of the public record and will be electronically distributed to all Committee members. Detailed minutes of the meeting will be available for public inspection within 90 days of the meeting.

Public Disclosure of Comments: Before including your address, phone number, email address, or other personal identifying information in your written comments, you should be aware that your entire comment including your personal identifying information will be publicly available. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 5 U.S.C. Appendix 2.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2021–07257 Filed 4–7–21; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–523 and 731–TA–1259 (Review)]

Boltless Steel Shelving Units Prepackaged for Sale From China; Scheduling of Expedited Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of expedited reviews pursuant to the Tariff Act of 1930 (''the Act'') to determine whether revocation of the countervailing and antidumping duty orders on boltless steel shelving units prepackaged for sale from China would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.

DATES: December 7, 2020.

FOR FURTHER INFORMATION CONTACT: Andres Andrade (202–205–2078), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter 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 (*https://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On December 7, 2020, the Commission determined that the domestic interested party group response to its notice of institution (85 FR 54404, September 1, 2020) of the subject five-year reviews was adequate and that the respondent interested party group response was inadequate. The Commission did not find any other circumstances that would warrant conducting full reviews.[1] Accordingly, the Commission determined that it would conduct expedited reviews pursuant to section 751(c)(3) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(3)).

For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

Please note the Secretary's Office will accept only electronic filings at this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

Staff report.—A staff report containing information concerning the subject matter of the reviews was placed in the nonpublic record on April 6, 2021, and made available to persons on the Administrative Protective Order service list for these reviews. A public version will be issued thereafter, pursuant to section 207.62(d)(4) of the Commission's rules.

Written submissions.—As provided in section 207.62(d) of the Commission's rules, interested parties that are parties to the reviews and that have provided individually adequate responses to the notice of institution,[2] and any party other than an interested party to the reviews may file written comments with the Secretary on what determination the Commission should reach in the reviews. Comments are due on or before April 12, 2021 and may not contain new factual information. Any person that is neither a party to the five-year reviews nor an interested party may submit a brief written statement (which shall not contain any new factual information) pertinent to the reviews by April 12, 2021. However, should the Department of Commerce (''Commerce'') extend the time limit for its completion of the final results of its reviews, the deadline for comments (which may not contain new factual information) on Commerce's final results is three business days after the issuance of Commerce's results. If comments contain business proprietary information (BPI), they must conform

[1] A record of the Commissioners' votes is available from the Office of the Secretary and at the Commission's website.

[2] The Commission has found the response to its notice of institution filed by Edsal Manufacturing Company, LLC, a domestic producer of boltless steel shelving, to be individually adequate. Comments from other interested parties will not be accepted (*see* 19 CFR 207.62(d)(2)).

with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Determination.—The Commission has determined these reviews are extraordinarily complicated and therefore has determined to exercise its authority to extend the review period by up to 90 days pursuant to 19 U.S.C. 1675(c)(5)(B).

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: April 5, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–07258 Filed 4–7–21; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–667 and 731–TA–1559 (Preliminary)]

Organic Soybean Meal From India; Institution of Antidumping and Countervailing Duty Investigations and Scheduling of Preliminary Phase Investigations

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the institution of investigations and commencement of preliminary phase antidumping and countervailing duty investigation Nos. 701–TA–667 and 731–TA–1559 (Preliminary) pursuant to the Tariff Act of 1930 (''the Act'') to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of organic soybean meal from India, provided for in subheading number 1208.10.00 and heading number 2304.00.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value and alleged to be subsidized by the Government of India. Unless the Department of Commerce (''Commerce'') extends the time for initiation, the Commission must reach a preliminary determination in antidumping and countervailing duty investigations in 45 days, or in this case by May 17, 2021. The Commission's views must be transmitted to Commerce within five business days thereafter, or by May 24, 2021.

DATES: March 31, 2021.

FOR FURTHER INFORMATION CONTACT: Lawrence Jones ((202) 205–3358), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter 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 (*https://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—These investigations are being instituted, pursuant to sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a) and 1673b(a)), in response to a petition filed on March 31, 2021, by the Organic Soybean Processors of America, Washington, DC, American Natural Processors, LLC, Dakota Dunes, South Dakota, Lester Feed & Grain Co., Lester, Iowa, Organic Production Services, LLC, Weldon, North Carolina, Professional Proteins Ltd., Washington, Iowa, Sheppard Grain Enterprises, LLC, Phelps, New York, Simmons Grain Co., Salem, Ohio, Super Soy, LLC, Brodhead, Wisconsin, and Tri-State Crush, Syracuse, Indiana.

For further information concerning the conduct of these investigations and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

Participation in the investigations and public service list.—Persons (other than petitioners) wishing to participate in the investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in §§ 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register**. Industrial users and (if the merchandise under investigation is sold at the retail level) representative consumer organizations have the right to appear as parties in Commission antidumping duty and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these investigations available to authorized applicants representing interested parties (as defined in 19 U.S.C. 1677(9)) who are parties to the investigations under the APO issued in the investigations, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference.— In light of the restrictions on access to the Commission building due to the COVID–19 pandemic, the Commission is conducting the staff conference through video conferencing on Wednesday, April 21, 2021. Requests to appear at the conference should be emailed to *preliminaryconferences@usitc.gov* (DO NOT FILE ON EDIS) on or before April 19, 2021. Please provide an email address for each conference participant in the email. Information on conference procedures will be provided separately and guidance on joining the video conference will be available on the Commission's Daily Calendar. A nonparty who has testimony that may aid the Commission's deliberations may request permission to participate by submitting a short statement.

Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

Written submissions.—As provided in §§ 201.8 and 207.15 of the Commission's rules, any person may

submit to the Commission on or before April 26, 2021, a written brief containing information and arguments pertinent to the subject matter of the investigations. Parties shall file written testimony and supplementary material in connection with their presentation at the conference no later than noon on April 20, 2021. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

In accordance with §§ 201.16(c) and 207.3 of the rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Certification.—Pursuant to § 207.3 of the Commission's rules, any person submitting information to the Commission in connection with these investigations must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that any information that it submits to the Commission during these investigations may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of these or related investigations or reviews, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.12 of the Commission's rules.

By order of the Commission.

Issued: April 2, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–07195 Filed 4–7–21; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–464 and 731–TA–1160 (Second Review)]

Prestressed Concrete Steel Wire Strand From China; Scheduling of Expedited Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of expedited reviews pursuant to the Tariff Act of 1930 (''the Act'') to determine whether revocation of the countervailing and antidumping duty orders on prestressed concrete steel wire strand from China would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.

DATES: December 7, 2020.

FOR FURTHER INFORMATION CONTACT: Tyler Berard (202–205–3354), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter 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 (*https://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On December 7, 2020, the Commission determined that the domestic interested party group response to its notice of institution (85 FR 54401, September 1, 2020) of the subject five-year reviews was adequate and that the respondent interested party group response was inadequate. The Commission did not find any other circumstances that would warrant conducting full reviews.[1] Accordingly, the Commission determined that it would conduct expedited reviews pursuant to section 751(c)(3) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(3)).

For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

Please note the Secretary's Office will accept only electronic filings at this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

Staff report.—A staff report containing information concerning the subject matter of the reviews was placed in the nonpublic record on April 5, 2021, and made available to persons on the Administrative Protective Order service list for these reviews. A public version will be issued thereafter, pursuant to section 207.62(d)(4) of the Commission's rules.

Written submissions.—As provided in section 207.62(d) of the Commission's rules, interested parties that are parties to the reviews and that have provided individually adequate responses to the notice of institution,[2] and any party other than an interested party to the reviews may file written comments with the Secretary on what determination the Commission should reach in the reviews. Comments are due on or before April 12, 2021 and may not contain new factual information. Any person that is neither a party to the five-year reviews nor an interested party may submit a brief written statement (which shall not contain any new factual information) pertinent to the reviews by April 12, 2021. However, should the Department of Commerce (''Commerce'') extend the time limit for its completion of the final results of its reviews, the deadline for comments (which may not contain new factual information) on Commerce's final results is three business days after the issuance of Commerce's results. If comments contain business proprietary information (BPI), they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

In accordance with sections 201.16(c) and 207.3 of the rules, each document

[1] A record of the Commissioners' votes is available from the Office of the Secretary and at the Commission's website.

[2] The Commission has found the joint response to its notice of institution on behalf of Insteel Wire Products Company, Sumiden Wire Products Corporation, and WMC Steel, LLC, domestic producers of prestressed concrete steel wire strand to be individually adequate. Comments from other interested parties will not be accepted (*see* 19 CFR 207.62(d)(2)).

filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Determination.—The Commission has determined these reviews are extraordinarily complicated and therefore has determined to exercise its authority to extend the review period by up to 90 days pursuant to 19 U.S.C. 1675(c)(5)(B).

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: April 2, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–07203 Filed 4–7–21; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1181]

Certain Lithium-Ion Battery Cells, Battery Modules, Battery Packs, Components Thereof, and Products Containing the Same; Notice of Request for Submissions on the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that on March 31, 2021, the presiding administrative law judge (''ALJ'') issued an Initial Determination on Violation of Section 337. The ALJ also issued a Recommended Determination on remedy and bonding should a violation be found in the above-captioned investigation. The Commission is soliciting submissions on public interest issues raised by the recommended relief should the Commission find a violation. This notice is soliciting comments from the public only.

FOR FURTHER INFORMATION CONTACT: Ronald A. Traud, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–3427. 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: Section 337 of the Tariff Act of 1930 provides that, if the Commission finds a violation, it shall exclude the articles concerned from the United States:

> unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.

19 U.S.C. 1337(d)(1). A similar provision applies to cease and desist orders. 19 U.S.C. 1337(f)(1).

The Commission is soliciting submissions on public interest issues raised by the recommended relief should the Commission find a violation, specifically: A limited exclusion order directed to certain lithium-ion battery cells, battery modules, battery packs, components thereof, and products containing the same imported, sold for importation, and/or sold after importation by respondents SK Innovation Co., Ltd. and SK Battery America, Inc.; and cease and desist orders directed to SK Innovation Co., Ltd. and SK Battery America, Inc. Parties are to file public interest submissions pursuant to 19 CFR 210.50(a)(4).

The Commission is interested in further development of the record on the public interest in this investigation. Accordingly, members of the public are invited to file submissions of no more than five (5) pages, inclusive of attachments, concerning the public interest in light of the ALJ's Recommended Determination on Remedy and Bonding issued in this investigation on March 31, 2021. Comments should address whether issuance of the recommended remedial orders in this investigation, should the Commission find a violation, would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the recommended remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the recommended orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third-party suppliers have the capacity to replace the volume of articles potentially subject to the recommended orders within a commercially reasonable time; and

(v) explain how the recommended orders would impact consumers in the United States.

Written submissions must be filed no later than by close of business on April 30, 2021.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (March 19, 2020). Submissions should refer to the investigation number (''Inv. No. 337–TA–1181'') in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures, https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity

purposes. All contract personnel will sign appropriate nondisclosure agreements. All nonconfidential written submissions will be available for public inspection on EDIS.

This action is taken under the authority of 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: April 5, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–07222 Filed 4–7–21; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Cooperative Research Group on Ros-Industrial Consortium Americas

Notice is hereby given that, on March 1, 2021, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Southwest Research Institute—Cooperative Research Group on ROS-Industrial Consortium-Americas (''RIC-Americas'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Arc Specialties, Toyota Industrial Equipment Mfg, Inc., Columbus, IN, and MegaChips Corporation, Osaka, JAPAN, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and RIC-Americas intends to file additional written notifications disclosing all changes in membership.

On April 30, 2014, RIC-Americas filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 9, 2014 (79 FR 32999).

The last notification was filed with the Department on January 27, 2021. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on February 12, 2021 (86 FR 9374).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2021–07225 Filed 4–7–21; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Advanced Media Workflow Association, Inc.

Notice is hereby given that, on March 24, 2021, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Advanced Media Workflow Association, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Marc Levy (individual member), San Diego, CA, has been added as a party to this venture. Also, A&E Television Networks, Stamford, CT; NEP Group, Pittsburgh, PA; and DirectOut Technologies, GmbH, Mittweida, GERMANY, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Advanced Media Workflow Association, Inc. intends to file additional written notifications disclosing all changes in membership.

On March 28, 2000, Advanced Media Workflow Association, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 29, 2000 (65 FR 40127).

The last notification was filed with the Department on December 15, 2020. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on December 29, 2020 (85 FR 85664).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2021–07246 Filed 4–7–21; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—UHD Alliance, Inc.

Notice is hereby given that, on March 22, 2021, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), UHD Alliance, Inc. (''UHD Alliance'') filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Apple Inc., Cupertino, CA; and Beijing ESWIN Computing Technology Co. Ltd., Beijing, PEOPLE's REPUBLIC OF CHINA, have been added as parties to this venture.

In addition, Dell Inc., Round Rock, TX has withdrawn as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and UHD Alliance intends to file additional written notifications disclosing all changes in membership.

On June 17, 2015, UHD Alliance filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on July 17, 2015 (80 FR 42537).

The last notification was filed with the Department on December 10, 2020. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on January 13, 2021 (86 FR 2698).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2021–07247 Filed 4–7–21; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—MLCommons Association

Notice is hereby given that on February 12, 2021 pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. Section 4301 *et seq.* (the

''Act''), MLCommons Association (''MLCommons'') filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Tenska Incorporated, Nicasio, CA; EDGECORTIX, INC., Singapore, SINGAPORE; Crosstalk LLC, Kansas City, MO; Amir Gholaminejad (individual), Berkeley, CA; Javier Duarte (individual), La Jolla, CA; Gopika Premsankar (individual), Aalto, FINLAND; DEEPX Co., Inc., Gyeonggi-do, REPUBLIC OF KOREA; Christopher Poptic (individual), Columbus, OH; and Krai Ltd., Cambridge, UNITED KINGDOM have joined as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open and MLCommons intends to file additional written notifications disclosing all changes in membership.

On September 15, 2020, MLCommons filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on September 29, 2020 (85 FR 61032).

The last notice was filed with the Department on January 5, 2021. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on January 19, 2021 (86 FR 5252).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2021–07230 Filed 4–7–21; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Open RF Association, Inc.

Notice is hereby given that, on March 15, 2021 pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Open RF Association, Inc. filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Rohde & Schwarz GmbH & Co. KG, Munich, GERMANY has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Open RF Association, Inc. intends to file additional written notifications disclosing all changes in membership.

On February 21, 2020, Open RF Association, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on March 11, 2020 (85 FR 14247).

The last notification was filed with the Department on January 4, 2021. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on January 13, 2021 (86 FR 2698).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2021–07240 Filed 4–7–21; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States, et al. v. Republic Services, 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 District of Columbia in *United States of America, et al.* v. *Republic Services, Inc., et al.,* Civil Action No. 1:21–cv–00883. On March 31, 2021, the United States filed a Complaint alleging that Republic Services, Inc.'s proposed acquisition of Santek Waste Services, LLC would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed at the same time as the Complaint, requires Republic and Santek to divest certain tangible and intangible assets relating to small container commercial waste collection and municipal solid waste disposal in six local markets located in five states.

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 District of Columbia. 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 Katrina Rouse, Chief, Defense, Industrials, and Aerospace Section, Antitrust Division, Department of Justice, 450 Fifth Street NW, Suite 8700, Washington, DC 20530.

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

United States District Court for the District of Columbia

United States of America, U.S. Department of Justice, Antitrust Division, 450 Fifth Street NW, Suite 8700, Washington, DC 20530 and State of Alabama, Office of the Attorney General, Consumer Interest Division, 501 Washington Avenue, Montgomery, AL 36130, *Plaintiffs,* v. Republic Services, Inc., 18500 North Allied Way, Phoenix, AZ 85054 and Santek Waste Services, LLC, 650 25th Street NW, Suite 100, Cleveland, TN 37311, *Defendants.*

Civil Action No.: 1:21–cv–00883–RDM
Judge: Randolph D. Moss

Complaint

The United States of America (''United States''), acting under the direction of the Attorney General of the United States, and the State of Alabama, bring this civil antitrust action against Defendants Republic Services, Inc. (''Republic'') and Santek Waste Services, LLC (''Santek'') to enjoin Republic's proposed acquisition of Santek. The United States and the State of Alabama complain and allege as follows:

I. Nature of the Action

1. Republic's proposed acquisition of its rival, Santek, would combine two of the largest waste management companies in numerous markets across the southeastern United States. Republic and Santek compete daily to provide essential waste collection and disposal services to keep neighborhoods sanitary.

If the transaction proceeds unremedied, customers likely will pay higher prices and receive lower quality waste collection and disposal services.

2. In a number of markets in the southeastern United States, Defendants Republic and Santek are two of only a few significant providers of small container commercial waste (''SCCW'') collection and municipal solid waste (''MSW'') disposal, which are necessary for businesses, municipalities, and towns.

3. If the transaction proceeds to close in its current form, consumers would likely pay higher prices and receive lower quality service. Competition between Republic and Santek has resulted in lower prices and improved service to numerous customers, including towns and cities, restaurants, offices, apartment buildings, and other businesses. SCCW collection customers depend on Republic and Santek to collect their waste reliably and on a regular basis. In the absence of competition between Republic and Santek, these customers would likely pay more for waste collection and receive lower quality service. Disposal customers, such as independent and municipally-owned waste haulers, rely on Republic and Santek for affordable and accessible waste disposal options, including landfills and transfer stations, to dispose of the waste they collect from towns, cities, and other municipalities. If the transaction is consummated as proposed by Defendants, these disposal customers would likely face higher fees and less favorable access to Republic's and Santek's disposal facilities.

4. In addition, the merger would also substantially lessen competition in waste collection in one geographic market (Chattanooga, Tennessee and North Georgia), as a result of the vertical integration of these firms, both of which enjoy strong positions in collection and disposal. Specifically, the combination of these two vertically-integrated firms that are both strong in collection and disposal would give the merged firm an increased incentive and ability to weaken its collection competitors by raising the price of disposal, a key input for collection services. With limited alternative disposal options left in the market, collection rivals would have to incur these higher costs or cease their operations, thereby limiting the ability of these rivals to compete with the merged firm's collection operations.

5. By eliminating competition between Republic and Santek and combining their businesses, the proposed acquisition would result in higher prices, fewer choices, and lower-quality service for waste collection and disposal customers in certain markets in the southeastern United States. Accordingly, Republic's acquisition of Santek would violate Section 7 of the Clayton Act, 15 U.S.C. 18, and therefore should be enjoined.

II. The Parties and the Transaction

6. Pursuant to a purchase agreement dated February 18, 2020, and amended on May 19, 2020, July 10, 2020, October 6, 2020, and March 8, 2021, Republic proposes to acquire all of the outstanding membership interest in Santek.

7. Republic, a Delaware corporation headquartered in Phoenix, Arizona, is the second-largest non-hazardous solid waste collection and disposal company in the United States. It provides waste collection, recycling, and disposal (including transfer) services. Republic operates in 41 states and Puerto Rico. For 2020, Republic reported revenues of approximately $10.2 billion.

8. Santek, a Tennessee limited liability company headquartered in Cleveland, Tennessee, is a vertically integrated solid waste management company with waste collection and disposal (including transfer) operations in nine southeastern states. In 2019, the last year for which information is publicly available, Santek generated approximately $140 million in revenue.

III. Jurisdiction and Venue

9. The United States brings this action under Section 15 of the Clayton Act, 15 U.S.C. 25, as amended, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. 18.

10. The State of Alabama brings this action under Section 16 of the Clayton Act, 15 U.S.C. 26, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. 18. The State of Alabama, by and through the Attorney General of Alabama, brings this action as *parens patriae* on behalf of and to protect the health and welfare of its citizens and the general economy of the State of Alabama.

11. Defendants' activities substantially affect interstate commerce. They provide collection and disposal services throughout the southeastern United States. This Court has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. 25, and 28 U.S.C. 1331, 1337(a), and 1345.

12. Defendants have consented to venue and personal jurisdiction in this judicial district. 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(b) and (c).

IV. Relevant Markets

A. Product Markets

i. Small Container Commercial Waste Collection

13. Small container commercial waste (''SCCW'') collection is a relevant product market. Waste collection firms—also called haulers—collect municipal solid waste (''MSW'') from residential, commercial, and industrial establishments, and transport that waste to a disposal site, such as a transfer station, landfill, or incinerator, for processing and disposal.

14. SCCW collection is the business of collecting MSW from commercial and industrial accounts, usually in small containers (*i.e.,* dumpsters with one to ten cubic yards capacity), and transporting such waste to a disposal site. Typical SCCW collection customers include office and apartment buildings and retail establishments like stores and restaurants.

15. SCCW collection is distinct from other types of waste collection such as residential and roll-off collection. An individual commercial customer typically generates substantially more MSW than a residential customer. To handle this high volume of MSW efficiently, SCCW haulers often provide commercial customers with small containers for storing the waste. SCCW haulers organize their commercial accounts into routes and collect and transport the MSW generated by these accounts in front-end load (''FEL'') trucks that are uniquely well suited for commercial waste collection.

16. On a typical SCCW collection route, an operator drives a FEL truck to the customer's container, engages a mechanism that grasps and lifts the container over the front of the truck, and empties the container into the vehicle's storage section where the waste is compacted and stored. The operator continues along the route, collecting MSW from each of the commercial accounts, until the vehicle is full. The operator then drives the FEL truck to a disposal facility, such as a transfer station, landfill, or incinerator, and empties the contents of the vehicle. Depending on the number of locations and amount of waste collected on the route, the operator may make one or more trips to the disposal facility in servicing the route.

17. In contrast to a SCCW collection route, a residential waste collection route is highly labor intensive. A residential customer's MSW is typically stored in much smaller containers such

as trash cans, and instead of using a FEL truck manned by a single operator, residential haulers routinely use rear-end load or side-load trucks typically manned by two- or three-person teams who may need to hand-load the customer's MSW. In light of these differences, haulers typically organize commercial customers into separate routes from residential customers.

18. Roll-off container collection also is not a substitute for SCCW collection. Roll-off container collection is commonly used to serve construction and demolition customers. A roll-off container is much larger than a SCCW container and is serviced by a truck capable of carrying a single roll-off container. Unlike SCCW customers, multiple roll-off customers are not served between trips to the disposal site, as each roll-off truck is typically only capable of carrying one roll-off container at a time.

19. Other types of waste collection, such as hazardous or medical waste collection, also are not substitutes for SCCW collection. These forms of collection differ from SCCW collection in the equipment required, the volume of waste collected, and the facilities where the waste is disposed.

20. Because no other waste collection service can substitute for SCCW collection, other waste collection services do not constrain pricing for SCCW collection. Absent competition, SCCW collection providers could profitably increase their prices without losing significant sales to firms engaged in the provision of other types of waste collection services. In other words, in the event of a small but significant non-transitory price increase for SCCW collection, customers would not substitute to other forms of collection in sufficient numbers so as to render the price increase unprofitable. SCCW collection is therefore a line of commerce, or relevant product market, for purposes of analyzing the effects of the acquisition under Section 7 of the Clayton Act.

ii. Municipal Solid Waste Disposal

21. MSW disposal is a relevant product market. MSW is solid putrescible waste generated by households and commercial establishments such as retail stores, offices, restaurants, warehouses, and industrial facilities. MSW has physical characteristics that readily distinguish it from other liquid or solid waste, such as waste from manufacturing processes, regulated medical waste, sewage, sludge, hazardous waste, or waste generated by construction or demolition sites.

22. Haulers must dispose of all MSW at a permitted disposal facility. There are intermediary disposal facilities—transfer stations—and ultimate disposal facilities—landfills and incinerators. All such facilities must be located on approved types of land and operated under prescribed procedures. Federal, state, and local safety, environmental, zoning, and permit laws and regulations dictate critical aspects of storage, handling, transportation, processing, and disposal of MSW. In less densely populated areas, MSW often is disposed of directly into landfills that are permitted and regulated by a state and the federal government. Landfill permit restrictions often impose limitations on the type and amount of waste that can be deposited. In many urban and suburban areas, landfills are scarce due to high population density and the limited availability of suitable land. As a result, MSW generated in such areas often is burned in an incinerator or taken to a transfer station. Transfer stations briefly hold MSW until it is reloaded from collection vehicles onto larger tractor-trailers for transport, in bulk, to more distant landfills or incinerators for final disposal.

23. Some haulers—including Republic and Santek—are vertically integrated and operate their own disposal facilities. Vertically-integrated haulers often prefer to dispose of waste at their own disposal facilities. Vertically-integrated haulers may also sell a portion of their disposal capacity to disposal customers in need of access to a disposal facility.

24. Disposal customers include private waste haulers without their own disposal assets (referred to in the industry as ''independent haulers'') as well as local governments that own their own equipment and collect their citizens' waste themselves. Disposal customers also include independent and municipally-owned transfer stations that serve as temporary disposal sites for haulers in areas where landfills and incinerators are not easily accessible. Disposal customers that are not vertically-integrated lack their own ultimate disposal facilities and rely on cost-competitive landfills.

25. Due to strict laws and regulations that govern the disposal of MSW, there are no reasonable substitutes for MSW disposal, which must occur at landfills, incinerators, or transfer stations. Thus, in the event of a small but significant non-transitory price increase from MSW disposal firms, customers would not substitute to other forms of disposal in sufficient numbers so as to render the price increase unprofitable. MSW disposal is therefore a line of commerce, or relevant product market, for purposes of analyzing the effects of the acquisition under Section 7 of the Clayton Act.

B. Relevant Geographic Markets

i. Small Container Commercial Waste Collection Geographic Markets

26. The relevant geographic markets for SCCW collection are local. This is because SCCW haulers need a large number of closely located customer pick-up locations to operate efficiently and profitably. If there is significant travel time between customers, then the SCCW hauler earns less money for the time that the truck operates. SCCW haulers, therefore, try to minimize the ''dead time'' in which the truck is operating and incurring costs from fuel, wear and tear, and labor, but not generating revenue from collecting waste. Likewise, customers must be near the SCCW hauler's base of operations as it would be unprofitable for a truck to travel a long distance to the start of a route. SCCW haulers, therefore, generally establish garages and related facilities to serve as bases within each area served.

27. As currently contemplated, the transaction would likely cause harm in four relevant geographic markets for SCCW collection: (1) The Birmingham, Alabama area (Jefferson and Shelby Counties); (2) the Chattanooga, Tennessee and North Georgia area (Hamilton, Marion, Rhea, and Sequatchie Counties in Tennessee; and Catoosa, Chattooga, Dade, Gordon, Murray, and Walker Counties in Georgia); (3) the Eastern Montgomery County, Texas area (the area east of the City of Conroe defined as zip codes 77357, 77365, and 77372); and (4) the Hattiesburg, Mississippi area (Forrest and Jones Counties). In each of these markets, a hypothetical monopolist of SCCW collection could profitably impose a small but significant non-transitory increase in price for SCCW collection without losing significant sales to more distant competitors. Accordingly, each of these areas constitutes a relevant geographic market and section of the country for purposes of analyzing the effects of the acquisition on SCCW collection under Section 7 of the Clayton Act.

ii. Municipal Solid Waste Disposal Geographic Markets

28. The relevant geographic markets for MSW disposal are local as the cost of transporting MSW to a disposal site—including fuel, regular truck maintenance, and hourly labor—is a substantial component of the total cost

of MSW disposal. Haulers also prefer nearby MSW disposal sites to minimize the FEL truck dead time. Due to the costs associated with travel time and customers' preference to have MSW disposal sites close by, an MSW disposal provider must have local facilities to be competitive.

29. The proposed transaction would likely cause harm in two relevant geographic markets for MSW disposal: (1) The Chattanooga, Tennessee area (Hamilton County); and (2) the Estill Springs and Fayetteville, Tennessee area (Franklin and Lincoln Counties). In each of these local markets, a hypothetical monopolist of MSW disposal could profitably impose a small but significant non-transitory increase in price for MSW disposal without losing significant sales to more distant MSW disposal sites. Accordingly, the Chattanooga, Tennessee area, and the Estill Springs and Fayetteville, Tennessee area constitute relevant geographic markets for the purposes of analyzing the effects of the acquisition on MSW disposal under Section 7 of the Clayton Act.

V. Anticompetitive Effects

30. The proposed transaction would increase concentration significantly and substantially lessen competition and harm consumers in each relevant market by eliminating the substantial head-to-head competition that currently exists between Republic and Santek.

31. Market concentration can be a useful indicator of the level of competitive vigor in a market and likely competitive effects of a merger. The more concentrated a market, and the more a transaction would increase concentration in a market, the more likely it is that the transaction would result in harm to consumers by meaningfully reducing competition.

32. Concentration in relevant markets is typically defined by the Herfindahl-Hirschman Index (or ''HHI,'' defined in Appendix A). Markets in which the HHI is above 2,500 are considered to be highly concentrated. Mergers that increase the HHI by more than 200 points and result in a highly concentrated market are presumed to likely enhance market power. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 5.3 (revised Aug. 19, 2010) (''Horizontal Merger Guidelines''), *https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.*

33. Republic's acquisition of Santek would result in a highly concentrated market in every relevant SCCW collection market and relevant MSW disposal market. Moreover, as a result of the acquisition, the HHI would increase by more than 400 points in each of these markets, suggesting an increased likelihood of significant anticompetitive effects. Therefore, Republic's proposed acquisition of Santek is presumptively likely to enhance Republic's market power. *See* Horizontal Merger Guidelines § 5.3.

34. In addition, the merger would also substantially lessen competition through the vertical integration of the two companies. Specifically, by combining Republic's strong position in both SCCW collection and MSW disposal with Santek's strong position in both SCCW collection and MSW disposal, the proposed transaction would increase Republic's incentive and ability to harm its SCCW collection rivals by raising the costs of MSW disposal in the Chattanooga, Tennessee and North Georgia area. With SCCW collection rivals facing higher operational costs, they would have to raise their SCCW collection prices to offset these costs and would be less able to apply competitive pressure on Republic's SCCW collection operations. As a result, businesses, municipalities, and other customers likely would pay higher prices for SCCW collection. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Vertical Merger Guidelines § 4(a) (June 30, 2020), *https://www.justice.gov/atr/page/file/1290686/download.*

A. Elimination of Horizontal Competition in SCCW Collection

35. Republic's acquisition of Santek would eliminate a significant competitor for SCCW collection in markets that are already highly concentrated and difficult to enter. Republic and Santek compete head-to-head for SCCW collection customers in the relevant SCCW collection markets. In these four geographic markets, Republic and Santek each account for a substantial share of total revenue generated from SCCW collection and, in each relevant market, are two of no more than five significant competitors.

36. In each relevant SCCW collection market, collection customers including offices, apartment buildings, and retail establishments have been able to secure better collection rates and improved collection service by threatening to switch from Republic to Santek or vice versa. In each of the relevant markets, the elimination of this head-to-head competition would allow Republic to exercise market power unilaterally to increase prices and reduce the quality of service for SCCW collection customers.

i. Birmingham, Alabama Area SCCW Collection

37. In the Birmingham, Alabama area, the proposed acquisition would reduce from five to four the number of significant competitors in the SCCW collection market. After the acquisition, Defendants would have approximately 61 percent of the SCCW collection customers in the market. The post-merger HHI for SCCW collection in this market would be approximately 4,157, an increase of 445 points from the current HHI.

ii. Chattanooga, Tennessee and North Georgia Area SCCW Collection

38. In the Chattanooga, Tennessee and North Georgia area, the proposed acquisition would reduce from five to four the number of significant competitors in the SCCW collection market. After the acquisition, Defendants would have approximately 73 percent of the SCCW collection customers in the market. The post-merger HHI for SCCW collection in this market would be approximately 5,551, an increase of 2,660 points from the current HHI.

iii. Eastern Montgomery County, Texas Area SCCW Collection

39. In the Eastern Montgomery County, Texas area, the proposed acquisition would reduce from three to two the number of significant competitors in the SCCW collection market. After the acquisition, Defendants would have approximately 58 percent of the SCCW collection customers in the market. The post-merger HHI for SCCW collection in this market would be approximately 4,064, an increase of 1,703 points from the current HHI.

iv. Hattiesburg, Mississippi Area SCCW Collection

40. In the Hattiesburg, Mississippi area, the proposed acquisition would reduce from five to four the number of significant competitors in the SCCW collection market. After the acquisition, Defendants would have approximately 55 percent of SCCW collection customers in the market. The post-merger HHI for SCCW collection would be approximately 3,853, an increase of 1,420 points from the current HHI.

B. Elimination of Horizontal Competition in MSW Disposal

41. Republic's acquisition of Santek would also eliminate a significant competitor for MSW disposal in markets that are already highly concentrated and difficult to enter. Republic and Santek compete head-to-head for MSW disposal customers in the relevant MSW disposal

markets. In these geographic markets, Republic and Santek each account for a substantial share of total revenue generated from MSW disposal and, in each relevant MSW disposal market, are two of no more than three significant competitors. In each relevant MSW disposal market, independent haulers and municipalities have been able to negotiate more favorable MSW disposal rates by threatening to move MSW from Republic's facilities to Santek's facilities and vice versa. In each of the relevant MSW disposal markets, the elimination of this head-to-head competition would allow Republic to exercise market power unilaterally to increase prices and reduce the quality of service for MSW disposal customers.

i. Chattanooga, Tennessee Area MSW Disposal

42. In the Chattanooga, Tennessee area, the proposed acquisition would reduce from three to two the number of significant competitors in the MSW disposal market. After the acquisition, approximately 82 percent of the waste generated in the Chattanooga, Tennessee area would either be disposed of directly in the Defendants' landfills or pass through the Defendants' transfer stations in Chattanooga before ultimately being disposed of in the Defendants' landfills. The post-merger HHI for MSW disposal would be approximately 6,980, an increase of 3,018 points from the current HHI.

ii. Estill Springs and Fayetteville, Tennessee Area MSW Disposal

43. MSW in the Estill Springs and Fayetteville, Tennessee area, is hauled to municipally-owned transfer stations before it is transferred to a landfill. The proposed acquisition would reduce from three to two the number of significant landfill competitors available to bid to dispose of the MSW from these transfer stations. Since Santek was awarded the most recent contracts for the exclusive right to dispose of the waste from the Estill Springs and Fayetteville, Tennessee area's municipally-owned transfer stations, the transaction will not have an impact on the market's HHI. Still, the loss of competition between Republic and Santek for the area's contracts will result in higher prices and lower quality service for these municipalities in the upcoming years when the current contracts expire.

C. Raising Rivals' Costs of MSW Disposal in the Chattanooga, Tennessee and North Georgia Area

44. In the Chattanooga, Tennessee and North Georgia area, the proposed transaction also would substantially lessen competition in the SCCW collection market by raising the MSW disposal costs of independent haulers.

45. As noted above, Republic and Santek collectively serve approximately 73 percent of the SCCW collection customers in the Chattanooga, Tennessee and North Georgia area. In addition, the vast majority of the waste generated in this area is disposed of in landfills operated by Republic and Santek. Thus, not only are Defendants each other's largest competitor in the SCCW collection market, they also compete with each other to supply MSW disposal services to independent haulers, including those that compete with them in the SCCW collection market.

46. By combining the two firms' SCCW collection and MSW disposal businesses, the merger would increase Republic's incentive and ability to raise its MSW disposal price for independent haulers. Having acquired its largest MSW disposal competitor, Santek, Republic would be able to raise its MSW disposal prices without fear of losing significant sales to remaining disposal competitors. With few alternative MSW disposal facilities available, independent haulers would be forced to incur these increased MSW disposal costs or shutter their operations. Those independent haulers that remained in business would need to raise their SCCW collection prices in order to offset higher MSW disposal costs, rendering them less competitive in SCCW collection. The merger would also increase Republic's incentive to raise the MSW disposal costs of independent haulers because Republic—no longer confronting competition from Santek in SCCW collection—would capture more of the business lost by independent haulers in the SCCW collection market.

47. As a result, the merged firm would likely find it profitable to raise the cost of MSW disposal or to deny service altogether to the merged firm's SCCW collection rivals, thereby reducing competition in the SCCW collection market.

VI. Entry

A. Difficulty of Entry Into Small Container Commercial Waste Collection

48. Entry of new competitors into the relevant SCCW collection markets would be difficult and time-consuming and is unlikely to prevent the harm to competition that is likely to result if the proposed transaction is consummated.

49. A new entrant in SCCW collection could not provide a significant competitive constraint on the prices that market incumbents charge until achieving a minimum efficient scale and operating efficiency comparable to existing competitors. In order to obtain a comparable operating efficiency, a new competitor would have to achieve route densities similar to those of firms already in the market. Incumbents in a geographic market, however, can prevent new entrants from winning a large enough base of customers by selectively lowering prices and entering into longer term contracts with collection customers.

B. Difficulty of Entry Into Municipal Solid Waste Disposal

50. Entry of new competitors into the relevant MSW disposal markets would be difficult and time-consuming and is unlikely to prevent the harm to competition that is likely to result if the proposed transaction is consummated.

51. A new entrant in MSW disposal would need to obtain a permit to construct an MSW disposal facility or to expand an existing one, and this process is costly and time-consuming, typically taking many years. Land suitable for MSW disposal is scarce, as a landfill must be constructed away from environmentally-sensitive areas, including fault zones, wetlands, flood plains, and other restricted areas. Even when suitable land is available, local public opposition frequently increases the time and uncertainty of the permitting process.

52. Construction of a new transfer station or incinerator also is difficult and time consuming and faces many of the same challenges as new landfill construction, including local public opposition.

53. Entry by constructing and permitting a new MSW disposal facility would thus be costly and time-consuming and unlikely to prevent market incumbents from significantly raising prices for MSW disposal in each of the relevant MSW disposal markets following the acquisition.

VII. Violations Alleged

54. Republic's proposed acquisition of Santek is likely to substantially lessen competition in each of the relevant markets set forth above in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

55. The acquisition will likely have the following anticompetitive effects, among others, in the relevant markets:

a. Actual and potential competition between Republic and Santek will be eliminated;

b. competition generally will be substantially lessened; and

c. prices will likely increase and quality and the level of service will likely decrease.

VIII. Request for Relief

56. The United States and the State of Alabama request that this Court:

a. Adjudge and decree Republic's acquisition of Santek to be unlawful and in violation of Section 7 of the Clayton Act, 15 U.S.C. 18;

b. preliminarily and permanently enjoin Defendants and all persons acting on their behalf from consummating the proposed acquisition by Republic of Santek or from entering into or carrying out any other contract, agreement, plan, or understanding, the effect of which would be to combine Republic with Santek;

c. award the United States and the State of Alabama the costs for this action; and

d. grant the United States and the State of Alabama such other relief as the Court deems just and proper.

Dated: March 31, 2021

Respectfully submitted,

Counsel for Plaintiff United States:

Richard Powers,
Acting Assistant Attorney General, Antitrust Division.

Kathleen S. O'Neil,
Senior Director of Investigations and Litigation, Antitrust Division.

Katrina Rouse (D.C. Bar #1013035),
Chief, Defense, Industrials, and Aerospace Section Antitrust Division.

Jay D. Owen,
Assistant Chief, Defense, Industrials, and Aerospace Section, Antitrust Division.

Gabriella R. Moskowitz * (D.C. Bar #1044309)
Stephen Harris
Kevin Quin (D.C. Bar #415268)
Trial Attorneys

Defense, Industrials, and Aerospace Section, Antitrust Division, 450 Fifth Street NW, Suite 8700, Washington, DC 20530, Telephone: (202) 598–2294, Facsimile: (202) 514–9033, Email: *gabriella.moskowitz@usdoj.gov*

* Lead Attorney To Be Noticed

For Plaintiff State of Alabama:

Steve Marshall,
Attorney General.

John A. Selden (AL Bar #5608C63A) (D.C. Bar #1022301),
Assistant Attorney General.

Office of the Attorney General, Consumer Interest Division, 501 Washington Avenue, Montgomery, AL 36130, Telephone: (334) 353–0065, Facsimile: (334) 353–8400, Email: *John.Selden@AlabamaAG.gov*

Appendix A: Definition of the Herfindahl-Hirschman Index

''HHI'' means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30 percent, 30 percent, 20 percent, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$). The HHI takes into account the relative size distribution of the firms in a market and approaches zero when a market consists of a large number of small firms. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is above 2,500 are considered to be highly concentrated. *See* Horizontal Merger Guidelines § 5.3. Transactions that increase the HHI by more than 200 points in highly concentrated markets are presumed to be likely to enhance market power under the guidelines issued by the U.S. Department of Justice and Federal Trade Commission. *See id.*

United States District Court for the District of Columbia

United States of America and State of Alabama, *Plaintiffs,* v. Republic Services, Inc. and Santek Waste Services, LLC, *Defendants.*
Civil Action No.: 1:21–cv–00883–RDM
Judge: Randolph D. Moss

Proposed Final Judgment

Whereas, Plaintiffs, United States of America and the State of Alabama, filed their Complaint on March 31, 2021;

And whereas, the United States, the State of Alabama, and Defendants, Republic Services, Inc. (''Republic'') and Santek Waste Services, LLC. (''Santek''), 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 regarding any issue of fact or law;

And whereas, Defendants agree to make certain divestitures to remedy the loss of competition alleged in the Complaint;

And whereas, Defendants represent that the divestitures and other relief required by this Final Judgment can and will be made and that Defendants 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 Defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

II. Definitions

As used in this Final Judgment:

A. ''Republic'' means Defendant Republic Services, Inc., a Delaware corporation with its headquarters in Phoenix, Arizona, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

B. ''Santek'' means Defendant Santek Waste Services, LLC, a Tennessee limited liability company with its headquarters in Cleveland, Tennessee, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. ''CWS'' means Capital Waste Services, LLC, a portfolio company of Kinderhook and a Delaware limited liability company with its headquarters in Columbia, South Carolina, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

D. ''EcoSouth'' means EcoSouth Services of Birmingham and EcoSouth Services of Mobile.

E. ''EcoSouth of Birmingham'' means EcoSouth Services of Birmingham, LLC, a portfolio company of Kinderhook and a Delaware limited liability company with its headquarters in Birmingham, Alabama, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

F. ''EcoSouth of Mobile'' means EcoSouth Services of Mobile, LLC, a portfolio company of Kinderhook and an Alabama limited liability company with its headquarters in Axis, Alabama, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

G. ''Kinderhook'' means Kinderhook Industries LLC, a Delaware limited liability company with its headquarters in New York, New York, its successors and assigns, and its subsidiaries, portfolio companies (including but not limited to CWS and EcoSouth), divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

H. ''Waste Connections'' means Waste Connections, Inc., a Canadian corporation with its headquarters in Ontario, Canada, its successors and assigns, and its subsidiaries (including but not limited to Waste Connections of Texas), divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

I. ''Waste Connections of Texas'' means Waste Connections of Texas, LLC, a subsidiary of Waste Connections and a Delaware limited liability company with its headquarters in The Woodlands, Texas, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

J. ''Divestiture Assets'' means the Southeast Divestiture Assets and the Texas Divestiture Assets.

K. ''Southeast Divestiture Assets'' means all of Defendants' rights, titles, and interests in and to:

1. The transfer stations and landfills listed in Appendix A;

2. all property and assets, tangible and intangible, wherever located, related to or used in connection with the transfer stations and landfills listed in Appendix A, including but not limited to:

a. All real property, including but not limited to fee simple interests, real property leasehold interests and renewal rights thereto, improvements to real property, and options to purchase any adjoining or other property, together with all offices, garages, material recovery facilities, and other related facilities;

b. all tangible personal property, including but not limited to capital equipment, trucks and other vehicles, scales, power supply equipment, and office furniture, materials, and supplies;

c. all contracts, contractual rights, and customer relationships; and all other agreements, commitments, and understandings;

d. all licenses, permits, certifications, approvals, consents, authorizations, and registrations and all pending applications or renewals; and

e. all records and data, including but not limited to customer lists, accounts, credits records, and repair and performance records;

3. the collection facilities and Routes listed in Appendix A; and

4. all property and assets, tangible and intangible, wherever located, related to or used in connection with the Routes listed in Appendix A, including but not limited to:

a. All real property, including but not limited to fee simple interests, real property leasehold interests and renewal rights thereto, improvements to real property, and options to purchase any adjoining or other property, together with all offices, garages, and related facilities;

b. all tangible personal property, including but not limited to capital equipment, vehicles, and containers assigned to Routes listed in Appendix A, and, at the option of the Acquirer of the Southeast Divestiture Assets, spare vehicles and containers, scales, power supply equipment, and office furniture, materials, and supplies;

c. all contracts (except Hybrid Contracts), contractual rights, and customer relationships; and all other agreements, commitments, and understandings;

d. all licenses, permits, certifications, approvals, consents, and authorizations, and all pending applications or renewals; and

e. all records and data, including but not limited to customer lists, accounts, and credits records, and repair and performance records; *provided, however,* that the assets specified in Paragraphs II(K)(4)(a)–(e) above do not include the collection facility located at 101 Barber Boulevard, Gardendale, Alabama 35071 or the Excluded Disposal Agreements.

L. ''Texas Divestiture Assets'' means all of Defendants' rights, titles, and interests in and to:

1. Santek SCCW Collection Routes 902 and 903 (''Routes 902 and 903''); and

2. all property and assets, tangible and intangible, wherever located, related to or used in connection with the Routes 902 and 903, including but not limited to:

a. All tangible personal property, including but not limited to capital equipment, vehicles, and containers assigned to Routes 902 or 903, and, at the option of the Acquirer of the Texas Divestiture Assets, spare vehicles and containers;

b. all contracts, contractual rights, and customer relationships; and all other agreements, commitments, and understandings;

c. all licenses, permits, certifications, approvals, consents, and authorizations, and all pending applications or renewals; and

d. all records and data, including but not limited to customer lists, accounts, and credits records, and repair and performance records; *provided, however,* that the assets specified in Paragraphs II(L)(2)(a)–(d) above do not include the collection facility located at 701 US Hwy 59 South, Cleveland, Texas 77327.

M. ''Acquirer'' or ''Acquirers'' means the Acquirer of the Southeast Divestiture Assets and the Acquirer of the Texas Divestiture Assets.

N. ''Acquirer of the Southeast Divestiture Assets'' means Kinderhook, including CWS and EcoSouth, or another entity to whom Defendants divest the Southeast Divestiture Assets.

O. ''Acquirer of the Texas Divestiture Assets'' means Waste Connections, including Waste Connections of Texas, or another entity to whom Defendants divest the Texas Divestiture Assets.

P. ''Commercial Recycling Collection'' means the business of collecting recyclables, which are discarded materials that will be processed and reused, from commercial and industrial accounts and transporting those recyclables to a recycling site (typically called a ''materials recovery facility,'' or ''MRF'').

Q. ''Disposal'' means the business of disposing of waste into disposal sites, including the use of transfer stations to facilitate shipment of waste to other disposal sites.

R. ''Excluded Disposal Agreements'' means (1) the Landfill Disposal Services Agreement, dated December 1, 2012, between Putnam County, Tennessee and Santek Environmental, Inc., as amended by First Amendment to Landfill Disposal Services Agreement, dated October 16, 2020, and (2) the Waste Disposal Agreement, dated November 16, 2018, between Santek Environmental, LLC and Clean Harbors Environmental Services, Inc., as amended by First Amendment to Waste Disposal Agreement, dated January 26, 2021.

S. ''Hybrid Contracts'' means customer waste or recycling collection contacts that include a combination of services and/or collection stops included in the Southeast Divestiture Assets and services and/or collection stops not included in the Southeast Divestiture Assets.

T. ''MSW'' means municipal solid waste. Municipal solid waste is a term of art used to describe solid putrescible waste generated by households and commercial establishments such as retail stores, offices, restaurants, warehouses, and non-manufacturing activities in industrial facilities. MSW does not include special handling waste (*e.g.,* waste from manufacturing processes, regulated medical waste, sewage, and sludge), hazardous waste, or waste generated by construction or demolition sites.

U. ''Route'' means a group of customers receiving regularly scheduled waste collection service as of February 23, 2021, including customers from that

group for whom service has been suspended due to issues related to COVID–19 and any customers added to that group between February 23, 2021, and the date that the Route is divested to an Acquirer.

V. ''Small Container Commercial Waste Collection'' (or ''SCCW Collection'') means the business of collecting MSW from commercial and industrial accounts, usually in ''dumpsters'' (*i.e.,* small containers with one-to-ten cubic yards of storage capacity), and transporting—or ''hauling''—that waste to a disposal site, typically by use of a front-end, side-load, or rear-end truck. Typical SCCW Collection customers include office and apartment buildings and retail establishments (*e.g.,* stores and restaurants).

W. ''Southeast Divestiture Date'' means the date on which the Southeast Divestiture Assets are divested to the Acquirer of the Southeast Divestiture Assets.

X. ''Southeast Personnel'' means all full-time, part-time, or contract employees wherever located, involved in the MSW Disposal, SCCW Collection, and Commercial Recycling Collection services provided for a Route or facility included in the Southeast Divestiture Assets at any time between February 18, 2020 and the Southeast Divestiture Date. The United States, in its sole discretion, will resolve any disagreement regarding which employees are Southeast Personnel.

Y. ''Texas Divestiture Date'' means the date on which the Texas Divestiture Assets are divested to the Acquirer of the Texas Divestiture Assets.

Z. ''Texas Personnel'' means all full-time, part-time, or contract employees of Santek, wherever located, involved in the SCCW Collection services provided for a Route included in the Texas Divestiture Assets at any time between February 18, 2020 and the Texas Divestiture Date. The United States, in its sole discretion, will resolve any disagreement regarding which employees are Texas Personnel.

III. Applicability

A. This Final Judgment applies to Republic and Santek, as defined above, and all other persons, in active concert or participation with any Defendant, who receive actual notice of this Final Judgment.

B. If, prior to complying with Sections IV, V, and VI of this Final Judgment, Defendants sell or otherwise dispose of all or substantially all of their assets or of business units that include the Divestiture Assets, Defendants must require any purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirers.

IV. Divestiture of the Southeast Divestiture Assets

A. Defendants are ordered and directed, within thirty (30) calendar days after the Court's entry of the Asset Preservation Stipulation and Order in this matter, to divest the Southeast Divestiture Assets in a manner consistent with this Final Judgment to Kinderhook (through its portfolio companies, CWS or EcoSouth) or another Acquirer acceptable to the United States, in its sole discretion, after consultation with the State of Alabama. The United States, in its sole discretion, may agree to one or more extensions of this time period, not to exceed sixty (60) calendar days in total, and will notify the Court of any extensions.

B. Defendants must use their best efforts to divest the Southeast Divestiture Assets as expeditiously as possible and may not take any action to impede the permitting, operation, or divestiture of the Southeast Divestiture Assets.

C. Unless the United States otherwise consents in writing, divestiture pursuant to this Final Judgment must include the entire Southeast Divestiture Assets and must be accomplished in such a way as to satisfy the United States, in its sole discretion, after consultation with the State of Alabama, that the Southeast Divestiture Assets can and will be used by the Acquirer of the Southeast Divestiture Assets as part of a viable, ongoing business of MSW Disposal and a viable, ongoing business of SCCW Collection and that the divestiture to the Acquirer of the Southeast Divestiture Assets will remedy the competitive harm alleged in the Complaint.

D. The divestiture must be made to an Acquirer that, in the United States' sole judgment, after consultation with the State of Alabama, has the intent and capability (including the necessary managerial, operational, technical, and financial capability) to compete effectively in the business of MSW Disposal and SCCW Collection.

E. The divestiture must be accomplished so as to satisfy the United States, in its sole discretion, after consultation with the State of Alabama, that none of the terms of any agreement between the Acquirer of the Southeast Divestiture Assets and Defendants give Defendants the ability unreasonably to raise the costs of the Acquirer of the Southeast Divestiture Assets, to lower the efficiency of the Acquirer of the Southeast Divestiture Assets, or otherwise to interfere in the ability of the Acquirer of the Southeast Divestiture Assets to compete effectively in the business of MSW Disposal and SCCW Collection.

F. Divestiture of the Southeast Divestiture Assets may be made to one or more Acquirers, provided that it is demonstrated to the sole satisfaction of the United States, after consultation with the State of Alabama, that the criteria required by Paragraphs IV(C), IV(D), and IV(E) will still be met.

G. In the event Defendants are attempting to divest the Southeast Divestiture Assets to an Acquirer other than Kinderhook (through its portfolio companies, CWS or EcoSouth), Defendants promptly must make known, by usual and customary means, the availability of the Southeast Divestiture Assets. Defendants must inform any person making an inquiry regarding a possible purchase of the Southeast Divestiture Assets that the Southeast Divestiture Assets are being divested in accordance with this Final Judgment and must provide that person with a copy of this Final Judgment. Defendants must offer to furnish to all prospective Acquirers of the Southeast Divestiture Assets, subject to customary confidentiality assurances, all information and documents relating to the Southeast Divestiture Assets that are customarily provided in a due-diligence process; *provided, however,* that Defendants need not provide information or documents subject to the attorney-client privilege or work-product doctrine. Defendants must make all information and documents available to Plaintiffs at the same time that the information and documents are made available to any other person.

H. Defendants must provide prospective Acquirers of the Southeast Divestiture Assets with (1) access to make inspections of the Southeast Divestiture Assets; (2) access to all environmental, zoning, and other permitting documents and information; and (3) access to all financial, operational, or other documents and information customarily provided as part of a due diligence process. Defendants also must disclose all encumbrances on any part of the Southeast Divestiture Assets, including on intangible property.

I. Defendants must cooperate with and assist the Acquirer of the Southeast Divestiture Assets in identifying and, at the option of the Acquirer of the Southeast Divestiture Assets, hiring all Southeast Personnel.

1. Within ten (10) business days following the filing of the Complaint in this matter, Defendants must identify all

Southeast Personnel to the Acquirer of the Southeast Divestiture Assets and Plaintiffs, including by providing organization charts covering all Southeast Personnel.

2. Within ten (10) business days following receipt of a request by the Acquirer of the Southeast Divestiture Assets or the United States, Defendants must provide to the Acquirer of the Southeast Divestiture Assets and Plaintiffs additional information related to Southeast Personnel, including name, job title, reporting relationships, past experience, responsibilities, training and educational history, relevant certifications, job performance evaluations. Defendants must also provide to the Acquirer of the Southeast Divestiture Assets and Plaintiffs current, recent, and accrued compensation and benefits, including most recent bonuses paid, aggregate annual compensation, current target or guaranteed bonus, if any, any retention agreement or incentives, and any other payments due, compensation or benefits accrued, or promises made to Southeast Personnel. If Defendants are barred by any applicable law from providing any of this information, within ten (10) business days following receipt of the request, Defendants must provide the requested information to the full extent permitted by law and also must provide a written explanation of Defendants' inability to provide the remaining information, including specifically identifying the provisions of applicable laws.

3. At the request of the Acquirer of the Southeast Divestiture Assets, Defendants must promptly make Southeast Personnel available for private interviews with the Acquirer of the Southeast Divestiture Assets during normal business hours at a mutually agreeable location.

4. Defendants must not interfere with any effort by the Acquirer of the Southeast Divestiture Assets to employ any Southeast Personnel. Interference includes but is not limited to offering to increase the compensation or improve the benefits of Southeast Personnel unless: (a) The offer is part of a company-wide increase in compensation or improvement in benefits that was announced prior to February 18, 2020; or (b) the offer is approved by the United States in its sole discretion. Defendants' obligations under this Paragraph will expire six (6) months after the divestiture of the Southeast Divestiture Assets pursuant to this Final Judgment.

5. For Southeast Personnel who elect employment with the Acquirer of the Southeast Divestiture Assets within six (6) months of the Southeast Divestiture Date, Defendants must waive all non-compete and non-disclosure agreements, vest all unvested pension and other equity rights, provide any pay pro-rata, provide all other compensation and benefits that those Southeast Personnel have fully or partially accrued, and provide all other benefits that those Southeast Personnel otherwise would have been provided had the Southeast Personnel continued employment with Defendants, including but not limited to any retention bonuses or payments. Defendants may maintain reasonable restrictions on disclosure by Southeast Personnel of Defendants' proprietary non-public information that is unrelated to the business of MSW Disposal, SCCW Collection, and Commercial Recycling Collection and not otherwise required to be disclosed by this Final Judgment.

6. For a period of twelve (12) months from the Southeast Divestiture Date, Defendants may not solicit to rehire Southeast Personnel who were hired by the Acquirer of the Southeast Divestiture Assets within six (6) months of the Southeast Divestiture Date unless (a) an individual is terminated or laid off by the Acquirer of the Southeast Divestiture Assets or (b) the Acquirer of the Southeast Divestiture Assets agrees in writing that Defendants may solicit to rehire that individual. Nothing in this Paragraph prohibits Defendants from advertising employment openings using general solicitations or advertisements and rehiring Southeast Personnel who apply for an employment opening through a general solicitation or advertisement.

J. Defendants must warrant to the Acquirer of the Southeast Divestiture Assets that (1) the Southeast Divestiture Assets will be operational and without material defect on the Southeast Divestiture Date; (2) there are no material defects in the environmental, zoning, or other permits pertaining to the operation of the Southeast Divestiture Assets; and (3) Defendants have disclosed all encumbrances on any part of the Southeast Divestiture Assets, including on intangible property. Following the sale of the Southeast Divestiture Assets, Defendants must not undertake, directly or indirectly, challenges to the environmental, zoning, or other permits pertaining to the operation of the Southeast Divestiture Assets.

K. Defendants must assign, subcontract, or otherwise transfer all contracts (except Hybrid Contracts and the Excluded Disposal Agreements), agreements, and relationships (or portions of such contracts, agreements, and relationships) included in the Southeast Divestiture Assets, including but not limited to all supply and sales contracts, to the Acquirer of the Southeast Divestiture Assets; *provided, however,* that for any contract or agreement that requires the consent of another party to assign, subcontract, or otherwise transfer, Defendants must use best efforts to accomplish the assignment, subcontracting, or transfer. Defendants must not interfere with any negotiations between the Acquirer of the Southeast Divestiture Assets and a contracting party.

L. At the option of the Acquirer of the Southeast Divestiture Assets, and subject to approval by the United States in its sole discretion, on or before the Southeast Divestiture Date, Defendants must assign, subcontract, or otherwise transfer all Hybrid Contracts; *provided, however,* that for any Hybrid Contract that requires the consent of another party to assign, subcontract, or otherwise transfer, Defendants must use best efforts to accomplish the assignment, subcontracting, or other transfer. Defendants must not interfere with any negotiations between the Acquirer of the Southeast Divestiture Assets and a contracting party.

M. Defendants must make best efforts to assist the Acquirer of the Southeast Divestiture Assets to obtain all necessary licenses, registrations, and permits to operate the Southeast Divestiture Assets. Until the Acquirer of the Southeast Divestiture Assets obtains the necessary licenses, registrations, and permits, Defendants must provide the Acquirer of the Southeast Divestiture Assets with the benefit of Defendants' licenses, registrations, and permits to the full extent permissible by law.

N. At the option of the Acquirer of the Southeast Divestiture Assets, and subject to approval by the United States in its sole discretion, on or before the Southeast Divestiture Date, Defendants must enter into a contract to provide transition services for back office, human resources, accounting, employee health and safety, telephone and information technology services and support for a period of up to three (3) months on terms and conditions reasonably related to market conditions for the provision of the transition services. Any amendments to or modifications of any provisions of a contract for transition services are subject to approval by the United States, in its sole discretion. The United States, in its sole discretion, may approve one or more extensions of any contract for transition services, for a total of up to an additional three (3) months. If the Acquirer of the Southeast Divestiture

Assets seeks an extension of the term of any transition services agreement, Defendants must notify the United States in writing at least fifteen (15) days prior to the date the contract expires. The Acquirer of the Southeast Divestiture Assets may terminate a contract for transition services, or any portion of a contract for transition services, without cost or penalty at any time upon thirty (30) days' written notice to Republic. The employee(s) of Defendants tasked with providing transition services must not share any competitively sensitive information of the Acquirer of the Southeast Divestiture Assets with any other employee of Defendants.

O. At the option of the Acquirer of the Southeast Divestiture Assets, and subject to approval by the United States in its sole discretion, on or before the Southeast Divestiture Date, Defendants must enter into a landfill disposal contract to provide rights to landfill disposal at Republic's Pineview Landfill, located at 2730 Bryan Road, Dora, Alabama 35062 and Santek's Mt. Olive Landfill, located at 101 Barber Boulevard, Gardendale, Alabama 35071. The landfill disposal contract must allow the Acquirer of the Southeast Divestiture Assets to dispose up to a total of 100,000 tons of MSW per year at the Pineview Landfill and Mt. Olive Landfill for a period of up to three (3) years from the Southeast Divestiture Date. Defendants must operate the Pineview Landfill and Mt. Olive Landfill gates, scale houses, and disposal areas for the benefit of the Acquirer of the Southeast Divestiture Assets under terms and conditions no less favorable than those that Defendants provide to their own vehicles. The Acquirer of the Southeast Divestiture Assets may terminate a contract for landfill disposal without cost or penalty at any time upon thirty (30) days' written notice to Republic.

P. At the option of the Acquirer of the Southeast Divestiture Assets, and subject to approval by the United States in its sole discretion, on or before the Southeast Divestiture Date, Defendants must enter into an agreement to provide the Acquirer of the Southeast Divestiture Assets, for a period of up to six (6) months from the Southeast Divestiture Date, the exclusive use of one maintenance bay, outdoor parking for six trucks and empty container storage, and an interior office at Republic's collection facility located at 3950 50th Street SW, Birmingham, Alabama 35221.

Q. If any term of an agreement between Defendants and the Acquirer of the Southeast Divestiture Assets, including but not limited to an agreement to effectuate the divestiture required by this Final Judgment, varies from a term of this Final Judgment, to the extent that Defendants cannot fully comply with both, this Final Judgment determines Defendants' obligations.

V. Divestiture of the Texas Divestiture Assets

A. Defendants are ordered and directed, within thirty (30) calendar days after the Court's entry of the Asset Preservation Stipulation and Order in this matter, to divest the Texas Divestiture Assets in a manner consistent with this Final Judgment to Waste Connections (through its subsidiary Waste Connections of Texas) or another Acquirer acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period, not to exceed sixty (60) calendar days in total, and will notify the Court of any extensions.

B. Defendants must use their best efforts to divest the Texas Divestiture Assets as expeditiously as possible and may not take any action to impede the permitting, operation, or divestiture of the Texas Divestiture Assets.

C. Unless the United States otherwise consents in writing, divestiture pursuant to this Final Judgment must include the entire Texas Divestiture Assets and must be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Texas Divestiture Assets can and will be used by the Acquirer of the Texas Divestiture Assets as part of a viable, ongoing SCCW Collection business and that the divestiture to the Acquirer of the Texas Divestiture Assets will remedy the competitive harm alleged in the Complaint.

D. The divestiture must be made to an Acquirer that, in the United States' sole judgment, has the intent and capability (including the necessary managerial, operational, technical, and financial capability) to compete effectively in the business of SCCW Collection.

E. The divestiture must be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between the Acquirer of the Texas Divestiture Assets and Defendants give Defendants the ability unreasonably to raise the costs of the Acquirer of the Texas Divestiture Assets, to lower the efficiency of the Acquirer of the Texas Divestiture Assets, or otherwise to interfere in the ability of the Acquirer of the Texas Divestiture Assets to compete effectively in the business of SCCW Collection.

F. In the event Defendants are attempting to divest the Texas Divestiture Assets to an Acquirer other than Waste Connections (through its subsidiary Waste Connections of Texas), Defendants promptly must make known, by usual and customary means, the availability of the Texas Divestiture Assets. Defendants must inform any person making an inquiry regarding a possible purchase of the Texas Divestiture Assets that the Texas Divestiture Assets are being divested in accordance with this Final Judgment and must provide that person with a copy of this Final Judgment. Defendants must offer to furnish to all prospective Acquirers of the Texas Divestiture Assets, subject to customary confidentiality assurances, all information and documents relating to the Texas Divestiture Assets that are customarily provided in a due-diligence process; *provided, however,* that Defendants need not provide information or documents subject to the attorney-client privilege or work-product doctrine. Defendants must make all information and documents available to the United States at the same time that the information and documents are made available to any other person.

G. Defendants must provide prospective Acquirers of the Texas Divestiture Assets with (1) access to make inspections of the Texas Divestiture Assets; (2) access to all environmental, zoning, and other permitting documents and information; and (3) access to all financial, operational, or other documents and information customarily provided as part of a due diligence process. Defendants also must disclose all encumbrances on any part of the Texas Divestiture Assets, including on intangible property.

H. Defendants must cooperate with and assist the Acquirer of the Texas Divestiture Assets in identifying and, at the option of the Acquirer of the Texas Divestiture Assets, hiring all Texas Personnel.

1. Within ten (10) business days following the filing of the Complaint in this matter, Defendants must identify all Texas Personnel to the Acquirer of the Texas Divestiture Assets and the United States, including by providing organization charts covering all Texas Personnel.

2. Within ten (10) business days following receipt of a request by the Acquirer of the Texas Divestiture Assets or the United States, Defendants must provide to the Acquirer of the Texas Divestiture Assets and the United States additional information related to Texas

Personnel, including name, job title, reporting relationships, past experience, responsibilities, training and educational history, relevant certifications, job performance evaluations. Defendants must also provide to the Acquirer of the Texas Divestiture Assets and the United States current, recent, and accrued compensation and benefits, including most recent bonuses paid, aggregate annual compensation, current target or guaranteed bonus, if any, any retention agreement or incentives, and any other payments due, compensation or benefits accrued, or promises made to Texas Personnel. If Defendants are barred by any applicable law from providing any of this information, within ten (10) business days following receipt of the request, Defendants must provide the requested information to the full extent permitted by law and also must provide a written explanation of Defendants' inability to provide the remaining information, including specifically identifying the provisions of applicable laws.

3. At the request of the Acquirer of the Texas Divestiture Assets, Defendants must promptly make Texas Personnel available for private interviews with the Acquirer of the Texas Divestiture Assets during normal business hours at a mutually agreeable location.

4. Defendants must not interfere with any effort by the Acquirer of the Texas Divestiture Assets to employ any Texas Personnel. Interference includes but is not limited to offering to increase the compensation or improve the benefits of Texas Personnel unless: (a) The offer is part of a company-wide increase in compensation or improvement in benefits that was announced prior to February 18, 2020; or (b) the offer is approved by the United States in its sole discretion. Defendants' obligations under this Paragraph will expire six (6) months after the divestiture of the Texas Divestiture Assets pursuant to this Final Judgment.

5. For Texas Personnel who elect employment with the Acquirer of the Texas Divestiture Assets within six (6) months of the Texas Divestiture Date, Defendants must waive all non-compete and non-disclosure agreements, vest all unvested pension and other equity rights, provide any pay pro-rata, provide all other compensation and benefits that those Texas Personnel have fully or partially accrued, and provide all other benefits that those Texas Personnel otherwise would have been provided had the Texas Personnel continued employment with Defendants, including but not limited to any retention bonuses or payments. Defendants may maintain reasonable restrictions on disclosure by Texas Personnel of Defendants' proprietary non-public information that is unrelated to the business of SCCW Collection and not otherwise required to be disclosed by this Final Judgment.

6. For a period of twelve (12) months from the Texas Divestiture Date, Defendants may not solicit to rehire Texas Personnel who were hired by the Acquirer of the Texas Divestiture Assets within six (6) months of the Texas Divestiture Date unless (a) an individual is terminated or laid off by the Acquirer of the Texas Divestiture Assets or (b) the Acquirer of the Texas Divestiture Assets agrees in writing that Defendants may solicit to rehire that individual. Nothing in this Paragraph prohibits Defendants from advertising employment openings using general solicitations or advertisements and rehiring Texas Personnel who apply for an employment opening through a general solicitation or advertisement.

I. Defendants must warrant to the Acquirer of the Texas Divestiture Assets that (1) the Texas Divestiture Assets will be operational and without material defect on the Texas Divestiture Date (2) there are no material defects in the environmental, zoning, or other permits pertaining to the operation of the Texas Divestiture Assets; and (3) Defendants have disclosed all encumbrances on any part of the Texas Divestiture Assets, including on intangible property. Following the sale of the Texas Divestiture Assets, Defendants must not undertake, directly or indirectly, challenges to the environmental, zoning, or other permits pertaining to the operation of the Texas Divestiture Assets.

J. Defendants must assign, subcontract, or otherwise transfer all contracts, agreements, and relationships (or portions of such contracts, agreements, and relationships) included in the Texas Divestiture Assets, including but not limited to all supply and sales contracts, to the Acquirer of the Texas Divestiture Assets; *provided, however,* that for any contract or agreement that requires the consent of another party to assign, subcontract, or otherwise transfer, Defendants must use best efforts to accomplish the assignment, subcontracting, or transfer. Defendants must not interfere with any negotiations between the Acquirer of the Texas Divestiture Assets and a contracting party.

K. Defendants must make best efforts to assist the Acquirer of the Texas Divestiture Assets to obtain all necessary licenses, registrations, and permits to operate the Texas Divestiture Assets. Until the Acquirer of the Texas Divestiture Assets obtains the necessary licenses, registrations, and permits, Defendants must provide the Acquirer of the Texas Divestiture Assets with the benefit of Defendants' licenses, registrations, and permits to the full extent permissible by law.

L. At the option of the Acquirer of the Texas Divestiture Assets, and subject to approval by the United States in its sole discretion, on or before the Texas Divestiture Date, Defendants must enter into a contract to provide transition services for back office, human resources, accounting, employee health and safety, telephone and information technology services and support for a period of up to six (6) months on terms and conditions reasonably related to market conditions for the provision of the transition services. Any amendments to or modifications of any provisions of a contract for transition services are subject to approval by the United States, in its sole discretion. The United States, in its sole discretion, may approve one or more extensions of any contract for transition services, for a total of up to an additional six (6) months. If the Acquirer of the Texas Divestiture Assets seeks an extension of the term of any transition services agreement, Defendants must notify the United States in writing at least one (1) month prior to the date the contract expires. The Acquirer of the Texas Divestiture Assets may terminate a contract for transition services, or any portion of a contract for transition services, without cost or penalty at any time upon thirty (30) days' written notice to Republic. The employee(s) of Defendants tasked with providing transition services must not share any competitively sensitive information of the Acquirer of the Texas Divestiture Assets with any other employee of Defendants.

M. If any term of an agreement between Defendants and the Acquirer of the Texas Divestiture Assets, including but not limited to an agreement to effectuate the divestiture required by this Final Judgment, varies from a term of this Final Judgment, to the extent that Defendants cannot fully comply with both, this Final Judgment determines Defendants' obligations.

VI. Appointment of Divestiture Trustee

A. If Defendants have not divested the Divestiture Assets within the periods specified in Paragraph IV(A) and Paragraph V(A), Defendants must immediately notify Plaintiffs of that fact in writing. Upon application of the United States, which Defendants may not oppose, the Court will appoint a divestiture trustee selected by the

United States and approved by the Court to effect the divestiture(s) of any of the Divestiture Assets.

B. After the appointment of a divestiture trustee by the Court, only the divestiture trustee will have the right to sell the Divestiture Assets that the divestiture trustee has been appointed to sell. The divestiture trustee will have the power and authority to accomplish the divestiture(s) to an Acquirer or Acquirers acceptable to the United States, in its sole discretion, after consultation with the State of Alabama, at a price and on terms as are then obtainable upon reasonable effort by the divestiture trustee, subject to the provisions of Sections IV, V, VI, and VII of this Final Judgment, and will have other powers as the Court deems appropriate. The divestiture trustee must sell the Divestiture Assets that the divestiture trustee has been appointed to sell as quickly as possible.

C. Defendants may not object to a sale by the divestiture trustee on any ground other than malfeasance by the divestiture trustee. Objections by Defendants must be conveyed in writing to Plaintiffs and the divestiture trustee within ten (10) calendar days after the divestiture trustee has provided the notice of proposed divestiture required under Section VII.

D. The divestiture trustee will serve at the cost and expense of Defendants pursuant to a written agreement, on terms and conditions, including confidentiality requirements and conflict-of-interest certifications, that are approved by the United States in its sole discretion.

E. The divestiture trustee may hire at the cost and expense of Defendants any agents or consultants, including but not limited to investment bankers, attorneys, and accountants, that are reasonably necessary in the divestiture trustee's judgment to assist with the divestiture trustee's duties. These agents or consultants will be accountable solely to the divestiture trustee and will serve on terms and conditions, including terms and conditions governing confidentiality requirements and conflict-of-interest certifications, that are approved by the United States in its sole discretion.

F. The compensation of the divestiture trustee and agents or consultants hired by the divestiture trustee must be reasonable in light of the value of the Divestiture Assets that the divestiture trustee has been appointed to sell and based on a fee arrangement that provides the divestiture trustee with incentives based on the price and terms of the divestiture(s) and the speed with which it is accomplished. If the divestiture trustee and Defendants are unable to reach agreement on the divestiture trustee's compensation or other terms and conditions of engagement within fourteen (14) calendar days of the appointment of the divestiture trustee by the Court, the United States may, in its sole discretion, take appropriate action, including by making a recommendation to the Court. Within three (3) business days of hiring an agent or consultant, the divestiture trustee must provide written notice of the hiring and rate of compensation to Defendants and the United States.

G. The divestiture trustee must account for all monies derived from the sale of the assets sold by the divestiture trustee and all costs and expenses incurred. Within thirty (30) calendar days of the date of the sale of the assets sold by the divestiture trustee, the divestiture trustee must submit that accounting to the Court for approval. After approval by the Court of the divestiture trustee's accounting, including fees for unpaid services and those of agents or consultants hired by the divestiture trustee, all remaining money must be paid to Defendants and the trust will then be terminated.

H. Defendants must use their best efforts to assist the divestiture trustee to accomplish the required divestiture. Subject to reasonable protection for trade secrets, other confidential research, development, or commercial information, or any applicable privileges, Defendants must provide the divestiture trustee and agents or consultants retained by the divestiture trustee with full and complete access to all personnel, books, records, and facilities of the Divestiture Assets that the divestiture trustee has been appointed to sell. Defendants also must provide or develop financial and other information relevant to the Divestiture Assets that the divestiture trustee may reasonably request. Defendants must not take any action to interfere with or to impede the divestiture trustee's accomplishment of the divestiture.

I. The divestiture trustee must maintain complete records of all efforts made to sell the Divestiture Assets, including by filing monthly reports with Plaintiffs setting forth the divestiture trustee's efforts to accomplish the divestitures ordered by this Final Judgment. The reports must include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring any interest in the Divestiture Assets that the divestiture trustee has been appointed to sell and must describe in detail each contact with any such person.

J. If the divestiture trustee has not accomplished the divestitures ordered by this Final Judgment within six months of appointment, the divestiture trustee must promptly provide Plaintiffs with a report setting forth: (1) The divestiture trustee's efforts to accomplish the required divestitures; (2) the reasons, in the divestiture trustee's judgment, why the required divestitures have not been accomplished; and (3) the divestiture trustee's recommendations for completing the divestitures. Following receipt of that report, the United States may make additional recommendations consistent with the purpose of the trust to the Court. The Court thereafter may enter such orders as it deems appropriate to carry out the purpose of this Final Judgment, which may include extending the trust and the term of the divestiture trustee's appointment by a period requested by the United States.

K. The divestiture trustee will serve until divestiture of all Divestiture Assets that the divestiture trustee has been appointed to sell is completed or for a term otherwise ordered by the Court.

L. If the United States determines that the divestiture trustee is not acting diligently or in a reasonably cost-effective manner, the United States may recommend that the Court appoint a substitute divestiture trustee.

VII. Notice of Proposed Divestiture

A. Within two (2) business days following execution of a definitive divestiture agreement with an Acquirer other than Kinderhook (through its portfolio companies, CWS or EcoSouth) or Waste Connections (through its subsidiary Waste Connections of Texas), Defendants or the divestiture trustee, whichever is then responsible for effecting the divestiture, must notify Plaintiffs of a proposed divestiture required by this Final Judgment. If the divestiture trustee is responsible for completing the divestiture, the divestiture trustee also must notify Defendants. The notice must set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets.

B. Within fifteen (15) calendar days of receipt by the United States of this notice, the United States may request from Defendants, the proposed Acquirer(s), other third parties, or the divestiture trustee additional

information concerning the proposed divestiture, the proposed Acquirer(s) and other prospective Acquirers. Defendants and the divestiture trustee must furnish the additional information requested within fifteen (15) calendar days of the receipt of the request, unless the United States provides written agreement to a different period.

C. Within forty-five (45) calendar days after receipt of the notice required by Paragraph VII(A) or within twenty (20) calendar days after the United States has been provided the additional information requested pursuant to Paragraph VII(B), whichever is later, the United States will provide written notice to Defendants and any divestiture trustee that states whether or not the United States, in its sole discretion, after consultation with State of Alabama, objects to the Acquirer(s) or any other aspect of the proposed divestiture. Without written notice that the United States does not object, a divestiture may not be consummated. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to Defendants' limited right to object to the sale under Paragraph VI(C) of this Final Judgment. Upon objection by Defendants pursuant to Paragraph VI(C), a divestiture by the divestiture trustee may not be consummated unless approved by the Court.

D. No information or documents obtained pursuant to this Section VII may be divulged by Plaintiffs to any person other than an authorized representative of the executive branch of the United States or an authorized representative of the State of Alabama, except in the course of legal proceedings to which the United States is a party, including grand-jury proceedings, for the purpose of evaluating a proposed Acquirer or securing compliance with this Final Judgment, or as otherwise required by law.

E. In the event of a request by a third party for disclosure of information under the Freedom of Information Act, 5 U.S.C. 552, 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. Persons 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 ten years after submission, ''unless the submitter requests and provides justification for a longer designation period.'' *See* 28 CFR 16.7(b).

F. If at the time that a person furnishes information or documents to the United States or the State of Alabama pursuant to this Section VII, that person 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 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 and the State of Alabama must give that person ten calendar days' notice before divulging the material in any legal proceeding (other than a grand-jury proceeding).

VIII. Financing

Defendants may not finance all or any part of any Acquirer's purchase of all or part of the Divestiture Assets made pursuant to this Final Judgment.

IX. Asset Preservation

Defendants must take all steps necessary to comply with the Asset Preservation Stipulation and Order entered by the Court. Defendants must take no action that would jeopardize the divestiture ordered by the Court.

X. Affidavits

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture required by this Final Judgment has been completed, each Defendant must deliver to Plaintiffs an affidavit describing the fact and manner of that Defendant's compliance with this Final Judgment. Republic's affidavits must be signed by the Senior Vice President of Emerging Business and a Deputy General Counsel; Santek's affidavits must be signed by the Chief Operating Officer and the Chief Business Officer. The United States, in its sole discretion, may approve different signatories for the affidavits.

B. Each affidavit must include: (1) The name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, an interest in the Divestiture Assets and describe in detail each contact with such persons during that period; (2) a description of the efforts Defendants have taken to solicit buyers for and complete the sale of the Divestiture Assets, and to provide required information to prospective Acquirers; and (3) a description of any limitations placed by Defendants on information provided to prospective Acquirers. Objection by the United States to information provided by Defendants to prospective Acquirers must be made within fourteen (14) calendar days of receipt of the affidavit, except that the United States may object at any time if the information set forth in the affidavit is not true or complete.

C. Defendants must keep all records of any efforts made to divest the Divestiture Assets until one year after the divestitures have been completed.

D. Within twenty (20) calendar days of the filing of the Complaint in this matter, each Defendant also must deliver to Plaintiffs an affidavit that describes in reasonable detail all actions that Defendant have taken and all steps that Defendant has implemented on an ongoing basis to comply with Section IX of this Final Judgment. Republic's affidavits must be signed by the Senior Vice President of Emerging Business and a Deputy General Counsel; Santek's affidavits must be signed by the Chief Operating Officer and the Chief Business Officer. The United States, in its sole discretion, may approve different signatories for the affidavits.

E. If a Defendant make any changes to the efforts and actions outlined in any earlier affidavits provided pursuant to Paragraph X(D), the Defendant must, within fifteen (15) calendar days after any change is implemented, deliver to Plaintiffs an affidavit describing those changes.

F. Defendants must keep all records of any efforts made to preserve the Divestiture Assets until one year after the divestiture has been completed.

XI. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of related orders such as the Asset Preservation Stipulation and Order 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 Defendants, Defendants 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 Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews must be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, Defendants must submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment.

C. No information or documents obtained by the United States pursuant to this Section XI may be divulged by Plaintiffs to any person other than an authorized representative of the executive branch of the United States or an authorized representative of the State of Alabama, except in the course of legal proceedings to which the United States is a party, including grand jury proceedings, for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. In the event of a request by a third party for disclosure of information under the Freedom of Information Act, 5 U.S.C. 552, 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. Defendants 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 ten years after submission, ''unless the submitter requests and provides justification for a longer designation period.'' *See* 28 CFR 16.7(b).

E. If at the time that Defendants furnish information or documents to the United States pursuant to this Section XI, Defendants represent and identify 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 Defendants mark 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 Defendants ten (10) calendar days' notice before divulging the material in any legal proceeding (other than a grand jury proceeding).

XII. Notification

A. Unless a transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the ''HSR Act''), Defendants may not, without first providing notification to the United States and, if any of the assets or interests are located in Alabama, to the State of Alabama, directly or indirectly acquire (including through an asset swap agreement) any assets of or any interest, including a financial, security, loan, equity, or management interest, in any person or entity involved in MSW Disposal and/or SCCW Collection services in any area identified in Appendix B, where that person's or entity's revenues for the 12 months preceding the proposed acquisition from MSW Disposal and/or SCCW Collection services in the identified area were in excess of $500,000. This provision also applies to an acquisition of facilities that serve an identified area but are located outside the area and requires notice to the State of Alabama where an identified area in Alabama is serviced by assets or interests to be acquired that are located outside of Alabama.

B. Defendants must provide the notification required by this Section XII in the same format as, and in accordance with the instructions relating to, the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5 through 8 of the instructions must be provided only about MSW Disposal and SCCW Collection. Notification must be provided at least thirty (30) calendar days before acquiring any assets or interest, and must include, beyond the information required by the instructions, the names of the principal representatives who negotiated the transaction on behalf of each party and all management or strategic plans discussing the proposed transaction. If, within the thirty (30) calendar days following notification, representatives of the United States make a written request for additional information, Defendants may not consummate the proposed transaction until thirty (30) calendar days after submitting all requested information.

C. Early termination of the waiting periods set forth in this Section XII may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This Section XII must be broadly construed and any ambiguity or uncertainty regarding whether to file a notice under this Section XII must be resolved in favor of filing notice.

XIII. Limitations on Reacquisition

Defendants may not reacquire any part of or any interest in the Divestiture Assets during the term of this Final Judgment.

XIV. 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.

XV. Enforcement of Final Judgment

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment or of related orders such as the Asset Preservation Stipulation and Order, including the right to seek an order of contempt from the Court. Defendants agree that in a civil contempt action, a motion to show cause, or a similar action brought by the United States regarding 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 Defendants waive 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 and the State of Alabama allege was harmed by the challenged conduct. Defendants agree that they 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 Defendants have violated this Final Judgment, the United States may apply to the Court for a one-time 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 a Defendant, whether litigated or resolved before litigation, that 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 the Final Judgment, including in the investigation of the potential violation.

D. For a period of four (4) years following the expiration of this Final Judgment, if the United States has evidence that a Defendant violated this Final Judgment before it expired, the United States may file an action against that 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 the Defendant complies with the terms of this Final Judgment; and (4) fees or expenses as called for by this Section XV.

XVI. Expiration of Final Judgment

Unless the Court grants an extension, this Final Judgment will expire ten (10) years from the date of its entry, except that after five (5) years from the date of its entry, this Final Judgment may be terminated upon notice by the United States, after consultation with the State of Alabama, to the Court and Defendants that the divestiture has been completed and the continuation of this Final Judgment is no longer necessary or in the public interest.

XVII. 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, 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

Appendix A: Southeast Divestiture Assets

I. Landfills and Transfer Stations (Paragraph II(K)(1))

a. Rhea County Landfill, located at 207 Sanitary Drive, Dayton, Tennessee 37321;

b. Murray County Landfill and Transfer Station, located at 6585 US–411, Chatsworth, Georgia 30734; and

c. Chattanooga Transfer Station, located at 1387 Wisdom Street, Chattanooga, Tennessee 37406.

II. Collection Facilities and Routes (Paragraph II(K)(3))

a. Collection facilities located at:

i. 140 Goodrich Drive, Birmingham, Alabama 35217;

ii. 1387 Wisdom Street, Chattanooga, Tennessee 37406;

iii. 2207 Industrial South Road, Dalton, Georgia 30721;

iv. 108 Nehi Road, Ellisville, Mississippi 39437;

b. Routes:

i. Santek Birmingham SCCW Collection Routes 901, 902, 903 and 904;

ii. Santek Chattanooga SCCW Collection Routes 901, 902, 903, 904, 906, and 907;

iii. Santek Chattanooga Commercial Recycling Collection Route 201;

iv. Santek North Georgia SCCW Collection Routes 902, 904, 905, 909, 919, 920, 922, and 923; and

v. Santek Hattiesburg SCCW Collection Routes 901, 902, 903, 904 and 905.

Appendix B: Areas for Which the Notice Provision in Paragraph XII(A) Applies

Geographic market	Counties within geographic market	Relevant service
Birmingham, Alabama	Jefferson and Shelby Counties	SCCW Collection.
Chattanooga, Tennessee and North Georgia.	Hamilton, Marion, Rhea, and Sequatchie Counties in Tennessee; and Catoosa, Chattooga, Dade, Gordon, Murray, and Walker Counties in Georgia.	MSW Disposal and SCCW Collection.
Eastern Montgomery County, Texas	Montgomery County (limited to zip codes 77357, 77365, and 77372).	SCCW Collection.
Estill Springs and Fayetteville, Tennessee.	Franklin and Lincoln Counties	MSW Disposal.
Hattiesburg, Mississippi	Forrest and Jones Counties	SCCW Collection.

United States District Court for the District of Columbia

United States of America and State of Alabama, *Plaintiffs,* v. Republic Services, Inc. and Santek Waste Services, LLC *Defendants.*

Civil Action No.: 1:21–cv–00883–RDM

Judge: Randolph D. Moss

Competitive Impact Statement

In accordance with the Antitrust Procedures and Penalties Act, 15 U.S.C. 16 (the ''APPA'' or ''Tunney Act''), the United States of America files this Competitive Impact Statement related to the proposed Final Judgment filed in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

On February, 18, 2020, Republic Services, Inc. (''Republic'') agreed to acquire Santek Waste Services, LLC (''Santek''). The United States and the State of Alabama filed a civil antitrust Complaint on March 31, 2021, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to substantially lessen competition for small container commercial waste (''SCCW'') collection and municipal solid waste (''MSW'') disposal in six geographic markets in the southeastern United States in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

At the same time the Complaint was filed, the United States filed a proposed Final Judgment and an Asset Preservation Stipulation and Order (''Stipulation and Order''), which are designed to remedy the loss of competition alleged in the Complaint.

Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest specified SCCW collection and MSW disposal assets in six local markets in five states. The assets to be divested are grouped into two packages—the Southeast Divestiture Assets and the Texas Divestiture Assets (capitalized terms are defined in the proposed Final Judgment). The Southeast Divestiture Assets includes assets in Alabama,

Georgia, Mississippi, and Tennessee. The Texas Divestiture Assets includes assets in Texas.

Under the terms of the Stipulation and Order, Defendants must take certain steps to ensure that the assets that must be divested are operated as ongoing, economically viable, competitive assets for the provision of SCCW collection and MSW disposal and must take all other actions to preserve and maintain the full economic viability, marketability, and competitiveness of the assets to be divested.

The Plaintiffs and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. Description of Events Giving Rise to the Alleged Violation

A. The Defendants and the Proposed Transaction

Pursuant to a purchase agreement dated February 18, 2020, and amended on May 19, 2020, July 10, 2020, October 6, 2020, and March 8, 2021, Republic proposes to acquire all of the outstanding membership interest in Santek.

Republic, a Delaware corporation headquartered in Phoenix, Arizona, is the second largest non-hazardous solid waste collection and disposal company in the United States. It provides waste collection, recycling, and disposal (including transfer) services. Republic operates in 41 states and Puerto Rico. For 2020 Republic reported revenues of approximately $10.2 billion.

Santek, a Tennessee limited liability company headquartered in Cleveland, Tennessee, is a vertically integrated solid waste management company with waste collection and disposal (including transfer) operations in nine southeastern states. In 2019, the most recent year for which information is publicly available, Santek generated approximately $140 million in revenue.

B. Relevant Product Markets

57. Small Container Commercial Waste Collection

As alleged in the Complaint, SCCW (small container commercial waste collection) is a relevant product market. Waste collection firms—also called haulers—collect MSW (municipal solid waste) from residential, commercial, and industrial establishments, and transport that waste to a disposal site, such as a transfer station, landfill, or incinerator, for processing and disposal.

SCCW collection is the business of collecting MSW from commercial and industrial accounts, usually in small containers (*i.e.,* dumpsters with one to ten cubic yards capacity), and transporting such waste to a disposal site. Typical SCCW collection customers include office and apartment buildings and retail establishments like stores and restaurants.

SCCW collection is distinct from other types of waste collection such as residential and roll-off collection. An individual commercial customer typically generates substantially more MSW than a residential customer. To handle this high volume of MSW efficiently, SCCW haulers often provide commercial customers with small containers for storing the waste. SCCW haulers organize their commercial accounts into routes and collect and transport the MSW generated by these accounts in front-end load (''FEL'') trucks that are uniquely well suited for commercial waste collection.

On a typical SCCW collection route, an operator drives a FEL truck to the customer's container, engages a mechanism that grasps and lifts the container over the front of the truck, and empties the container into the vehicle's storage section where the waste is compacted and stored. The operator continues along the route, collecting MSW from each of the commercial accounts, until the vehicle is full. The operator then drives the FEL truck to a disposal facility, such as a transfer station, landfill, or incinerator, and empties the contents of the vehicle. Depending on the number of locations and amount of waste collected on the route, the operator may make one or more trips to the disposal facility in servicing the route.

In contrast to a SCCW collection route, a residential waste collection route is highly labor intensive. A residential customer's MSW is typically stored in much smaller containers such as trash cans, and instead of using a FEL truck manned by a single operator, residential haulers routinely use rear-end load or side-load trucks typically manned by two- or three-person teams who may need to hand-load the customer's MSW. In light of these differences, haulers typically organize commercial customers into separate routes from residential customers.

Roll-off container collection also is not a substitute for SCCW collection. Roll-off container collection is commonly used to serve construction and demolition customers. A roll-off container is much larger than a SCCW container and is serviced by a truck capable of carrying a single roll-off container. Unlike SCCW customers, multiple roll-off customers are not served between trips to the disposal site, as each roll-off truck is typically only capable of carrying one roll-off container at a time.

Other types of waste collection, such as hazardous or medical waste collection, also are not substitutes for SCCW collection. These forms of collection differ from SCCW collection in the equipment required, the volume of waste collected, and the facilities where the waste is disposed.

The Complaint alleges that, because no other waste collection service can substitute for SCCW collection, other waste collection services do not constrain pricing for SCCW collection. Absent competition, SCCW collection providers could profitably increase their prices without losing significant sales to firms engaged in the provision of other types of waste collection services. In other words, in the event of a small but significant non-transitory increase in price for SCCW collection, customers would not substitute to other forms of collection in sufficient numbers so as to render the price increase unprofitable. SCCW collection is therefore a line of commerce, or relevant product market, for purposes of analyzing the effects of the acquisition under Section 7 of the Clayton Act.

58. Municipal Solid Waste Disposal

As alleged in the Complaint, MSW disposal is a relevant product market. MSW is solid putrescible waste generated by households and commercial establishments such as retail stores, offices, restaurants, warehouses, and industrial facilities. MSW has physical characteristics that readily distinguish it from other liquid or solid waste, such as waste from manufacturing processes, regulated medical waste, sewage, sludge, hazardous waste, or waste generated by construction or demolition sites.

Haulers must dispose of all MSW at a permitted disposal facility. There are intermediary disposal facilities—transfer stations—and ultimate disposal facilities—landfills and incinerators. All such facilities must be located on approved types of land and operated under prescribed procedures. Federal, state, and local safety, environmental, zoning, and permit laws and regulations dictate critical aspects of storage, handling, transportation, processing, and disposal of MSW. In less densely populated areas, MSW often is disposed of directly into landfills that are permitted and regulated by a state and

the federal government. Landfill permit restrictions often impose limitations on the type and amount of waste that can be deposited. In many urban and suburban areas, landfills are scarce due to high population density and the limited availability of suitable land. As a result, MSW generated in such areas often is burned in an incinerator or taken to a transfer station. Transfer stations briefly hold MSW until it is reloaded from collection vehicles onto larger tractor-trailers for transport, in bulk, to more distant landfills or incinerators for final disposal.

Some haulers—including Republic and Santek—are vertically integrated and operate their own disposal facilities. Vertically integrated haulers often prefer to dispose of waste at their own disposal facilities. Vertically integrated haulers may also sell a portion of their disposal capacity to disposal customers in need of access to a disposal facility.

Disposal customers include private waste haulers without their own disposal assets (referred to in the industry as ''independent haulers'') as well as local governments that own their own equipment and collect their citizens' waste themselves. Disposal customers also include independent and municipally-owned transfer stations that serve as temporary disposal sites for haulers in areas where landfills and incinerators are not easily accessible. Disposal customers that are not vertically integrated lack their own ultimate disposal facilities and rely on cost-competitive landfills.

As alleged in the Complaint, due to strict laws and regulations that govern the disposal of MSW, there are no reasonable substitutes for MSW disposal, which must occur at landfills, incinerators, or transfer stations. Thus, in the event of a small but significant non-transitory increase in price from MSW disposal firms, customers would not substitute to other forms of disposal in sufficient numbers so as to render the price increase unprofitable. MSW disposal is therefore a line of commerce, or relevant product market, for purposes of analyzing the effects of the acquisition under Section 7 of the Clayton Act.

C. Relevant Geographic Markets

1. Small Container Commercial Waste Collection Geographic Markets

As alleged in the Complaint, the relevant geographic markets for SCCW collection are local. This is because SCCW haulers need a large number of closely located customer pick-up locations to operate efficiently and profitably. If there is significant travel time between customers, then the SCCW hauler earns less money for the time that the truck operates. SCCW haulers, therefore, try to minimize the ''dead time'' in which the truck is operating and incurring costs from fuel, wear and tear, and labor, but not generating revenue from collecting waste. Likewise, customers must be near the SCCW hauler's base of operations as it would be unprofitable for a truck to travel a long distance to the start of a route. SCCW haulers, therefore, generally establish garages and related facilities to serve as bases within each area served.

As alleged in the Complaint, the transaction would likely cause harm in four relevant geographic markets for SCCW collection: (1) The Birmingham, Alabama area (Jefferson and Shelby Counties); (2) the Chattanooga, Tennessee and North Georgia area (Hamilton, Marion, Rhea, and Sequatchie Counties in Tennessee; and Catoosa, Chattooga, Dade, Gordon, Murray, and Walker Counties in Georgia); (3) the Eastern Montgomery County, Texas area (the area east of the City of Conroe defined as zip codes 77357, 77365, and 77372); and (4) the Hattiesburg, Mississippi area (Forrest and Jones Counties). In each of these markets, a hypothetical monopolist of SCCW collection could profitably impose a small but significant non-transitory increase in price for SCCW collection without losing significant sales to more distant competitors. Accordingly, each of these areas constitutes a relevant geographic market and section of the country for purposes of analyzing the effects of the acquisition on SCCW collection under Section 7 of the Clayton Act.

2. Municipal Solid Waste Disposal Geographic Markets

As alleged in the Complaint, the relevant geographic markets for MSW disposal are local as the cost of transporting MSW to a disposal site—including fuel, regular truck maintenance, and hourly labor—is a substantial component of the total cost of MSW disposal. Haulers also prefer nearby MSW disposal sites to minimize the FEL truck dead time. Due to the costs associated with travel time and customers' preference to have MSW disposal sites close by, an MSW disposal provider must have local facilities to be competitive.

As alleged in the Complaint, the proposed transaction would likely cause harm in two relevant geographic markets for MSW disposal: (1) The Chattanooga, Tennessee area (Hamilton County); and (2) the Estill Springs and Fayetteville, Tennessee area (Franklin and Lincoln Counties). In each of these local markets, a hypothetical monopolist of MSW disposal could profitably impose a small but significant non-transitory increase in price for MSW disposal without losing significant sales to more distant MSW disposal sites.

Accordingly, the Complaint alleges that the Chattanooga, Tennessee area, and the Estill Springs and Fayetteville, Tennessee area constitute relevant geographic markets for the purposes of analyzing the effects of the acquisition on MSW disposal under Section 7 of the Clayton Act.

D. Anticompetitive Effects of the Proposed Transaction

As alleged in the Complaint, the proposed transaction would increase concentration, significantly and substantially lessen competition, and harm consumers in each relevant market by eliminating the substantial head-to-head competition that currently exists between Republic and Santek.

Market concentration can be a useful indicator of the level of competitive vigor in a market and likely competitive effects of a merger. The more concentrated a market, and the more a transaction would increase concentration in a market, the more likely it is that the transaction would result in harm to consumers by meaningfully reducing competition.

Concentration in relevant markets is typically defined by the Herfindahl-Hirschman Index (''HHI''). Markets in which the HHI is above 2,500 are considered to be highly concentrated. Mergers that increase the HHI by more than 200 points and result in a highly concentrated market are presumed to likely enhance market power. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 5.3 (revised Aug. 19, 2010) (''Horizontal Merger Guidelines''), *https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.*

As alleged in the Complaint, Republic's acquisition of Santek would result in a highly concentrated market in every relevant SCCW collection market and relevant MSW disposal market. Moreover, as a result of the acquisition, the HHI would increase by more than 400 points in each of these markets, suggesting an increased likelihood of significant anticompetitive effects. Therefore, Republic's proposed acquisition of Santek is presumptively likely to enhance Republic's market power. *See* Horizontal Merger Guidelines § 5.3.

As alleged in the Complaint, the merger would also substantially lessen competition through the vertical integration of the two companies. Specifically, by combining Republic's strong position in both SCCW collection and MSW disposal with Santek's strong position in both SCCW collection and MSW disposal, the proposed transaction would increase Republic's incentive and ability to harm its SCCW collection rivals by raising the costs of MSW disposal in the Chattanooga, Tennessee and North Georgia area. With SCCW collection rivals facing higher operational costs, they would have to raise their SCCW collection prices to offset these costs and would be less able to apply competitive pressure on Republic's SCCW collection operations. As a result, businesses, municipalities, and other customers likely would pay higher prices for SCCW collection. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Vertical Merger Guidelines § 4(a) (June 30, 2020), *https://www.justice.gov/atr/page/file/1290686/download.*

1. Elimination of Horizontal Competition in SCCW Collection

As alleged in the Complaint, Republic's acquisition of Santek would eliminate a significant competitor for SCCW collection in markets that are already highly concentrated and difficult to enter. Republic and Santek compete head-to-head for SCCW collection customers in the relevant SCCW collection markets. In these four geographic markets, Republic and Santek each account for a substantial share of total revenue generated from SCCW collection and, in each relevant market, are two of no more than five significant competitors.

In each relevant SCCW collection market, collection customers including offices, apartment buildings, and retail establishments have been able to secure better collection rates and improved collection service by threatening to switch from Republic to Santek or vice versa. In each of the relevant markets, the elimination of this head-to-head competition would allow Republic to exercise market power unilaterally to increase prices and reduce the quality of service for SCCW collection customers.

i. Birmingham, Alabama Area SCCW Collection

As alleged in the Complaint, in the Birmingham, Alabama area, the proposed acquisition would reduce from five to four the number of significant competitors in the SCCW collection market. After the acquisition, Defendants would have approximately 61 percent of the SCCW collection customers in the market. The post-merger HHI for SCCW collection in this market would be approximately 4,157, an increase of 445 points from the current HHI.

ii. Chattanooga, Tennessee and North Georgia Area SCCW Collection

As alleged in the Complaint, in the Chattanooga, Tennessee and North Georgia area, the proposed acquisition would reduce from five to four the number of significant competitors in the SCCW collection market. After the acquisition, Defendants would have approximately 73 percent of the SCCW collection customers in the market. The post-merger HHI for SCCW collection in this market would be approximately 5,551, an increase of 2,660 points from the current HHI.

iii. Eastern Montgomery County, Texas Area SCCW Collection

As alleged in the Complaint, in the Eastern Montgomery County, Texas area, the proposed acquisition would reduce from three to two the number of significant competitors in the SCCW collection market. After the acquisition, Defendants would have approximately 58 percent of the SCCW collection customers in the market. The post-merger HHI for SCCW collection in this market would be approximately 4,064, an increase of 1,703 points from the current HHI.

iv. Hattiesburg, Mississippi Area SCCW Collection

As alleged in the Complaint, in the Hattiesburg, Mississippi area, the proposed acquisition would reduce from five to four the number of significant competitors in the SCCW collection market. After the acquisition, Defendants would have approximately 55 percent of SCCW collection customers in the market. The post-merger HHI for SCCW collection would be approximately 3,853, an increase of 1,420 points from the current HHI.

2. Elimination of Horizontal Competition in MSW Disposal

As alleged in the Complaint, Republic's acquisition of Santek would also eliminate a significant competitor for MSW disposal in markets that are already highly concentrated and difficult to enter. Republic and Santek compete head-to-head for MSW disposal customers in the relevant MSW disposal markets. In these geographic markets, Republic and Santek each account for a substantial share of total revenue generated from MSW disposal and, in each relevant MSW disposal market, are two of no more than three significant competitors. In each relevant MSW disposal market, independent haulers and municipalities have been able to negotiate more favorable MSW disposal rates by threatening to move MSW from Republic's facilities to Santek's facilities and vice versa. In each of the relevant MSW disposal markets, the elimination of this head-to-head competition would allow Republic to exercise market power unilaterally to increase prices and reduce the quality of service for MSW disposal customers.

i. Chattanooga, Tennessee Area MSW Disposal

As alleged in the Complaint, in the Chattanooga, Tennessee area, the proposed acquisition would reduce from three to two the number of significant competitors in the MSW disposal market. After the acquisition, approximately 82 percent of the waste generated in the Chattanooga, Tennessee area would either be disposed of directly in the Defendants' landfills or pass through the Defendants' transfer stations in Chattanooga before ultimately being disposed of in the Defendants' landfills. The post-merger HHI for MSW disposal would be approximately 6,980, an increase of 3,018 points from the current HHI.

ii. Estill Springs and Fayetteville, Tennessee Area MSW Disposal

MSW in the Estill Springs and Fayetteville, Tennessee area, is hauled to municipally-owned transfer stations before it is transferred to a landfill. As alleged in the Complaint, the proposed acquisition would reduce from three to two the number of significant landfill competitors available to bid to dispose of the MSW from these transfer stations. Since Santek was awarded the most recent contracts for the exclusive right to dispose of the waste from the Estill Springs and Fayetteville, Tennessee area's municipally-owned transfer stations, the transaction will not have an impact on the market's HHI. Still, the loss of competition between Republic and Santek for the area's contracts will result in higher prices and lower quality service for these municipalities in the upcoming years when the current contracts expire.

3. Raising Rivals' Costs of MSW Disposal in the Chattanooga, Tennessee and North Georgia Area

As alleged in the Complaint, in the Chattanooga, Tennessee and North Georgia area, the proposed transaction also would substantially lessen competition in the SCCW collection market by raising the MSW disposal

costs of independent haulers. As noted above, Republic and Santek collectively serve approximately 73 percent of the SCCW collection customers in the Chattanooga, Tennessee and North Georgia area. In addition, the vast majority of the waste generated in this area is disposed of in landfills operated by Republic and Santek. Thus, not only are Defendants each other's largest competitor in the SCCW collection market, they also compete with each other to supply MSW disposal services to independent haulers, including those that compete with them in the SCCW collection market.

By combining the two firms' SCCW collection and MSW disposal businesses, the merger would increase Republic's incentive and ability to raise its MSW disposal price for independent haulers. Having acquired its largest MSW disposal competitor, Santek, Republic would be able to raise its MSW disposal prices without fear of losing significant sales to remaining disposal competitors. With few alternative MSW disposal facilities available, independent haulers would be forced to incur these increased MSW disposal costs or shutter their operations. Those independent haulers that remained in business would need to raise their SCCW collection prices in order to offset higher MSW disposal costs, rendering them less competitive in SCCW collection. The merger would also increase Republic's incentive to raise the MSW disposal costs of independent haulers because Republic—no longer confronting competition from Santek in SCCW collection—would capture more of the business lost by independent haulers in the SCCW collection market.

As alleged in the Complaint, as a result, the merged firm would likely find it profitable to raise the cost of MSW disposal or to deny service altogether to the merged firm's SCCW collection rivals, thereby reducing competition in the SCCW collection market.

E. Difficulty of Entry

1. Difficulty of Entry Into SCCW Collection

As alleged in the Complaint, entry of new competitors into the relevant SCCW collection markets would be difficult and time-consuming and is unlikely to prevent the harm to competition that is likely to result if the proposed transaction is consummated.

A new entrant in SCCW collection could not provide a significant competitive constraint on the prices that market incumbents charge until achieving a minimum efficient scale and operating efficiency comparable to existing competitors. In order to obtain a comparable operating efficiency, a new competitor would have to achieve route densities similar to those of firms already in the market. Incumbents in a geographic market, however, can prevent new entrants from winning a large enough base of customers by selectively lowering prices and entering into longer term contracts with collection customers.

2. Difficulty of Entry Into MSW Disposal

As alleged in the Complaint, entry of new competitors into the relevant MSW disposal markets would be difficult and time-consuming and is unlikely to prevent the harm to competition that is likely to result if the proposed transaction is consummated.

A new entrant in MSW disposal would need to obtain a permit to construct an MSW disposal facility or to expand an existing one, and this process is costly and time-consuming, typically taking many years. Land suitable for MSW disposal is scarce, as a landfill must be constructed away from environmentally-sensitive areas, including fault zones, wetlands, flood plains, and other restricted areas. Even when suitable land is available, local public opposition frequently increases the time and uncertainty of the permitting process.

Construction of a new transfer station or incinerator also is difficult and time consuming and faces many of the same challenges as new landfill construction, including local public opposition.

Thus, entry by constructing and permitting a new MSW disposal facility would be costly, time-consuming, and unlikely to prevent market incumbents from significantly raising prices for MSW disposal in each of the relevant MSW disposal markets following the acquisition.

III. Explanation of the Proposed Final Judgment

The relief required by the proposed Final Judgment will remedy the loss of competition alleged in the Complaint by maintaining competition in each of the SCCW collection and MSW disposal markets alleged in the Complaint. The assets to be divested are grouped into two packages—the Southeast Divestiture Assets and the Texas Divestiture Assets (capitalized terms are defined in the proposed Final Judgment).

The Southeast Divestiture Assets include all of the assets necessary for the Acquirer of the Southeast Divestiture Assets to operate an economically viable business that will remedy the harm that the United States and the State of Alabama allege would otherwise result from the transaction in (1) the SCCW collection markets in the Birmingham, Alabama area; the Chattanooga, Tennessee and North Georgia area; and the Hattiesburg, Mississippi area and (2) the MSW disposal markets in the Chattanooga, Tennessee area and the Estill Springs and Fayetteville, Tennessee area.[1]

The Texas Divestiture Assets include all of the assets necessary for the Acquirer of the Texas Divestiture Assets to operate an economically viable business that will remedy the harm that the United States and the State of Alabama allege would otherwise result from the transaction in the SCCW collection market in the Eastern Montgomery County, Texas area.

A. Southeast Divestiture Assets

Paragraph IV(A) of the proposed Final Judgment requires Defendants, within 30 days after the entry of the Stipulation and Order by the Court, to divest the Southeast Divestiture Assets to Kinderhook Industries LLC (through its portfolio companies Capital Waste Services, LLC, EcoSouth Services of Birmingham, LLC, and EcoSouth Services of Mobile, LLC), or an alternative acquirer acceptable to the United States, in its sole discretion, after consultation with the State of Alabama. The assets must be divested in such a way as to satisfy the United States in its sole discretion, after consultation with the State of Alabama, that the Southeast Divestiture Assets can and will be used by the Acquirer as part of a viable, ongoing SCCW collection business and a viable, ongoing MSW disposal business that can compete effectively in each of the markets in Alabama, Georgia, Mississippi, and Tennessee alleged in the Complaint. Defendants must take all reasonable steps necessary to accomplish the divestiture of the Southeast Divestiture Assets quickly and must cooperate with the Acquirer.

The Southeast Divestiture Assets are defined as all tangible and intangible assets relating to or used in connection with the MSW disposal assets identified in Paragraphs II(K)(1) and II(K)(2) of the

[1] The landfill and transfer station assets to be divested in Tennessee and Georgia, as defined in Paragraphs II(K)(1) and (2) of the proposed Final Judgment, address not only the potential elimination of horizontal competition in MSW disposal as alleged in Paragraphs 41–43 of the Complaint, but along with the SCCW collection assets to be divested in Tennessee and Georgia, as defined in Paragraphs II(K)(3) and (4) of the proposed Final Judgment, they address the potential for Defendants to raise rivals' costs of MSW disposal as alleged in Paragraphs 44–47 of the Complaint.

proposed Final Judgment and the SCCW collection assets identified in Paragraphs II(K)(3) and II(K)(4) of the proposed Final Judgment. The Southeast Divestiture Assets include two landfills, two transfer stations, four collection facilities, and 24 Routes in Alabama, Georgia, Mississippi, and Tennessee. The Southeast Divestiture Assets also include, in each MSW disposal market alleged: All tangible and intangible property and assets related to or used in connection with the transfer stations and landfills except for the Excluded Disposal Agreements, which are explained below. In each SCCW collection market alleged, the Southeast Divestiture Assets include: All intangible and tangible assets related to or used in connection with the Routes except for what the proposed Final Judgment defines as Hybrid Contracts, which are explained below, and a collection facility located at 101 Barber Boulevard, Gardendale, Alabama 35071. In the Chattanooga, Tennessee and North Georgia market, the Southeast Divestiture Assets include not only SCCW collection assets, but also commercial recycling collection assets which should enhance the viability of the Southeast Divestiture Assets.

Paragraph IV(K) of the proposed Final Judgment facilitates the transfer of customers and other contractual relationships, except for Hybrid Contracts and the Excluded Disposal Agreements, to the Acquirer of the Southeast Divestiture Assets. Defendants must transfer all contracts, agreements, and relationships to the Acquirer of the Southeast Divestiture Assets and must make best efforts to assign, subcontract, or otherwise transfer contracts or agreements that require the consent of another party before assignment, subcontracting, or other transfer.

Hybrid Contracts, which are defined in Paragraph II(S) as customer waste or recycling contracts that include a combination of services and/or collection stops included in the Southeast Divestiture Assets and services and/or collection stops not included in the Southeast Divestiture Assets, and that make up a small portion of the SCCW collection contracts included in the divestiture package, are required under Paragraph IV(L) to be divested at the option of the Acquirer of the Southeast Divestiture Assets. This will enable the Acquirer of the Southeast Divestiture Assets to have the option to acquire the customer contracts which it determines it can efficiently and profitably serve.

The Excluded Disposal Agreements are not required to be divested because they are not necessary for the Acquirer of the Southeast Divestiture Assets to operate the Southeast Divestiture Assets as part of a viable, ongoing MSW disposal business that can compete effectively in the Chattanooga, Tennessee area and the Fayetteville and Estill Springs, Tennessee area. The Excluded Disposal Agreements are defined in Paragraph II(R) as (1) the Landfill Disposal Services Agreement, dated December 1, 2012, between Putnam County, Tennessee and Santek Environmental, Inc., as amended by First Amendment to Landfill Disposal Services Agreement, dated October 16, 2020, and (2) the Waste Disposal Agreement, dated November 16, 2018, between Santek Environmental, LLC and Clean Harbors Environmental Services, Inc., as amended by First Amendment to Waste Disposal Agreement, dated January 26, 2021. They are not related to MSW disposal services provided in any market alleged in the Complaint, and, therefore, are excluded from the assets to be divested.

The collection facility located at 101 Barber Boulevard, Gardendale, Alabama 35071 is not part of the Southeast Divestiture Assets because the Acquirer of the Southeast Divestiture Assets will acquire a collection facility located 140 Goodrich Drive, Birmingham, Alabama 35217 from which it can competitively run the acquired Routes in the Birmingham, Alabama area.

The proposed Final Judgment contains several provisions to facilitate the transition of the Southeast Divestiture Assets to the Acquirer of the Southeast Divestiture Assets. First, Paragraph IV(P) of the proposed Final Judgement requires Defendants, at the option of the Acquirer of the Southeast Divestiture Assets, to enter into an agreement to provide a maintenance bay, outdoor parking for six trucks and empty container storage, and an interior office at Republic's collection facility in Birmingham, Alabama. This provision is intended to give the Acquirer of the Southeast Divestiture Assets a location from which it can temporarily run the acquired Routes in the Birmingham, Alabama area while it sets up its own maintenance bay and interior offices at the collection facility it is acquiring.

Second, Paragraph IV(N) of the proposed Final Judgment requires Defendants to provide certain transition services to maintain the viability and competitiveness of the Southeast Divestiture Assets during the transition to the Acquirer of the Southeast Divestiture Assets. Paragraph IV(N) of the proposed Final Judgment requires Defendants, at the option of the Acquirer of the Southeast Divestiture Assets, to enter into a transition services agreement for back office, human resources, accounting, employee health and safety, telephone, and information technology services and support for the Southeast Divestiture Assets for a period of up to three months. The Acquirer of the Southeast Divestiture Assets may terminate the transition services agreement, or any portion of it, without cost or penalty at any time upon 30 days' written notice to Republic. The paragraph further provides that the United States, in its sole discretion, may approve one or more extensions of this transition services agreement for a total of up to an additional three months and that any amendments to or modifications of any provisions of a transition services agreement are subject to approval by the United States in its sole discretion. Paragraph IV(N) also provides that employees of Defendants tasked with supporting this agreement must not share any competitively sensitive information of the Acquirer of the Southeast Divestiture Assets with any other employee of Defendants.

Third, Paragraph IV(O) of the proposed Final Judgment requires Defendants, at the option of the Acquirer of the Southeast Divestiture Assets, to enter into a contract to provide rights to landfill disposal at Republic's Pineview Landfill and Santek's Mt. Olive Landfill for a period of up to three years. The proposed Final Judgment also requires Defendants to operate gates, side houses, and disposal areas for the benefit of the Acquirer of the Southeast Divestiture Assets under terms and conditions that are no less favorable than those provided to Defendants' own vehicles. The Acquirer of the Southeast Divestiture Assets may terminate the landfill disposal contract without cost or penalty at any time upon 30 days' written notice to Republic. This provision is intended to give the Acquirer of the Southeast Divestiture Assets an immediate and efficient outlet for the waste that it will collect on the Routes in the Birmingham, Alabama area. This will allow the Acquirer of the Southeast Divestiture Assets to operate cost competitively as soon as it acquires the Routes rather than face a delay in needing to negotiate with disposal facilities in the region.

The proposed Final Judgment also contains provisions intended to facilitate efforts by the Acquirer of the Southeast Divestiture Assets to hire certain employees. Specifically, Paragraph IV(I) of the proposed Final Judgment requires Defendants to provide the Acquirer of the Southeast Divestiture Assets, the United States,

and the State of Alabama with organization charts and information relating to these employees and to make them available for interviews. It also provides that Defendants must not interfere with any negotiations by the Acquirer of the Southeast Divestiture Assets to hire these employees. In addition, for employees who elect employment with the Acquirer of the Southeast Divestiture Assets, Defendants must waive all non-compete and non-disclosure agreements, vest all unvested pension and other equity rights, provide any pay pro-rata, provide all other compensation and benefits that those employees have fully or partially accrued, and provide all other benefits that those employees otherwise would have been provided had those employees continued employment with Defendants, including but not limited to any retention bonuses or payments. This paragraph further provides that the Defendants may not solicit to hire any employees who elect employment with the Acquirer of the Southeast Divestiture Assets, unless that individual is terminated or laid off by the Acquirer of the Southeast Divestiture Assets or the Acquirer of the Southeast Divestiture Assets agrees in writing that the Defendants may solicit or hire that individual. The non-solicitation period runs for 12 months from the date of the divestiture. This paragraph does not prohibit Defendants from advertising employment openings using general solicitations or advertisements and rehiring employees who apply for a position through a general solicitation or advertisement.

B. Texas Divestiture Assets

Paragraph V(A) of the proposed Final Judgment requires Defendants, within 30 days after the entry of the Stipulation and Order by the Court, to divest the Texas Divestiture Assets to Waste Connections, Inc. (through its subsidiary Waste Connections of Texas, LLC), or an alternative acquirer acceptable to the United States. The Texas Divestiture Assets must be divested in such a way as to satisfy the United States in its sole discretion that the Texas Divestiture Assets can and will be used by the Acquirer as part of a viable, ongoing SCCW collection business that can compete effectively in Eastern Montgomery County, Texas. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and must cooperate with the Acquirer.

The Texas Divestiture Assets are defined as all tangible and intangible assets relating to or used in connection with the SCCW collection assets identified in Paragraphs II(L)(1) and II(L)(2) of the proposed Final Judgment. The Texas Divestiture Assets include two Routes and all intangible and tangible assets related to or used in connection with the Routes except for the collection facility located at 701 US Hwy 59 South, Cleveland Texas, 77327. The collection facility located at 701 US Hwy 59 South, Cleveland Texas, 77327 is not part of the Texas Divestiture Assets because, as with Waste Connections, any acquirer should already operate a collection facility in the Eastern Montgomery, County area into which it can efficiently integrate the two Routes and from which it can compete.

Paragraph V(J) of the proposed Final Judgment facilitates the transfer of customers and other contractual relationships to the Acquirer of the Texas Divestiture Assets. Defendants must transfer all contracts, agreements, and relationships to the Acquirer and must make best efforts to assign, subcontract, or otherwise transfer contracts or agreements that require the consent of another party before assignment, subcontracting or other transfer.

Paragraph IV(N) of the proposed Final Judgment requires Defendants to provide certain transition services to maintain the viability and competitiveness of the Texas Divestiture Assets during the transition to the Acquirer of the Texas Divestiture Assets. Paragraph V(L) of the proposed Final Judgment requires Defendants, at the Acquirer of the Texas Divestiture Assets' option, to enter into a transition services agreement for back office, human resources, accounting, employee health and safety, telephone, and information technology services and support for the Texas Divestiture Assets for a period of up to six months. The Acquirer of the Texas Divestiture Assets may terminate the transition services agreement, or any portion of it, without cost or penalty at any time upon 30 days' written notice to Republic. The paragraph further provides that the United States, in its sole discretion, may approve one or more extensions of this transition services agreement for a total of up to an additional six months and that any amendments to or modifications of any provisions of a transition services agreement are subject to approval by the United States in its sole discretion. Paragraph IV(N) also provides that employees of Defendants tasked with supporting this agreement must not share any competitively sensitive information of the Acquirer of the Texas Divestiture Assets with any other employee of Defendants.

The proposed Final Judgment also contains provisions intended to facilitate the Acquirer of the Southeast Divestiture Assets' efforts to hire certain employees. Paragraph V(H) of the proposed Final Judgment requires Defendants to provide the Acquirer of the Texas Divestiture Assets and the United States with organization charts and information relating to these employees and to make them available for interviews. It also provides that Defendants must not interfere with any negotiations by the Acquirer of the Texas Divestiture Assets to hire these employees. In addition, for employees who elect employment with the Acquirer of the Texas Divestiture Assets, Defendants must waive all non-compete and non-disclosure agreements, vest all unvested pension and other equity rights, provide any pay pro-rata, provide all other compensation and benefits that those employees have fully or partially accrued, and provide all other benefits that those employees otherwise would have been provided had those employees continued employment with Defendants, including but not limited to any retention bonuses or payments. This paragraph further provides that the Defendants may not solicit to hire any employees who elect employment with the Acquirer of the Texas Divestiture Assets, unless that individual is terminated or laid off by the Acquirer of the Texas Divestiture Assets or the Acquirer of the Texas Divestiture Assets agrees in writing that the Defendants may solicit or hire that individual. The non-solicitation period runs for 12 months from the date of the divestiture. This paragraph does not prohibit Defendants from advertising employment openings using general solicitations or advertisements and rehiring employees who apply for a position through a general solicitation or advertisement.

C. Divestiture Trustee

If Defendants do not accomplish the divestiture(s) within the periods prescribed in Sections IV and V of the proposed Final Judgment, Section VI of the proposed Final Judgment provides that the Court will appoint a divestiture trustee selected by the United States to effect the divestiture. If a divestiture trustee is appointed, the proposed Final Judgment provides that Defendants must pay all costs and expenses of the trustee. The divestiture trustee's commission must be structured so as to provide an incentive for the trustee based on the price and terms of the divestiture(s) and the speed with which the divestiture is accomplished. After the divestiture trustee's appointment

becomes effective, the trustee must provide monthly reports to the Plaintiffs setting forth his or her efforts to accomplish the divestiture. If the divestiture has not been accomplished within six months of the divestiture trustee's appointment, the United States may make recommendations to the Court, which will enter such orders as appropriate, in order to carry out the purpose of the Final Judgment, including by extending the trust or the term of the divestiture trustee's appointment.

D. Other Provisions

Section XII of the proposed Final Judgment requires Defendants to notify the United States and, if any of the assets or interests are located in Alabama, to the State of Alabama, in advance of acquiring, directly or indirectly (including through an asset swap agreement), in a transaction that would not otherwise be reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the ''HSR Act''), any assets of or interest in any business engaged in SCCW collection or MSW disposal in a market where the Complaint alleged a violation, which are listed in Appendix A. Pursuant to the proposed Final Judgment, Defendants must notify the United States of such acquisitions as it would for a required HSR Act filing, as specified in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations. The proposed Final Judgment further provides for waiting periods and opportunities for the United States to obtain additional information analogous to the provisions of the HSR Act before such acquisitions can be consummated. The notification requirement applies when the acquired business's annual revenues from the relevant service in the market exceeded $500,000 for the 12 months preceding the proposed acquisition. It is important for the United States and the State of Alabama to receive notice of even small transactions that have the potential to reduce competition in these markets because the markets alleged in the Complaint are highly concentrated. Requiring notification of any such acquisition will permit the United States and the State of Alabama, as relevant, to assess the competitive effects of that acquisition before it is consummated and, if necessary, seek to enjoin the transaction.

The proposed Final Judgment also contains provisions designed to promote compliance with and make enforcement of the Final Judgment as effective as possible. Paragraph XV(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, Defendants have 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 Defendants have 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 that the Final Judgment addresses.

Paragraph XV(B) provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment is intended to remedy the loss of competition the United States alleges would otherwise be harmed by the transaction. Defendants agree that they will abide by the proposed Final Judgment and that they 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 this procompetitive purpose.

Paragraph XV(C) provides that if the Court finds in an enforcement proceeding that a Defendant has violated the Final Judgment, the United States may apply to the Court for a one-time 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 XV(C) provides that, in any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved before litigation, the Defendant must reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with any effort to enforce the Final Judgment, including the investigation of the potential violation.

Paragraph XV(D) states that the United States may file an action against a Defendant 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 XVI of the proposed Final Judgment provides that the Final Judgment will expire ten years from the date of its entry, except that after five years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestiture has been completed and 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 Defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and Defendants 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 the last 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 response 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: Katrina Rouse, Chief, Defense, Industrials, and Aerospace Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street NW, Suite 8700, 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 Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Republic's acquisition of Santek. The United States is satisfied, however, that the relief required by the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition for the provision of SCCW collection and MSW disposal in each of the geographic markets alleged in the Complaint. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation but 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. *U.S. 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 mechanism to enforce the final judgment are clear and manageable'').

As the U.S. Court of Appeals for the District of Columbia 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. 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 consent 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 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 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). More demanding requirements would ''have enormous practical consequences for the government's ability to negotiate future settlements,'' contrary to congressional intent. *Id.* 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 U.S. 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''). 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, Public Law 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 U.S. 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.'' *U.S. 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: April 2, 2021

Respectfully submitted,

For Plaintiff United States of America:

Gabriella R. Moskowitz, (D.C. Bar #1044309), Defense, Industrials, and Aerospace Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street NW, Suite 8700, Washington, DC 20530, Telephone: (202) 598–8885, *gabriella.moskowitz@usdoj.gov*

Appendix A: Areas for Which the Notice Provision in Paragraph XII(A) of the Proposed Final Judgment Applies

Geographic market	Counties within geographic market	Relevant service
Birmingham, Alabama	Jefferson and Shelby Counties	SCCW Collection.
Chattanooga, Tennessee and North Georgia.	Hamilton, Marion, Rhea, and Sequatchie Counties in Tennessee; and Catoosa, Chattooga, Dade, Gordon, Murray, and Walker Counties in Georgia.	MSW Disposal and SCCW Collection.
Eastern Montgomery County, Texas	Montgomery County (limited to zip codes 77357, 77365, and 77372).	SCCW Collection.
Estill Springs and Fayetteville, Tennessee.	Franklin and Lincoln Counties	MSW Disposal.
Hattiesburg, Mississippi	Forrest and Jones Counties	SCCW Collection.

[FR Doc. 2021–07224 Filed 4–7–21; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—R Consortium, Inc.

Notice is hereby given that, on March 22, 2021, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), R Consortium, Inc. (''R Consortium'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, GlaxoSmithKline USA, Research Triangle Park, NC, has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and R Consortium intends to file additional written notifications disclosing all changes in membership.

On September 15, 2015, R Consortium filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on October 2, 2015 (80 FR 59815).

The last notification was filed with the Department on December 28, 2020. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on January 13, 2021 (86 FR 2698).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2021–07245 Filed 4–7–21; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—The National Advanced Mobility Consortium, Inc. (Formerly Known as The Robotics Technology Consortium)

Notice is hereby given that, on March 18, 2021, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), The National Advanced Mobility Consortium, Inc. (''NAMC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. On February 3, 2015, the RTC officially changed its name to NAMC. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, 3-Dimensional Services

Group, Rochester Hills, MI; A-Tech Corporation, Albuquerque, NM; Acellent Technologies, Inc., Sunnyvale, CA; Acrow Corporation of America, Inc., Parsippany, NJ; ADI Technologies, Inc., Chantilly, VA; ADS, Inc., Virginia Beach, VA; Advanced Armor Research Group, LLC, Fredericksburg, VA; Adsys Controls, Inc., Irvine, CA; Aegis Systems, Inc., New York, NY; Aeronix, Melbourne, FL; AeroVironment, Inc., Huntsville, AL; Agile Decision Sciences, LLC, Huntsville, AL; AimLock, Littleton, CO; AMBOT, Reno, NV; Amerex Corporation, Trussville, AL; American Defense International, Inc., Washington, DC; American Engineering Group, LLC, Akron, OH; American Lightweight Material Manufacturing Innovation Institute, Detroit, MI; American Power Systems, Inc., Davenport, IA; American Rheinmetall Systems, LLC, Biddeford, ME; American Rheinmetall Vehicles, LLC, Sterling Heights, MI; American Systems Corporation, Chantilly, VA; American Warrior Enterprises, Inc., Sioux City, IA; Ampex Data Systems Corporation, Hayward, CA; Andromeda Systems Incorporated, Orange Park, FL; Anduril Industries, Inc., Costa Mesa, CA; API Heat Transfer, Inc., Buffalo, NY; APT-Research, Inc., Huntsville, AL; Aqua-Chem, Inc., Knoxville, TN; Archarithms, Inc., Huntsville, AL; Ares Technology, LLC, Shelby Charter Township, MI; Arete Associates, Arlington, VA; ArmorWorks Enterprises, Inc., Chandler, AZ; ASRC Federal Mission Solutions, Moorestown, NJ; Atlas Business Consulting, Inc., Southlake, TX; Attollo Engineering, Camarillo, CA; Auburn University, Auburn, AL; BAE Systems, Santa Clara, CA; Baker Engineering, LLC, Nunica, MI; Barden Brook Capital LLC, Bloomfield Hills, MI; Bascom Hunter Technologies, Baton Rouge, LA; Battelle, Aberdeen, MD; BEARS LLC, Royal Oak, MI; Bell Helicopter Textron, Inc., Fort Worth, TX; BlackHorse Solutions, Inc., Herndon, VA; Booz Allen Hamilton, Inc., Troy, MI; Boston Engineering Corporation, Waltham, MA; Brenner Tank Services, LLC, Fond du Lac, WI; Brighton Cromwell, LLC, Randolph, NJ; Buffalo Armory, LLC, Buffalo, NY; C&R Racing, Inc., Indianapolis, IN; CACI, Inc., Chantilly, VA; Calnetix Technologies, Cerritos, CA; CAMX Power LLC, Lexington, MA; Carnegie Mellon University, Pittsburgh, PA; Carnegie Robotics LLC, Pittsburgh, PA; Carolina Growler, Inc., Star, NC; CerTech LLC, Saginaw, MI; Charles River Analytics, Inc., Cambridge, MA; Chase Defense Partners, Hampton, VA; Chemeon Surface Technology, LLC, Minden, NV; Cherokee Nation Aerospace & Defense, Tulsa, OK; Choctaw Defense Manufacturing, LLC, McAlester, OK; Cintel, Inc., Huntsville, AL; Citadel Defense Company, National City, CA; CITE Armored, Holly Springs, MS; CMI Defence America, Inc., Sterling Heights, MI; Coda Octopus Colmek, Inc., Murray, UT; Colorado Engineering, Inc., Colorado Springs, CO; Concurrent Technologies Corporation, Johnstown, PA; Consolidated Resource Imaging LLC, Grand Rapids, MI; ContiTech USA, Inc., St. Marys, OH; Continental Mapping Consultants, Inc., Sun Prairie, WI; CoorsTek Incorporated, Golden, CO; CP Technologies LLC, San Diego, CA; Crane Electronics, Inc., Walton Beach, FL; CUBRC, Inc. Buffalo, NY; Cybernet Systems Corporation, Ann Arbor, MI; Czero, Inc., Fort Collins, CO; D–2 Incorporated, Bourne, MA; Dataspeed, Inc., Troy, MI; Davidson Technologies, Inc., Huntsville, AL; Davis Defense Group, Inc., Stafford, VA; Daylight Defense, LLC, San Diego, CA; DB Santasalo-USA, Greer, SC; Deep Analytics, LLC, Montpellier, VT; Defense Research Associates, Inc., Beavercreek, OH; Dell Technologies, Apex, NC; Design Interactive, Inc., Orlando, FL; DHPC Technologies, Inc., Woodbridge, NJ; Digital Design Corporation, Arlington Heights, IL; DLI, LLC, Shady Grove, PA; DOLL America Inc., Logan Township, NJ; DornerWorks, Ltd, Grand Rapids, MI; Dragonfly Pictures, Inc., Essington, PA; Drive System Design, Inc., Farmington Hills, MI; DroneShield LLC, Warrenton, VA; DuPont Specialty Products USA, LLC, Midlothian, VA; Dynatrac Products Co., Inc., Huntington Beach, CA; Easy Aerial Inc., Brooklyn, NY; E.D. Etnyre & Co., Oregon, IL; Edge Case Research, Inc., Pittsburgh, PA; EndoSec LLC, Lenexa, KS; Elroy Air, Inc., San Francisco, CA; Engineered Materials Technology, Inc., Sterling Heights, MI; EOS Defense Systems USA, Huntsville, AL; Epirus, Inc., Hawthorne, CA; Equinox Innovative Systems, Columbia, MD; ESI Motion, Simi Valley, CA; Espey Manufacturing & Electronics Corporation, Saratoga Springs, NY; Essex Industries, Inc., St. Louis, MO; EWA Government Systems, Inc., Herndon, VA; Exyn Technologies, Philadelphia, PA; FAAC Incorporated, Ann Arbor, MI; Fenix Group, Chantilly, VA; FLIR Systems, Inc., Arlington, VA; Flyer Defense, LLC, Los Angeles, CA; Florida Institute for Human and Machine Cognition, Inc. (IHMC), Pensacola, FL; Fontaine Heavy Haul, Springville, AL; FPH USA, Warren, MI; Friedman Research Corporation, Austin, TX; Galvion Ltd, Essex Junction, VT; GE Global Research, Niskayuna, NY; Gen3 Defense and Aerospace LLC, Grand Rapids, MI; General Atomics, San Diego, CA; General Dynamics Mission Systems, Scottsdale, AZ; General Electric Aviation Systems, LLC, Grand Rapids, MI; General Kinetics, LLC, Bedford, NJ; General Motors Defense LLC, Washington, DC; Georgia Tech Applied Research Corporation, Smyrna, GA; GGS Information Services, Inc., York, PA; Ghost Robotics Corporation, Philadelphia, PA; GK Mechanical System, LLC, Brookfield, CT; Global Ordnance, Sarasota, FL; GLX Power Systems, Inc., Chagrin Falls, OH; Globe Tech LLC, Plymouth, MI; Grand Valley Mfg., Titusville, PA; Great Lakes Waterjet and Laser, Albion, MI; GRIMM, Arlington, VA; GuardKnox Cyber Technologies USA, Inc., Plymouth, MI; H2L Solutions, Huntsville, AL; Hamilton Sundstrand Corporation, Rockford, IL; Hanwha International LLC, Arlington, VA; HDT Expeditionary Systems, Inc., Solon, OH; Heil Trailer International, Athens, TN; Hensoldt, Inc., Vienna, VA; HII Unmanned Systems Inc., Virginia Beach, VA; IAI North America Inc., Herndon, VA; IEC Infrared Systems LLC, Middleburg Heights, OH, IERUS Technologies, Inc., Huntsville, AL; Independent Rough Terrain Center, Cibolo, TX, Institute for Defense Analyses, Alexandria, VA; Intellisense Systems, Inc., Torrance, CA; International Logistics Systems, Inc., Glen Rock, PA; Intuitive Research and Technology Corporation, Huntsville, AL; IR Technologies, Bethesda, MD; Island City Engineering, LLC, Merrill, WI; Isometrics, Inc., Reidsville, NC; Israeli Military Industries Services USA, Inc., Bethesda, MD; J.F. Taylor, Inc., Lexington Park, MD; Indiana Tool & Manufacturing Company (ITAMCO), Plymouth, IN; J.G.B. Enterprises, Inc., Liverpool, NY; iXblue Defense Systems, Inc., Natick, MA; Jankel Tactical Systems, Duncan, SC; Janus Communications, Irvine, CA; Jenoptik Advanced Systems, LLC, Jupiter, FL; Jovian Software Consulting LLC, Grand Rapids, MI; JWF Defense Systems, Johnstown, PA; Kaman Precision Products, Middletown, CT; KEF Robotics, Inc., Pittsburgh, PA; Kopis Mobile, Flowood, MS; Kratos Defense & Rocket Support Services, Inc., Huntsville, AL; Kymeta Government Solutions, Inc., Redmond, WA; L3 Combat Propulsion Systems, Muskegon, MI; L3 Harris, Melbourne, FL; L3 Technologies, Inc. Advanced Laser Systems Technology Division, Orlando, FL; L3 Technologies, ComCept Division, Rockwall, TX; L3 Technologies, Inc. (Communication Systems—East),

Camden, NJ; L3 Technologies, Inc. (Communication Systems—West), Salt Lake City, UT; LINE–X LLC, Huntsville, AL; LiquidPiston, Inc., Bloomfield, CT; Lithos Energy, Inc., San Rafael, CA; Lockheed Martin, Bethesda, MD; LRAD Corporation, San Diego, CA; Lynx Software Technologies, San Jose, CA; Mack Defense, LLC, Allentown, PA; Macomb Community College, Warren, MI; Mainstream Engineering Corporation, Rockledge, FL; MAK Technologies, Orlando, FL; ManTech Advanced Systems International, Inc., Herndon, VA; Martin Technologies, New Hudson, MI; Mass XV, LLC, Yorktown, VA; Mawashi Science & Technology, Cape Coral, FL; Mayer Alloys Corporation, Ferndale, MI; Maynard Steel Casting Company, Milwaukee, WI; MCM Learning, Inc., Warren, MI; McNally Industries, LLC, Grantsburg, WI; McQ, Inc., Fredericksburg, VA; Meggitt Defense Systems, Irvine, CA; Mercury Systems, Inc., Andover, MA; Meritor, Inc., Troy, MI; Metalbuilt LLC, Chesterfield, MI; Metawave Corporation, Carlsbad, CA; Mettle-Ops, Sterling Heights, MI; Michigan Engineering Services, LLC, Ann Arbor, MI; Michigan State University, East Lansing, MI; Michigan Technological University, Houghton, MI; Microsoft Corporation, Redmond, WA; Mide Technology Corp, Medford, MA; Military Systems Group, Inc., Nashville, TN; Milpower Source, Inc., Belmont, NH; Mississippi State University, Mississippi State, MS; MIT Lincoln Laboratory, Lexington, MA; Morgan 6 LLC, Charleston, SC; MSI Defense Solutions, LLC, Mooresville, NC; MTU America, Inc., Novi, MI; Nahsai, LLC, Ann Arbor, MI; Nanohmics, Inc., Austin, TX; Navistar Defense, LLC, Lisle, IL; Navatek, LLC, Honolulu, HI; NewSoTech, Inc., Ashburn, VA; Neya Systems, LLC, Seven Fields, PA; North Atlantic Industries, Bohemia, NY; Northrop Grumman Remotec, Clinton, TN; Numurus, LLC, Seattle, WA; Nu-Trek, Inc., San Diego, CA; Oakland University, Rochester, MI; ODU–USA, Inc., Camarillo, CA; O'Neil & Associates, Inc., Miamisburg, OH; Onodi Tool & Engineering, Melvindale, MI; On-Point Defense Technologies, Fort Walton Beach, FL; OnTime Networks LLC, Dallas, TX; Optics 1, Inc., Bedford, NH; Orbital Traction, Ltd., Houston, TX; Oshkosh Corporation, Oshkosh, WI; PacStar, Portland, OR; Parker-Hannifin Corporation, Cleveland, OH; Parts Life, Inc., Moorestown, NJ; PD Systems, Sterling Heights, MI; Pendar Technologies, LLC, Cambridge, MA; Peregrine Technical Solutions, LLC, Yorktown, VA; Persistent Systems LLC, New York, NY; Perspecta Labs, Basking Ridge, NJ; Photodon, LLC, Traverse City, MI; Piasecki Aircraft Corporation, Essington, PA; Pi Innovo, LLC, Plymouth, MI; Planck Aerosystems, San Diego, CA; Point Blank Enterprises, Inc., Pompano Beach, FL; Polaris Alpha Advanced Systems, Inc., Picatinny, NJ; Polaris Sales, Inc., Medina, MN; Polaris Sensor Technologies, Inc., Huntsville, AL; Pratt & Miller Engineering, New Hudson, MI; Precision Boring Company, Clinton Township, MI; Precision Combustion, Inc., North Haven, CT; Production Products Manufacturing & Sales, Inc., St. Louis, MO; Productive Resources, LLC, Lemont, IL; Protective Technologies Group, Inc., Fallbrook, CA; Purdue University, West Lafayette, IN; Quantum Research International, Inc., Huntsville, AL; Quantum Ventura, Inc., Los Angeles, CA; RADA Technologies, LLC, Silver Spring, MD; Rafael Systems Global Sustainment, LLC, Bethesda, MD; RAVE Computer, Sterling Heights, MI; Raytheon Company, Waltham, MA; RE2, Inc., Pittsburgh, PA; Real-Time Analyzers Inc., Middletown, CT; Real-Time Innovations, Inc., Sunnyvale, CA; ReconRobotics, Inc., Edina, MN; Red Hat Professional Consulting, Inc., Raleigh, NC; Regents of the University of Michigan, Ann Arbor, MI; ReLogic Research, Inc., Huntsville, AL; Riptide Software, Oviedo, FL; Robo-Team NA, Inc., Rockville, MD; Robotic Research, LLC, Gaithersburg, MD; Rockwell Collins, Inc., Cedar Rapids, IA; Roxtec, Inc., Ada, MI; Sarcos LC, Salt Lake City, UT; SAVIT Corporation, Rockaway, NJ; Schutt Industries, Inc., Clintonville, WI; Scientific Systems Company, Inc., Woburn, MA; ScioTeq LLC, Duluth, GA; SCI Technology, Inc., Huntsville, AL; Seco USA Inc., Rockville, MD; Secord Solutions, LLC, Grose Ile, MI; Seiler Instrument, St. Louis, MO; Senseeker Engineering, Santa Barbara, CA; Sequoia Applied Solutions, Inc., Ann Arbor, MI; Shield AI, San Diego, CA; Shift5, Inc., Rosslyn, VA; SI2 Technologies, Inc., N. Billerica, MA; Sierra Nevada Corporation, Folsom, CA; Signature Research, Inc., Calumet, MI; Silvus Technologies, Inc., Los Angeles, CA; Skyward, Ltd., Dayton, OH; Soar Technology, Inc., Ann Arbor, MI; SOLUTE, Inc., San Diego, CA; Sonalysts, Inc., Waterford, CT; SOUCY USA, Chaplain, NY; Southwest Research Institute, San Antonio, TX; Spark Insights, LLC, Tampa, FL; Spark Thermionics, Inc., Emeryville, CA; Spear Power Systems, Inc., Grandview, MO; Spectra Technologies, LLC, East Camden, AR; Sphere Brake Defense, LLC, Erie, PA; Squarehead Technology, LLC, Herndon, VA; SRC, Inc., N. Syracuse, NY; SRI International, Arlington, VA; SSL Robotics LLC, Pasadena, CA; ST Engineering North America Government, Huntsville, AL; Steelhead Composites, Golden, CO; Stephens Pneumatics, Inc., Haslet, TX; Strategic Technology Consulting, LLC, Toms River, NJ; Stratom, Inc., Boulder, CO; Strata-G-Solutions, Inc., Huntsville, AL; Swift Engineering, Inc., San Clemente, CA; Synergistic, Inc., Sterling Heights, MI; Syntonics, LLC, Columbia, MD; Systecon North America, Juno Beach, FL; Systel, Inc., Sugar Land, TX; Systematic, Inc., Centreville, VA; System Strategy, Inc., Beverly Hills, MI; Systems & Technology Research, Woburn, MA; Target Arm, Inc., Ridgefield, CT; Targeted GeoSystems, LLC, Madison, AL; Taylor Defense Products, LLC, Louisville, MS; Technology Service Corporation, Arlington, VA; Teledyne Brown Engineering, Inc., Huntsville, AL; Telephonics Corporation, Farmingdale, NY; TeleSwivel, LLC, Durham, NC; Tercero Technologies, LLC, Pittsburgh, PA; Texas A&M Engineering Experiment Stations, College Station, TX; TexPower, Inc., Austin, TX; Textron, Inc., Slidell, LA; Thales Defense & Security, Inc., The Charles Stark Draper Laboratory, Inc., Cambridge, MA; The Entwistle Company, Hudson, MA; The Loch Harbour Group, Alexandria, VA; The MITRE Corporation, Bedford, MA; The Pennsylvania State University, Freeport, PA; The Spectrum Group, LLC, Alexandria, VA; The TireBall Company, Crestwood, KY; The University of Texas at Austin, Austin, TX; THK Rhythm Automotive Michigan Corporation, Portland, MI; TJ Clark International, LLC, Delaware, OH; Tomahawk Robotics, LLC, Melbourne, FL; TomCo Service Group, LLC, Detroit, MI; TORC Robotics, LLC, Blacksburg, VA; Torch Technologies, Inc., Huntsville, AL; Toyon Research Corporation, Goleta, CA; Tranformational Security, LLC, Columbia, MD; Triad Services Group, Inc.; Madison Heights, MI; Triz Engineering Services America, LLC, Highland Park, IL; Tuskegee University, Tuskegee, AL; UEC Electronics, Hanahan, SC; UHV Technologies, Inc., Lexington, KY; United Rotocraft, Englewood, CO; University of Dayton Research Institute, Dayton, OH; University of Texas at Arlington, Fort Worth, TX; Underground Pipeline, Inc., Eagle, WI; UVision-USA Corporation, Purcellville, VA; VES, LLC, Aberdeen Proving Ground, MD; Virginia Polytechnic Institute and State University, Blacksburg, VA; VITEC, Inc.,

Atlanta, GA; Volans-I, San Francisco, CA; Western International, Inc., Troy, MI; West-Mark, Ceres, CA; Wittenstein Aerospace & Simulation, Inc., Barlett, IL; W.L. Gore & Associates, Inc., Newark, DE; W.S. Darley & Co., Itasca, IL; xCraft Enterprises, Inc., Coeur d'Alene, ID; XPER Company, Butler, PA; YawPITCh, LLC, Holland, MI; have been added as parties to this venture.

Also, Acquisition Technologies Integrated, Inc., Williamsburg, PA; and ADA Technologies, Inc., Littleton, CO; Also, Acquisition Technologies Integrated, Inc., Williamsburg, PA; ADA Technologies, Inc., Littleton, CO; Alcoa Defense, Inc., New Kensington, PA; AlphaUSA, Livonia, MI; Altex Technologies Corporation, Sunnyvale, CA; Analysis & Design Application Co. Ltd., Melville, NY; AnthroTronix, Inc., Silver Spring, MD; Applied Technology Integration, Inc., Maumee, OH; ATA Engineering, Inc., San Diego, CA; Atlas Scientific, LLC, Brooklyn, NY; August Research Systems, Inc., Coraopolis, PA; Automation Alley Business Services, Sterling Heights, MI; Automotive Rentals, Inc., Mount Laurel, NJ; Badenoch, LLC, Southfield, MI; Battelle Memorial Institute, Dover, NJ; Baum Romstedt Technology Research Corp., Fairfax, VA; Bokam Engineering, Inc., Santa Ana, CA; CALIBRE Systems, Inc., Alexandria, VA; Coliant Corporation, Warren, MI; Combat Advanced Propulsion, LLC, Muskegon, MI; Control Point Corporation, Goleta, CA; CPS Technologies Corporation, Norton, MA; Creative Electronic Systems North America, Inc., Apex, NC; Critical Solutions International, Inc., Richland, MO; CrossTek Solutions LLC, Vicksburg, MS; DomerWorks, Ltd., Grand Rapids, MI; DRS Network & Imaging Systems, LLC, Dallas, TX; eTrans Systems, Fairfax, VA; EaglePicher Technologies, Joplin, MO; EDAG, Inc., Troy, MI; Efficient Drivetrains, Inc., Boulder, CO; Electro-Mechanical Associates, Inc., Ann Arbor, MI; Elevate Systems, San Antonio, TX; Excel Engineering, Diagonal, IA; Exponent, Inc., Menlo Park, CA; Fastpilot, Inc., Lake in the Hills, IL; FBS, Inc., State College, PA; FEV North America, Inc., Auburn Hills, MI; Flash Bainite, Washington, MI; Global Embedded Technologies, Inc., Farmington Hills, MI; Global Technology Associates, Ltd., Dearborn, MI; Green Hills Software, Inc., Santa Barbara, CA; Harbrick, Moscow, ID; Hendrick Motorsports Performance Group, Charlotte, NC; Hydroid, Inc., Pocasset, MA; IAV Automotive Engineering, Inc., Northville, MI; IGNIO LLC, Bloomfield Hills, MI; IMSolutions, LLC, Dumfries, VA; Induct Technology, Inc., Boca Raton, FL; Infinite Technologies, Inc., Folsom, CA; Inmatech, Inc., Ann Arbor, MI; InnoVital Systems, Inc., Beltsville, MD; Intertek Testing Services NA, LLC, Cortland, NY; J.G.W. International Ltd., Reston, VA; Kalmar Rough Terrain Center, Cibolo, TX; Lentix, Inc., Powell, TN; Lionbridge, Sterling Heights, MI; Logikos, Inc., Fort Wayne, IN; Lotus Engineering, Inc., Ann Arbor, MI; LSA Autonomy, Westminster, MD; Lucid Dimensions, Inc., Lafayette, CO; MAHLE Powertrain, LLC, Farmington Hills, MI; M Cubed Technologies, Inc., Newtown, CT; MDA US Systems, LLC, Pasadena, CA; Mechanical Solutions, Inc., Whippany, NY; Med-Eng, LLC, Bismarck, ND; Meldetech, Princeton, NJ; MetaMorph Inc., Nashville, TN; MillenWorks, Tustin, CA; Milwaukee School of Engineering, Milwaukee, WI; N&R Engineering and Management Services Corporation, Parma Heights, OH; Nexus Energy, Mobility and Cleantech, LLC, Raleigh, NC; NextEnergy Center, Detroit, MI; Nhungs Notions, Saugus, MA; Orbital ATK (formerly Alliant Techsystems ATK), Tucson, AZ; Primus Solutions, Inc., Colorado Springs, CO; Protection Engineering Consultants, LLC, San Antonio, TX; Quantum Fuel Systems Technologies Worldwide, Inc., Lake Forest, CA; Quantum Signal, LLC, Saline, MI; REL, Inc., Calumet, MI; Robertson Fuel Systems LLC, Tempe, AZ; S&K Global Solutions, LLC, Polson, MT; Select Engineering Services, Layton, UT; SIFT, LLC, Minneapolis, MN; SimaFore, LLC, Ann Arbor, MI; Sirab Technologies, Inc., Novato, CA; Sound Answers, Inc., Canton, MI; South Dakota School of Mines and Technology, Rapid City, SD; Spatial Integrated Systems, Inc., Kinston, NC; Specialty Tooling Systems, Inc., Grand Rapids, MI; SpringActive, Inc., Tempe, AZ; Stark Aerospace, Columbus, MS; Stryke Industries, LLC, Fernandina Beach, FL; Survivability Solutions, LLC, Sterling Heights, MI; Systems Process, Inc., Fort Wayne, IN; Team O'Neil Rally School LLC, Dalton, NH; Technical Professional Services, Inc., Wayland, MI; Technology and Supply Management, LLC, Fairfax, VA; The Energetics Technology Center, Inc. (ETC), St. Charles, MD; The Omnicon Group, Inc., Hauppauge, NY; Troika Solutions, LLC, Arlington, VA; Tyco Electronics Corporation, Berwyn, PA; UnderSea Sensor Systems, Inc. (formerly Ultra Electronics, AMI), Columbia City, IN; University of Wisconsin-Milwaukee, Milwaukee, WI; Venture Management Services, LLC, Troy, MI; Veyance Technologies, Inc., St. Marys, OH; have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and NAMC intends to file additional written notifications disclosing all changes in membership.

On October 15, 2009, NAMC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on November 30, 2009 (74 FR 62599).

The last notification was filed with the Department on June 11, 2016. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on July 6, 2016 (81 FR 44045).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2021–07241 Filed 4–7–21; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—The Institute of Electrical and Electronics Engineers, Inc.

Notice is hereby given that, on February 24, 2021, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), The Institute of Electrical and Electronics Engineers, Inc. (''IEEE'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing additions or changes to its standards development activities. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, 25 new standards have been initiated and 10 existing standards are being revised. More detail regarding these changes can be found at: *https://standards.ieee.org/about/sasb/sba/feb2021.html.*

On September 17, 2004, IEEE filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on November 3, 2004 (69 FR 64105).

The last notification was filed with the Department on January 11, 2021. A

notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on February 12, 2021 (86 FR 9375).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2021–07232 Filed 4–7–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—ASTM International Standards

Notice is hereby given that on February 22, 2021 pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), ASTM International (''ASTM'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing additions or changes to its standards development activities.

The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, ASTM has provided an updated list of current, ongoing ASTM activities originating between December 14, 2020 and February 17, 2021 designated as Work Items. A complete listing of ASTM Work Items, along with a brief description of each, is available at *http://www.astm.org.*

On September 15, 2004, ASTM filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on November 10, 2004 (69 FR 65226). The last notification with the Department was filed on December 14, 2020. A notice was filed in the **Federal Register** on January 8, 2021 (86 FR 1526).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2021–07228 Filed 4–7–21; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2018–0005]

Whistleblower Stakeholder Meeting

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice of public meeting.

SUMMARY: The Occupational Safety and Health Administration (OSHA) is announcing a public meeting to solicit comments and suggestions from stakeholders on issues facing the agency in the administration of the whistleblower laws it enforces.

DATES: The public meeting will be held on May 19, 2021, from 1:00 p.m. to 4:00 p.m., ET via telephone. Persons interested in attending the meeting must register by May 12, 2021. In addition, comments relating to the ''Scope of Meeting'' section of this document must be submitted in written or electronic form by May 12, 2021.

ADDRESSES:

Electronically: You may submit materials, including attachments, electronically at *http://www.regulations.gov,* which is the Federal eRulemaking portal. Follow the on-line instructions for submissions. All comments should be identified with Docket No. OSHA–2018–0005.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, OSHA Docket No. OSHA–2018–0005, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3653, 200 Constitution Avenue NW, Washington, DC 20210. **Please note:** While OSHA's Docket Office is continuing to accept and process submissions by regular mail, due to the COVID–19 pandemic, the Docket Office is closed to the public and not able to receive submissions to the docket by hand, express mail, messenger, and courier service.

Registration to Attend and/or to Participate in the Telephonic Meeting: If you wish to attend the public meeting, make an oral presentation at the meeting, or participate in the meeting, you must register using this link: *https://www.eventbrite.com/e/whistleblower-stakeholder-meeting-tickets-146767279885* by close of business on May 12, 2021. Actual times provided for presentation will depend on the number of requests, but no more than 10 minutes per participant will be allowed. There is no fee to register for the public meeting. After reviewing the requests to present, OSHA will contact each participant prior to the meeting to inform them of the speaking order.

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor; telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov.*

For general information: Mr. Anthony Rosa, Deputy Director, OSHA Directorate of Whistleblower Protection Programs, U.S. Department of Labor; telephone: (202) 693–2199; email: *osha.dwpp@dol.gov.*

SUPPLEMENTARY INFORMATION:

A. Scope of Meeting

OSHA is interested in obtaining information from the public on key issues facing the agency's whistleblower program. This meeting is the seventh in a series of meetings requesting public input on this program. The agency is seeking suggestions on how it can improve the program. Please note that the agency does not have the authority to change the statutory language and requirements of the laws it enforces. In particular, the agency invites input on the following:

1. How can OSHA deliver better whistleblower customer service?

2. What kind of assistance can OSHA provide to help explain the agency's whistleblower laws to employees and employers?

3. What can OSHA do to ensure that workers are protected from retaliation for raising concerns related to the pandemic?

B. Request for Comments

Regardless of attendance at the public meeting, interested persons may submit written or electronic comments (see **ADDRESSES** above). Submit a single copy of electronic comments or two paper copies of any mailed comments. To permit time for interested persons to submit data, information, or views on the issues in the ''Scope of Meeting'' section of this notice, please submit comments by May 12, 2021, and include Docket No. OSHA–2018–0005.

C. Access to the Public Record

Electronic copies of this **Federal Register** notice are available at: *http://www.regulations.gov.* This notice, as well as news releases and other relevant information, also is available on the Directorate of Whistleblower Protection Programs' web page at: *http://www.whistleblowers.gov.*

Authority and Signature

James S. Frederick, Principal Deputy Assistant Secretary for Occupational Safety and Health, authorized the preparation of this notice under the authority granted by Secretary's Order 08–2020 (May 15, 2020).

Signed at Washington, DC, on April 2, 2021.

James S. Frederick,

Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2021–07213 Filed 4–7–21; 8:45 am]

BILLING CODE 4510–26–P

NEIGHBORHOOD REINVESTMENT CORPORATION

Sunshine Act Meetings; Audit Committee Meeting

TIME AND DATE: 12:30 p.m., Monday, April 12, 2021.

PLACE: Via Conference Call.

STATUS: Open (with the exception of Executive Session).

MATTERS TO BE CONSIDERED: The General Counsel of the Corporation has certified that in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552 (b)(2) and (4) permit closure of the following portion(s) of this meeting:

- Executive Session

Agenda

I. CALL TO ORDER
II. Discussion Item FY20 External Audit
III. Executive Session: External Auditors
IV. Action Item Resolution to Approve the FY20 External Audit
V. Action Item Internal Audit Report
VI. Adjournment

CONTACT PERSON FOR MORE INFORMATION: Lakeyia Thompson, Special Assistant, (202) 524–9940; *Lthompson@nw.org.*

Lakeyia Thompson,

Special Assistant.

[FR Doc. 2021–07317 Filed 4–6–21; 11:15 am]

BILLING CODE 7570–02–P

NEIGHBORHOOD REINVESTMENT CORPORATION

Sunshine Act Meetings

TIME AND DATE: 3:00 p.m., Thursday, April 15, 2021.

PLACE: Via Conference Call.

STATUS: Parts of this meeting will be open to the public. The rest of the meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Regular Board of Directors meeting.

The General Counsel of the Corporation has certified that in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552(b)(2) and (4) permit closure of the following portion(s) of this meeting:

- Executive Session

Agenda

I. CALL TO ORDER
II. Discussion Item FY2020 External Audit
III. Executive Session with External Auditors
IV. Executive Session: Report from CEO
V. Executive Session: Report from CFO
VI. Executive Session: NeighborWorks Compass Update
VII. Action Item Approval of Minutes
VIII. Action Item Resolution to Approve FY2020 External Audit
IX. Action Item Recognition of Service for Todd M. Harper
X. Action Item $100M Housing Counseling Plan
XI. Discussion Item NeighborWorks New York City Office Lease
XII. CFPB Fee for Service Opportunity
XIII. Strategic Planning Update
XIV. Capital Corporations Update and Grant Request for June
XV. Management Program Background and Updates
XVI. Adjournment

Portions Open to the Public: Everything except the Executive Session.

Portions Closed to the Public: Executive Session.

CONTACT PERSON FOR MORE INFORMATION: Lakeyia Thompson, Special Assistant, (202) 524–9940; *Lthompson@nw.org.*

Lakeyia Thompson,

Special Assistant.

[FR Doc. 2021–07321 Filed 4–6–21; 11:15 am]

BILLING CODE 7570–02–P

NUCLEAR REGULATORY COMMISSION

[NRC–2021–0089]

Integrated Human Event Analysis System for Event and Condition Assessment Method and Software Tool

AGENCY: Nuclear Regulatory Commission.

ACTION: Public meeting and request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is requesting comments on its Integrated Human Event Analysis System for Event and Condition Assessment (IDHEAS–ECA) method and software tool for human reliability analysis applications.

DATES: Submit comments by July 30, 2021. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date. The NRC will hold a public meeting as an online webinar. See Section IV Public Meeting, of this document for additional information.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal Rulemaking website:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2021–0089. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Yung Hsien James Chang, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–2378, email: *James.Chang@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2021–0089 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2021–0089.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–

415–4737, or by email to *pdr.resource@nrc.gov.* The IDHEAS–ECA research information letter (RIL) is available in ADAMS under Accession No. ML20016A481.

• *Attention:* The PDR, where you may examine and order copies of public documents, is currently closed. You may submit your request to the PDR via email at *pdr.resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal Rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2021–0089 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

The NRC has developed the IDHEAS–ECA human reliability analysis (HRA) method with a plan to replace the SPAR–H HRA method (NUREG/CR–6883) currently in use for risk-informed applications. The IDHEA–ECA method was developed based on the IDHEAS–G methodology, Draft, NUREG–2198, ''The General Methodology of an Integrated Human Event Analysis System (IDHEAS–G)'' (ADAMS Accession No. ML20238B988). IDHEAS–G provides all technical components required to develop application-specific HRA methods. IDHEAS–ECA modifies some of the technical components for the event condition assessment of the significance determination process. The NRC collects human reliability data to support the IDHEAS–ECA development. The data is documented in the Integrated Human Event Analysis System for Human Reliability Data (IDHEAS–DATA) report, Draft RIL–2021–XX, ''Integrated Human Event Analysis System for Human Reliability Data (IDHEAS–DATA)'' (ADAMS Accession No. ML20238B982). An important data source to the IDHEAS–DATA is the NRC's Scenario Authoring, Characterization, and Debriefing Application (SACADA) project, is available in ADAMS under Accession No. ML17164A077, that collects operator performance information in simulator training. The IDHEAS–G, IDHEAS–DATA, and SACADA are foundation of IDHEAS–ECA.

III. Specific Considerations

IDHEAS–ECA is currently published as a RIL and is planned to be published as a NUREG report after addressing the public comments from this **Federal Register** notice. IDHEAS–ECA is an HRA method. The software tool (IDHEAS–ECA v1.1) is used to perform the calculations of the IDHEAS–ECA method. The NRC developed the IDHEAS–ECA software tool in-house and has all the rights to distribute the software licenses. The software is available for all U.S. citizens, but its availability to foreign citizens is decided on a case by case. To obtain a copy of the software, send an email to Y. James Chang (*James.Chang@nrc.gov*) on the subject line state ''Request for IDHEAS–ECA software license.'' In the email include the requestor's name, email address, company, and nationality. Once the NRC determines to issue the free software license to the requester, the requester will receive an email from Dropbox, along with the instruction to download the software.

IV. Public Meeting

The NRC plans to hold a public meeting during the public comment period for this action. A public meeting is planned for April 8, 2021, via webinar. The NRC will present information about IDHEAS–G, IDHEAS–DATA, SACADA, and IDHEAS–ECA method and software tool during the public meeting. The information would facilitate having a holistic understanding of the IDHEAS–ECA development.

The public meeting will provide a forum for the NRC staff to discuss issues and questions with members of the public. The NRC does not intend to provide any responses to comments submitted during the public meeting. The public meeting will be noticed on the NRC's public meeting website at least 10 calendar days before the meeting. Members of the public should monitor the NRC's public meeting website for additional information about the public meetings at *https://www.nrc.gov/public-involve/public-meetings/index.cfm.* The NRC will post the notices for the public meetings and webinars and may post additional material related to this action to the Federal Rulemaking website at *https://www.regulations.gov/* under Docket ID NRC–2021–0089. The Federal Rulemaking website allows you to receive alerts when changes or additions occur in a docket folder. To subscribe: (1) Navigate to the docket folder (NRC–2021–0089); (2) click the ''Sign up for Email Alerts'' link; and (3) enter your email address and select how frequently you would like to receive emails (daily, weekly, or monthly).

Dated: April 5, 2021.

For the Nuclear Regulatory Commission.

Sean E. Peters,

Chief, Human Factors and Reliability Branch, Division of Risk Analysis, Office of Nuclear Regulatory Research.

[FR Doc. 2021–07214 Filed 4–7–21; 8:45 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

Product Change—First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 8, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on March 29, 2021, it filed with the Postal Regulatory Commission a *USPS Request to Add First-Class Package Service Contract 115 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2021–79, CP2021–82.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2021–07206 Filed 4–7–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 8, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on March 24, 2021, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 192 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2021–77, CP2021–80.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2021–07205 Filed 4–7–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 8, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on March 24, 2021, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 191 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2021–76, CP2021–79.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2021–07207 Filed 4–7–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 8, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on March 23, 2021, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express Contract 87 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2021–75, CP2021–78.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2021–07204 Filed 4–7–21; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91461; File No. SR–NASDAQ–2021–004]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Approving Proposed Rule Change, as Modified by Amendment No. 2, To Disseminate Abbreviated Order Imbalance Information for the Nasdaq Opening Cross, Amend Certain Cutoff Times for On-Open Orders Entered for Participation in the Nasdaq Opening Cross, and Extend the Time Period for Accepting Certain Limit-On-Open Orders

April 2, 2021.

I. Introduction

On February 3, 2021, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to disseminate abbreviated order imbalance information for the Nasdaq opening cross, amend certain cutoff times for on-open orders entered for participation in the Nasdaq opening cross, and extend the time period for accepting certain limit-on-open orders. The proposed rule change was published for comment in the **Federal Register** on February 17, 2021.[3] On April 1, 2021, the Exchange filed Amendment No. 2 to the proposed rule change.[4] The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change, as modified by Amendment No. 2.

II. Description of the Proposal

The Nasdaq opening cross is the process for determining the price at which orders would be executed at the open and for executing those orders, and it establishes the Nasdaq official opening price for a security.[5] Under the current process, market-on-open (''MOO'') orders [6] and limit-on-open (''LOO'') orders [7] may be entered, cancelled, or modified between 4:00 a.m.[8] and immediately prior to 9:28 a.m.[9] Opening imbalance only (''OIO'') orders may be entered between 4:00 a.m. until the time of execution of the Nasdaq opening cross, and may be

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 91096 (February 10, 2021), 86 FR 9972 (''Notice'').

[4] On April 1, 2021, the Exchange also filed and withdrew Amendment No. 1 to the proposed rule change. In Amendment No. 2, the Exchange specified April 26, 2021 as the implementation date for the proposed rule change and amended a footnote to reflect that the proposal would not affect the handling of market-on-open orders or market hours orders with market pegging that are entered after 9:28 a.m. Because Amendment No. 2 does not materially alter the substance of the proposed rule change and makes conforming and technical changes, it is not subject to notice and comment. Amendment No. 2 is available on the Commission's website at: *https://www.sec.gov/rules/sro/nasdaq.htm.*

[5] *See* Nasdaq Equity 4, Rule (''Rule'') 4752(a)(5) and Notice, *supra* note 3, at 9972–73.

[6] A MOO order is an order type entered without a price that may be executed only during the Nasdaq opening cross. *See* Rule 4702(b)(8)(A); *see also* Notice, *supra* note 3, at 9973 n.8.

[7] A LOO order is an order type entered with a price that may be executed only in the Nasdaq opening cross, and only if the price determined by the Nasdaq opening cross is equal to or better than the price at which the LOO order was entered. *See* Rule 4702(b)(9)(A); *see also* Notice, *supra* note 3, at 9973 n.9.

[8] All times referenced are in Eastern Time.

[9] *See* Rule 4702(b)(8)(A) and (b)(9)(A); *see also* Notice, *supra* note 3, at 9973 n.8–9.

cancelled or modified between 4:00 a.m. and immediately prior to 9:28 a.m.[10] At 9:28 a.m., the Exchange begins to disseminate an order imbalance indicator (also known as the net order imbalance indicator or ''NOII'') every second until market open.[11] The NOII is a message disseminated by electronic means containing information about MOO, LOO, OIO, and early market hours orders,[12] and information about the price at which those orders would execute at the time of dissemination.[13]

Early Opening Order Imbalance Indicator and Cutoff Times for On-Open Orders

The Exchange proposes to amend Rule 4752 to establish an early opening order imbalance indicator (''EOII'') that would be disseminated by electronic means every 10 seconds beginning at 9:25 a.m. until the NOII begins to disseminate at 9:28 a.m.[14] As proposed, the EOII would contain the same information as the NOII, except it would exclude information about indicative prices.[15] Specifically, the EOII would contain: (1) The current reference price; (2) the number of shares represented by MOO, LOO, OIO, and early market hours orders that are paired at the current reference price; (3) the size of any imbalance; and (4) the buy/sell direction of any imbalance.[16] The Exchange believes that an early release of a subset of the NOII information would offer participants additional time and flexibility to react to imbalance information in advance of 9:28 a.m. and aid them in making informed decisions about whether and how to participate in the opening cross.[17] The Exchange also believes that the EOII would enhance price discovery and liquidity by attracting more participants to its opening cross.[18] In addition, the Exchange believes that disseminating the EOII every 10 seconds would provide participants more time to digest the information and enter MOO, LOO, and OIO orders in between dissemination periods.[19]

As stated above, the EOII would differ from the NOII in that the EOII would not include information about indicative prices.[20] The Exchange believes that the exclusion of the near and far clearing prices (which are part of the indicative price information) from the EOII would enhance stability in the opening cross process because it would reduce the possibility of large indicative price movements during the early moments of the price formation process.[21] By contrast, the Exchange proposes to include in the EOII the current reference price because it reflects the Nasdaq best bid and best offer at the time of dissemination and it is used to calculate any imbalance direction and imbalance size.[22] According to the Exchange, providing the current reference price in the EOII would increase transparency and allow participants to provide additional orders to improve the price discovery process in the opening cross.[23]

In connection with the establishment of the EOII that would begin disseminating at 9:25 a.m., the Exchange proposes to amend Rule 4702(b) to prohibit participants from cancelling or modifying MOO, LOO, and OIO orders beginning at 9:25 a.m.[24] The Exchange does not propose to similarly change the cutoff times for entering MOO, LOO, and OIO orders for participation in the opening cross. Thus, under the proposal, MOO orders may continue to be entered until immediately prior to 9:28 a.m.;[25] LOO orders may be entered until immediately prior to 9:28 a.m. or, in certain circumstances as described below, until 9:29:30 a.m.;[26] and OIO orders may continue to be entered until the time of execution of the opening cross.[27] But any such orders, once entered, may not be cancelled or modified at or after 9:25 a.m.[28]

LOO Order Type Changes

The Exchange proposes to amend Rule 4702(b)(9)(A) to permit the entry of LOO orders between 9:28 a.m. and 9:29:30 a.m. (''late LOO orders''), provided that the security has a first opening reference price or a second opening reference price.[29] The Exchange believes that allowing the entry of eligible LOO orders after 9:28 a.m. would enhance the price discovery process for and liquidity of a given security in the opening cross.[30] As proposed, any LOO order entered after 9:29:30 a.m. that is designated as immediate-or-cancel (''IOC'') would be rejected.[31]

[10] An OIO order is an order type entered with a price that may be executed only in the Nasdaq opening cross and only against MOO, LOO, or early market hours orders. If the entered price of an OIO order to buy (sell) is higher than (lower than) the highest bid (lowest offer) on the Nasdaq book, the price of the OIO order will be modified repeatedly to equal the highest bid (lowest offer) on the Nasdaq book; provided, however, that the price of the order will not be moved beyond its stated limit price. *See* Rule 4702(b)(10)(A); *see also* Notice, *supra* note 3, at 9973 n.10.

[11] *See* Rule 4752(d)(1); *see also* Notice, *supra* note 3, at 9973.

[12] Market hours orders means any order that may be entered into the system and designated with a time-in-force of MIOC, MDAY, and MGTC; market hours orders are designated as ''early market hours orders'' if they are entered into the system prior to 9:28 a.m. *See* Rule 4752(a)(7).

[13] Specifically, the NOII contains: (1) The current reference price; (2) the number of shares represented by MOO, LOO, OIO, and early market hours orders that are paired at the current reference price; (3) the size of any imbalance; (4) the buy/sell direction of any imbalance; and (5) the indicative prices at which the Nasdaq opening cross would occur if it were to occur at that time and the percent by which the indicative prices are outside the then current Nasdaq market center best bid or best offer, whichever is closer. *See* Rule 4752(a) (also providing the definitions for current reference price, imbalance, and indicative prices); *see also* Notice, *supra* note 3 at 9973.

[14] *See* proposed Rule 4752(a)(1) and (d)(1); *see also* Notice, *supra* note 3, at 9973. The Exchange also proposes to renumber certain provisions of Rule 4752 to incorporate newly proposed defined terms into the rule, and to make a non-substantive change in current Rule 4752(a)(2)(E)(i) to delete the word ''both.''

[15] *See* proposed Rule 4752(a)(1).

[16] *See id.*; *see also* Notice, *supra* note 3, at 9973.

[17] *See* Notice, *supra* note 3, at 9973.

[18] *Id.*

[19] *See id.* at 9974.

[20] *See supra* note 15 and accompanying text.

[21] The Exchange also states that, because participants may freely enter new orders that contribute to price discovery before 9:28 a.m., indicative prices may change more substantially before 9:28 a.m. than after. *See* Notice, *supra* note 3, at 9973–74.

[22] *See id.* at 9974 n.19.

[23] *See id.*

[24] *See* proposed Rule 4702(b)(8), (b)(9), and (b)(10); *see also* Notice, *supra* note 3, at 9974. Relatedly, the Exchange proposes to amend current Rule 4752(a)(7) to provide that requests to cancel or modify market hours orders would be suspended beginning at 9:25 a.m. (rather than 9:28 a.m. as the rule currently provides) until after completion of the Nasdaq opening cross, at which time such requests will be processed to the extent that such orders remain available within the system. The Exchange also proposes to amend current Rule 4752(a)(7) to utilize certain defined terms and abbreviated terms.

[25] *See* proposed Rule 4702(b)(8)(A).

[26] *See* proposed Rule 4702(b)(9)(A).

[27] *See* proposed Rule 4702(b)(10)(A).

[28] *See* proposed Rule 4702(b)(8), (b)(9), and (b)(10); *see also* Notice, *supra* note 3, at 9974.

[29] The Exchange also proposes to make conforming changes in Rule 4702(b)(9)(B). Specifically, Rule 4702(b)(9)(B) currently specifies the handling of opening cross/market hours orders (*i.e.,* orders with a time-in-force that continues after the time of the Nasdaq opening cross and are flagged to participate in the opening cross) entered between 9:28 a.m. and the time of the Nasdaq opening cross. The Exchange proposes to amend this time interval such that it refers to opening cross/market hours orders entered between 9:29:30 a.m. and the time of the Nasdaq opening cross. Relatedly, the Exchange proposes to specify in Rule 4702(b)(9)(B) that certain LOO orders entered at or after 9:28 a.m. would not be rejected. Moreover, the Exchange states that market hours orders entered between 9:28 a.m. and 9:29:30 a.m. would be treated as late LOO orders, as applicable. *See* Notice, *supra* note 3, at 9974 n.21 and Amendment No. 2, *supra* note 4. In addition, the Exchange proposes to make a conforming change in current Rule 4752(a)(7) to provide that orders entered at or after 9:29:30 a.m. (rather than 9:28 a.m. as the rule currently provides) with a time-in-force other than IOC would be designated as ''late market hours orders.''

[30] *See* Notice, *supra* note 3, at 9974.

[31] *See* proposed Rule 4702(b)(9)(A). Relatedly, the Exchange proposes to amend Rule 4702(b)(9)(B) to provide that LOO orders that are opening cross/

Continued

The Exchange proposes to define the first opening reference price as the previous day's Nasdaq official closing price of the security for Nasdaq-listed securities or the consolidated closing price for non-Nasdaq-listed securities.[32] For new exchange-traded products that do not have a Nasdaq official closing price or a consolidated closing price, the first opening reference price would be the offering price.[33] The Exchange states that it proposes to use the Nasdaq official closing price as the first opening reference price because the Nasdaq official closing price is a well-defined benchmark for the security's market price that serves as the most relevant price of a security at or before regular trading hours.[34] The Exchange proposes to define the second opening reference price as the current reference price in the NOII disseminated at 9:28 a.m.[35] The Exchange states that it proposes to use the current reference price in the NOII disseminated at 9:28 a.m. as the second opening reference price because it is consistent with the Exchange's functionality with respect to the closing cross and late limit-on-close (''LOC'') orders, and is intended to promote price stability of the opening cross.[36]

In addition, the Exchange proposes to accept a LOO order entered between 9:28 a.m. and 9:29:30 a.m. at its limit price, unless its limit price is higher (lower) than the higher (lower) of the first opening reference price and the second opening reference price for a LOO order to buy (sell), in which case the LOO order would be handled consistent with the participant's instruction that the LOO order is to be: (1) Rejected; or (2) re-priced to the higher (lower) of the first opening reference price and the second opening reference price, provided that if either the first opening reference price or the second opening reference price is not at a permissible minimum increment, the first opening reference price or the second opening reference price, as applicable, would be rounded (i) to the nearest permitted minimum increment (with midpoint prices being rounded up) if there is no imbalance, (ii) up if there is a buy imbalance, or (iii) down if there is a sell imbalance.[37] The default configuration for participants that do not specify otherwise would be to have such LOO order re-priced rather than rejected.[38] The Exchange states that this repricing mechanism is designed to reduce order imbalances and volatility for securities that participate in the opening cross, and believes that allowing such LOO orders to be priced at the more aggressive of the two reference prices would provide flexibility to market participants by allowing them to consider information in both the EOII and NOII within the context of the previous day's Nasdaq official closing price or consolidated closing price to facilitate informed decisions about whether and how to participate in the opening cross.[39]

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[40] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[41] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in 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.

As described above, the Exchange proposes to disseminate the EOII beginning at 9:25 a.m., which would provide market participants with certain information relating to the Nasdaq opening cross earlier than the current NOII.[42] The Commission believes that the EOII would provide earlier transparency regarding the current reference price, the number of paired shares at that price, the size of any imbalance, and the direction of any imbalance for the Nasdaq opening cross, which would provide market participants with additional time before the opening cross to consider this information and flexibility in determining whether and how to participate in the opening cross.[43] The Commission also believes that the proposed 10-second interval between EOII disseminations would provide market participants with time to consider any EOII updates, while avoiding excessive message traffic. Accordingly, the Commission believes that the dissemination of the EOII could lead to increased participation and liquidity and promote price discovery in the Nasdaq opening cross.[44]

As described above, in connection with the proposal to begin disseminating the EOII at 9:25 a.m., the Exchange also proposes to prohibit participants from cancelling or modifying MOO, LOO, and OIO orders beginning at 9:25 a.m. The Commission believes that this proposed change would allow the Exchange to begin disseminating the EOII at a time when on-open interest is relatively settled, and could reduce the possibility of large price movements in the opening cross process that may otherwise result from cancellations or modifications of MOO, LOO, and OIO orders in response to the EOII. Moreover, because the Exchange is

market hours orders and entered between 9:29:30 a.m. (as proposed) and the time of the Nasdaq opening cross are subject to the handling described in that rule only if the orders have a time-in-force other than IOC. The Exchange states that this is a clarifying, non-substantive change because opening cross/market hours orders, by definition, have a time-in-force other than IOC. *See* Notice, *supra* note 3, at 9974 n.24. The Exchange also proposes to remove language from Rule 4702(b)(9)(B) regarding how it handles routable orders with a time-in-force other than IOC that are flagged to participate in the Nasdaq opening cross and entered at or after 9:28 a.m. because the Exchange believes that language is duplicative of other language in the same rule. *See id.* at 9975. Moreover, the Exchange proposes to make a conforming change in current Rule 4752(a)(7) to provide that orders entered at or after 9:29:30 a.m. (as proposed) would be designated as ''late market hours orders'' if they have a time-in-force other than IOC.

[32] *See* proposed Rule 4752(a)(8).

[33] *See id.*

[34] *See* Notice, *supra* note 3, at 9974.

[35] *See* proposed Rule 4752(a)(9).

[36] *See* Notice, *supra* note 3, at 9974.

[37] *See* proposed Rule 4702(b)(9)(A). The Exchange proposes to use natural rounding when there is no imbalance. When there is an imbalance, the Exchange would round such that more offsetting interest can participate. Thus, when there is a buy imbalance, the Exchange would round the first opening reference price or second opening reference price up to allow more sell interest to participate, and when there is a sell imbalance, the Exchange would round the first opening reference price or second opening reference price down to allow more buy interest to participate. *See* Notice, *supra* note 3, at 9974 n.22.

[38] *See* proposed Rule 4702(b)(9)(A).

[39] *See* Notice, *supra* note 3, at 9974.

[40] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[41] 15 U.S.C. 78f(b)(5).

[42] As described above, the EOII would contain the same information as the NOII, except it would exclude information about indicative prices in order to reduce the possibility of large indicative price movements during the early moments of the price formation process.

[43] As described above, participants may enter MOO, LOO, and OIO orders after the Exchange begins disseminating the EOII at 9:25 a.m. Specifically, MOO orders may continue to be entered until immediately prior to 9:28 a.m., LOO orders may be entered until immediately prior to 9:28 a.m. (or, in certain circumstances, until 9:29:30 a.m.), and OIO orders may continue to be entered until the time of execution of the opening cross.

[44] The Exchange also provides a similar early order imbalance indicator for the Nasdaq closing cross, which is also disseminated with a 10-second interval. *See* Rule 4754(a)(10) and (b)(1).

not proposing a similar 9:25 a.m. cutoff time for the entry of MOO, LOO, and OIO orders, market participants may consider the information in the EOII and NOII, as applicable, in entering these orders.[45]

In addition, as described above, the Exchange proposes to permit the entry of LOO orders between 9:28 a.m. and 9:29:30 a.m. if there is either a first opening reference price or a second opening reference price, with such orders priced no more aggressively than the first opening reference price and the second opening reference price. The Commission believes that these proposed changes would allow participants to retain control over the entry of LOO orders until a later time, and would allow participants to consider the information contained in the EOII and the NOII, as well as the previous day's closing price, in deciding whether to enter late LOO orders. The Commission also believes that the proposed re-pricing of late LOO orders such that they are priced no more aggressively than the first opening reference price and the second opening reference price could promote price stability in the opening cross process. Accordingly, the Commission believes that the proposed changes relating to late LOO orders could encourage additional participation and reduce imbalances in the Nasdaq opening cross, while promoting price stability in the opening process.[46]

Finally, the Commission believes that the Exchange's proposed technical and conforming changes to Rules 4702 and 4752 would allow those rules to consistently reflect the proposed 9:29:30 a.m. cutoff time for entering late LOO orders and the proposed 9:25 a.m. cutoff time for cancellations and modifications of MOO, LOO, and OIO orders, and would add clarity with respect to how the Exchange conducts its opening process and handles orders in connection with that process.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[47] that the proposed rule change (SR–NASDAQ–2021–004), as modified by Amendment No. 2, be, and hereby is, approved.

[45] The Exchange also has a cutoff time for cancellations or modifications of on-close interest that aligns with the time that the Exchange begins disseminating the early order imbalance indicator for the Nasdaq closing cross. *See* Rules 4702(b)(11)–(13) and 4754(b)(1).

[46] The Exchange also has a similar late LOC order type for the Nasdaq closing cross. *See* Rule 4702(b)(12).

[47] 15 U.S.C. 78s(b)(2).

[48] 17 CFR 200.30–3(a)(12).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[48]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–07197 Filed 4–7–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91469; File No. SR–CboeEDGX–2021–016]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 19.6 (Series of Options Contracts Open for Trading) in Connection With Limiting the Number of Strikes Listed for Short Term Option Series Which are Available for Quoting and Trading on the Exchange

April 2, 2021.

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 March 26, 2021, 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 Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX Options'') proposes to amend Rule 19.6 (Series of Options Contracts Open for Trading) in connection with limiting the number of strikes listed for Short Term Option Series which are available for quoting and trading on the Exchange. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

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 19.6 (Series of Options Contracts Open for Trading). Specifically, this proposal seeks to widen the intervals between strikes in order to limit the number of strikes listed for multiply listed equity options classes (excluding options on Exchange-Traded Funds (''ETFs'') and Exchange-Traded Notes (''ETNs'')) within the Short Term Option Series program that have an expiration date more than 21 days from the listing date.

Background

Current Rule 19.6 permits the Exchange, after a particular class of options has been approved for listing and trading on the Exchange, to open for trading series of options therein. The Exchange may list series of options for trading on a weekly,[5] monthly [6] or

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] The weekly listing program is known as the Short Term Option Series Program and is described within Rule 19.6.05.

[6] The Exchange will open at least one expiration month for each class of options open for trading on the Exchange. *See* Rule 19.6(e). The monthly expirations are subject to certain listing criteria for underlying securities described within Rule 19.3. Monthly listings expire the third Friday of the month. The term ''expiration date'' when used in respect of a series of binary options other than event options means the last day on which the options may be automatically exercised. In the case of a series of event options (other than credit default options or credit default basket options) that are be automatically exercised prior to their expiration date upon receipt by the Corporation of an event confirmation, the expiration date is the date specified by the listing Exchange; provided, however, that when an event confirmation is deemed to have been received by the Corporation with respect to such series of options, the expiration date will be accelerated to the date on which such event confirmation is deemed to have

Continued

quarterly [7] basis. Rule 19.6.01 sets forth the intervals between strike prices of series of options on individual stocks generally,[8] and Rule 19.6.05(e) specifically sets forth intervals between strike prices on Short Term Option Series. Additionally, the Exchange may list series of options pursuant to the $1 Strike Price Interval Program,[9] the $0.50 Strike Program,[10] the $2.50 Strike Price Program,[11] and the $5 Strike Program.[12]

The Exchange's proposal seeks to amend the listing of weekly series of options (*i.e.* Short Term Option Series) by adopting new Rule 19.6.05(f),[13] which widens the permissible intervals between strikes, thereby limiting the number of strikes listed, for multiply listed equity options (excluding options on ETFs [14] and ETNs [15]) that have an expiration date more than 21 days from the listing date. This proposal does not amend the monthly or quarterly listing rules, nor does it amend the $1 Strike Price Interval Program, the $0.50 Strike Program, the $2.50 Strike Price Program, or the $5 Strike Program.

Short Term Option Series Program

After an option class has been approved for listing and trading on the Exchange,[16] Rule 19.6.05 permits the

been received by the Corporation or such later date as the Corporation may specify. In the case of a series of credit default options or credit default basket options, the expiration date is the fourth business day after the last trading day for such series as such trading day is specified by the Exchange on which the series of options is listed; provided, however, that when an event confirmation is deemed to have been received by the Corporation with respect to a series of credit default options or single payout credit default basket options prior to the last trading day for such series, the expiration date for options of that series will be accelerated to the second business day following the day on which such event confirmation is deemed to have been received by the Corporation. ''Expiration date'' means, in respect of a series of range options expiring prior to February 1, 2015, the Saturday immediately following the third Friday of the expiration month of such series, and, in respect of a series of range options expiring on or after February 1, 2015 means the third Friday of the expiration month of such series, or if such Friday is a day on which the Exchange on which such series is listed is not open for business, the preceding day on which such Exchange is open for business. *See* The Options Clearing Corporation (''OCC'') By-Laws at Section 1.

[7] The quarterly listing program is known as the Quarterly Options Series Program and is described within Rule 19.6.04.

[8] The interval between strike prices of series of options on individual stocks may be $2.50 or greater where the strike price is $25 or less, provided however, that EDGX Options may not list $2.50 intervals below $50 (*e.g.* $12.50, $17.50) for any class included within the $1 Strike Price Program, as detailed below in Interpretations and Policy .02, if the addition of $2.50 intervals would cause the class to have strike price intervals that are $0.50 apart. For series of options on 283 Exchange-Traded Fund Shares that satisfy the criteria set forth in Rule 19.3(i), the interval of strike prices may be $1 or greater where the strike price is $200 or less or $5 or greater where the strike price is over $200. Exceptions to the strike price intervals above are set forth in Interpretations and Policies .02 and .03. *See* Rule 19.6.01.

[9] The $1 Strike Interval Program is described within Rule 19.6.02.

[10] The $0.50 Strike Program is described within Rule 19.6.06.

[11] The $2.50 Strike Price Program is described within Rule 19.6.03.

[12] The $5 Strike Program is described within Rule 19.6(d)(5).

[13] As a result, the proposed rule change subsequently updates current Rule 19.6.05(f) and (g) to (g) and (h), respectively.

[14] The term ''ETF'' (Exchange-Traded Fund) (or ''Fund Shares'') has the same meaning as the term ''exchange-traded fund'' as defined in Rule 6c–11 under the Investment Company Act of 1940. *See* Rule 14.2(c)(2); *see also* Rule 19.3(i). Securities deemed appropriate for options trading shall include shares or other securities (''Fund Shares''), including but not limited to Partnership Units as defined in this Rule, that are principally traded on a national securities exchange and are defined as an ''NMS stock'' under Rule 600 of Regulation NMS, and that (1) represent interests in registered investment companies (or series thereof) organized as open-end management investment companies, unit investment trusts or similar entities, and that hold portfolios of securities comprising or otherwise based on or representing investments in indexes or portfolios of securities (or that hold securities in one or more other registered investment companies that themselves hold such portfolios of securities) (''Funds '') and/or financial instruments including, but not limited to, stock index futures contracts, options on futures, options on securities and indexes, equity caps, collars and floors, swap agreements, forward contracts, repurchase agreements and reverse repurchase agreements (the ''Financial Instruments''), and money market instruments, including, but not limited to, U.S. government securities and repurchase agreements (the ''Money Market Instruments'') constituting or otherwise based on or representing an investment in an index or portfolio of securities and/or Financial Instruments and Money Market Instruments, or (2) represent commodity pool interests principally engaged, directly or indirectly, in holding and/or managing portfolios or baskets of securities, commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or non-U.S. currency (''Commodity Pool ETFs'') or (3) represent interests in a trust or similar entity that holds a specified non- U.S. currency or currencies deposited with the trust or similar entity when aggregated in some specified minimum number may be surrendered to the trust by the beneficial owner to receive the specified non-U.S. currency or currencies and pays the beneficial owner interest and other distributions on the deposited non-U.S. currency or currencies, if any, declared and paid by the trust (''Currency Trust Shares''), or (4) represent interests in the SPDR Gold Trust or are issued by the iShares COMEX Gold Trust or iShares Silver Trust).

[15] Securities deemed appropriate for options trading shall include shares or other securities (''Equity Index-Linked Securities,'' ''Commodity-Linked Securities,'' ''Currency-Linked Securities,'' ''Fixed Income Index-Linked Securities,'' ''Futures-Linked Securities,'' and ''Multifactor Index-Linked Securities,'' collectively known as ''Index- Linked Securities'') (or ''ETNs'') that are principally traded on a national securities exchange and an ''NMS Stock'' (as defined in Rule 600 of Regulation NMS under the Securities Exchange Act of 1934), and represent ownership of a security that provides for the payment at maturity. Equity Index-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of an underlying index or indexes of equity securities (''Equity Reference Asset''); Commodity-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of one or more physical commodities or commodity futures, options on commodities, or other commodity derivatives or Commodity-Based Trust Shares or a basket or index of any of the foregoing (''Commodity Reference Asset''); Currency-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of one or more currencies, or options on currencies or currency futures or other currency derivatives or Currency Trust Shares (as defined in this Rule), or a basket or index of any of the foregoing (''Currency Reference Asset''); Fixed Income Index-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of one or more notes, bonds, debentures or evidence of indebtedness that include, but are not limited to, U.S. Department of Treasury securities (''Treasury Securities''), government-sponsored entity securities (''GSE Securities''), municipal securities, trust preferred securities, supranational debt and debt of a foreign country or a subdivision thereof or a basket or index of any of the foregoing (''Fixed Income Reference Asset''); Futures-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of an index of (i) futures on Treasury Securities, GSE Securities, supranational debt and debt of a foreign country or a subdivision thereof, or options or other derivatives on any of the foregoing; or (ii) interest rate futures or options or derivatives on the foregoing in this subparagraph (ii) (''Futures Reference Asset''); and Multifactor Index-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of any combination of two or more Equity Reference Assets, Commodity Reference Assets, Currency Reference Assets, Fixed Income Reference Assets, or Futures Reference Assets (''Multifactor Reference Asset''). *See* 19.3(l).

[16] The Exchange may have no more than a total of five Short Term Option Expiration Dates, not including any Monday or Wednesday SPY Expirations as provided in paragraph (g). If EDGX Options is not open for business on the respective Thursday or Friday, the Short Term Option Opening Date will be the first business day immediately prior to that respective Thursday or Friday. Similarly, if EDGX Options is not open for business on the Friday that the options are set to expire, the Short Term Option Expiration Date will be the first business day immediately prior to that Friday. *See* Rule 19.6.05. The Exchange may open for trading on any Friday or Monday that is a business day series of options on the SPDR S&P 500 ETF Trust (''SPY'') to expire on any Monday of the month that is a business day and is not a Monday on which Quarterly Options Series expire (''Monday SPY Expirations''), provided that any Friday on which the Exchange opens for trading a Monday SPY Expiration is one business week and one business day prior to expiration. The Exchange may also open for trading on any Tuesday or Wednesday that is a business day series of SPY options to expire on any Wednesday of the month that is a business day and is not a Wednesday on which Quarterly Options Series expire (''Wednesday SPY Expirations''). The Exchange may list up to five consecutive Monday SPY Expirations and up to five consecutive Wednesday SPY Expirations at one time; the Exchange may have no more than a total of five Monday SPY Expirations and no more than a total of five Wednesday SPY Expirations. Monday and Wednesday SPY Expirations will be subject to the provisions of this Rule. See Rule 19.6.05(g). With the exception of Monday and Wednesday SPY Expirations, no Short Term Option Series may expire in the same week in which monthly option

Exchange to open for trading on any Thursday or Friday that is a business day (''Short Term Option Opening Date'') series of options on that class that expire at the close of business on each of the next five Fridays that are business days and are not Fridays on which monthly options series or Quarterly Options Series expire (''Short Term Option Expiration Dates''). The Exchange may select up to fifty currently listed option classes on which Short Term Option Series may be opened on any Short Term Option Opening Date. In addition to the fifty option class restriction, the Exchange may also list Short Term Option Series on any option classes that are selected by other securities exchanges that employ a similar program under their respective rules. For each option class eligible for participation in the Short Term Option Series Program, the Exchange may open up to 30 Short Term Option Series for each expiration date in that class. The Exchange may also open Short Term Option Series that are opened by other securities exchanges in option classes selected by such exchanges under their respective short term option rules.[17] Pursuant to Rule 19.6.05(c), the Exchange may open up to 30 initial series for each option class that participates in the Short Term Option Series Program and, pursuant to Rule19.6.05(d), if the Exchange opens less than 30 Short Term Option Series for a Short Term Option Expiration Date, additional series may be opened for trading on the Exchange when the Exchange deems it necessary to maintain an orderly market, to meet customer demand, or when the market price of the underlying security moves substantially from the exercise price or prices of the series already opened. Rule 19.6(e) provides that, if the class does not trade in $1 strike price intervals, the strike price interval for Short Term Option Series may be: (i) $0.50 or greater where the strike price is less than $75; (ii) $1.00 or greater where the strike price is between $75 and $150; or (iii) $2.50 or greater for strike prices greater than $150.[18]

The Exchange notes that listings in the weekly program comprise a significant part of the standard listing in options markets and that the industry has observed a notable increase over approximately the last five years in compound annual growth rate (''CAGR'') of weekly strikes as compared to CAGR for standard third-Friday expirations.[19]

Proposal

The Exchange proposes to widen the intervals between strikes in order to limit the number of strikes listed for equity options (excluding options on ETFs and ETNs) listed as part of the Short Term Option Series Program that have an expiration date more than 21 days from the listing date, by adopting proposed Rule 19.6.05(f). The Exchange notes that this proposal is substantively identical to the strike interval proposal recently submitted by Nasdaq BX, Inc. (''BX'') and approved by the Securities and Exchange Commission (''Commission'').[20]

The proposal widens intervals between strikes for expiration dates of equity option series (excluding options on ETFs and ETNs) beyond 21 days utilizing the three-tiered table in proposed Rule 19.6.05(f) (presented below) which considers both the Share Price and Average Daily Volume for the option series. The table indicates the applicable strike intervals and supersedes Rule 19.6.05(d), which currently permits 10 additional series to be opened for trading on the Exchange when the Exchange deems it necessary to maintain an orderly market, to meet customer demand or when the market price of the underlying security moves substantially from the exercise price or prices of the series already opened. As a result of the proposal, 19.6.05(d) would not permit an additional series of an equity option to have an expiration date more than 21 days from the listing date to be opened for trading on the Exchange despite the noted circumstances in paragraph (d) when such additional series may otherwise be added.

Tier	Average daily volume	Share price				
		Less than $25	$25 to less than $75	$75 to less than $150	$150 to less than $500	$500 or greater
1	Greater than 5,000	$0.50	$1.00	$1.00	$5.00	$5.00
2	Greater than 1,000 to 5,000[21]	1.00	1.00	1.00	5.00	10.00
3	0 to 1,000	2.50	5.00	5.00	5.00	10.00

Proposed Rule 19.6.05(f)(1) provides that the Share Price is the closing price on the primary market on the last day of the calendar quarter. This value is used to derive the column from which to apply strike intervals throughout the next calendar quarter. Also, proposed Rule 19.6.05(f)(1) provides that in the event of a corporate action, the Share Price of the surviving company is utilized.[22] Proposed Rule19.6.05(f)(2) provides that the Average Daily Volume is the total number of option contracts traded in a given security for the applicable calendar quarter divided by the number of trading days in the applicable calendar quarter. Beginning on the second trading day in the first month of each calendar quarter, the Average Daily Volume is calculated by utilizing data from the prior calendar

series on the same class expire or, in the case of Quarterly Options Series, on an expiration that coincides with an expiration of Quarterly Options Series on the same class. *See* Rule 19.6.05(b).

[17] *See* Rule 19.6.05(a).

[18] Additionally, Rule 19.6.05(e) provides that the interval between strike prices on Short Term Option Series shall be the same as the strike prices for series in that same option class that expire in accordance with the normal monthly expiration cycle. During the expiration week of an option class that is selected for the Short Term Option Series Program pursuant to this rule (''Short Term Option''), the strike price intervals for the related non-Short Term Option (''Related non-Short Term Option'') shall be the same as the strike price intervals for the Short Term Option.

[19] *See* Securities Exchange Act Release No. 91125 (February 12, 2021), 86 FR 10375 (February 19, 2021) (SR–BX–2020–032) (''BX Strike Interval Approval Order''); *and* SR–2020–BX–032 as amended by Amendment No. 1 (February 10, 2021) available at: *https://www.sec.gov/comments/sr-bx-2020-032/srbx2020032-8359799-229182.pdf* (''BX proposal''); *see also* BX Options Strike Proliferation Proposal (February 25, 2021) available at: *https://www.nasdaq.com/solutions/bx-options-strike-proliferation-proposal*).

[20] *See* BX Strike Interval Approval Order, *id.*

[21] The Exchange notes that while the term ''greater than'' is not present in this cell in the corresponding BX rule, the Exchange has inserted it for clarity, otherwise an Average Daily Volume of 1,000 contracts could be read to fall into two categories.

[22] The Exchange notes that corporate actions resulting in change ownership would result in a surviving company, such as a merger of two publicly listed companies, and the Share Price of the surviving company would be used to determine strike intervals pursuant to the proposed table. Corporate actions that do not result in a change of ownership, such as stock-splits or distribution of special cash dividends, would not result in a ''surviving company,'' therefore would not impact which Share Price to apply pursuant to the proposed Rule.

quarter based on Customer-cleared volume at OCC. For options listed on the first trading day of a given calendar quarter, the Average Daily Volume is calculated using the calendar quarter prior to the last trading calendar quarter.[23] Pursuant to current Rule 19.6.05, if the Exchange is not open for business on the respective Thursday or Friday, the Short Term Option Opening Date will be the first business day immediately prior to that respective Thursday or Friday.

By way of example, if the Share Price for a symbol was $142 at the end of a calendar quarter, with an Average Daily Volume greater than 5,000, thereby, requiring strike intervals to be listed $1.00 apart, that strike interval would apply for the calendar quarter, regardless of whether the Share Price changed to $150 or greater during that calendar quarter.[24] The proposed table within Rule 19.6.05(f) takes into account the notional value of a security, as well as Average Daily Volume in the underlying stock, in order to widen the intervals between strikes and thereby limit the number of strikes listed for equity options (excluding options on ETFs and ETNs) in the Short Term Option Series listing program. The Exchange will utilize OCC Customer-cleared volume, as customer volume is an appropriate proxy for demand. The OCC Customer-cleared volume represents the majority of options volume executed on the Exchange, which, in turn, reflects the demand in the marketplace. The options series listed on the Exchange are intended to meet customer demand by offering an appropriate number of strikes. Non-Customer cleared OCC volume generally represents the supply side.

The proposal is intended to remove repetitive and unnecessary strike listings across the weekly expiries. Specifically, the proposal seeks to reduce the number of strikes listed in the furthest weeklies, which generally have wider markets and therefore lower market quality.[25] The proposed strike intervals are intended to widen permissible strike intervals in multiply listed equity options (excluding options on ETFs and ETNs) where there is less volume as measured by the Average Daily Volume tiers. Therefore, the lower the Average Daily Volume, the greater the proposed spread between strike intervals. Options classes with higher volume contain the most liquid symbols and strikes, which the Exchange believes makes the finer proposed spread between strike intervals for those symbols appropriate. Additionally, lower-priced shares have finer strike intervals than higher-priced shares when comparing the proposed spread between strike intervals. Today, weeklies are available on 16% of underlying products. The proposal limits the density of strikes listed in series of options, without reducing the classes of options available for trading on the Exchange. Short Term Option Series with an expiration date greater than 21 days from the listing date currently equate to 7.5% of the total number of strikes in the options market, which equals 81,000 strikes.[26] The Exchange expects this proposal to result in the limitation of approximately 20,000 strikes within the Short Term Option Series, which is approximately 2% of the total strikes in the options markets.[27] The Exchange understands there has been an inconsistency of demand for series of options beyond 21 calendar days.[28] The proposal takes into account customer demand for certain options classes, by considering both the Share Price and the Average Daily Volume, in order to remove certain strike intervals where there exist clusters of strikes whose characteristics closely resemble one another and, therefore, do not serve different trading needs,[29] rendering these strikes less useful. The Exchange also notes that the proposal focuses on strikes in multiply listed equity options, and excludes ETFs and ETNs, as the majority of strikes reside within equity options.

Additionally, proposed Rule 19.6.05(f)(3) provides that options that are newly eligible for listing pursuant to Rule 19.3 and designated to participate in the Short Term Option Series program pursuant to Rule19.6.05(f) will not be subject to subparagraph (f) (as proposed) until after the end of the first full calendar quarter following the date the option class was first listed for trading on any options market.[30] As proposed, the Exchange is permitted to list options on newly eligible listings, without having to apply the wider strike intervals, until the end of the first full calendar quarter after such options were listed. The proposal thereby permits the Exchange to add strikes to meet customer demand in a newly listed options class. A newly eligible option class may fluctuate in price after its initial listing; such volatility reflects a natural uncertainty about the security. By deferring the application of the proposed wider strike intervals until after the end of the first full calendar quarter, additional information on the underlying security will be available to market participants and public investors, as the price of the underlying has an opportunity to settle based on the price discovery that has occurred in the primary market during this deferment period. Also, the Exchange has the ability to list as many strikes as are permissible for the Short Term Option Series once the expiry is no more than 21 days. Short Term Option Series that have an expiration date no more than 21 days from the listing date are not subject to the proposed strike intervals, which allows the Exchange to list additional, and potentially narrower, strikes in the event of market volatility or other market events. These metrics are intended to align expectations for determining which strike intervals will be utilized. Finally, proposed Rule 19.6.05(f)(4) provides that, notwithstanding the strike intervals imposed in proposed subparagraph (f), the proposal does not amend the range of strikes that may be listed pursuant to subparagraph (e).

While the current listing rules permit the Exchange to list a number of weekly strikes on its market, in an effort to encourage Market Makers to deploy capital more efficiently, as well as improve displayed market quality, the

[23] For example, options listed as of April 1, 2021 would be calculated on April 2, 2021 using the Average Daily Volume from October 1, 2020 to December 31, 2020.

[24] The Exchange notes that any strike intervals imposed by the Exchange's Rules will continue to apply. In this example, the strikes would be in $1 intervals up to (but not including) $150, which is the upper limit imposed by Rule 19.6.05(e).

[25] *See* BX proposal, *supra* note 19, which presents tables that focus on data for 10 of the most and least actively traded symbols and demonstrate average spreads in weekly options during the month of August 2020.

[26] The Exchange notes that this proposal is an initial attempt at reducing strikes and anticipates filing additional proposals to continue reducing strikes. The percentage of underlying products and percentage of and total number of strikes, are approximations and may vary slightly at the time of this filing. The Exchange intends to decrease the overall number of strikes listed on the Cboe Cboe-affiliated options exchanges in a methodical fashion, so that it may monitor progress and feedback from its Members. The Exchange also notes that its affiliated options exchanges, Cboe Exchange, Inc. (''Cboe Options''), Cboe C2 Exchange, Inc. (''C2'') [sic], and Cboe BZX Exchange, Inc. (''BZX Options'') plan to submit identical proposals.

[27] From information drawn from time period between January 2020 and May 2020. *See* BX proposal, *supra* note 19.

[28] *See* BX proposal, *supra* note 19.

[29] For example, two strikes that are densely clustered may have the same risk properties and may also be the same percentage out-of-the money.

[30] For example, if an options class became newly eligible for listing pursuant to Rule 19.3 on March 1, 2021 (and was actually listed for trading that day), the first full quarterly lookback would be available on July 1, 2021. This option would become subject to the proposed strike intervals on July 2, 2021.

proposal aims to reduce the density of strikes listed in later weeks by widening the intervals between strikes listed for equity options (excluding options on ETFs and ETNs) which have an expiration date more than 21 days from the listing date. The Exchange requires Designated Primary Market Makers (''DPMs'') and Market Makers to quote during a certain amount of time in the trading day and in a certain percentage of series in their assigned options classes to maintain liquidity in the market.[31] With an increasing number of strikes being listed across options exchanges, Market Makers must expend their capital to ensure that they have the appropriate infrastructure to meet their quoting obligations on all options markets in which they are assigned in option classes. The Exchange believes that by widening the intervals between strikes listed for equity options (excluding options on ETFs and ETNs), thus reducing the number of strikes listed on the Exchange, the proposal will likewise reduce the number of weekly strikes in which DPMs and Market Makers are required to quote and, as a result, allow DPMs and Market Makers to expend their capital in the options market in a more efficient manner. Due to this increased efficiency, the Exchange believes that the proposal may improve overall market quality on the Exchange by widening the intervals between strikes in multiply listed equity options (excluding options on ETFs and ETNs) that have an expiration date more than 21 days from the listing date. The proposal is intended to balance the goal of limiting the number of listed strikes with the needs of market participants. The Exchange believes that the various permissible strike intervals will continue to offer market participants the ability to select the appropriate strikes to meet their investment objectives.

Implementation

The Exchange, along with BX and other options exchanges that intend to submit the same strike interval proposal, intends to begin implementation of the proposed rule change prior to June 30, 2021. The Exchange will issue a notice of the planned implementation date to its Members in advance. Once implemented, the Exchange will provide notice [32] to its Members of the Short Term Option Series eligible in a new quarter to be listed pursuant to Rule 19.6.05(f).

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.[33] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [34] 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) [35] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposal seeks to widen the permissible intervals between strikes listed for equity options (excluding options on ETFs and ETNs) in order to limit the number of strikes listed in the Short Term Option Series program that have an expiration date more than 21 days. The proposal removes impediments to and perfects the mechanism of a free and open market and a national market system by encouraging Market Makers to deploy capital more efficiently, which may improve market quality overall on the Exchange, by widening the intervals between strikes when applying the strike interval table to multiply listed equity options (excluding options on ETFs and ETPs) that have an expiration date more than 21 days from the listing date. As described above, the Exchange requires DPMs and Market Makers to quote during a certain amount of time in the trading day and in a certain percentage of series in their assigned options classes to maintain liquidity in the market.[36] With an increasing number of strikes due, in part, to tighter intervals being listed across options exchanges, Market Makers must expend their capital to ensure that they have the appropriate infrastructure to meet their quoting obligations on all options markets in which they are assigned in options classes. The Exchange believes that this proposal will widen the intervals between strikes listed on the Exchange, thereby reducing the number of weekly options listed on its market in later weeks in which Market Makers are required to quote and, in turn, allowing DPMs and Market Makers to expend their capital in the options market in a more efficient manner.

The Exchange believes that limiting the permissible strikes for multiply listed equity options (excluding options on ETFs and ETNs) that have an expiration date more than 21 days from the listing date will not significantly disrupt the market, as the majority of the volume traded in weekly options exists in options series which have an expiration date of 21 days or less. The proposal will limit the number of strikes listed in series of options without reducing the number of classes of options available for trading on the Exchange. The proposal allows the Exchange to determine the weekly strike intervals for multiply listed equity Short Term Option Series listed in the later weeks by taking into account customer demand for certain options classes by considering both the Share Price and the Average Daily Volume in the underlying security. The Exchange utilizes OCC Customer-cleared volume, as customer volume is an appropriate proxy for demand. Whereas non-Customer cleared OCC volume generally represents the supply side, the Exchange believes OCC Customer-cleared volume represents the majority of options volume executed on the Exchange, which, in turn, reflects the demands in the marketplace and is therefore intended to assist the Exchange in meeting customer demand by offering an appropriate number of strikes.

The proposal is intended to remove certain strikes where there exist clusters of strikes whose characteristics closely resemble one another and, therefore, do not serve different trading needs, which currently results in less useful strikes. As such, the proposal protects investors and the general public by removing unnecessary choices for an options series, which the Exchange believes may improve market quality. The proposal seeks to reduce the number of strikes in the furthest weeklies, which generally have wider markets, and, therefore, lower market quality. The implementation of the Strike Interval

[31] *See* Rule 22.6(d).

[32] In its notices disseminated to Members regarding the Short Term Option Series eligible in a new quarter to be listed pursuant to Rule 19.6.05(f), the Exchange will include for each eligible option class: The closing price of the underlying; the Average Daily Volume of the option class; and the eligible strike category (per the proposed table) in which the eligible option class falls under as a result of the closing price and Average Daily Volume.

[33] 15 U.S.C. 78f(b).

[34] 15 U.S.C. 78f(b)(5).

[35] *Id.*

[36] *See supra* note 31.

table is intended to allow for greater spreads between strike intervals in multiply listed equity options where there is less volume as measured by the Average Daily Volume tiers. Therefore, the lower the Average Daily Volume, the wider the proposed spread between strike intervals, and the higher the Average Daily Volume (*i.e.,* the options classes that contain the most liquid symbols and strikes), the narrower the proposed spread between strike intervals. Additionally, the proposed strike intervals are finer for lower-priced shares than higher-priced shares.[37] As a result, the Exchange believes that, by limiting the permissible strikes for multiply listed equity options (excluding options on ETFs and ETNs) that have an expiration date more than 21 days from the listing date pursuant to the proposed Strike Interval table, the proposal may improve overall market quality on the Exchange, which serves to protect investors and the general public.

Further, utilizing the second trading day of a calendar quarter allows the Exchange to accumulate data regarding OCC Customer-cleared volume from the entire prior calendar quarter and allows the calculation of Average Daily Volume to account for trades executed on the last day of the previous calendar quarter, which will have settled by the second trading day.[38] The Exchange believes that applying the previous calendar quarter for the calculation is appropriate to reduce the impact of unusual trading activity as a result of unique market events, such as a corporate action (*i.e.,* it may result in a more reliable measure of Average Daily Volume than a shorter period).

As stated, the proposal is substantively identical to the strike interval proposal recently submitted by BX and approved by the Commission.[39] The Exchange believes that varied strike intervals will continue to offer market participants the ability to select the appropriate strike interval to meet that market participants' investment objectives.

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 as the proposed rule change limits the number of Short Term Option Series strikes available for quoting and trading on the Exchange for all market participants. Therefore, all market participants will equally be able to transact in options series in the strikes listed for trading on the Exchange. The proposal is intended to reduce the number of strikes for weekly options listed in later weeks without reducing the number of classes of options available for trading on the Exchange while also continuing to offer an appropriate number of strikes the Exchange believes will meet market participants' investment objectives.

The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act as it only impacts the permissible strike intervals for certain options series listed on the Exchange. Additionally, another options exchange has recently implemented a substantively identical rule for listing Short Term Option Series strike intervals on its exchange, approved by the Commission.[40] The proposal is a competitive response that will permit the Exchange to list the same series in multiply listed options as another options 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

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[41] and Rule 19b–4(f)(6) thereunder.[42]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeEDGX–2021–016 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–2021–016. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549–1090 on official business days between the hours of

[37] The Exchange notes that is has discussed the proposed strike intervals with various Members.

[38] Options contracts settle one business day after trade date. Strike listing determinations are made the day prior to the start of trading in each series.

[39] *See* BX Strike Interval Approval Order, *supra* note 19.

[40] *See* BX Strike Interval Approval Order, *supra* note 19.

[41] 15 U.S.C. 78s(b)(3)(A).

[42] 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.

10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeEDGX–2021–016 and should be submitted on or before April 29, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[43]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–07200 Filed 4–7–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91468; File No. SR–NYSEArca–2021–20]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 6.90–O

April 2, 2021.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on April 1, 2021, 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 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 Rule 6.90–O (Qualified Contingent Crosses) to clarify the permissible trading differentials for such orders. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this rule change is to amend Rule 6.90–O (Qualified Contingent Crosses) to clarify the permissible trading differentials for such orders.

Rule 6.62–O(bb) provides that a Qualified Contingent Cross or QCC Order must be comprised of an originating order to buy or sell at least 1,000 contracts that is identified as being part of a qualified contingent trade, coupled with a contra-side order or orders to buy or sell an equal number of contracts.[4] As Qualified Contingent Crosses, QCC Orders are automatically executed upon entry provided that the execution (i) is not at the same price as a Customer Order in the Consolidated Book and (ii) is at or between the NBBO.[5] In addition, QCC Orders may only be entered in the regular trading increments applicable to the options class under Rule 6.72–O(Trading Differentials).[6] Rule 6.72–O subsection (a) sets forth the minimum quoting increments for all options traded on the Exchange and subsection (b) sets forth the minimum trading increments of one cent ($0.01) for all series of option contracts traded on the Exchange.[7]

The Exchange proposes to modify Rule 6.90–O(2) to add reference to paragraph (b) of Rule 6.72–O in the text of the rule, which would make it clear that QCCs may be entered in minimum trading increments of one cent ($0.01).[8] The Exchange believes this proposed change, which aligns with current functionality, would add clarity, transparency and internal consistency to Exchange rules.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[9] in general, and furthers the objectives of Section 6(b)(5) of the Act,[10] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, 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 modification—to make clear that QCC Orders may be entered and traded in minimum trading increments of a penny would promote just and equitable principles of trade, as well as serve to remove impediments to and perfect the mechanism of a free and open market because the proposed change clarifies existing functionality. In addition, the Exchange believes that the proposed rule change is consistent with other options order types and functionalities that are not displayed in OPRA's quote feed. For example, electronic paired auctions, which are not displayed in OPRA's quote feed before they are executed, provide for penny trading increments, regardless of the quoting increment of the options class.[11] As a result, the proposed change

[43] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] A ''qualified contingent trade'' is a transaction consisting of two or more component orders, executed as agent or principal, where: (i) At least one component must be an NMS Stock; (ii) all the components must be effected with a product price contingency that either has been agreed to by all the respective counterparties or arranged for by a broker-dealer as principal or agent; (iii) the execution of one component must be contingent upon the execution of all other components at or near the same time; (iv) the specific relationship between the component orders (*e.g.,* the spread between the prices of the component orders) must be determined by the time the contingent order is placed; (v) the component orders must bear a derivative relationship to one another, represent different classes of shares of the same issuer, or involve the securities of participants in mergers or with intentions to merge that have been announced or cancelled; and (vi) the transaction must be fully hedged (without regard to any prior existing position) as a result of other components of the contingent trade. *See* Commentary .02 to Rule 6.62–O.

[5] *See* Rule 6.90–O. QCC Orders that cannot be executed when entered will automatically cancel. *See* Rule 6.90–O(1).

[6] *See* Rule 6.90–O(2).

[7] *See* Rule 6.72–O(a) and (b), respectively. Paragraph (2) to Rule 6.90–O provides that QCCs ''may only be entered in the regular trading increments applicable to the options class under Rule 6.72–O.''

[8] *See* proposed Rule 6.90–O(2) (''Qualified Contingent Cross Orders may only be entered in the regular trading increments applicable to the options class under Rule 6.72–O(b)'').

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] *See, e.g.,* NYSE American Rule 971.1NY(b)(7) (regarding the Customer Best Execution—or

Continued

would not impact the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Specifically, as discussed above, the Exchange believes that the proposed change would align the rule text with current functionality. Thus, the Exchange does not believe the proposal creates any significant impact on competition.

Intramarket Competition. The proposed rule change would be applicable to all market participants that trade QCC Orders and therefore would not impose any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intermarket Competition. The Exchange believes that this proposed rule change will not have an impact on intermarket competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [12] and Rule 19b–4(f)(6) thereunder.[13] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [14] and subparagraph (f)(6) of Rule 19b–4 thereunder.[15]

A proposed rule change filed under Rule 19b–4(f)(6) [16] normally does not become operative prior to 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii) [17] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative upon filing. The Exchange believes a waiver is consistent with the protection of investors and the public interest because it would enable to Exchange to clarify current functionality for QCC Orders without delay. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing so that the benefits of this proposed rule change can be realized immediately.[18]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [19] to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2021–20 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–2021–20. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2021–20 and should be submitted on or before April 29, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–07196 Filed 4–7–21; 8:45 am]

BILLING CODE 8011–01–P

CUBE—auction and providing that ''CUBE Orders may be entered in $.01 increments regardless of the MPV of the series involved'').

[12] 15 U.S.C. 78s(b)(3)(A)(iii).

[13] 17 CFR 240.19b–4(f)(6).

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6). In addition, Rule19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[16] 17 CFR 240.19b–4(f)(6).

[17] 17 CFR 240.19b–4(f)(6)(iii).

[18] For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[19] 15 U.S.C. 78s(b)(2)(B).

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91477; File No. S7–22–20]

Reopening of Comment Period for Order Proposing Conditional Substituted Compliance in Connection With Certain Requirements Applicable to Non-U.S. Security-Based Swap Dealers and Major Security-Based Swap Participants Subject to Regulation in the French Republic

AGENCY: Securities and Exchange Commission.

ACTION: Reopening of comment period.

SUMMARY: The Securities and Exchange Commission (''Commission'') is reopening the comment period for its proposed conditional substituted compliance order, published in the **Federal Register** on December 29, 2020, in connection with certain requirements applicable to non-U.S. security-based swap dealers and major security-based swap participants subject to regulation in the French Republic (''Proposed Order''). The reopening of the comment period is intended to allow interested persons time to analyze and comment upon potential changes to the Proposed Order and additional questions related to the Proposed Order.

DATES: The comment period is re-opened until May 3, 2021.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/submitcomments.htm*);
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–22–20; or
- Use the Federal Rulemaking portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–22–20. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. We will post all comments on the Commission's internet website (*http://www.sec.gov/rules/other.shtml*). Typically, comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Due to pandemic conditions, however, access to the Commission's public reference room is not permitted at this time. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Carol M. McGee, Assistant Director Office of Derivatives Policy, Division of Trading and Markets, at (202) 551–5870, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Background

The French Autorité des Marchés Financiers (''AMF'') and the Autorité de Contrôle Prudentiel et de Résolution (''ACPR''), the French financial authorities, have submitted a ''substituted compliance'' application requesting that the Commission determine, pursuant to the Securities Exchange Act of 1934 (''Exchange Act'') rule 3a71–6, that security-based swap dealers and major security-based swap participants (''SBS Entities'') subject to regulation in France conditionally may satisfy requirements under the Exchange Act by complying with comparable French and European Union (''EU'') requirements.[1] In their application, the AMF and the ACPR (''French Authorities'') sought substituted compliance in connection with certain Exchange Act requirements related to risk control, capital and margin, internal supervision and compliance, counterparty protection, recordkeeping, reporting and notification. The application incorporated comparability analyses regarding applicable French and EU law, as well as information regarding French supervisory and enforcement frameworks.

On December 22, 2020, the Commission published a notice of the French Authorities' completed application, accompanied by a Proposed Order to conditionally grant substituted compliance in connection with the application.[2] The Proposed Order incorporated a number of conditions to tailor the scope of substituted compliance consistent with the prerequisite that relevant French and EU requirements produce regulatory outcomes that are comparable to relevant requirements under the Exchange Act.

II. Reopening of Comment Period

As a result of comments received [3] and upon further reflection, the Commission is reopening the comment period for the Proposed Order until May 3, 2021. Commenters may submit, and the Commission will consider, comments on any aspect of the Proposed Order. In addition to the questions raised in the Proposed Order, the Commission specifically seeks comments on the issues below and potential changes to the Proposed Order (defined terms can be found in the Proposed Order). Commenters should also consider the approaches taken in connection with the application and proposed order for substituted compliance for the United Kingdom [4] when answering these questions.

A. EMIR-Related General Conditions

Commenters raised concerns regarding the proposed conditions associated with substituted compliance for trade acknowledgement and verification requirements and trading relationship documentation requirements.[5] They particularly requested that those parts of the final Order not incorporate proposed conditions requiring compliance with certain provisions under MiFID, arguing that those MiFID-related conditions in practice would prevent SBS Entities with branches in other EU countries from relying on substituted compliance for those requirements, and that compliance with proposed EMIR conditions would be sufficient to

[1] *See* Letter from Robert Ophèle, Chairman, AMF, and Denis Beau, Chairman, ACPR, to Vanessa Countryman, Secretary, Commission, dated Nov. 6, 2020 (''French Authorities' Application''). The application is available on the Commission's website at: *https://www.sec.gov/files/full-french-application.pdf.*

[2] Exchange Act Release No. 90766 (Dec. 22, 2020), 85 FR 85720 (Dec. 29, 2020) (''French Substituted Compliance Notice and Proposed Order'').

[3] *See* Letter from Kyle Brandon, Managing Director, Head of Derivative Policy, SIFMA (Jan. 25, 2021) (''SIFMA Letter''), letter from Wim Mijs, Chief Executive Officer, European Banking Federation (Jan. 25, 2021) (''EBF Letter'') (generally supporting the SIFMA letter), and Letter from Etienne Barel, Deputy Chief Executive Officer, French Banking Federation (Jan. 25, 2021) (''FBF Letter''). Comments may be found on the Commission's website at: *https://www.sec.gov/comments/s7-22-20/s72220.htm.*

[4] *See* Notice of Substituted Compliance Application Submitted by the United Kingdom Financial Conduct Authority in Connection with Certain Requirements Applicable to Security-Based Swap Dealers and Major Security-Based Swap Participants Subject to Regulation in the United Kingdom; Proposed Order, Exchange Act Release No. 91476 (Apr. 5, 2021) (''Proposed UK Order'').

[5] *See* SIFMA Letter at 3–6, FBF Letter at 2.

produce the requisite regulatory outcomes.[6]

As discussed below, the Commission believes that based on the issues raised by those commenters, it may be appropriate for the portions of the final Order related to trade acknowledgment and verification and to trading relationship documentation not to include the MiFID-related conditions and instead to rely solely on EMIR conditions. Any such heightened reliance on EMIR, however, highlights the need for safeguards to ensure that there will be no opportunity for gaps that may prevent the EMIR provisions in practice from producing regulatory outcomes consistent with those of the Exchange Act rules.

Accordingly, upon further consideration, the Commission believes that it may be useful for the final Order to incorporate two additional general conditions to promote certainty that EMIR will apply and help preclude gaps between the regulatory outcomes associated with Exchange Act requirements and those associated with the relevant EMIR provisions.[7]

Potential counterparty-related EMIR condition. First, it may be useful for the final Order to incorporate a new general condition to address the fact that the ''financial counterparty'' and ''non-financial counterparty'' definitions that trigger the application of the relevant EMIR provisions in part are predicated on the Covered Entity and its counterparty being either subject to certain authorizations consistent with its activities or a legal entity established in the EU.[8] To help ensure that the relevant EMIR requirements would produce the requisite regulatory outcomes regardless of a counterparty's status under those definitions, the Commission is considering adding a general condition to provide that, for each part of the final Order that requires compliance with EMIR-related requirements, if the Covered Entity's relevant security-based swap counterparty does not fall within the relevant ''financial counterparty'' or ''non-financial counterparty'' definitions, the Covered Entity must comply with the applicable condition as if the counterparty were a ''financial counterparty'' or ''non-financial counterparty'' consistent with the counterparty's business.[9]

Potential product-related conditions. It may also be useful for the final Order to account for the facts that the relevant trade acknowledgement and verification and trading relationship documentation rules under the Exchange Act do not apply to security-based swaps cleared by a clearing agency registered with the Commission (or exempt from registration), while the analogous EMIR provisions exclude instruments that are cleared by a central counterparty that has been authorized or recognized to clear derivatives contracts in the EU. As a result, instruments that have been cleared at an EU-authorized or EU-recognized central counterparty neither would be excluded from the application of those Exchange Act rules nor would be subject to the EMIR requirements that otherwise would underpin substituted compliance—making direct compliance problematic but compliance with the conditions of a positive substituted compliance order unworkable. To bridge that gap and help ensure that substituted compliance is not precluded in connection with instruments that have been cleared in the EU, the Commission is considering adding a new general condition that, for each part of the final Order that requires compliance with EMIR-related conditions: (i) The relevant security-based swap must either be an ''OTC derivative'' or ''OTC derivative contract'' for purposes of EMIR [10] that has not been cleared and otherwise is subject to the provisions of the relevant requirements under EMIR, or (ii) the relevant security-based swap has been cleared by a central counterparty that has been authorized or recognized to clear derivatives contracts in the EU.[11]

Commenters are invited to address whether additional general conditions of this nature are appropriate to help ensure that EMIR-related conditions to the final Order will apply in an appropriate scope, particularly in connection with trade acknowledgment and verification requirements and trading relationship documentation requirements. Would general conditions of the type discussed above be appropriate to help foreclose substituted compliance when there are gaps inconsistent with the comparability of regulatory outcomes? Would different approaches be more effective at achieving that goal? If so, please describe.

B. Risk Control Requirements

The proposal in part would condition substituted compliance for Exchange Act rule 15Fi–2 trade acknowledgment and verification requirements and rule 15Fi–5 trading relationship documentation requirements on firms complying with certain requirements under MiFID article 25 (including the French implementation of those MiFID requirements) and under EMIR. Commenters expressed the view that the EMIR-based requirements standing

[6] *Id.* Under the proposal, substituted compliance for trade acknowledgment and for trading relationship documentation in part would require that relevant SBS Entities (''Covered Entities'' as defined in the proposed Order) comply with certain requirements under MiFID (''Markets in Financial Instruments Directive,'' Directive 2014/65/EU) and the French implementation of MiFID, and also comply with certain requirements under EMIR (''European Market Infrastructure Regulation,'' Regulation (EU) 648/2012). *See* paras. (a)(2) and (a)(5) to the proposed Order.

[7] Addition of two new EMIR-related general conditions potentially would necessitate renumbering of certain of the extant proposed general conditions, and the addition of technical clarifying language to the captions for certain of the other proposed general conditions (*e.g.,* recaptioning proposed general conditions (a)(1) through (a)(3) to the Proposed Order so they specifically refer to MiFID, and recaptioning of proposed general condition (a)(4) so it specifically refers to CRD/CRR).

[8] *See* EMIR art. 2(8) (defining ''financial counterparty'' by reference to certain investment firms, insurers and other types of institutions authorized pursuant to various EU directives), 2(9) (defining ''non-financial counterparty'' as an ''undertaking'' established in the EU that is not a financial counterparty).

[9] In other words, the Covered Entity would be subject to the relevant requirements under EMIR even if the counterparty is not authorized pursuant to EU law as anticipated by the EMIR art. 2(8) ''financial counterparty'' definition, or if the counterparty is not an ''undertaking'' (such as by virtue of being a natural person), or is not established in the EU (by virtue of being a U.S. person or otherwise being established in some non-EU jurisdiction), as anticipated by the EMIR art. 2(9) ''non-financial counterparty'' definition. This approach appears to be consistent with European guidance. *See* European Securities and Markets Authority, ''Questions and Answers: Implementation of the Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR)'' (*https://www.esma.europa.eu/sites/default/files/library/esma70-1861941480-52_qa_on_emir_implementation.pdf*) answer 5(a) (stating that compliance with the EMIR confirmation requirement necessitates that the counterparties must reach a legally binding agreement to all terms of the OTC derivative contract, and that the EMIR RTS ''implies'' that both parties must comply and agree in advance to a specific process to do so); answer 12(b) (stating that where an EU counterparty transacts with a third country entity, the EU counterparty generally must ensure that the EMIR requirements for portfolio reconciliation, dispute resolution, timely confirmation and portfolio compression are met for the relevant portfolio and/or transactions even though the third country entity would not itself be subject to EMIR; this is subject to special processes when the European Commission has declared the third country requirements to be comparable to EU requirements).

[10] *See* EMIR art. 2(7) (defining those terms by reference to ''a derivative contract the execution of which'' does not take place on a regulated market or certain third-party market as defined in the 2004 iteration of MiFID).

[11] Prong (i) to this potential new condition would require uncleared instruments to fall within the ambit of the EMIR requirements at issue. The alternative prong (ii) would be satisfied when cleared instruments fall outside the ambit of those EMIR requirements by virtue of being cleared in the EU, akin to the Exchange Act rules' exclusion for security-based swaps cleared by clearing agencies registered with the Commission.

alone would be sufficient to produce regulatory outcomes that are comparable to those associated with the Exchange Act rules, and that the conditions should not incorporate references to MiFID provisions.[12]

The commenter concern regarding the application of MiFID arises from application of a proposed cross-border condition providing that if responsibility for ensuring compliance with any provision of MiFID (or EU or French implementing requirement) that is listed as a condition for substituted compliance is allocated to an authority in a member state of the EU in whose territory a Covered Entity provides a service, the AMF or ACPR must be the authority responsible for supervision and enforcement of that provision.[13] In the commenter's view, this EU cross-border condition means that conditioning substituted compliance on Covered Entities also having to comply with MiFID confirmation and documentation requirements in practice would undermine the availability of substituted compliance for Covered Entities that have branches in EU Member States for which the Commission has not entered into an applicable substituted compliance memorandum of understanding.[14]

In light of those commenters' concerns that substituted compliance for trade acknowledgment and verification and for trading relationship documentation as proposed would be curtailed as a result of the interplay between the MiFID provisions and the EU cross-border condition, the Commission is considering whether the EMIR requirements standing alone produce comparable results such that the Commission appropriately may remove those MiFID provisions as prerequisites to substituted compliance in connection with the trade acknowledgment and verification and trading relationship documentation requirements under the Exchange Act.[15]

Under such an approach, substituted compliance in connection with Exchange Act rule 15Fi–2 trade acknowledgment and verification requirements would be conditioned solely on compliance with the confirmation provisions of EMIR article 11(1)(a) and EMIR RTS article 12.

Moreover, under such an approach, substituted compliance in connection with Exchange Act rule 15Fi–5 trading relationship documentation requirements in part would be conditioned on compliance with the collateral-related risk management procedure provisions of EMIR Margin RTS article 2 (as proposed). In addition, to further promote comparability with the rule 15Fi–5(b)(2) provisions requiring that trading relationship documentation incorporate trade acknowledgements and verification, substituted compliance under such an approach also may be conditioned on compliance with the confirmation provisions of EMIR article 11(1)(a) and EMIR RTS article 12.

Commenters are invited to address whether MiFID requirements should be removed from the conditions for substituted compliance in connection with trade acknowledgment and verification requirements and trading relationship documentation requirements. Would the proposed EMIR conditions (and the potential additional EMIR condition related to trading relationship documentation) be sufficient to produce regulatory outcomes that are comparable to those associated with the Exchange Act rules, particularly if the new general conditions addressed in part II.A above also are incorporated as part of the final Order? If so, please explain. If not, please explain.

C. Capital

The Proposed Order did not contain any proposed conditions for substituted compliance with respect to the capital requirements of Exchange Act section 15F(e) and Exchange Act rule 18a–1 and its appendices (collectively ''Exchange Act rule 18a–1'').[16] In the Proposed Order, the Commission, however, requested comment on whether there are any conditions that should be applied to substituted compliance for these capital requirements to promote comparable regulatory outcomes.[17] The Commission also requested comment on whether it should consider conditions related to: (1) Maintaining a minimum amount of liquid assets; (2) imposing a specific liquidity requirement; and (3) maintaining minimum equity capital at least equal to the minimum fixed-dollar capital requirements under Exchange Act rule 18a–1.[18] In addition, the Commission requested comment on the types of firms in France that would be relying on substituted compliance for capital, and whether the balance sheets of these entities were primarily composed of liquid or illiquid assets.[19]

Commenters supported the proposed approach of making a positive substituted compliance determination with respect to Exchange Act rule 18a–1. Commenters, however, stated that imposing any conditions on applying substituted compliance to Exchange Act rule 18a–1 was neither necessary nor appropriate.[20] For example, one commenter expressed concern that requiring a Covered Entity to maintain a minimum amount of liquid assets

[12] *See* SIFMA Letter at 2–6, FBF Letter at 2. Under the Proposed Order, substituted compliance in connection with trade acknowledgment and verification requirements in part would be conditioned on an entity's compliance with EMIR article 11(1)(a) and EMIR RTS article 12, which jointly set forth a bilateral confirmation requirement. Substituted compliance in connection with trading relationship requirements in part would be conditioned on compliance with EMIR Margin RTS article 2, which addresses risk management procedures related to the exchange of collateral, including procedures related to the terms of all necessary agreements to be entered into by counterparties (*e.g.,* payment obligations, netting conditions, events of default, calculation methods, transfers of rights and obligations upon termination, and governing law).

[13] *See* paragraph (a)(8) to the proposed Order (''EU cross-border condition''). In practice (pursuant to MiFID article 35), this allocation of oversight applies to requirements pursuant to MiFID article 25 (''assessment of suitability and appropriateness and reporting to clients'') as well as certain other MiFID provisions not relevant here.

[14] *See* SIFMA Letter at 2–6. In the commenter's view, application of those MiFID article 25 conditions in connection with trade acknowledgment and verification requirements and trading relationship documentation requirements would ''in practice lead to an untenable patchwork of substituted compliance.'' *See* SIFMA letter at 3. The commenter further explained that SBS Entities ''operating branches throughout the EU'' would not be able to avail themselves of substituted compliance in connection with these requirements ''unless authorities or regulated SBS Entities in every or nearly every one of the 27 EU Member States submit their own substituted compliance applications covering local branches of SBS Entities, and the Commission reviews and responds to those applications and enters into memoranda of understanding [ ] in each of these Member States.'' The same problem does not arise in connection with requirements under EMIR, which would not allocate oversight of a French entity's compliance to authorities in other EU Member States.

[15] For trade acknowledgment and verification, proposed paragraph (b)(2) in part particularly would require compliance with MiFID article 25(6) (requiring that investment firms provide certain reports to clients), and MiFID Org Reg articles 59–61 (addressing contents of reports with specificity). EMIR article 11(1)(a) and EMIR RTS article 12, in contrast, specify more general conformation requirements applicable to both counterparties to a transaction. For trading relationship documentation requirements, proposed paragraph (b)(5) in part particularly would require compliance with MiFID Org Reg article 25(5) (requiring investment firms to establish a record regarding the rights and obligations of parties and other terms of service), and MiFID Org Reg articles 24, 58, 73 and applicable parts of Annex I (addressing internal audit, client agreements and recordkeeping). EMIR Martin RTS article 2, in contrast, encompasses collateral-related risk management procedures that in part require counterparties to specify the terms of all necessary agreements to be entered into by counterparties.

[16] *See* Proposed Order, 85 FR at 85726.

[17] *See* Proposed Order, 85 FR at 85737.

[18] *Id.*

[19] *Id.*

[20] *See* SIFMA Letter at 11; EBF Letter at 4; FBF Letter at 4.

would impose unnecessary burdens.[21] This commenter believed that imposing additional liquidity conditions would be duplicative of, and (depending on their design) inconsistent with applicable EU and French capital requirements, since these Covered Entities are already subject to the liquidity coverage ratio (''LCR''), the net stable funding ratio (''NSFR''), and an internal liquidity adequacy assessment process (''liquidity assessment process'').[22] This commenter also noted that Covered Entities are subject to bank-style resolution regimes, which the commenter believed makes their liquidity risks less significant than other SBS Entities.[23] This commenter also noted that certain Covered Entities will have access to short-term liquidity through relevant EU Member State central banks.[24] This commenter also expressed concern, that absent an additional comment period, any definitions contained in a final substituted compliance determination would be adopted without the benefit of public comment.[25] Finally, this commenter also stated that imposing a liquidity condition would be similar to the Commission imposing a net liquid assets test on Covered Entities, in contrast to EU policy makers applying a risk-based approach to capital. The commenter believed this would potentially change the ways these entities conduct business in a manner that may be inconsistent with their home country regulation.[26]

The Commission continues to consider whether it would be appropriate to impose additional conditions with respect to applying substituted compliance to Exchange Act rule 18a–1. In this regard, the Commission is seeking further comment about the concerns raised by the commenters and potential capital conditions. The reasons why the Commission continues to consider additional capital conditions are discussed below.

As a commenter noted, the capital standard of Exchange Act rule 18a–1 is the net liquid assets test. This is the same capital standard that applies to broker-dealers under Exchange Act rule 15c3–1. The net liquid assets test is designed to promote liquidity. In particular, Exchange Act rule 18a–1 allows an SBS Entity to engage in activities that are part of conducting a securities business (*e.g.,* taking securities into inventory) but in a manner that places the firm in the position of holding at all times more than one dollar of highly liquid assets for each dollar of unsubordinated liabilities (*e.g.,* money owed to customers, counterparties, and creditors).[27] For example, Exchange Act rule 18a–1 allows securities positions to count as allowable net capital, subject to standardized or internal model-based haircuts. The rule, however, does not permit most unsecured receivables to count as allowable net capital. This aspect of the rule severely limits the ability of SBS Entities to engage in activities, such as uncollateralized lending, that generate unsecured receivables. The rule also does not permit fixed assets or other illiquid assets to count as allowable net capital, which creates disincentives for SBS Entities to own real estate and other fixed assets that cannot be readily converted into cash. For these reasons, Exchange Act rule 18a–1 incentivizes SBS Entities to confine their business activities and devote capital to security-based swap activities.

The net liquid assets test is imposed through the mechanics of how an SBS Entity is required to compute net capital pursuant to Exchange Act rule 18a–1. The first step is to compute the SBS Entity's net worth under generally accepted accounting principles. Next, the SBS Entity must make certain adjustments to its net worth to calculate net capital, such as deducting illiquid assets and taking other capital charges and adding qualifying subordinated loans.[28] The amount remaining after these deductions is defined as ''tentative net capital.'' Exchange Act rule 18a–1 prescribes a minimum tentative net capital requirement of $100 million for SBS Entities approved to use models to calculate net capital. The final step in computing net capital is to take prescribed percentage deductions (standardized haircuts) or model-based deductions from the mark-to-market value of the SBS Entity's proprietary positions (*e.g.,* securities, money market instruments, and commodities) that are included in its tentative net capital. The amount remaining is the firm's net capital, which must exceed the greater of $20 million or a ratio amount. An SBS Entity that is meeting its minimum net capital requirement will be in the position where each dollar of unsubordinated liabilities is matched by more than a dollar of highly liquid assets.

In comparison, Covered Entities in France are subject to capital requirements applicable to prudentially regulated entities based on the international capital standard for banks (the ''Basel capital standard'').[29] The Basel capital standard counts as capital assets that Exchange Act rule 18a–1 would exclude (*e.g.,* loans and most other types of uncollateralized receivables, furniture and fixtures, real estate). The Basel capital standard accommodates the business of banking: Making loans (including extending unsecured credit) and taking deposits. While the Covered Entities that will apply substituted compliance with respect to Exchange Act rule 18a–1 will not be banks, the Basel capital standard allows them to count illiquid assets such as real estate and fixtures as capital. It also allows them to treat unsecured receivables related to activities beyond dealing in security-based swaps as capital notwithstanding the illiquidity of these assets.

Further, one critical example of the difference between the requirements of Exchange Act rule 18a–1 and the Basel capital standard relates to the treatment of initial margin with respect to security-based swaps and swaps. Under French margin requirements, Covered Entities will be required to post initial margin to counterparties unless an

[21] *See* SIFMA Letter at 11.

[22] *See* SIFMA Letter at 12.

[23] *See* SIFMA Letter at 12.

[24] *See* SIFMA Letter at 12.

[25] *Id.*

[26] *See* SIFMA Letter at 12–13.

[27] *See, e.g.,* Exchange Act Release No. 8024 (Jan. 18, 1967), 32 FR 856 (Jan. 25, 1967) (''Rule 15c3–1 (17 CFR 240.15c3–1) was adopted to provide safeguards for public investors by setting standards of financial responsibility to be met by brokers and dealers. The basic concept of the rule is liquidity; its object being to require a broker-dealer to have at all times sufficient liquid assets to cover his current indebtedness.'') (footnotes omitted); Exchange Act Release No. 10209 (June 8, 1973), 38 FR 16774 (June 26, 1973) (Commission release of a letter from the Division of Market Regulation) (''The purpose of the net capital rule is to require a broker or dealer to have at all times sufficient liquid assets to cover its current indebtedness. The need for liquidity has long been recognized as vital to the public interest and for the protection of investors and is predicated on the belief that accounts are not opened and maintained with broker-dealers in anticipation of relying upon suit, judgment and execution to collect claims but rather on a reasonable demand one can liquidate his cash or securities positions.''); Exchange Act Release No. 15426 (Dec. 21, 1978), 44 FR 1754 (Jan. 8, 1979) (''The rule requires brokers or dealers to have sufficient cash or liquid assets to protect the cash or securities positions carried in their customers' accounts. The thrust of the rule is to insure that a broker or dealer has sufficient liquid assets to cover current indebtedness.''); Exchange Act Release No. 26402 (Dec. 28, 1989), 54 FR 315 (Jan. 5, 1989) (''The rule's design is that broker-dealers maintain liquid assets in sufficient amounts to enable them to satisfy promptly their liabilities. The rule accomplishes this by requiring broker-dealers to maintain liquid assets in excess of their liabilities to protect against potential market and credit risks.'') (footnote omitted).

[28] *See* 17 CFR 240.15c3–1(c)(2).

[29] *See* BCBS, The Basel Framework, available at: *https://www.bis.org/basel_framework/.*

exception applies.[30] Under Exchange Act rule 18a–1, an SBS Entity cannot count as capital the amount of initial margin posted to a counterparty unless it enters into a special loan agreement with an affiliate.[31] The special loan agreement requires the affiliate to fund the initial margin amount and the agreement must be structured so that the affiliate—rather than the SBS Entity—bears the risk that the counterparty may default on the obligation to return the initial margin. The reason for this restrictive approach to initial margin posted away is that it ''would not be available [to the SBS Entity] for other purposes, and, therefore, the firm's liquidity would be reduced.'' [32] Under the Basel capital standard, a Covered Entity can count initial margin posted away as capital without the need to enter into a special loan arrangement with an affiliate. Consequently, because of the ability to include illiquid assets and margin posted away as capital, Covered Entities subject to the Basel capital standard may have less balance sheet liquidity than SBS Entities subject to Exchange Act rule 18a–1.

To address this potential liquidity difference, the Commission is seeking comment on whether substituted compliance with respect to Exchange Act rule 18a–1 should be subject to the conditions that a Covered Entity: (1) Maintains an amount of assets that are allowable under Exchange Act rule 18a–1, after applying applicable haircuts under the Basel capital standard, that equals or exceeds the Covered Entity's current liabilities coming due in the next 365 days; (2) makes a quarterly record listing: (a) The assets maintained pursuant to the first condition, their value, and the amount of their applicable haircuts; and (b) the aggregate amount of the liabilities coming due in the next 365 days; (3) maintains at least $100 million of equity capital composed of highly liquid assets, as defined in the Basel capital standard; and (4) includes its most recent statement of financial condition (*i.e.,* balance sheet) filed with its local supervisor whether audited or unaudited with its written notice to the Commission of its intent to rely on substituted compliance. This potential approach to substituted compliance is illustrated in the Proposed UK Order.[33]

The purpose of the potential conditions would be to address the concern that, while the Basel capital standard may contain requirements designed to address liquidity such as the LCR and NSFR, the Basel capital standard does not impose a net liquid assets test that requires a Covered Entity to maintain more than one dollar of highly liquid assets for each dollar of unsubordinated liabilities. The Commission requests comment on how the liquidity provisions in the Basel capital standard (the LCR, NSFR, and liquidity assessment process) impact the liquidity of Covered Entities that would apply substituted compliance with respect to Exchange Act rule 18a–1 (*i.e.,* nonbanks). Do these requirements in practice result in Covered Entities maintaining more than one dollar of highly liquid assets for each dollar of unsubordinated liabilities? If so, explain why. If not, explain why not.

A commenter stated that certain non-bank entities in the European Union have access to short-term liquidity through relevant Central Banks.[34] The Commission requests comment on whether Covered Entities that are not banks have access to short-term liquidity through Central Bank facilities in France or Europe that are available to banks. Please identify and describe each facility that is available to nonbank Covered Entities, including any limitations on their ability to access the facility.

The Commission also requests comment on how the potential additional capital conditions compare to any existing capital requirements under the Basel capital standards. For example, are there differences in the frequency or nature of calculations under the Basel capital standards?

The Commission continues to request comment on and seek information about the assets, liabilities, and capital of the Covered Entities that would apply substituted compliance with respect to Exchange Act rule 18a–1. What are the primary business lines engaged in by these entities and what types of assets and liabilities do they typically carry on their balance sheets? Are the balance sheets of these entities primarily composed of liquid or illiquid assets? The Commission would use this information to analyze the liquidity of these entities in the context of considering the potential additional capital conditions. For example, do the Covered Entities that would apply substituted compliance with respect to Exchange rule 18a–1 engage primarily in a securities business? If so, are their balance sheets similar to those of U.S. broker-dealers that deal in securities in terms of holding highly liquid assets? If their balance sheets are similar to U.S. broker-dealers, are the additional capital conditions discussed above necessary? Alternatively, would the additional capital conditions serve to ensure that these firms do not engage in non-securities business activities that could impair their liquidity? Should the Commission consider the relevance of a Covered Entity's business model in determining whether to impose any potential capital conditions? For example, should the Commission take into account the fact that a Covered Entity does not engage in unsecured lending and other activities more typical of banks?

The first potential additional capital condition would require a Covered Entity to maintain an amount of assets that are allowable under Exchange Act rule 18a–1, after applying applicable haircuts under the Basel capital standard [35] that equals or exceeds the Covered Entity's current liabilities coming due in the next 365 days. The objective of this condition is to require a Covered Entity to maintain sufficient liquidity to meet near-term liabilities through a simple computation, as compared to the net capital computation required by Exchange Act rule 18a–1. Generally, current liabilities are understood to mean those liabilities coming due within one year as distinct from long-term liabilities that mature in more than a year. The potential 365-day period is designed to align with that distinction between short-term and long-term liabilities to facilitate compliance with the condition. Because the condition does not address long-term liabilities, it would not necessarily leave the Covered Entity in position where each dollar of unsubordinated liabilities is matched by more than a dollar of highly liquid assets (as is the case with the net liquid assets test of Exchange Act rule 18a–1). However, it would provide a pool of highly liquid assets that can be used by the Covered Entity to avoid a near-term liquidity strain that could imperil its ability to remain a going concern.[36] The

[30] Exchange Act rule 18a–3 does not require SBS Entities to post initial margin (though it does not prohibit the practice).

[31] *See* 84 FR at 43887–88.

[32] *See id.* at 43887.

[33] *See* para. (c)(1)(ii) of the Proposed UK Order.

[34] *See* SIFMA Letter at 12.

[35] *See* standard supervisory haircuts under the Basel capital standards. BCBS, The Basel Framework, available at: *https://www.bis.org/basel_framework/.*

[36] *See* Exchange Act Release No. 86175 (Jun. 21, 2019), 84 FR 43872, 43881 (Aug. 22, 2019) (''The Commission believes that the broker-dealer capital standard is the most appropriate alternative for nonbank SBSDs, given the nature of their business activities and the Commission's experience administering the standard with respect to broker-dealers. The objective of the broker-dealer capital standard is to protect customers and counterparties and to mitigate the consequences of a firm's failure

Continued

condition's use of the Basel capital standard haircuts (as opposed to Exchange Act rule 18a–1 haircuts) is designed to tailor the condition to the Basel capital standard consistent with substituted compliance.

The second potential additional capital condition would require that a Covered Entity make a quarterly record listing: (1) The assets maintained pursuant to the first potential additional capital condition, their value, and the amount of their applicable haircuts; and (2) the aggregate amount of the liabilities coming due in the next 365 days. The requirement to create this record would enable the Commission or Commission staff to monitor compliance with the potential condition and facilitate examination of the Covered Entity with regard to substituted compliance. The quarterly interval between making this record (as opposed to a daily, weekly, or monthly interval) is designed to facilitate exams while minimizing the burden of the condition. Should the Commission require a shorter interval such as daily, weekly, or monthly or a longer one such as semi-annually or annually? Please explain.

In considering these two potential conditions, the Commission recognizes that the LCR requires Covered Entities to maintain an amount of high quality liquid assets equal to or greater than their projected total net cash outflows over a prospective 30 calendar-day period. As discussed above, the first potential additional condition requires sufficient liquidity to address liabilities coming due over the next 365 days. The longer period in the condition is designed to cover a greater amount of liabilities in order to further enhance the Covered Entity's liquidity to achieve an outcome more in line with the liquidity that results from the net liquid assets test of Exchange Act rule 18a–1. The Commission requests comment on how these conditions would compare to the LCR.

The Commission requests comment and supporting data on the potential first two capital conditions. Is the term ''current liabilities'' understood by market participants? If not, please explain why and suggest alternative language. Is 365 days an appropriate number of days to use in connection with covering ''current liabilities''? If not, please explain why and suggest an alternative number of days. For example, would a period of 60, 90, 120, 150, 180, 210, 240, 270, 300, 330, 420, 510 days or some other period of days be more appropriate in terms of enhancing the liquidity of Covered Entities applying substituted compliance to Exchange Act rule 18a–1? If so, explain why. If the Commission determines to use a number of days that is less than 365, should the Commission use a term other than ''current liabilities'' such as ''short-term liabilities''? If so, explain why. The Commission requests comment on whether the haircuts under the Basel capital standard are the appropriate haircuts to apply under the proposed capital condition. If so, please explain why. Are they comparable to the haircuts under Exchange Act rule 18a–1? Would it impose a significant burden on Covered Entities to apply the haircuts under Exchange Act rule 18a–1 rather than under the Basel capital standard? If so, please explain why. Please identify any regulatory or operational issues in connection with these proposed capital conditions, including with maintaining a quarterly record.

The third potential additional capital condition is that the Covered Entity maintain at least $100 million of equity capital composed of highly liquid assets as defined in the Basel capital standard. This potential condition is based on the $100 million tentative net capital requirement of Exchange Act rule 18a–1 for SBS Entities authorized to use models. The condition would be designed to ensure that Covered Entities applying substituted compliance with respect to Exchange Act rule 18a–1 have a minimum level of capital to absorb financial losses. Further, the LCR defines ''highly liquid assets'' and the use of that definition is designed to tailor the condition to the Basel capital standard consistent with the substituted compliance.

The Commission requests comment and supporting data on the third potential additional capital condition. How would this potential minimum capital amount compare with the amounts of equity capital currently maintained by Covered Entities that would apply substituted compliance to Exchange Act rule 18a–1? Should the condition require a different amount of equity capital? For example, should the amount be $50, $75, $125, or $150 million or some other amount? If so, explain why. Are the terms ''highly liquid assets'' and ''equity capital'' understood by market participants? If not, please explain why and suggest alternative terms.

The fourth potential additional capital condition is that the Covered Entity include its most recently filed statement of financial condition whether audited or unaudited with its initial notice to the Commission of its intent to rely on substituted compliance. This one-time obligation would provide the Commission with information about the assets, liabilities, and capital of Covered Entities applying substituted compliance with respect to Exchange Act rule 18a–1. The Commission would use the statement of financial condition and the periodic audited and unaudited reports Covered Entities will file with the Commission to monitor the appropriateness of the capital condition if it is included in the final Order. The Commission expects that most Covered Entities will file their initial notice of intent to apply substituted compliance with respect to Exchange Act rule 18a–1 at or around the time they file their registration applications with the Commission. Therefore, receipt of the statement of financial condition at that time would allow the Commission to begin this monitoring process before Covered Entities begin filing audited and unaudited reports with the Commission pursuant to Exchange Act rule 18a–7.

The Commission requests comment on the fourth potential additional capital condition. Are there other means for the Commission to efficiently obtain this information? If so, explain how. Is the information presented in these reports prepared in accordance with the GAAP that the firm uses to prepare publicly available or available to be issued general purpose financial statements in its home jurisdiction?

The Commission requests comment on the potential benefits and costs of the potential capital conditions? Would the conditions promote comparable regulatory outcomes between the capital requirements applied to Covered Entities in France and capital requirements under Exchange Act rule 18a–1? If so, explain why. If not, explain why not. The Commission is mindful that compliance with these capital conditions would require Covered Entities applying substituted compliance to Exchange Act rule 18a–1 to supplement their existing capital calculations and practices, as well as to incur additional time and cost burdens to implement the potential conditions and integrate them into existing business operations.[37] The Commission

by promoting the ability of these entities to absorb financial shocks and, if necessary, to self-liquidate in an orderly manner.'').

[37] Additional time and costs burdens may include employee costs and time to program software and computer systems to add an additional capital calculation into an existing system and firm processes and procedures, as well as ongoing time and expenses to monitor the calculations on an ongoing basis. Further, additional time and expense may be incurred with respect to any additional controls implemented to ensure compliance with the potential additional capital conditions.

requests comment and supporting data on these potential time and cost burdens, including quantitative information about the amount of the burdens. The Commission also requests comment on any potential operational or regulatory issues or burdens associated with adhering to the potential additional capital conditions.

The Commission requests comment on the potential impacts the capital conditions would have on competition. For example, how would they impact competition between Covered Entities applying substituted compliance with respect to Exchange Act rule 18a–1 and SBS Entities that will comply with Exchange Act rule 18a–1? Would the conditions eliminate or mitigate potential competitive advantages that Covered Entities adhering to the Basel capital standard might have over SBS Entities adhering to the more stringent net liquid assets test standard of Exchange Act rule 18a–1? Alternatively, would the conditions create competitive disadvantages for Covered Entities applying substituted compliance with respect to Exchange Act rule 18a–1 as compared to SBS Entities complying with Exchange Act rule 18a–1? Please describe and explain.

The Commission also requests comment on how the potential additional capital conditions compare to any existing capital requirements under the Basel capital standards (*e.g.,* LCR, NSFR). For example, are there differences in the frequency or nature of calculations under the Basel capital standards?

Please identify and describe any potential impacts on the way Covered Entities currently conduct their business with respect to implementing the potential additional capital conditions.

The Commission further requests comment on whether the Commission should consider other potential conditions with respect to applying substituted compliance to Exchange Act rule 18a–1. Should the Commission consider imposing a potential capital condition that is more consistent with Exchange Act rule 18a–1? Please explain why or why not. Should the Commission consider a capital condition that includes higher requirements for a Covered Entity that holds a significant amount of illiquid assets? For example, if 20%, 30%, 40%, 50%, or some other percent of the Covered Entity's assets would not be allowable under Exchange Act rule 18a–1, should the firm be required to hold an amount of allowable assets to cover liabilities coming due over a longer period of time than a firm that does not exceed the percent threshold? If so, explain why and identify the appropriate percent threshold. Should the Commission consider including a condition prescribing a percent threshold of non-allowable assets under Exchange Act rule 18a–1 held by the Covered Entity over which substituted compliance with respect to capital would not be permitted? If so, explain why and identify the appropriate percent threshold.

The Commission requests comment on whether the Commission should consider imposing other potential capital conditions (or no conditions) if a Covered Entity's business with U.S. persons falls below a certain notional threshold, such as $8 billion, $20 billion, $50 billion, or some other threshold. Please explain which threshold may be appropriate or suggest an alternative.

D. Recordkeeping, Reporting, Notification, and Securities Count

The Commission received comment asking it to eliminate conditions requiring a Covered Entity to be subject to and comply with EU or French requirements that either do not apply to the Covered Entity on an entity-wide basis or are not supervised by the Covered Entity's home regulator.[38] The same commenter suggested as a possible solution that SBS Entities be permitted to elect to comply directly with U.S. law instead of EU or French requirements with respect to distinct requirements of the recordkeeping and reporting rules.

Would it be appropriate to structure the Commission's substituted compliance determinations in the Order with respect to the recordkeeping and reporting rules to provide Covered Entities with greater flexibility to select which distinct requirements within the broader recordkeeping, reporting, notification, and securities count rules for which they want to apply substituted compliance? This approach of making substituted compliance determinations with respect to certain distinct requirements within the recordkeeping and reporting rules is illustrated in the proposed UK Order.[39]

As applied to Exchange Act rules 18a–5 and 18a–6, this approach of providing greater flexibility would result in substituted compliance determinations with respect to the different categories of records these rules require SBS Entities to make, keep current, and/or preserve. Each requirement with respect to a specific category of records (*e.g.,* paragraph (a)(2) of Exchange Act rule 18a–5 addressing ledgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts) would be viewed in isolation as a distinct recordkeeping rule. This approach is illustrated in the Proposed UK Order.[40] Would permitting Covered Entities to take a more granular approach to the requirements within these recordkeeping rules be appropriate for the final French Order? For example, would this approach make it more difficult for the Commission to get a comprehensive understanding of the Covered Entity's security-based swap activities and financial condition? Explain why or why not. Would it be overly complex for the Covered Entity to administer a firm-wide recordkeeping system under this approach? Explain why or why not. Would this approach address commenters' concerns with respect to the proposed French Order? If so, explain why. If not, explain why not.

The EU cross-border condition was intended to address concerns that are relevant not only to certain requirements under MiFID and MAR as noted in the Proposed Order, but also to certain requirements under MiFIR (and other EU and French requirements adopted pursuant to MiFIR). Just as is true for certain requirements under MiFID and MAR, EU law allocates the responsibility for supervising and enforcing certain MiFIR requirements to authorities of the Member State where a Covered Entity provides certain services. If the Commission adopts the granular approach to recordkeeping, reporting, notification and securities count requirements suggested above, should it expand the EU cross-border condition described above in Section B to apply to the relevant requirements under MiFIR? Explain why or why not.

Commenters suggested that the Commission distinguish between EU and French laws that are conditions to substituted compliance for non-prudentially regulated SBS Entities versus prudentially regulated SBS Entities.[41] Would this request be addressed if the Commission granted substituted compliance on a more granular level as described above and illustrated in the Proposed UK Order? If so, explain why. If not, explain why not.

Certain of the Commission's recordkeeping, reporting, and notification requirements are fully or partially linked to substantive Exchange Act requirements for which a positive

[38] SIFMA Letter at 2–4.

[39] *See* paras. (f)(1) through (3) of the Proposed UK Order.

[40] *See* paras. (f)(1) and (2) of the Proposed UK Order.

[41] *See* SIFMA Letter at 8; FBF Letter at 2.

substituted compliance determination is preliminarily not being made under the proposed Order. In these cases, should the Commission not make a positive substituted compliance determination for the fully linked requirement in the recordkeeping or reporting rules or to the portion of the requirement that is linked to substantive Exchange Act requirements? In particular, should the Commission not make a positive substituted compliance determination for recordkeeping, reporting, or notification requirements linked to the following Exchange Act rules for which a positive substituted compliance determination is preliminarily not being made: (1) Exchange Act rule 10b–10; (2) Exchange Act rule 15Fh–4; (3) Exchange Act rule 15Fh–5; (4) Exchange Act rule 15Fh–6; (5) Exchange Act rule 18a–2; (6) Exchange Act rule 18a–4; and (7) Regulation SBSR? This approach is illustrated in the Proposed UK Order.[42] Is this approach appropriate for the final French Order? If not, explain why.

Certain of the requirements in the Commission's recordkeeping, reporting, and notification rules are linked to substantive Exchange Act requirements where a positive substituted compliance determination is being made under the proposed Order. In these cases, should a positive substituted compliance determination for the linked requirement in the recordkeeping, reporting, or notification rule be conditioned on the Covered Entity applying substituted compliance to the linked substantive Exchange Act requirement? If not, explain why. Should this be the case regardless of whether the requirement is fully or partially linked to the substantive Exchange Act requirement? If not, explain why. In particular, should substituted compliance for recordkeeping, reporting, and notification requirements linked to the following Exchange Act rules be conditioned on the SBS Entity applying substituted compliance to the linked substantive Exchange Act rule: (1) Exchange Act rule 15Fh–3; (2) Exchange Act rule 15Fi–2; (3) Exchange Act rule 15Fi–3; (4) Exchange Act rule 15Fi–4; (5) Exchange Act rule 15Fi–5; (6) Exchange Act rule 15Fk–1; (7) Exchange Act rule 18a–1; (8) Exchange Act rule 18a–3; (8) Exchange Act rule 18a–5; and (9) Exchange Act rule 18a–7? This approach is illustrated in the Proposed UK Order.[43] Is this approach appropriate for the final French Order? If not, explain why.

While certain recordkeeping and reporting requirements are not expressly linked to Exchange Act rule 18a–1, they would be important to the Commission's ability to monitor or examine for compliance with the capital requirements under this rule. The records also will assist the firm in monitoring its net capital position and, therefore, in complying with Exchange rule 18a–1 and its appendices. Should a positive substituted compliance determination with respect to these recordkeeping and reporting requirements be subject to the condition that the Covered Entity applies substituted compliance with respect to Exchange Act rule 18a–1 and its appendices? If not, explain why. This approach is illustrated in the Proposed UK Order.[44] Is this approach appropriate for the final French Order? If not, explain why.

French credit institutions and finance companies are generally required to close their financial year on December 31.[45] Moreover, the French substituted compliance application does not identify French laws that are comparable to Exchange Act rule 18a–7(i) (notice of change of fiscal year end). Consequently, is there a basis and a need for the Commission to make a positive substituted compliance determination with respect to the requirements in Exchange Act rule 18a–7(i)? If so, explain why? Should the Commission condition a positive substituted compliance determination with respect to Exchange Act rule 18a–7(i) on the Covered Entity simultaneously transmitting to the Commission a copy of any comparable notice required to be sent by applicable French law, and including with the transmission the contact information of an individual who can provide further information about the matter that is the subject of the notice. If so, explain why. If not, explain why not.

E. Covered Entity Definition

As discussed in the Proposed Order, Exchange Act rule 3a71–6 provides that the Commission's assessment of the comparability of the requirements of the foreign financial regulatory system must account for the effectiveness of foreign authority's supervisory and enforcement frameworks.[46] This prerequisite accounts for the understanding that substituted compliance determinations should reflect the reality of the foreign regulatory framework, in that rules that appear high-quality on paper nonetheless should not form the basis for substituted compliance if—in practice—market participants are permitted to fall short of their regulatory obligations.

The French Authorities' Application provided information about the AMF's and ACPR's supervisory framework. With respect to the AMF's supervision, the information related to Tier 1 firms. The Commission is therefore considering revising the definition of Covered Entity to be limited to credit institutions and investment firms that are supervised by the AMF under the Tier 1 framework through the single supervisory mechanism.

Commenters are invited to address whether the change in the definition of Covered Entity is appropriate. Would the change result in the exclusion of any entities likely to register as SBS Entities in France from reliance on the substituted compliance order?

F. Internal Supervision and Compliance

Finally, the Commission is considering revising paragraph (d)(3) to the proposal, which sets forth conditions to substituted compliance in connection with internal supervision and compliance. Under the potential revision, substituted compliance for internal supervision and compliance would encompass two additional sets of prerequisites (in addition to the other provisions identified in proposed paragraph (d)(3)): CRR articles 286–88 and 293, which address counterparty credit risk and risk management generally; and EMIR Margin RTS article 2, which addresses collateral-related risk management procedures. Those provisions, which also are incorporated within the proposed prerequisites to substituted compliance for internal risk management (proposed paragraph (b)(1)), promote analogous compliance goals as the other requirements identified within proposed paragraph (d)(3).[47] Commenters are invited to address the appropriateness of this potential revision, particularly with regard to the goal of promoting regulatory outcomes that are comparable to those associated with the internal supervision and compliance requirements under the Exchange Act.

[42] *See* paras. (f)(1) through (4) of the Proposed UK Order.

[43] *See* paras. (f)(1) through (4) of the Proposed UK Order.

[44] *See* paras. (f)(1) through (5) of the Proposed UK Order.

[45] *See* French Monetary and Financial Code article R. 511–6.

[46] *See* French Substituted Compliance Notice and Proposed Order, 85 FR at 85721 (citing Exchange Act rule 3a71–6(a)(2)(i)).

[47] The Proposed UK Order similarly encompasses those provisions as part of the proposed prerequisites to substituted compliance for internal supervision and compliance requirements.

All comments received to date on the Proposed Order will be considered and need not be resubmitted.

By the Commission.

Dated: April 5, 2021.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2021–07254 Filed 4–7–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91460; File No. SR–EMERALD–2021–11]

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt Port Fees, Increase Certain Network Connectivity Fees, and Increase the Number of Additional Limited Service MIAX Emerald Express Interface Ports Available to Market Makers

April 2, 2021.

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 March 24, 2021, MIAX Emerald, LLC (''MIAX Emerald'' or ''Exchange''), filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Emerald Fee Schedule (the ''Fee Schedule'').

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/emerald,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to: (1) Adopt Port fees; (2) increase the Exchange's network connectivity fees for its 10 gigabit (''Gb'') ultra-low latency (''ULL'') fiber connection for Members [3] and non-Members (collectively, the ''Proposed Access Fees''); and (3) increase the number of Additional Limited Service MIAX Emerald Express Interface (''MEI'') [4] Ports available to Market Makers.[5]

On September 15, 2020, the Exchange issued a Regulatory Circular, which announced, among other things, that the Exchange would adopt Port fees, thereby terminating the Waiver Period [6] for such fees, and increase the fees for its 10Gb ULL connection for Members and non-Members, beginning October 1, 2020.[7] On January 14, 2021, the Exchange announced that it would offer Market Makers the ability to purchase an additional six Limited Service MEI Ports,[8] without changing the Limited Service MEI Port fee amount.

The Exchange initially filed its proposal to adopt certain Port fees and increase the fees for its 10Gb ULL connection on October 1, 2020.[9] The First Proposed Rule Change was published for comment in the **Federal Register** on October 20, 2020.[10] The Exchange notes that the First Proposed Rule Change did not receive any comment letters. Nonetheless, the Exchange withdrew the First Proposed Rule Change on November 25, 2020 [11] and resubmitted a replacement proposal.[12] The Second Proposed Rule Change was published for comment in the **Federal Register** on December 14, 2020.[13] The Exchange notes that the Second Proposed Rule Change did not receive any comment letters. Nonetheless, the Exchange withdrew the Second Proposed Rule Change on January 22, 2021 [14] and resubmitted a replacement proposal.[15] The Third Proposed Rule Change was published for comment in the **Federal Register** on February 5, 2021.[16] The Exchange withdrew the Third Proposed Rule Change on February 16, 2021 [17] and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[4] MIAX Emerald Express Interface is a connection to the MIAX Emerald System that enables Market Makers to submit simple and complex electronic quotes to MIAX Emerald. ''Full Service MEI Ports'' means a port which provides Market Makers with the ability to send Market Maker simple and complex quotes, eQuotes, and quote purge messages to the MIAX Emerald System. Full Service MEI Ports are also capable of receiving administrative information. Market Makers are limited to two Full Service MEI Ports per Matching Engine. ''Limited Service MEI Ports'' means a port which provides Market Makers with the ability to send simple and complex eQuotes and quote purge messages only, but not Market Maker Quotes, to the MIAX Emerald System. Limited Service MEI Ports are also capable of receiving administrative information. Market Makers initially receive two Limited Service MEI Ports per Matching Engine. *See* the Definitions Section of the Fee Schedule.

[5] ''Market Maker'' refers to ''Lead Market Maker'' (''LMM''), ''Primary Lead Market Maker'' (''PLMM'') and ''Registered Market Maker'' (''RMM''), collectively. *See* Exchange Rule 100 and the Definitions Section of the Fee Schedule.

[6] ''Waiver Period'' means, for each applicable fee, the period of time from the initial effective date of the MIAX Emerald Fee Schedule until such time that the Exchange has an effective fee filing establishing the applicable fee. The Exchange will issue a Regulatory Circular announcing the establishment of an applicable fee that was subject to a Waiver Period at least fifteen (15) days prior to the termination of the Waiver Period and effective date of any such applicable fee. *See* the Definitions Section of the Fee Schedule.

[7] *See* MIAX Emerald Regulatory Circular 2020–41 available at *https://www.miaxoptions.com/sites/default/files/circular-files/MIAX_Emerald_RC_2020_41.pdf.*

[8] *See https://www.miaxoptions.com/alerts/2021/01/14/miax-emerald-options-announce-support-additional-mei-limited-service-ports.* In a subsequent alert, the Exchange announced that the six Additional Limited Service MEI Ports would be available beginning February 16, 2021, pending filing with the Commission.

[9] *See* Securities Exchange Act Release No. 90184 (October 14, 2020), 85 FR 66636 (October 20, 2020) (SR–EMERALD–2020–12) (the ''First Proposed Rule Change'').

[10] *See id.*

[11] *See* Comment Letter from Joseph Ferraro, SVP, Deputy General Counsel, the Exchange, dated November 20, 2020, notifying the Commission that the Exchange would withdraw the First Proposed Rule Change.

[12] *See* Securities Exchange Act Release No. 90600 (December 8, 2020), 85 FR 80831 (December 14, 2020) (SR–EMERALD–2020–17) (the ''Second Proposed Rule Change'').

[13] *See id.*

[14] *See* Comment Letter from Joseph Ferraro, SVP, Deputy General Counsel, the Exchange, dated January 15, 2021, notifying the Commission that the Exchange would withdraw the Second Proposed Rule Change.

[15] *See* Securities Exchange Act Release No. 91032 (February 1, 2021), 86 FR 8428 (February 5, 2021) (SR–EMERALD–2021–02) (the ''Third Proposed Rule Change'').

[16] *See id.*

[17] *See* Comment Letter from Joseph Ferraro, SVP, Deputy General Counsel, the Exchange, dated February 16, 2021, notifying the Commission that

Continued

resubmitted a replacement proposal, which included the proposal to offer six Additional Limited Service MEI Ports available to Market Makers.[18] On March 24, 2021, the Exchange withdrew the Fourth Proposed Rule Change and resubmitted this proposal to further clarify its expense and revenue projections and to make certain technical corrections.

Port Fees

The Exchange proposes to adopt fees for ''Ports'', which are used by Members and non-Members to access the Exchange. MIAX Emerald provides four Port types: (i) The Financial Information Exchange (''FIX'') Port,[19], which allows Members to electronically send orders in all products traded on the Exchange; (ii) the MEI Port, which allows Market Makers to submit electronic orders and quotes to the Exchange; (iii) the Clearing Trade Drop Port (''CTD'') Port,[20] which provides real-time trade clearing information to the participants to a trade on MIAX Emerald and to the participants' respective clearing firms; and (iv) the FIX Drop Copy (''FXD'') Port,[21] which provides a copy of real-time trade execution, correction and cancellation information through a FIX Port to any number of FIX Ports designated by an Electronic Exchange Member (''EEM'') [22] to receive such messages. The Exchange also proposes to increase the monthly fee for each Additional Limited Service MEI Port per matching engine for Market Makers, as described below.

Since the launch of the Exchange, all Port fees have been waived by the Exchange in order to incentivize market participants to connect to the Exchange, except for Additional Limited Service MEI Ports. However, also at launch, the Exchange introduced the structure of Port fees on its Fee Schedule (without proposing the actual fee amounts), in order to indicate to market participants that Port fees would ultimately apply upon expiration of the Waiver Period. The Exchange now proposes to assess monthly Port fees for Members and non-Members in each month the market participant is credentialed to use a Port in the production environment and based upon the number of credentialed Ports that a user is entitled to use. MIAX Emerald has Primary and Secondary Facilities and a Disaster Recovery Facility. Each type of Port provides access to all Exchange facilities for a single fee. The Exchange notes that, unless otherwise specifically set forth in the Fee Schedule, the Port fees include the information communicated through the Port. That is, unless otherwise specifically set forth in the Fee Schedule, there is no additional charge for the information that is communicated through the Port apart from what the user is assessed for each Port.[23]

FIX Port Fees

Since the launch of the Exchange, fees for FIX Ports have been waived for the Waiver Period. The Exchange now proposes to assess a monthly FIX Port fee to Members in each month the Member is credentialed to use a FIX Port in the production environment and based upon the number of credentialed FIX Ports, as follows: $550 for the first FIX Port; $350 for FIX Ports two through five; and $150 for each FIX Port over five.

Below is the proposed table showing the FIX Port fees:

FIX port fees	MIAX Emerald monthly port fees includes connectivity to the primary, secondary and disaster recovery data centers
1st FIX Port	$550.00
FIX Ports 2 through 5	350.00
Additional FIX Ports over 5	150.00

MEI Port Fees

MIAX Emerald offers different options of MEI Ports depending on the services required by Market Makers. Since the launch of the Exchange, fees for MEI Ports have been waived for the Waiver Period. The Exchange now proposes to assess monthly MEI Port Fees to Market Makers based upon the number of classes or class volume accessed by the Market Maker. Market Makers are allocated two (2) Full Service MEI Ports [24] and two (2) Limited Service MEI Ports [25] per Matching Engine [26] to which they connect. The Full Service MEI Ports, Limited Service MEI Ports and the Additional Limited Service MEI Ports all include access to the Exchange's Primary and Secondary data centers and its Disaster Recovery center.

Specifically, the Exchange proposes to adopt MEI Port fees assessable to Market Makers based upon the number of classes or class volume accessed by the Market Maker. The Exchange proposes to adopt the following MEI Port fees: (i) $5,000 for Market Maker Assignments in up to 5 option classes or up to 10% of option classes by volume; (ii) $10,000 for Market Maker Assignments in up to 10 option classes or up to 20% of option classes by volume; (iii) $14,000 for Market Maker Assignments in up to 40 option classes or up to 35% of option classes by volume; (iv) $17,500 for Market Maker Assignments in up to 100 option classes or up to 50% of option classes by volume; and (v) $20,500 for Market Maker Assignments in over 100 option classes or over 50% of option classes by volume up to all option classes listed on MIAX Emerald.

The Exchange also proposes to adopt new footnote ''■'' for its MEI Port fees that will apply to the Market Makers

the Exchange would withdraw the Third Proposed Rule Change.

[18] *See* Securities Exchange Act Release No. 91200 (February 24, 2021), 86 FR 12221 (March 2, 2021) (SR–EMERALD–2021–07) (the ''Fourth Proposed Rule Change'').

[19] ''FIX Port'' means an interface with MIAX Emerald systems that enables the Port user to submit simple and complex orders electronically to MIAX Emerald. *See* the Definitions Section of the Fee Schedule.

[20] ''CTD Port'' or ''Clearing Trade Drop Port'' provides an Exchange Member with a real-time clearing trade updates. The updates include the Member's clearing trade messages on a low latency, real-time basis. The trade messages are routed to a Member's connection containing certain information. The information includes, among other things, the following: (i) Trade date and time; (ii) symbol information; (iii) trade price/size information; (iv) Member type (for example, and without limitation, Market Maker, Electronic Exchange Member, Broker-Dealer); and (v) Exchange MPID for each side of the transaction, including Clearing Member MPID. *See* the Definitions Section of the Fee Schedule.

[21] The FIX Drop Copy (''FXD'') Port is a messaging interface that will provide a copy of real-time trade execution, trade correction and trade cancellation information to FXD Port users who subscribe to the service. FXD Port users are those users who are designated by an EEM to receive the information and the information is restricted for use by the EEM. FXD Port Fees will be assessed in any month the Member is credentialed to use the FXD Port in the production environment. *See* Fee Schedule, Section 5)d)iv).

[22] ''Electronic Exchange Member'' or ''EEM'' means the holder of a Trading Permit who is not a Market Maker. Electronic Exchange Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100 and the Definitions Section of the Fee Schedule.

[23] An example of one such exception where there is an additional charge for information that is communicated through a Port is for certain market data products, such as ToM, AIS, and MOR, that are received via a direct connection to the Exchange. *See* Sections (6a)–(c) of the Fee Schedule.

[24] *See supra* note 4.

[25] *See id.*

[26] A ''matching engine'' is a part of the MIAX Emerald electronic system that processes options quotes and trades on a symbol-by-symbol basis. Some matching engines will process option classes with multiple root symbols, and other matching engines will be dedicated to one single option root symbol (for example, options on SPY will be processed by one single matching engine that is dedicated only to SPY). A particular root symbol may only be assigned to a single designated matching engine. A particular root symbol may not be assigned to multiple matching engines. *See* the Definitions Section of the Fee Schedule.

who fall within the following MEI Port fee levels, which represent the 4th and 5th levels of the fee table: Market Makers who have (i) Assignments in up to 100 option classes or up to 50% of option classes by volume and (ii) Assignments in over 100 option classes or over 50% of option classes by volume up to all option classes listed on MIAX Emerald. Specifically, the Exchange proposes for these monthly MEI Port tier levels, if the Market Maker's total monthly executed volume during the relevant month is less than 0.025% of the total monthly executed volume reported by OCC in the customer account type for MIAX Emerald–listed option classes for that month, then the fee will be $14,500 instead of the fee otherwise applicable to such level.

The purpose of this proposed lower monthly MEI Port fee is to provide a lower fixed cost to those Market Makers who are willing to quote the entire Exchange market (or substantial amount of the Exchange market), as objectively measured by either number of classes assigned or national ADV, but who do not otherwise execute a significant amount of volume on the Exchange. The Exchange believes that, by offering lower fixed costs to Market Makers that execute less volume, the Exchange will retain and attract smaller-scale Market Makers, which are an integral component of the option industry marketplace, but have been decreasing in number in recent years, due to industry consolidation and lower market maker profitability. Since these smaller-scale Market Makers utilize less Exchange capacity due to lower overall volume executed, the Exchange believes it is reasonable and appropriate to offer such Market Makers a lower fixed cost. The Exchange notes that other options exchanges assess certain of their fees at different rates, based upon a member's participation on that exchange,[27] and, as such, this concept is not novel. The proposed changes to the MEI Port fees for Market Makers who fall within the 4th and 5th levels of the fee table are based upon a business determination of current Market Maker assignments and trading volume.

For the calculation of the monthly MEI Port Fees that apply to Market Makers, the number of classes is defined as the greatest number of classes the Market Maker was assigned to quote in on any given day within the calendar month and the class volume percentage is based on the total national average daily volume in classes listed on MIAX Emerald in the prior calendar quarter.[28] Newly listed option classes are excluded from the calculation of the monthly MEI Port Fee until the calendar quarter following their listing, at which time the newly listed option classes will be included in both the per class count and the percentage of total national average daily volume. The Exchange proposes to assess Market Makers the monthly MEI Port Fees based on the greatest number of classes listed on MIAX Emerald that the Market Maker was assigned to quote in on any given day within a calendar month and the applicable fee rate that is the lesser of either the per class basis or percentage of total national average daily volume measurement.

The Exchange charges $50 per month for each Additional Limited Service MEI Port per matching engine for Market Makers over and above the two (2) Limited Service MEI Ports per matching engine that are allocated with the Full Service MEI Ports. The Full Service MEI Ports, Limited Service MEI Ports and the Additional Limited Service MEI Ports all include access to the Exchange's Primary and Secondary data centers and its Disaster Recovery center. Currently, footnote ''*'' in the MEI Port Fee table provides that the fees for Additional Limited Service MEI Ports are not subject to the Waiver Period. Accordingly, in connection with this proposal, the Exchange proposes to delete footnote ''*'' since the Exchange proposes to begin assessing MEI Port fees, which will no longer be subject to the Waiver Period. The Exchange also proposes to increase the monthly fee from $50 to $100 for each Additional Limited Service MEI Port per matching engine for Market Makers over and above the two (2) Limited Service MEI Ports per matching engine that are allocated with the Full Service MEI Ports.

Below is the proposed table showing the MEI Port fees:

Monthly MIAX Emerald MEI fees	Market maker assignments (the lesser of the applicable measurements below)	
	Per class	% of national average daily volume
$5,000.00	Up to 5 Classes	Up to 10% of Classes by volume.
$10,000.00	Up to 10 Classes	Up to 20% of Classes by volume.
$14,000.00	Up to 40 Classes	Up to 35% of Classes by volume.
$17,500.00■	Up to 100 Classes	Up to 50% of Classes by volume.
$20,500.00■	Over 100 Classes	Over 50% of Classes by volume up to all Classes listed on MIAX Emerald.

■ For these Monthly MIAX Emerald MEI Port tier levels, if the Market Maker's total monthly executed volume during the relevant month is less than 0.025% of the total monthly executed volume reported by OCC in the customer account type for MIAX Emerald-listed option classes for that month, then the fee will be $14,500 instead of the fee otherwise applicable to such level.

The Exchange also proposes to offer six (6) Additional Limited Service MEI Ports to Market Makers. Currently, Market Makers are limited to six Additional Limited Service MEI Ports per Matching Engine, for a total of eight per Matching Engine. The Exchange originally provided Limited Service MEI Ports to enhance the MEI Port connectivity available to Market Makers. Limited Service MEI Ports have been well received by Market Makers since the Exchange launched operations in March of 2019. The Exchange now proposes to offer to Market Makers the ability to purchase an additional six (6) Limited Service MEI Ports per Matching Engine over and above the current six (6) Additional Limited Service MEI Ports per Matching Engine that are available for purchase by Market Makers. The Exchange proposes to make a corresponding change to Section 5)d)ii) of the Fee Schedule to specify

[27] *See, e.g.,* Cboe BZX Options Exchange (''BZX Options'') assesses the Participant Fee, which is a membership fee, according to a member's ADV. *See* Cboe BZX Options Exchange Fee Schedule under ''Membership Fees''. The Participant Fee is $500 if the member ADV is less than 5000 contracts and $1,000 if the member ADV is equal to or greater than 5000 contracts.

[28] The Exchange will use the following formula to calculate the percentage of total national average daily volume that the Market Maker assignment is for purposes of the MEI Port Fee for a given month: Market Maker assignment percentage of national average daily volume = [total volume during the prior calendar quarter in a class in which the Market Maker was assigned]/[total national volume in classes listed on MIAX in the prior calendar quarter].

that Market Makers will now be limited to purchasing twelve (12) Additional Limited Service MEI Ports per Matching Engine, for a total of fourteen (14) per Matching Engine.

The Exchange proposes to increase the number of Additional Limited Service MEI Ports because the Exchange is expanding its network. This network expansion is necessary due to increased customer demand and increased volatility in the marketplace, both of which have translated into increased message traffic rates across the network. Consequently, this network expansion, which increases the number of switches supporting customer-facing systems, is necessary in order to provide sufficient access to new and existing Members, to maintain a sufficient amount of network capacity head-room, and to continue to provide the same level of service across the Exchange's low-latency, high-throughput technology environment. The Exchange notes that its affiliates, Miami International Securities Exchange, LLC (''MIAX'') and MIAX Pearl, LLC (''MIAX Pearl''), recently filed similar proposals to increase the number of Additional Limited Service Ports available for purchase due to similar network expansions and customer demand.[29]

The Exchange has 6 network switches that support the entire customer base of MIAX Emerald. The Exchange plans to increase this to 12 switches, which will increase the number of available customer ports by 100%. The proposed increase in the number of available customer ports will enable the Exchange to continue to provide sufficient and equal access to the MIAX Emerald System to all Members. Absent the proposed increase in available MEI Ports, the Exchange projects that its current inventory will be depleted and it will lack sufficient capacity to continue to meet Members' access needs.

Purge Port Fees

The Exchange also offers Market Makers the ability to request and be allocated two (2) Purge Ports [30] per Matching Engine to which it connects. Purge Ports provide Market Makers with the ability to send quote purge messages to the MIAX Emerald System. Purge Ports are not capable of sending or receiving any other type of messages or information. Since the launch of the Exchange, fees for Purge Ports have been waived for the Waiver Period. The Exchange now proposes to amend its Fee Schedule to adopt fees for Purge Ports. For each month in which the MIAX Emerald Market Maker has been credentialed to use Purge Ports in the production environment and has been assigned to quote in at least one class, the Exchange proposes to assess the MIAX Emerald Market Maker a flat fee $1,500, regardless of the number of Purge Ports allocated to the MIAX Emerald Market Maker.

CTD Port Fees

The Exchange proposes to assess a CTD Port fee as a monthly fixed amount, not tied to transacted volume of the Member. This fixed fee structure is the same structure in place at Nasdaq PHLX with respect to the proposed CTD Port Fees.[31] Since the launch of the Exchange, CTD Port Fees have been waived for the Waiver Period. CTD provides Exchange members with real-time clearing trade updates. The updates include the Member's clearing trade messages on a low latency, real-time basis. The trade messages are routed to a Member's connection containing certain information. The information includes, among other things, the following: (i) Trade date and time; (ii) symbol information; (iii) trade price/size information; (iv) Member type (for example, and without limitation, Market Maker, Electronic Exchange Member, Broker-Dealer); (v) Exchange Member Participant Identifier (''MPID'') for each side of the transaction, including Clearing Member MPID; and (vi) strategy specific information for complex transactions. CTD Port fees will be assessed in any month the Member is credentialed to use the CTD Port in the production environment. The Exchange proposes to assess a CTD Port fee of $450 per month.

Below is the proposed table for the CTD Port fees:

Description	Monthly fee
Real-Time CTD Information	$450.00

FXD Port Fee

The Exchange proposes to assess an FXD Port Fee as a monthly fixed amount, not tied to transacted volume of the Member. This fixed fee structure is the same structure in place at Nasdaq PHLX with respect to FXD Port Fees.[32] Since the launch of the Exchange, FXD Port Fees have been waived for the Waiver Period. FXD is a messaging interface that will provide a copy of real-time trade execution, trade correction and trade cancellation information to FXD Port users who subscribe to the service. FXD Port users are those users who are designated by an EEM to receive the information and the information is restricted for use by the EEM. FXD Port fees will be assessed in any month the Member is credentialed to use the FXD Port in the production environment. The Exchange proposes to assess an FXD Port fee of $500 per month. Below is the proposed table for the FXD Port fees:

Description	MIAX Emerald monthly port fees includes connectivity to the primary, secondary and disaster recovery data centers
FIX Drop Copy Port	$500.00

10Gb ULL Connectivity Fee

The Exchange proposes to amend Sections 5(a) and (b) of the Fee Schedule to increase the monthly network connectivity fees for the 10Gb ULL fiber connection, which is charged to both Members and non-Members of the Exchange for connectivity to the Exchange's primary/secondary facility. The Exchange offers to both Members and non-Members two bandwidth alternatives for connectivity to the Exchange, to its primary and secondary facilities, consisting of a 1Gb fiber connection and a 10Gb ULL fiber connection. The 10Gb ULL offering uses an ultra-low latency switch, which provides faster processing of messages sent to it in comparison to the switch used for the other types of connectivity. The Exchange now proposes to increase its monthly network connectivity fee for its 10Gb ULL connection to $10,000 for Members and non-Members.

* * * * *

MIAX Emerald believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. MIAX Emerald believes this high standard is especially important when an exchange imposes various access fees for market participants to access an exchange's

[29] *See* Securities Exchange Act Release Nos. 90811 (December 29, 2020), 86 FR 344 (January 5, 2021) (SR–MIAX–2020–41) and 90812 (December 29, 2020), 86 FR 338 (January 5, 2021) (SR–PEARL–2020–35).

[30] ''Purge Ports'' provide Market Makers with the ability to send quote purge messages to the MIAX Emerald System. Purge Ports are not capable of sending or receiving any other type of messages or information. *See* the Definitions Section of the Fee Schedule.

[31] *See* Nasdaq PHLX Pricing Schedule, Options 7, Section 9, Other Member Fees, B. Port Fees.

[32] *Id.*

marketplace. MIAX Emerald deems Port fees and Connectivity fees to be access fees, and that Ports and Connectivity are inextricably linked components of the network. Accordingly, the Exchange believes that it is reasonable and appropriate that the costs and revenues for both should be considered together, as the services associated with connectivity and ports are linked pieces of the network's infrastructure, both of which are necessary for a market participant to access and use the trading System of the Exchange. Finally, both Connectivity fee and Port fee revenue are consolidated into a single line item (''Access Fees'') on the Exchange's financial statements. The Exchange believes that it is important to demonstrate that these fees are based on its costs to provide access to the Exchange's network and reasonable business needs. Accordingly, the Exchange believes the Proposed Access Fees will allow the Exchange to offset expense the Exchange has and will incur, and that the Exchange is providing sufficient transparency (as described below) into how the Exchange determined to charge such fees. Accordingly, the Exchange is providing an analysis of its revenues, costs, and profitability associated with the Proposed Access Fees. This analysis includes information regarding its methodology for determining the costs and revenues associated with the Proposed Access Fees.

In order to determine the Exchange's costs associated with providing the Proposed Access Fees, the Exchange conducted an extensive cost review in which the Exchange analyzed every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the Proposed Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the services included in the Proposed Access Fees. The sum of all such portions of expenses represents the total cost of the Exchange to provide the Proposed Access Fees. For the avoidance of doubt, no expense amount was allocated twice. The Exchange is also providing detailed information regarding the Exchange's cost allocation methodology—namely, information that explains the Exchange's rationale for determining that it was reasonable to allocate certain expenses described in this filing towards the total cost to the Exchange to provide the Proposed Access Fees.

In order to determine the Exchange's projected revenues associated with providing the Proposed Access Fees, the Exchange analyzed the number of Members and non-Members currently utilizing the Exchange's services associated with the Proposed Access Fees, and, utilizing a recent monthly billing cycle representative of the Exchange's monthly revenue, extrapolated annualized revenue on a going-forward basis. The Exchange does not believe it is appropriate to factor into its analysis future revenue growth or decline into its projections for purposes of these calculations, given the uncertainty of such projections due to the continually changing access needs of market participants, discounts that can be achieved through reaching certain tiers, market participant consolidation, etc. Additionally, the Exchange similarly does not factor into its analysis future cost growth or decline.

The Exchange is presenting its revenue and expense associated with the Proposed Access Fees in this filing in a manner that is consistent with how the Exchange presents its revenue and expense in its Audited Unconsolidated Financial Statements. The Exchange's most recent Audited Unconsolidated Financial Statement is for 2019. However, since the revenue and expense associated with the Proposed Access Fees were not in place in 2019 or for the first three quarters of 2020, the Exchange believes its 2019 Audited Unconsolidated Financial Statement is not useful for analyzing the reasonableness of the total annual revenue and costs associated with the Proposed Access Fees. Accordingly, the Exchange believes it is more appropriate to analyze the Proposed Access Fees utilizing a recent monthly billing cycle representative of the Exchange's revenue and costs, as described herein, which utilize the same presentation methodology as set forth in the Exchange's previously-issued Audited Unconsolidated Financial Statements. Based on this analysis, the Exchange believes that the Proposed Access Fees are fair and reasonable because they will not result in excessive pricing or supra-competitive profit when comparing the Exchange's total annual expense associated with providing the services associated with the Proposed Access Fees versus the total projected annual revenue the Exchange will collect for providing those services.

* * * * *

On March 29, 2019, the Commission issued its Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network (the ''BOX Order'').[33] On May 21, 2019, the Commission issued the Staff Guidance on SRO Rule Filings Relating to Fees.[34] On December 20, 2019, the Exchange adopted Connectivity Fees in a filing utilizing a cost-based justification framework that is substantially similar to the cost-based justification framework utilized for the instant Proposed Access Fees.[35] Accordingly, the Exchange believes that the Proposed Access Fees are consistent with the Act because they (i) are reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition; (ii) comply with the BOX Order and the Guidance; (iii) are supported by evidence (including comprehensive revenue and cost data and analysis) that they are fair and reasonable because they do not result in excessive pricing or supra-competitive profit; and (iv) utilize a cost-based justification framework that is substantially similar to a framework previously used by the Exchange to establish Connectivity Fees. Accordingly, the Exchange believes that the Commission should find that the Proposed Fees are consistent with the Act.

The proposed rule change is immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act[36] in general, and furthers the objectives of Section 6(b)(4) of the Act[37] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among Exchange Members and issuers and other persons using any facility or system which the Exchange operates or controls. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act[38] 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

[33] *See* Securities Exchange Act Release No. 85459 (March 29, 2019), 84 FR 13363 (April 4, 2019) (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04).

[34] *See* Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), at *https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees* (the ''Guidance'').

[35] *See* Securities Exchange Act Release No. 87877 (December 31, 2019), 84 FR 738 (January 7, 2020) (SR–EMERALD–2019–39).

[36] 15 U.S.C. 78f(b).

[37] 15 U.S.C. 78f(b)(4).

[38] 15 U.S.C. 78f(b)(5).

investors and the public interest and is not designed to permit unfair discrimination between customer, issuers, brokers and dealers.

The Exchange launched trading on March 1, 2019. For the month of December 2020, the Exchange had a market share of only approximately 3.58% of the U.S. options industry.[39] The Exchange is not aware of any evidence that a market share of approximately 3.6% provides the Exchange with anti-competitive pricing power. If the Exchange were to attempt to establish unreasonable pricing, then no market participant would join or connect, and existing market participants would disconnect.

Separately, the Exchange is not aware of any reason why market participants could not simply drop their connections to an exchange (or not connect to an exchange) if an exchange were to establish prices for its non-transaction fees that, in the determination of such market participant, did not make business or economic sense for such market participant to connect to such exchange. No options market participant is required by rule, regulation, or competitive forces to be a Member of the Exchange. As evidence of the fact that market participants can and do disconnect from exchanges based on non-transaction fee pricing, R2G Services LLC (''R2G'') filed a comment letter after BOX's proposed rule changes to increase its connectivity fees (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04).[40] The R2G Letter stated, ''[w]hen BOX instituted a $10,000/month price increase for connectivity; we had no choice but to terminate connectivity into them as well as terminate our market data relationship. The cost benefit analysis just didn't make any sense for us at those new levels.'' [41] Since the Exchange issued its notice for the Proposed Access Fees, one Member discontinued the use of the Exchange's connectivity and port services as a result of the Proposed Access Fees. Accordingly, these examples show that if an exchange sets too high of a fee for connectivity and/or other non-transaction fees for its relevant marketplace, market participants can choose to disconnect from such exchange.

The Exchange believes that its proposal is consistent with Section 6(b)(4) of the Act because the Proposed Access Fees will not result in excessive or supra-competitive profit. The costs associated with providing access to Exchange Members and non-Members, as well as the general expansion of a state-of-the-art infrastructure, are extensive, have increased year-over-year, and are projected to increase year-over-year in the future. In particular, the Exchange has experienced a material increase in its costs in 2020, in connection with a project to make its network environment more transparent and deterministic, based on customer demand. This project will allow the Exchange to enhance its network architecture with the intent of ensuring a best-in-class, transparent and deterministic trading system while maintaining its industry leading latency and throughput capabilities. In order to provide this greater amount of transparency and higher determinism, MIAX Emerald has made significant capital expenditures (''CapEx''), incurred increased ongoing operational expenditures (''OpEx''), and undertaken additional engineering research and development (''R&D'') in the numerous areas. This includes expenditures and R&D in the following areas: (i) Implementation of an improved network design to ensure the minimum latency between multicast market data signals disseminated by the Exchange across the extranet switches; (ii) an improvement to the unicast jitter profile to reduce the occurrence of message sequence inversions from Members to the Exchange quoting gateway processors; (iii) introduction of new optical fiber network infrastructure that ensures the optical fiber path for participants within extremely tight tolerances; (iv) introduction of a re-architected and engineered participant quoting gateway that ensures the delivery of messages to the match engine with absolute determinism, eliminating the message processing inversions that can occur with messages received nanoseconds apart; and (v) an improved monitoring platform to better measure the performance of the network and systems at extremely tight tolerances and to provide Members with reporting on the performance of their systems. The CapEx associated with only phase 1 of this project in 2020 was approximately $1.85 million. This expense does not include the significant increase in employee time and other resources necessary to maintain and service this network, which expense is captured in the operating expense discussed below. This project, which results in a material increase in expense of the Exchange, is a primary driver for the increase in network connectivity fees proposed by the Exchange.

The Exchange believes the proposed increase to the 10Gb ULL connection is an equitable allocation of reasonable fees because 10Gb ULL purchasers: (1) Consume the most bandwidth and resources of the network; (2) transact the vast majority of the volume on the Exchange; and (3) require the high touch network support services provided by the Exchange and its staff, including more costly network monitoring, reporting and support services, resulting in a much higher cost to the Exchange. Further, the Exchange believes the Proposed Access Fees are equitably allocated because of customer demand for an even more transparent and deterministic network, as described above, which has resulted in higher CapEx, increasingly higher OpEx, and increased costs to engineering R&D. The Proposed Access Fees are equitably allocated in this regard because the majority of customer demand is coming from purchasers of the 10Gb ULL connections, which Member and non-Member firms transact the vast majority of volume on the Exchange. Accordingly, the Exchange believes it is reasonable, equitably allocated and not unfairly discriminatory to recoup the majority of its costs associated with the project to make the network more transparent and deterministic from market participants utilizing 10Gb ULL connections on the Exchange.

The Exchange believes that the proposed increase to the 10Gb ULL fees are equitably allocated among users of the network connectivity alternatives, as the users of the 10Gb ULL connections consume the most bandwidth and resources of the network. Specifically, the Exchange notes that these users account for approximately greater than 99% of message traffic over the network, while the users of the 1Gb connections account for approximately less than 1% of message traffic over the network. In the Exchange's experience, users of the 1Gb connections do not have a business need for the high performance network solutions required by 10Gb ULL users. The Exchange's high performance network solutions and supporting infrastructure (including employee support), provides unparalleled system throughput and the capacity to handle approximately 18 million quote messages per second. On an average day, the Exchange handles over approximately 3 billion total messages.

[39] *See* The Options Clearing Corporation (''OCC'') publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, available here: *https://www.theocc.com/market-data/volume/default.jsp.*

[40] *See* Letter from Stefano Durdic, R2G, to Vanessa Countryman, Acting Secretary, Commission, dated March 27, 2019 (the ''R2G Letter'').

[41] *See id.*

Of those, users of the 10Gb ULL connections generate approximately 3 billion messages, and users of the 1Gb connections generate 500,000 messages. However, in order to achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. Given this difference in network utilization rate, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that the 10Gb ULL users pay for the vast majority of the shared network resources from which all Member and non-Member users benefit, but is designed and maintained from a capacity standpoint to specifically handle the message rate and performance requirements of 10Gb ULL users.

The Exchange also believes that the connectivity fees are equitably allocated amongst users of the network connectivity alternatives, when these fees are viewed in the context of the overall trading volume on the Exchange. To illustrate, the purchasers of the 10Gb ULL connectivity account for approximately 98% of the volume on the Exchange for the month of October 2020. This overall volume percentage (98% of total Exchange volume) is in line with the amount of network connectivity revenue collected from 10Gb ULL purchasers (99% of total Exchange connectivity revenue). For example, utilizing a recent billing cycle, Exchange Members and non-Members that purchased 10Gb ULL connections accounted for approximately 99% of the total network connectivity revenue collected by the Exchange from all connectivity alternatives; and (ii) Members and non-Members that purchased 1Gb connections accounted for approximately 1% of the revenue collected by the Exchange from all connectivity alternatives.

The Exchange further believes that the increased fee for the 10Gb ULL connection is an equitable allocation of reasonable fees as the fees for the various connectivity alternatives are directly related to the actual costs associated with providing the respective connectivity alternatives. That is, the cost to the Exchange of providing a 1Gb network connection is significantly lower than the cost to the Exchange of providing a 10Gb ULL network connection. Pursuant to its extensive cost review described above and in connection with the Exchange's new project to increase transparency and determinism, the Exchange believes that the average cost to provide a 10Gb ULL network connection is approximately 8 times more than the average cost to provide a 1Gb connection. The simple hardware and software component costs alone of a 10Gb ULL connection are not 8 times more than the 1Gb connection. Rather, it is the associated premium-product level network monitoring, reporting, and support services costs that accompany a 10Gb ULL connection which cause it to be 8 times more costly to provide than the 1Gb connection. Accordingly, the Exchange believes it is equitable to allocate those network infrastructure costs that accompany a 10Gb ULL connection to the purchasers of those connections, and not to purchasers of 1Gb connections.

The Exchange differentiates itself by offering a ''premium-product'' network experience, as an operator of a high performance, ultra-low latency network with unparalleled system throughput, which network can support access to three distinct options markets and multiple competing market-makers having affirmative obligations to continuously quote over 750,000 distinct trading products (per exchange), and the capacity to handle approximately 18 million quote messages per second. The ''premium-product'' network experience enables users of 10Gb ULL connections to receive the network monitoring and reporting services for those approximately 750,000 distinct trading products. There is a significant, quantifiable amount of R&D effort, employee compensation and benefits expense, and other expense associated with providing the high touch network monitoring and reporting services that are utilized by the 10Gb ULL connections offered by the Exchange. These value add services are fully-discussed herein, and the actual costs associated with providing these services are the basis for the differentiated amount of the fees for the various connectivity alternatives.

In order to provide more detail and to quantify the Exchange's costs associated with providing access to the Exchange in general, the Exchange notes that there are material costs associated with providing the infrastructure and headcount to fully-support access to the Exchange. The Exchange incurs technology expense related to establishing and maintaining Information Security services, enhanced network monitoring and customer reporting, as well as Regulation SCI mandated processes, associated with its network technology. While some of the expense is fixed, much of the expense is not fixed, and thus increases as the services associated with the Proposed Access Fees increase. For example, new 10Gb ULL connections and Ports require the purchase of additional hardware to support those connections as well as enhanced monitoring and reporting of customer performance that MIAX Emerald and its affiliates provide. Further, as the total number of all connections and Ports increase, MIAX Emerald and its affiliates need to increase their data center footprint and consume more power, resulting in increased costs charged by their third-party data center provider. Accordingly, the cost to MIAX Emerald and its affiliates is not fixed. The Exchange believes the Proposed Access Fees are reasonable in order to offset the costs to the Exchange associated with providing access to its network infrastructure.

Further, because the costs of operating its own data center are significant and not economically feasible for the Exchange at this time, the Exchange does not operate its own data centers, and instead contracts with a third-party data center provider. The Exchange notes that other competing exchange operators own/operate their data centers, which offers them greater control over their data center costs. Because those exchanges own and operate their data centers as profit centers, the Exchange is subject to additional costs. The Proposed Access Fees, charged for accessing the Exchange's data center network infrastructure, are directly related to the network and offset such costs.

The Exchange invests significant resources in network R&D to improve the overall performance and stability of its network. For example, the Exchange has a number of network monitoring tools (some of which were developed in-house, and some of which are licensed from third-parties), that continually monitor, detect, and report network performance, many of which serve as significant value-adds to the Exchange's Members and enable the Exchange to provide a high level of customer service. These tools detect and report performance issues, and thus enable the Exchange to proactively notify a Member (and the SIPs) when the Exchange detects a problem with a Member's connectivity. In fact, the Exchange often receives inquiries from other industry participants regarding the status of networking issues outside of the Exchange's own network environment that are impacting the industry as a whole via the SIPs. This

includes inquiries from regulators because the Exchange has a superior, state-of the-art network that, through its enhanced monitoring and reporting solutions, often detects and identifies industry-wide networking issues ahead of the SIPs. The Exchange also incurs costs associated with the maintenance and improvement of existing tools and the development of new tools.

Additionally, certain Exchange-developed network aggregation and monitoring tools provide the Exchange with the ability to measure network traffic with a much more granular level of variability. This is important as Exchange Members demand a higher level of network determinism and the ability to measure variability in terms of single digit nanoseconds. Also, routine R&D projects to improve the performance of the network's hardware infrastructure result in additional cost. In sum, the costs associated with maintaining and enhancing a state-of-the-art exchange network in the U.S. options industry is a significant expense for the Exchange that also increases year-over-year, and thus the Exchange believes that it is reasonable to offset those costs through the Proposed Access Fees. The Exchange invests in and offers a superior network infrastructure as part of its overall options exchange services offering, resulting in significant costs associated with maintaining this network infrastructure, which are directly tied to the amount of the Proposed Access Fees that must be charged to access it, in order to recover those costs.

The Exchange believes it is reasonable to consider the expense and revenue for ports and connectivity alternatives together because ports and connectivity are inextricably linked components of the network infrastructure, and that both are necessary for a market participant to access the Exchange. The various types of connectivity and port alternatives that the Exchange offers provide a wide array of access alternatives necessary for a market participant to conduct its business using the Exchange, which is a business decision to be made by each particular type of market participant. The different types of connectivity and port alternatives allows Members to conduct their different business strategies—some Members put an emphasis on speed, while others emphasize other strategies, such as redundancy and certainty of execution. The Exchange does not require a Member to have a certain framework for accessing the Exchange, but provides various connectivity and port alternatives for each Member's distinct business lines.

The Exchange offers various types of ports with differing prices because each port accomplishes different tasks, are suited to different types of Members, and consume varying capacity amounts of the network. For instance, MEI ports allow for a higher throughput and can handle much higher quote/order rates than FIX ports. Members that are Market Makers or high frequency trading firms utilize these ports (typically coupled with 10Gb ULL connectivity) because they transact in significantly higher amounts of messages being sent to and from the Exchange, versus FIX port users, who are traditionally customers sending only orders to the Exchange (typically coupled with 1Gb connectivity). The different types of ports cater to the different types of Exchange Memberships and different capabilities of the various Exchange Members. Market Makers have quoting and other obligations that traditional customers do not. Market Makers, therefore, need ports and connections that can handle using far more of the network's capacity for message throughput, risk protections, and the amount of information that has to be assessed. Market Makers account for the vast majority of network capacity utilization and volume executed on the Exchange, as discussed throughout.[42] Accordingly, the Exchange believes that it is reasonable and appropriate to charge market participants more for MEI ports versus FIX ports and other lower capacity ports.

The Exchange believes that its proposal to increase the number of Additional Limited Service Ports available to Market Makers is consistent with the objectives of Section 6(b)(5) of the Act[43] because the proposed addition of Limited Service MEI Ports will be available to all Market Makers and the current fees for the Additional Limited Service MEI Ports apply equally to all Market Makers regardless of type, and access to the Exchange is offered on terms that are not unfairly discriminatory. The Exchange proposes to increase the number of available Limited Service MEI Ports because the Exchange is expanding its network. This network expansion is necessary due to increased customer demand and increased volatility in the marketplace, both of which have translated into increased message traffic rates across the network. Consequently, this network expansion, which increases the number of switches supporting customer facing systems, is necessary in order to provide sufficient and equal access to new and existing Members, to maintain a sufficient amount of network capacity head-room, and to continue to provide the same level of service across the Exchange's low-latency, high-throughput technology environment.

Currently, the Exchange has 6 network switches that support the entire customer base of MIAX Emerald. The Exchange plans to increase this to 12 switches, which will increase the number of available customer ports by 100%. This increase in the number of available customer ports will enable the Exchange to continue to provide sufficient and equal access to the MIAX Emerald System for all Members. Absent the proposed increase in available MEI Ports, the Exchange projects that its current inventory will be depleted and it will lack sufficient capacity to continue to meet Members' access needs. Further, the Exchange notes the decision of whether to purchase any Additional Limited Service MEI Ports is completely optional and it is a business decision for each Market Maker to determine whether Additional Limited Service MEI Ports are necessary to meet their business requirements.

The Exchange further believes that the availability of the Additional Limited Service MEI Ports is equitable and not unfairly discriminatory because it will enable Market Makers to maintain uninterrupted access to the MIAX Emerald System and consequently enhance the marketplace by helping Market Makers to better manage risk, thus preserving the integrity of the MIAX Emerald markets, all to the benefit of and protection of investors and the public as a whole. The Exchange also believes that its proposal is consistent with Section 6(b)(4) of the Act because only Market Makers that voluntarily purchase Additional Limited Service MEI Ports will be charged the monthly fee per port.

As stated above, the Exchange proposes to expand its network by making available six Additional Limit Service MEI Ports due to increased customer demand and increased volatility in the marketplace, both of which have translated into increased message traffic rates across the network. The cost to expand the network in this

[42] *See supra* page 72 (discussing how purchasers of the 10Gb ULL connectivity accounted for approximately 98% of the volume on the Exchange for the month of October 2020; 99% of total Exchange connectivity revenue; Members and non-Members that purchased 10Gb ULL connections accounted for approximately 99% of the total network connectivity revenue collected by the Exchange from all connectivity alternatives; and Members and non-Members that purchased 1Gb connections accounted for approximately 1% of the revenue collected by the Exchange from all connectivity alternatives).

[43] 15 U.S.C. 78f(b)(5).

manner is greater than the revenue the Exchange anticipates the Additional Limited Service MEI Ports will generate. Specifically, the Exchange estimates it has already incurred a one-time cost of approximately $175,000 in capital expenditures (''CapEx'') on hardware, software, and other items to expand the network to make available the six Additional Limited Service MEI Ports. This estimated cost also includes expense associated with providing the necessary engineering and support personnel to transition those Market Makers who wish to acquire any number of Additional Limited Service MEI Ports.

The Exchange cannot predict with certainty how many Market Makers will purchase the Additional Limited Service MEI Ports, in what quantity, or if Market Makers will add/drop Limited Service MEI Ports from month to month. However, utilizing a recent monthly billing cycle, the Exchange notes four Market Makers purchased all six of the Additional Limited Service MEI Ports, and two Market Makers purchased two out of six of the Additional Limited Service MEI Ports, which will be subject to the proposed fee of $100 per month per Additional Limited Service MEI Port for each Matching Engine. Therefore, utilizing the recent monthly billing cycle, Market Makers purchased 28 total Additional Limited Service MEI Ports. The Exchange has 12 Matching Engines.[44] Assuming that each Market Maker that purchased the 28 Additional Limited Service MEI Ports connected to all 12 Matching Engines at a rate of $100 per month, the Exchange projects monthly revenue for the Additional Limited Service MEI Ports of approximately $33,600 (28 Additional LSPs × 12 Matching Engines × $100 = $33,600 per month). On a going-forward basis and assuming no Market Maker drops or adds Additional Limited Service MEI Ports, the Exchange projects to collect an additional $403,200 in annualized revenue from the Additional Limited Service MEI Ports that are part of this proposal.

The Exchange only has four primary sources of revenue: Transaction fees, access fees (of which the Proposed Access Fees constitute the majority), regulatory fees, and market data fees. Accordingly, the Exchange must cover all of its expenses from these four primary sources of revenue.

The Exchange believes that the Proposed Access Fees are fair and reasonable because they will not result in excessive pricing or supra-competitive profit, when comparing the total annual expense that the Exchange projects to incur in connection with providing these services versus the total annual revenue that the Exchange projects to collect in connection with providing these services. For 2020,[45] the total annual expense for providing the services associated with the Proposed Access Fees for MIAX Emerald is projected to be approximately $9.3 million. The $9.3 million in expense includes expense associated with providing all ports and all connectivity alternatives. The Exchange is unable to separate out its expense by connectivity alternative, as all connectivity alternatives are intricately combined in a single network infrastructure. Nevertheless, the Exchange attributes the majority of connectivity expense to the 10Gb ULL connections because the majority of network capacity is used by 10Gb ULL purchasers.[46] The $9.3 million in projected total annual expense is comprised of the following, all of which are directly related to the services associated with the Proposed Access Fees: (1) Third-party expense, relating to fees paid by MIAX Emerald to third-parties for certain products and services; and (2) internal expense, relating to the internal costs of MIAX Emerald to provide the services associated with the Proposed Access Fees. As noted above, the Exchange believes it is more appropriate to analyze the Proposed Access Fees utilizing its 2020 revenue and costs, which utilize the same presentation methodology as set forth in the Exchange's previously-issued Audited Unconsolidated Financial Statements.[47] The $9.3 million in projected total annual expense is directly related to the services associated with the Proposed Access Fees, and not any other product or service offered by the Exchange. It does not include general costs of operating matching systems and other trading technology, and no expense amount was allocated twice.

As discussed, the Exchange conducted an extensive cost review in which the Exchange analyzed every expense item in the Exchange's general expense ledger (this includes over 150 separate and distinct expense items) to determine whether each such expense relates to the services associated with the Proposed Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports those services, and thus bears a relationship that is, ''in nature and closeness,'' directly related to those services. The sum of all such portions of expenses represents the total cost of the Exchange to provide services associated with the Proposed Access Fees.

For 2020, total third-party expense, relating to fees paid by MIAX Emerald to third-parties for certain products and services for the Exchange to be able to provide the services associated with the Proposed Access Fees, is projected to be $1,932,519. This includes, but is not limited to, a portion of the fees paid to: (1) Equinix, for data center services, for the primary, secondary, and disaster recovery locations of the MIAX Emerald trading system infrastructure; (2) Zayo Group Holdings, Inc. (''Zayo'') for network services (fiber and bandwidth products and services) linking MIAX Emerald's office locations in Princeton, NJ and Miami, FL to all data center locations; (3) Secure Financial Transaction Infrastructure (''SFTI''),[48] which supports connectivity and feeds for the entire U.S. options industry; (4) various other services providers (including Thompson Reuters, NYSE, Nasdaq, and Internap), which provide content, connectivity services, and infrastructure services for critical components of options connectivity and network services; and (5) various other hardware and software providers (including Dell and Cisco, which support the production environment in which Members and non-Members connect to the network to trade, receive market data, etc.).

For clarity, only a portion of all fees paid to such third-parties is included in

[44] The Exchange notes that several Market Makers, including those that purchased the Additional Limited Service MEI Ports, do not connect to all 12 Matching Engines. It is a business decision of each Market Maker whether to purchase one or more types of ports that connect to each Matching Engine.

[45] The Exchange has not yet finalized its 2020-year end results.

[46] *See supra* note 42.

[47] For example, the Exchange previously noted that all third-party expense described in its prior fee filing was contained in the information technology and communication costs line item under the section titled ''Operating Expenses Incurred Directly or Allocated From Parent,'' in the Exchange's 2019 Form 1 Amendment containing its financial statements for 2018. *See* Securities Exchange Act Release No. 87877 (December 31, 2019), 85 FR 738 (January 7, 2020) (SR–EMERALD–2019–39). Accordingly, the third-part expense described in this filing is attributed to the same line item for the Exchange's 2020 Form 1 Amendment, which will be filed in 2021.

[48] In fact, on October 22, 2019, the Exchange was notified by SFTI that it is again raising its fees charged to the Exchange by approximately 11%, without having to show that such fee change complies with the Act by being reasonable, equitably allocated, and not unfairly discriminatory. It is unfathomable to the Exchange that, given the critical nature of the infrastructure services provided by SFTI, that its fees are not required to be rule-filed with the Commission pursuant to Section 19(b)(1) of the Act and Rule 19b–4 thereunder. *See* 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b–4, respectively.

the third-party expense herein, and no expense amount is allocated twice. Accordingly, MIAX Emerald does not allocate its entire information technology and communication costs to the services associated with the Proposed Access Fees.

The Exchange believes it is reasonable to allocate such third-party expense described above towards the total cost to the Exchange to provide the services associated with the Proposed Access Fees. In particular, the Exchange believes it is reasonable to allocate the identified portion of the Equinix expense because Equinix operates the data centers (primary, secondary, and disaster recovery) that host the Exchange's network infrastructure. This includes, among other things, the necessary storage space, which continues to expand and increase in cost, power to operate the network infrastructure, and cooling apparatuses to ensure the Exchange's network infrastructure maintains stability. Without these services from Equinix, the Exchange would not be able to operate and support the network and provide the services associated with the Proposed Access Fees to its Members and non-Members and their customers. The Exchange did not allocate all of the Equinix expense toward the cost of providing the services associated with the Proposed Access Fees, only that portion which the Exchange identified as being specifically mapped to providing the services associated with the Proposed Access Fees, approximately 73% of the total Equinix expense (68% allocated towards the cost of providing the provision of network connectivity and 5% allocated towards the cost of providing ports). The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.

The Exchange believes it is reasonable to allocate the identified portion of the Zayo expense because Zayo provides the internet, fiber and bandwidth connections with respect to the network, linking MIAX Emerald with its affiliates, Miami International Securities Exchange, LLC (''MIAX'') and MIAX Pearl, LLC (''MIAX Pearl''), as well as the data center and disaster recovery locations. As such, all of the trade data, including the billions of messages each day per exchange, flow through Zayo's infrastructure over the Exchange's network. Without these services from Zayo, the Exchange would not be able to operate and support the network and provide the services associated with the Proposed Access Fees. The Exchange did not allocate all of the Zayo expense toward the cost of providing the services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the Proposed Access Fees, approximately 66% of the total Zayo expense (62% allocated towards the cost of providing the provision of network connectivity and 4% allocated towards the cost of providing ports). The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.

The Exchange believes it is reasonable to allocate the identified portions of the SFTI expense and various other service providers' (including Thompson Reuters, NYSE, Nasdaq, and Internap) expense because those entities provide connectivity and feeds for the entire U.S. options industry, as well as the content, connectivity services, and infrastructure services for critical components of the network. Without these services from SFTI and various other service providers, the Exchange would not be able to operate and support the network and provide access to its Members and non-Members and their customers. The Exchange did not allocate all of the SFTI and other service providers' expense toward the cost of providing the services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the services associated with the Proposed Access Fees, approximately 94% of the total SFTI and other service providers' expense (89% allocated towards the cost of providing the provision of network connectivity and 5% allocated towards the cost of providing ports).[49] The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the services associated with the Proposed Access Fees.

The Exchange believes it is reasonable to allocate the identified portion of the other hardware and software provider expense because this includes costs for dedicated hardware licenses for switches and servers, as well as dedicated software licenses for security monitoring and reporting across the network. Without this hardware and software, the Exchange would not be able to operate and support the network and provide access to its Members and non-Members and their customers. The Exchange did not allocate all of the hardware and software provider expense toward the cost of providing the services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the services associated with the Proposed Access Fees, approximately 57% of the total hardware and software provider expense (54% allocated towards the cost of providing the provision of network connectivity and 3% allocated towards the cost of providing ports). The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the services associated with the Proposed Access Fees.

For 2020, total projected internal expense, relating to the internal costs of MIAX Emerald to provide the services associated with the Proposed Access Fees, is projected to be $7,367,259. This includes, but is not limited to, costs associated with: (1) Employee compensation and benefits for full-time employees that support the services associated with the Proposed Access Fees, including staff in network operations, trading operations, development, system operations, business, as well as staff in general corporate departments (such as legal, regulatory, and finance) that support those employees and functions (including an increase as a result of the higher determinism project); (2) depreciation and amortization of hardware and software used to provide the services associated with the Proposed Access Fees, including equipment, servers, cabling, purchased software and internally developed software used in the production environment to support the network for trading; and (3) occupancy costs for leased office space for staff that provide the services associated with the Proposed Access Fees. The breakdown of these costs is more fully-described below. For clarity, only a portion of all such internal expenses are included in

[49] The Exchange notes an increase to the SFTI and other service providers' expense percentage contained herein versus the same expense category percentage the Exchange used in its initial filing to adopt connectivity fees. *See* Securities Exchange Act Release No. 87877 (December 31, 2019), 85 FR 738 (January 7, 2020) (SR–EMERALD–2019–39). This is because at the time the Exchange performed its cost analysis for the initial connectivity fee filing, the Exchange was operational for only part of the year. Since that time, the Exchange has been fully operational, increased market share and number of market participants, and undertaken significant performance upgrades, resulting in increased expense. Accordingly, the Exchange believes it is appropriate to analyze its SFTI and other service providers' expense more in line with its affiliate options exchanges, MIAX and MIAX PEARL.

the internal expense herein, and no expense amount is allocated twice. Accordingly, MIAX Emerald does not allocate its entire costs contained in those items to the services associated with the Proposed Access Fees.

The Exchange believes it is reasonable to allocate such internal expense described above towards the total cost to the Exchange to provide the services associated with the Proposed Access Fees. In particular, MIAX Emerald's employee compensation and benefits expense relating to providing the services associated with the Proposed Access Fees is projected to be $4,489,924, which is only a portion of the $9,354,009 total projected expense for employee compensation and benefits. The Exchange believes it is reasonable to allocate the identified portion of such expense because this includes the time spent by employees of several departments, including Technology, Back Office, Systems Operations, Networking, Business Strategy Development (who create the business requirement documents that the Technology staff use to develop network features and enhancements), Trade Operations, Finance (who provide billing and accounting services relating to the network), and Legal (who provide legal services relating to the network, such as rule filings and various license agreements and other contracts). As part of the extensive cost review conducted by the Exchange, the Exchange reviewed the amount of time spent by each employee on matters relating to the provision of services associated with the Proposed Access Fees. Without these employees, the Exchange would not be able to provide the services associated with the Proposed Access Fees to its Members and non-Members and their customers. The Exchange did not allocate all of the employee compensation and benefits expense toward the cost of the services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the services associated with the Proposed Access Fees, approximately 48% of the total employee compensation and benefits expense (39% allocated towards the cost of providing the provision of network connectivity and 9% allocated towards the cost of providing ports). The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.

MIAX Emerald's depreciation and amortization expense relating to providing the services associated with the Proposed Access Fees is projected to be $2,630,687, which is only a portion of the $3,812,590 total projected expense for depreciation and amortization. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network and provide the services associated with the Proposed Access Fees. Without this equipment, the Exchange would not be able to operate the network and provide the services associated with the Proposed Access Fees to its Members and non-Members and their customers. The Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing the services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the services associated with the Proposed Access Fees, approximately 69% of the total depreciation and amortization expense, as these services would not be possible without relying on such equipment (65% allocated towards the cost of providing the provision of network connectivity and 4% allocated towards the cost of providing ports). The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.

MIAX Emerald's occupancy expense relating to providing the services associated with the Proposed Access Fees is projected to be $246,648, which is only a portion of the $474,323 total projected expense for occupancy. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense represents the portion of the Exchange's cost to rent and maintain a physical location for the Exchange's staff who operate and support the network, including providing the services associated with the Proposed Access Fees. This amount consists primarily of rent for the Exchange's Princeton, NJ office, as well as various related costs, such as physical security, property management fees, property taxes, and utilities. The Exchange operates its Network Operations Center (''NOC'') and Security Operations Center (''SOC'') from its Princeton, New Jersey office location. A centralized office space is required to house the staff that operates and supports the network. The Exchange currently has approximately 150 employees. Approximately two-thirds of the Exchange's staff are in the Technology department, and the majority of those staff have some role in the operation and performance of the services associated with the Proposed Access Fees. Without this office space, the Exchange would not be able to operate and support the network and provide the services associated with the Proposed Access Fees to its Members and non-Members and their customers. Accordingly, the Exchange believes it is reasonable to allocate the identified portion of its occupancy expense because such amount represents the Exchange's actual cost to house the equipment and personnel who operate and support the Exchange's network infrastructure and the services associated with the Proposed Access Fees. The Exchange did not allocate all of the occupancy expense toward the cost of providing the services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to operating and supporting the network, approximately 52% of the total occupancy expense (48% allocated towards the cost of providing the provision of network connectivity and 4% allocated towards the cost of providing ports). The Exchange believes this allocation is reasonable because it represents the Exchange's cost to provide the services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.

The Exchange notes that a material portion of its total overall expense is allocated to the provision of services associated with the Proposed Access Fees. The Exchange believes this is reasonable and in line, as the Exchange operates a technology-based business that differentiates itself from its competitors based on its trading systems that rely on its high performance network, resulting in significant technology expense. Over two-thirds of Exchange staff are technology-related employees. The majority of the Exchange's expense is technology-based. As described above, the Exchange has only four primary sources of fees in to recover its costs, thus the Exchange believes it is reasonable to allocate a material portion of its total

overall expense towards the Proposed Access Fees.

The Exchange's monthly projected revenue for the Proposed Access Fees is based on the following projected purchases by Members and non-Members, which is based on a recent billing cycle: (i) 62 10Gb ULL connections; (ii) 14 CTD Ports; (iii) 8 FXD Ports; (iv) 113 FIX Ports; (v) 363 Limited Service MEI Ports; (vi) 37 Full Service MEI Ports; [50] and (vii) 10 Purge Ports. As described above, the fee charged to each Market Maker for MEI Ports can vary from month to month depending on the number of classes in which the Market Maker was assigned to quote on any given day within the calendar month, and upon certain class volume percentages. The Exchange also provides a further discount for a Market Maker's MEI Port fees if the Market Maker's total monthly executed volume during the relevant month is less than 0.025% of the total monthly executed volume reported by OCC in the customer account type for MIAX Emerald-listed option classes for that month. The Exchange has at least one Member consistently quoting in the highest tier for MEI Port fees, but receiving this discount, resulting in lower revenue for the Exchange. Further, the projected revenue from FIX Port fees is subject to change from month to month depending on the number of FIX Ports purchased.

Accordingly, based on current assumptions and approximations, the Exchange projects total monthly Port revenue (including the Additional Limited Service MEI Port revenue described above and the cancellation of Ports by one Member) of approximately $268,200 and total 10Gb ULL connectivity revenue of approximately $620,000 (including the cancellation of one 10Gb ULL connection by one Member). The Exchange notes that the port revenue projections are subject to change depending on the number of classes that Market Makers are quoting in and the tiers achieved. As such, the projection of $268,200 per month is not a static number and can fluctuate month to month. Further, as noted above, one Member dropped its connections and ports as a direct result of the introduction of the Proposed Access Fees. Accordingly, reflecting that cancellation of approximately $324,000 per year ($27,000 total per month in connectivity and port fees), and including the revenue from the proposed Additional Limited Service MEI Ports, the Exchange projects annualized revenue of approximately $10,658,400 from all connectivity alternatives and port types.[51] This is broken down as follows:

- $268,200/month × 12 months = $3,218,400/annually for all ports (including the subtraction of one Member who dropped ports, plus the Additional LSPs described above)
- $620,000/month × 12 months = $7,440,000/annually for all connectivity (including the subtraction of one Member who dropped its 10Gb ULL connection)
- $3,218,400 + $7,440,000 = $10,658,400/annually for the Proposed Access Fees

Accordingly, based on the facts and circumstances presented, the Exchange believes that its provision of the services associated with the Proposed Access Fees will not result in excessive pricing or supra-competitive profit. As described above, on a going-forward, fully-annualized basis, the Exchange projects that its annualized revenue for providing the services associated with the Proposed Access Fees would be approximately $10,658,400, based on a recent billing cycle. The Exchange projects that its annualized expense for providing the services associated with the Proposed Access Fees would be approximately $9.3 million per annum. Accordingly, on a fully-annualized basis, the Exchange believes its total projected revenue for the providing the services associated with the Proposed Access Fees will not result in excessive pricing or supra-competitive profit, as the Exchange will make only a 12.7% profit margin on the Proposed Access Fees ($10,658,400 − $9.3 million = $1,358,400 per annum). This profit margin does not take into account the cost of the CapEx the Exchange projected to spend in 2020 of $1.85 million on the project to make the Exchange's network more deterministic, or the amounts the Exchange is projected to spend each year on CapEx going forward for that project. This profit margin also does not take into account the cost of the CapEx of $175,000 for adding the six Additional Limited Service MEI Ports.

For the avoidance of doubt, none of the expenses included herein relating to the services associated with the Proposed Access Fees relate to the provision of any other services offered by MIAX Emerald. Stated differently, no expense amount of the Exchange is allocated twice. The Exchange notes that, with respect to the MIAX Emerald expenses included herein, those expenses only cover the MIAX Emerald market; expenses associated with the Exchange's affiliate exchanges, MIAX and MIAX Pearl, are accounted for separately and are not included within the scope of this filing. Stated differently, no expense amount of the Exchange is also allocated to MIAX or MIAX Pearl.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to allocate the respective percentages of each expense category described above towards the total cost to the Exchange of operating and supporting the network, including providing the services associated with the Proposed Access Fees because the Exchange performed a line-by-line item analysis of all the expenses of the Exchange, and has determined the expenses that directly relate to operation and support of the network. Further, the Exchange notes that, without the specific third-party and internal items listed above, the Exchange would not be able to operate and support the network, including providing the services associated with the Proposed Access Fees to its Members and non-Members and their customers. Each of these expense items, including physical hardware, software, employee compensation and benefits, occupancy costs, and the depreciation and amortization of equipment, have been identified through a line-by-line item analysis to be integral to the operation and support of the network. The Proposed Access Fees are intended to recover the Exchange's costs of operating and supporting the network. Accordingly, the Exchange believes that the Proposed Access Fee Increases are fair and reasonable because they do not result in excessive pricing or supra-competitive profit, when comparing the actual network operation and support costs to the Exchange versus the projected annual revenue from the Proposed Access Fees, including the increased amount.

The Exchange also points out that it is not seeking to recoup any of its past costs associated with the provision of any Ports during the Waiver Period. The

[50] The Exchange's projections included 9 firms or their affiliates purchasing Full Service MEI Ports. Of those firms, the Exchange projects that 6 firms will achieve the highest tier in the MEI Port fee table, 2 firms will achieve the lowest tier in the MEI Port fee table, and 1 firm will achieve the middle tier in the MEI Port fee table.

[51] This revenue projection includes revenue from all connectivity sources, including all 10Gb ULL connections discussed above (after giving effect to the recent cancellation), two 1Gb connections (the Exchange is not increasing fees for 1Gb connections, however, those connections are included in total connectivity revenue in order to have a true comparison between all connectivity revenue and all connectivity expense), and all port types discussed above (after giving effect to the recent cancellation).

Exchange currently has 35 Members,[52] all of whom did not pay Port fees during the Waiver Period from the time these firms all became Members of the Exchange. Further, the majority of firms that are Members of the Exchange's affiliate options exchanges, MIAX and MIAX Pearl, also became Members of those exchanges during similar Waiver Periods for the MIAX and MIAX Pearl Port fees. Accordingly, the Exchange (and MIAX and MIAX Pearl) have assumed approximately 100% of the costs associated with providing Ports for the majority of Member firms of the Exchange, MIAX, and MIAX Pearl during their respective Waiver Periods. Accordingly, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory to now adopt Port fees that are reasonably related to (and designed to recover) the Exchange's cost associated with the provision of such Ports.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete.

Intra-Market Competition

The Exchange believes that the Proposed Access Fees do not place certain market participants at a relative disadvantage to other market participants because the Proposed Access Fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation of the Proposed Access Fees reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most, particularly since higher bandwidth consumption translates to higher costs to the Exchange.

Inter-Market Competition

The Exchange believes the Proposed Access Fees do not place an undue burden on competition on other SROs that is not necessary or appropriate. In particular, options market participants are not forced to connect to (and purchase market data from) all options exchanges. The Exchange had one of its member firms cancel its membership with the Exchange as a direct result of the Proposed Access Fees. The Exchange also notes that it has far less Members as compared to the much greater number of members at other options exchanges. Not only does MIAX Emerald have less than half the number of members as certain other options exchanges, but there are also a number of the Exchange's Members that do not connect directly to MIAX Emerald. There are a number of large market makers and broker-dealers that are members of other options exchange but not Members of MIAX Emerald. The Exchange is also unaware of any assertion that its existing fee levels or the Proposed Access Fees would somehow unduly impair its competition with other options exchanges. To the contrary, if the fees charged are deemed too high by market participants, they can simply disconnect, as described above.

The Exchange operates in a highly competitive market in which market participants can readily favor one of the 15 competing options venues if they deem fee levels at a particular venue to be excessive. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% market share. Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. For the month of December 2020, the Exchange had a market share of approximately 3.58% of executed multiply-listed equity options[53] and the Exchange believes that the ever-shifting market share among exchanges from month to month demonstrates that market participants can discontinue or reduce use of certain categories of products, or shift order flow, in response to fee changes. In such an environment, the Exchange must continually adjust its fees and fee waivers to remain competitive with other exchanges and to attract order flow to the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[54] and Rule 19b–4(f)(2)[55] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–EMERALD–2021–11 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–EMERALD–2021–11. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments

[52] *See https://www.miaxoptions.com/exchange-members/emerald.*

[53] *See supra* note 39.

[54] 15 U.S.C. 78s(b)(3)(A)(ii).

[55] 17 CFR 240.19b–4(f)(2).

received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EMERALD–2021–11 and should be submitted on or before April 29, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[56]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–07194 Filed 4–7–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91471; File No. SR–NYSE–2020–85]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval to a Proposed Rule Change, as Modified by Amendment No. 1, To Amend the NYSE Listed Company Manual To Revise the Shareholder Approval Requirements in Sections 312.03 and 312.04 and the Requirements for Related Party Transactions in Section 314.00

April 2, 2021.

On December 16, 2020, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''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 amend the NYSE Listed Company Manual (''Manual'') to revise the shareholder approval requirements in Sections 312.03 and 312.04 and the requirements for related party transactions in Section 314.00. The Commission published notice of the proposed rule change in the **Federal Register** on January 4, 2021.[3] On February 12, 2021, pursuant to Section 19(b)(2) of the Exchange Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] The Commission has received no comment letters on the proposal. On March 30, 2021, the Exchange filed Amendment No. 1 to the proposed rule change.[6] The Commission is publishing notice of the filing of Amendment No. 1 to solicit comment from interested persons and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

I. Description of the Proposal, as Modified by Amendment No. 1

The Exchange is proposing to amend its shareholder approval rules for issuances of securities to certain related parties, as set forth in Section 312.03(b) of the Manual. Section 312.03(b) of the Manual currently requires shareholder approval prior to certain issuances of common stock, or securities convertible into or exercisable for common stock, to: (1) A director, officer, or substantial security holder[7] of the company (each a ''related party'' for purposes of current Section 312.03(b)); (2) a subsidiary, affiliate, or other closely related person of a related party; or (3) any company or entity in which a related party has a substantial direct or indirect interest. Such shareholder approval is subject to an exemption for early stage companies set forth in Section 312.03(b) of the Manual.

Under Section 312.03(b) of the Manual, prior shareholder approval is currently required if the number of shares of common stock to be issued, or if the number of shares of common stock into which the securities may be convertible or exercisable, exceeds either one percent of the number of shares of common stock or one percent of the voting power outstanding before the issuance. A limited exception to these shareholder approval requirements permits cash sales relating to no more than five percent of the number of shares of common stock or voting power outstanding that meet a minimum price test set forth in the rule (''Minimum Price'')[8] if the related party in the transaction has related party status solely because it is a substantial security holder of the company.

The Exchange is proposing several changes to Section 312.03(b) of the Manual. The Exchange states that these changes would bring its shareholder approval requirements into closer alignment with those of Nasdaq and NYSE American.[9] First, the Exchange proposes to modify the class of persons with respect to which an issuance of common stock would require a listed

[56] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 90803 (December 28, 2020), 86 FR 0148.

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 91126, 86 FR 10362 (February 19, 2021).

[6] In Amendment No. 1, the Exchange: (1) Revised the proposed rule text in Section 312.03(b)(3) of the Manual to state that shareholder approval would be required for issuances of stock to Related Parties that exceed one percent of the common stock or the voting power outstanding before the issuance, other than cash sales for a price that is at least the Minimum Price (defined herein); (2) revised the proposed rule text in Section 312.03(c)(2) of the Manual to state that shareholder approval is required for securities issued in connection with an acquisition of the stock or assets of another company if the issuance of securities, when alone or combined with any other present or potential issuance of common stock or securities convertible into common stock in connection with such acquisition, is equal to or exceeds either 20 percent of the number of shares of common stock or 20 percent of the voting power before the issuance; (3) revised the proposed rule text in Section 314.00 of the Manual to state that a company's audit committee or another independent body of the board of directors shall conduct a reasonable prior review of related party transactions, and will prohibit a transaction if it determines it to be inconsistent with the interests of the company and its shareholders; (4) revised the proposed rule text in Section 314.00 of the Manual to state that, for the purposes of Section 314.00, the term ''related party transactions'' will not apply the transaction value threshold under Item 404 of Regulation S–K or the materiality threshold under Form 20–F, Item 7.B, as applicable; (5) clarified the discussion regarding the applicability of Section 312.03(b); (6) clarified that, under Nasdaq and NYSE American rules, stock sales may be subject to shareholder approval under equity compensation rules; (7) deleted a description of certain requirements of Section 312.03(b) that the Exchange has proposed to delete because they relate to the early stage company exemption that would no longer be applicable; (8) clarified that the Exchange believes that Section 312.03(c) would cause any significantly economically dilutive transaction to be subject to shareholder approval; (9) clarified that the amendments to Section 312.03(c) would remove a limitation that participation in a financing under the exception is available only to multiple purchasers; and (10) made other clarifying, conforming, and technical changes. Amendment No. 1 is available at *https://www.sec.gov/rules/sro/nyse/nysearchive/nysearchive2020.htm.*

[7] For purposes of Section 312.03, Section 312.04(e) provides that: ''[a]n interest consisting of less than either five percent of the number of shares of common stock or five percent of the voting power outstanding of a company or entity shall not be considered a substantial interest or cause the holder of such an interest to be regarded as a substantial security holder.''

[8] Section 312.04(i) defines the ''Minimum Price'' as follows: ''Minimum Price'' means a price that is the lower of: (i) The Official Closing Price immediately preceding the signing of the binding agreement; or (ii) the average Official Closing Price for the five trading days immediately preceding the signing of the binding agreement. As proposed, Section 312.04(j) defines ''Official Closing Price'' as follows: ''Official Closing Price'' of the issuer's common stock means the official closing price on the Exchange as reported to the Consolidated Tape immediately preceding the signing of a binding agreement to issue the securities. For example, if the transaction is signed after the close of the regular session at 4:00 p.m. Eastern Standard Time on a Tuesday, then Tuesday's official closing price is used. If the transaction is signed at any time between the close of the regular session on Monday and the close of the regular session on Tuesday, then Monday's official closing price is used. The Exchange is proposing to correct a typographical error in the definition of ''Official Closing Price.''

[9] *See* Amendment No. 1, *supra* note 6, at 4.

company to seek shareholder approval. Specifically, Section 312.03(b) as amended would require prior shareholder approval for certain issuances of common stock to directors, officers, and substantial security holders of the company (each a ''Related Party'') and would no longer require such approval for issuances to such Related Parties' subsidiaries, affiliates or other closely related persons or to any companies or entities in which a Related Party has a substantial interest (except where a Related Party has a five percent or greater interest in the counterparty, as described below).

In addition, the Exchange has proposed to amend Section 312.03(b) to require shareholder approval of cash sales to Related Parties only if the price is less than the Minimum Price. Issuances to Related Parties in non-cash transactions relating to more than one percent of the issuer's common stock or voting power outstanding before the issuance would continue to be subject to shareholder approval.[10] Cash sales to a Related Party relating to more than one percent of the issuer's common stock or voting power prior to the issuance for prices below the Minimum Price would continue to be subject to shareholder approval under Section 312.03(b). Cash sales to Related Parties that meet the Minimum Price requirement would be subject to the same limitations as cash sales to all other investors under the proposed amended Section 312.03(c), as described below. In addition, certain issuances to a Related Party that meet the Minimum Price could also be subject to shareholder approval under proposed Section 312.03(b)(ii). The Exchange proposes Section 312.03(b)(ii) to require shareholder approval of any transaction or series of related transactions in which any Related Party has a five percent or greater interest (or such persons collectively have a 10 percent or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction and the present or potential issuance of common stock, or securities convertible into common stock, could result in an increase in either the number of shares of common stock or voting power outstanding of five percent or more before the issuance.

Finally, the Exchange proposes to delete from Section 312.03(b) two provisions that it states will no longer be relevant as they relate to transactions that benefit from exemptions from shareholder approval under current Section 312.03(b), but would be exempt from shareholder approval under the general application of Section 312.03(b) as proposed to be amended. These provisions relate to: (1) Cash sales meeting the Minimum Price test and relating to no more than five percent of the number of shares of common stock or five percent of the voting power outstanding before the issuance to a Related Party where the Related Party involved in the transaction is classified as such solely because such person is a substantial security holder; and (2) the early stage company exemption, to which the Exchange proposes to remove the reference from Section 312.04. The Exchange states that, for the same reason, the Exchange proposes to delete from Section 312.03(b) a sentence that provides that the early stage company exemption is not applicable to a sale of securities by the listed company to any person subject to the provisions of Section 312.03(b) in a transaction, or series of transactions, whose proceeds will be used to fund an acquisition of stock or assets of another company where such person has a direct or indirect interest in the company or assets to be acquired or in the consideration to be paid for such acquisition.

The Exchange states that Section 312.03(b) would continue to require that any sale of stock to an employee, director, or service provider is also subject to the equity compensation rules in Section 303A.08 of the Manual and that shareholder approval would be required if any of the subparagraphs of Section 312.03 require such approval, notwithstanding that the transaction does not require approval under Section 312.03(b) or one or more of the other subparagraphs.

In addition, the Exchange is proposing changes to Section 312.03(c) of the Manual, which currently requires shareholder approval of any transaction relating to 20 percent or more of the company's outstanding common stock or 20 percent of the voting power outstanding before such issuance, but provides the following exceptions: (1) Any public offering for cash; and (2) any bona fide private financing involving a cash sale of the company's securities that comply with the Minimum Price requirement. As set forth in Section 312.04(g), a ''bona fide private financing'' refers to a sale in which either: (1) A registered broker-dealer purchases the securities from the issuer with a view to the private sale of such securities to one or more purchasers; or (2) the issuer sells the securities to multiple purchasers, and no one such purchaser, or group of related purchasers, acquires, or has the right to acquire upon exercise or conversion of the securities, more than five percent of the shares of the issuer's common stock or more than five percent of the issuer's voting power before the sale.

The Exchange proposes to replace the reference to ''bona fide private financing'' in Section 312.03(c) with ''other financing (that is not a public offering for cash) in which the company is selling securities for cash.'' [11] This change would eliminate the requirement that, for the exception, the issuer sell the securities to multiple purchasers, and that no one such purchaser, or group of related purchasers, acquires more than five percent of the issuer's common stock or voting power.[12] In addition, the Exchange states that, because any sale to a broker-dealer under the current bona fide private financing exception would also qualify for an exception to shareholder approval under the proposed amended exception, there is no need to retain a separate provision for sales made to broker-dealers.[13] The Exchange also proposes to amend Section 312.03(c) to provide that, if the securities in a financing (that is not a public offering for cash) in which the company is selling securities for cash are issued in connection with an acquisition of the stock or assets of another company, shareholder approval will be required if the issuance of the securities alone or when combined with any other present or potential issuance of common stock in connection with such acquisition, is equal to or exceeds either 20 percent of the number of shares of common stock or 20 percent of the voting power outstanding before the issuance. Additionally, as the ''bona fide private financing'' term will no longer be used in Section 312.03(c), the Exchange proposes to delete the definition of that term in Section 312.04(g). The Exchange states that these changes would bring its shareholder requirements into closer alignment with those of Nasdaq and NYSE American.[14]

The Exchange is also proposing to delete Section 312.03T, which was adopted to provide temporary relief from certain of the requirements of Section 312.03 during the COVID–19 pandemic, and which was applicable by

[10] *See id.* at 4.

[11] As described above, Section 312.03(c) of the Manual also provides an exception from the shareholder approval requirements of Section 312.03(c) for any public offering for cash.

[12] NYSE stated in its proposal that while the proposed amended exemption would not limit the size of any transaction that meets the Minimum Price test, any such transaction giving rise to a change of control will be subject to shareholder approval under Section 312.03(d). *See* Amendment No. 1, *supra* note 6, at n. 9.

[13] *See id.* at 9.

[14] *See* Amendment No. 1, *supra* note 6, at 4.

its terms through June 30, 2020. As that date has passed, the Exchange has proposed to delete Section 312.03T in its entirety, as it is no longer applicable.

Finally, the Exchange is proposing to amend Section 314.00 of the Manual, which currently provides that related party transactions normally include transactions between officers, directors, and principal shareholders and the company and that each related party transaction is to be reviewed and evaluated by an appropriate group within the listed company involved. The current rule further states that, while the Exchange does not specify who should review related party transactions, the Exchange believes that the audit committee or another comparable body might be considered as an appropriate forum for this task.

The Exchange proposes to amend the first paragraph of Section 314.00[15] by stating that, for purposes of Section 314.00, the term ''related party transaction'' refers to transactions required to be disclosed pursuant to Item 404 of Regulation S–K under the Exchange Act (but without applying the transaction value threshold under that provision), and, in the case of foreign private issuers, the term ''related party transaction'' refers to transactions required to be disclosed pursuant to Form 20–F, Item 7.B (but without regard to the materiality threshold of that provision).[16]

In addition, the Exchange proposes to amend Section 314 to state that the company's audit committee[17] or another independent body of the board of directors shall conduct a reasonable prior review and oversight of all related party transactions for potential conflicts of interest and will prohibit such a transaction if it determines it to be inconsistent with the interests of the company and its shareholders.[18]

[15] The second paragraph of Section 314.00 will be retained in its entirety. It reads as follows: ''The Exchange will continue to review proxy statements and other SEC filings disclosing related party transactions and where such situations continue year after year, the Exchange will remind the listed company of its obligation, on a continuing basis, to evaluate each related party transaction and determine whether or not it should be permitted to continue.''

[16] *See* Item 404 of Regulation S–K (Transactions with related persons, promoters and certain control persons) [17 CFR 229.404] and Item 7.B of Form 20–F (Related party transactions) [referenced in 17 CFR 249.220f].

[17] Section 303A.07 of the Manual requires that all members of an audit committee must satisfy independence requirements set out in Section 303A.02 of the Manual and, in the absence of an applicable exemption, Rule 10A–3(b)(1) of the Exchange Act.

[18] The Exchange proposes to delete from Section 314.00 a sentence that reads as follows: ''Following the review, the company should determine whether or not a particular relationship serves the best interests of the company and its shareholders and whether the relationship should be continued or eliminated.'' The Exchange states that this sentence is no longer necessary; the proposed amended rule requires the audit committee or other independent body of the board to prohibit any related party transaction it reviews if it determines it to be inconsistent with the interests of the company and its shareholders. *See* Amendment No. 1, *supra* note 6, at n. 11.

II. Discussion and Commission Findings

The Commission has carefully reviewed the proposed rule change, as modified by Amendment No. 1, and finds that it is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.[19] In particular, the Commission finds that the proposed rule change, as modified by Amendment No 1, is consistent with Section 6(b)(5) of the Exchange Act,[20] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, 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 are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The development and enforcement of meaningful corporate governance listing standards for a national securities exchange is of substantial importance to financial markets and the investing public, especially given investor expectations regarding the nature of companies that have achieved an exchange listing for their securities. The corporate governance standards embodied in the listing standards of national securities exchanges, in particular, play an important role in assuring that exchange-listed companies observe good governance practices including safeguarding the interests of shareholders with respect to certain potentially dilutive transactions.[21]

As discussed above, the Exchange has proposed to limit the shareholder approval requirements of Section 312.03(b) to a Related Party that is a director, officer, or substantial security holder,[22] and no longer require shareholder approval under this provision for issuances to subsidiaries, affiliates, or other closely-related persons of the Related Party or any company or entity in which a Related Party has a substantial interest except where the Related Party has a five percent or greater interest in the company or assets to be acquired or in the consideration to be paid and the issuance falls within the scope of proposed Section 312.03(b)(ii). Section 312.03(b) would also no longer require shareholder approval for cash sales to Related Parties at or above the Minimum Price.[23] Under proposed Section 312.03(b)(ii), shareholder approval would be required for an issuance of common stock or securities convertible into or exercisable for common stock where such securities are issued as consideration in a transaction or series of related transactions in which any Related Party has a five percent or greater interest (or such persons collectively have a 10 percent or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction and the present or potential issuance of common stock, or securities convertible into common stock, could result in an increase in outstanding common shares of five percent or more, or where otherwise required under the

[19] 15 U.S.C. 78f. In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[20] 15 U.S.C. 78f(b)(4) and (5).

[21] *See, e.g.,* Securities Exchange Act Release No. 84287 (September 26, 2018), 83 FR 49599 (October 2, 2018) (NASDAQ–2018–008) (approving a Nasdaq proposal to change to the definition of market value for purposes of the shareholder approval rule and eliminate the requirement for shareholder approval of issuances at less than book value but greater than market value); Securities Exchange Act Release No. 76814 (December 31, 2015), 81 FR 0820 (January 7, 2016) (NYSE–2015–02) (approving amendments to the Manual to exempt early stage companies from requirements to obtain shareholder approval in certain circumstances) (''2015 Approval Order''). *See also* Securities Exchange Act Release No. 48108 (June 30, 2003), 68 FR 39995 (July 3, 2003) (approving equity compensation shareholder approval rules of both the NYSE and the National Association of Securities Dealers, Inc. n/k/a NASDAQ); and Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (approving registration of BATS Exchange, Inc. noting that qualitative listing requirements including shareholder approval rules are designed to ensure that companies trading on a national securities exchange will adequately protect the interest of public shareholders).

[22] *See supra* note 7 (defining ''substantial security holder'').

[23] Specifically, Section 312.03(b) would no longer require shareholder approval of cash sales at or above Minimum Price where the number of shares of common stock into which the securities may be convertible or exercisable, exceeds: (i) One percent of the number of shares of common stock or one percent of the voting power outstanding before the issuance; or (ii) in the case of a cash sale to a Related Party that has that status solely because such person is a substantial security holder, five percent of the number of shares of common stock or five percent of the voting power outstanding before the issuance. The Exchange would continue to require shareholder approval for all non-cash sales to Related Parties that exceed one percent of the number of shares of common stock or one percent of the voting power outstanding before the issuance.

Exchange's rules.[24] The Exchange states that it believes that current requirements in Section 312.03(b) can make it unnecessarily difficult for listed companies to raise necessary capital in private placement transactions that are in the interests of the company and its shareholders.[25]

The Exchange states that the proposed changes would bring its shareholder approval requirements into closer alignment with other exchanges, namely Nasdaq and NYSE American.[26] The Exchange notes that Nasdaq and NYSE American rules contain substantively identical requirements to those the Exchange is proposing for transactions in which a Related Party has an interest in the company or assets to be acquired or the consideration to be paid in the transaction.[27] The Exchange also states that, unlike NYSE, Nasdaq and NYSE American rules do not have a separate shareholder approval requirement for cash sales to a Related Party that do not meet the Minimum Price requirement and that relate to more than one percent of the issuer's common stock or voting power, although such sales may also be subject to shareholder approval requirements under the exchanges' equity compensation rules.[28] In addition, Nasdaq and NYSE American rules do not include shareholder approval requirements specifically for issuances to subsidiaries, affiliates, or closely related persons of Related Parties or to companies or entities in which a Related Party has a substantial interest unless the Related Party has a five percent or greater interest in the company or assets to be acquired or consideration to be paid in the transaction.[29] Accordingly, the Exchange states that it believes that its proposal to limit the Related Party requirements to directors, officers, and substantial security holders would harmonize its rules with Nasdaq and NYSE American requirements.[30]

The Commission believes that the proposed amendments to Section 312.03(b) to change the circumstances under which shareholder approval is required for issuances to Related Parties, and where shareholder approval is required for issuances based on certain relationships with a Related Party, are consistent with Section 6(b)(5) of the Exchange Act. Although the circumstances of when shareholder approval is required under Section 312.03(b) of the Manual will be modified by the proposal, there will continue to be other protections for shareholders. The Exchange's rules provide that, notwithstanding that the transaction does not require approval under Section 312.03(b), shareholder approval is required if any of the subparagraphs of Section 312.03 require such approval.[31] As described above, regardless of the Minimum Price, the Exchange is proposing to require shareholder approval of any transaction or series of related transactions in which any Related Party has a five percent or greater interest (or such persons collectively have a 10 percent or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction and the present or potential issuance of common stock, or securities convertible into common stock, could result in an increase in outstanding common shares of five percent or more.[32] This provision therefore would require shareholder approval under the conditions described above in circumstances where the transaction is priced at or above the Minimum Price as well as below the Minimum Price.[33] Section 312.03(c) would also continue to require shareholder approval for any non-cash issuances of 20 percent or more of the issuer's common stock or voting power and any financing (that is not a public offering for cash) involving cash sales relating to 20 percent or more of the issuer's common stock or voting power for less than the Minimum Price.[34] Under the proposal, Section 312.03(c) will also require shareholder approval of all cash sales in connection with an acquisition of the stock or assets of another company relating to 20 percent of the issuer's common stock or voting power even if the issuance meets the Minimum Price.[35] The Exchange also states that Section 312.03(c) applies to any transaction or series of related transactions, which provides shareholders with further protection by ensuring that a company cannot avoid the shareholder approval requirement by separating an overall transaction into smaller separate transactions that would not individually require shareholder approval. In addition, any sale that gives rise to a change of control will be subject to shareholder approval under Section 312.03(d), a sale of stock to an employee, director, or service provider would continue to be subject to the equity compensation shareholder approval rules in Section 303A.08 of the Manual, and shareholder approval will be required if a vote is required under any other applicable provision of the Exchange's rules. As to cash sales of more than one percent of common stock or voting power to directors, officers, and substantial security holders below Minimum Price, Section 312.03(b) will continue to require shareholder approval for such issuances to these Related Parties.[36] Section 312.03(b) will also continue to require shareholder approval for non-cash issuances of more than one percent of the number of shares of common stock or the voting power outstanding before the issuance to such Related Parties.[37]

Furthermore, Section 314.00 of the Manual, concerning review of related party transactions, as proposed to be

[24] The Exchange temporarily waived certain requirements under Section 312.03 to provide listed companies with greater flexibility to raise capital during the COVID–19 crisis from April 6, 2020 through March 31, 2021. Particularly, pursuant to the waiver, the Exchange allowed companies to sell their securities for cash to related parties and other persons subject to Section 312.03(b) under certain conditions without complying with the numerical limitations of that rule, as long as the sale in the cash transaction met the Minimum Price requirements, and other applicable requirements of the Exchange's rules. *See* Securities Exchange Act Release No. 88572 (April 6, 2020), 85 FR 20323 (April 10, 2020) (SR–NYSE–2020–30) (waiving certain requirements of Section 312.03 through June 30, 2020). *See also* Securities Exchange Act Release No. 89219 (July 2, 2020), 85 FR 41640 (July 10, 2020) (SR–NYSE–2020–58) (extending the waiver through September 30, 2020). *See also* Securities Exchange Act Release No. 90020 (September 28, 2020), 85 FR 62357 (October 2, 2020) (SR–NYSE–2020–79) (extending the waiver through December 31, 2020). *See also* Securities Exchange Act Release No. 2712 (January 7, 2021), 86 FR 2712 (January 13, 2021) (SR–NYSE–2020–108) (extending the waiver through March 31, 2021) (''Waiver''). The Exchange also temporarily waived certain requirements for meeting the bona fide financing exception under Section 312.03(c). *See infra* note 44.

[25] *See* Amendment No. 1, *supra* note 6, at 4.

[26] *See id. See also* Nasdaq Marketplace Rule 5635 and NYSE American Company Guide Sections 712 and 713.

[27] *See* Amendment No. 1, *supra* note 6, at 8. *See* proposed Section 312.03(b)(ii).

[28] *See* Amendment No. 1, *supra* note 6, at 6.

[29] *See* Nasdaq Marketplace Rule 5635 and NYSE American Company Guide Sections 712 and 713.

[30] *See* Amendment No. 1, *supra* note 6, at 6.

[31] *See* proposed Section 312.03(b)(iii). *See also* Section 312.04(a).

[32] *See* proposed Section 312.03(b)(ii). The Exchange notes that this limitation is substantively identical to a limitation placed specifically on issuances to related parties in the Nasdaq and NYSE American rules. *See* Amendment No. 1, *supra* note 6, at 7

[33] Although NYSE is deleting its specific requirement for shareholder approval issuances to a subsidiary, affiliate, or other closely-related person of a Related Party, and any company or entity in which a Related Party has a substantial direct or indirect interest, shareholder approval for issuances to such entities could still be required if they meet the requirements of this new provision.

[34] *See infra* note 36 and accompanying text (discussing when shareholder approval is required for cash sales to Related Parties for below Minimum Price).

[35] *See* proposed Section 312.03(c). In determining whether the issuance is equal to or exceeds 20 percent, the rule provides that the issuance is combined with any other present or potential issuance of common stock or securities convertible into common stock in connection with the acquisition.

[36] *See* Section 312.03(b)(i).

[37] *See supra* note 10 and accompanying text.

amended, states that a company's audit committee or another independent body of the board of directors shall conduct a reasonable prior review and oversight of all related party transactions required to be reviewed [38] for potential conflicts of interest and will prohibit a related party transaction if it determines it to be inconsistent with the interests of the company and its shareholders.[39] The Commission has long acknowledged the important role an independent board committee has in protecting shareholders from potential conflicts of interest.[40] The Commission believes that prior independent committee review and oversight of certain related party transactions for conflicts of interest, with the requirement to prohibit transactions that are determined to be inconsistent with the interests of the company and its shareholders, is an additional safeguard to protect shareholder interests. Additionally, the Exchange has proposed to expand the types of related parties whose transactions will be subject to review under Section 314.00 of the Manual, as discussed in more detail below. This should help to ensure that related party transactions that can present conflicts of interest are within the scope of the Exchange's rule and will be reviewed by the audit committee or another independent body of the board.[41]

The Commission believes that the continued requirements for shareholder approval described above, including, among others, the new provision in Section 312.02(b)(ii), and the changes to the review of related party transactions in Section 314.00 of the Manual including, among others, expanding the scope of related parties whose transactions are covered by the rule,[42] on balance, should help to ensure continued shareholder protections. The Commission also notes that the changes to Section 312.03(b) of the Manual described above are consistent with the rules of two other national securities exchanges, Nasdaq and NYSE American.[43]

The Commission believes that the proposed amendments to Section 312.03(c) are consistent with Section 6(b)(5) of the Exchange Act. The proposed amendments to Section 312.03(c) do not change the rule as it relates to shareholder approval for issuances of 20 percent or more of the number of shares of the voting power or common stock outstanding before the issuance in non-cash transactions or to cash transactions for a price below the Minimum Price. The amendments would remove the requirements, under the bona fide private placement exception to Section 312.03(c), that cash sales at a price at least as great as Minimum Price must be to multiple purchasers and that a single purchaser may not acquire, or have the right to acquire more than five percent of the shares of the issuer's common stock or voting power.[44] The Exchange states that it believes that current Section 312.03(c) of the Manual can make it unnecessarily difficult for listed companies to raise necessary capital in private placement transactions that are in the interests of the company and its shareholders,[45] and that the proposed requirements would allow companies additional flexibility. The Exchange states that it believes that this change is consistent with the protection of investors because the Minimum Price requirement provides protection against economic dilution, while the separately applicable requirements of Section 312.03(d) provide that shareholders will have a vote on any transaction that would result in a change of control. The proposal also adds a new condition to the financing exception to the shareholder vote requirements under Section 312.03(c) by requiring shareholder approval if the securities being issued are in connection with an acquisition of the stock or assets of another company and the issuance either alone or in combination with any other present or potential issuance of common stock or securities convertible into common stock is equal to or exceeds 20 percent of the common stock or voting power outstanding before the issuance. Under the current bona fide private financing exception under the Exchange's existing rules, there was no such requirement. The new requirement will ensure that if a financing, other than a public offering for cash, involving a 20 percent issuance is for an acquisition, even if at the Minimum Price, there will be a shareholder vote on the matter. This new requirement can help to ensure that shareholders will get to vote on potentially dilutive transactions, whether voting dilution or otherwise, that may occur due to the acquisition.

The Exchange further states that the proposed amendments would make the Exchange's rules for cash sales of securities that meet the Minimum Price test substantively identical to those of Nasdaq and NYSE American.[46] The Commission is cognizant of the fact that the exchanges operate in a highly competitive environment, including with respect to the listing of issuers. In addition, shareholder approval will still be required if any issuance under the new financing provision results in a change of control or if a vote is required under any other applicable provisions, such as the equity compensation rules or the new Related Party provisions of Section 312.03(b)(ii).[47] The proposal will allow listed companies more flexibility to raise capital at market related prices without shareholder approval under Section 312.03(c) while still preserving protections for shareholders through the other shareholder approval requirements as well as promoting fair competition among exchanges given that NASDAQ and NYSE American have substantially identical provisions.

Additionally, the proposed amendments to Section 314.00 are consistent with investor protection pursuant to Section 6(b)(5) of the Exchange Act. By defining the term ''related party transaction'' by reference to the Commission's disclosure rules, as discussed below, the amendment would provide greater clarity and transparency to when the review of a related party transaction would be required. The related party transactions required to be reviewed also would be expanded when compared to the current rule requirement which states ''related party transactions normally include transactions between officers, directors and principal shareholders and the

[38] *See infra* note 49 and accompanying text (describing proposed revisions to the related party transactions that must be reviewed under Section 314.00).

[39] *See supra* note 16.

[40] *See* 2015 Approval Order, *supra* note 21, 81 FR at n. 88.

[41] As discussed above, under Section 314.00 of the Manual, issuers have an obligation on a continuing basis to evaluate each related party transaction and determine whether or not it should be permitted to continue. *See supra* note 15.

[42] *See supra* notes 15–18 and accompanying text. *See also infra* note 49 and accompanying text.

[43] *See* Nasdaq Marketplace Rule 5635 and NYSE American Company Guide Sections 712 and 713.

[44] The Exchange had temporarily waived these requirements of Section 312.03(c) due to the COVID–19 crisis under certain conditions. *See* Waiver, *supra* note 24 (providing that a listed company would be exempt from the shareholder approval requirement of Section 312.03(c) in relation to a private placement transaction regardless of its size or the number of participating investors or the amount of securities purchased by any single investor, provided that the transaction is a sale of the company's securities for cash at a price that meets the Minimum Price requirement). The waiver did not apply to any sales of a listed company's securities where the use of the proceeds was to fund an acquisition. *See id.*

[45] *See* Amendment No. 1, *supra* note 6 at 4.

[46] *See* Amendment No. 1, *supra* note 6, at 9.

[47] *See* Section 312.04(a) (providing that. for the purpose of Section 312.03, shareholder approval is required if any of the subparagraphs of Section 312.03 require such approval, notwithstanding the fact that the transaction does not require approval under one or more of the other subparagraphs).

company.'' [48] Under the revised provisions, related party transactions refer to transactions required to be disclosed pursuant to Item 404 of Regulation S–K (but without applying the transaction value threshold of that provision) or for a foreign private issuer transactions required to be disclosed pursuant to Form 20–F, Item 7.B (but without regard to the materiality threshold of that provision) and these provisions include a broader group of persons than that listed in the current Exchange rule.[49] By proposing to require that transactions under the rule must be subject to prior review by either the audit committee or another body of independent directors, and that such body shall prohibit such a transaction if it determines it to be inconsistent with the interests of the company and its shareholders, the Exchange is adding more clarity to the rule's requirements. By removing the ambiguous language in the current rule that allowed a listed company flexibility in the kind of committee that it could choose to review related party transactions, as the Exchange stated in its proposal, this change will prevent a listed issuer from giving the role of reviewing transactions to any group that is not entirely made up of independent directors.[50]

Finally, it is consistent with the Exchange Act for the Exchange to remove Rule 312.03T, which is now obsolete, from the Exchange's rule text in order to provide greater transparency to the Exchange's rules and to avoid confusion.

III. Solicitation of Comments on Amendment No. 1 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 1 to the proposed rule change is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2020–85 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2020–85. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2020–85, and should be submitted on or before April 29, 2021.

IV. Accelerated Approval of the Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 1 in the **Federal Register**. The Commission notes that Amendment No. 1 clarifies the proposed rule change. Among other things, Amendment No. 1 amends the proposal to state or to clarify in the rule text: (1) That shareholder approval would be required for issuances of stock to Related Parties that exceed one percent of the common stock or the voting power outstanding before the issuance, except that shareholder approval will not be required if such transaction is a cash sale for a price that is at least the Minimum Price; (2) that shareholder approval is required for securities issued in connection with an acquisition of the stock or assets of another company if the issuance of securities, alone or when combined with any other present or potential issuance of common stock or securities convertible into common stock in connection with such acquisition, is equal to or exceeds either 20 percent of the number of shares of common stock or 20 percent of the voting power before the issuance; (3) that a company's audit committee or another independent body of the board of directors shall conduct a reasonable prior review of related party transactions, and will prohibit a transaction if it determines it to be inconsistent with the interests of the company and its shareholders; and (4) that, for the purposes of Section 314.00, the term ''related party transactions'' will not apply the transaction value threshold under Item 404 of Regulation S–K or the materiality threshold under Form 20–F, Item 7.B, as applicable.[51] The Exchange also made clarifying, conforming, and technical changes in the filing of the proposed rule change.[52] The Commission believes that the changes in Amendment No. 1 provide greater clarity to the proposal and should help to avoid any confusion as to the scope or application of the rule changes being adopted herein. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,[53] to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[54] that the proposed rule change (SR–NYSE–2020–85), as modified by Amendment No. 1, be, and it hereby is, approved on an accelerated basis.

[48] *See* current Section 314.00 of the Manual.

[49] Among other disclosures, Item 404 of Regulation S–K generally requires a description of any transaction in which the issuer was or is to be a participant that meets certain transaction value thresholds and in which any related party (including, for example, directors, executive officers, beneficial owners of more than five percent of any class of the issuer's voting securities, and their immediate family members) had or will have a direct or indirect material interest. Item 7.B of Form 20–F generally requires disclosure of transactions and loans between a foreign private issuer and certain categories of related parties (including, for example, directors, senior management, individuals with significant voting influence over the issuer, close family members of those categories of persons, and enterprises under common control). Required disclosure under Item 7.B includes the nature and extent of any transactions that are material to the company or the related party or that are unusual in their nature or conditions.

[50] *See* Amendment No. 1, *supra* note 6, at 12.

[51] *See supra* note 6.

[52] *See id.*

[53] 15 U.S.C. 78s(b)(2).

[54] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[55]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–07198 Filed 4–7–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91466; File No. SR–NYSEAMER–2021–16]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 985NY

April 2, 2021.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on March 29, 2021, 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 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 Rule 985NY (Qualified Contingent Cross Trade) to clarify the permissible trading differentials for such orders. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this rule change is to amend Rule 985NY(Qualified Contingent Cross Trade) to clarify the permissible trading differentials for such orders.

Rule 900.3NY(y) provides that a Qualified Contingent Cross or QCC Order must be comprised of an originating order to buy or sell at least 1,000 contracts that is identified as being part of a qualified contingent trade, coupled with a contra-side order or orders to buy or sell an equal number of contracts.[4] As Qualified Contingent Crosses, QCC Orders are automatically executed upon entry provided that the execution (i) is not at the same price as a Customer Order in the Consolidated Book and (ii) is at or between the NBBO.[5] In addition, QCC Orders may only be entered in the regular trading increments applicable to the options class under Rule 960NY (Trading Differentials).[6] Rule 960NY subsection (a) sets forth the minimum quoting increments for all options traded on the Exchange and subsection (b) sets forth the minimum trading increments of one cent ($0.01) for all series of option contracts traded on the Exchange.[7]

The Exchange proposes to modify Rule 985NY(2) to add reference to paragraph (b) of Rule 960NY in the text of the rule, which would make clear that QCCs may be entered in minimum trading increments of one cent ($0.01).[8] The Exchange believes this proposed change, which aligns with current functionality, would add clarity, transparency and internal consistency to Exchange rules.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[9] in general, and furthers the objectives of Section 6(b)(5) of the Act,[10] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, 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 modification—to make clear that QCC Orders may be entered and traded in minimum trading increments of a penny would promote just and equitable principles of trade, as well as serve to remove impediments to and perfect the mechanism of a free and open market because the proposed change clarifies existing functionality. In addition, the Exchange believes that the proposed rule change is consistent with other options order types and functionalities that are not displayed in OPRA's quote feed. For example, electronic paired auctions, which are not displayed in OPRA's quote feed before they are executed, provide for penny trading increments, regardless of the quoting increment of the options class.[11] As a result, the proposed change would not impact the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Specifically, as discussed above, the Exchange believes that the proposed change would align the rule text with current functionality. Thus, the Exchange does not believe the proposal creates any significant impact on competition.

[55] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] A ''qualified contingent trade'' is a transaction consisting of two or more component orders, executed as agent or principal, where: (i) At least one component must be an NMS Stock; (ii) all the components must be effected with a product price contingency that either has been agreed to by all the respective counterparties or arranged for by a broker-dealer as principal or agent; (iii) the execution of one component must be contingent upon the execution of all other components at or near the same time; (iv) the specific relationship between the component orders (*e.g.,* the spread between the prices of the component orders) must be determined by the time the contingent order is placed; (v) the component orders must bear a derivative relationship to one another, represent different classes of shares of the same issuer, or involve the securities of participants in mergers or with intentions to merge that have been announced or cancelled; and (vi) the transaction must be fully hedged (without regard to any prior existing position) as a result of other components of the contingent trade. *See* Commentary .01 to Rule 900.3NY.

[5] *See* Rule 985NY. QCC Orders that cannot be executed when entered will automatically cancel. *See* Rule 985NY(1).

[6] *See* Rule 985NY(2).

[7] *See* Rule 960NY(a) and (b), respectively. Paragraph (2) to Rule 985NY provides that QCCs ''may only be entered in the regular trading increments applicable to the options class under Rule 960NY.''

[8] *See* proposed Rule 985NY(2) (''Qualified Contingent Cross Orders may only be entered in the regular trading increments applicable to the options class under Rule 960NY(b)'').

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] *See, e.g.,* Rule 971.1NY(b)(7) (regarding the Customer Best Execution—or CUBE—auction and providing that ''CUBE Orders may be entered in $.01 increments regardless of the MPV of the series involved'').

Intramarket Competition. The proposed rule change would be applicable to all market participants that trade QCC Orders and therefore would not impose any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intermarket Competition. The Exchange believes that this proposed rule change will not have an impact on intermarket competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[12] and Rule 19b–4(f)(6) thereunder.[13] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[14] and subparagraph (f)(6) of Rule 19b–4 thereunder.[15]

A proposed rule change filed under Rule 19b–4(f)(6)[16] normally does not become operative prior to 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[17] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative upon filing. The Exchange believes a waiver is consistent with the protection of investors and the public interest because it would enable to Exchange to clarify current functionality for QCC Orders without delay. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing so that the benefits of this proposed rule change can be realized immediately.[18]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[19] to determine whether the proposed rule 195change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEAMER–2021–16 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–2021–16. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAMER–2021–16 and should be submitted on or before April 29, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–07199 Filed 4–7–21; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A)(iii).

[13] 17 CFR 240.19b–4(f)(6).

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[16] 17 CFR 240.19b–4(f)(6).

[17] 17 CFR 240.19b–4(f)(6)(iii).

[18] For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[19] 15 U.S.C. 78s(b)(2)(B).

[20] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #16913 and #16914; Alabama Disaster Number AL–00118]

Administrative Declaration of a Disaster for the State of Alabama

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Alabama dated 04/01/2021. *Incident:* Tornado. *Incident Period:* 01/25/2021 through 01/26/2021.

DATES: Issued on 04/01/2021.

Physical Loan Application Deadline Date: 06/01/2021.

Economic Injury (EIDL) Loan Application Deadline Date: 01/03/2022.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Jefferson.

Contiguous Counties: Alabama: Bibb, Blount, Saint Clair, Shelby, Tuscaloosa, Walker.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners with Credit Available Elsewhere	2.250
Homeowners without Credit Available Elsewhere	1.125
Businesses with Credit Available Elsewhere	6.000
Businesses without Credit Available Elsewhere	3.000
Non-Profit Organizations with Credit Available Elsewhere	2.000
Non-Profit Organizations without Credit Available Elsewhere	2.000
For Economic Injury:	
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	3.000
Non-Profit Organizations without Credit Available Elsewhere	2.000

The number assigned to this disaster for physical damage is 16913 C and for economic injury is 16914 0.

The State which received an EIDL Declaration # is Alabama.

(Catalog of Federal Domestic Assistance Number 59008)

Isabella Guzman,

Administrator.

[FR Doc. 2021–07227 Filed 4–7–21; 8:45 am]

BILLING CODE 8026–03–P

DEPARTMENT OF STATE

[Public Notice 11397]

Determination Pursuant to Section 451 of the Foreign Assistance Act for the Use of Funds To Support South Sudan

Pursuant to section 451 of the Foreign Assistance Act of 1961 (the ''Act'') (22 U.S.C. 2261), section 1–100(a)(1) of Executive Order 12163 and Delegation of Authority 245–2, I hereby authorize, notwithstanding any other provision of law, the use of up to $3,500,000 made available to carry out provisions of the Act (other than the provisions of chapter 1 of part I of the Act) to provide assistance authorized by part I of the Act to support countries that participate in the reconstituted Joint Monitoring and Evaluation Commission (RJMEC) and the Ceasefire and Transitional Security Arrangements Monitoring and Verification Mechanism (CTSAMVM) in South Sudan, as well as support to improve oversight of private security contractors working with the United Nations Mission in South Sudan (UNMISS).

This Determination and the accompanying Memorandum of Justification shall be promptly reported to the Congress. This Determination shall be published in the **Federal Register**.

Dated: March 15, 2021.

Daniel B. Smith,

Acting Deputy Secretary of State.

[FR Doc. 2021–07202 Filed 4–7–21; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF STATE

[Public Notice 11394]

U.S. Department of State Advisory Committee on Private International Law: Notice of Annual Meeting

The Department of State's Advisory Committee on Private International Law (ACPIL) will hold its annual meeting virtually on Tuesday, May 25, 2021, via WebEx. The program is scheduled to run from 12:30 p.m. to 5:00 p.m.

During the meeting, we will provide updates on key projects at the United Nations Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (Unidroit), and The Hague Conference on Private International Law (HCCH) and discuss possible U.S. private international law treaty priorities. We will also discuss the HCCH project on direct jurisdiction and parallel proceedings as well as current and proposed work, including by UNCITRAL and Unidroit, relating to the digital economy. If time allows other topics of interest could be discussed.

Members of the public may attend this virtual session and will be permitted to participate in the question and answer discussion period following the formal ACPIL presentation on each agenda topic in accordance with the Chair's instructions. Members of the public may also submit a brief statement (less than three pages) or comments to the committee in writing for inclusion in the public minutes of the meeting to *pil@state.gov.* Virtual attendance is limited to 100 persons, so members of the public that wish to attend this session must provide their name, contact information, and affiliation to *pil@state.gov,* not later than May 19, 2021. When you register, please indicate whether you require captioning. The WebEx link and agenda will be forwarded to individuals who register. Requests made after that date will be considered but might not be able to be fulfilled.

Sharla Draemel,

Attorney-Adviser, Executive Director of ACPIL, Office of Private International Law, Office of the Legal Adviser, Department of State.

[FR Doc. 2021–07210 Filed 4–7–21; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF STATE

[Public Notice 11384]

30-Day Notice of Proposed Information Collection: Advance Notification; Form: Tourist and Other Non-Governmental Activities in the Antarctic Treaty Area

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. 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 30 days for public comment.

DATES: Submit comments up to May 10, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to William Muntean, Senior Advisor for Antarctica, Office of Ocean and Polar Affairs, Room 2665, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State, 2201 C Street NW, Washington, DC 20520 or *Antarctica@state.gov.*

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* ADVANCE NOTIFICATION FORM: Tourist and Other Non-Governmental Activities in the Antarctic Treaty Area.
- *OMB Control Number:* 1405–0181.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* Bureau of Oceans and International Environmental and Scientific Affairs (OES/OPA).
- *Form Number:* DS–4131.
- *Respondents:* Operators of Antarctic expeditions organized in or proceeding from the United States.
- *Estimated Number of Respondents:* 25.
- *Estimated Number of Responses:* 25.
- *Average Time per Response:* 9 hours.
- *Total Estimated Burden Time:* 225 hours.
- *Frequency:* On occasion.
- *Obligation to Respond:* Required to comply with Article VII(5)(a) of the Antarctic Treaty and associated documents.

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

Information solicited on the Advance Notification Form (DS–4131) provides the U.S. Government with information on tourist and other non-governmental expeditions to the Antarctic Treaty area. The U.S. Government needs this information to comply with Article VII(5)(a) of the Antarctic Treaty and associated documents.

Methodology

The Form DS–4131 is available by download from the Department's website. The information will be submitted by U.S. organizers of tourist and other non-governmental expeditions to Antarctica by means of this form. The form should be submitted via email, although signed originals submitted by regular mail are also valid.

Kevin E. Bryant,

Deputy Director, Office of Directives of Management, Department of State.

[FR Doc. 2021–07259 Filed 4–7–21; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Requirements; Information Collection Renewal; Comment Request; Release of Non-Public Information

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a continuing information collection as required by the Paperwork Reduction Act of 1995 (PRA). In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC is soliciting comment concerning the renewal of its information collection titled, ''Release of Non-Public Information.''

DATES: You should submit written comments by June 7, 2021.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Chief Counsel's Office, Attention: Comment Processing, Office of the Comptroller of the Currency, Attention: 1557–0200, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Fax:* (571) 465–4326.

Instructions: You must include ''OCC'' as the agency name and ''1557–0200'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this information collection beginning on the date of publication of the second notice for this collection [1] by the following method:

- *Viewing Comments Electronically:* Go to *www.reginfo.gov.* Click on the ''Information Collection Review'' tab. Underneath the ''Currently under Review'' section heading, from the drop-down menu select ''Department of Treasury'' and then click ''submit.'' This information collection can be located by searching by OMB control number ''1557–0200'' or ''Release of Non-Public Information.'' Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.
- For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, OCC Clearance Officer, (202) 649–5490, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information that they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of title 44 requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB

[1] Following the close of this notice's 60-day comment period, the OCC will publish a second notice with a 30-day comment period.

for approval. To comply with this requirement, the OCC is publishing notice of the proposed collection of information set forth in this document.

Title: Release of Non-Public Information.

OMB Control No.: 1557–0200.

Abstract: The information collection requirements require individuals who are requesting non-public OCC information to provide the OCC with information regarding the legal grounds for the request. The release of non-public OCC information to a requester without sufficient legal grounds to obtain the information would inhibit open consultation between a bank and the OCC, thereby impairing the OCC's supervisory and regulatory mission. The OCC is entitled, under statute and case law, to require requesters to demonstrate that they have sufficient legal grounds for the OCC to release non-public OCC information. The OCC needs to identify the requester's legal grounds to determine if it should release the requested non-public OCC information.

The information requirements in 12 CFR part 4, subpart C, are as follows:

- 12 CFR 4.33: Request for non-public OCC records or testimony;
- 12 CFR 4.35(b)(3): Third parties requesting testimony;
- 12 CFR 4.37(a)(2): OCC former employee notifying OCC of subpoena;
- 12 CFR 4.37(a) and (b): Prohibition on dissemination of released information;
- 12 CFR 4.38(a) and (b): Restrictions on dissemination of released information; and
- 12 CFR 4.39(d): Request for authenticated records or certificate of nonexistence of records.

The OCC uses the information to process requests for non-public OCC information and to determine if sufficient grounds exist for the OCC to release the requested information or provide testimony that would include a discussion of non-public information. This information collection facilitates the processing of requests and expedites the OCC's release of non-public information and testimony to the requester, as appropriate.

Type of Review: Extension, without change, of a currently approved collection.

Affected Public: Businesses or other for-profit; individuals.

Number of Respondents: 2.

Frequency of Response: On occasion.

Total Annual Burden: 6 hours.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;

(b) The accuracy of the agency's estimate of the burden of the collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2021–07256 Filed 4–7–21; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

[Docket No.: OFAC–2021–0001]

Agency Information Collection Activities; Proposed Collection; Comment Request for Reporting, Procedures and Penalties Regulations

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently, the Office of Foreign Assets Control (OFAC) within the Department of the Treasury is soliciting comments concerning OFAC's information collection requirements contained within OFAC's Reporting, Procedures and Penalties Regulations.

DATES: Written comments must be submitted on or before June 7, 2021 to be assured of consideration.

ADDRESSES: You may submit comments by either of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions on the website for submitting comments.

Email: OFACreport@treasury.gov with Attn: Request for Comments (Reporting, Procedures and Penalties Regulations).

Instructions: All submissions received must include the agency name and refer to Docket Number OFAC–2021–0001 and the Office of Management and Budget (OMB) control number 1505–0164. Comments received will be made available to the public via *https://www.regulations.gov* or upon request, without change and including any personal information provided.

FOR FURTHER INFORMATION CONTACT: OFAC: Assistant Director for Licensing, 202–622–2480; Assistant Director for Regulatory Affairs, 202–622–4855; or Assistant Director for Sanctions Compliance & Evaluation, 202–622–2490.

SUPPLEMENTARY INFORMATION:

Title: Reporting, Procedures and Penalties Regulations.

OMB Number: 1505–0164.

Type of Review: Extension without change of a currently approved collection.

Description: The collections of information are contained in sections 501.601 through 501.605, 501.801, and 501.805 through 501.807 of OFAC's Reporting, Procedures and Penalties Regulations (the ''Regulations''), and certain other parts, and pertain to the operation of various economic sanctions programs administered by OFAC under 31 CFR chapter V. Section 501.601 addresses the maintenance of records and § 501.602 relates to OFAC demands for information relative to any transaction or property subject to the provisions of 31 CFR chapter V. Section 501.603 imposes reporting requirements pertaining to blocked property and retained funds, as well as property that is released from blocked status (unblocked property). This information is required by OFAC to monitor compliance with regulatory requirements, to support diplomatic negotiations concerning the targets of sanctions, and to support settlement negotiations addressing U.S. claims. Section 501.604 requires the filing of reports for compliance purposes by U.S. persons where a transaction is not required to be blocked but where processing or otherwise engaging in the transaction would nonetheless violate, or facilitate a transaction that is prohibited under, other provisions in 31 CFR chapter V. Section 501.605 requires reporting of information pertaining to litigation, arbitration, and other binding alternative dispute resolution proceedings in the United States to prevent the intentional or inadvertent transfer through such proceedings of

blocked property or retained funds. Sections 501.801 and 501.805 relate, respectively, to license requests and records requests. Section 501.806 sets forth the procedures to be followed by a person seeking to have funds unblocked at a financial institution if the person believes that the funds were blocked due to mistaken identity. Section 501.807 sets forth the procedures to be followed by a person seeking administrative reconsideration of a designation or of a vessel as blocked, or who wishes to assert that the circumstances resulting in the designation or blocking no longer apply.

The reports covered by this information collection will be reviewed by the U.S. Department of the Treasury and may be used for compliance, civil penalty, and enforcement purposes by the agency.

Forms: OFAC requires the submission of the Annual Report of Blocked Property (ARBP) through approved form: TD–F 90–22.50. OFAC also maintains voluntary forms for submission of certain other information required as a part of the information collections covered by this notice including the following approved forms: Report on Blocked Property—Financial, TD–F 93.02; Report on Blocked Property—Tangible/Real/Other Non-Financial Property, TD–F 93.08; Report on Rejected Transaction, TD–F 93.07; TSRA License Application, TD–F 93.04; and Licensing Cover Sheet, TD–F 98–22.61. Any other information collections covered by this notice do not have mandatory or voluntary forms.

Affected Public: Financial institutions, business organizations, individuals, and legal representatives.

Estimated Number of Respondents: OFAC's estimate for the number of unique reporting respondents is approximately 5,600. The significant decrease in the number of unique respondents since OFAC's last information collection submission regarding the Regulations in 2019 is due to OFAC's increased use of technology, which has enabled it to consolidate multiple filers within a single institution under one unique identification number assigned to the institution for all reports submitted to OFAC. Previously, OFAC did not have the ability to easily ascertain the number of unique respondents due to different identification numbers being selected for reports filed by different individuals within the same institution, or different branches or offices of the same institution. This inability to uniquely identify all reports associated with one institution led to counting numerous filers that were all associated with the same institution instead of counting the institutions themselves as unique respondents, resulting in an inflated number of respondents in past information collection submissions. OFAC is now adjusting its number of unique reporting respondents based on its more accurate data set.

Frequency of Response: The estimated annual frequency of responses is between 1 and 4,641, varying greatly by entity depending on the size, nature, and scope of business activities of each respondent, with the majority of filers providing a small number of responses and a small number of filers submitting a higher number of responses.

Estimated Total Number of Annual Responses: The estimated total number of responses per year is approximately 30,051.

Estimated Time per Response: OFAC assesses that there is an average time estimate for reports associated with forms ranging from 15 minutes to 2 hours and for reports associated with general licenses and other miscellaneous reports ranging from 15 minutes to 5 hours.

Estimated Total Annual Burden Hours: The estimated total annual reporting burden is approximately 14,752 hours.

Request for Comments

Comments submitted in response to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services required to provide information.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: April 5, 2021.

Andrea Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2021–07260 Filed 4–7–21; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning health insurance costs of eligible individuals.

DATES: Written comments should be received on or before June 7, 2021 to be assured of consideration.

ADDRESSES: Direct all written comments to Kinna Brewington, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form should be directed to Kerry Dennis, at (202) 317–5751 or Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at *Kerry.Dennis@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Health Insurance Costs of Eligible Individuals.

OMB Number: 1545–1875.

Regulation Project Number: Rev. Proc. 2004–12.

Abstract: Revenue Procedure 2004–12 informs states how to elect a health program to be qualified health insurance for purposes of the health coverage tax credit (HCTC) under section 35 of the Internal Revenue Code. The collection of information is voluntary. However, if a state does not make an election, eligible residents of the state may be impeded in their efforts to claim the HCTC.

Current Actions: There is no change to the revenue procedure, or the paperwork burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: States, Local, or Tribal Government.

Estimated Number of Respondents: 51.

Estimated Average Time per Respondent: 30 minutes.

Estimated Total Annual Burden Hours: 36.

The following paragraph applies to all the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: April 2, 2021.

Chakinna B. Clemons,

Supervisory Tax Analyst.

[FR Doc. 2021–07235 Filed 4–7–21; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Requesting Comments on Membership Application for Internal Revenue Service Advisory Council (IRSAC)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning membership application for Internal Revenue Service Advisory Council.

DATES: Written comments should be received on or before June 7, 2021 to be assured of consideration.

ADDRESSES: Direct all written comments to Kinna Brewington, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224. You must reference the information collection's title, form number, reporting or record-keeping requirement number, and OMB number in your comment.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Jon Callahan, (737) 800–7639, at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet at *jon.r.callahan@irs.gov.*

SUPPLEMENTARY INFORMATION: Currently, the IRS is seeking comments concerning the following information collection tools, reporting, and record-keeping requirements:

Title: Internal Revenue Service Advisory Council Membership Application.

OMB Number: 1545–1791.

Form Number: 12339.

Abstract: The Federal Advisory Committee Act (FACA) requires that committee membership be fairly balanced in terms of points of view represented and the functions to be performed. As a result, members of specific committees often have both the expertise and professional skills that parallel the program responsibilities of their sponsoring agencies. Selection of committee members is based on the FACA's requirements and the potential member's background and qualifications. Therefore, an application is needed to ascertain the desired skills set for membership. The IRS will also use the information to perform federal income tax, background, and practitioner checks as required of all members and applicants to the Committee or Council. Information provided will be used to qualify or disqualify individuals to serve as members.

Current Actions: There are changes to the existing collection. The Advisory Committee on Tax Exempt and Government Entities and the Information Reporting Program Advisory Committee ceased operating as separate IRS advisory committees and combined with the Internal Revenue Service Advisory Council. Form 12339–B, Form 12339–C and Form 13775 are obsolete and have been removed from the collection.

Type of Review: Revision of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 125.

Estimated Time per Response: 1 hr. 30 min.

Estimated Total Annual Burden Hours: 187.5.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: April 5, 2021.

Chakinna B. Clemons,

Supervisory Tax Analyst.

[FR Doc. 2021–07233 Filed 4–7–21; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Office of the Secretary

List of Countries Requiring Cooperation With an International Boycott

In accordance with section 999(a)(3) of the Internal Revenue Code of 1986,

the Department of the Treasury is publishing a current list of countries which require or may require participation in, or cooperation with, an international boycott (within the meaning of section 999(b)(3) of the Internal Revenue Code of 1986).

On the basis of the best information currently available to the Department of the Treasury, the following countries require or may require participation in, or cooperation with, an international boycott (within the meaning of section 999(b)(3) of the Internal Revenue Code of 1986).

Iraq
Kuwait
Lebanon
Libya
Qatar
Saudi Arabia
Syria
Yemen

The UAE has been removed from this list due to issuance of Federal Decree-Law No. 4 of 2020, which repealed its law mandating a boycott of Israel, and the subsequent actions that the UAE government has taken to implement the new policy.

Kevin Nichols,

Acting International Tax Counsel (Tax Policy).

[FR Doc. 2021–07244 Filed 4–7–21; 8:45 am]

BILLING CODE 4810–25–P

UNITED STATES INSTITUTE OF PEACE

Notice of Board of Directors Meeting

AGENCY: United States Institute of Peace (USIP) and Endowment of the United States Institute of Peace.

ACTION: Announcement of meeting.

SUMMARY: Quarterly meeting of the Board of Directors: Chair's Report; Vice Chair's Report; President's Report; Meeting of the Board of Directors of the Endowment of the U.S. Institute of Peace; USIP Updates: *Afghanistan; Myanmar;* and *Central America;* Approval of Minutes; Reports from USIP Building, Program, Audit & Finance, and Security Committees.

DATES: Friday, April 16, 2021 (10:00 a.m.–12:00 p.m.).

ADDRESSES: Virtual Board Meeting Information: Join by video: *https://usip-org.zoomgov.com/j/1611888954?pwd=YjVDMUtCTmNHQU9CWXdlM3cvR0RUZz09;* Dial-in option: +1–646–828–7666; Meeting ID: 161 188 8954/ Passcode: 121110.

FOR FURTHER INFORMATION CONTACT: Megan O'Hare, 202–429–414, *mohare@usip.org.*

SUPPLEMENTARY INFORMATION: Open Session—Portions may be closed pursuant to Subsection (c) of Section 552(b) of Title 5, United States Code, as provided in subsection 1706(h)(3) of the United States Institute of Peace Act, Public Law 98–525.

Authority: 22 U.S.C. 4605(h)(3).

Dated: April 1, 2021.

Megan O'Hare,

Chief of Staff.

[FR Doc. 2021–07229 Filed 4–7–21; 8:45 am]

BILLING CODE 6820–AR–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0092]

Agency Information Collection Activity: Veteran Readiness and Employment (VR&E) Questionnaire (Chapter 31, Title 38 U.S. Code)

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed reinstatement of a previously approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before June 7, 2021.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger.@va.gov.* Please refer to ''OMB Control No. 2900–0092'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 1717 H Street NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0092'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: 38 U.S.C. 501(a), 38 U.S.C. 3102 and 38 U.S.C. 3106.

Title: Veteran Readiness and Employment (VR&E) Questionnaire.

OMB Control Number: 2900–0092.

Type of Review: Reinstatement of a previously approved collection.

Abstract: VA Form 28–1902w is used by VA Vocational Rehabilitation Counselors (VRC) to gather the necessary information to determine entitlement during the initial evaluation process. Without this information, determination of entitlement to the maximum benefit to include counseling, education, and/or rehabilitation program may not be granted under 38 U.S.C. 3102, 38 U.S.C. 3106 and 38 U.S.C. 501(a).

Affected Public: Individuals and households.

Estimated Annual Burden: 94,500 hours.

Estimated Average Burden per Respondent: 45 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 126,000.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2021–07237 Filed 4–7–21; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0061]

Agency Information Collection Activity: Request and Authorization for Supplies (Chapter 31—Veteran Readiness and Employment)

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before June 7, 2021.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *Nancy.Kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0061'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 1717 H Street NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0061'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: 38 United States Code (U.S.C.) 3104(a)(7).

Title: Request and Authorization for Supplies (Chapter 31—Veteran Readiness and Employment), VA Form 28–1905m.

OMB Control Number: 2900–0061.

Type of Review: Extension of a currently approved collection.

Abstract: A claimant uses VA Form 28–1905m, Request and Authorization for Supplies (Chapter 31—Veteran Readiness and Employment), to request supplies or equipment be provided as part of a rehabilitation program under 38 U.S.C. Chapter 31. The training facility the claimant attends, or the employer for whom the claimant works, may also need to complete the form when the facility or employer requires specific types of supplies or equipment under 38 U.S.C. 3104(a)(7). The Veteran Readiness and Employment (VR&E) program subsequently uses the information on this form to approve the purchase of appropriate supplies and equipment for claimants.

Affected Public: Individuals and households.

Estimated Annual Burden: 14,000 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 28,000.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2021–07231 Filed 4–7–21; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 86 Thursday,
No. 66 April 8, 2021

Part II

Securities and Exchange Commission

Notice of Substituted Compliance Application Submitted by the United Kingdom Financial Conduct Authority in Connection With Certain Requirements Applicable to Security-Based Swap Dealers and Major Security-Based Swap Participants Subject to Regulation in the United Kingdom; Proposed Order; Notice

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91476; S7–04–21]

Notice of Substituted Compliance Application Submitted by the United Kingdom Financial Conduct Authority in Connection With Certain Requirements Applicable to Security-Based Swap Dealers and Major Security-Based Swap Participants Subject to Regulation in the United Kingdom; Proposed Order

AGENCY: Securities and Exchange Commission.

ACTION: Notice of application for substituted compliance determination; proposed order.

SUMMARY: The Securities and Exchange Commission (''Commission'' or ''SEC'') is soliciting public comment on an application by the United Kingdom Financial Conduct Authority (''FCA'') requesting that, pursuant to rule 3a71–6 under the Securities Exchange Act of 1934 (''Exchange Act''), the Commission determine that registered security-based swap dealers and registered major security-based swap participants (together, ''SBS Entities'') that are not U.S. persons and that are subject to certain regulation in the United Kingdom (''UK'') may comply with certain requirements under the Exchange Act via compliance with corresponding requirements of the UK. The Commission also is soliciting comment on a proposed Order providing for conditional substituted compliance in connection with the application.

DATES: Submit comments on or before May 3, 2021.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/submitcomments.htm*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–04–21 on the subject line.

Paper Comments

- Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–04–21. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/proposed.shtml*). Typically, comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Due to pandemic conditions, however, access to the Commission's public reference room is not permitted at this time. All comments received will be posted without change. Persons submitting comments are cautioned that the Commission does not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Carol M. McGee, Assistant Director, Laura Compton, Senior Special Counsel, or Pamela Carmody, Special Counsel, at 202–551–5870, Office of Derivatives Policy, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION: The Commission is soliciting public comment on an application by the FCA requesting that the Commission determine that SBS Entities that are not U.S. persons and that are subject to certain regulation in the UK may satisfy certain requirements under the Exchange Act by complying with comparable requirements in the UK. The Commission also is soliciting comment on a proposed Order, set forth in Attachment A, providing for conditional substituted compliance in connection with the FCA application.

I. Background

On August 6, 2021, market participants will begin to count security-based swap positions toward the thresholds for registration with the Commission as an SBS Entity.[1] Exchange Act rule 3a71–6 [2] conditionally provides that non-U.S. SBS Entities may satisfy certain requirements under Exchange Act section 15F [3] by complying with comparable regulatory requirements of a foreign jurisdiction.[4] Substituted compliance potentially is available in connection with requirements regarding business conduct and supervision, chief compliance officers, trade acknowledgment and verification, non-prudentially regulated capital and margin, recordkeeping and reporting, portfolio reconciliation and dispute reporting, portfolio compression and trading relationship documentation.[5]

Substituted compliance in part is predicated on the Commission determining the analogous foreign requirements are ''comparable'' to the applicable requirements under the Exchange Act, after accounting for factors such as the ''scope and objectives'' of the relevant foreign regulatory requirements and the effectiveness of the relevant foreign authority's or authorities' supervisory and enforcement frameworks.[6] Substituted compliance further requires that the Commission and the relevant foreign financial regulatory authorities have entered into an effective supervisory and enforcement memorandum of understanding and/or other arrangement addressing cooperation and other matters related to substituted compliance.[7] A foreign

[1] *See* Exchange Act Release No. 86175 (Jun. 21, 2019), 84 FR 43872, 53954 (Aug. 22, 2019) (''Capital and Margin Adopting Release''); *see also* Exchange Act Release No. 87780 (Dec. 18, 2019), 85 FR 6270, 6345–49 (Feb. 4, 2020).

[2] 17 CFR 240.3a71–6.

[3] 15 U.S.C. 78o–10.

[4] The Commission also has discussed the parameters of substituted compliance in connection with substituted compliance requests regarding the Federal Republic of Germany and the French Republic. *See* Exchange Act Release No. 90378 (Nov. 9, 2020), 85 FR 72726 (Nov. 13, 2020) (''German Notice and Proposed Order''); Exchange Act Release No. 90765 (Dec. 22, 2020), 85 FR 85686 (Dec. 29, 2020) (''German Substituted Compliance Order''); Exchange Act Release No. 90766 (Dec. 22, 2020), 85 FR 85720 (Dec. 29, 2020) (''French Notice and Proposed Order'').

[5] *See* Exchange Act rule 3a71–6(d). Substituted compliance is not available for antifraud prohibitions and information-related requirements under section 15F. *See* Exchange Act rule 3a71–6(d)(1) (specifying that substituted compliance is not available in connection with the antifraud provisions of Exchange Act section 15F(h)(4)(A) and Exchange Act rule 15Fh–4(a), 17 CFR 240.15Fh–4(a), and the information-related provisions of Exchange Act sections 15F(j)(3) and 15F(j)(4)(B)). Substituted compliance under rule 3a71–6 also does not extend to certain other provisions of the federal securities laws that apply to security-based swaps, such as: (1) Additional antifraud prohibitions (*see* Exchange Act section 10(b), 15 U.S.C. 78j(b), Exchange Act rule 10b–5, 17 CFR 240.10b–5, and Securities Act of 1933 section 17(a), 15 U.S.C. 77q(a)); (2) requirements related to transactions with counterparties that are not eligible contract participants (''ECPs'') (*see* Exchange Act section 6(l), 15 U.S.C. 78f(l); Securities Act of 1933 section 5(e), 15 U.S.C. 77e(e)); (3) segregation of customer assets (*see* Exchange Act section 3E, 15 U.S.C. 78c–5; Exchange Act rule 18a–4, 17 CFR 240.18a–4); (4) required clearing upon counterparty election (*see* Exchange Act section 3C(g)(5), 15 U.S.C. 78c–3(g)(5)); (5) regulatory reporting and public dissemination (*see generally* Regulation SBSR, 17 CFR 242.900 *et seq.*); (6) SBS Entity registration (*see* Exchange Act section 15F(a) and (b)); and (7) registration of offerings (*see* Securities Act of 1933 section 5, 15 U.S.C. 77e).

[6] *See* Exchange Act rule 3a71–6(a)(2)(i).

[7] *See* Exchange Act rule 3a71–6(a)(2)(ii). The Commission and the FCA are in the process of negotiating a memorandum of understanding to

financial regulatory authority may submit a substituted compliance application only if the authority provides ''adequate assurances'' that no law or policy would impede the ability of any entity that is directly supervised by the authority and that may register with the Commission ''to provide prompt access to the Commission to such entity's books and records or to submit to onsite inspection or examination by the Commission.'' [8]

Commission rule 0–13 [9] addresses procedures for filing substituted compliance applications. The rule provides that the Commission will publish a notice when a completed application has been submitted and that any person may submit to the Commission ''any information that relates to the Commission action requested in the application.'' [10]

II. The FCA's Substituted Compliance Request

The FCA has submitted a complete substituted compliance application to the Commission (''FCA Application'').[11] Pursuant to rule 0–13, the Commission is publishing notice of the FCA Application together with a proposed Order to conditionally grant substituted compliance to an entity that (1) is a security-based swap dealer or major security-based swap participant registered with the Commission; (2) is not a ''U.S. person,'' as that term is defined in rule 3a71–3(a)(4) under the Exchange Act; [12] (3) is a ''MiFID investment firm'' or ''third country investment firm,'' as such terms are defined in the FCA Handbook Glossary, that has permission from the FCA or PRA under Part 4A of FSMA to carry on regulated activities relating to investment services and activities in the UK; and (4) is supervised by the FCA under the fixed supervision model and, if the firm is a PRA-authorized person, also supervised by the PRA as a Category 1 firm (each, a ''Covered Entity'').[13] In making its substituted compliance determination, the Commission will consider public comments on the FCA Application and the proposed Order.

The FCA seeks substituted compliance for Covered Entities in connection with a number of requirements under Exchange Act section 15F.

A. Relevant Market Participants and General Conditions

The Commission will consider whether to allow substituted compliance to be used by any Covered Entity.

B. Relevant Section 15F Requirements

The FCA requests that the Commission issue an order determining that—for substituted compliance purposes—applicable requirements in the UK are comparable with the following requirements under Exchange Act section 15F:

- *Risk control requirements*—Requirements related to internal risk management systems, trade acknowledgment and verification, portfolio reconciliation and dispute resolution, portfolio compression and trading relationship documentation.[14]
- *Capital and margin requirements*—Requirements related to capital applicable to non-prudentially regulated security-based swap dealers and requirements related to margin applicable to non-prudentially regulated SBS Entities.[15]
- *Internal supervision, chief compliance officer and additional Exchange Act section 15F(j) requirements*—Requirements related to diligent supervision, conflicts of interest, information gathering under Exchange Act section 15F(j) and chief compliance officers.[16]
- *Counterparty protection requirements*—Requirements related to disclosure of material risks and characteristics and material incentives or conflicts of interest, ''know your counterparty,'' suitability of recommendations, fair and balanced communications, disclosure of daily marks and disclosure of clearing rights.[17]
- *Recordkeeping, reporting, notification and securities count requirements*—Requirements related to making and keeping current certain prescribed records, the preservation of records, reporting, notification and securities counts.[18]

C. Comparability Considerations and Proposed Order

Though the UK ceased to be a member of the European Union (the ''EU'') on January 31, 2020, market participants in the UK remain subject to UK requirements implemented pursuant to EU directives, and to EU regulations that have been added to UK law.[19] Those requirements include those related to: Organization, compliance

address cooperation matters related to substituted compliance. Because the FCA asks the Commission to permit certain entities regulated and supervised by both the FCA and the UK Prudential Regulation Authority (''PRA'') to use substituted compliance, the Commission and the PRA are also in the process of developing a memorandum of understanding or other arrangement to address cooperation matters related to substituted compliance. These memoranda of understanding or other arrangements will need to be in place before the Commission may allow Covered Entities (as defined herein) to use substituted compliance to satisfy obligations under the Exchange Act. The Commission expects to publish any such memorandum of understanding or arrangement on its website at *www.sec.gov* under the ''Substituted Compliance'' tab, which is located on the ''Security-Based Swap Markets'' page in the Division of Trading and Markets section of the site.

[8] *See* Exchange Act rule 3a71–6(a)(3). The FCA has satisfied this prerequisite in the Commission's preliminary view, taking into account information and representations that the FCA provided regarding certain UK requirements that are relevant to the Commission's ability to inspect, and access the books and records of, Covered Entities (as defined herein).

[9] 17 CFR 240.0–13.

[10] *See* Commission rule 0–13(h). The Commission may take final action on a substituted compliance application no earlier than 25 days following publication of the notice in the **Federal Register.** *See id.*

[11] *See* Letter from Nausicaa Delfas, Executive Director of International, FCA, dated March 19, 2021. The FCA Application is available on the Commission's website at: *https://www.sec.gov/files/uk-financial-conduct-authority-complete-application-substituted-compliance-031921.pdf.*

[12] 17 CFR 240.3a71–3(a)(4).

[13] The terms ''MiFID investment firm'' and ''third country investment firm'' include credit institutions when they provide investment services or perform investment activities in the UK. *See* FCA Handbook Glossary.

[14] *See* part IV, *infra.*

[15] *See* part V, *infra.* The FCA requests substituted compliance in connection with capital and margin requirements applicable to non-prudentially regulated SBS Entities pursuant to Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d, and 18a–3. 17 CFR 240.18a–1 through 18a–1d, and 17 CFR 240.18a–3. The FCA does not request substituted compliance in connection with capital requirements applicable to non-prudentially regulated major security-based swap participants pursuant to Exchange Act rule 18a–2, 17 CFR 240.18a–2. The proposed Order defines the term ''prudentially regulated'' to mean an SBS Entity that has a ''prudential regulator'' as that term is defined in Exchange Act section 3(a)(74), 15 U.S.C. 78c(a)(74). *See* para. (g)(41) to the proposed Order.

[16] *See* part VI, *infra.*

[17] *See* part VII, *infra.* The FCA is not requesting substituted compliance in connection with: ECP verification requirements (Exchange Act section 15F(h)(3)(A) and Exchange Act rule 15Fh–3(a)(1), 17 CFR 240.15Fh–3(a)(1)); ''special entity'' provisions (Exchange Act sections 15F(h)(4) and (5) and Exchange Act rules 15Fh–3(a)(2) and (3), 15Fh–4(b) and 15Fh–5, 17 CFR 240.15Fh–3(a)(2) and (3), 240.15Fh–4(b) and 240.15Fh–5); and political contribution provisions (Exchange Act rule 15Fh–6, 17 CFR 240.15Fh–6).

[18] *See* part VIII, *infra.*

[19] In adding EU regulations to UK law, the UK in some cases has adopted UK versions of these regulations that differ from the original EU versions ''as necessary to account for the effects of Brexit.'' *See* FCA Application Appendix A at 7. The Commission has reviewed the FCA Application in light of the UK versions of these regulations.

and conduct;[20] risk-mitigation;[21] prudential matters;[22] and certain other matters relevant to the application.[23] In the view of the FCA, UK requirements taken as a whole produce regulatory outcomes that are comparable to those of the relevant requirements under the Exchange Act.[24]

In the Commission's preliminary view, requirements under the Exchange Act and UK requirements maintain similar approaches with respect to achieving regulatory goals in several respects, but follow differing approaches or incorporate disparate elements in certain other respects. The Commission has considered those similarities and differences when analyzing comparability and developing preliminary views, while recognizing that differences in approach do not necessarily preclude substituted compliance in light of the Commission's holistic, outcomes-oriented framework for assessing comparability.[25]

Based on the Commission's analysis of the application and review of relevant UK requirements, the proposed Order, located at Attachment A, would grant substituted compliance subject to specific conditions and limitations. When Covered Entities seek to rely on substituted compliance to satisfy particular requirements under the Exchange Act, non-compliance with the applicable UK requirements would lead to a violation of those requirements under the Exchange Act and potential enforcement action by the Commission (as opposed to automatic revocation of the substituted compliance order).

III. Applicable Entities and General Conditions

A. Covered Entities for Which the Commission Is Proposing a Positive Conditional Substituted Compliance Determination

Under the proposed Order, substituted compliance could be applied by ''Covered Entities''—a term that would limit the scope of the substituted compliance determination to SBS Entities that are subject to applicable UK requirements and oversight. Consistent with the parameters of substituted compliance under Exchange Act rule 3a71–6, the proposed ''Covered Entity'' definition provides that the relevant entity must be a security-based swap dealer or major security-based swap participant registered with the Commission, and that the entity cannot be a U.S. person.[26] The proposed ''Covered Entity'' definition further would provide that the entity must be either a MiFID investment firm or a third country investment firm that has permission from the FCA or PRA under Part 4A of FSMA to carry on regulated activities relating to investment services and activities in the UK.[27] Each entity also must be supervised by the FCA under the fixed supervision model and, if the firm is a PRA-authorized person, also supervised by the PRA as a Category 1 firm.[28] These prongs of the definition are intended to help ensure that Covered Entities are subject to relevant UK requirements and oversight.

B. General Conditions and Prerequisites

Substituted compliance under the proposed Order would be subject to a number of conditions and other prerequisites, to help ensure that the relevant UK requirements that form the basis for substituted compliance in practice will apply to the Covered Entity's security-based swap business and activities, and to promote the Commission's oversight over entities that avail themselves of substituted compliance.

1. ''Subject to and Complies With'' Applicability Provisions

Each relevant section of the proposed Order would be subject to the condition that the Covered Entity ''is subject to and complies with'' the applicable UK requirements that are needed to establish comparability. Accordingly, the proposed Order would not provide substituted compliance when a Covered Entity is excused from compliance with relevant foreign provisions, such as, for example, if relevant UK requirements do not apply to the security-based swap activities of a non-UK branch of a MiFID investment firm or to a third country investment firm. In that event, the Covered Entity would not be ''subject to'' those requirements, and the Covered Entity could not rely on substituted compliance in connection with those activities.[29]

[20] The Financial Services and Markets Act 2000 (''FSMA'') gives the FCA and PRA powers to make rules and guidance for firms within the scope of FSMA's financial services regulatory regime, including MiFID investment firms and third country investment firms. Relevant elements of the EU's Markets in Financial Instruments Directive, Directive 2014/65/EU (''MiFID''), have been implemented in the UK via provisions in the FCA Handbook and PRA Rulebook. These provisions in the FCA Handbook and the PRA Rulebook address organizational, compliance and conduct requirements applicable to MiFID investment firms and third country investment firms. The UK version of Commission Delegated Regulation (EU) 2017/565 (''UK MiFID Org Reg'') in part supplements the FCA Handbook and the PRA Rulebook with respect to organizational requirements for these firms. The UK version of the Markets in Financial Instruments Regulation, Regulation (EU) 648/2012 (''UK MiFIR''), addresses certain recordkeeping requirements. Commission Delegated Directive (EU) 2017/593 (''MiFID Delegated Directive'') in part supplements MiFID with regard to safeguarding client property, and in the UK has been implemented in relevant part in the FCA Handbook and PRA Rulebook.

[21] The UK version of the European Market Infrastructure Regulation (''EMIR''), Regulation (EU) 648/2012 (''UK EMIR''), in part imposes certain risk mitigation requirements on counterparties in connection with non-centrally cleared OTC derivatives transactions. The UK version of Delegated Regulation (EU) 149/2013 (''UK EMIR RTS'') supplements EMIR with requirements related to confirmations, portfolio reconciliation, portfolio compression and dispute resolution. The UK version of Delegated Regulation (EU) 2016/2251 (''UK EMIR Margin RTS'') further supplements EMIR with requirements related to documentation and collateral.

[22] The EU's Capital Requirements Directive IV, Directive 2013/36/EU (''CRD''), has been adopted in the UK via provisions in the FCA Handbook and PRA Rulebook. The FCA Handbook sets forth prudential and related requirements applicable in relevant part to IFPRU investment firms. The PRA Rulebook sets forth prudential and related requirements applicable in relevant part to UK banks and UK designated investment firms. The UK version of the Capital Requirements Regulation (''CRR''), Regulation (EU) 575/2013 (''UK CRR''), further addresses prudential and related requirements for those firms. The UK version of Commission Implementing Regulation (EU) 680/2014 (''UK CRR Reporting ITS'') sets forth implementing technical standards regarding supervisory reporting.

[23] The UK version of the Market Abuse Regulation, Regulation (EU) 596/2014 (''UK MAR''), sets forth requirements to enhance market integrity and investor protection. The UK version of the MAR Investment Recommendations Regulation, Commission Delegated Regulation (EU) 2016/958 (''UK MAR Investment Recommendations Regulation''), supplements UK MAR with respect to regulatory technical standards regarding investment recommendations. The UK's Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (''MLR 2017'') sets forth ''know your counterparty'' requirements.

[24] The FCA Application includes a series of analyses that compare UK requirements with the applicable requirements under the Exchange Act in the following areas: Risk control (*see* FCA Application Appendix B category 1), books and records (*see* FCA Application Appendix B category 2), internal supervision and compliance (*see* FCA Application Appendix B category 3) and counterparty protection (*see* FCA Application Appendix B category 4). These analyses are available on the Commission's website along with the remainder of the FCA Application. *See* note 11, *supra.*

[25] In this context, the Commission recognizes that other regulatory regimes will have exclusions, exceptions and exemptions that may not align perfectly with the corresponding requirements under the Exchange Act. Where the Commission preliminarily has found that the UK regime produces comparable outcomes notwithstanding those particular differences, the Commission proposes to make a positive determination on substituted compliance. Where the Commission preliminarily has found that those exclusions, exemptions and exceptions lead to outcomes that are not comparable, however, the proposal would not provide for substituted compliance.

[26] *See* paras. (g)(1)(i) and (ii) to the proposed Order.

[27] *See* para. (g)(1)(iii) to the proposed Order.

[28] *See* para. (g)(1)(iv) to the proposed Order.

[29] An SBS Entity's ''voluntary'' compliance with the relevant UK requirements would not suffice for

2. Additional General Conditions

Substituted compliance under the proposed Order further would be subject to general conditions intended to help ensure the applicability of relevant UK requirements, and to facilitate the Commission's oversight of firms that avail themselves of substituted compliance. In particular:

• ''*Regulated activities*''—For each condition in the proposed Order that requires the application of, and compliance with, provisions of the Senior Management Arrangements, Systems and Controls Sourcebook of the FCA Handbook (''FCA SYSC'') 4, 5, 6, 7, 9 and/or 10, certain parts of the PRA Rulebook and/or MLR 2017, the Covered Entity's relevant security-based swap activities must constitute ''regulated activities'' as defined for purposes of the relevant UK provisions, must be carried on by the Covered Entity from an establishment in the UK and must fall within the scope of the Covered Entity's authorization from the FCA and/or PRA to conduct regulated activities in the UK.[30]

• *UK MiFID* ''*investment services or activities*''—For each condition in the proposed Order that requires the application of, and compliance with, provisions of the Product Intervention and Product Governance Sourcebook of the FCA Handbook (''FCA PROD'') 3 and/or UK MiFID Org Reg, the Covered Entity's relevant security-based swap activities must constitute ''investment services or activities,'' as defined in the FCA Handbook Glossary, must be carried on by the Covered Entity from an establishment in the UK and must fall within the scope of the Covered Entity's authorization from the FCA and/or PRA to conduct regulated activities in the UK.[31]

• *UK* ''*MiFID or equivalent third country business*''—For each condition in the proposed Order that requires the application of, and compliance with, provisions of the Conduct of Business Sourcebook of the FCA Handbook (''FCA COBS'') 2, 4, 6, 8A, 9A, 14 and/or 14A, the Covered Entity's relevant security-based swap activities must constitute ''MiFID or equivalent third country business,'' as defined in the FCA Handbook Glossary, must be carried on by the Covered Entity from an establishment in the UK and must fall within the scope of the Covered Entity's authorization from the FCA and/or PRA to conduct regulated activities in the UK.[32]

• *UK* ''*designated investment business*''—For each condition in the proposed Order that requires the application of, and compliance with, provisions of FCA COBS 11, the Covered Entity's relevant security-based swap activities must constitute ''MiFID business'' that is also ''designated investment business,'' each as defined in the FCA Handbook Glossary, must be carried on by the Covered Entity from an establishment in the UK and must fall within the scope of the Covered Entity's authorization from the FCA and/or PRA to conduct regulated activities in the UK.[33]

• *UK* ''*MiFID business*''—For each condition in the proposed Order that requires the application of, and compliance with, provisions of the Client Asset Sourcebook of the FCA Handbook (''FCA CASS'') 6 and/or 7, the Covered Entity must not be an ''ICVC'' as defined in the FCA Handbook Glossary,[34] the Covered Entity's relevant security-based swap activities must constitute ''regulated activities'' as defined for purposes of the relevant UK provisions and ''MiFID business'' as defined in the FCA Handbook Glossary, must be carried on by the Covered Entity from an establishment in the UK and must fall within the scope of the Covered Entity's authorization from the FCA and/or PRA to conduct regulated activities in the UK.[35]

• *Activities covered by FCA SYSC 10A*—For each condition in the proposed Order that requires the application of, and compliance with, provisions of FCA SYSC 10A, the Covered Entity's relevant security-based swap activities must constitute activities described in FCA SYSC 10A.1.1(2)(a), (b) and/or (c), must be carried on by the Covered Entity from an establishment in the UK and must fall within the scope of the Covered Entity's authorization from the FCA and/or PRA to conduct regulated activities in the UK.[36]

• *UK MiFID* ''*clients*''—For each condition in the proposed Order that requires the application of, and compliance with, provisions of FCA CASS 6 and/or 7, FCA COBS 2, 4, 6, 8A, 9A, 11, 14 and/or 14A, FCA PROD 3, FCA SYSC 10.1.8, FCA SYSC 10A and/or UK MiFID Org, the Covered Entity's relevant counterparties (or potential counterparties) must be ''clients'' (or potential ''clients'') as defined in FCA COBS 3.2.1R.[37]

• *UK MiFID* ''*financial instruments*''—For each condition in the proposed Order that requires the

these purposes. Substituted compliance reflects an alternative means by which an SBS Entity may comply with applicable requirements under the Exchange Act, and thus mandates that the SBS Entity be subject to the requirements needed to establish comparability and face consequences arising from any failure to comply with those requirements. Moreover, the comparability assessment takes into account the effectiveness of the supervisory compliance program administered and the enforcement authority exercised by the FCA and/or PRA, which would not be expected to promote comparable outcomes when compliance merely is ''voluntary.''

[30] *See* para. (a)(1) to the proposed Order.

[31] *See* para. (a)(2) to the proposed Order. Under this condition, a Covered Entity's security-based swap activities must constitute ''investment services or activities'' only to the extent that the relevant part of the proposed Order requires the entity to be subject to and comply with the UK provisions listed in paragraph (a)(2) to the proposed Order. The security-based swap activities need not be ''investment services or activities'' when the relevant part of the proposed Order does not require compliance with one of those provisions (*e.g.,* paragraph (e)(6) to the proposed Order addressing substituted compliance for daily mark disclosure requirements).

[32] *See* para. (a)(3) to the proposed Order. Under this condition, a Covered Entity's security-based swap activities must constitute ''MiFID or equivalent third country business'' only to the extent that the relevant part of the proposed Order requires the entity to be subject to and comply with the UK provisions listed in paragraph (a)(3) to the proposed Order. The security-based swap activities need not be ''MiFID or equivalent third country business'' when the relevant part of the proposed Order does not require compliance with one of those provisions (*e.g.,* paragraph (e)(6) to the proposed Order addressing substituted compliance for daily mark disclosure requirements).

[33] *See* para. (a)(4) to the proposed Order. Under this condition, a Covered Entity's security-based swap activities must constitute ''MiFID business'' that is also ''designated investment business'' only to the extent that the relevant part of the proposed Order requires the entity to be subject to and comply with FCA COBS 11. The security-based swap activities need not be ''MiFID business'' that is also ''designated investment business'' when the relevant part of the proposed Order does not require compliance with FCA COBS 11 (*e.g.,* paragraph (e)(6) addressing substituted compliance for daily mark disclosure requirements).

[34] ''ICVC'' means investment company with variable capital as defined in the FCA Handbook Glossary.

[35] *See* para. (a)(5) to the proposed Order. Under this condition, a Covered Entity's security-based swap activities must constitute ''regulated activities'' that is also ''MiFID business'' only to the extent that the relevant part of the proposed Order requires the entity to be subject to and comply with the UK provisions listed in paragraph (a)(5) to the proposed Order. The security-based swap activities need not be ''MiFID business'' that is also ''designated investment business'' when the relevant part of the proposed Order does not require compliance with one of those provisions (*e.g.,* paragraph (e)(6) addressing substituted compliance for daily mark disclosure requirements).

[36] *See* para. (a)(6) to the proposed Order. Under this condition, a Covered Entity's security-based swap activities must constitute activities described in FCA SYSC 10A.1.1(2)(a), (b) and/or (c) only to the extent that the relevant part of the proposed Order requires the entity to be subject to and comply with FCA SYSC 10A. The security-based swap activities need not be activities described in those provisions when the relevant part of the proposed Order does not require compliance with FCA SYSC 10A (*e.g.,* paragraph (e)(6) addressing substituted compliance for daily mark disclosure requirements).

[37] *See* para. (a)(7) to the proposed Order.

application of, and compliance with, provisions of FCA CASS 6 and/or 7, FCA COBS 2, 4, 6, 8A, 9A, 11, 14 and/or 14A, FCA PROD 3, FCA SYSC 10A, UK MAR, UK MAR Investment Recommendations Regulation and/or UK MiFID Org Reg, the relevant security-based swap must be a ''financial instrument'' as defined in Part 1 of Schedule 2 of the UK Regulated Activities Order.[38]

• *UK CRD/CRR* ''*institution*''—For each condition in the proposed Order that requires the application of, and compliance with, provisions of UK CRR, the Covered Entity must be an ''institution'' as defined in UK CRR article 4(1)(3).[39]

• ''*Common platform firm*'' *or* ''*third country firm*''—For each condition in the proposed Order that requires the application of, and compliance with, provisions of FCA SYSC 4, 5, 6, 7, 9 and/or 10, the Covered Entity must be either a ''common platform firm'' (other than a ''UCITS investment firm'') or a ''third country firm,'' each as defined in the FCA Handbook Glossary.[40]

• ''*IFPRU investment firm*''—For each condition in the proposed Order that requires the application of, and compliance with, provisions of FCA SYSC 19A, the Prudential Sourcebook for Investment Firms of the FCA Handbook (''FCA IFPRU'') and/or the Prudential Sourcebook for Banks, Building Societies and Investment Firms of the FCA Handbook (''FCA BIPRU''), the Covered Entity must be an ''IFPRU investment firm'' as defined in the FCA Handbook Glossary.[41]

• ''*UK bank*'' *or* ''*UK designated investment firm*''—For each condition in the proposed Order that requires the application of, and compliance with, provisions of FCA SYSC 19D and/or certain parts of the PRA Rulebook, the Covered Entity must be a ''UK bank'' or ''UK designated investment firm,'' each as defined in the FCA Handbook Glossary (in the case of chapter 19D of FCA SYSC) or in the PRA Rulebook Glossary (in the case of a part of the PRA Rulebook).[42]

• *Covered Entity's counterparties as UK EMIR* ''*counterparties*''—For each condition in the proposed Order that requires the application of, and compliance with, provisions of UK EMIR, UK EMIR RTS and/or UK EMIR Margin RTS, if the counterparty to the Covered Entity is not a ''financial counterparty'' or ''non-financial counterparty'' as defined in UK EMIR articles 2(8) or 2(9), respectively, the Covered Entity must comply with the applicable condition as if the counterparty were a financial counterparty or non-financial counterparty.[43] If the Covered Entity reasonably determines that the counterparty conducts a financial business that would cause it to be a financial counterparty if it were UK-established and UK-authorized, then the proposed Order would require the Covered Entity to treat the counterparty as a financial counterparty; otherwise, the proposed Order would require the Covered Entity to treat the counterparty as a non-financial counterparty.[44] In addition, the proposed Order would provide that a Covered Entity complying with UK EMIR could not apply substituted compliance by complying with third country requirements that UK authorities may determine to be equivalent to UK EMIR.[45]

• *Security-based swap status under UK EMIR*—For each condition in the proposed Order that requires the application of, and compliance with, provisions of UK EMIR, UK EMIR RTS and/or UK EMIR Margin RTS, either: (1) The relevant security-based swap must be an ''OTC derivative'' or ''OTC derivative contract,'' as defined in UK EMIR article 2(7), that has not been cleared by a CCP and otherwise is subject to the provisions of UK EMIR article 11, UK EMIR RTS articles 11 through 15, and UK EMIR Margin RTS article 2; or (2) the relevant security-based swap must have been cleared by a central counterparty that has been authorized or recognized to clear derivatives contracts in the UK.[46]

• *Memorandum of understanding*—The Commission has an applicable memorandum of understanding or other arrangement with the FCA and PRA addressing cooperation with respect to the proposed Order at the time the Covered Entity makes use of substituted compliance.[47]

• *Notice of reliance on substituted compliance*—A Covered Entity must provide notice of its intent to rely on the proposed Order by notifying the Commission in the manner specified on the Commission's website.[48] In the notice, the Covered Entity would need to identify each specific substituted compliance determination in the proposed Order for which the Covered Entity intends to apply substituted compliance.[49] If a Covered Entity elects not to apply substituted compliance with respect to a specific substituted compliance determination in the proposed Order, it must comply with the Exchange Act requirements subject to that determination. Further, except in the case of the counterparty protection requirements and linked recordkeeping requirements discussed below, the Commission has determined that the Exchange Act requirements subject to substituted compliance determinations in the proposed Order are entity-level requirements. Therefore, if a Covered Entity elects to apply substituted compliance to these entity-level requirements, it must do so at the entity level. Finally, a Covered Entity must promptly update the notice if it intends to modify its reliance on the positive substituted compliance determinations in the proposed Order.[50]

[38] *See* para. (a)(8) to the proposed Order.

[39] *See* para. (a)(9) to the proposed Order.

[40] *See* para. (a)(10) to the proposed Order.

[41] *See* para. (a)(11) to the proposed Order.

[42] *See* para. (a)(12) to the proposed Order.

[43] *See* para. (a)(13) to the proposed Order.

[44] *See* para. (a)(13)(i) to the proposed Order.

[45] *See* para. (a)(13)(ii) to the proposed Order.

[46] *See* para. (a)(14) to the proposed Order.

[47] *See* para. (a)(15) to the proposed Order.

[48] *See* para. (a)(16) to the proposed Order.

[49] If the Covered Entity intends to rely on all the substituted compliance determinations in a given paragraph of the Order, it can cite that paragraph in the notice. For example, if the Covered Entity intends to rely on the capital and margin determinations in paragraph (c) of the proposed Order, it would indicate in the notice that it is relying on the determinations in paragraph (c). However, if the Covered Entity intends to rely on the margin determination but not the capital determination, it would need to indicate in the notice that it is relying on paragraph (c)(2) of the proposed Order (the margin determination). In this case, paragraph (c)(1) of the proposed Order (the capital determination) would be excluded from the notice and the Covered Entity would need to comply with the Exchange Act capital requirements. Further, as discussed below in section VIII.B. of this notice, the recordkeeping and reporting determinations in the proposed Order have been structured to provide Covered Entities with a high level of flexibility in selecting specific requirements within those rules for which they want to rely on substituted compliance. For example, paragraph (f)(1)(i) of the proposed Order sets forth the Commission's preliminary substituted compliance determinations with respect to the requirements of Exchange Act rule 18a–5, 17 CFR 240.18a–5. These proposed determinations are set forth in paragraphs (f)(1)(i)(A) through (O). If a Covered Entity intends to rely on some but not all of the determinations, it would need to identify in the notice the specific determinations in this paragraph it intends to rely on (*e.g.,* paragraphs (f)(1)(i)(A), (B), (C), (D), (G), (H), (I), and (O)). For any determinations excluded from the notice, the Covered Entity would need to comply with the Exchange Act rule 18a–5 requirement. Finally, as discussed below in sections VII.B.2. and VIII.B.2. of this notice, a Covered Entity would be able to apply substituted compliance at the transaction level (rather than the entity level) for certain counterparty protection requirements and the recordkeeping requirements that are linked to them. In this case, the notice would need to indicate the class of transactions (*e.g.,* transactions with UK counterparties) for which the Covered Entity is applying substituted compliance with respect to the counterparty protection requirements and linked recordkeeping requirements.

[50] A Covered Entity would modify its reliance on the positive substituted compliance determinations in the proposed Order, and thereby trigger the requirement to update its notice, if it adds or

IV. Substituted Compliance for Risk Control Requirements

A. FCA Request and Associated Analytic Considerations

The FCA Application in part requests substituted compliance in connection with risk control requirements under the Exchange Act relating to:

• *Risk management systems*—Internal risk management system requirements pursuant to Exchange Act section 15F(j)(2) and relevant aspects of Exchange Act rule 15Fh–3(h)(2)(iii)(I).[51] Those provisions address the obligation of SBS Entities to follow policies and procedures reasonably designed to help manage the risks associated with their business activities.[52]

• *Trade acknowledgment and verification*—Trade acknowledgment and verification requirements pursuant to Exchange Act section 15F(i) and Exchange Act rule 15Fi–2.[53] Those provisions help avoid legal and operational risks by requiring definitive written records of transactions and for procedures to avoid disagreements regarding the meaning of transaction terms.[54]

• *Portfolio reconciliation and dispute reporting*—Portfolio reconciliation and dispute reporting requirements pursuant to Exchange Act section 15F(i) and Exchange Act rule 15Fi–3.[55] Those provisions require that counterparties engage in portfolio reconciliation and resolve discrepancies in connection with uncleared security-based swaps and promptly notify the Commission and applicable prudential regulators regarding certain valuation disputes.[56]

• *Portfolio compression*—Portfolio compression requirements pursuant to Exchange Act section 15F(i) and Exchange Act rule 15Fi–4.[57] Those provisions require that SBS Entities have procedures addressing bilateral offset, bilateral compression and multilateral compression in connection with uncleared security-based swaps.[58]

• *Trading relationship documentation*—Trading relationship documentation requirements pursuant to Exchange Act section 15F(i) and Exchange Act rule 15Fi–5.[59] Those provisions require that SBS Entities have procedures to execute written security-based swap trading relationship documentation with their counterparties prior to, or contemporaneously with, executing certain security-based swaps.[60]

Taken as a whole, these risk control requirements help to promote market stability by mandating that SBS Entities follow practices that are appropriate to manage the market, credit, counterparty, operational and legal risks associated with their security-based swap businesses. The Commission's comparability assessment accordingly focuses on whether the analogous foreign requirements—taken as a whole—produce comparable outcomes with regard to providing that Covered Entities follow risk mitigation and documentation practices that are appropriate to the risks associated with their security-based swap businesses.

B. Preliminary Views and Proposed Order

1. General Considerations

In the Commission's preliminary view based on the FCA Application and the Commission's review of applicable provisions, relevant UK requirements would produce regulatory outcomes that are comparable to those associated with the above risk control requirements, by subjecting Covered Entities to risk mitigation and documentation practices that are appropriate to the risks associated with their security-based swap businesses. Substituted compliance accordingly would be conditioned on Covered Entities being subject to the UK provisions that in the aggregate establish a framework that produces outcomes comparable to those associated with these risk control requirements under the Exchange Act.[61]

In connection with trade acknowledgement and verification requirements, the Commission preliminarily believes that UK requirements are comparable to Exchange Act requirements despite not requiring a Covered Entity to establish, maintain and enforce written policies and procedures that are reasonably designed to obtain prompt verification of a trade acknowledgment. The Commission reached this preliminary conclusion because the UK requirements instead generally require both counterparties to provide a trade confirmation. Though this confirmation requirement generally does not apply to a counterparty not established in the UK, such as a U.S. person counterparty (unless the relevant contract has a direct and substantial effect in the UK), the Commission has considered the UK confirmation requirements together with guidance from the European Securities and Markets Authority (''ESMA'').[62] In interpreting EU confirmation

subtracts determinations for which it is applying substituted compliance or completely discontinues its reliance on the proposed Order.

[51] 17 CFR 240.15Fh–3(h)(2)(iii)(I). The FCA also is requesting substituted compliance in connection with Exchange Act rule 18a–1(f), 17 CFR 240.18a–1(f), which sets forth additional internal risk management system requirements for non-prudentially regulated security-based swap dealers. The Commission preliminarily has considered that request holistically as part of its analysis of the FCA's request for substituted compliance for capital requirements for those entities. *See* part V, *infra.* The FCA is not requesting substituted compliance in connection with Exchange Act rule 18a–2(c), which sets forth additional internal risk management system requirements for non-prudentially regulated major security-based swap participants.

[52] *See* Exchange Act Release No. 68071 (Oct. 18, 2012), 77 FR 70214, 70250 (Nov. 23, 2012) (proposing capital and margin requirements for security-based swap dealers and major security-based swap participants). The FCA Application discusses UK requirements that address Covered Entities' obligations related to risk management. *See* FCA Application Appendix B category 1 at 19–71.

[53] 17 CFR 240.15Fi–2.

[54] *See* Exchange Act Release No. 78011 (Jun. 8, 2016), 81 FR 39808, 39809 & 39820 (Jun. 17, 2016) (''Trade Acknowledgment and Verification Adopting Release''). The FCA Application discusses UK requirements that address Covered Entities' obligations related to confirmations. *See* FCA Application Appendix B category 1 at 72–84.

[55] 17 CFR 240.15Fi–3.

[56] *See* Exchange Act Release No. 87782 (Dec. 18, 2019), 85 FR 6359, 6360–61 (Feb. 4, 2020) (''Risk Mitigation Adopting Release''). The FCA Application discusses UK requirements that address portfolio reconciliation and dispute resolution and reporting. *See* FCA Application Appendix B category 1 at 85–93.

[57] 17 CFR 240.15Fi–4.

[58] *See* Risk Mitigation Adopting Release, 85 FR at 6361. The FCA Application discusses UK portfolio compression requirements. *See* FCA Application Appendix B category 1 at 94–96.

[59] 17 CFR 240.15Fi–5.

[60] *See* Risk Mitigation Adopting Release, 85 FR at 6361. The FCA Application discusses UK requirements regarding records of agreements with counterparties. *See* FCA Application Appendix B category 1 at 96–100.

[61] In connection with risk management system requirements, a Covered Entity must be subject to and comply with provisions of UK law that implement MiFID article 16(4) and (5) and CRD articles 74, 76 and 79 through 87; UK CRR articles 286 through 288 and 293; UK EMIR Margin RTS article 2; and UK MiFID Org Reg articles 21 through 24. *See* para. (b)(1) to the proposed Order. In connection with trade acknowledgment and verification requirements, a Covered Entity must be subject to and comply with the UK EMIR article 11(1)(a) and the UK EMIR RTS article 12. *See* para. (b)(2) to the proposed Order. In connection with portfolio reconciliation and dispute reporting requirements, a Covered Entity must be subject to and comply with UK EMIR article 11(1)(b) and UK EMIR RTS articles 13 and 15. *See* para. (b)(3) to the proposed Order. In connection with portfolio compression requirements, a Covered Entity must be subject to and comply with UK EMIR RTS article 14. *See* para. (b)(4) to the proposed Order. In connection with trading relationship documentation requirements, a Covered Entity must be subject to and comply with UK EMIR article 11(1)(a), UK EMIR article 12 and UK EMIR Margin RTS article 2. *See* para. (b)(5) to the proposed Order.

[62] *See* European Securities and Markets Authority, Questions and Answers: Implementation of the Regulation (EU) No 648/2012 on OTC Derivatives, Central Counterparties and Trade Repositories (EMIR), available at: *https://www.esma.europa.eu/sites/default/files/library/esma70-1861941480-52_qa_on_emir_implementation.pdf* (''ESMA EMIR Q&A'').

requirements that are identical to the UK requirements referenced in the proposed Order, that guidance provides that ''when an EU counterparty is transacting with a third country entity, the EU counterparty would be required to ensure that the requirements for . . . timely confirmation . . . are met for the relevant . . . transactions even though the third country entity would not itself be subject to EMIR.'' [63] That guidance also provides that compliance with the EMIR confirmation requirements means ''reach[ing] a legally binding agreement to all the terms of an OTC derivative contract.'' [64] The FCA has published guidance indicating that ESMA's guidance ''will remain relevant [after the UK's exit from the EU] to the FCA and market participants in their compliance with regulatory requirements.'' [65] In the Commission's preliminary view, the UK requirements, as interpreted by this guidance, thus are comparable to Exchange Act trade acknowledgment and verification requirements.

In connection with trading relationship documentation requirements, the Commission also preliminarily believes that UK requirements are comparable to Exchange Act requirements when considered together with this guidance. The proposed Order would require a Covered Entity to be subject to and comply with UK EMIR article 11(1)(a), UK EMIR RTS article 12 and UK EMIR Margin RTS article 2. By its terms, UK EMIR Margin RTS article 2 relates to documentation of ''risk management procedures for the exchange of collateral'' for non-centrally cleared transactions.[66] Exchange Act trading relationship documentation requirements, however, apply not only to agreements related to collateral exchange procedures but also to any other terms governing the trading relationship between the counterparties.[67] In the Commission's preliminary view, UK EMIR article 11(1)(a) and UK EMIR RTS article 12, when viewed together with the ESMA EMIR Q&A as described above, bridge this gap by requiring counterparties to reach a legally binding agreement to all the terms of a transaction.

While the Commission recognizes these and certain other differences between UK requirements and the applicable risk control requirements under the Exchange Act, in the Commission's preliminary view those differences on balance would not preclude substituted compliance for these requirements, particularly as requirement-by-requirement similarity is not needed for substituted compliance.

2. Scope of Substituted Compliance

The proposed Order would permit a Covered Entity to apply substituted compliance for one or more risk control requirements. For example, a Covered Entity could apply substituted compliance for internal risk management requirements but comply directly with Exchange Act trade acknowledgment and verification, portfolio reconciliation and dispute reporting, portfolio compression or trading relationship documentation requirements. For any set of risk control requirements for which a Covered Entity applies substituted compliance, however, the proposed Order would require the Covered Entity to apply substituted compliance at an entity level, *i.e.,* to all of its activities subject to that set of risk control requirements. For example, the proposed Order would require a Covered Entity applying substituted compliance for internal risk management requirements to comply with the comparable UK requirements with respect to all of its risk management systems. The Covered Entity could not choose to comply with the Exchange Act for one part of its risk management systems and with UK requirements for another part of its risk management systems.[68] The Commission preliminarily believes that this scope of substituted compliance strikes the right balance between providing Covered Entities flexibility to tailor the application of substituted compliance to their business needs and ensuring that substituted compliance is consistent with the Commission's classification of the relevant Exchange Act risk control requirements as entity-level requirements.[69]

3. Types of Covered Entities ''Subject to'' Comparable UK Requirements

In connection with risk management system requirements, each of the comparable UK provisions listed in the proposed Order applies to a uniquely defined set of UK-authorized firms.[70] To assist UK firms in determining whether they are subject to these provisions, the Commission preliminarily has determined that any Covered Entity that is an ''IFPRU investment firm,'' as defined in the FCA Handbook Glossary, or a ''UK bank'' or ''UK designated investment firm,'' as defined in both the FCA Handbook Glossary and the PRA Rulebook Glossary, would be subject to all of the required UK provisions. Accordingly, those types of firms preliminarily would be eligible to apply substituted compliance for risk management system requirements. A Covered Entity that is preliminarily not eligible to apply substituted compliance

---

[63] *See* ESMA EMIR Q&A, OTC Answer 12(b).

[64] *See* ESMA EMIR Q&A, OTC Answer 5(a).

[65] *See* Financial Conduct Authority, ''Brexit: Our approach to EU non-legislative materials,'' para. 9, available at: *https://www.fca.org.uk/publication/corporate/brexit-our-approach-to-eu-non-legislative-materials.pdf* (''FCA Brexit Guidance''); *see also* FCA Brexit Guidance at para. 12 (''We will continue to have regard to other EU non-legislative material where and if they are relevant, taking account of Brexit and ongoing domestic legislation. Firms, market participants and stakeholders should also continue to do so.'').

[66] UK EMIR Margin RTS article 2(1).

[67] *See* Exchange Act rule 15Fi–5(b)(1) (''The security-based swap trading relationship documentation shall be in writing and shall include all terms governing the trading relationship between the security-based swap dealer or major security-based swap participant and its counterparty. . . .'').

[68] *See* para. (b)(1) to the proposed Order. Similarly, a Covered Entity applying substituted compliance for trade acknowledgment and verification requirements would have to comply with the comparable UK requirements with respect to all security-based swaps subject to Exchange Act trade acknowledgment and verification requirements. *See* para. (b)(2) to the proposed Order. A Covered Entity applying substituted compliance for portfolio reconciliation and dispute reporting requirements would have to comply with the comparable UK requirements with respect to all security-based swaps subject to Exchange Act portfolio reconciliation and dispute reporting requirements. *See* para. (b)(3) to the proposed Order. A Covered Entity applying substituted compliance for portfolio compression requirements would have to comply with the comparable UK requirements with respect to all security-based swaps subject to Exchange Act portfolio compression requirements. *See* para. (b)(4) to the proposed Order. A Covered Entity applying substituted compliance for trading relationship documentation requirements would have to comply with the comparable UK requirements with respect to all security-based swaps subject to Exchange Act trading relationship documentation requirements. *See* para. (b)(5) to the proposed Order.

[69] *See* Exchange Act Release No. 77617 (Apr. 14, 2016), 81 FR 29960, 30064 (May 13, 2016) (''Business Conduct Adopting Release'') (internal risk management requirements are entity-level requirements); Trade Acknowledgment and Verification Adopting Release, 81 FR at 39826 (trade acknowledgment and verification requirements are entity-level requirements); Risk Mitigation Adopting Release, 85 FR at 6378 (portfolio reconciliation and dispute reporting, portfolio compression and trading relationship documentation requirements are entity-level requirements).

[70] The Commission preliminarily understands that FCA IFPRU and FCA BIPRU apply to IFPRU investment firms; FCA SYSC 4 and 7 apply to common platform firms and third country firms; FCA SYSC 19A applies to IFPRU investment firms and their overseas firm analogues; FCA SYSC 19D applies to UK banks, UK designated investment firms and their overseas firm analogues; the PRA rules cited in paragraph (b)(1) to the proposed Order apply to CRR firms as defined in the PRA Rulebook Glossary; UK CRR applies to CRR firms as defined in that legislation; UK EMIR Margin RTS applies to financial counterparties; and UK MiFID Org Reg applies to MIFID investment firms.

for risk management system requirements, such as a third country investment firm, nevertheless would be preliminarily eligible to apply substituted compliance for other requirements addressed in the proposed Order if it complies with the relevant parts of the proposed Order.

In connection with trade acknowledgment and verification, portfolio reconciliation and dispute reporting, portfolio compression and trading relationship documentation requirements, each of the comparable UK provisions listed in the proposed Order applies to ''financial counterparties.'' The Commission preliminarily understands that this term includes Covered Entities that are MiFID investment firms but not Covered Entities that are third country investment firms. A Covered Entity that is preliminarily not eligible to apply substituted compliance for these Exchange Act requirements nevertheless would be preliminarily eligible to apply substituted compliance for other requirements addressed in the proposed Order if it complies with the relevant parts of the proposed Order.

4. Additional Conditions and Scope Issues

Substituted compliance in connection with these requirements would be subject to certain additional conditions to help ensure the comparability of outcomes:

a. Trading Relationship Documentation—Disclosure Regarding Legal and Bankruptcy Status

Under the proposed Order, substituted compliance in connection with trading relationship documentation would not extend to disclosures regarding legal and bankruptcy status that are required by paragraph (b)(5) to Exchange Act rule 15Fi–5 when the counterparty is a U.S. person.[71] Documentation requirements under applicable UK law do not address the disclosure of information related to insolvency procedures under U.S. law. However, the absence of such disclosure would not appear to preclude a comparable regulatory outcome when the counterparty is not a U.S. person, because the insolvency-related consequences that are the subject of the disclosure would not be applicable to non-U.S. counterparties in most cases.[72]

b. Dispute Reporting—Provision of Dispute Reports Consistent With UK Law

Under the proposed Order, substituted compliance further would be conditioned on Covered Entities having to provide the Commission with reports regarding disputes between counterparties, on the same basis as the Covered Entities provide those reports to the FCA pursuant to UK law.[73] This condition promotes comparability with the Exchange Act rule requiring reporting to the Commission regarding significant valuation disputes,[74] while leveraging UK reporting provisions to avoid the need for Covered Entities to create additional reporting frameworks.[75]

V. Substituted Compliance for Capital and Margin Requirements

A. The FCA's Request and Associated Analytic Considerations

The FCA Application in part requests substituted compliance in connection with requirements under the Exchange Act relating to:

- *Capital*—Capital requirements pursuant to Exchange Act section 15F(e) and Exchange Act rule 18a–1 and its appendices (collectively ''Exchange Act rule 18a–1'') applicable to certain SBS Entities.[76] Exchange Act rule 18a–1 helps to ensure the SBS Entity maintains at all times sufficient liquid assets to promptly satisfy its liabilities, and to provide a cushion of liquid assets in excess of liabilities to cover potential market, credit, and other risks.[77] The rule's net liquid assets test standard protects customers and counterparties and mitigates the consequences of an SBS Entity's failure by promoting the ability of the firm to absorb financial shocks and, if necessary, to self-liquidate in an orderly manner.[78] As part of the capital requirements, non-prudentially regulated security-based swap dealers also must comply with the internal risk management control requirements of Exchange Act Rule 15c3–4 with respect to certain activities.[79]
- *Margin*—Margin requirements pursuant to Exchange Act section 15F(e) and Exchange Act rule 18a–3 for non-prudentially regulated SBS Entities. The margin requirements are designed to protect SBS Entities from the consequences of a counterparty's default.[80]

Taken as a whole, these capital and margin requirements help to promote

[71] Those disclosures address information regarding the status of the SBS Entity or its counterparty as an insured depository institution or financial counterparty, and regarding the possibility that in certain circumstances the SBS Entity or its counterparty may be subject to the insolvency regime set forth under Title II of the Dodd-Frank Act or the Federal Deposit Insurance Act, which may affect rights to terminate, liquidate or net security-based swaps. *See* Risk Mitigation Adopting Release, 85 FR at 6374 (discussing potential application of alternatives to the liquidation schemes established under the Securities Investor Protection Act of 1970 or the U.S. Bankruptcy Code).

[72] *See also* UK EMIR Margin RTS (in part addressing procedures providing for or specifying the terms of agreements entered into by counterparties, including applicable governing law for non-centrally cleared derivatives, and further providing that counterparties which enter into a netting or collateral exchange agreement must perform an independent legal review regarding enforceability).

[73] *See* para. (b)(3)(ii) to the proposed Order.

[74] In proposing the notice provision, the Commission recognized that valuation inaccuracies may lead to uncollateralized credit exposure and the potential for loss in the event of default. *See* Exchange Act Release No. 84861 (Dec. 19, 2018), 84 FR 4614, 4621 (Feb. 15, 2019). It thus is important that the Commission be informed regarding valuation disputes affecting SBS Entities.

[75] The principal difference between the two sets of requirements concerns the timing of notices. Under Exchange Act rule 15Fi–3, SBS Entities must promptly report to the Commission valuation disputes in excess of $20 million that have been outstanding for three or five business days (depending on counterparty types). Under UK EMIR RTS article 15(2), firms must report to the FCA at least monthly any disputes between counterparties in excess of €15 million and outstanding for at least 15 business days. The Commission is mindful that the UK provision does not provide for notice as quickly as rule 15Fi–3(c), but in the Commission's preliminary view, on balance this difference would not be inconsistent with the conclusion that the two sets of risk control requirements—taken as a whole—produce comparable regulatory outcomes.

[76] Exchange Act rule 18a–1 applies to non-prudentially regulated security-based swap dealers that are not also registered as broker-dealers, other than OTC derivatives dealers.

[77] *See* Capital and Margin Adopting Release, 84 FR at 43947. The FCA Application discusses UK requirements that address firms' capital requirements. *See* FCA Application Appendix B, Annex V (Side Letter Addressing Capital Requirements). *See also* FCA Application Appendix B category 1.d. (Internal Risk Management Requirements) (generally discussing internal risk management requirements).

[78] *See* Capital and Margin Adopting Release, 84 FR at 43879–83. The capital standard of Exchange Act rule 18a–1 is based on the net liquid assets test of Exchange Act rule 15c3–1 applicable to broker-dealers. *Id.* The net liquid assets test seeks to promote liquidity by requiring that a firm maintain sufficient liquid assets to meet all liabilities, including obligations to customers, counterparties, and other creditors, and, in the event a firm fails financially, to have adequate additional resources to wind-down its business in an orderly manner without the need for a formal proceeding. *See id.* at 43879. *See* FCA Application Appendix B, Annex V (Side Letter Addressing Capital Requirements).

[79] *See* Exchange Act rule 18a–1(f).

[80] *See* Capital and Margin Adopting Release, 84 FR at 43947; *see also id.* at 43949 (''Obtaining collateral is one of the ways OTC derivatives dealers manage their credit risk exposure to OTC derivatives counterparties. Prior to the financial crisis, in certain circumstances, counterparties were able to enter into OTC derivatives transactions without having to deliver collateral. When ''trigger events'' occurred during the financial crisis, those counterparties faced significant liquidity strains when they were required to deliver collateral''). The FCA Application discusses UK requirements that address firms' margin requirements. *See* FCA Application Appendix B category 1.c. (Margin Requirements for Nonbank Firms) and Annex I (Margin Haircuts (Category 1)).

market stability by mandating that SBS Entities follow practices to manage the market, credit, liquidity, solvency, counterparty, and operational risks associated with their security-based swap businesses. The Commission's comparability assessment accordingly focuses on whether the analogous foreign requirements—taken as a whole—produce comparable outcomes with regard to providing that Covered Entities follow capital and margin requirements that address the risks associated with their security-based swap businesses.

B. Preliminary Views and Proposed Order

1. General Considerations

In the Commission's preliminary view, based on the FCA Application and the Commission's review of applicable provisions, relevant UK capital requirements would produce regulatory outcomes that address the risks that the above capital requirements are designed to address. As discussed below, however, the Commission preliminarily believes that additional conditions on applying substituted compliance with respect to the Exchange Act capital requirements may be an appropriate supplement to the UK capital requirements in order to produce comparable regulatory outcomes. Substituted compliance with respect to the capital requirements accordingly would be conditioned on Covered Entities being subject to the UK capital requirements and additional conditions that, in the aggregate, establish a framework that produces outcomes comparable to those associated with the capital requirements under Exchange Act rule 18a–1.[81]

In the Commission's preliminary view, based on the FCA Application and the Commission's review of applicable provisions, relevant UK margin requirements would produce regulatory outcomes that are comparable to those associated with the above margin requirements. For example, in adopting its final margin requirements for non-cleared security-based swaps, the Commission stated that it modified the proposal to more closely align the final rule with the margin rules of the Commodity Futures Trading Commission and the U.S. prudential regulators and, in doing so, with the recommendations made by the Basel Committee on Banking Supervision (''BCBS'') and the Board of the International Organization of Securities Commissions (''IOSCO'') with respect to margin requirements for non-centrally cleared derivatives.[82] Substituted compliance with respect to the margin requirements accordingly would be conditioned on Covered Entities being subject to those UK provisions that, the Commission has determined, in the aggregate, establish a framework that produces outcomes comparable to those associated with the requirements under the Exchange Act rule 18a–3.[83]

While the Commission recognizes that there are certain differences between those UK requirements and the applicable capital and margin requirements under the Exchange Act, in the Commission's preliminary view, those differences on balance would not preclude substituted compliance for these requirements, particularly as requirement-by-requirement similarity is not needed for substituted compliance.

As noted above, substituted compliance in connection with capital requirements would be subject to certain additional conditions to help ensure the comparability of outcomes.[84] As discussed in more detail below in section V.B.3. of this notice, these proposed conditions to substituted compliance for capital are designed to promote comparability in light of the differences between the net liquid assets test standard of Exchange Act rule 18a–1 and the bank capital standard applicable to Covered Entities.[85] More specifically, in proposing the capital conditions, the Commission has preliminarily sought to balance the Commission's objective to promote the ability of Covered Entities to absorb financial shocks and, if necessary, to self-liquidate in an orderly manner while also providing them flexibility to apply substituted compliance with respect to Exchange Act rule 18a–1.[86]

2. Scope of Substituted Compliance

The proposed Order would permit a Covered Entity to apply substituted compliance for the capital *and/or* margin requirements. Thus, a Covered Entity could apply substituted compliance for Exchange Act margin requirements by complying with UK margin requirements but comply with Exchange Act capital requirements (rather than applying substituted compliance to those requirements) and vice versa. However, as to the various requirements within the capital and margin rules, the Commission found the rules to be entity-level when adopting amendments to Exchange Act rule 3a71–6 to make substituted compliance available with respect to them.[87] Consequently, under the proposed Order, a Covered Entity must apply substituted compliance with respect to capital and margin requirements at an entity level. For example, a Covered Entity applying substituted compliance for capital would need to comply with the comparable UK capital requirements at the entity level with respect to all capital requirements and calculations. Similarly, a Covered Entity applying substituted compliance for margin would need to comply with the

[81] In connection with capital requirements, Covered Entities must comply with: The capital requirements of UK CRR, including recitals 40, 43 and 87, and articles 26, 28, 50 through 52, 61, 63, 92, 111, 113(1), 114 through 122, 143, 153(8), 177(2), 283, 290, 300 through 311, 312(2), 362 through 377, 382 through 383, 412(1), 413(1), 416(1), 427(1), 413, 429, 430, and 499; UK MiFID Org Reg article 23; UK EMIR Margin RTS recital 31 and articles 2, 3(b), 7, and 19(1)(d) and (e), (3) and (8); FCA SYSC 4.1.1R, 7.1.4R, and 7.1.18R; FCA IFPRU 2,7, 10, and 11; FCA BIPRU 12; FCA PRIN; Client asset protection requirements under FCA CASS; PRA General Organisational Requirements Rule 2.1; PRA Risk Control Rules 2.3 and 3.1(1), Capital Buffers Part, Internal Capital Adequacy Assessment Part, Internal Liquidity Adequacy Assessment Part, Liquidity Coverage Requirement—UK Designated Investment Firms Part, and Notifications Part, of the PRA Rulebook; Banking Act 2009; Capital Requirements Regulations 2013; Capital Requirements (Capital Buffers and Macro-prudential Measures) Regulations 2014; Part 8 and Part 9 of the Bank Recovery and Resolution (No 2) Order 2014; Bank of England Act 1998 (Macro-prudential Measures) (No 2) Order 2015; and Parts 4A and 12A of FSMA. *See* para. (c)(1)(i) to the proposed Order.

[82] *See* Capital and Margin Adopting Release, 84 FR at 43908–09; *see also* BCBS/IOSCO, Margin Requirements for Non-centrally Cleared Derivatives (April 2020), available at: *https://www.bis.org/bcbs/publ/d499.pdf* (''BCBS/IOSCO Paper''). The UK margin requirements also are based on the recommendation in the BCBS/IOSCO Paper.

[83] In connection with margin requirements, Covered Entities must comply with: UK EMIR article 11; UK EMIR Margin RTS; UK CRR articles 103, 105(3); 105(10); 111(2), 224, 285, 286, 286(7), 290, 295, 296(2)(b), 297(1), 297(3), and 298(1); UK MiFID Org Reg article 23(1); FCA SYSC 4.1.1R; FCA IFPRU 2.2.18R; PRA General Organisational Requirements Rule 2.1; and PRA Internal Capital Adequacy Assessment Rule 4.2. *See* para. (c)(2) to the proposed Order.

[84] *See* para. (c)(1)(ii) to the proposed Order.

[85] *See* Capital and Margin Adopting Release, 84 FR at 43881 (''Consequently, in the Commission's judgment, the broker-dealer capital standard is the appropriate standard for nonbank SBSDs because it is designed to promote a firm's liquidity and self-sufficiency (in other words, to account for the lack of inexpensive funding sources that are available to banks, such as deposits and central bank support).'').

[86] *See, e.g.,* Capital and Margin Adopting Release, 84 FR at 43881 (''The Commission believes that the broker-dealer capital standard is the most appropriate alternative for nonbank SBSDs, given the nature of their business activities and the Commission's experience administering the standard with respect to broker-dealers. The objective of the broker-dealer capital standard is to protect customers and counterparties and to mitigate the consequences of a firm's failure by promoting the ability of these entities to absorb financial shocks and, if necessary, to self-liquidate in an orderly manner.'').

[87] *See* Capital and Margin Adopting Release, 84 FR at 43946–50.

comparable UK requirements at the entity level with respect to all margin requirements and counterparties—the firm could not apply UK margin requirements for one set of counterparties and Exchange Act margin requirements for another set of counterparties.[88]

3. Additional Conditions

Substituted compliance in connection with capital requirements would be subject to certain additional conditions to help ensure the comparability of outcomes. As discussed above, the capital standard of Exchange Act rule 18a–1 is the net liquid assets test. This is the same capital standard that applies to broker-dealers under Exchange Act rule 15c3–1. The net liquid assets test is designed to promote liquidity. In particular, Exchange Act rule 18a–1 allows an SBS Entity to engage in activities that are part of conducting a securities business (*e.g.,* taking securities into inventory) but in a manner that places the firm in the position of holding at all times more than one dollar of highly liquid assets for each dollar of unsubordinated liabilities (*e.g.,* money owed to customers, counterparties, and creditors).[89] For example, Exchange Act rule 18a–1 allows securities positions to count as allowable net capital, subject to standardized or internal model-based haircuts. The rule, however, does not permit most unsecured receivables to count as allowable net capital. This aspect of the rule severely limits the ability of SBS Entities to engage in activities, such as uncollateralized lending, that generate unsecured receivables. The rule also does not permit fixed assets or other illiquid assets to count as allowable net capital, which creates disincentives for SBS Entities to own real estate and other fixed assets that cannot be readily converted into cash. For these reasons, Exchange Act rule 18a–1 incentivizes SBS Entities to confine their business activities and devote capital to security-based swap activities.

The net liquid assets test is imposed through how an SBS Entity is required to compute net capital pursuant to Exchange Act rule 18a–1. The first step is to compute the SBS Entity's net worth under generally accepted accounting principles (''GAAP''). Next, the SBS Entity must make certain adjustments to its net worth to calculate net capital, such as deducting illiquid assets and taking other capital charges and adding qualifying subordinated loans.[90] The amount remaining after these deductions is defined as ''tentative net capital.'' Exchange Act rule 18a–1 prescribes a minimum tentative net capital requirement of $100 million for SBS Entities approved to use models to calculate net capital. The final step in computing net capital is to take prescribed percentage deductions (standardized haircuts) or model-based deductions from the mark-to-market value of the SBS Entity's proprietary positions (*e.g.,* securities, money market instruments, and commodities) that are included in its tentative net capital. The amount remaining is the firm's net capital, which must exceed the greater of $20 million or a ratio amount. An SBS Entity that is meeting its minimum net capital requirement will be in the position where each dollar of unsubordinated liabilities is matched by more than a dollar of highly liquid assets.

In comparison, Covered Entities in the UK are subject to capital requirements applicable to prudentially regulated entities based on the international capital standard for banks (the ''Basel capital standard'').[91] The Basel capital standard counts as capital assets that Exchange Act rule 18a–1 would exclude (*e.g.,* loans and most other types of uncollateralized receivables, furniture and fixtures, real estate). The Basel capital standard accommodates the business of banking: Making loans (including extending unsecured credit) and taking deposits. While the Covered Entities that will apply substituted compliance with respect to Exchange Act rule 18a–1 will not be banks, the Basel capital standard allows them to count illiquid assets such as real estate and fixtures as capital. It also allows them to treat unsecured receivables related to activities beyond dealing in security-based swaps as capital notwithstanding the illiquidity of these assets.

Further, one critical example of the difference between the requirements of Exchange Act rule 18a–1 and the Basel capital standard relates to the treatment of initial margin with respect to security-based swaps and swaps. Under the UK margin requirements, Covered Entities will be required to post initial margin to counterparties unless an exception applies.[92] Under Exchange Act rule 18a–1, an SBS Entity cannot count as capital the amount of initial margin posted to a counterparty unless it enters into a special loan agreement with an affiliate.[93] The special loan agreement requires the affiliate to fund the initial margin amount and the agreement must be structured so that the affiliate—rather than the SBS Entity—bears the risk that the counterparty may default on the obligation to return the initial margin. The reason for this restrictive approach to initial margin posted away is that it ''would not be available [to the SBS Entity] for other purposes, and, therefore, the firm's liquidity would be reduced.'' [94] Under the Basel capital standard, a Covered Entity can count initial margin posted away as capital without the need to enter into a special loan arrangement with an affiliate. Consequently, because of the ability to include illiquid assets and margin posted away as capital, Covered Entities subject to the Basel capital standard may have less balance sheet liquidity than SBS Entities subject to Exchange Act rule 18a–1.

To address this potential liquidity difference, substituted compliance with respect to Exchange Act rule 18a–1

[88] *See* Capital and Margin Adopting Release, 84 FR at 43947 (''Margin is designed to protect the nonbank SBSD or MSBSP from the consequences of a counterparty's default. Permitting different margin requirements based on the location of the counterparty is not consistent with this objective.'') (footnotes omitted).

[89] *See, e.g.,* Exchange Act Release No. 8024 (Jan. 18, 1967), 32 FR 856 (Jan. 25, 1967) (''Rule 15c3–1 (17 CFR 240.15c3–1) was adopted to provide safeguards for public investors by setting standards of financial responsibility to be met by brokers and dealers. The basic concept of the rule is liquidity; its object being to require a broker-dealer to have at all times sufficient liquid assets to cover his current indebtedness.'') (footnotes omitted); Exchange Act Release No. 10209 (June 8, 1973), 38 FR 16774 (June 26, 1973) (Commission release of a letter from the Division of Market Regulation) (''The purpose of the net capital rule is to require a broker or dealer to have at all times sufficient liquid assets to cover its current indebtedness. The need for liquidity has long been recognized as vital to the public interest and for the protection of investors and is predicated on the belief that accounts are not opened and maintained with broker-dealers in anticipation of relying upon suit, judgment and execution to collect claims but rather on a reasonable demand one can liquidate his cash or securities positions.''); Exchange Act Release No. 15426 (Dec. 21, 1978), 44 FR 1754 (Jan. 8, 1979) (''The rule requires brokers or dealers to have sufficient cash or liquid assets to protect the cash or securities positions carried in their customers' accounts. The thrust of the rule is to insure that a broker or dealer has sufficient liquid assets to cover current indebtedness.''); Exchange Act Release No. 26402 (Dec. 28, 1988), 54 FR 315 (Jan. 5, 1989) (''The rule's design is that broker-dealers maintain liquid assets in sufficient amounts to enable them to satisfy promptly their liabilities. The rule accomplishes this by requiring broker-dealers to maintain liquid assets in excess of their liabilities to protect against potential market and credit risks.'') (footnote omitted).

[90] *See* 17 CFR 240.15c3–1(c)(2).

[91] *See* supra note 81 (citing UK capital requirements under UK CRR). *See also* BCBS, The Basel Framework, available at: *https://www.bis.org/basel_framework/.*

[92] Exchange Act rule 18a–3 does not require SBS Entities to post initial margin (though it does not prohibit the practice).

[93] *See* Capital and Margin Adopting Release, 84 FR at 43887–88.

[94] *See id.* at 43887.

would be subject to the conditions that a Covered Entity: (1) Maintains an amount of assets that are allowable under Exchange Act rule 18a–1, after applying applicable haircuts under the Basel capital standard, that equals or exceeds the Covered Entity's current liabilities coming due in the next 365 days; (2) makes a quarterly record listing: (a) The assets maintained pursuant to the first condition, their value, and the amount of their applicable haircuts; and (b) the aggregate amount of the liabilities coming due in the next 365 days; (3) maintains at least $100 million of equity capital composed of highly liquid assets, as defined in the Basel capital standard; and (4) includes its most recent statement of financial condition (*i.e.,* balance sheet) filed with its local supervisor whether audited or unaudited with its initial written notice to the Commission of its intent to rely on substituted compliance under condition (a)(16) to the proposed Order.[95]

The first proposed capital condition would require a Covered Entity to maintain an amount of assets that are allowable under Exchange Act rule 18a–1, after applying applicable haircuts under the Basel capital standard,[96] that equals or exceeds the Covered Entity's current liabilities coming due in the next 365 days.[97] The objective of this condition is to require a Covered Entity to maintain sufficient liquidity to meet near-term liabilities through a simple computation, as compared to the net capital computation required by Exchange Act rule 18a–1. Generally, current liabilities are understood to mean those liabilities coming due within one year as distinct from long-term liabilities that mature in more than a year. The proposed 365-day period is designed to align with that distinction between short-term and long-term liabilities to facilitate compliance with the condition. Because the condition does not address long-term liabilities, it would not necessarily leave the Covered Entity in position where each dollar of unsubordinated liabilities is matched by more than a dollar of highly liquid assets (as is the case with the net liquid assets test of Exchange Act rule 18a–1). However, it would provide a pool of highly liquid assets that can be used by the Covered Entity to avoid a near-term liquidity strain that could imperil its ability to remain a going concern.[98] The condition's use of the Basel capital standard haircuts (as opposed to Exchange Act rule 18a–1 haircuts) is designed to tailor the condition to the Basel capital standard consistent with substituted compliance.

The second proposed condition would require that a Covered Entity make a quarterly record listing: (1) The assets maintained pursuant to the first condition, their value, and the amount of their applicable haircuts; and (2) the aggregate amount of the liabilities coming due in the next 365 days.[99] The requirement to create this record would enable the Commission or Commission staff to monitor compliance with the proposed condition and facilitate examination of the Covered Entity with regard to substituted compliance. The proposed quarterly interval between making this record (as opposed to a daily, weekly, or monthly interval) is designed to facilitate exams while minimizing the burden of the condition.

In proposing these two conditions, the Commission acknowledges that the Basel capital standard includes the liquidity coverage ratio (''LCR''). However, the LCR requires Covered Entities to maintain an amount of high quality liquid assets equal to or greater than their projected total net cash outflows over a prospective 30 calendar-day period. As discussed above, the first proposed condition requires sufficient liquidity to address liabilities coming due over the next 365 days. The longer period in the condition is designed to cover a greater amount of liabilities in order to further enhance the Covered Entity's liquidity to achieve an outcome more in line with the liquidity that results from the net liquid assets test of Exchange Act rule 18a–1. This is consistent with the goal of ensuring comparability of outcomes.

The third proposed condition is that the Covered Entity maintain at least $100 million of equity capital composed of highly liquid assets as defined in the Basel capital standard.[100] This condition is based on the $100 million tentative net capital requirement of Exchange Act rule 18a–1 for SBS Entities authorized to use models. The condition is designed to ensure that Covered Entities applying substituted compliance with respect to Exchange Act rule 18a–1 have a minimum level of capital to absorb financial losses. Further, the LCR defines ''highly liquid assets'' and the use of that definition is designed to tailor the condition to the Basel capital standard consistent with the substituted compliance.

The fourth condition is that the Covered Entity include its most recently filed statement of financial condition whether audited or unaudited with its initial notice to the Commission of its intent to rely on substituted compliance.[101] This one-time obligation would provide the Commission with information about the assets, liabilities, and capital of Covered Entities applying substituted compliance with respect to Exchange Act rule 18a–1. The Commission would use the statement of financial condition and the periodic audited and unaudited reports Covered Entities will file with the Commission to monitor the appropriateness of the capital condition if it is included in the final Order. The Commission expects that most Covered Entities will file their initial notice of intent to apply substituted compliance with respect to Exchange Act rule 18a–1 at or around the time they file their registration applications with the Commission. Therefore, receipt of the statement of financial condition at that time would allow the Commission to begin this monitoring process before Covered Entities begin filing audited and unaudited reports with the Commission pursuant to Exchange Act rule 18a–7.

The Commission is mindful that compliance with these conditions would require Covered Entities applying substituted compliance to Exchange Act rule 18a–1 to supplement their existing capital calculations and practices, as well as to incur additional time and cost burdens to implement the potential conditions and integrate them into existing business operations.[102] On balance, however, these proposed conditions to substituted compliance for capital are designed to ensure the comparability of outcomes in light of the differences between the net liquid

[95] *See* para. (c)(1)(ii) to the proposed Order.

[96] *See* standard supervisory haircuts under the Basel capital standards. BCBS, The Basel Framework, available at: *https://www.bis.org/basel_framework/.*

[97] *See* para. (c)(1)(ii)(A) to the proposed Order.

[98] *See* Capital and Margin Adopting Release, 84 FR at 43881 (''The Commission believes that the broker-dealer capital standard is the most appropriate alternative for nonbank SBSDs, given the nature of their business activities and the Commission's experience administering the standard with respect to broker-dealers. The objective of the broker-dealer capital standard is to protect customers and counterparties and to mitigate the consequences of a firm's failure by promoting the ability of these entities to absorb financial shocks and, if necessary, to self-liquidate in an orderly manner.'')

[99] *See* para. (c)(1)(ii)(B) to the proposed Order.

[100] *See* para. (c)(1)(ii)(C) to the proposed Order.

[101] *See* para. (c)(1)(ii)(D) to the proposed Order.

[102] Additional time and costs burdens may include employee costs and time to program software and computer systems to add an additional capital calculation into an existing system and firm processes and procedures, as well as ongoing time and expenses to monitor the calculations on an ongoing basis. Further, additional time and expense may be incurred with respect to any additional controls implemented to ensure compliance with the proposed capital conditions.

assets test and the Basel capital standard. If these conditions are included in the final order, the Commission intends to monitor their impact on firms and to make adjustments to them as appropriate.

VI. Substituted Compliance for Internal Supervision, Chief Compliance Officers and Additional Exchange Act Section 15F(j) Requirements

A. FCA Request and Associated Analytic Considerations

The FCA also requests substituted compliance in connection with requirements under the Exchange Act relating to:

- *Internal supervision*—Diligent supervision is required pursuant to Exchange Act rule 15Fh–3(h),[103] and Exchange Act section 15F(j)(5) requires conflict of interest systems and procedures. These provisions generally require that SBS Entities establish, maintain and enforce supervisory policies and procedures that reasonably are designed to prevent violations of applicable law, and implement certain systems and procedures related to conflicts of interest.[104]
- *Chief compliance officers*—Chief compliance officer requirements are set out in Exchange Act section 15F(k) and Exchange Act rule 15Fk–1.[105] These provisions in general require that SBS Entities designate individuals with the responsibility and authority to establish, administer and review compliance policies and procedures, to resolve conflicts of interest, and to prepare and certify an annual compliance report to the Commission.[106]
- *Additional Exchange Act section 15F(j) requirements*—Additional requirements related to information-gathering pursuant to Exchange Act section 15F(j)(4)(A), and certain antitrust prohibitions specified by Exchange Act section 15F(j)(6).[107]

Taken as a whole, these internal supervision, chief compliance officer and additional Exchange Act section 15F(j) requirements help to promote SBS Entities' use of structures, processes and responsible personnel reasonably designed to promote compliance with applicable law, to identify and cure instances of non-compliance and to manage conflicts of interest. The comparability assessment accordingly may focus on whether the analogous foreign requirements—taken as a whole—produce comparable outcomes with regard to providing that Covered Entities have structures and processes reasonably designed to promote compliance with applicable law, identify and cure instances of non-compliance and to manage conflicts of interest, in part through the designation of an individual with responsibility and authority over compliance matters.

B. Preliminary Views and Proposed Order

1. General Considerations

Based on the FCA Application and the Commission's review of applicable provisions, in the Commission's preliminary view the relevant UK requirements would produce regulatory outcomes that are comparable to those associated with the above-described internal supervision, chief compliance officer, conflict of interest and information-related requirements by providing that Covered Entities have structures and processes that reasonably are designed to promote compliance with applicable law and to identify and cure instances of non-compliance and manage conflicts of interest.[108] As elsewhere, this part of the proposed Order conditions substituted compliance on Covered Entities being subject to and complying with specified UK requirements that are necessary to establish comparability.[109]

The Commission recognizes that certain differences are present between those UK requirements and the applicable requirements under the Exchange Act. In the Commission's preliminary view, on balance, however, those differences would not preclude substituted compliance within the relevant outcomes-oriented context.

2. Scope of Substituted Compliance

The proposed Order would permit a Covered Entity to apply substituted compliance for internal supervision and/or chief compliance officer requirements. For example, a Covered Entity could apply substituted compliance for internal supervision requirements but comply directly with Exchange Act chief compliance officer requirements. For either set of requirements for which a Covered Entity applies substituted compliance, however, the proposed Order would require the Covered Entity to apply substituted compliance at an entity level, *i.e.,* to all of its activities subject to that set of requirements. For example, the proposed Order would require a Covered Entity applying substituted compliance for internal supervision requirements to comply with the comparable UK requirements with respect to all of its internal supervision systems and procedures. The Covered Entity could not choose to comply with the Exchange Act for one part of its internal supervision systems and procedures and with UK requirements for another part of its internal supervision systems and procedures.[110] The Commission preliminarily believes that this scope of substituted compliance strikes the right balance between providing Covered Entities

---

[103] 17 CFR 240.15Fh–3(h).

[104] The FCA Application addresses UK provisions that address firms' supervisory frameworks, persons with supervisory authority, supervisory policies and procedures, general compliance and internal recordkeeping, investigation of personnel, conflicts of interest, personal trading and remuneration. *See* FCA Application Appendix B category 3 at 190–214, 217–48.

[105] 17 CFR 240.15Fk–1.

[106] The FCA Application discusses UK requirements that address compliance officers and their responsibilities, compliance officer appointment, removal and compensation, related conflict of interest provisions and compliance-related reports. *See* FCA Application Appendix B category 3 at 249–74.

[107] Section 15F(j)(4)(A) particularly requires firms to have systems and procedures to obtain necessary information to perform functions required under section 15F. The FCA Application in turn discusses UK provisions generally addressing information gathering and disclosure. *See* FCA Application Appendix B category 3 at 214–15. Section 15F(j)(6) prohibits firms from adopting any process or taking any action that results in any unreasonable restraint of trade, or to impose any material anticompetitive burden on trading or clearing. The FCA Application addresses EU antitrust requirements. *See* FCA Application Appendix B category 3 at 216–17.

[108] This portion of the proposed Order accordingly would extend generally to the internal supervision provisions of Exchange Act rule 15Fh–3(h), the requirement in Exchange Act section 15F(j)(4)(A) to have systems and procedures to obtain necessary information to perform functions required under Exchange Act section 15F and the conflict of interest provisions of Exchange Act section 15F(j)(5). *See* para. (d)(1) to the proposed Order. This portion of the proposed Order does not extend to the portions of rule 15Fh–3(h) that mandate supervisory policies and procedures in connection with: The risk management system provisions of Exchange Act section 15F(j)(2) (which are addressed by paragraph (b)(1) to the proposed Order in connection with internal risk management); the information-related provisions of Exchange Act sections 15F(j)(3) and (j)(4)(B) (for which substituted compliance is not available); or the antitrust provisions of Exchange Act section 15F(j)(6) (for which the Commission is not proposing to provide substituted compliance). *See* para. (d)(1)(iii) to the proposed Order.

[109] In connection with these internal supervision, chief compliance officer and conflict of interest and information gathering provisions, a Covered Entity must be subject to and comply with provisions of UK law that implement MiFID articles 16 and 23 and CRD articles 74, 76, 79 through 87, 88(1), 91(1) and (2) and 92; UK CRR article 286 through 288 and 293; UK EMIR Margin RTS article 2; and UK MiFID Org Reg articles 21 through 37 and 72 through 76 and Annex IV. *See* para. (d)(3) to the proposed Order.

[110] *See* para. (d)(1) to the proposed Order. Similarly, a Covered Entity applying substituted compliance for chief compliance officer requirements would have to comply with the comparable UK requirements with respect to all security-based swaps subject to Exchange Act trade acknowledgment and verification requirements. *See* para. (d)(2) to the proposed Order.

flexibility to tailor the application of substituted compliance to their business needs and ensuring that substituted compliance is consistent with the Commission's classification of the relevant Exchange Act requirements as entity-level requirements.[111]

3. Types of Covered Entities ''Subject to'' Comparable UK Requirements

Each of the comparable UK provisions listed in the proposed Order applies to a uniquely defined set of UK-authorized firms.[112] To assist UK firms in determining whether they are subject to these provisions, the Commission preliminarily has determined that any Covered Entity that is an ''IFPRU investment firm,'' as defined in the FCA Handbook Glossary, or a ''UK bank'' or ''UK designated investment firm,'' as defined in both the FCA Handbook Glossary and the PRA Rulebook Glossary, and is not an ''investment company with variable capital,'' as defined in the FCA Handbook Glossary, would be subject to all of the required UK provisions. Accordingly, those types of firms preliminarily would be eligible to apply substituted compliance for internal supervision, chief compliance officer, conflict of interest and information-related requirements. A Covered Entity that is preliminarily not eligible to apply substituted compliance for those requirements, such as a third country investment firm, nevertheless would be preliminarily eligible to apply substituted compliance for other requirements addressed in the proposed Order if it complies with the relevant parts of the proposed Order.

4. Additional Conditions and Scope Issues

Substituted compliance in connection with these requirements would be subject to certain additional conditions to help ensure the comparability of outcomes:

a. Application of UK Supervisory and Compliance Requirements to Residual U.S. Requirements and Order Conditions

Under the proposed Order, substituted compliance for the relevant internal supervision requirements would be conditioned on Covered Entities complying with applicable UK supervisory and compliance provisions *as if* those provisions also require the Covered Entity to comply with applicable requirements under the Exchange Act and the other applicable conditions to the Order.[113]

Even with substituted compliance, Covered Entities still would be subject directly to a number of requirements under the Exchange Act and to the conditions to the Order. In some cases, particular requirements under the Exchange Act are outside the ambit of substituted compliance.[114] In other cases, certain requirements under the Exchange Act may not have comparable UK requirements or may be outside the scope of the FCA Application,[115] or the Covered Entity may decide not to use substituted compliance for certain requirements under the Exchange Act. While the UK regulatory framework in general reasonably appears to promote Covered Entities' compliance with applicable UK laws, those requirements do not appear to promote Covered Entities' compliance with requirements under the Exchange Act that are not subject to substituted compliance, or promote Covered Entities' compliance with the applicable conditions to substituted compliance. This condition would address this issue, while still allowing Covered Entities to use their existing internal supervision and compliance frameworks to comply with the relevant Exchange Act requirements and Order conditions, rather than having to establish separate special-purpose supervision and compliance frameworks.

b. Compliance Reports

Under the proposed Order, substituted compliance in connection with the compliance report requirements under Exchange Act section 15F(k)(3) and Exchange Act rule 15Fk–1(c) also would be subject to the condition that the compliance reports required pursuant to UK MiFID Org Reg article 22(2)(c) must: (1) Be provided to the Commission annually and in the English language; (2) include a certification under penalty of law that the report is accurate and complete; and (3) address the Covered Entity's compliance with other applicable conditions to the proposed Order.[116]

Although certain UK requirements address a Covered Entity's use of internal compliance reports, those provisions do not require it to submit compliance reports to the Commission. Under this condition, a Covered Entity could leverage the compliance reports that it otherwise must produce, by extending those reports to address compliance with the conditions to the proposed Order.[117]

c. Antitrust Considerations

Under the proposed Order, substituted compliance would not extend to Exchange Act section 15F(j)(6) (and related internal supervision requirements of Exchange Act rule 15Fh–3(h)(2)(iii)(I)). Allowing an alternative means of compliance would not lead to outcomes comparable to that statutory prohibition.[118]

VII. Substituted Compliance for Counterparty Protection Requirements

A. FCA Request and Associated Analytic Considerations

The FCA further requests substituted compliance in connection with provisions under the Exchange Act relating to:

[111] *See* Business Conduct Adopting Release, 81 FR at 30064 (diligent supervision and chief compliance officer requirements are entity-level requirements).

[112] The Commission preliminarily understands that FCA CASS 6 and 7 apply to all FCA-authorized firms that are not investment companies with variable capital; FCA COBS 11 applies to all FCA-authorized firms; FCA IFPRU and FCA BIPRU apply to IFPRU investment firms; FCA SYSC 4, 7, 9 and 10 (except SYSC 10.1.8) apply to common platform firms and third country firms; FCA SYSC 10.1.8 applies to firms that provide services to a client in the course of carrying on regulated activities or ancillary activities or providing ancillary services that constituted MiFID business; FCA SYSC 10A applies to MiFID investment firms and third country investment firms; FCA SYSC 19A applies to IFPRU investment firms and their overseas firm analogues; FCA SYSC 19D applies to UK banks, UK designated investment firms and their overseas firm analogues; the PRA rules cited in paragraph (d)(3) to the proposed Order apply to CRR firms as defined in the PRA Rulebook Glossary; and UK MiFID Org Reg applies to investment firms and credit institutions.

[113] *See* para. (d)(4) to the proposed Order.

[114] As noted, substituted compliance does not extend to antifraud prohibitions or to certain other requirements under the Exchange Act (*e.g.,* requirements related to transactions with counterparties that are not ECPs and segregation requirements). *See* note 5, *supra.*

[115] For example, the FCA is not requesting substituted compliance in connection with ECP verification requirements, ''special entity'' provisions and political contribution provisions. *See* note 17, *supra.*

[116] *See* para. (d)(2)(ii) to the proposed Order. UK MiFID Org Reg article 22(2)(c) particularly requires that a Covered Entity's compliance function ''report to the management body, on at least an annual basis, on the implementation and effectiveness of the overall control environment for investment services and activities, on the risks that have been identified and on the complaints-handling reporting as well as remedies undertaken or to be undertaken[.]'' Under the proposed condition, those reports, as submitted to the Commission and the Covered Entity's management body, also would address the Covered Entity's compliance with the other conditions to the proposed Order (in addition to addressing the Covered Entity's compliance with applicable UK provisions).

[117] In practice, a Covered Entity may satisfy this condition by identifying relevant Order conditions and reporting on the implementation and effectiveness of its controls with regard to compliance with those Order conditions.

[118] *See also* German Substituted Compliance Order, 85 FR at 85691–92. The Commission is not taking any position regarding the applicability of the section 15F(j)(6) antitrust prohibitions in the cross-border context. Non-U.S. SBS Entities should assess the applicability of those prohibitions to their security-based swap businesses.

• *Disclosure of material risks and characteristics and material incentives or conflicts of interest*—Exchange Act rule 15Fh–3(b) [119] requires that SBS Entities disclose to certain counterparties to a security-based swap certain information about the material risks and characteristics of the security-based swap, as well as material incentives or conflicts of interest that the SBS Entity may have in connection with the security-based swap. These provisions address the need for security-based swap market participants to have information that is sufficient to make informed decisions regarding potential transactions involving particular counterparties and particular financial instruments.[120]

• ''*Know your counterparty*''—Exchange Act rule 15Fh–3(e) [121] requires that SBS Entities establish, maintain and enforce written policies and procedures to obtain and retain certain information regarding a counterparty that is necessary for conducting business with that counterparty. This provision accounts for the need that SBS Entities obtain essential counterparty information necessary to promote effective compliance and risk management.[122]

• *Suitability*—Exchange Act rule 15Fh–3(f) [123] requires a security-based swap dealer that recommends to certain counterparties a security-based swap or trading strategy involving a security-based swap, to undertake reasonable diligence to understand the potential risks and rewards associated with the recommendation and to have a reasonable basis to believe that the recommendation is suitable for the counterparty.[124] This provision accounts for the need to guard against security-based swap dealers making unsuitable recommendations.[125]

• *Fair and balanced communications*—Exchange Act rule 15Fh–3(g) [126] requires that SBS Entities communicate with counterparties in a fair and balanced manner based on principles of fair dealing and good faith. These provisions promote complete and honest communications as part of SBS Entities' security-based swap businesses.[127]

• *Daily mark disclosure*—Exchange Act rule 15Fh–3(c) [128] requires that SBS Entities provide daily mark information to certain counterparties. These provisions address the need for market participants to have effective access to daily mark information necessary to manage their security-based swap positions.[129]

• *Clearing rights disclosure*—Exchange Act rule 15Fh–3(d) [130] requires that SBS Entities provide certain counterparties with information regarding clearing rights under the Exchange Act.[131]

Taken as a whole, the counterparty protection requirements under section 15F of the Exchange Act help to ''bring professional standards of conduct to, and increase transparency in, the security-based swap market and to require [SBS Entities] to treat parties to these transactions fairly.'' [132] The comparability assessment accordingly may focus on whether the analogous foreign requirements—taken as a whole—produce similar outcomes with regard to promoting professional standards of conduct, increasing transparency and requiring Covered Entities to treat parties fairly.

B. Preliminary Views and Proposed Order

1. General Considerations

Based on the FCA Application and the Commission's review of applicable provisions, in the Commission's preliminary view, the relevant UK requirements produce regulatory outcomes that are comparable to counterparty protection requirements under Exchange Act section 15F(h) related to disclosure of material risks and characteristics, disclosure of material incentives or conflicts of interest, ''know your counterparty,'' suitability, fair and balanced communications and daily mark disclosure, by subjecting Covered Entities to obligations that promote standards of professional conduct, transparency and the fair treatment of parties. The proposed Order accordingly would provide conditional substituted compliance in connection with those requirements.[133] The proposed Order preliminarily does not provide substituted compliance in connection with requirements related to clearing rights disclosure, however, for reasons addressed below.

In taking this proposed approach, the Commission recognizes that there are certain differences between relevant UK requirements, on the one hand, and the relevant disclosure, ''know your counterparty,'' suitability and communications requirements under the Exchange Act, on the other hand. On balance, however, in the Commission's preliminary view, those differences, when coupled with the conditions in the proposed Order, are not so material as to be inconsistent with substituted

[119] 17 CFR 240.15Fh–3(b).

[120] *See* Business Conduct Adopting Release, 81 FR at 29983–86. The FCA Application discusses UK requirements that address disclosure of product information and firm information. *See* FCA Application Appendix B category 4 at 292–303.

[121] 17 CFR 240.15Fh–3(e).

[122] *See* Business Conduct Adopting Release, 81 FR at 29993–94. The FCA Application discusses UK suitability requirements regarding information that firms must obtain regarding counterparties. *See* FCA Application Appendix B category 4 at 313–20.

[123] 17 CFR 240.15Fh–3(f).

[124] *See* Business Conduct Adopting Release, 81 FR at 29994–30000. A security-based swap dealer may satisfy its counterparty-specific suitability obligation with respect to an ''institutional counterparty,'' as defined in Exchange Act rule 15Fh–3(f)(4), if the security-based swap dealer reasonably determines that the counterparty or its agent is capable of independently evaluating relevant investment risks, the counterparty or its agent represents in writing that it is exercising independent judgment in evaluating the recommendation, and the security-based swap dealer discloses that it is acting as counterparty and is not undertaking to assess the suitability of the recommendation for the counterparty. *See* Exchange Act rule 15Fh–3(f)(2) and (3).

[125] *See* Business Conduct Adopting Release, 81 FR at 29997. The FCA Application discusses UK suitability requirements that are more targeted for transactions with ''professional clients.'' *See* FCA Application Appendix B category 4 at 321–32.

[126] 17 CFR 240.15Fh–3(g).

[127] *See* Business Conduct Adopting Release, 81 FR at 30000–02. The FCA Application discusses UK requirements that address communications standards. *See* FCA Application Appendix B category 4 at 275–91.

[128] 17 CFR 240.15Fh–3(c).

[129] *See* Business Conduct Adopting Release, 81 FR at 29986–91. The FCA Application discusses UK requirements that address valuation, portfolio reconciliation and trade reporting. *See* FCA Application Appendix B category 4 at 304–12.

[130] 17 CFR 240.15Fh–3(d).

[131] Exchange Act section 3C(g)(5), provides certain rights for counterparties to select the clearing agency at which a security-based swap is cleared. For all security-based swaps that an SBS Entity enters into with certain counterparties, the counterparty has the sole right to select the clearing agency at which the security-based swap is cleared. For security-based swaps that are not subject to mandatory clearing (pursuant to Exchange Act sections 3C(a) and (b), 15 U.S.C. 78c–3(a) and (b)) and that an SBS Entity enters into with certain counterparties, the counterparty also may elect to require clearing of the security-based swap. Substituted compliance is not available in connection with this provision. The FCA Application discusses UK provisions that address clearing rights. *See* FCA Application Appendix B category 4 at 333–40.

[132] *See* Business Conduct Adopting Release, 81 FR at 30065. These transaction-level requirements generally apply only to a non-U.S. SBS Entity's activities involving U.S. counterparties (unless the transaction is arranged, negotiated or executed in the United States). In particular, for non-U.S. SBS Entities, the counterparty protection requirements under Exchange Act section 15F(h) apply only to the SBS Entity's transactions with U.S. counterparties (apart from certain transactions conducted through a foreign branch of the U.S. counterparty), or to transactions arranged, negotiated or executed in the United States. *See* Exchange Act rule 3a71–3(c), 17 CFR 240.3a71–3(c) (exception from business conduct requirements for a security-based swap dealer's ''foreign business''); *see also* Exchange Act rule 3a71–3(a)(3), (8) and (9), 17 CFR 240.3a71–3(a)(3), (8) and (9) (definitions of ''transaction conducted through a foreign branch,'' ''U.S. business'' and ''foreign business'').

[133] *See generally* para. (e) to the proposed Order.

compliance within the requisite outcomes-oriented framework. As elsewhere, the counterparty protection provisions of the proposed Order in part condition substituted compliance on Covered Entities being subject to, and complying with, specified UK requirements that are necessary to establish comparability.[134] Substituted compliance in connection with these counterparty protection requirements also would be subject to specific conditions and limitations necessary to promote consistency in regulatory outcomes.

2. Scope of Substituted Compliance

The proposed Order would permit a Covered Entity to apply substituted compliance for one or more counterparty protection requirements. For example, a Covered Entity could apply substituted compliance for fair and balanced communications requirements but comply directly with Exchange Act requirements related to disclosure of information regarding material risks and characteristics, disclosure of information regarding material incentives or conflicts of interest, ''know your counterparty,'' suitability and daily mark disclosure. A Covered Entity also may decide to apply substituted compliance for a particular set of counterparty protection requirements, such as fair and balance communications, for some activities and comply directly with Exchange Act requirements for other activities. For example, the proposed Order would allow a Covered Entity applying substituted compliance for fair and balanced communications requirements to comply with the comparable UK requirements with respect to communications with UK counterparties that are subject to the Exchange Act and to comply directly with Exchange Act requirements with respect to U.S. person counterparties.[135] The Commission preliminarily believes that this scope of substituted compliance would provide Covered Entities flexibility to tailor the application of substituted compliance to their business needs in a manner consistent with the Commission's classification of the relevant Exchange Act counterparty protection requirements as transaction-level requirements.[136]

3. Types of Covered Entities ''Subject to'' Comparable UK Requirements

Each of the comparable UK provisions listed in the proposed Order applies to a uniquely defined set of UK-authorized firms.[137] To assist UK firms in determining whether they are subject to these provisions, the Commission preliminarily has determined that any Covered Entity would be subject to the required UK requirements related to disclosure of material risks and characteristics, disclosure of material incentives or conflicts of interest, suitability and fair and balanced communications. Accordingly, any

[134] In connection with requirements related to disclosure of information regarding material risks and characteristics, a Covered Entity must be subject to and comply with provisions of UK law that implement MiFID article 24(4) and either UK MiFID Org Reg articles 48 through 50 or provisions of UK law that reflect UK MiFID Org Reg articles 48 through 50, in each case in relation to the security-based swap for which substituted compliance is applied. *See* para. (e)(1) to the proposed Order. In connection with requirements related to disclosure of information regarding material incentives or conflicts of interest, a Covered Entity must be subject to and comply with either: (1) Provisions of UK law that implement MiFID article 23(2) and (3) and UK MiFID Org Reg articles 33 through 35; (2) provisions of UK law that implement MiFID article 24(9) and MiFID Delegated Directive article 11(5); or (3) UK MAR article 20(1) and UK MAR Investment Recommendations Regulation articles 5 and 6, in each case in relation to the security-based swap for which substituted compliance is applied. *See* para. (e)(2) to the proposed Order. In connection with ''know your counterparty'' requirements, a Covered Entity must be subject to and comply with provisions of UK law that implement MiFID article 16(2); UK MiFID Org Reg articles 21, 22, 25, 26 and applicable parts of Annex I; provisions of UK law that implement CRD articles 74(1) and 85(1), MLD articles 11 and 13 and MLD articles 8(3) and 8(4)(a) as applied to policies, controls and procedures regarding customer due diligence, in each case in relation to the security-based swap counterparty for which substituted compliance is applied. *See* para. (e)(3) to the proposed Order. In connection with suitability requirements, a Covered Entity must be subject to and comply with provisions of UK law that implement MiFID articles 24(2) and (3) and 25(1) and (2) and UK MiFID Org Reg articles 21(1)(b) and (d), 54 and 55, in each case in relation to the recommendation of a security-based swap or trading strategy involving a security-based swap for which substituted compliance is applied. *See* para. (e)(4)(i) to the proposed Order. In connection with fair and balanced communications requirements, a Covered Entity must be subject to and comply with provisions of UK law that implement either MiFID article 24(1) and (3) or MiFID article 30(1); provisions of UK law that implement MiFID article 24(4) and (5); either UK MiFID Org Reg articles 46 through 48 or provisions of UK law that reflect UK MiFID Org Reg articles 46 through 48; UK MAR Investment Recommendations Regulation articles 3 and 4; and UK MAR articles 12(1)(c), 15 and 20(1), in each case in relation to the communication for which substituted compliance is applied. *See* para. (e)(5) to the Proposed Order. In connection with daily mark disclosure requirements, Covered Entities must be required to reconcile, and in fact reconcile, the portfolio containing the security-based swap for which substituted compliance is applied, on each business day pursuant to UK EMIR articles 11(1)(b) and 11(2) and UK EMIR RTS article 13. *See* para. (e)(6) to the Proposed Order.

[135] *See* para. (e)(5) to the proposed Order. Similarly, a Covered Entity applying substituted compliance for requirements to disclose information regarding material risks and characteristics could comply with the comparable UK requirements with respect to some security-based swaps and comply directly with Exchange Act requirements with respect to other security-based swaps. *See* para. (e)(1) to the proposed Order. A Covered Entity applying substituted compliance for requirements to disclose information regarding material incentives or conflicts of interest could comply with the comparable UK requirements with respect to some security-based swaps and comply directly with Exchange Act requirements with respect to other security-based swaps. *See* para. (e)(2) to the proposed Order. A Covered Entity applying substituted compliance for ''know your counterparty'' requirements could comply with the comparable UK requirements with respect to some security-based swap counterparties and comply directly with Exchange Act requirements with respect to other counterparties. *See* para. (e)(3) to the proposed Order. A Covered Entity applying substituted compliance for suitability requirements could comply with the comparable UK requirements with respect to some recommendations of a security-based swap or trading strategy involving a security-based swap and comply directly with Exchange Act requirements with respect to other recommendations. *See* para. (e)(4) to the proposed Order. A Covered Entity applying substituted compliance for daily mark disclosure requirements could comply with the comparable UK requirements with respect to some security-based swaps and comply directly with Exchange Act requirements with respect to other security-based swaps. *See* para. (e)(6) to the proposed Order.

[136] *See* Business Conduct Adopting Release, 81 FR at 30065 (counterparty protection requirements are transaction-level requirements).

[137] In connection with requirements related to disclosure of information regarding material risks and characteristics, the Commission preliminarily understands that FCA COBS 2, 6, 9A and 14 apply to MiFID investment firms and third country investment firms and the UK MiFID Org Reg applies to investment firms and credit institutions. In connection with requirements related to disclosure of information regarding material incentives or conflicts of interest, the Commission preliminarily understands that FCA COBS 2 applies to MiFID investment firms and third country investment firms; FCA SYSC 10.1.8 applies to firms that provide services to a client in the course of carrying on regulated activities or ancillary activities or providing ancillary services that constitute MiFID business; UK MAR article 20 applies to all natural and legal persons; and UK MiFID Org Reg applies to investment firms and credit institutions. In connection with ''know your counterparty'' requirements, the Commission preliminarily understands that FCA IFPRU applies to IFPRU investment firms; FCA SYSC 4 and 6 apply to common platform firms and third country firms; MLR 2017 applies to, among others, investment firms and credit institutions; the PRA rules cited in paragraph (e)(3) to the proposed Order apply to CRR firms as defined in the PRA Rulebook Glossary; and UK MiFID Org Reg applies to investment firms and credit institutions. In connection with suitability requirements, the Commission preliminarily understands that FCA COBS 4 and 9A and PROD 3 apply to MiFID investment firms and third country investment firms; FCA SYSC 5 applies to common platform firms and third country firms; and UK MiFID Org Reg applies to investment firms and credit institutions. In connection with fair and balanced communications requirements, the Commission preliminarily understands that FCA COBS 2, 4, 6, 8A, 9A, 14 and 14A apply to MiFID investment firms and third country investment firms; UK MAR articles 12(1)(c) and 15 and UK MAR Investment Recommendations Regulation article 5 apply to all natural and legal persons; and UK MiFID Org Reg applies to investment firms and credit institutions. In connection with daily mark disclosure requirements, the Commission preliminarily understands that UK EMIR and UK EMIR RTS apply to financial counterparties.

Covered Entity preliminarily would be eligible to apply substituted compliance for disclosure of material risks and characteristics, disclosure of material incentives or conflicts of interest, suitability and fair and balanced communications requirements. In connection with ''know your counterparty'' requirements, the Commission also preliminarily has determined that any Covered Entity that is an ''IFPRU investment firm,'' as defined in the FCA Handbook Glossary, or a ''UK bank'' or ''UK designated investment firm,'' as defined in both the FCA Handbook Glossary and the PRA Rulebook Glossary, would be subject to all of the required UK provisions and thus eligible to apply substituted compliance for Exchange Act ''know your counterparty'' requirements. In connection with daily mark disclosure requirements, the Commission preliminarily has determined that any Covered Entity that is a ''financial counterparty''—that is, a Covered Entity that is a MiFID investment firm rather than a third country investment firm—would be subject to all of the required UK provisions and thus eligible to apply substituted compliance for Exchange Act daily mark disclosure requirements. A Covered Entity that is preliminarily not eligible to apply substituted compliance for ''know your counterparty'' and/or daily mark disclosure requirements, such as a third country investment firm, nevertheless would be preliminarily eligible to apply substituted compliance for other requirements addressed in the proposed Order if it complies with the relevant parts of the proposed Order.

4. Additional Conditions and Scope Issues

a. Daily Mark Disclosure

The proposed Order would provide substituted compliance in connection with daily mark disclosure requirements pursuant to Exchange Act rule 15Fh–3(c) to the extent that the Covered Entity participates in daily portfolio reconciliation exercises that include the relevant security-based swap pursuant to UK requirements.[138] The FCA Application takes the view that UK requirements directing certain types of derivatives counterparties to mark-to-market (or mark-to-model) uncleared transactions each day are comparable to Exchange Act requirements. In the Commission's preliminary view, however, these UK mark-to-market (or mark-to-model) requirements are not comparable to Exchange Act requirements because the UK requirements do not require disclosure to counterparties. In the alternative, the FCA Application notes that certain derivatives counterparties must report to a UK trade repository updated daily valuations for each OTC derivative contract and that all counterparties have the right to access these valuations at the relevant UK trade repository. In the Commission's preliminary view, in practice, U.S. counterparties may encounter challenges when attempting to access daily marks for different security-based swaps reported to multiple UK trade repositories with which they may not otherwise have business relationships. In addition, the information may be less current, given the time necessary for reporting and for the trade repository to make the information available.[139] For these reasons, in the Commission's preliminary view, these UK reporting requirements also are not comparable to Exchange Act requirements. Finally, the FCA Application describes the EU's portfolio reconciliation requirements for uncleared OTC derivative contracts, which include a requirement to exchange valuations of those contracts directly between counterparties. The required frequency of portfolio reconciliations varies depending on the types of counterparties and the size of the portfolio of OTC derivatives between them, with daily reconciliation required only for the largest portfolios. For security-based swaps to which the UK's daily portfolio reconciliation requirements apply (*i.e.,* security-based swaps of a financial counterparty or non-financial counterparty subject to the clearing obligation in UK EMIR, if the counterparties have 500 or more OTC derivatives contracts outstanding with each other[140]), the Commission preliminarily views these requirements as comparable to Exchange Act requirements. For all other security-based swaps in portfolios that are not required to be reconciled on each business day, the Commission preliminarily views the UK's portfolio reconciliation requirements as not comparable to Exchange Act requirements and is proposing not to make a positive substituted compliance determination.

b. No Substituted Compliance in Connection With Clearing Rights Disclosure

The proposed Order would not provide substituted compliance in connection with clearing rights disclosure requirements pursuant to Exchange Act rule 15Fh–3(d). For those requirements, the FCA Application cites certain provisions related to clearing rights in the UK that are unrelated to the clearing rights provided by Exchange Act section 3C(g)(5).[141] The section 3C(g)(5) clearing rights are not eligible for substituted compliance, and the UK provisions do not require disclosure of these section 3C(g)(5) clearing rights. In the Commission's preliminary view, substituted compliance based on UK clearing provisions would not lead to comparable disclosure of a counterparty's clearing rights under the Exchange Act.

c. Suitability

Under the proposed Order, substituted compliance in connection with the suitability provisions of Exchange Act rule 15Fh–3(f) in part would be conditioned on the requirement that the counterparty be a per se ''professional client'' as defined in FCA COBS and not be a ''special entity'' as defined in Exchange Act section 15F(h)(2)(C) and Exchange Act rule 15Fh–2(d).[142] Accordingly, the proposed Order would not provide substituted compliance for Exchange Act suitability requirements for a recommendation made to a counterparty

[138] The Commission received a comment on the German Notice and Proposed Order suggesting that a similar condition should apply only to security-based swaps with U.S. counterparties; for all other transactions subject to Exchange Act daily mark requirements, the commenter proposed that the Commission grant substituted compliance if the Covered Entity complies with EU mark-to-market (or mark-to-model) and reporting requirements. *See* Letter from Kyle Brandon, Managing Director, Head of Derivative Policy, SIFMA (Dec. 8, 2020) (''SIFMA Letter'') at 6. The Commission did not adopt that bifurcated approach. *See* German Substituted Compliance Order, 85 FR at 85694–95. Similarly, the Commission is proposing one approach to substituted compliance for daily mark requirements in response to the FCA Application. This approach would provide substituted compliance for daily mark requirements based on comparability of outcomes with respect to transactions with U.S. counterparties to the same extent as it would provide substituted compliance with respect to all other transactions.

[139] The Commission received a comment on the German Notice and Proposed Order that EU reporting requirements similar to the UK requirements cited by the FCA are comparable to Exchange Act daily mark requirements. *See* SIFMA Letter at 5. The commenter stated that the access and timing challenges should not be as relevant for EU and other non-U.S. counterparties if they are already subject to EU reporting obligations and that in its experience data is available promptly from trade repositories. *See id.* The commenter's position, however, highlights that U.S. counterparties, as well as non-U.S. counterparties without existing business relationships with multiple UK trade repositories, still may encounter challenges in receiving timely marks from these trade reports. *See also* German Substituted Compliance Order, 85 FR at 85694–95.

[140] *See* UK EMIR RTS article 13(3)(a)(i); UK EMIR article 10.

[141] *See* note 131, *supra.*

[142] 17 CFR 240.15Fh–2(d). *See* para. (e)(4)(ii) to the proposed Order.

that is a ''retail client'' or an elective ''professional client,'' as such terms are defined in FCA COBS,[143] or for a ''special entity'' as defined in the Exchange Act. In the Commission's preliminary view, absent such a condition the UK suitability requirements would not be expected to produce a counterparty protection outcome that is comparable with the outcome produced by the suitability requirements under the Exchange Act.[144]

VIII. Substituted Compliance for Recordkeeping, Reporting, Notification, and Securities Count Requirements

A. FCA Request and Associated Analytic Considerations

The FCA Application in part requests substituted compliance for requirements applicable to SBS Entities under the Exchange Act relating to:

- *Recordmaking*—Exchange Act rule 18a–5 requires prescribed records to be made and kept current.[145]
- *Record Preservation*—Exchange Act section 15F(g) and Exchange Act rule 18a–6 require preservation of records.[146]
- *Reporting*—Exchange Act rule 18a–7 requires certain reports.[147]
- *Notification*—Exchange Act rule 18a–8 requires notification to the Commission when certain financial or operational problems occur.[148]
- *Securities Count*—Exchange Act rule 18a–9 requires non-prudentially regulated security-based swap dealers to perform a quarterly securities count.[149]

Taken as a whole, the recordkeeping, reporting, notification, and securities count requirements that apply to SBS Entities are designed to promote the prudent operation of the firm's security-based swap activities, assist the Commission in conducting compliance examinations of those activities, and alert the Commission to potential financial or operational problems that could impact the firm and its customers. The comparability assessment accordingly may focus on whether the analogous foreign requirements—taken as a whole—produce comparable outcomes with regard to recordkeeping, reporting, notification, securities counts, and related practices that support the Commission's oversight of these registrants. A foreign jurisdiction need not have analogues to every requirement under Commission rules to receive a positive substituted compliance determination.[150]

B. Preliminary Views and Proposed Order

1. General Considerations

Based on the FCA Application and the Commission's review of applicable provisions, in the Commission's preliminary view, the relevant UK requirements, subject to the conditions and limitations of the proposed Order, would produce regulatory outcomes that are comparable to the outcomes associated with the vast majority of the recordkeeping, reporting, notification, and securities count requirements under the Exchange Act applicable to SBS Entities pursuant to Exchange Act section 15F(g) and Exchange Act rules 18a–5, 18a–6, 18a–7, 18a–8, and 18a–9.

In reaching this preliminary conclusion, the Commission recognizes that there are certain differences between those UK requirements and the applicable recordkeeping, reporting, notification, and securities count requirements under the Exchange Act. In the Commission's preliminary view, on balance, those differences generally would not be inconsistent with substituted compliance for these requirements. As noted, requirement-by-requirement similarity is not needed for substituted compliance.

However, the Commission is structuring its preliminary substituted compliance determinations in the Order with respect to the recordkeeping and reporting rules to provide Covered Entities with greater flexibility to select which distinct requirements within the broader recordkeeping and reporting rules for which they want to apply substituted compliance. This flexibility is intended to permit Covered Entities to leverage existing recordkeeping and reporting systems that are designed to comply with the broker-dealer recordkeeping and reporting requirements on which the recordkeeping and reporting requirements applicable to SBS Entities are based. For example, it may be more efficient for a Covered Entity to comply with certain Exchange Act requirements within a given recordkeeping or reporting rule (rather than apply substituted compliance) because it can utilize systems that its affiliated broker-dealer has implemented to comply with them.

As applied to Exchange Act rules 18a–5 and 18a–6, this approach of providing greater flexibility results in preliminary substituted compliance determinations with respect to the different categories of records these rules require SBS Entities to make, keep current, and/or preserve. The objectives of these rules—taken as a whole—is to assist the Commission in monitoring and examining for compliance with Exchange Act requirements applicable to SBS Entities as well as to promote the prudent operation of these firms.[151] The

[143] FCA COBS 3.5 describes which clients are ''professional clients.'' FCA COBS 3.5.2R describes the types of clients considered to be professional clients unless the client elects non-professional treatment; these clients are per se professional clients. FCA COBS 3.5.3R describes the types of clients who may be treated as professional clients on request; these clients are elective professional clients. *See* FCA COBS 3.5.

[144] The Commission recognizes that Exchange Act rules permit security-based swap dealers, when making a recommendation to an ''institutional counterparty,'' to satisfy some elements of the suitability requirement if the security-based swap dealer reasonably determines that the counterparty or its agent is capable of independently evaluating relevant investment risks, the counterparty or its agent represents in writing that it is exercising independent judgment in evaluating recommendations, and the security-based swap dealer discloses to the counterparty that it is acting as counterparty and is not undertaking to assess the suitability of the recommendation for the counterparty. *See* Exchange Act rule 15Fh–3(f)(2). However, the institutional counterparties to whom this alternative applies are only a subset of the ''professional clients'' to whom more narrowly tailored suitability requirements apply under UK law. The Commission notes that the institutional counterparty alternative under the Exchange Act would remain available, in accordance with its terms, for recommendations that are not eligible for, or for which a Covered Entity does not rely on, substituted compliance.

[145] *See* 17 CFR 240.18a–5. The FCA Application discusses UK requirements that address firms' record creation obligations related to matters such as financial condition, operations, transactions, counterparties and their property, personnel and business conduct. *See* FCA Application Appendix B category 2 at 101–28, 136–39.

[146] *See* 15 U.S.C. 780–10(g); 17 CFR 240.18a–6. The FCA Application discusses UK requirements that address firms' record preservation obligations related to records that firms are required to create, as well as additional records such as records of communications. *See* FCA Application Appendix B category 2 at 140–71.

[147] *See* 17 CFR 240.18a–7. The FCA Application discusses UK requirements that address firms' obligations to make certain reports. *See* FCA Application Appendix B category 2 at 172–80, 185–89.

[148] *See* 17 CFR 240.18a–8. The FCA Application discusses UK requirements that address firms' obligations to make certain notifications. *See* FCA Application Appendix B category 2 at 181–85.

[149] *See* 17 CFR 240.18a–9. The FCA Application discusses UK requirements that address firms' obligations to perform securities counts. *See* FCA Application Appendix B category 2 at 129–36.

[150] Rule 3a71–6 sets forth additional analytic considerations in connection with substituted compliance for the Commission's recordkeeping, reporting, notification, and securities count requirements. In particular, Exchange Act rule 3a71–6(d)(6) provides that the Commission intends to consider (in addition to any conditions imposed) ''whether the foreign financial regulatory system's required records and reports, the timeframes for recording or reporting information, the accounting standards governing the records and reports, and the required format of the records and reports'' are comparable to applicable provisions under the Exchange Act, and whether the foreign provisions ''would permit the Commission to examine and inspect regulated firms' compliance with the applicable securities laws.''

[151] *See, e.g.,* Exchange Act Release No. 71958 (Apr. 17, 2014), 79 FR 25194, 25199–200 (May 2, 2014).

Commission preliminarily believes the comparable UK recordkeeping rules achieve these outcomes with respect to compliance with UK requirements for which positive substituted compliance determinations are being made in this proposed Order (*e.g.,* capital and margin requirements). At the same time, the recordkeeping rules address different categories of records through distinct requirements within the rules. Each requirement with respect to a specific category of records (*e.g.,* paragraph (a)(2) of Exchange Act rule 18a–5 addressing ledgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts) can be viewed in isolation as a distinct recordkeeping rule. Therefore, it may be appropriate to make substituted compliance determinations at this level of Exchange Act rules 18a–5 and 18a–6.

As discussed in more detail below, the Commission's preliminary view is that substituted compliance is appropriate for most of the requirements within these rules. However, certain of the requirements are fully or partially linked to substantive Exchange Act requirements for which a positive substituted compliance determination is not being made under the proposed Order. In these cases, a positive substituted compliance determination is not being made for the fully linked requirement in the recordkeeping or reporting rules or to the portion of the requirement that is linked to substantive Exchange Act requirement for which there is not a positive determination. In particular, a positive substituted compliance determination is not being made for recordkeeping, reporting, or notification requirements linked to the following Exchange Act rules for which a positive substituted compliance determination is not being made: (1) Exchange Act rule 10b–10 (''Rule 10b–10 Exclusion''); (2) Exchange Act rule 15Fh–4 (''Rule 15Fh–4 Exclusion''); (3) Exchange Act rule 15Fh–5 (''Rule 15Fh–5 Exclusion''); (4) Exchange Act rule 15Fh–6 (''Rule 15Fh–6 Exclusion''); (5) Exchange Act rule 18a–2 (''Rule 18a–2 Exclusion''); (6) Exchange Act rule 18a–4 (''Rule 18a–4 Exclusion''); and (7) Regulation SBSR (''Regulation SBSR Exclusion'').

In addition, certain of the requirements in the recordkeeping, reporting, and notification rules are linked to substantive Exchange Act requirements where a positive substituted compliance determination is being made under the proposed Order. In these cases, substituted compliance with the linked requirement in the recordkeeping, reporting, or notification rule is conditioned on the Covered Entity applying substituted compliance to the linked substantive Exchange Act requirement. This is the case regardless of whether the requirement is fully or partially linked to the substantive Exchange Act requirement. The recordkeeping, reporting, and notification requirements that are linked to a substantive Exchange Act requirement are designed and tailored to assist the Commission in monitoring and examining an SBS Entity's compliance with the substantive Exchange Act requirement. UK recordkeeping, reporting, and notification requirements are designed to perform a similar role with respect to the UK requirements to which they are linked. Consequently, this condition is designed to ensure that the records, reports, and notifications of a Covered Entity align with the substantive Exchange Act or UK requirement to which they are linked. For these reasons, substituted compliance for recordkeeping, reporting, and notification requirements linked to the following Exchange Act rules is conditioned on the SBS Entity applying substituted compliance to the linked substantive Exchange Act rule: (1) Exchange Act rule 15Fh–3 (''Rule 15Fh–3 Condition''); (2) Exchange Act rule 15Fi–2 (''Rule 15Fi–2 Condition''); (3) Exchange Act rule 15Fi–3 (''Rule 15Fi–3 Condition''); (4) Exchange Act rule 15Fi–4 (''Rule 15Fi–4 Condition''); (5) Exchange Act rule 15Fi–5 (''Rule 15Fi–5 Condition''); (6) Exchange Act rule 15Fk–1 (''Rule 15Fk–1 Condition''); (7) Exchange Act rule 18a–1 (''Rule 18a–1 Condition''); (8) Exchange Act rule 18a–3 (''Rule 18a–3 Condition''); (8) Exchange Act rule 18a–5 (''Rule 18a–5 Condition'') and (9) Exchange Act rule 18a–7 (''Rule 18a–7 Condition'').

Moreover, while certain recordkeeping and reporting requirements are not expressly linked to Exchange Act rule 18a–1, they would be important to the Commission's ability to monitor or examine for compliance with the capital requirements under this rule. The records also will assist the firm in monitoring its net capital position and, therefore, in complying with Exchange rule 18a–1 and its appendices. Therefore, substituted compliance with respect to these recordkeeping and reporting requirements is subject to the condition that the Covered Entity applies substituted compliance with respect to Exchange Act rule 18a–1 and its appendices (*i.e.,* the Rule 18a–1 Condition). This approach is designed to ensure that, if the Covered Entity does not apply substituted compliance with respect to Exchange Act rule 18a–1, it makes and preserves records and files reports that the Commission uses to monitor and examine for compliance with the Exchange Act rule 18a–1 and its appendices, and that the firm makes and preserves records to assist it in complying with these rules.

2. Scope of Substituted Compliance

The structure of the preliminary substituted compliance determinations with respect to Exchange Act rules 18a–5, 18a–6, 18a–7, 18a–8, and 18a–9 as well as Exchange Act Section 15F(g) would permit a covered entity to apply substituted compliance with respect to certain of these rules (*e.g.,* Exchange Act rules 18a–5 and 18a–6) and comply with the Exchange Act requirements of the remaining rules and statute (*i.e.,* Exchange Act rules 18a–7, 18a–8, and 18a–9, as well as Exchange Act Section 15F(g)). Moreover, as discussed above, the Commission is structuring its preliminary substituted compliance determinations in the Order with respect to the recordkeeping and reporting rules to provide Covered Entities with greater flexibility to select distinct requirements within the broader recordkeeping and reporting rules for which they want to apply substituted compliance. As applied to Exchange Act rules 18a–5 and 18a–6, this approach of providing greater flexibility results in preliminary substituted compliance determinations with respect to the different categories of records these rules require SBS Entities to make, keep current, and/or preserve. For example, a Covered Entity could apply substituted compliance with respect Exchange Act rule 18a–5 requirements to make and keep current records of trade blotters [152] but comply directly with Exchange Act rule 18a–5 requirements to make and keep current employment records.[153]

In this regard, the Commission found the recordkeeping, reporting, notification, and securities count rules to be entity-level when adopting amendments to Exchange Act rule 3a71–6 to make substituted compliance available with respect to them.[154] Consequently, aside from a limited exception for recordkeeping requirements linked to customer

[152] *See* para. (f)(1)(i)(A) to the proposed Order (relating to substituted compliance for Exchange Act rule 18a–5(a)(1) and (b)(1)).

[153] *See* para. (f)(1)(i)(K) to the proposed Order (relating to substituted compliance for Exchange Act rule 18a–5(a)(10) and (b)(8)).

[154] *See* 84 FR 68550, 68596–97 (Dec. 16, 2019), Exchange Act Release No. 87005 (Sept. 19, 2019) (''Recordkeeping Adopting Release'').

protection rules,[155] a Covered Entity must apply substituted compliance at the entity level if it chooses to apply substituted compliance with respect to Exchange Act rule 18a–9 and Exchange Act Section 15F(g). Further, with respect to a distinct substituted compliance determination for a requirement within rule 18a–5, 18a–6, 18a–7, or 18a–8, a Covered Entity must apply substituted compliance with respect to the determination at the entity level. For example, a Covered Entity applying substituted compliance for Exchange Act rule 18a–5 requirements to make and keep current records of trade blotters pursuant to paragraph (f)(1)(i)(A) of the proposed Order would have to comply with the comparable UK requirements at the entity level. The Covered Entity could not choose to comply with the Exchange Act for one part of its trade blotters and with UK requirements for another part of its trade blotters. The Commission preliminarily believes that this scope of substituted compliance strikes the right balance between providing Covered Entities flexibility to tailor the application of substituted compliance to their business needs and ensuring that substituted compliance is consistent with the Commission's classification of the Exchange Act recordkeeping, reporting, notification and securities count requirements as entity-level requirements.[156]

With respect to requirements in Exchange Act rules 18a–5 and 18a–6 linked to counterparty protection rules (*i.e.,* Exchange Act rules 15Fh–3(b), (c), (e), (f) and (g)), the proposed Order would permit a Covered Entity to apply substituted compliance to some security-based swap activities and comply directly with Exchange Act requirements for other activities.[157] As discussed in section VII.B.2. of this notice, a Covered Entity may decide to apply substituted compliance for a particular set of counterparty protection requirements, such as fair and balanced communications, for some activities and comply directly with Exchange Act requirements for other activities.[158] For example, the proposed Order would allow a Covered Entity applying substituted compliance for fair and balanced communications requirements to comply with the comparable UK requirements with respect to communications with UK counterparties that are subject to the Exchange Act and to comply directly with Exchange Act requirements with respect to U.S. person counterparties.

To accommodate the transaction-level approach to the counterparty protection rules, the proposed Order would allow a Covered Entity to apply substituted compliance to requirements of Exchange Act rules 18a–5 and 18a–6 linked to the counterparty protection rules consistently with how the firm is applying substituted compliance with respect to the counterparty protection rules. For example, if the Covered Entity is applying substituted compliance with respect to Exchange Act rule 15Fh–3(g) for UK counterparties and complying with Exchange Act rule 15Fh–3(g) for U.S. person counterparties, the Covered Entity could apply substituted compliance with respect to the linked requirements of Exchange Act rule 18a–5 for UK counterparties and comply with the linked requirements of Exchange Act rule 18a–5 for U.S. person counterparties.

The Commission preliminarily believes that this scope of substituted compliance would provide Covered Entities flexibility to tailor the application of substituted compliance to their business needs in a manner consistent with the Commission's classification of the relevant Exchange Act counterparty protection requirements as transaction-level requirements. In proposing this significant flexibility for the application of substituted compliance, the Commission nevertheless would expect Covered Entities to ensure that the manner in which they choose to apply substituted compliance allows them to comply with the requirements to keep books and records open to inspection by any representative of the Commission and promptly furnish to a representative of the Commission legible, true, complete and current copies of the Covered Entity's records.[159]

3. Exchange Act Rule 18a–5

Exchange Act rule 18a–5 requires SBS Entities to make and keep current various types of records. The requirements for SBS Entities that do not have a prudential regulator are set forth in paragraph (a) of the rule.[160] The requirements for SBS Entities that do have a prudential regulator are set forth in paragraph (b) of the rule.[161] The Commission preliminarily is making a positive substituted compliance determination for many of the requirements set forth in these paragraphs.

However, certain of these requirements are linked to substantive Exchange Act requirements for which a positive substituted compliance is not being made under the proposed Order. In these cases, a positive substituted compliance determination is not being made for the linked requirement in Exchange Act rule 18a–5 or the portion of the requirement in Exchange Act rule 18a–5 that is linked to the substantive Exchange Act requirement.[162]

In addition, certain of the requirements in Exchange Act rule 18a–5 are fully or partially linked to substantive Exchange Act requirements where a positive substituted compliance determination is being made under the proposed Order. In these cases, substituted compliance with the requirement in Exchange Act rule 18a–5 is conditioned on the SBS Entity applying substituted compliance to the linked substantive Exchange Act requirement.[163]

---

[155] *See* paras. (f)(1)(i)(M) and (f)(2)(i)(K) to the proposed Order (permitting substituted compliance on a transaction level). As discussed below, these recordkeeping requirements are linked to transaction level counterparty protection requirements.

[156] *Id.*

[157] *See* paras. (f)(1)(ii)(B) and (f)(2)(ii)(A) of the proposed Order; *see also* para. (f)(1)(i)(M) of the proposed Order (the preliminary substituted compliance determination with respect to Exchange Act rules 18a–5(a)(17) and (b)(13)) and para. (f)(2)(i)(K) of the proposed Order (the preliminary substituted compliance determination with respect to Exchange Act rules 18a–6(b)(1)(xii) and (b)(2)(vii)).

[158] *See* Business Conduct Adopting Release, 81 FR at 30065 (counterparty protection requirements are transaction-level requirements).

[159] *See also* para. (f)(7) to the proposed Order.

[160] *See* paras. (a)(1) through (18) of Exchange Act rule 18a–5.

[161] *See* paras. (b)(1) through (14) of Exchange Act rule 18a–6.

[162] A positive substituted compliance determination is not being made for the following requirements of Exchange Act rule 18a–5 because they are linked to a substantive Exchange Act requirement for which a positive substituted compliance determination is not being made: (1) The portion of Exchange Act rules 18a–5(a)(6) and (b)(6) that relates to confirmations with respect to securities (other than security based swaps) is subject to the Rule 10b–10 Exclusion; (2) the portion of Exchange Act rule 18a–5(a)(9) that relates to Exchange Act rule 18a–2 is subject to the Rule 18a–2 Exclusion; (3) Exchange Act rules 18a–5(a)(13) and (14) and (b)(9) and (10) are fully linked to Exchange Act rule 18a–4 and, therefore, are subject to the Rule 18a–4 Exclusion; (4) the portions of Exchange Act rules 18a–5(a)(16) and (b)(12) that relate to Exchange Act rule 15Fh–6 are subject to the Rule 15Fh–6 Exclusion; (5) the portions of Exchange Act rules 18a–5(a)(17) and (b)(13) that relate to Exchange Act rules 15Fh–4 are subject to the Rule 15Fh–4 Exclusion; and (6) the portions of Exchange Act rules 18a–5(a)(17) and (b)(13) that relate to Exchange Act rule 15Fh–5 are subject to the 15Fh–5 Exclusion.

[163] Substituted compliance with the following requirements of Exchange Act rule 18a–5 is conditioned on the SBS Entity applying substituted compliance to the linked substantive Exchange Act requirement: (1) Exchange Act rules 18a–5(a)(6), (a)(15), (b)(6) and (b)(11) are linked to Exchange Act rule 15Fi–2 and, therefore, are subject to the Rule 15Fi–2 Condition; (2) Exchange Act rule 18a–5(a)(9) is linked to Exchange Act rule 18a–1 and, therefore, is subject to the Rule 18a–1 Condition; (3) Exchange

Moreover, there are certain requirements in Exchange Act rule 18a–5 that are not expressly linked to Exchange Act rule 18a–1, but that would be important records in terms of the Commission's ability to examine for compliance with that rule, and the Covered Entity's ability to monitor its net capital position. Therefore, substituted compliance with respect to these requirements of Exchange Act rule 18a–5 is subject to the condition that the Covered Entity applies substituted compliance with respect to Exchange Act rule 18a–1 and its appendices (*i.e.,* the Rule 18a–1 Condition).[164]

Under the proposed Order, substituted compliance in connection with the recordmaking requirements of Exchange Act rule 18a–5 is subject to the condition that the SBS Entity: (1) Preserves all of the data elements necessary to create the records required by Exchange Act rules 18a–5(a)(1), (2), (3), (4), and (7) (if not prudentially regulated) or Exchange Act rules 18a–5(b)(1), (2), (3), and (7) (if prudentially regulated); and (2) upon request furnishes promptly to representatives of the Commission the records required by those rules (''SEC Format Condition'').[165] This condition is modeled on the alternative compliance mechanism in paragraph (c) of Exchange Act rule 18a–5. In effect, a Covered Entity applying substituted compliance with respect to these requirements of Exchange Act rule 18a–5 would need to comply with the comparable UK requirements. However, under the SEC Format Condition, the Covered Entity would need to produce a record that is formatted in accordance with the requirements of rule 18a–5 at the request of Commission staff. The objective is to require—on a very limited basis—the production of a record that consolidates the information required by Exchange Act rules 18a–5(a)(1), (2), (3), (4), and (7) (if not prudentially regulated) or Exchange Act rules 18a–5(b)(1), (2), (3), and (7) (if prudentially regulated) in a single record and, as applicable, in a blotter or ledger format. This will assist the Commission staff in reviewing the information on the record.

The following table summarizes the Commission's proposed positive substituted compliance determinations with respect to requirements of Exchange Act rule 18a–5 by listing in each row: (1) The paragraph of the proposed Order that sets forth the determination; (2) the paragraph(s) of Exchange Act rule 18a–5 to which the determination applies; (3) a brief description of the records required by those paragraphs; and (4) any additional conditions, including any partial exclusions from positive substituted compliance.[166]

EXCHANGE ACT RULE 18a–5

[Record making]

Order paragraph	Rule paragraph		Rule description	Additional conditions and partial exclusions
(f)(1)(i)(A)	(a)(1)	(b)(1)	Trade blotters	(1) SEC Format Condition; (2) Rule 18a–1 Condition for ¶(a)(1).
(f)(1)(i)(B)	(a)(2)		General ledger	(1) SEC Format Condition; (2) Rule 18a–1 Condition for ¶(a)(2).
(f)(1)(i)(C)	(a)(3)	(b)(2)	Account ledgers	(1) SEC Format Condition; (2) Rule 18a–1 Condition for ¶(a)(3).
(f)(1)(i)(D)	(a)(4)	(b)(3)	Stock record	(1) SEC Format Condition; (2) Rule 18a–1 Condition for ¶(a)(4).
(f)(1)(i)(E)		(b)(4)	Memoranda of brokerage orders.	N/A.
(f)(1)(i)(F)	(a)(5)	(b)(5)	Memoranda of proprietary orders.	Rule 18a–1 Condition for ¶(a)(5).
(f)(1)(i)(G)	(a)(6), (a)(15)	(b)(6), (b)(11)	Confirmations, trade verification	(1) Rule 15Fi–2 Condition; (2) Rule 10b–10 Exclusion.
(f)(1)(i)(H)	(a)(7)	(b)(7)	Accountholder information	(1) SEC Format Condition; (2) Rule 18a–1 Condition for ¶(a)(7).
(f)(1)(i)(I)	(a)(8)		Options positions	Rule 18a–1 Condition.
(f)(1)(i)(J)	(a)(9)		Trial balances, computation of net capital and tangible net worth.	(1) Rule 18a–1 Condition; (2) Rule 18a–2 Exclusion.
(f)(1)(i)(K)	(a)(10)	(b)(8)	Associated person's employment application.	N/A.
(f)(1)(i)(L)	(a)(12)		Non-cleared margin rule calculations.	Rule 18a–3 Condition.
(f)(1)(i)(M)	(a)(17)	(b)(13)	Compliance with business conduct requirements.	(1) Rule 15Fh–3 Condition; (2) Rule 15Fk–1 Condition; (3) Rule 15Fh–4 Exclusion; (4) Rule 15Fh–5 Exclusion.
(f)(1)(i)(N)	(a)(18)(i), (a)(18)(ii)	(b)(14)(i), (b)(14)(ii)	Portfolio reconciliation	Rule 15Fi–3 Condition.

Act rule 18a–5(a)(12) is linked to Exchange Act rule 18a–3 and, therefore, is subject to the Rule 18a–3 Condition; (4) Exchange Act rules 18a–5(a)(17) and (b)(13) are linked to Exchange Act rule 15Fh–3 and, therefore, are subject to the Rule 15Fh–3 Condition; (5) Exchange Act rules 18a–5(a)(17) and (b)(13) are linked to Exchange Act rule 15Fk–1, and therefore, are subject to the Rule 15Fk–1 Condition; (6) Exchange Act rules 18a–5(a)(18)(i) and (ii) or (b)(14)(i) and (ii) are linked to Exchange Act rule 15Fi–3 and, therefore, are subject to the Rule 15Fi–3 Condition; and (7) Exchange Act rules 18a–5(a)(18)(iii) and (b)(14)(iii) are linked to Exchange Act rule 15Fi–4 and, therefore, are subject to the Rule 15Fi–4 Condition.

[164] Substituted compliance with the requirements of Exchange Act rules 18a–5(a)(1), (2), (3), (4), (5), (7), (8), and (9) is conditioned on the SBS Entity applying substituted compliance to Exchange Act rule 18a–1 and its appendices.

[165] *See* para. (f)(1)(ii) to the proposed Order.

[166] The chart below does not include the additional conditions for applying substituted compliance to Exchange Act rule 18a–5; namely that the SBS Entity: (1) Must be subject to and comply with specified requirements of foreign law; (2) remains subject to the requirement of Exchange Act section 15F(f) to keep books and records open to inspection by any representative of the Commission and the requirement of Exchange Act rule 18a–6(g) to furnish promptly to a representative of the Commission legible, true, complete, and current copies of certain records (see discussion below); and (3) must promptly furnish to a representative of the Commission upon request an English translation of certain records (see discussion below). *See* paras. (f)(7) and (8) to the proposed Order (with respect to the second and third conditions).

EXCHANGE ACT RULE 18a–5—Continued

[Record making]

Order paragraph				
(f)(1)(i)(O)	(a)(18)(iii)	(b)(14)(iii)	Portfolio compression	Rule 15Fi–4 Condition.

The following table summarizes the Commission's preliminary determinations with respect to requirements of Exchange Act rule 18a–5 for which a positive substituted compliance determination is not being made because they are fully linked to substantive Exchange Act requirements for which a positive substituted compliance determination is not being made by listing in each row: (1) The paragraph of the proposed Order that sets forth the determination; (2) the paragraph(s) of Exchange Act rule 18a–5 to which the determination applies; (3) a brief description of the records required by those paragraphs; and (4) the exclusion from substituted compliance.

EXCHANGE ACT RULE 18a–5

[Record making]

Order paragraph	Rule paragraph		Rule description	Exclusion
(f)(1)(ii)(B)	(a)(13)	(b)(9)	Possession or control records ..	Rule 18a–4 Exclusion.
(f)(1)(ii)(B)	(a)(14)	(b)(10)	Reserve computations	Rule 18a–4 Exclusion.
(f)(1)(ii)(B)	(a)(16)	(b)(12)	Political contribution records	Rule 15Fh–6 Exclusion.

4. Exchange Act Rule 18a–6

Exchange Act rule 18a–6 requires an SBS Entity to preserve certain types of records if it makes or receives them (in addition to the records the SBS Entity is required to make and keep current pursuant to Exchange Act rule 18a–5). Exchange Act rule 18a–6 also prescribes the time period that these additional records and the records required to be made and kept current pursuant to Exchange Act rule 18a–5 must be preserved and the manner in which they must be preserved.[167] Paragraphs (a) through (d) of Exchange Act rule 18a–6 identify the records that an SBS Entity must retain if it makes or receives them and prescribes the retention periods for these records as well as for the records that must be made and kept current pursuant to Exchange Act rule 18a–5. Certain of these paragraphs prescribe requirements separately for SBS Entities that do not have a prudential regulator and SBS Entities that do have a prudential regulator.[168]

Paragraph (e) of Exchange Act rule 18a–6 sets forth the requirements for preserving records electronically. Paragraph (f) sets forth requirements for when records are prepared or maintained by a third party. Paragraph (g) requires that an SBS Entity must furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the SBS Entity that are required to be preserved under Exchange Act rule 18a–6, or any other records of the SBS Entity that are subject to examination or required to be made or maintained pursuant to section 15F of the Exchange Act that are requested by a representative of the Commission.

The Commission is making a preliminary positive substituted compliance determination for many of the requirements set forth in paragraphs (a) through (f) of Exchange Act rule 18a–6.[169] However, certain of these requirements are fully or partially linked to substantive Exchange Act requirements for which a positive substituted compliance determination is not being made under the proposed Order. In these cases, a positive substituted compliance determination is not being made for the linked requirement in Exchange Act rule 18a–6.[170]

In addition, certain of the requirements in Exchange Act rule 18a–6 are fully or partially linked to substantive Exchange Act requirements where a positive substituted compliance determination is being made under the proposed Order. In these cases, substituted compliance with the requirement in Exchange Act rule 18a–6 is conditioned on the SBS Entity applying substituted compliance to the linked substantive Exchange Act requirement.[171]

[167] *See* 17 CFR 240.18a–5.

[168] Paragraphs (a)(1), (b)(1), (d)(2)(i), and (d)(3)(i) of Exchange Act rule 18a–6 apply to SBS Entities that do not have a prudential regulator. Paragraphs (a)(2), (b)(2), (d)(2)(ii), and (d)(3)(ii) of Exchange Act rule 18a–6 apply to SBS Entities that have a prudential regulator. Paragraphs (c), (d)(1), (d)(4), (d)(5), (e), (f), (g), and (h) of Exchange Act rule 18a–6 apply to SBS Entities irrespective of whether they have a prudential regulator.

[169] The Commission does not believe it would be appropriate to grant substituted compliance with respect to the requirements in paragraph (g) of Exchange Act rule 18a–6 because there is no comparable requirement in the UK to produce these records to a representative of the Commission.

[170] A positive substituted compliance determination is not being made for the following requirements of Exchange Act rule 18a–6 because they are linked to a substantive Exchange Act requirement for which a positive substituted compliance determination is not being made: (1) The portion of Exchange Act rule 18a–6(b)(1)(v) relating to Exchange Act rule 18a–2 is subject to the Rule 18a–2 Exclusion; (2) Exchange Act rule 18a–6(b)(1)(viii)(L) is fully linked to Exchange Act Rule 18a–4 and, therefore, is subject to the Rule 18a–4 Exclusion; (3) the portion of Exchange Act rule 18a–6(b)(1)(viii)(M) relating to Exchange Act rule 18a–2 is subject to the Rule 18a–2 Exclusion; (4) Exchange Act rules 18a–6(b)(1)(xi) and (b)(2)(vi) are fully linked to Regulation SBSR and, therefore, are subject to the Regulation SBSR Exclusion; (5) Exchange Act rules 18a–6(b)(1)(xiii) and 18a–6(b)(2)(viii) are fully linked to Exchange Act rules 15Fh–4 and, therefore, are subject to the Rule 15Fh–4 Exclusion; and (6) Exchange Act rules 18a–6(b)(1)(xiii) and 18a–6(b)(2)(viii) are fully linked to Exchange Act rules 15Fh–5 and, therefore, are subject to the Rule 15Fh–5 Exclusion.

[171] Substituted compliance with the following requirements of Exchange Act rule 18a–6 is conditioned on the SBS Entity applying substituted compliance to the linked substantive Exchange Act requirement: (1) Exchange Act rule 18a–6(b)(1)(v) is linked to Exchange Act rule 18a–1 and, therefore, is subject to the Rule 18a–1 Condition; (2) Exchange Act rules 18a–6(b)(1)(viii) and (b)(2)(v) are linked to Exchange Act rule 18a–7 and, therefore are subject to the Rule 18a–7 Condition; (3) Exchange Act rule 18a–6(b)(1)(viii) is linked to Exchange Act rule 18a–1 and, therefore, is subject to the Rule 18a–1 Condition; (4) Exchange Act rule 18a–6(b)(1)(ix) is linked to Exchange Act rule 18a–1 and, therefore, is subject to the Rule 18a–1 Condition; (5) Exchange Act rule 18a–6(b)(1)(x) is linked to Exchange Act rule 18a–1 and, therefore, is subject to the Rule 18a–1 Condition; (6) Exchange Act rules 18a–6(b)(1)(xii) and (b)(2)(vii) are linked to Exchange

Moreover, there are certain requirements in Exchange Act rule 18a–6 that are not expressly linked to Exchange Act rule 18a–1, but that would be important records in terms of the Commission's ability to examine for compliance with that rule, and the Covered Entity's ability to monitor its net capital position. Therefore, substituted compliance with respect to these requirements of Exchange Act rule 18a–6 is subject to the Rule 18a–1 Condition.[172]

The following table summarizes the Commission's proposed positive substituted compliance determinations with respect to requirements of Exchange Act rule 18a–6 by listing in each row: (1) The paragraph of the proposed Order that sets forth the determination; (2) the paragraph(s) of Exchange Act rule 18a–6 to which the determination applies; (3) a brief description of the records required by those paragraphs; and (4) a brief description of any additional conditions to applying substituted compliance to the requirements, including any partial exclusions because portions of the requirements are linked to substantive Exchange Act requirements for which a positive substituted compliance is not being made under this Order.[173]

EXCHANGE ACT RULE 18a–6

[Record preservation]

Order paragraph	Rule paragraph		Rule description	Conditions and partial exclusions
(f)(2)(i)(A)	(a)(1)	(a)(2)	6 year record preservation	N/A.
(f)(2)(i)(B)	(b)(1)(i)	(b)(2)(i)	3 year record preservation	N/A.
(f)(2)(i)(C)	(b)(1)(ii), (b)(1)(iii)		Bank records, bills	Rule 18a–1 Condition.
(f)(2)(i)(D)	(b)(1)(iv)	(b)(2)(ii)	Communications	N/A.
(f)(2)(i)(E)	(b)(1)(v)		Trial balances	(1) Rule 18a–1 Condition; (2) Rule 18a–2 Exclusion.
(f)(2)(i)(F)	(b)(1)(vi)	(b)(2)(iii)	Account documents	Rule 18a–1 Condition for ¶(b)(1)(vi).
(f)(2)(i)(G)	(b)(1)(vii)	(b)(2)(iv)	Written agreements	Rule 18a–1 Condition for ¶(b)(1)(vii).
(f)(2)(i)(H)	(b)(1)(viii)	(b)(2)(v)	Information supporting financial reports.	(1) Rule 18a–7 Condition; (2) Rule 18a–2 Exclusion for ¶(b)(1)(viii)(M).
(f)(2)(i)(I)	(b)(1)(ix)		Rule 15c3–4 risk management records.	Rule 18a–1 Condition.
(f)(2)(i)(J)	(b)(1)(x)		Credit risk determinations	Rule 18a–1 Condition.
(f)(2)(i)(K)	(b)(1)(xii)	(b)(2)(vii)	Business conduct standard records.	(1) Rule 15Fh–3 Condition; (2) Rule 15Fk–1 Condition.
(f)(2)(i)(L)	(c)		Corporate documents	N/A.
(f)(2)(i)(M)	(d)(1)		Associated person's employment application.	N/A.
(f)(2)(i)(N)	(d)(2)(i)	(d)(2)(ii)	Regulatory authority reports	Rule 18a–1 Condition for ¶(d)(2)(i).
(f)(2)(i)(O)	(d)(3)(i)	(d)(3)(ii)	Compliance, supervisory, and procedures manuals.	Rule 18a–1 Condition for ¶(d)(3)(i).
(f)(2)(i)(P)	(d)(4), (d)(5)		Portfolio reconciliation	(1) Rule 15Fi–3 Condition; (2) Rule 15Fi–4 Condition; (3) Rule 15Fi–5 Condition.
(f)(2)(i)(Q)	(e)		Electronic storage system	N/A.
(f)(2)(i)(R)	(f)		Third-party recordkeeper	N/A.

The following table summarizes the Commission's preliminary determinations with respect to requirements of Exchange Act rule 18a–6 for which for which a positive substituted compliance determination is not being made because they are fully linked to substantive Exchange Act requirements for which a positive substituted compliance determination is not being made by listing in each row: (1) The paragraph of the proposed Order that sets forth the determination; (2) the paragraph(s) of Exchange Act rule 18a–6 to which the determination applies; (3) a brief description of the records required by those paragraphs; and (4) the exclusion from substituted compliance.

Act rule 15Fh–3 and, therefore, is subject to the Rule 15Fh–3 Condition; (7) Exchange Act rules 18a–6(b)(1)(xii) and (b)(2)(vii) are linked to Exchange Act rule 15Fk–1 and, therefore, is subject to the Rule 15Fk–1 Condition; (8) Exchange Act rules 18a–6(d)(4) and (d)(5) are linked to Exchange act rule 15Fi–3 and, therefore, are subject to the Rule 15Fi–3 Condition; (9) Exchange Act rules 18a–6(d)(4) and (d)(5) are linked to Exchange act rule 15Fi–4 and, therefore, are subject to the Rule 15Fi–4 Condition; and (10) Exchange Act rules 18a–6(d)(4) and (d)(5) are linked to Exchange act rule 15Fi–3 and, therefore, are subject to the Rule 15Fi–5 Condition.

[172] Substituted compliance with the requirements of Exchange Act rules 18a–6(b)(1)(ii), (b)(1)(iii), (b)(1)(vi), (b)(1)(vii), (d)(2)(i), and (d)(3)(i) is conditioned on the SBS Entity applying substituted compliance to Exchange Act rule 18a–1 and its appendices.

[173] The chart below does not include the additional conditions for applying substituted compliance to Exchange Act rule 18a–6; namely that the SBS Entity: (1) Is subject to and complies with the requirements of foreign law; (2) remains subject to the requirement of Exchange Act section 15F(f) to keep books and records open to inspection by any representative of the Commission and the requirement of Exchange Act rule 18a–6(g) to furnish promptly to a representative of the Commission legible, true, complete, and current copies of certain records; and (3) must promptly furnish to a representative of the Commission upon request an English translation of certain records. *See* para. (f)(7) and (8) to the proposed Order (with respect to the second and third conditions).

EXCHANGE ACT RULE 18a–6

[Preservation]

Order paragraph	Rule paragraph		Rule description	Exclusion
(f)(2)(ii)	(b)(1)(xi)	(b)(2)(vi)	Regulation SBSR information	Regulation SBSR Exclusion.
(f)(2)(i)(H)(*4*)	(b)(1)(viii)(L)		Possession or control information.	Rule 18a–4 Exclusion.
(f)(2)(ii)	(b)(1)(xiii)	(b)(2)(viii)	Special entity documents	(1) Rule 15Fh–4 Exclusion; (2) Rule 15Fh–5 Exclusion.

5. Exchange Act Rule 18a–7

Paragraph (a)(1) of Exchange Act rule 18a–7 requires SBS Entities that are not prudentially regulated to file monthly unaudited reports about its financial and operational condition using the FOCUS Report Part II. Paragraph (a)(2) of Exchange Act rule 18a–7 requires SBS Entities that are prudentially regulated to file quarterly periodic unaudited reports about their financial and operational condition using the FOCUS Report Part IIC. The FOCUS Report Part IIC elicits less information than the FOCUS Report Part II because the Commission does not have responsibility for overseeing the capital and margin requirements applicable to these entities. Paragraph (a)(3) of Exchange Act rule 18a–7 requires SBS Entities that are not prudentially regulated and have been authorized by the Commission to compute net capital under Exchange Act rule 18a–1 using models to file certain monthly or quarterly information related to their use of models. Paragraph (b) of Exchange Act rule 18a–7 requires SBS Entities that are not prudentially regulated to make certain financial information available on their websites. Paragraphs (c), (d), (e), (f), (g), and (h) of Exchange Act rule 18a–7 set forth requirements for SBS Entities that are not prudentially regulated to annually file financial statements and certain reports, as well as reports covering those statements and reports prepared by an independent public accountant. Paragraph (i) of Exchange Act rule 18a–7 requires SBS Entities that do not have a prudential regulator to notify the Commission when they change their fiscal year. Finally, Paragraph (j) of Exchange Act rule 18a–7 sets forth requirements with respect to the reports that must be filed with the Commission under the rule.[174]

The Commission preliminarily is making a positive substituted compliance determination for all of these paragraphs of Exchange Act rule 18a–7. As discussed below, substituted compliance with respect to these paragraphs of Exchange Act rule 18a–7 is subject to certain conditions.

First, certain of the requirements in Exchange Act rule 18a–7 are fully or partially linked to substantive Exchange Act requirements for which a positive substituted compliance determination is being made under the proposed Order. In these cases, substituted compliance with the requirement in Exchange Act rule 18a–7 is conditioned on the Covered Entity applying substituted compliance to the linked substantive Exchange Act requirement.[175]

Second, under the proposed Order, substituted compliance with respect to the requirement in Exchange Act rule 18a–7 to file periodic unaudited financial and operational information on the FOCUS Report Part II or Part IIC is subject to the condition that the Covered Entity file with the Commission periodic unaudited financial and operational information in the manner and format specified by the Commission by order or rule (''Manner and Format Condition'') and present the financial information in accordance with GAAP that the firm uses to prepare general purpose publicly available or available to be issued financial statements in the UK (''UK GAAP Condition'').[176]

As noted above, Exchange Act rule 18a–7 requires SBS Entities, on a monthly basis (if not prudentially regulated) or on a quarterly basis (if prudentially regulated), to file an unaudited financial and operational report on the FOCUS Report Part II (if not prudentially regulated) or Part IIC (if prudentially regulated). The Commission will use the FOCUS Reports filed by the SBS Entities to both monitor the financial and operational condition of individual SBS Entities and to perform comparisons across SBS Entities. The FOCUS Report Parts II and IIC are standardized forms that elicit specific information through numbered line items. This facilitates cross-firm analysis and comprehensive monitoring of all SBS Entities registered with the Commission. Further, the Commission has designated the Financial Industry Regulatory Authority, Inc. (''FINRA'') to receive the FOCUS Reports from SBS Entities.[177] Broker-dealers registered with the Commission currently file their FOCUS Reports with FINRA through the eFOCUS system it administers. Using FINRA's eFOCUS system will enable broker-dealers, security-based swap dealers, and major security-based swap participants to file FOCUS Reports on the same platform using the same preexisting templates, software, and procedures.

The Commission preliminarily believes that it would be appropriate to condition substituted compliance with respect to Exchange Act rule 18a–7 on the Covered Entity filing unaudited financial and operational information in a manner and format that facilitates cross-firm analysis and comprehensive monitoring of all SBS Entities registered with the Commission. For example, the Commission could by order or rule require SBS Entities to file the financial and operational information with FINRA using the FOCUS Report Part II (if not prudentially regulated) or Part IIC (if prudentially regulated) but permit the information input into the form to

[174] *See* 17 CFR 240.18a–7.

[175] Substituted compliance with the following requirements of Exchange Act rule 18a–7 is conditioned on the SBS Entity applying substituted compliance to the linked substantive Exchange Act requirement: (1) Exchange Act rule 18a–7(a)(1) is linked to Exchange Act rule 18a–1 and, therefore, is subject to the Rule 18a–1 Condition; (2) Exchange Act rule 18a–7(a)(3) is linked to Exchange Act rule 18a–1 and, therefore, is subject to the Rule 18a–1 Condition; and (3) Exchange Act rules 18a–7(c), (d), (e), (f), (g) and (h) taken as a whole are linked to Exchange Act rule 18a–1 and, therefore, are subject to the Rule 18a–1 Condition.

[176] *See* para. (f)(3)(i) to the proposed Order. Under this approach, Covered Entities would be permitted to present the information reported in the FOCUS Report in accordance with GAAP that the firm uses to prepare publicly available or available to be issued general purpose financial statements in its home jurisdiction instead of U.S. GAAP if other GAAP, such as International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB), is used by the SBS Entity in preparing publicly available or available to be issued general purpose financial statements in the UK.

[177] *See* Order Designating Financial Industry Regulatory Authority, Inc., to Receive Form X–17A–5 (FOCUS Report) from Certain Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Release No. 88866 (May 14, 2020).

be the same information the SBS Entity reports to the FCA or PRA.[178]

Third, under the proposed Order, substituted compliance in connection with the requirement that Covered Entities without a prudential regulator file audited annual reports under Exchange Act rule 18a–7 is subject to five conditions.[179] The first condition is that the SBS Entity simultaneously sends a copy of the financial statements the Covered Entity is required to file with the UK PRA or FCA, including a report of an independent public accountant covering the financial statements, to the Commission in the manner specified on the Commission's website (''SEC Filing Condition''). Because UK laws would not otherwise require the financial statements and report of the independent public accountant covering the financial statements to be filed with the Commission, the purpose of this condition is to ensure the Commission receives the financial statements and report to more effectively supervise and monitor SBS Entities.

The second condition is that the SBS Entity includes with the transmission of the annual financial statements and report the contact information of an individual who can provide further information about the financial statements and reports (''Contact Information Condition''). This would assist the Commission staff in promptly contacting an individual at the SBS Entity who can respond to questions that information on the financial statements or report may raise about the Covered Entity's financial or operational condition.

The third condition is that the SBS Entity includes with the transmission the report of an independent public accountant required by Exchange Act rule 18a–7(c)(1)(i)(C) covering the annual financial statements if UK laws do not require the Covered Entity to engage an independent public accountant to prepare a report covering the annual financial statements (''Accountant's Report Condition''). The third condition further provides that the report of the independent public accountant may be prepared in accordance with generally accepted auditing standards (''GAAS'') in the UK that are used to perform audit and attestation services and the accountant complies with UK independence requirements. According to the FCA Application, UK laws only require certain investment firms (depending on their size) to have their financial statements audited, so this condition ensures that all SBS Entities subject to the requirement in rule 18a–7 to file audited annual reports are required to have their financial statements audited.

The fourth condition is that an SBS Entity that is a security-based swap dealer must file the reports required by Exchange Act rule 18a–7(c)(1)(i)(B) and (C) addressing the statements identified in Exchange Act rule 18a–7(c)(3) or (c)(4), as applicable, that relate to Exchange Act rule 18a–4 (''Rule 18a–4 Limited Exclusion'').[180] These reports are designed to provide the Commission with information about an SBS Entity's compliance with Rule 18a–4. As discussed above, a positive substituted compliance determination is not being made for Exchange Act rule 18a–4 and, therefore, this condition is designed to provide the Commission with similar compliance information. Under this condition, Covered Entities will need to file a limited compliance report that includes the statements relating to Rule 18a–4 [181] or exemption report if the Covered Entity claims an exemption from Rule 18a–4. The Covered Entity also will need to file the report of an independent public accountant covering the limited compliance report or exemption report. The fourth condition further provides that the report of the independent public accountant may be prepared in accordance with GAAS in the UK that are used to perform audit and attestation services and the accountant complies with UK independence requirements.

The fifth condition is that a Covered Entity that is a security-based swap dealer files the supporting schedules required by Exchange Act rule 18a–7(c)(1)(i)(A) and (C) addressing the statements identified in Exchange Act rules 18a–7(c)(2)(ii) and (iii) that relate to Exchange Act rule 18a–4 if the SBS Entity is not exempt from Exchange Act rule 18a–4 (*i.e.,* a Rule 18a–4 Limited Exclusion). These supporting schedules are the Computation for Determination of Security-Based Swap Customer Reserve Requirements and the Information Relating to the Possession or Control Requirements for Security-Based Swap Customers, which are designed to provide the Commission with information about an SBS Entity's compliance with Rule 18a–4.

Fourth, under the proposed Order, substituted compliance in connection with the requirement that Covered Entities file notice of a change in fiscal year under Exchange Act rule 18a–7(i) is conditioned on the SBS Entity simultaneously sending a copy of the notice of change in fiscal year that the Covered Entity is required to file with the UK PRA or FCA to the Commission in the manner specified on the Commission's website (''SEC Filing Condition''). Because UK laws would not otherwise require the notice of a change in fiscal year to be filed with the Commission, the purpose of this condition is to ensure the Commission receives the notice to more effectively supervise and monitor SBS Entities.

The following table summarizes the Commission's proposed positive substituted compliance determinations with respect to requirements of Exchange Act rule 18a–7 by listing in each row: (1) The paragraph of the proposed Order that sets forth the determination; (2) the paragraph(s) of Exchange Act rule 18a–7 to which the determination applies; (3) a brief description of the records required by those paragraphs; and (4) a brief description of any additional conditions to applying substituted compliance to the requirements, including any partial exclusions because portions of the requirements are linked to substantive Exchange Act requirements for which a positive substituted compliance determination is not being made under the proposed Order.[182]

[178] The Commission anticipates that it would be appropriate to tailor the line items required to be reported pursuant to this condition and is requesting comment on which, if any, line items in FOCUS Report Part II (if not prudentially regulated) and Part IIC (if prudentially regulated) the SBS Entity does not otherwise report or record pursuant to applicable laws or regulations. Further, the Commission is requesting comment on whether it would be appropriate as a condition to substitute compliance for SBS Entities to file a FOCUS Report Part II (if not prudentially regulated) or Part IIC (if prudentially regulated) with a limited number of the required line items filled out for two years. During this time, the Commission could further evaluate the scope of information SBS Entities should file.

[179] *See* para. (f)(3)(iv) to the proposed Order.

[180] The Commission views this as a limited exclusion from the availability of substituted compliance for these requirements because the proposed Order permits these reports relating Exchange Act rule 18a–4 to be included with the UK regulatory reports the Covered Entities will file with the Commission and because the reports can be prepared in accordance with UK GAAS (as discussed below).

[181] The limited compliance report would not need to address Exchange Act rule 18a–9 if the Covered Entity is applying substituted compliance to this requirement. Further, as discussed above, substituted compliance with paragraphs (c) through (h) of Exchange Act rule 18a–7 is conditioned on the Covered Entity applying substituted compliance to Exchange Act rule 18a–1. Therefore, the Covered Entity would not need to address that rule in the compliance report. Finally, the Covered Entity would not need to address an account statement rule of a self-regulatory organization.

[182] The chart below does not include the additional conditions for applying substituted compliance to Exchange Act rule 18a–7; namely that the SBS Entity: (1) Is subject to and complies with the requirements of foreign law; (2) remains subject to the requirement of Exchange Act section

Continued

EXCHANGE ACT RULE 18a–7

[Reporting]

Order paragraph	Rule paragraph		Rule description	Conditions and partial exclusions
(f)(3)(i)	(a)(1)	(a)(2)	File FOCUS Reports	(1) Manner and Format Condition; (2) UK GAAP Condition; (3) Rule 18a–1 Condition for ¶(a)(1).
(f)(3)(ii)	(a)(3)		Information related to capital models.	(1) Rule 18a–1 Condition.
(f)(3)(iii)	(b)		Publish certain financial information.	N/A.
(f)(3)(iv)	(c), (d), (e), (f), (g), (h).		File annual audited reports	(1) SEC Filing Condition; (2) Contact Information Condition; (3) Accountant's Report Condition; (4) Rule 18a–4 Limited Exclusion; (5) Rule 18a–1 Condition.
(f)(3)(v)	(i)		Notice of fiscal year change	SEC Filing Condition.

6. Exchange Act Rule 18a–8

Exchange Act rule 18a–8 requires SBS Entities to send notifications to the Commission if certain adverse events occur.[183] Paragraphs (a)(1)(i), (a)(1)(ii), (b)(1), (b)(2), and (b)(4) of Exchange Act rule 18a–8 require an SBS Entity that is a security-based swap dealer and that does not have a prudential regulator to provide notifications related to the capital requirements of Exchange Act rule 18a–1. Paragraphs (a)(2) and (b)(3) Exchange Act rule 18a–8 require an SBS Entity that is a major security-based swap participant and that does not have a prudential regulator to provide notifications related to the capital requirements of Exchange Act rule 18a–8. Paragraph (c) Exchange Act rule 18a–8 requires an SBS Entity that is a security-based swap dealer and that files a notice of adjustment to its reported capital category with a U.S. prudential regulator to transmit a copy of the notice to the Commission. Paragraph (d) of Exchange Act rule 18a–8, in pertinent part, requires an SBS Entity to provide notification to the Commission if it fails to make and keep current books and records under Exchange Act rule 18a–5 and to transmit a subsequent report on what is being done to correct the situation. Paragraph (e) of Exchange Act rule 18a–8, in pertinent part, requires an SBS Entity that is a security-based swap dealer and that does not have a prudential regulator to provide notification if it has a material weakness under Exchange Act rule 18a–7 and to transmit a subsequent report on what is being done to correct the situation. Paragraph (g) of Exchange Act rule 18a–8, in pertinent part, requires an SBS Entity that is a security-based swap dealer to provide notification if it fails to make a required deposit into its special reserve account for the exclusive benefit of security-based swap customers under Exchange Act rule 18a–4. Finally, paragraph (h) sets forth requirements for transmitting the notifications described above.

The Commission preliminarily makes a positive substituted compliance determination for a number of the notification requirements set forth in these paragraphs. However, certain of these requirements are linked to substantive Exchange Act requirements for which a positive substituted compliance determination is not being made under the proposed Order. In these cases, a positive substituted compliance determination is not being made for the linked requirement in Exchange Act rule 18a–8 or the portion of the requirement in Exchange Act rule 18a–8 that is linked to the substantive Exchange Act requirement.[184]

In addition, certain of the requirements in Exchange Act rule 18a–8 are fully or partially linked to substantive Exchange Act requirements where a positive substituted compliance determination is being made under the proposed Order. In these cases, substituted compliance with the requirement in Exchange Act rule 18a–8 is conditioned on the SBS Entity applying substituted compliance to the linked substantive Exchange Act requirement.[185]

Under the proposed Order, substituted compliance in connection with the notification requirements of Exchange Act rule 18a–8 is subject to the condition that the SBS Entity: (1) Simultaneously sends a copy of any notice required to be sent by UK notification laws to the Commission in the manner specified on the Commission's website; and (2) includes with the transmission the contact information of an individual who can provide further information about the matter that is the subject of the notice (*i.e.,* the ''Contact Information Condition''). The purpose of this condition is to alert the Commission to financial or operational problems that could adversely affect the firm—the objective of Exchange Act rule 18a–8.

The following table summarizes the Commission's proposed positive

15F(f) to keep books and records open to inspection by any representative of the Commission and the requirement of Exchange Act rule 18a–6(g) to furnish promptly to a representative of the Commission legible, true, complete, and current copies of certain records; and (3) must promptly furnish to a representative of the Commission upon request an English translation of certain records. *See* paras. (f)(7) and (8) to the proposed Order (with respect to the second and third conditions).

[183] *See* 17 CFR 240.18a–8.

[184] A positive substituted compliance determination is not being made for the following requirements of Exchange Act rule 18a–8 because they are linked to a substantive Exchange Act requirement for which a positive substituted compliance determination is not being made: (1) Exchange Act rules 18a–8(a)(3) and (b)(3) are fully linked to Exchange Act rule 18a–2 and, therefore, are subject to the Rule 18a–2 Exclusion; (2) the portion of Exchange Act rule 18a–8(e) that relates to Exchange Act rule 18a–2 is subject to the Rule 18a–2 Exclusion; (3) the portion of Exchange Act rule 18a–8(e) that relates to Exchange Act rule 18a–4 is subject to the Rule 18a–4 Exclusion; and (4) Exchange Act rule 18a–8(g) is fully linked to Exchange act rule 18a–4 and, therefore, is subject to the Rule 18a–4 Exclusion.

[185] Substituted compliance with the following requirements of Exchange Act rule 18a–8 is conditioned on the SBS Entity applying substituted compliance to the linked substantive Exchange Act requirement: (1) Exchange Act rules 18a–8(a)(1)(i) and (ii), (b)(1), (b)(2), and (b)(4) are linked to Exchange Act rule 18a–1 and, therefore, are subject to the Rule 18a–1 Condition; and (2) Exchange Act rules 18a–8(d) is linked to Exchange Act rule 18a–5 and, therefore, is subject to the Rule 18a–5 Condition with respect to any category of records required to be made and kept current by that rule. Consequently, if the Covered Entity does not apply substituted compliance with respect to a category of record required to be made and kept current by Exchange Act rule 18a–5, the Covered Entity would need to provide the notification required by Exchange Act rule 18a–8(d) if it fails to make and keep current that category of record.

substituted compliance determinations with respect to requirements of Exchange Act rule 18a–8 by listing in each row: (1) The paragraph of the proposed Order that sets forth the determination; (2) the paragraph(s) of Exchange Act rule 18a–8 to which the determination applies; (3) a brief description of the records required by those paragraphs; and (4) a brief description of any additional conditions to applying substituted compliance to the requirements, including any partial exclusions because portions of the requirements are linked to substantive Exchange Act requirements for which a positive substituted compliance determination is not being made.[186]

EXCHANGE ACT RULE 18a–8

[Notification]

Order paragraph	Rule paragraph		Rule description	Conditions and partial exclusions
(f)(4)(i)(A)	(a)(1)(i), (a)(1)(ii), (b)(1), (b)(2), (b)(4).		Capital notices	(1) Rule 18a–1 Condition; (2) SEC Filing Condition; (3) Contact Information Condition.
(f)(4)(i)(B)	(c)		Prudential regulator capital category adjustment notices.	(1) SEC Filing Condition; (2) Contact Information Condition.
(f)(4)(i)(C)	(d)		Books and records notices	(1) Rule 18a–5 Condition; (2) SEC Filing Condition; (3) Contact Information Condition.
(f)(4)(i)(D)	(e)		Material weakness notices	(1) Rule 18a–1 Condition; (2) Rule 18a–2 Exclusion; (3) Rule 18a–4 Limited Exclusion; (4) SEC Filing Condition; (5) Contact Information Condition.

The following table summarizes the Commission's preliminary determinations with respect to requirements of Exchange Act rule 18a–8 for which a positive substituted compliance determination is not being made because they are fully linked to substantive Exchange Act requirements for which a positive substituted compliance determination is not being made by listing in each row: (1) The paragraph of the proposed Order that sets forth the determination; (2) the paragraph(s) of Exchange Act rule 18a–8 to which the determination applies; (3) a brief description of the records required by those paragraphs; and (4) the exclusion from substituted compliance.

EXCHANGE ACT RULE 18a–8

[Notification]

Order paragraph	Rule paragraph		Rule description	Exclusion
(f)(4)(ii)(B)	(a)(2)	(b)(3)	MSBSP capital notices	Rule 18a–2 Exclusion.
(f)(4)(ii)(C)	(g)		Reserve account notices	Rule 18a–4 Exclusion.

7. Exchange Act Rule 18a–9

Exchange Act rule 18a–9 requires SBS Entities that are security-based swap dealers and that do not have a prudential regulator to examine and count the securities they physically hold, account for the securities that are subject to their control or direction but are not in their physical possession, verify the locations of securities under certain circumstances, and compare the results of the count and verification with their records.[187] The Commission preliminarily is making a positive substituted compliance determination' for this rule.[188]

8. Exchange Act Section 15F(g)

Exchange Act Section 15F(g) requires SBS Entities to maintain daily trading records.[189] The Commission preliminarily believes UK law produces a comparable result in terms of its daily trading recordkeeping requirements.[190] Accordingly, the Commission preliminarily is making a positive substituted compliance determination for the self-executing requirements in this paragraph.[191]

9. Examination and Production of Records

Every Covered Entity registered with the Commission, whether complying directly with Exchange Act requirements or relying on substituted compliance as a means of complying with the Exchange Act, is required to satisfy the inspection and production requirements imposed on such entities under the Exchange Act.[192] Covered Entities may make, keep, and preserve records, subject to the conditions described above, in a manner prescribed by applicable UK requirements. The Commission notes that as an element of its substituted compliance application, the FCA has provided the Commission with adequate assurances that no law or policy would impede the ability of any entity that is directly supervised by the

[186] The chart below does not include the additional conditions for applying substituted compliance to Exchange Act rule 18a–8; namely that the SBS Entity: (1) Is subject to and complies with the requirements of foreign law; (2) remains subject to the requirement of Exchange Act section 15F(f) to keep books and records open to inspection by any representative of the Commission and the requirement of Exchange Act rule 18a–6(g) to furnish promptly to a representative of the Commission legible, true, complete, and current copies of certain records; and (3) must promptly furnish to a representative of the Commission upon request an English translation of certain records. *See* paras. (f)(7) and (8) to the proposed Order (with respect to the second and third conditions).

[187] *See* 17 CFR 240.18a–9.

[188] *See* para. (f)(5) to the proposed Order.

[189] *See* 15 U.S.C. 78o–10(g).

[190] *See* FCA COND at paragraphs 2C, 2D, 3B, 3C, 5D and 5F; PRA Fundamental Rules 2 and 6; FCA PRIN 2.1.1.R(2) and (3); PRA Recordkeeping Rule 2.1; FCA SYSC 9.1.1AR.

[191] *See* para. (f)(6) to the proposed Order.

[192] *See* Exchange Act section 15F(f); Exchange Act rule 18a–6(g).

authority and that may register with the Commission ''to provide prompt access to the Commission to such entity's books and records or to submit to onsite inspection or examination by the Commission.'' Consistent with those assurances and the requirements that apply to all Covered Entities under the Exchange Act, Covered Entities will need to keep books and records open to inspection by any representative of the Commission and to furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the firm that these entities are required to preserve under Exchange Act rule 18a–6 (which would include records for which a positive substituted compliance determination is being made with respect to Exchange Act rule 18a–6 under the Order), or any other records of the firm that are subject to examination or required to be made or maintained pursuant to Exchange Act section 15F that are requested by a representative of the Commission.[193]

10. English Translations

The proposed Order states that to the extent documents are not prepared in the English language, SBS Entities must furnish to a representative of the Commission upon request an English translation of any record, report, or notification of the SBS Entity that is required to be made, preserved, filed, or subject to examination pursuant to Exchange Act section 15F or the UK Order.[194] This requirement addresses difficulties that Commission examinations staff would have examining SBS Entities that furnish documents in a foreign language. While acknowledging that English is widely spoken in the UK, this requirement is included to address foreign branches of UK SBS Entities that may prepare documents in foreign languages. Such English translations would be required to be provided promptly.

IX. Additional Considerations Regarding Supervisory and Enforcement Effectiveness in the UK

A. General Considerations

As noted above, Exchange Act rule 3a71–6 provides that the Commission's assessment of the comparability of the requirements of the foreign financial regulatory system must account for ''the effectiveness of the supervisory program administered, and the enforcement authority exercised'' by the foreign financial regulatory authority. This prerequisite accounts for the understanding that substituted compliance determinations should reflect the reality of the foreign regulatory framework, in that rules that appear high-quality on paper nonetheless should not form the basis for substituted compliance if—in practice—market participants are permitted to fall short of their regulatory obligations. This prerequisite, however, also recognizes that differences among the supervisory and enforcement regimes should not be assumed to reflect flaws in one regime or another.[195]

In connection with these considerations, the FCA Application includes information regarding the UK supervisory and enforcement framework applicable to derivatives markets and market participants. This includes information regarding the supervisory and enforcement authority afforded to the FCA and the PRA to promote compliance with applicable requirements, applicable supervisory and enforcement tools and capabilities, consequences of non-compliance, and the application of the FCA's and PRA's supervisory and enforcement practices in the cross-border context. After review of this information, the Commission preliminarily believes that the framework is reasonably designed to promote compliance with the laws where substituted compliance has been requested.

In preliminarily concluding that the relevant supervisory and enforcement considerations are consistent with substituted compliance, the Commission particularly has considered the following factors:

B. Supervisory Framework in the UK

Supervision of banks and investment firms (together, ''firms'') that conduct security-based swap business in the UK is conducted by the FCA and the PRA. At the time of this application, all firms that will be using substituted compliance are dually-regulated by the FCA and PRA. Although both supervisors take a broad view of their supervisory powers, the FCA is primarily responsible for conduct, anti-money laundering, trade acknowledgment and verification, portfolio reconciliation and dispute reporting, portfolio compression, trading relationship documentation and securities count requirements, while the PRA is primarily responsible for capital, margin, internal supervision, chief compliance officer and risk management requirements. Both the FCA and the PRA are responsible for recordkeeping, reporting and notification requirements, and both have the ability to request records needed for supervision from firms through the supervisory process. In addition, the FCA and the PRA set priorities in their annual business plans which also sets forth the thematic reviews that will be conducted each year. These thematic reviews focus on particular areas of risk or products across several firms and key findings are made public to promote consistency across the market.

1. FCA

For large firms, such as those that will be applying to be security-based swap dealers in the United States, the FCA uses a firm-specific supervision program (''fixed supervision'') and assigns at least one supervisor dedicated to supervising the firm. The supervisor has regular interaction with the firm, including meetings, emails, phone calls and video calls. The supervisor reviews the monthly and quarterly reports that are submitted by firms. If a supervisor sees a red flag on a report, the supervisor may take a number of actions such as contacting the firm's senior management or requiring a skilled person review. This supervisor also works with specialists, who monitor specific activities at the firm, such as financial crimes, and provide support to the primary supervisor.

The FCA meets with each firm subject to fixed supervision to conduct a strategy meeting, which allows the firm to inform the FCA of their business strategy for the next two years.[196] This strategy meeting feeds into the firm evaluation, which is the FCA's assessment of the firm using the FAM methodology.[197] Before a firm evaluation is finalized, the supervisor presents the FAM analysis, a description of the key risks at the firm, and a workplan to address those risks to senior management for approval. Once the workplan is approved, the firm is sent a letter that summarizes the supervisory team's assessment of the firm and gives the firm an overview of what to expect from a supervisory perspective over the next year.

When the FCA identifies a risk or issue at a firm that requires remediation,

[193] *See* para. (f)(6) to the proposed Order.

[194] *See* para. (f)(7) to the proposed Order.

[195] *See generally* Business Conduct Adopting Release, 81 FR at 30079.

[196] Depending on the regulatory cycle of the firm, these meetings typically occur at least every two years.

[197] More information on FCA's supervisory approach, including a description of the FAM methodology, is available at: *https://www.fca.org.uk/publication/corporate/our-approach-supervision-final-report-feedback-statement.pdf.*

the FCA can take a number of corrective actions and strives to choose the one that is appropriate and proportionate to the circumstances. If the FCA determines that the issue is minor then the supervisor may discuss with the firm how the matter is best resolved and follow up with the firm to ensure adequate steps have been taken. For more significant issues, the supervisor can deploy a range of regulatory tools to achieve a specific outcome. The common tools used by the FCA include starting a deep dive;[198] requiring the firm to commit to certain action (for example, varying a firm's ability to conduct business until a prescribed action is taken); or requiring review by a third party, such as a skilled person review.[199] If these actions fail, or if the issue is considered harmful enough, the matter will be referred to the FCA Enforcement division for investigation.

2. PRA

The PRA divides all firms into the five categories for supervisory purposes, with category 1 (''CAT1'') being the most significant firms whose size, interconnectedness, complexity and business type give them the capacity to cause significant disruption to the UK financial system by failing, or by carrying on their business in an unsafe manner.[200] All firms that will be registering as security-based swap dealers in the United States are CAT1 firms and are assigned several supervisors to monitor the firm. These supervisors have frequent interactions (typically daily) with the firms, including regular meetings with the firm's executive management. Supervisors review information submitted by a firm and this information is periodically validated, either through onsite inspection by the PRA supervisory and specialist risk staff, or by third-parties. Supervisors examine for risks in the firm's business model and analyze where and how a firm makes money, the risks involved in doing so, and how the firm is funded. PRA staff regularly engages with firms on business performance, governance and management, external context impact, capital, liquidity, risk controls, and resolvability. The supervisors work with risk specialists and other staff who offer expertise in certain areas (*e.g.,* credit risk, operational risk, governance) to monitor the firm.

The PRA conducts an annual internal meeting regarding each firm called a ''periodic summary meeting'' (''PSM'') to discuss the major risks at the firm, the supervisory strategy, and proposed remedial actions, including guidance about the adequacy of a firm's capital and liquidity. After the PSM, the PRA sends an annual letter to each firm outlining the key risks that are of greatest concern, which require action by the firm. The PRA verifies that action is taken on the key risks identified in the PSM, and actively engages with the firm's audit committee and non-executive directors on the progress made to address the most significant risks. Less significant issues identified in the PSM are conveyed to the firm to be addressed autonomously and the PRA expects confirmation by the most appropriate senior individual within the firm (*e.g.,* the chief executive officer, finance director, or chair of the audit committee) that these issues have been closed.

When the PRA detects supervisory issues at a firm, it has the power to require firms to take corrective actions, such as conducting an internal audit or appointing a monitor to review certain aspects of the firm's regulatory reports. The PRA may also determine that further information is needed and can, for example, require an external audit, conduct its own inspection or appoint an independent skilled person that will produce a report on the topic to the PRA. The PRA may conduct its own onsite inspection, which involves risk specialists and other technical staff, when it wants to review a certain area, such as a particular business line or a model review. The inspections are in-depth, focused reviews that involve discussions with staff, reviews of internal documents at the firm, and testing to ensure the information provided by the firm to the PRA is accurate. If a firm does not take appropriate corrective action as required, the PRA may open an enforcement proceeding.

C. Enforcement Authority in the UK

Similar to the supervision regime, enforcement of banks and investment firms located in the UK is conducted by the FCA and the PRA. As with supervisory powers, the FCA is primarily responsible for conduct, anti-money laundering, trade acknowledgment and verification, portfolio reconciliation and dispute reporting, portfolio compression, trading relationship documentation and securities count requirements, while the PRA is primarily responsible for capital, margin, internal supervision, chief compliance officer and risk management requirements. Both the FCA and PRA are responsible for recordkeeping, reporting and notification requirements.

1. FCA

Within the FCA, enforcement investigations are carried out by the relevant department of the organization's Enforcement and Market Oversight Division (''EMO''). EMO has three investigation departments: (1) Unauthorized business; (2) retail; and (3) wholesale. Most investigations into firms subject to substituted compliance would fall into the wholesale category. The FCA gathers information through voluntary submissions and interviews, and may compel information, documents or testimony as necessary, and subject to limitations on use. In addition to the authority to investigate and impose sanctions for regulatory misconduct, the FCA can simultaneously prosecute criminal offenses such as insider trading and unauthorized business and promotion activities. The FCA has many sanctions and remedies for wrongdoing available for use. Among its sanctioning powers are: Public censure, financial penalties, disciplinary prohibitions, and suspension or restriction orders. In deciding which sanction to apply, the FCA considers relevant circumstances including steps taken to mitigate or remedy the harm and the level of cooperation. The FCA resolves many matters by settlement. Additionally, as required by law, it publishes Final Notices regarding enforcement, subject to certain public interest limitations on publication.

2. PRA

The decision to open an investigation at the PRA is typically made jointly by a senior supervisor and a senior representative of the PRA's enforcement team. Once these individuals decide to investigate, investigators are appointed and the PRA sends a notice to the subject. Like the FCA, the PRA is empowered to require certain information or documents from authorized firms. Under certain circumstances, investigators also can require a person that is neither the subject of the investigation nor connected with the subject to attend an interview and answer questions and/or

[198] A deep dive is a focused, forward-looking assessment of a firm to investigate a specific area of potential risk. Deep dives are designed to be focused assessments, looking at specific risks, rather than wide ranging assessments that, for example, look at controls within a firm generally.

[199] More information on skilled person reviews is available at: *https://www.fca.org.uk/about/supervision/skilled-persons-reviews.*

[200] Information on the PRA's supervisory approach, including the factors it uses to divide firms into the different categories, is available at: *https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/approach/banking-approach-2018.pdf?la=en&hash=3445FD6B39A2576ACCE8B4F9692B05EE04D0CFE3.*

provide information necessary to the investigation. At the end of an investigation, the investigators will report to the PRA and make a recommendation. The possible recommendations include, among others, (1) taking no further action; (2) imposing an enforcement sanction against the subject, which may start settlement discussions or steps towards a contested process; (3) imposing requirements or other supervisory measures against a firm; or (4) opening additional investigations.[201] The PRA is empowered to impose sanctions such as publishing a public statement regarding misconduct, called ''public censure,'' directing persons to refrain from conduct, prohibiting a person from holding an office or position, or imposing a financial penalty.[202] In determining the appropriate amount of penalty, the PRA considers: (1) Any disgorgement to be ordered; (2) the seriousness of the misconduct; (3) any adjustment for aggravating or mitigating factors; (4) any adjustment for deterrence; and (5) reductions for settlement discount and/or serious financial hardship. In resolving actions, the PRA seeks first to determine whether an appropriate settlement can be reached. If one cannot be reached, the investigation team recommends action to the Enforcement Decision Making Committee, which is the PRA's decision-making body for contested enforcement cases.[203] As with the FCA, the PRA is required by law to publish Final Notices regarding enforcement, subject to certain public interest limitations on publication.

X. Request for Comment

Commenters are invited to address all aspects of the application, the Commission's preliminary views and the proposed Order.

A. General Aspects of the Comparability Assessments and Proposed Order

The Commission requests comment regarding the preliminary views and proposed Order in connection with each of the general ''regulatory outcome'' categories addressed above. Commenters particularly are invited to address, among other issues, whether the relevant UK provisions generally are sufficient to produce regulatory outcomes that are comparable to the outcomes associated with requirements under the Exchange Act, and whether the conditions and limitations of the proposed Order would adequately address potential gaps in the relevant regulatory outcomes or would otherwise result in any implementation or other practical issues.

Further, the Commission requests comment regarding whether the proposed conditions and limitations guard against comparability gaps arising from the cross-border application of UK requirements (including when SBS Entities conduct security-based swap business through branches located in the United States or in third countries).

With respect to the proposed conditions and limitations, commenters also are invited to address any differences between UK regulatory requirements and frameworks and either the German requirements and frameworks that formed the basis for the Commission's conditional grant of substituted compliance for Germany or the French requirements and frameworks that formed the basis for the Commission's proposed conditional grant of substituted compliance for France.[204] Would the responses to any of the questions that the Commission asked in connection with the German Notice and Proposed Order and/or the French Notice and Proposed Order differ if those questions applied to UK regulatory requirements and frameworks?

B. Risk Control Requirements

The Commission further requests comment regarding the proposed grant of substituted compliance in connection with requirements under the Exchange Act related to internal risk management systems, trade acknowledgement and verification, portfolio reconciliation and dispute reporting, and trading relationship documentation. Commenters particularly are invited to address the basis for substituted compliance in connection with those risk control requirements, and the proposed conditions and limitations connected to substituted compliance for those requirements.

In addition to these general matters, the Commission invites commenters to address the Commission's preliminary analysis that UK EMIR trade acknowledgment and verification and trading relationship documentation requirements are comparable to Exchange Act requirements when viewed in light of the ESMA EMIR Q&A and the addition of the new general condition concerning a Covered Entity's application of UK EMIR requirements, and without the need to rely on UK requirements that implement MiFID documentation requirements. Should the Commission instead require Covered Entities to comply both with UK EMIR requirements related to trade acknowledgment and verification and trading relationship documentation and with UK requirements that implement MiFID documentation requirements?

With respect to portfolio reconciliation and dispute reporting requirements, the Commission also invites commenters to address the condition requiring a Covered Entity to provide the Commission with reports regarding disputes between counterparties on the same basis as the Covered Entity provides those reports to the FCA pursuant to UK law. Would differences in the timing of dispute reports made pursuant to Exchange Act requirements as compared to reports made pursuant to UK law make UK portfolio reconciliation and dispute reporting requirements not comparable to Exchange Act requirements?

With respect to all risk control requirements, commenters also are invited to address any differences between UK regulatory requirements and frameworks and either the German requirements and frameworks that formed the basis for the Commission's conditional grant of substituted compliance for Germany or the French requirements and frameworks that formed the basis for the Commission's proposed conditional grant of substituted compliance for France.[205] Would the responses to any of the questions about risk control requirements that the Commission asked in connection with the German Notice and Proposed Order and/or the French Notice and Proposed Order differ if those questions applied to UK regulatory requirements and frameworks?

---

[201] See PRA Regulatory Investigations Guide, available at: *https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/pra-statutory-powers/regulatory-investigations-guide.pdf?la=en&hash=7170036F5249F21F15236504A8CC94E6F65D5EE2,* April 2019 at 8.

[202] See Enforcement Decision Making Committee Policy Statement PS/EDMC2018, available at: *https://www.bankofengland.co.uk/-/media/boe/files/paper/2018/enforcement-decision-making-committee-policy-statement.pdf?la=en&hash=2F1E211F8BDB9B23A054DD770CBE342EB381020E* (''Enforcement Decision Making Committee Policy Statement PS/EDMC2018''), at 1 (citing Section 832ZR of the Banking Act of 2009).

[203] Enforcement Decision Making Committee Policy Statement PS/EDMC2018.

[204] *See* German Substituted Compliance Order, 85 FR at 85868; French Notice and Proposed Order, 85 FR at 85720; *see also* German Notice and Proposed Order, 85 FR at 72729–30.

[205] *See* German Substituted Compliance Order, 85 FR at 85689–91; French Notice and Proposed Order, 85 FR 85724–25; *see also* German Notice and Proposed Order, 85 FR at 72730–32.

C. Capital and Margin Requirements

1. Capital

The Commission further requests comment regarding the comparability analysis of UK capital requirements with Exchange Act capital requirements for non-prudentially regulated security-based swap dealers. Commenters particularly are invited to address the basis for substituted compliance in connection with those requirements, and the proposed conditions and limitations connected to substituted compliance for those requirements. Does UK law taken as a whole produce regulatory outcomes that are comparable to those of Exchange Act rule 18a–1? Are there any additional conditions that should be applied to substituted compliance for these capital requirements to promote comparable regulatory outcomes?

The Commission also requests comment and supporting data on the proposed capital conditions. The purpose of the potential conditions would be to address the concern that, while the Basel capital standard contains requirements designed to address liquidity such as the LCR, net stable funding ratio (''NSFR''), and an internal liquidity adequacy assessment process (''liquidity assessment process''), the Basel capital standard does not impose a net liquid assets test that requires a Covered Entity to maintain more than one dollar of highly liquid assets for each dollar of unsubordinated liabilities. The Commission requests comment on how the liquidity provisions in the Basel capital standard (the LCR, NSFR, and liquidity assessment process) impact the liquidity of Covered Entities that would apply substituted compliance with respect to Exchange Act rule 18a–1 (*i.e.,* nonbanks). Do these requirements in practice result in Covered Entities maintaining more than one dollar of highly liquid assets for each dollar of unsubordinated liabilities? If so, explain why. If not, explain why not.

The Commission also requests comment on whether Covered Entities that are not banks have access to short-term liquidity through Central Bank facilities in the UK that are available to banks (*e.g.,* Sterling Monetary Framework through the Bank of England). Please identify and describe each facility that is available to nonbank Covered Entities, including any limitations on their ability to access the facility.

The Commission also requests comment on how the proposed capital conditions compare to any existing capital requirements under the Basel capital standards. For example, are there differences in the frequency or nature of calculations under the Basel capital standards?

The Commission also requests comment on and seeks information about the assets, liabilities, and capital of the Covered Entities that would apply substituted compliance with respect to Exchange Act rule 18a–1. The Commission further requests comment on what specific types of non-prudentially regulated security-based swap dealers in the UK would be relying on a substituted compliance determination with respect to capital requirements under Exchange Act rule 18a–1. What are the primary business lines engaged in by these entities and what types of assets and liabilities do they typically carry on their balance sheets? Are the balance sheets of these entities primarily composed of liquid or illiquid assets? The Commission would use this information to analyze the liquidity of these entities in the context of considering the proposed capital conditions. For example, do the Covered Entities that would apply substituted compliance with respect to Exchange Act rule 18a–1 engage primarily in a securities business? If so, are their balance sheets similar to those of U.S. broker-dealers that deal in securities in terms of holding highly liquid assets? If their balance sheets are similar to U.S. broker-dealers, are the additional capital conditions discussed above necessary? Alternatively, would the additional capital conditions serve to ensure that these firms do not engage in non-securities business activities that could impair their liquidity? Should the Commission consider the relevance of a Covered Entity's business model in determining whether to impose any potential capital conditions? For example, should the Commission take into account the fact that a Covered Entity does not engage in unsecured lending and other activities more typical of banks?

The Commission requests comment on the capital conditions that would require a Covered Entity to: (1) Maintain an amount of assets that are allowable under Exchange Act rule 18a–1, after applying applicable haircuts under the Basel capital standard, that equals or exceeds the Covered Entity's current liabilities coming due in the next 365 days; and (2) makes a quarterly record listing: (a) The assets maintained pursuant to the first proposed condition, their value, and the amount of their applicable haircuts; and (b) the aggregate amount of the liabilities coming due in the next 365 days. Is the term ''current liabilities'' understood by market participants? If not, please explain why and suggest alternative language. Is 365 days an appropriate number of days to use in connection with covering ''current liabilities''? If not, please explain why and suggest an alternative number of days. For example, would a period of 60, 90, 120, 150, 180, 210, 240, 270, 300, 330, 420, 510 days or some other period of days be more appropriate in terms of enhancing the liquidity of Covered Entities applying substituted compliance to Exchange Act rule 18a–1? If so, explain why. If the Commission determines to use a number of days that is less than 365, should the Commission use a term other than ''current liabilities'' such as ''short-term liabilities''? If so, explain why. The Commission requests comment on whether the haircuts under the Basel capital standard are the appropriate haircuts to apply under the proposed capital condition. If so, please explain why. Are they comparable to the haircuts under Exchange Act rule 18a–1? Would it impose a significant burden on Covered Entities to apply the haircuts under Exchange Act rule 18a–1 rather than under the Basel capital standard? If so, please explain why. Please identify any regulatory or operational issues in connection with these proposed capital conditions, including with maintaining a quarterly record. The Commission requests comment on how these conditions would compare to the LCR.

The Commission also requests comment and supporting data on the proposed condition that a Covered Entity maintain at least $100 million of equity capital composed of ''highly liquid assets'' as defined in the Basel capital standard. How would this potential minimum capital amount compare with the amounts of equity capital currently maintained by Covered Entities that would apply substituted compliance to Exchange Act rule 18a–1? Should the condition require a different amount of equity capital? For example, should the amount be $50, $75, $125, or $150 million or some other amount? If so, explain why. Are the terms ''highly liquid assets'' and ''equity capital'' understood by market participants? If not, please explain why and suggest alternative terms.

The Commission also requests comment and supporting data on the proposed condition that a Covered Entity includes its most recent audited or unaudited statement of financial condition filed with its local supervisor with its initial written notice to the Commission of its intent to rely on substituted compliance. Are there other

means for the Commission to efficiently obtain this information? If so, explain how. Is the information presented in these reports prepared in accordance with the GAAP that the firm uses to prepare publicly available or available to be issued general purpose financial statements in its home jurisdiction?

The Commission requests comment on the potential benefits and costs of the potential capital conditions? Would the conditions promote comparable regulatory outcomes between the capital requirements applied to Covered Entities in the UK and capital requirements under Exchange Act rule 18a–1? If so, explain why. If not, explain why not. The Commission is mindful that compliance with these capital conditions would require Covered Entities applying substituted compliance to Exchange Act rule 18a–1 to supplement their existing capital calculations and practices, as well as to incur additional time and cost burdens to implement the potential conditions and integrate them into existing business operations. The Commission requests comment and supporting data on these potential time and cost burdens, including quantitative information about the amount of the burdens. The Commission also requests comment on any potential operational or regulatory issues or burdens associated with adhering to the proposed capital conditions.

The Commission requests comment on the potential impacts the capital conditions would have on competition. For example, how would they impact competition between Covered Entities applying substituted compliance with respect to Exchange Act rule 18a–1 and SBS Entities that will comply with Exchange Act rule 18a–1? Would the conditions eliminate or mitigate potential competitive advantages that Covered Entities adhering to the Basel capital standard might have over SBS Entities adhering to the more stringent net liquid assets test standard of Exchange Act rule 18a–1? Alternatively, would the conditions create competitive disadvantages for Covered Entities applying substituted compliance with respect to Exchange Act rule 18a–1 as compared to SBS Entities complying with Exchange Act rule 18a–1? Please describe and explain.

Please identify and describe any potential impacts on the way Covered Entities currently conduct their business with respect to implementing the proposed capital conditions.

The Commission further requests comment on whether the Commission should consider other potential conditions with respect to applying substituted compliance to Exchange Act rule 18a–1. Should the Commission consider imposing a potential capital condition that is more consistent with Exchange Act rule 18a–1? Please explain why or why not. Should the capital condition include higher requirements for a Covered Entity that holds a significant amount of illiquid assets? For example, if 20%, 30%, 40%, 50%, or some other percent of the Covered Entity's assets would not be allowable under Exchange Act rule 18a–1, should the firm be required to hold an amount of allowable assets to cover liabilities coming due over a longer period of time than a firm that does not exceed the percent threshold? If so, explain why and identify the appropriate percent threshold. Should there be a percent threshold of non-allowable assets under Exchange Act rule 18a–1 held by the Covered Entity over which substituted compliance with respect to capital would not be permitted? If so, explain why and identify the appropriate percent threshold.

The Commission also requests comment on whether the Commission should consider imposing other capital conditions (or no conditions) if a Covered Entity's business with U.S. persons falls below a certain notional threshold, such as $8 billion, $20 billion, $50 billion, or some other threshold. If so, explain why? Please explain which threshold may be appropriate or suggest an alternative.

The Commission further requests comment on whether there will be any non-prudentially regulated security-based swap dealers in the UK other than PRA-designated investment firms that would be seeking substituted compliance. In addition, HM Treasury, the PRA and the FCA published a joint statement announcing that they had decided to target an implementation date of January 1, 2022 for the new prudential rules for investment firms. The Commission further requests comment on whether any investment firms that may be relying on the Commission's proposed substituted compliance determination with respect to Exchange Act rule 18a–1 would potentially be covered under this new capital regime for investment firms in the UK. If so, should these capital requirements be included in any Commission final order regarding the determination of substituted compliance with respect to the capital requirements of the Commission and the UK? If so, explain how they are comparable to the capital requirements for non-prudentially regulated security-based swap dealers under the Exchange Act.

With respect to capital requirements, commenters also are invited to address any differences between UK regulatory requirements and frameworks and the French requirements and frameworks that formed the basis for the Commission's proposed conditional grant of substituted compliance for France.[206] Would the responses to any of the questions about capital requirements that the Commission asked in connection with the French Notice and Proposed Order differ if those questions applied to UK regulatory requirements and frameworks?[207]

The Commission further requests comment on whether there would be any non-prudentially regulated major security-based swap participants in the UK that would be seeking substituted compliance with respect to Exchange Act rule 18a–2.

2. Margin

The Commission further requests comment regarding the Commission's preliminary view that the UK margin requirements are comparable to the Exchange Act margin requirements for non-prudentially regulated security-based swap dealers and major security-based swap participants. Commenters particularly are invited to address the basis for substituted compliance in connection with those requirements. Does UK law taken as a whole produce regulatory outcomes that are comparable to those of Exchange Act rule 18a–3? Are there any additional conditions that should be applied to substituted compliance for these margin requirements to promote comparable regulatory outcomes?

The Commission further requests comment on whether the haircuts required under the UK EMIR Margin RTS are comparable to the collateral haircuts required under paragraph (c)(3) of Exchange Act rule 18a–3. The Commission also requests comment whether the standardized grid for computing initial margin under the UK EMIR Margin RTS is comparable to the standardized approach for computing initial margin under paragraph (d)(1) of Exchange Act rule 18a–3.

With respect to margin requirements, commenters also are invited to address any differences between UK regulatory requirements and frameworks and the French requirements and frameworks that formed the basis for the Commission's proposed conditional

[206] *See* French Notice and Proposed Order, 85 FR 85726.

[207] *See* French Notice and Proposed Order, 85 FR 85736–37.

grant of substituted compliance for France.[208] Would the responses to any of the questions about margin requirements that the Commission asked in connection with the French Notice and Proposed Order differ if those questions applied to UK regulatory requirements and frameworks?[209]

D. Internal Supervision, Chief Compliance Officer and Additional Exchange Act Section 15F(j) Requirements

The Commission requests comment regarding the proposed grant of substituted compliance in connection with requirements under the Exchange Act related to internal supervision and chief compliance officers, as well as additional Exchange Act section 15F(j) requirements. Commenters particularly are invited to address the basis for substituted compliance in connection with those risk control requirements, and the proposed conditions and limitations connected to substituted compliance for those requirements.

With respect to internal supervision and chief compliance officers requirements, as well as additional Exchange Act section 15F(j) requirements, commenters also are invited to address any differences between UK regulatory requirements and frameworks and either the German requirements and frameworks that formed the basis for the Commission's conditional grant of substituted compliance for Germany or the French requirements and frameworks that formed the basis for the Commission's proposed conditional grant of substituted compliance for France.[210] In particular, the proposed Order would require a Covered Entity to be subject to, and comply with, in part provisions of UK law that implement CRD article 92, whereas the German Substituted Compliance Order requires, and the French Notice and Proposed Order would require, compliance with provisions that implement CRD articles 92 through 95. Should the Commission apply to these three orders (and to any other substituted compliance orders in jurisdictions with requirements based on CRD) the approach to these provisions in the proposed Order or the approach in the German Substituted Compliance Order and French Notice and Proposed Order? Similarly, the proposed Order would require a Covered Entity to be subject to, and comply with, in part UK CRR articles 286 through 288 and 293, whereas the German Substituted Compliance Order does not require, and the French Notice and Proposed Order would not require, compliance with comparable provisions of EU law. Should the Commission apply to these three order (and to any other substituted compliance orders in jurisdictions with requirements based on CRR) the approach to these provisions in the proposed Order or the approach in the German Substituted Compliance Order and French Notice and Proposed Order? In addition, would the responses to any of the questions about internal supervision or chief compliance officer requirements, or the additional Exchange Act section 15F(j) requirements, that the Commission asked in connection with the German Notice and Proposed Order and/or the French Notice and Proposed Order differ if those questions applied to UK regulatory requirements and frameworks?

E. Counterparty Protection Requirements

The Commission requests comment regarding the proposed grant of substituted compliance in connection with counterparty protection requirements under the Exchange Act. Commenters particularly are invited to address the basis for substituted compliance in connection with the counterparty protection requirements, and the proposed conditions and limitations connected to substituted compliance for those requirements.

The Commission also requests comment on the scope of UK ''know your counterparty'' and daily mark requirements to which a Covered Entity must be subject if it relies on substituted compliance. Third country investment firms (a term that includes third country credit institutions when providing investment services or performing investment activities in the UK) are not subject to these UK requirements and therefore would not be eligible to apply substituted compliance for Exchange Act ''know your counterparty'' or daily mark requirements. Do any such third country investment firms currently plan to apply, or believe they might in the future apply, substituted compliance for Exchange Act ''know your counterparty'' or daily mark requirements? Are any other UK requirements applicable to third country investment firms comparable to Exchange Act ''know your counterparty'' or daily mark requirements?

With respect to all counterparty protection requirements, commenters also are invited to address any differences between UK regulatory requirements and frameworks and either the German requirements and frameworks that formed the basis for the Commission's conditional grant of substituted compliance for Germany or the French requirements and frameworks that formed the basis for the Commission's proposed conditional grant of substituted compliance for France.[211] Would the responses to any of the questions about counterparty protection requirements that the Commission asked in connection with the German Notice and Proposed Order and/or the French Notice and Proposed Order differ if those questions applied to UK regulatory requirements and frameworks?

F. Recordkeeping, Reporting, Notification, and Securities Count

The Commission requests comment regarding the proposed grant of substituted compliance in connection with requirements under the Exchange Act related to recordkeeping, reporting, notification, and securities counts, as well as the requirement of Exchange Act section 15F(g). Commenters particularly are invited to address the basis for substituted compliance in connection with those requirements, and the proposed conditions and limitations connected to substituted compliance for those requirements. Does UK law taken as a whole produce regulatory outcomes that are comparable to those of Exchange Act section 15F(g) and Exchange Act rules 18a–5, 18a–6, 18a–7, 18a–8, and 18a–9? In this regard, commenters are invited to address the UK laws cited for each substituted compliance determination with respect to the distinct requirements within Exchange Act rules 18a–5, 18a–6, 18a–7, and 18a–8 (*i.e.,* the rules for which a more granular approach to substituted compliance is being taken). With respect to each substituted compliance determination, the Commission seeks comment on the following matters: (1) Will the UK laws cited for the determination result in a comparable regulatory outcome; (2) are there additional or alternative UK laws that should be cited to achieve a comparable regulatory outcome; and (3) are any of the UK laws cited for the determination

[208] *See* French Notice and Proposed Order, 85 FR 85726.

[209] *See* French Notice and Proposed Order, 85 FR 85736.

[210] *See generally* German Substituted Compliance Order, 85 FR at 85691–92; French Notice and Proposed Order, 85 FR 85726–28; *see also* German Notice and Proposed Order, 85 FR at 72732–34.

[211] *See generally* German Substituted Compliance Order, 85 FR at 85692–95; French Notice and Proposed Order, 85 FR 85728–30; *see also* German Notice and Proposed Order, 85 FR at 72734–36.

unnecessary to achieve a comparable regulatory outcome?

Commenters particularly are invited to address the proposed condition with respect to Exchange Act rule 18a–5 that the Covered Entity: (1) Preserve all of the data elements necessary to create the records required by Exchange Act rules 18a–5(a)(1), (2), (3), (4), and (7) (if not prudentially regulated) or Exchange Act rules 18a–5(b)(1), (2), (3), and (7) (if prudentially regulated); and (2) upon request furnish promptly to representatives of the Commission the records required by those rules. Do the relevant UK laws require SBS Entities to retain the data elements necessary to create the records required by these rules? If not, please identify which data elements are not preserved pursuant to the relevant UK laws. Further, how burdensome would it be for an SBS Entity to format the data elements into the records required by these rules (*e.g.,* a blotter, ledger, or securities record, as applicable) if the firm was requested to do so? In what formats do SBS Entities in the UK produce this information to the PRA, FCA, or other UK authorities? How do those formats differ from the formats required by Exchange Act rules 18a–5(a)(1), (2), (3), (4), and (7) (if not prudentially regulated) or Exchange Act rules 18a–5(b)(1), (2), (3), and (7) (if prudentially regulated)?

Is it appropriate to structure the Commission's substituted compliance determinations in the Order with respect to the recordkeeping and reporting rules to provide Covered Entities with greater flexibility to select which distinct requirements within the broader recordkeeping, reporting, notification, and securities count rules for which they want to apply substituted compliance? Explain why or why not. For example, would it be more efficient for a Covered Entity to comply with certain Exchange Act requirements within a given recordkeeping or reporting rule (rather than apply substituted compliance) because it can utilize systems that its affiliated broker-dealer has implemented to comply with them? If so, explain why. If not, explain why not. Is it appropriate to permit Covered Entities to take a more granular approach to the requirements within these recordkeeping rules? For example, would this approach make it more difficult for the Commission to get a comprehensive understanding of the Covered Entity's security-based swap activities and financial condition? Explain why or why not. Would it be overly complex for the Covered Entity to administer a firm-wide recordkeeping system under this approach? Explain why or why not.

Certain of the Commission's recordkeeping, reporting, and notification requirements are fully or partially linked to substantive Exchange Act requirements for which a positive substituted compliance determination is preliminarily not being made under the proposed Order. In these cases, should the Commission not make a positive substituted compliance determination for the fully linked requirement in the recordkeeping or reporting rules or to the portion of the requirement that is linked to a substantive Exchange Act requirement? In particular, should the Commission not make a positive substituted compliance determination for recordkeeping, reporting, or notification requirements linked to the following Exchange Act rules for which a positive substituted compliance determination is preliminarily not being made: (1) Exchange Act rule 10b–10; (2) Exchange Act rule 15Fh–4; (3) Exchange Act rule 15Fh–5; (4) Exchange Act rule 15Fh–6; (5) Exchange Act rule 18a–2; (6) Exchange Act rule 18a–4; and (7) Regulation SBSR? If not, explain why.

Certain of the requirements in the Commission's recordkeeping, reporting, and notification rules are linked to substantive Exchange Act requirements where a positive substituted compliance determination is being made under the proposed Order. In these cases, should a positive substituted compliance determination for the linked requirement in the recordkeeping, reporting, or notification rule be conditioned on the Covered Entity applying substituted compliance to the linked substantive Exchange Act requirement? If not, explain why. Should this be the case regardless of whether the requirement is fully or partially linked to the substantive Exchange Act requirement? If not, explain why. In particular, should substituted compliance for recordkeeping, reporting, and notification requirements linked to the following Exchange Act rules be conditioned on the SBS Entity applying substituted compliance to the linked substantive Exchange Act rule: (1) Exchange Act rule 15Fh–3; (2) Exchange Act rule 15Fi–2; (3) Exchange Act rule 15Fi–3; (4) Exchange Act rule 15Fi–4; (5) Exchange Act rule 15Fi–5; (6) Exchange Act rule 15Fk–1; (7) Exchange Act rule 18a–1; (8) Exchange Act rule 18a–3; (8) Exchange Act rule 18a–5; and (9) Exchange Act rule 18a–7? If not, explain why.

While certain recordkeeping and reporting requirements are not expressly linked to Exchange Act rule 18a–1, they would be important to the Commission's ability to monitor or examine for compliance with the capital requirements under this rule. The records also will assist the firm in monitoring its net capital position and, therefore, in complying with Exchange rule 18a–1 and its appendices. Should a positive substituted compliance determination with respect to these recordkeeping and reporting requirements be subject to the condition that the Covered Entity applies substituted compliance with respect to Exchange Act rule 18a–1 and its appendices? If not, explain why.

Commenters also are invited to address the proposal that a positive substituted compliance determination with respect to Exchange Act rule 18a–7 would be conditioned on the Covered Entity filing financial and operational information with the Commission in the manner and format specified by the Commission by order or rule. With respect to FOCUS Report Part II, not all of the line items on the report may be as pertinent to a non-prudentially regulated SBS Entity if a positive substituted compliance determination is made with respect to capital or margin. With respect to FOCUS Report Part IIC, because the Commission does not have responsibility to administer capital and margin requirements for prudentially regulated SBS Entities, the FOCUS Report Part IIC elicits much less information than the FOCUS Report Part II or the financial reports SBS Entities file with UK authorities. Should the Commission require Covered Entities to file the financial and operational information using the FOCUS Report Part II (if not prudentially regulated) or Part IIC (if prudentially regulated)? Are there line items on the FOCUS Report Part II or Part IIC that elicit information that is not included in the reports SBS Entities file with the FCA or PRA? If so, do SBS Entities record that information in their required books and records? Please identify any information that is elicited in the FOCUS Report Part II (if not prudentially regulated) or Part IIC (if prudentially regulated) that is not: (1) Included in the financial reports filed by SBS Entities with the FCA or PRA; or (2) recorded in the books and records required of SBS Entities. With respect to FOCUS Report Part IIC, would the answer to these questions change if references to FFIEC Form 031 were not included in the FOCUS Report Part IIC? If so, how? As a preliminary matter, as a condition of substituted compliance should SBS Entities file a limited amount of financial and operational information on the FOCUS Report Part II (if not prudentially regulated) or Part IIC (if prudentially regulated) for a

period of two years to further evaluate the burden of requiring all applicable line items to be filled out? If so, which line items should be required? To the extent that SBS Entities otherwise report or record information that is responsive to the FOCUS Report Part II or Part IIC, how could the information on these reports be integrated into a database of filings the Commission or its designee will maintain for filers of the FOCUS Report Parts II and IIC (*e.g.,* the eFOCUS system) to achieve the objective of being able to perform cross-form analysis of information entered into the uniquely numbered line items on the forms?

Commenters also are invited to address the proposal that a positive substituted compliance determination with respect to the requirement to file annual audited reports pursuant to Exchange Act rule 18a–7 would be subject to five conditions. For example, comment is sought on the first and third conditions that would permit the SBS Entity to simultaneously transmit to the Commission a copy of the financial statements the SBS Entity is required to file annually with a UK regulator, and, if not already required, require the SBS Entity to engage an independent public accountant to prepare a report covering the annual financial statements. Are there any concerns with the Commission accepting financial statements that are prepared in accordance with UK GAAP and audited by an independent public accountant in accordance with UK GAAS? In addition, are there any concerns with the public accountant being independent in accordance with local UK requirements? Further, the third condition would require SBS Entities that are not required under UK law to file a report of an independent public accountant covering their financial statements to file such an accountant's report. This condition is based on the fact that UK law only requires certain investment firms (depending on their size) to have their financial statements audited. Do the firms in the UK that are not subject to the requirement to file audited financial reports engage in security-based swap activities? If so, are they likely to register with the Commission as a non-prudentially regulated security-based swap dealer or major security-based swap participant?

With respect to recordkeeping, reporting, notification, and securities count requirements, commenters also are invited to address any differences between UK regulatory requirements and frameworks and either the German requirements and frameworks that formed the basis for the Commission's conditional grant of substituted compliance for Germany or the French requirements and frameworks that formed the basis for the Commission's proposed conditional grant of substituted compliance for France.[212] Would the responses to any of the questions about recordkeeping, reporting, notification, and securities count requirements that the Commission asked in connection with the German Notice and Proposed Order and the French Notice and Proposed Order differ if those questions applied to UK regulatory requirements and frameworks?

G. Supervisory and Enforcement Issues

The Commission further requests comment regarding how to weigh considerations regarding supervisory and enforcement effectiveness in the UK as part of the comparability assessments. Commenters particularly are invited to address relevant issues regarding the effectiveness of UK supervision and enforcement over firms that may register with the Commission as SBS Entities, including but not limited to issues regarding:

- UK supervisory and enforcement authority, supervisory inspection practices and the use of alternative supervisory tools, and enforcement tools and practices;
- UK supervisory and enforcement effectiveness with respect to derivatives such as security-based swaps; and
- UK supervision and enforcement in the cross-border context (*e.g.,* any differences between the oversight of firms' businesses within the UK and the oversight of activities and branches outside of the UK, including within the United States).

By the Commission.

Dated: April 5, 2021.

Vanessa A. Countryman,

Secretary.

Attachment A

It is hereby determined and ordered, pursuant to rule 3a71–6 under the Exchange Act, that a Covered Entity (as defined in paragraph (g)(1) of this Order) may satisfy the requirements under the Exchange Act that are addressed in paragraphs (b) through (f) of this Order so long as the Covered Entity is subject to and complies with relevant requirements of the United Kingdom and with the conditions to this Order, as amended or superseded from time to time.

[212] *See generally* German Substituted Compliance Order, 85 FR at 85695–97; French Notice and Proposed Order, 85 FR 85730–34.

(a) General Conditions

This Order is subject to the following general conditions, in addition to the conditions specified in paragraphs (b) through (f):

(1) *Activities as UK ''regulated activities.''* For each condition in paragraphs (b) through (f) of this Order that requires the application of, and the Covered Entity's compliance with, provisions of FCA SYSC 4, 5, 6, 7, 9 and/or 10, PRA General Organisational Requirements, PRA Recordkeeping Rules, PRA Remuneration Rules, PRA Risk Control Rules and/or MLR 2017, the Covered Entity's relevant security-based swap activities constitute ''regulated activities'' as defined for purposes of the relevant UK provisions, are carried on by the Covered Entity from an establishment in the United Kingdom and fall within the scope of the Covered Entity's authorization from the FCA and/or the PRA to conduct regulated activities in the United Kingdom.

(2) *Activities as UK MiFID ''investment services or activities.''* For each condition in paragraphs (b) through (f) of this Order that requires the application of, and the Covered Entity's compliance with, provisions of FCA PROD 3 and/or UK MiFID Org Reg, the Covered Entity's relevant security-based swap activities constitute ''investment services or activities,'' as defined in the FCA Handbook Glossary, are carried on by the Covered Entity from an establishment in the United Kingdom and fall within the scope of the Covered Entity's authorization from the FCA and/or PRA to conduct regulated activities in the United Kingdom.

(3) *Activities as UK ''MiFID or equivalent third country business.''* For each condition in paragraphs (b) through (f) of this Order that requires the application of, and the Covered Entity's compliance with, provisions of FCA COBS 2, 4, 6, 8A, 9A, 14 and/or 14A, the Covered Entity's relevant security-based swap activities constitute ''MiFID or equivalent third country business,'' as defined in the FCA Handbook Glossary, are carried on by the Covered Entity from an establishment in the United Kingdom and fall within the scope of the Covered Entity's authorization from the FCA and/or PRA to conduct regulated activities in the United Kingdom.

(4) *Activities as UK ''designated investment business.''* For each condition in paragraphs (b) through (f) of this Order that requires the application of, and the Covered Entity's compliance with, provisions of FCA

COBS 11, the Covered Entity's relevant security-based swap activities constitute ''MiFID business'' that is also ''designated investment business,'' each as defined in the FCA Handbook Glossary; are carried on by the Covered Entity from an establishment in the United Kingdom; and fall within the scope of the Covered Entity's authorization from the FCA and/or PRA to conduct regulated activities in the United Kingdom.

(5) *Activities as UK ''MiFID business.''* For each condition in paragraphs (b) through (f) of this Order that requires the application of, and the Covered Entity's compliance with, provisions of FCA CASS 6 and/or 7, the Covered Entity is not an ICVC as defined in the FCA Handbook Glossary and the Covered Entity's relevant security-based swap activities constitute ''regulated activities'' as defined for purposes of the relevant UK provisions and ''MiFID business'' as defined in the FCA Handbook Glossary; are carried on by the Covered Entity from an establishment in the United Kingdom and fall within the scope of the Covered Entity's authorization from the FCA and/or the PRA to conduct regulated activities in the United Kingdom.

(6) *Activities covered by FCA SYSC 10A.* For each condition in paragraphs (b) through (f) of this Order that requires the application of, and the Covered Entity's compliance with, provisions of FCA SYSC 10A, the Covered Entity's relevant security-based swap activities constitute activities described in FCA SYSC 10A.1.1(2)(a), (b) and/or (c); are carried on by the Covered Entity from an establishment in the United Kingdom and fall within the scope of the Covered Entity's authorization from the FCA and/or the PRA to conduct regulated activities in the United Kingdom.

(7) *Counterparties as UK MiFID ''clients.''* For each condition in paragraphs (b) through (f) of this Order that requires the application of, and the Covered Entity's compliance with, provisions of FCA CASS 6 and/or 7, FCA COBS 2, 4, 6, 8A, 9A, 11, 14 and/or 14A, FCA PROD 3, FCA SYSC 10.1.8, FCA SYSC 10A and/or UK MiFID Org Reg, the relevant counterparty (or potential counterparty) to the Covered Entity is a ''client'' (or potential ''client''), as defined in COBS 3.2.1R.

(8) *Security-based swaps as UK MiFID ''financial instruments.''* For each condition in paragraphs (b) through (f) of this Order that requires the application of, and the Covered Entity's compliance with, provisions of FCA CASS 6 and/or 7, FCA COBS 2, 4, 6, 8A, 9A, 11, 14 and/or 14A, FCA PROD 3, FCA SYSC 10A, UK MAR, UK MAR Investment Recommendations Regulation and/or UK MiFID Org Reg, the relevant security-based swap is a ''financial instrument,'' as defined in Part 1 of Schedule 2 of the UK Regulated Activities Order.

(9) *Covered Entity as UK CRD/CRR ''institution.''* For each condition in paragraph (b) through (f) of this Order that requires the application of, and the Covered Entity's compliance with, provisions of UK CRR, the Covered Entity is an ''institution,'' as defined in UK CRR article 4(1)(3).

(10) *Covered Entity as UK ''common platform firm'' or ''third country firm.''* For each condition in paragraph (b) through (f) of this Order that requires the application of, and the Covered Entity's compliance with, provisions of FCA SYSC 4, 5, 6, 7, 9 and/or 10, the Covered Entity is either a ''common platform firm'' (other than a ''UCITS investment firm'') or a ''third country firm,'' each as defined in the FCA Handbook Glossary.

(11) *Covered Entity as UK ''IFPRU investment firm.''* For each condition in paragraph (b) through (f) of this Order that requires the application of, and the Covered Entity's compliance with, provisions of FCA SYSC 19A, FCA IFPRU and/or FCA BIPRU, the Covered Entity is an ''IFPRU investment firm,'' as defined in the FCA Handbook Glossary.

(12) *Covered Entity as ''UK bank'' or ''UK designated investment firm.''* For each condition in paragraph (b) through (f) of this Order that requires the application of, and the Covered Entity's compliance with, provisions of FCA SYSC 19D, PRA Internal Capital Adequacy Assessment Rules, PRA Internal Liquidity Adequacy Assessment Rules, PRA General Organisational Requirements, PRA Remuneration Rules and/or PRA Risk Control Rules, the Covered Entity is a ''UK bank'' or ''UK designated investment firm,'' each as defined in the FCA Handbook Glossary (in the case of a provision of FCA SYSC 19D) or as defined in the PRA Rulebook Glossary (in the case of a provision of a PRA rule).

(13) *Covered Entity's counterparties as UK EMIR ''counterparties.''* For each condition in paragraphs (b) through (e) of this Order that requires the application of, and the Covered Entity's compliance with, provisions of UK EMIR, UK EMIR RTS and/or UK EMIR Margin RTS, if the counterparty to the Covered Entity is not a ''financial counterparty'' or ''non-financial counterparty'' as defined in UK EMIR articles 2(8) or 2(9), respectively, the Covered Entity complies with the applicable condition of this Order:

(i) As if the counterparty were a financial counterparty, if the Covered Entity reasonably determines that the counterparty would be a financial counterparty if it were established in the UK and authorized by an appropriate UK authority, or, otherwise, as if the counterparty were a non-financial counterparty; and

(ii) Without regard to the application of UK EMIR article 13.

(14) *Security-based swap status under UK EMIR.* For each condition in paragraphs (b) through (e) of this Order that requires the application of, and the Covered Entity's compliance with, provisions of UK EMIR and/or other UK requirements adopted pursuant to those provisions, either:

(i) The relevant security-based swap is an ''OTC derivative'' or ''OTC derivative contract,'' as defined in UK EMIR article 2(7), that has not been cleared by a CCP and otherwise is subject to the provisions of UK EMIR article 11, UK EMIR RTS articles 11 through 15, and UK EMIR Margin RTS article 2; or

(ii) The relevant security-based swap has been cleared by a central counterparty that has been authorized or recognized to clear derivatives contracts in the UK.

(15) *Memorandum of Understanding with the FCA and the PRA.* The Commission has a supervisory and enforcement memorandum of understanding and/or other arrangement with the FCA and the PRA addressing cooperation with respect to this Order at the time the Covered Entity complies with the relevant requirements under the Exchange Act via compliance with one or more provisions of this Order.

(16) *Notice to Commission.* A Covered Entity relying on this Order must provide notice of its intent to rely on this Order by notifying the Commission in writing. Such notice must be sent to the Commission in the manner specified on the Commission's website. The notice must include the contact information of an individual who can provide further information about the matter that is the subject of the notice. The notice must identify each specific substituted compliance determination within paragraphs (b) through (f) of the Order for which the Covered Entity intends to apply substituted compliance. A Covered Entity must promptly provide an amended notice if it modifies its reliance on the substituted compliance determinations in this Order.

(b) Substituted Compliance in Connection With Risk Control Requirements

This Order extends to the following provisions related to risk control:

(1) *Internal risk management.* The requirements of Exchange Act section 15F(j)(2) and related aspects of Exchange Act rule 15Fh–3(h)(2)(iii)(I), provided that the Covered Entity is subject to and complies with the requirements of:

(i) Either {FCA IFPRU 2.2.7R(2), 2.2.17R through 2.2.28R, 2.2.30R and 2.2.32R through 2.2.35R; and FCA BIPRU 12.3.4R, 12.3.5R, 12.3.7R, 12.3.8R, 12.3.22AR, 12.3.22BR, 12.3.27R, 12.4.–2R, 12.4.–1R, 12.4.5AR, 12.4.10R and 12.4.11R} or {PRA Internal Capital Adequacy Assessment Rules 4.1 through 4.4, 5.1, 6.1, 7.1, 7.2, 8.1 through 8.5, 9.1, 10.1, 10.2 and 11.1 through 11.3; and PRA Internal Liquidity Adequacy Assessment Rules 3.1, 3.2, 3.3, 4.1, 7.2, 8.1, 9.2, 11.1, 11.2, 11.4, 12.1, 12.3, and 12.4};

(ii) FCA PRIN 2.1.1R(3);

(iii) FCA SYSC 4.1.1R(1), 4.1.2R, 7.1.4R, 7.1.17R, 7.1.18R, 7.1.18BR, 7.1.19R, 7.1.20R, 7.1.21R and 7.1.22R and, if the Covered Entity is a UK bank or UK designated investment firm, also PRA General Organisational Requirements Rule 2.1 and 2.2 and PRA Risk Control Rules 2.3, 2.7 and 3.1 through 3.5;

(iv) Either {FCA SYSC 19A.2.1R} or {FCA SYSC 19D.2.1R and PRA Remuneration Rule 6.2};

(v) Either {FSMA schedule 6 part 2D and FCA COND 2.4.1A} or {FSMA schedule 6 parts 3C and 5D, FCA COND 2.4.1C and PRA Fundamental Rules 3 through 6};

(vi) UK CRR articles 286 through 288 and 293;

(vii) UK EMIR Margin RTS article 2; and

(viii) UK MiFID Org Reg articles 21 through 24.

(2) *Trade acknowledgement and verification.* The requirements of Exchange Act rule 15Fi–2, provided that the Covered Entity is subject to and complies with the requirements of UK EMIR article 11(1)(a) and UK EMIR RTS article 12.

(3) *Portfolio reconciliation and dispute reporting.* The requirements of Exchange Act rule 15Fi–3, provided that:

(i) The Covered Entity is subject to and complies with the requirements of UK EMIR article 11(1)(b) and UK EMIR RTS articles 13 and 15;

(ii) The Covered Entity provides the Commission with reports regarding disputes between counterparties on the same basis as it provides those reports to the FCA pursuant to UK EMIR RTS article 15(2).

(4) *Portfolio compression.* The requirements of Exchange Act rule 15Fi–4, provided that the Covered Entity is subject to and complies with the requirements of UK EMIR RTS article 14.

(5) *Trading relationship documentation.* The requirements of Exchange Act rule 15Fi–5, other than paragraph (b)(5) to that rule when the counterparty is a U.S. person, provided that the Covered Entity is subject to and complies with the requirements of UK EMIR article 11(1)(a), UK EMIR RTS article 12 and UK EMIR Margin RTS article 2.

(c) Substituted Compliance in Connection With Capital and Margin

(1) *Capital.* The requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1, and 18a–1a through d, provided that:

(i) The Covered Entity is subject to and complies with the capital requirements of: The UK CRR, including recitals 40, 43 and 87, and articles 26, 28, 50 through 52, 61, 63, 92, 111, 113(1), 114 through 122, 143, 153(8), 177(2), 283, 290, 300 through 311, 312(2), 362 through 377, 382 through 383, 412(1), 413(1), 416(1), 427(1), 413, 429, 430, and 499; UK MiFID Org Reg article 23; UK EMIR Margin RTS, recital 31, articles 2, 3(b), 7, and 19(1)(d) and (e), (3) and (8); FCA SYSC 4.1.1R, 7.1.4R and 7.1.18R; Chapters 2,7, 10, 11 of FCA IFPRU; Chapter 12 of FCA BIPRU; FCA PRIN; Client asset protection requirements under the FCA CASS; PRA General Organisational Requirements Rule 2.1; PRA Risk Control Rules 2.3 and 3.1(1); PRA Capital Buffers Rules; PRA Internal Capital Adequacy Assessment Rules; PRA Internal Liquidity Adequacy Assessment Rules; PRA Liquidity Coverage Requirement—UK Designated Investment Firms Rules; PRA Notifications Rules; Banking Act 2009; Capital Requirements Regulations 2013; Capital Requirements (Capital Buffers and Macro-prudential Measures) Regulations 2014; Part 8 and Part 9 of the Bank Recovery and Resolution (No 2) Order 2014; Bank of England Act 1998 (Macro-prudential Measures) (No 2) Order 2015; and Parts 4A and 12A of FSMA; and

(ii) The Covered Entity:

(A) Maintains an amount of assets that are allowable under Exchange Act rule 18a–1, after applying applicable haircuts under the Basel capital standard, that equals or exceeds the Covered Entity's current liabilities coming due in the next 365 days;

(B) Makes a quarterly record listing:

(*1*) The assets maintained pursuant to paragraph (c)(1)(ii)(A), their value, and the amount of their applicable haircuts;

(*2*) The aggregate amount of the liabilities coming due in the next 365 days; and

(C) Maintains at least $100 million of equity capital composed of ''highly liquid assets'' as defined in the Basel capital standard; and

(D) Includes its most recent statement of financial condition filed with its local supervisor whether audited or unaudited with its initial written notice to the Commission of its intent to rely on substituted compliance under condition (a)(16) above.

(2) *Margin.* The requirements of Exchange Act section 15F(e) and Exchange Act rule 18a–3, provided that the Covered Entity is subject to and complies with the requirements of: UK EMIR article 11; UK EMIR Margin RTS; UK CRR articles 103, 105(3); 105(10); 111(2), 224, 285, 286, 286(7), 290, 295, 296(2)(b), 297(1), 297(3), and 298(1); UK MiFID Org Reg article 23(1); FCA SYSC 4.1.1R; FCA IFPRU 2.2.18R; PRA General Organisational Requirements Rule 2.1; and PRA Internal Capital Adequacy Assessment Rule 4.2.

(d) Substituted Compliance in Connection With Internal Supervision and Compliance Requirements and Certain Exchange Act Section 15F(j) Requirements

This Order extends to the following provisions related to internal supervision and compliance and Exchange Act section 15F(j) requirements:

(1) *Internal supervision.* The requirements of Exchange Act rule 15Fh–3(h) and Exchange Act sections 15F(j)(4)(A) and (j)(5), provided that:

(i) The Covered Entity is subject to and complies with the requirements identified in paragraph (d)(3) to this Order;

(ii) The Covered Entity complies with paragraph (d)(4) to this Order; and

(iii) This paragraph (d) does not extend to the requirements of paragraph (h)(2)(iii)(I) to rule 15Fh–3 to the extent those requirements pertain to compliance with Exchange Act sections 15F(j)(2), (j)(3), (j)(4)(B) and (j)(6), or to the general and supporting provisions of paragraph (h) to rule 15Fh–3 in connection with those Exchange Act sections.

(2) *Chief compliance officers.* The requirements of Exchange Act section 15F(k) and Exchange Act rule 15Fk–1, provided that:

(i) The Covered Entity is subject to and complies with the requirements

identified in paragraph (d)(3) to this Order;

(ii) All reports required pursuant to UK MiFID Org Reg article 22(2)(c) must also:

(A) Be provided to the Commission at least annually and in the English language;

(B) Include a certification that, under penalty of law, the report is accurate and complete; and

(C) Address the firm's compliance with other applicable conditions to this Order in connection with requirements for which the Covered Entity is relying on this Order.

(3) *Applicable supervisory and compliance requirements.* Paragraphs (d)(1) and (d)(2) are conditioned on the Covered Entity being subject to and complying with the following requirements:

(i) FCA CASS 6.2.1R, 7.11.1R and 7.12.1R;

(ii) FCA COBS 11.7A.3R;

(iii) Either {FCA IFPRU 2.2.7R(2), 2.2.17R through 2.2.28R, 2.2.30R and 2.2.32R through 2.2.35R; and FCA BIPRU 12.3.4R, 12.3.5R, 12.3.7R, 12.3.8R, 12.3.22AR, 12.3.22BR, 12.3.27R, 12.4.–2R, 12.4.–1R, 12.4.5AR, 12.4.10R and 12.4.11R} or {PRA Internal Capital Adequacy Assessment Rules 4.1 through 4.4, 5.1, 6.1, 7.1, 7.2, 8.1 through 8.5, 9.1, 10.1, 10.2 and 11.1 through 11.3; and PRA Internal Liquidity Adequacy Assessment Rules 3.1, 3.2, 3.3, 4.1, 7.2, 8.1, 9.2, 11.1, 11.2, 11.4, 12.1, 12.3 and 12.4};

(iv) FCA PRIN 2.1.1R(3);

(v) FCA SYSC 4.1.1R(1), 4.1.2R, 4.3A.1R, 4.3A.3R, 4.3A.4R, 7.1.4R, 7.1.17R, 7.1.18R, 7.1.18BR, 7.1.19R, 7.1.20R, 7.1.21R, 7.1.22R, 9.1.1AR, 10.1.3R, 10.1.7R, 10.1.8R, 10A.1.6R, 10A.1.8R, 10A.1.11R and 24.2.6R(8) and, if the Covered Entity is a UK bank or UK designated investment firm, also PRA Allocation of Responsibilities Rule 4.1(16); PRA General Organisational Requirements Rules 2.1, 2.2 and 5.1 through 5.3; PRA Record Keeping Rule 2.1; PRA Risk Control Rules 2.3, 2.7 and 3.1 through 3.5; and PRA Senior Management Functions Rule 8.2;

(vi) Either {FCA SYSC 19A.2.1R, 19A.3.1R(1), 19A.3.3R, 19A.3.7R through 19A.3.11R, 19A.3.14R, 19A.3.16R and 19A.3.35AR} or {FCA SYSC 19D.2.1R, 19D.3.1R, 19D.3.3R, 19D.3.7R through 19D.3.11R, 19D.3.15R, 19D.3.17R and 19D.3.37R and PRA Remuneration Rules 3.1, 4.2, 5.1, 6.2, 6.3, 6.4, 7.2, 7.3, 8.1, 8.2 and 15.2};

(vii) Either {FSMA schedule 6 part 2D and FCA COND 2.4.1A} or {FSMA schedule 6 parts 3C and 5D, FCA COND 2.4.1C and PRA Fundamental Rules 3 through 6};

(viii) UK CRR articles 286 through 288 and 293;

(ix) UK EMIR Margin RTS article 2; and

(x) UK MiFID Org Reg articles 21 through 37 and 72 through 76 and Annex IV.

(4) *Additional condition to paragraph (d)(1).* Paragraph (d)(1) further is conditioned on the requirement that the Covered Entity complies with the provisions specified in paragraph (d)(3) as if those provisions also require compliance with:

(i) Applicable requirements under the Exchange Act; and

(ii) The other applicable conditions to this Order in connection with requirements for which the Covered Entity is relying on this Order.

(e) Substituted Compliance in Connection With Counterparty Protection Requirements

This Order extends to the following provisions related to counterparty protection:

(1) *Disclosure of information regarding material risks and characteristics.* The requirements of Exchange Act rule 15Fh–3(b) relating to disclosure of material risks and characteristics of one or more security-based swaps subject thereto, provided that the Covered Entity, in relation to that security-based swap, is subject to and complies with the requirements of:

(i) FCA COBS 2.2A.2R, 6.1ZA.11R, 6.1ZA.12R, 6.2B.33R, 9A.3.6R and 14.3A.3R; and

(ii) Either {UK MiFID Org Reg articles 48 through 50} or {FCA COBS 6.1ZA.9UK, 6.1ZA.14UK, and 14.3A.5UK}.

(2) *Disclosure of information regarding material incentives or conflicts of interest.* The requirements of Exchange Act rule 15Fh–3(b) relating to disclosure of material incentives or conflicts of interest that a Covered Entity may have in connection with one or more security-based swaps subject thereto, provided that the Covered Entity, in relation to that security-based swap, is subject to and complies with the requirements of either:

(i) FCA SYSC 10.1.8R and UK MiFID Org Reg articles 33 to 35;

(ii) FCA COBS 2.3A.5R, 2.3A.6R, 2.3A.7E and 2.3A.10R through 2.3A.14R; or

(iii) UK MAR article 20(1) and UK MAR Investment Recommendations Regulation articles 5 and 6.

(3) ''*Know your counterparty.*'' The requirements of Exchange Act rule 15Fh–3(e), as applied to one or more security-based swap counterparties subject thereto, provided that the Covered Entity, in relation to the relevant security-based swap counterparty, is subject to and complies with the requirements of:

(i) FCA SYSC 6.1.1R;

(ii) UK MiFID Org Reg articles 21, 22, 25, 26 and applicable parts of Annex I;

(iii) FCA SYSC 4.1.1R(1);

(iv) Either {FCA IFPRU 2.2.7R(2) and 2.2.32R} or {PRA General Organisational Requirement 2.1 and PRA Internal Capital Adequacy Assessment Rule 10.1};

(v) MLR 2017 Regulations 27 and 28; and

(v) MLR 2017 Regulations 19(1) through (3), as applied to policies, controls and procedures regarding customer due diligence.

(4) *Suitability.* The requirements of Exchange Act rule 15Fh–3(f), as applied to one or more recommendations of a security-based swap or trading strategy involving a security-based swap subject thereto, provided that:

(i) The Covered Entity, in relation to the relevant recommendation, is subject to and complies with the requirements of:

(A) FCA COBS 4.2.1R, 9A.2.1R and 9A.1.16R;

(B) FCA PROD 3.2.1R and 3.3.1R;

(C) FCA SYSC 5.1.5AAR and 5.1.5ABR; and

(D) UK MiFID Org Reg articles 21(1)(b) and (d), 54 and 55; and

(ii) The counterparty to which the Covered Entity makes the recommendation is a ''professional client'' mentioned in FCA COBS 3.5.2R and is not a ''special entity'' as defined in Exchange Act section 15F(h)(2)(C) and Exchange Act rule 15Fh–2(d).

(5) *Fair and balanced communications.* The requirements of Exchange Act rule 15Fh–3(g), as applied to one or more communications subject thereto, provided that the Covered Entity, in relation to the relevant communication, is subject to and complies with the requirements of:

(i) Either {FCA COBS 2.1.1R and FCA COBS 4.2.1R} or {FCA COBS 2.1.1AR and FCA COBS 4.2.1R};

(ii) FCA COBS 2.2A.2R, 2.2A.3R, 6.1ZA.11R, 6.1ZA.12R, 6.1ZA.13R, 6.2B.33R, 6.2B.34R, 9A.3.6R and 14.3A.3R;

(iii) Either {UK MiFID Org Reg articles 46 through 48} or {FCA COBS 4.5A.9UK, 4.7.–1AUK, 6.1ZA.5UK, 6.1ZA.8UK, 6.1ZA.17UK, 6.1ZA.19UK, 6.1ZA.20UK, 8A.1.5UK to 8A.1.7UK, 14.3A.5UK, 14.3A.7UK and 14.3A.9UK};

(iv) UK MAR Investment Recommendations Regulation articles 3 and 4; and

(v) UK MAR articles 12(1)(c), 15 and 20(1).

(6) *Daily mark disclosure.* The requirements of Exchange Act rule 15Fh–3(c), as applied to one or more security-based swaps subject thereto, provided that the Covered Entity is required to reconcile, and does reconcile, the portfolio containing the relevant security-based swap on each business day pursuant to UK EMIR articles 11(1)(b) and 11(2) and UK EMIR RTS article 13.

(f) Substituted Compliance in Connection With Recordkeeping, Reporting, Notification, and Securities Count Requirements

This Order extends to the following provisions that apply to a Covered Entity related to recordkeeping, reporting, notification and securities counts:

(1)(i) *Make and keep current certain records.* The requirements of the following provisions of Exchange Act rule 18a–5, provided that the Covered Entity complies with the relevant conditions in this paragraph (f)(1)(i) and with the applicable conditions in paragraph (f)(1)(ii):

(A) The requirements of Exchange Act rule 18a–5(a)(1) or (b)(1), as applicable, provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of UK MiFID Org Reg articles 74, 75, 76 and Annex IV; UK MiFIR article 25(1); and FCA SYSC 10A.1.6R, 10A.1.8R; and

(*2*) With respect to the requirements of Exchange Act rule 18a–5(a)(1), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order.

(B) The requirements of Exchange Act rule 18a–5(a)(2), provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of FCA IFPRU 2.2.7R(1); PRA Internal Capital Adequacy Assessment Rule 3.1; FCA CASS 6.2.1R, 6.2.2R, 6.3.2AR, 6.3.4A–1R, 6.3.6AR, 6.6.2R, 6.6.3R, 6.6.4R, 6.6.5G, 6.6.33G, 6.6.34R, 6.6.8R, 7.12.1R, 7.12.2R, 7.13.12R, 7.13.25R, 7.13.32R(3), 7.13.33R(3), 7.15.2R, 7.15.3R, 7.15.4G, 7.15.5R, 7.15.8R, 7.15.9R, 7.15.20R, 7.15.21G, 10.1.2G, 10.1.3R, 10.1.7 and 10.1.9E; UK MiFID Org Reg articles 72(1), 74 and 75; and UK EMIR article 39(4); and

(*2*) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(C) The requirements of Exchange Act rule 18a–5(a)(3) or (b)(2), as applicable, provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of FCA CASS 6.2.1R, 6.2.2R, 6.3.2AR, 6.3.4A–1R, 6.3.6AR, 6.6.4R, 6.6.5G, 6.6.2R, 6.6.3R, 6.6.33G, 6.6.34R, 6.6.8R, 7.12.1R, 7.12.2R, 7.13.12R, 7.13.25R, 7.13.32R(3), 7.13.33R(3), 7.15.2R, 7.15.3R, 7.15.4G, 7.15.5R, 7.15.8R, 7.15.9R, 7.15.20R, 7.15.21G, 10.1.2G, 10.1.3R, 10.1.7 and 10.1.9E; UK MiFID Org Reg articles 72(1), 74 and 75; and UK EMIR article 39(4); and

(*2*) With respect to the requirements of Exchange Act rule 18a–5(a)(3), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(D) The requirements of Exchange Act rule 18a–5(a)(4) or (b)(3), as applicable, provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of UK CRR articles 103 and 103(b)(ii); FCA COND at paragraphs 2C, 2D, 3B, 3C, 5D and 5F; PRA Fundamental Rules 2 and 6; FCA PRIN 2.1.1.R(2) and (3); PRA Recordkeeping Rule 2.1; UK MiFID Org Reg articles 59, 74, 75 and 76 and Annex IV; UK MiFIR article 25(1); FCA SYSC 9.1.1AR, 10A.1.6R and 10A.1.8R; FCA COBS 8A.1.9R, 9A.2.1R, 9.1.1AR, 16A.2.1 R and 16A.3.1UK; UK EMIR articles 9(2) and 11(1)(a); MLR 2017 Regulations 28(10) and (18) and 28 through 30; and FCA FCG 3.1.7; and

(*2*) With respect to the requirements of Exchange Act rule 18a–5(a)(4), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(E) The requirements of Exchange Act rule 18a–5(b)(4) provided that the Covered Entity is subject to and complies with the requirements of FCA COBS 8A.1.9R, 16A.2.1 R, 16A.3.1UK; UK MiFID Org Reg article 59; FCA SYSC 9.1.1AR; and UK EMIR articles 9(2) and 11(1)(a);

(F) The requirements of Exchange Act rule 18a–5(a)(5) or (b)(5), as applicable, provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of UK MiFID Org Reg articles 74, 75, 76 and Annex IV; UK MiFIR article 25(1); FCA SYSC 10A.1.6R, 10A.1.8R; and UK MiFID Org Reg article 76; and

(*2*) With respect to the requirements of Exchange Act rule 18a–5(a)(5), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(G) The requirements of Exchange Act rules 18a–5(a)(6) and (a)(15) or (b)(6) and (b)(11), as applicable, provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of FCA COND at paragraphs 2C, 2D, 3B, 3C, 5D and 5F; PRA Fundamental Rules 2 and 6; FCA PRIN 2.1.1.R(2) and (3); PRA Recordkeeping Rule 2.1; UK MiFID Org Reg articles 59, 74, 75 76 and Annex IV; UK MiFIR article 25(1); FCA SYSC 9.1.1AR, 10A.1.6R and 10A.1.8R; FCA COBS 8A.1.9R, 9.1.1AR, 9A.2.1R, 16A.2.1R and 16A.3.1UK; UK EMIR articles 9(2) and 11(1)(a); MLR 2017 Regulations 28(10) and (18) and 28–30; and FCA FCG 3.1.7;

(*2*) The Covered Entity applies substituted compliance for the requirements of Exchange Act rule 15Fi–2 pursuant to this Order; and

(*3*) This Order does not extend to the requirements of Exchange Act rule 18a–5(a)(6) and (b)(6) to make and keep current books and records of confirmations of purchases and sales of securities other than security-based swaps;

(H) The requirements of Exchange Act rule 18a–5(a)(7) or (b)(7), as applicable, provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of UK MiFIR article 25(1); MLR 2017 Regulations 28 through 30; FCA FCG 3.1.7; FCA COBS 8A.1.9R, 9.1.1AR, 9A.2.1R, 16A.2.1 R and 16A.3.1UK; FCA SYSC 9.1.1AR, 10A.1.6R and 10A.1.8R; FCA COND at paragraphs 2C, 2D, 3B, 3C, 5D and 5F; PRA Fundamental Rules 2 and 6; FCA PRIN 2.1.1.R(2) and (3); PRA Recordkeeping Rule 2.1; UK MiFID Org Reg articles 59, 74, 75 and 76 and Annex IV; and UK EMIR articles 9(2) and 11(1)(a); and

(*2*) With respect to the requirements of Exchange Act rule 18a–5(a)(7), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(I) The requirements of Exchange Act rule 18a–5(a)(8), provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of FCA COND at paragraphs 2C, 2D, 3B, 3C, 5D and 5F; PRA Fundamental Rules 2 and 6; FCA PRIN 2.1.1.R(2) and (3); PRA Recordkeeping Rule 2.1; UK MiFID Org Reg articles 59, 72(1), 74, 75 76 and Annex IV; UK MiFIR article 25(1); FCA SYSC 9.1.1AR, 10A.1.6R and 10A.1.8R; FCA COBS 8A.1.9R, 9.1.1AR, 9A.2.1R, 16A.2.1 R and 16A.3.1UK; UK EMIR articles 9(2) and 11(1)(a); MLR 2017 Regulations 28(10) and (18) and 28 through 30; and FCA FCG 3.1.7; and

(*2*) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order.;

(J) The requirements of Exchange Act rule 18a–5(a)(9), provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of FCA IFPRU 2.2.7R(1); PRA Internal Capital Adequacy Assessment Rule 3.1; FCA CASS 6.2.1R, 6.2.2R, 6.3.2AR, 6.3.4A–1R, 6.3.6AR, 6.6.2R, 6.6.3R, 6.6.4R, 6.6.5G, 6.6.33G, 6.6.34R, 6.6.8R, 7.12.1R, 7.12.2R, 7.13.12R, 7.13.25R, 7.13.32R(3), 7.13.33R(3), 7.15.2R, 7.15.3R, 7.15.4G, 7.15.5R, 7.15.8R, 7.15.9R, 7.15.20R, 7.15.21G, 10.1.2G, 10.1.3R, 10.1.7 and 10.1.9E; UK EMIR article 39(4); and UK MiFID Org Reg articles 72(1), 74, and 75;

(*2*) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order; and

(*3*) This Order does not extend to the requirements of Exchange Act rule 18a–5(a)(9) relating to Exchange Act rule 18a–2;

(K) The requirements of Exchange Act rule 18a–5(a)(10) and (b)(8), provided that the Covered Entity is subject to and complies with the requirements of FSMA sections 63F(2), 63F(5), 63(2A), 60A(2) and (5); PRA Fitness and Propriety Rules 2.6 and 2.9; SMR Applications and Notifications Rules 2.1, 2.2 and 2.6; PRA Certification Rules; PRA Fundamental Rules 2 and 6; PRA Recordkeeping Rule 2.1; PRA Internal Capital Adequacy Assessment Rule 3.1; PRA General Organisational Requirements Rules 5.1 and 5.2; FCA SUP 3.10.4R through 3.10.7R, 10C.10.8D, 10C.10.8AD, 10C.15, 10C.10.14G, 10C.10.16R, 10C.10.21G and 10C Annex 3D; FCA SYSC 4.3A.1R., 4.3A.3R, 4.3A.3R, 10.1.7R, 27 and 27.2.5G; FCA FIT 2.1, 2.2 and 2.3; UK MiFID Org Reg articles 21(1)(a), 35;

(L) The requirements of Exchange Act rule 18a–5(a)(12), provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of UK CRR articles 103, 105(3) and 105(10); FCA IFPRU 2.2.7R(1); PRA Internal Capital Adequacy Assessment Rule 3.1; FCA CASS 6.2.1R, 6.2.2R, 6.3.2AR, 6.3.4A–1R, 6.3.6AR, 6.6.2R, 6.6.3R, 6.6.4R, 6.6.5G, 6.6.33G, 6.6.34R, 6.6.8R, 7.12.1R, 7.12.2R, 7.13.12R, 7.13.25R, 7.13.32R(3), 7.13.33R(3), 7.15.2R, 7.15.3R, 7.15.4G, 7.15.5R, 7.15.8R, 7.15.9R, 7.15.20R, 7.15.21G, 10.1.2G, 10.1.3R, 10.1.7 and 10.1.9E; UK EMIR article 39(4); and MiFID Org Reg. articles 72(1), 74 and 75;

(*2*) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rule 18a–3 pursuant to this Order;

(M) The requirements of Exchange Act rule 18a–5(a)(17) and (b)(13), as applicable, regarding one or more provisions of Exchange Act rules 15Fh–3 or 15Fk–1 for which substituted compliance is available under this Order, provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of FCA COND at paragraphs 2C, 2D, 3B, 3C, 5D and 5F; PRA Fundamental Rules 2 and 6; FCA PRIN 2.1.1.R(2) and (3); PRA Recordkeeping Rule 2.1; FCA SYSC 9.1.1AR and 10A.1.6R; UK MiFID Org Reg articles 72, 73, 76(8)(b) and Annex I; and UK EMIR article 39(5), in each case with respect to the relevant security-based swap or activity;

(*2*) With respect to the portion of Exchange Act rule 18a–5(a)(17) and (b)(13) that relates to Exchange Act rule 15Fh–3, the Covered Entity applies substituted compliance for such business conduct standard(s) of Exchange Act rule 15Fh–3 pursuant to this Order, as applicable, with respect to the relevant security-based swap or activity; and

(*3*) With respect to the portion of Exchange Act rule 18a–5(a)(17) and (b)(13) that relates to Exchange Act rule 15Fk–1, the Covered Entity applies substituted compliance for Exchange Act section 15F(k) and Exchange Act rule 15Fk–1 pursuant to this Order;

(N) The requirements of Exchange Act rule 18a–5(a)(18)(i) and (ii) or (b)(14)(i) and (ii), as applicable, provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of UK EMIR article 11(1)(b); and UK EMIR RTS article 15(1); and

(*2*) The Covered Entity applies substituted compliance for Exchange Act rule 15Fi–3 pursuant to this Order; and

(O) The requirements of Exchange Act rule 18a–5(a)(18)(iii) or (b)(14)(iii), as applicable, provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of UK EMIR article 11(1)(b); and UK EMIR RTS article 15(1), in each case with respect to such security-based swap portfolio(s); and

(*2*) The Covered Entity applies substituted compliance for Exchange Act rule 15Fi–4 pursuant to this Order.

(ii) Paragraph (f)(1)(i) is subject to the following further conditions:

(A) Paragraphs (f)(1)(i)(A) through (D) and (H) are subject to the condition that the Covered Entity preserves all of the data elements necessary to create the records required by the applicable Exchange Act rules cited in such paragraphs and upon request furnishes promptly to representatives of the Commission the records required by those rules;

(B) A Covered Entity may apply the substituted compliance determination in paragraph (f)(1)(i)(M) to records of compliance with Exchange Act rule 15Fh–3(b), (c), (e), (f) and (g) in respect of one or more security-based swaps or activities related to security-based swaps; and

(C) This Order does not extend to the requirements of Exchange Act rule 18a–5(a)(13), (a)(14), (a)(16), (b)(9), (b)(10) or (b)(12).

(2)(i) *Preserve certain records.* The requirements of the following provisions of Exchange Act rule 18a–6, provided that the Covered Entity complies with the relevant conditions in this paragraph (f)(2)(i) and with the applicable conditions in paragraph (f)(2)(ii):

(A) The requirements of Exchange Act rule 18a–6(a)(1) or (a)(2), as applicable, provided that the Covered Entity is subject to and complies with the requirements of UK MiFID Org Reg articles 59, 72(1), 74, 75, 76 and Annex IV; FCA SYSC 9.1.1AR, 9.1.2R, 10A.1.6R and 10A.1.8R; FCA IFPRU 2.2.7R(1); PRA Internal Capital Adequacy Assessment Rule 3.1; PRA Fundamental Rules 2 and 6; PRA Recordkeeping Rules 2.1 and 2.2; FCA COBS 8A.1.9R, 9.1.1AR, 9A.2.1R, 16A.2.1 R and 16A.3.1UK; FCA PRIN 2.1.1.R(2) and (3); FCA FCG 3.1.7; FCA CASS 6.2.1R, 6.2.2R, 6.3.2AR, 6.3.4A–1R, 6.3.6AR, 6.6.2R, 6.6.3R, 6.6.4R, 6.6.5G, 6.6.33G, 6.6.34R, 6.6.8R, 7.12.1R, 7.12.2R, 7.13.12R, 7.13.25R, 7.13.32R(3), 7.13.33R(3), 7.15.2R, 7.15.3R, 7.15.4G, 7.15.5R, 7.15.8R, 7.15.9R, 7.15.20R, 7.15.21G, 10.1.2G, 10.1.3R, 10.1.7 and 10.1.9E; UK CRR articles 103 and 103(b)(ii); FCA COND at paragraphs 2C, 2D, 3B, 3C, 5D and 5F; MLR 2017 Regulations 28 through 30; UK MiFID Org Reg article 72(1), 74 and 75; UK MiFIR article 25(1); and UK EMIR article 9(2), 39(4) and 11(1)(a);

(B) The requirements of Exchange Act rule 18a–6(b)(1)(i) or (b)(2)(i), as applicable, provided that the Covered Entity is subject to and complies with the requirements of UK MiFID Org Reg articles 59, 72(1), 74, 75, 76 and Annex IV; FCA SYSC 9.1.1AR, 9.1.2R, 10A.1.6R and 10A.1.8R; FCA IFPRU 2.2.7R(1); PRA Internal Capital Adequacy Assessment Rule 3.1; PRA Fundamental Rules 2 and 6; PRA Recordkeeping Rules 2.1 and 2.2; FCA COBS 8A.1.9R, 9.1.1AR, 9A.2.1R, 16A.2.1 R and 16A.3.1UK; FCA PRIN

2.1.1.R(2) and (3); FCA FCG 3.1.7; FCA CASS 6.2.1R, 6.2.2R, 6.3.2AR, 6.3.4A–1R, 6.3.6AR, 6.6.2R, 6.6.3R, 6.6.4R, 6.6.5G, 6.6.33G, 6.6.34R, 6.6.8R, 7.12.1R, 7.12.2R, 7.13.12R, 7.13.25R, 7.13.32R(3), 7.13.33R(3), 7.15.2R, 7.15.3R, 7.15.4G, 7.15.5R, 7.15.8R, 7.15.9R, 7.15.20R, 7.15.21G, 10.1.2G, 10.1.3R, 10.1.7 and 10.1.9E; UK CRR articles 103 and 103(b)(ii); FCA COND at paragraphs 2C, 2D, 3B, 3C, 5D and 5F; MLR 2017 Regulations 28(10) and (18) and 28 through 30; UK MiFID Org Reg articles 72(1), 74 and 75; UK MiFIR article 25(1); and UK EMIR articles 9(2), 39(4) and 11(1)(a);

(C) The requirements of Exchange Act rule 18a–6(b)(1)(ii) and (iii), provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of FCA IFPRU 2.2.7R(1); PRA Internal Capital Adequacy Assessment Rule 3.1; FCA CASS 6.2.1R, 6.2.2R, 6.3.2AR, 6.3.4A–1R, 6.3.6AR, 6.6.2R, 6.6.3R, 6.6.4R, 6.6.5G, 6.6.33G, 6.6.34R, 6.6.8R, 7.12.1R, 7.12.2R, 7.13.12R, 7.13.25R, 7.13.32R(3), 7.13.33R(3), 7.15.2R, 7.15.3R, 7.15.4G, 7.15.5R, 7.15.8R, 7.15.9R, 7.15.20R, 7.15.21G, 10.1.2G, 10.1.3R, 10.1.7 and 10.1.9E; UK MiFID Org Reg articles 72(1), 74 and 75; PRA Recordkeeping Rules 2.1 and 2.2; FCA SYSC 9.1.1AR and 9.1.2R; UK EMIR articles 9(2), 25(1) and 39(4); FCA COND at paragraphs 2C, 2D, 3B, 3C, 5D and 5F; and PRA Fundamental Rules 2 and 6; and

(*2*) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(D) The requirements of Exchange Act rule 18a–6(b)(1)(iv) or (b)(2)(ii), as applicable, provided that the Covered Entity is subject to and complies with the requirements of FCA SYSC 9.1.1AR, 10A.1.6R and 10A.1.8R; FCA COND at paragraphs 2C, 2D, 3B, 3C, 5D and 5F; MLR 2017 Regulations 28(18), 28(10) and 28 through 30; PRA Internal Capital Adequacy Assessment Rule 3.1; PRA Fundamental Rules 2 and 6; PRA Recordkeeping Rules 2.1 and 2.2; FCA CASS 6.2.1R, 6.2.2R, 6.3.2AR, 6.3.4A–1R, 6.3.6AR, 6.6.2R, 6.6.3R, 6.6.4R, 6.6.5G, 6.6.33G, 6.6.34R, 6.6.8R, 7.12.1R, 7.12.2R, 7.13.12R, 7.13.25R, 7.13.32R(3), 7.13.33R(3), 7.15.2R, 7.15.3R, 7.15.4G, 7.15.5R, 7.15.8R, 7.15.9R, 7.15.20R, 7.15.21G, 10.1.2G, 10.1.3R, 10.1.7 and 10.1.9E; UK CRR articles 103 and 103(b)(ii); FCA PRIN 2.1.1.R(2) and (3); FCA FCG 3.1.7; FCA IFPRU 2.2.7R(1); FCA COBS 8A.1.9R, 9.1.1AR, 9A.2.1R, 16A.2.1 R and 16A.3.1UK; FCA SYSC 9.1.1AR, 9.1.2R, 10A.1.6R and 10A.1.8R; UK MiFID Org Reg articles 59, 72, 72(1), 73, 74, 75, 76, 76(8)(b), Annex I and Annex IV; UK MiFIR article 25(1); and UK EMIR articles 9(2), 11(1)(a), 39(4) and 39(5);

(E) The requirements of Exchange Act rule 18a–6(b)(1)(v), provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of UK CRR articles 99, 104(1)(j), 294, 394, 415, 430 and Part Six: Title II & Title III; UK CRR Reporting ITS annexes I, II, III, IV, V, VIII, IX, X, XI, XII, XIII and article 14; PRA Recordkeeping Rules 2.1 and 2.2; FCA SYSC 9.1.1AR and 9.1.2R; UK MiFID Org Reg article 72(1); UK MiFIR article 25(1); and UK EMIR article 9(2);

(*2*) With respect to the requirements of Exchange Act rule 18a–6(b)(1)(v), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant this Order; and

(*3*) This Order does not extend to the requirements of Exchange Act rule 18a–6(b)(1)(v) relating to Exchange Act rule 18a–2;

(F) The requirements of Exchange Act rule 18a–6(b)(1)(vi) or (b)(2)(iii), as applicable, provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of FCA COBS 8A.1.9R; PRA Recordkeeping Rules 2.1 and 2.2; FCA SYSC 9.1.1AR and 9.1.2R; UK MiFID Org Reg articles 72(1) and 73; FCA COND at paragraphs 2C, 2D, 3B, 3C, 5D and 5F; PRA Fundamental Rules 2 and 6; and FCA PRIN 2.1.1.R(2) and (3); UK MiFIR article 25(1); and UK EMIR article 9(2); and

(*2*) With respect to the requirements of Exchange Act rule 18a–6(b)(1)(vi), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(G) The requirements of Exchange Act rule 18a–6(b)(1)(vii) or (b)(2)(iv), as applicable, provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of FCA COBS 8A.1.9R, 16A.2.1 R, and 16A.3.1; PRA Recordkeeping Rules 2.1 and 2.2; FCA SYSC 9.1.1AR and 9.1.2R; UK MiFID Org Reg articles 59, 72(1) and 73; UK MiFIR article 25(1); UK EMIR articles 9(2) and 11(1)(a); FCA COND at paragraphs 2C, 2D, 3B, 3C, 5D and 5F; PRA Fundamental Rules 2 and 6; and FCA PRIN 2.1.1.R(2) and (3); and

(*2*) With respect to the requirements of Exchange Act rule 18a–6(b)(1)(vii), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(H) The requirements of Exchange Act rule 18a–6(b)(1)(viii) or (b)(2)(v), as applicable, provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of UK CRR articles 99, 104(1)(j), 294, 394, 415, 430 and Part Six: Title II & Title III; UK CRR Reporting ITS article 14 and annexes I, II, III, IV, V, VIII, IX, X, XI, XII, XIII; PRA Recordkeeping Rules 2.1 and 2.2; FCA SYSC 9.1.1AR and 9.1.2R; UK MiFID Org Reg article 72(1); UK MiFIR article 25(1); and UK EMIR article 9(2);

(*2*) The Covered Entity applies substituted compliance for the requirements of Exchange Act rule 18a–7 pursuant to this Order;

(*3*) With respect to the requirements of Exchange Act rule 18a–6(b)(1)(viii), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(*4*) This Order does not extend to the requirements of Exchange Act rule 18a–6(b)(1)(viii)(L); and

(*5*) This Order does not extend to the requirements of Exchange Act rule 18a–6(b)(1)(viii)(M) relating to Exchange Act rule 18a–2.

(I) The requirements of Exchange Act rule 18a–6(b)(1)(ix), provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of FCA SYSC 4.1.1(1)R, 4.1.1R(1), 6.1.1R, 7.1.4R, 9.1.1AR, 9.1.2R and 10.1.7R; FCA COBS 2.3A.32R; UK MiFID Org Reg articles 22(3)(c), 23, 23(1)(b), 24, 25(2), 26, 29(2)(c), 35 and 72(1); PRA Risk Control Rule 2.3; PRA Internal Capital Adequacy Assessment Rules 3 through 11; FCA IFPRU 2.2.7R, 2.2.17R through 2.2.35R and 2.2.44R; UK CRR articles 286 and 293(1)(d); UK EMIR RTS; PRA Recordkeeping Rule 2.1 and 2.2; UK MiFIR article 25(1); UK EMIR articles 9(2) and 11; UK EMIR RTS; FCA COND at paragraphs 2C, 2D, 3B, 3C, 5D and 5F; PRA Fundamental Rules 2 and 6; and FCA PRIN 2.1.1.R(2) and (3); and

(*2*) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(J) The requirements of Exchange Act rule 18a–6(b)(1)(x), provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of FCA IFPRU 2.2.7R; PRA Internal Capital Adequacy Assessment Rule 3.1; PRA Recordkeeping Rules 2.1 and 2.2; FCA SYSC 9.1.1AR and 9.1.2R; UK MiFID Org Reg article 72(1); UK MiFIR article 25(1); UK EMIR article 9(2); FCA COND at paragraphs 2C, 2D, 3B, 3C, 5D and 5F; PRA Fundamental Rules 2 and 6; FCA

PRIN 2.1.1.R(2) and (3); PRA Recordkeeping Rule 2.1; and FCA SYSC 9.1.1AR; and

(*2*) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(K) The requirements of Exchange Act rule 18a–6(b)(1)(xii) or (b)(2)(vii), as applicable, regarding one or more provisions of Exchange Act rules 15Fh–3 or 15Fk–1 for which substituted compliance is available under this Order, provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of MLD4 articles 11 and 14; MLR 2017 Regulations 27 through 30; PRA Recordkeeping Rule 2.1 and 2.2; FCA SYSC 9.1.1AR and 9.1.2R; UK MiFID Org Reg article 72(1); UK MiFIR article 25(1); and UK EMIR article 9(2), in each case with respect to the relevant security-based swap or activity;

(*2*) With respect to the portion of Exchange Act rule 18a–6(b)(1)(xii) or (b)(2)(vii) that relates to Exchange Act rule 15Fh–3, the Covered Entity applies substituted compliance for such business conduct standard(s) of Exchange Act rule 15Fh–3 pursuant to this Order, as applicable, with respect to the relevant security-based swap or activity; and

(*3*) With respect to the portion of Exchange Act rule 18a–6(b)(1)(xii) or (b)(2)(vii), as applicable, that relates to Exchange Act rule 15Fk–1, the Covered Entity applies substituted compliance for Exchange Act section 15F(k) and Exchange Act rule 15Fk–1 pursuant to this Order;

(L) The requirements of Exchange Act rule 18a–6(c), provided that the Covered Entity is subject to and complies with the requirements of PRA Recordkeeping Rules 2.1 and 2.2; FCA SYSC 9.1.1AR and 9.1.2R; UK MiFID Org Reg article 72(1); UK MiFIR article 25(1); and UK EMIR article 9(2);

(M) The requirements of Exchange Act rule 18a–6(d)(1), provided that the Covered Entity is subject to and complies with the requirements of PRA General Organisational Requirements Rule 5.2; FSMA sections 60A(2), 63(2A), 63F(2) and (5); PRA Fitness and Propriety Rules 2.6 and 2.9; FCA SUP 10C.10.8D, 10C.10.8AD 10C.15, 10C Annex 3D, 10C.10.14G, 10C.10.16R, and 10C.10.21G; SMR Applications and Notifications Rules 2.1, 2.2 and 2.6; PRA Certification Rule 2.1; FCA SYSC 4.3A.1R, 4.3A.3R, 9.1.1AR, 9.1.2R, 10.1.7R, 27 and 27.2.5G; FCA FIT 2.1, 2.2 and 2.3; PRA General Organisational Requirements Rules 5.1 and 5.2; UK MiFID Org Reg articles 21(1)(a), 35 and 72(1); and PRA Recordkeeping Rules 2.1 and 2.2;

(N) The requirements of Exchange Act rule 18a–6(d)(2), provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of PRA Recordkeeping Rules 2.1 and 2.2; FCA SYSC 9.1.1AR and 9.1.2R; UK MiFID Org Reg articles 72(1) and 72(3); UK MiFIR article 25(1); and UK EMIR article 9(2); and

(*2*) With respect to the requirements of Exchange Act rule 18a–6(d)(2)(i), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(O) The requirements of Exchange Act rule 18a–6(d)(3), provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of FCA COND at paragraphs 2C, 2D, 3B, 3C, 5D and 5F; PRA Fundamental Rules 2 and 6; FCA PRIN 2.1.1.R(2) and (3); FCA SYSC 6.1.1R, 9.1.1AR, 9.1.2R and 10A.1.6R; PRA Recordkeeping Rules 2.1 and 2.2; UK MiFID Org Reg articles 72, 72(1), 73, 76(8)(b) and Annex I; UK MiFIR article 25(1); and UK EMIR article 9(2) and 39(5); and

(*2*) With respect to the requirements of Exchange Act rule 18a–6(d)(3)(i), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(P) The requirements of Exchange Act rule 18a–6(d)(4) and (d)(5), provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of FCA COBS 8A.1.9R; PRA Recordkeeping Rules 2.1 and 2.2; FCA SYSC 4.1.1R(1), 9.1.1AR and 9.1.2R; UK MiFID Org Reg articles 24, 25(2), 72(1) and 73; UK MiFIR article 25(1); and UK EMIR article 9(2); and

(*2*) The Covered Entity applies substituted compliance for Exchange Act rules 15Fi–3, 15Fi–4, and 15Fi–5 pursuant to this Order;

(Q) The requirements of Exchange Act rule 18a–6(e), provided that the Covered Entity is subject to and complies with the requirements of FCA COBS 8A.1.9R; PRA Recordkeeping Rules 2.1 and 2.2; FCA SYSC 4.1.1R, 9.1.1AR and 9.1.2R; UK MiFID Org Reg articles 21(2), 58, 72(1) and 72(3); UK MiFIR article 25(1); and UK EMIR article 9(2); and

(R) The requirements of Exchange Act rule 18a–6(f), provided that the Covered Entity is subject to and complies with the requirements of PRA Outsourcing Rule 2.1; EBA Guidelines on Outsourcing section 13.3; PRA Recordkeeping Rules 2.1 and 2.2; FCA SYSC 8.1.1R, 9.1.1AR and 9.1.2R; UK MiFID Org Reg articles 31(1) and 72(1); UK MiFIR article 25(1); and UK EMIR article 9(2).

(ii) Paragraph (f)(2)(i) is subject to the following further conditions:

(A) A Covered Entity may apply the substituted compliance determination in paragraph (f)(2)(i)(K) to records related to Exchange Act rule 15Fh–3(b), (c), (e), (f) and (g) in respect of one or more security-based swaps or activities related to security-based swaps; and

(B) This Order does not extend to the requirements of Exchange Act rule (b)(1)(xi), (b)(1)(xiii), (b)(2)(vi), or (b)(2)(viii).

(3) *File Reports.* The requirements of the following provisions of Exchange Act rule 18a–7, provided that the Covered Entity complies with the relevant conditions in this paragraph (f)(3):

(i) The requirements of Exchange Act rule 18a–7(a)(1) or (a)(2), as applicable, and the requirements of Exchange Act rule 18a–7(j) as applied to such requirements, provided that:

(A) The Covered Entity is subject to and complies with the requirements of FSMA sections 137A, 137G and 137T; CRD article 104(1)(j); PRA Definition of Capital Rule 4.5; UK CRR articles 99, 394, 430 and Part Six: Title II & Title III; and UK CRR Reporting ITS annexes I, II, III, IV, V, VIII, IX, X, XI, XII and XIII;

(B) The Covered Entity files periodic unaudited financial and operational information with the Commission or its designee in the manner and format required by Commission rule or order and presents the financial information in the filing in accordance with generally accepted accounting principles that the Covered Entity uses to prepare general purpose publicly available or available to be issued financial statements in the UK; and

(C) With respect to the requirements of Exchange Act rule 18a–7(a)(1), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(ii) The requirements of Exchange Act rule 18a–7(a)(3) and the requirements of Exchange Act rule 18a–7(j) as applied to such requirements, provided that:

(A) The Covered Entity is subject to and complies with the requirements of UK CRR articles 99, 394, 431 to 455, 432, 433, 434, 437 to 440, 442, 443, 445 to 449, 451 to 455, 452 and 455; UK CRR Reporting ITS annexes I, II, VIII and IX; FSMA sections 137A, 137G and 137T; PRA Definition of Capital Rule 4.5; and Companies Act sections 394, 415, 442 and 475; and

(B) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(iii) The requirements of Exchange Act rule 18a–7(b), provided that the Covered Entity is subject to and complies with the requirements of UK CRR articles 434, 437 through 440, 442, 443, 445 through 449, 451 through 455; and Companies Act sections 394, 415, 442 and 475;

(iv) The requirements of Exchange Act rule 18a–7(c), (d), (e), (f), (g) and (h) and the requirements of Exchange Act rule 18a–7(j) as applied to such requirements, provided that:

(A) The Covered Entity is subject to and complies with the requirements of FCA CASS 6.2.2R, 6.6.2R, 6.6.3R, 6.6.33G, 6.6.34R, 7.12.2R, 7.15.2R, 7.15.3R, 7.15.20R and 7.15.21R; FCA SUP 3.8.5R, 3.10.4R through 3.10.7R; UK CRR articles 26(2), 132(5), 154, 191, 321, 325bi, 350, 353, 368, 418, 431 to 455, 434, 437 to 440, 442, 443, 445 to 449 and 451 to 455; Companies Act sections 394, 415, 442 and 475; and Capital Requirements Regulations 2013 Regulation 2(4);

(B) With respect to financial statements the Covered Entity is required to file annually with the UK PRA or FCA, including a report of an independent public accountant covering the financial statements, the Covered Entity:

(*1*) Simultaneously sends a copy of such annual financial statements and the report of the independent public accountant covering the annual financial statements to the Commission in the manner specified on the Commission's website;

(*2*) Includes with the transmission the contact information of an individual who can provide further information about the financial statements and report;

(*3*) Includes with the transmission the report of an independent public accountant required by Exchange Act rule 18a–7(c)(1)(i)(C) covering the annual financial statements if UK laws do not require the Covered Entity to engage an independent public accountant to prepare a report covering the annual financial statements; provided, however, that such report of the independent public accountant may be prepared in accordance with generally accepted auditing standards in UK that the independent public accountant uses to perform audit and attestation services and the accountant complies with UK independence requirements;

(*4*) Includes with the transmission the reports required by Exchange Act rule 18a–7(c)(1)(i)(B) and (C) addressing the statements identified in Exchange Act rule 18a–7(c)(3) or (c)(4), as applicable, that relate to Exchange Act rule 18a–4; provided, however, that the report of the independent public accountant required by Exchange Act rule 18a–7(c)(1)(i)(C) may be prepared in accordance with generally accepted auditing standards in the UK that the independent public accountant uses to perform audit and attestation services and the accountant complies with UK independence requirements; and

(*5*) Includes with the transmission the supporting schedules and reconciliations, as applicable, required by Exchange Act rules 18a–7(c)(2)(ii) and (iii), respectively, relating to Exchange Act rule 18a–2; and

(*6*) Includes with the transmission the supporting schedules and reconciliations, as applicable, required by Exchange Act rules 18a–7(c)(2)(ii) and (iii), respectively, relating to Exchange Act rules 18a–4 and 18a–4a; and

(C) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(v) The requirements of Exchange Act rule 18a–7(i), provided that:

(A) The Covered Entity is subject to and complies with the requirements of FCA SUP 16.3.17R and PRA Regulatory Reporting Rule 18; and

(B) The Covered Entity:

(*1*) Simultaneously sends a copy of any notice required to be sent by UK law cited in paragraph (f)(3)(v)(A) of the Order to the Commission in the manner specified on the Commission's website; and

(*2*) Includes with the transmission the contact information of an individual who can provide further information about the matter that is the subject of the notice.

(4)(i) *Provide Notification.* The requirements of the following provisions of Exchange Act rule 18a–8, provided that the Covered Entity complies with the relevant conditions in this paragraph (f)(4)(i) and with the applicable conditions in paragraph (f)(4)(ii):

(A) The requirements of paragraphs (a)(1)(i), (a)(1)(ii), (b)(1), (b)(2), and (b)(4) of Exchange Act rule 18a–8 and the requirements of Exchange Act rule 18a–8(h) as applied to such requirements, provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of FCA PRIN 2.1.1R and 11; PRA Fundamental Rule 7; FCA SUP 15.3.1R, 15.3.11R, 15.3.12G, 15.3.14G, 15.3.15R, 15.3.17R and 15.3.21R; FCA CASS 6.6.57R, 7.15.33R and Schedule 2; PRA Notifications Rules 2.1, 2.4, 2.5, 2.6, 2.8 and 2.9; FCA SYSC 18.6.1R and 18.6.4G; FCA IFPRU 2.4.1R; and PRA General Organisational Requirements 2A.2, 2A.1(2) and 2A.3 to 2A.6; and

(*2*) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(B) The requirements of Exchange Act rule 18a–8(c) and the requirements of Exchange Act rule 18a–8(h) as applied to such requirements, provided that the Covered Entity is subject to and complies with the requirements of FCA PRIN 2.1.1R and 11; PRA Fundamental Rule 7; FCA SUP 15.3.1R, 15.3.11R, 15.3.12G, 15.3.14G, 15.3.15R, 15.3.17R and 15.3.21R; FCA CASS 6.6.57R, 7.15.33R and Schedule 2; PRA Notifications Rules 2.1, 2.4, 2.5, 2.6, 2.8 and 2.9; FCA SYSC 18.6.1R and 18.6.4G; FCA IFPRU 2.4.1R; and PRA General Organisational Requirements 2A.2, 2A.1(2) and 2A.3 to 2A.6;

(C) The requirements of Exchange Act rule 18a–8(d) and the requirements of Exchange Act rule 18a–8(h) as applied to such requirements, provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of FCA PRIN 2.1.1R and 11; PRA Fundamental Rule 7; FCA SUP 15.3.1R, 15.3.11R, 15.3.12G, 15.3.14G, 15.3.15R, 15.3.17R and 15.3.21R; FCA CASS 6.6.57R, 7.15.33R and Schedule 2; PRA Notifications Rules 2.1, 2.4, 2.5, 2.6, 2.8 and 2.9; FCA SYSC 18.6.1R and 18.6.4G; FCA IFPRU 2.4.1R; and PRA General Organisational Requirements 2A.2, 2A.1(2) and 2A.3 through 2A.6; and

(*2*) This Order does not extend to the requirements of Exchange Act rule 18a–8(d) to give notice with respect to books and records required by Exchange Act rule 18a–5 for which the Covered Entity does not apply substituted compliance pursuant to this Order;

(D) The requirements of Exchange Act rule 18a–8(e) and the requirements of Exchange Act rule 18a–8(h) as applied to such requirements, provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of FCA PRIN 2.1.1R and 11; PRA Fundamental Rule 7; FCA SUP 15.3.1R, 15.3.11R, 15.3.12G, 15.3.14G, 15.3.15R, 15.3.17R and 15.3.21R; FCA CASS 6.6.57R, 7.15.33R and Schedule 2; PRA Notifications Rules 2.1, 2.4, 2.5, 2.6, 2.8 and 2.9; FCA SYSC 18.6.1R and 18.6.4G; FCA IFPRU 2.4.1R; and PRA General Organisational Requirements 2A.2, 2A.1(2) and 2A.3 through 2A.6;

(*2*) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(*3*) This Order does not extend to the requirements of Exchange act rule 18a–8(e) relating to Exchange Act rule 18a–2 or to the requirements of Exchange Act rule 18a–8(h) as applied to such requirements; and

(*4*) This Order does not extend to the requirements of Exchange act rule 18a–8(e) relating to Exchange Act rule 18a–4 or to the requirements of Exchange Act rule 18a–8(h) as applied to such requirements;

(ii) Paragraph (f)(4)(i) is subject to the following further conditions:

(A) The Covered Entity:

(*1*) Simultaneously sends a copy of any notice required to be sent by UK law cited in this paragraph of the Order to the Commission in the manner specified on the Commission's website; and

(*2*) Includes with the transmission the contact information of an individual who can provide further information about the matter that is the subject of the notice;

(B) This Order does not extend to the requirements of paragraphs (a)(2) and (b)(3), and of Exchange Act rule 18a–8 relating to Exchange Act rule 18a–2 or to the requirements of Exchange Act rule 18a–8(h) as applied to such requirements;

(C) This Order does not extend to the requirements of paragraph (g) of rule 18a–8 or to the requirements of Exchange Act rule 18a–8(h) as applied to such requirements.

(5) *Securities Counts.* The requirements of Exchange Act rule 18a–9, provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of FCA CASS 6.2.1R, 6.2.2R, 6.3.4A–1R, 6.3.6AR, 6.6.2R, 6.6.3R, 6.6.33G, 6.6.34R, 6.6.4R, 6.6.47G, 6.6.5G, 6.6.8R, 7.12.1R, 7.12.2R, 7.13.12R, 7.13.32R(3), 7.13.33R(3), 7.15.2R, 7.15.5R, 7.15.9R, 7.15.3R, 7.15.8R, 7.15.20R, 7.15.21G, 10.1.2G, 10.1.3R, 10.1.7 and 10.1.9E; FCA SUP 3.10.4R–3.10.7R; UK MiFID Org Reg articles 74 and 75; UK EMIR article 11(1)(b); and UK EMIR RTS articles 12 and 13; and

(*2*) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order.

(6) *Daily Trading Records.* The requirements of Exchange Act section 15F(g), provided that:

(*1*) The Covered Entity is subject to and complies with the requirements of FCA COND at paragraphs 2C, 2D, 3B, 3C, 5D and 5F; PRA Fundamental Rules 2 and 6; FCA PRIN 2.1.1.R(2) and (3); PRA Recordkeeping Rule 2.1; and FCA SYSC 9.1.1AR; and

(*2*) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order.

(7) *Examination and Production of Records.* Notwithstanding the forgoing provisions of paragraph (f) of this Order, this Order does not extend to, and Covered Entities remain subject to, the requirement of Exchange Act section 15F(f) to keep books and records open to inspection by any representative of the Commission and the requirement of Exchange Act rule 18a–6(g) to furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the Covered Entity that are required to be preserved under Exchange Act rule 18a–6, or any other records of the Covered Entity that are subject to examination or required to be made or maintained pursuant to Exchange Act section 15F that are requested by a representative of the Commission.

(8) *English Translations.* Notwithstanding the forgoing provisions of paragraph (f) of this Order, to the extent documents are not prepared in the English language, Covered Entities must promptly furnish to a representative of the Commission upon request an English translation of any record, report, or notification of the Covered Entity that is required to be made, preserved, filed, or subject to examination pursuant to Exchange Act section 15F of this Order.

(g) Definitions

(1) ''Covered Entity'' means an entity that:

(i) Is a security-based swap dealer or major security-based swap participant registered with the Commission;

(ii) Is not a ''U.S. person,'' as that term is defined in rule 3a71–3(a)(4) under the Exchange Act;

(iii) Is a ''MiFID investment firm'' or ''third country investment firm,'' as such terms are defined in the FCA Handbook Glossary, that has permission from the FCA or PRA under Part 4A of FSMA to carry on regulated activities relating to investment services and activities in the United Kingdom; and

(iv) Is supervised by the FCA under the fixed supervision model and, if the firm is a PRA-authorized person, also supervised by the PRA as a Category 1 firm.

(2) ''Capital Requirements Regulations 2013'' means the UK Capital Requirements Regulations 2013, as amended from time to time.

(3) ''Companies Act'' means the UK Companies Act 2006, as amended from time to time.

(4) ''FCA'' means the UK's Financial Conduct Authority.

(5) ''FCA BIFPRU'' means the Prudential Sourcebook for Banks, Building Societies and Investment Firms of the FCA Handbook, as amended from time to time.

(6) ''FCA CASS'' means the Client Asset Sourcebook of the FCA Handbook, as amended from time to time.

(7) ''FCA COBS'' means the Conduct of Business Sourcebook of the FCA Handbook, as amended from time to time.

(8) ''FCA COND'' means the Threshold Conditions of the FCA Handbook, as amended from time to time.

(9) ''FCA Enforcement Guide'' means the Enforcement Guide of the FCA Handbook, as amended from time to time.

(10) ''FCA FCG'' means the Financial Crime Guide of the FCA Handbook, as amended from time to time.

(11) ''FCA FIT'' means the Fit and Proper test for Employees and Senior Personnel Sourcebook of the FCA Handbook, as amended from time to time.

(12) ''FCA Handbook'' means the FCA's Handbook of rules and guidance, as amended from time to time.

(13) ''FCA Handbook Glossary'' means the Glossary part of the FCA's Handbook of rules and guidance, as amended from time to time.

(14) ''FCA IFPRU'' means the Prudential Sourcebook for Investment Firms of the FCA Handbook, as amended from time to time.

(15) ''FCA PRIN'' means the Principles for Businesses Sourcebook of the FCA Handbook, as amended from time to time.

(16) ''FCA PROD'' means the Product Intervention and Product Governance Sourcebook of the FCA Handbook, as amended from time to time.

(17) ''FCA SUP'' means the Supervision Sourcebook of the FCA Handbook, as amended from time to time.

(18) ''FCA SYSC'' means the Senior Management Arrangements, Systems and Controls Sourcebook of the FCA Handbook, as amended from time to time.

(19) ''FSMA'' means the UK's Financial Services and Markets Act 2000, as amended from time to time.

(20) ''ICVC'' means investment company with variable capital as defined in the FCA Handbook Glossary.

(21) ''MLR 2017'' means the UK's Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, as amended from time to time.

(22) ''PRA'' means the UK's Prudential Regulation Authority.

(23) ''PRA Capital Buffer Rules'' means the Capital Buffer Part of the PRA Rulebook for CRR Firms, as amended from time to time.

(24) ''PRA Certification Rules'' means the Certification Part of the PRA Rulebook for CRR Firms, as amended from time to time.

(25) ''PRA Definition of Capital Rules'' means the Definition of Capital Part of the PRA Rulebook for CRR Firms, as amended from time to time.

(26) ''PRA Fitness and Proprietary Rules'' means the Fitness and Propriety Part of the PRA Rulebook for CRR Firms, as amended from time to time.

(27) ''PRA Fundamental Rules'' means the Fundamental Rules Part of the PRA Rulebook for CRR Firms, as amended from time to time.

(28) ''PRA General Organisational Requirements'' means the General Organisational Requirements Part of the PRA Rulebook for CRR Firms, as amended from time to time.

(29) ''PRA Internal Capital Adequacy Assessment Rules'' means the Internal Capital Adequacy Assessment Part of the PRA Rulebook for CRR Firms, as amended from time to time.

(30) ''PRA Internal Liquidity Adequacy Assessment Rules'' means the Internal Liquidity Adequacy Assessment Part of the PRA Rulebook for CRR Firms, as amended from time to time.

(31) ''PRA Liquidity Coverage Requirement—UK Designated Investment Firms Rules'' means the PRA Liquidity Coverage Requirement—UK Designated Investment Firms Part of the PRA Rulebook for CRR Firms, as amended from time to time.

(32) ''PRA Notifications Rules'' means the Notifications Part of the PRA Rulebook for CRR Firms, as amended from time to time.

(33) ''PRA Outsourcing Rules'' means the Outsourcing Part of the PRA Rulebook for CRR Firms, as amended from time to time.

(34) ''PRA Recordkeeping Rules'' means the Recordkeeping Part of the PRA Rulebook for CRR Firms, as amended from time to time.

(35) ''PRA Regulatory Reporting Rules'' means the Regulatory Reporting Part of the PRA Rulebook for CRR Firms, as amended from time to time.

(36) ''PRA Remuneration Rules'' means the Remuneration Part of the PRA Rulebook for CRR Firms, as amended from time to time.

(37) ''PRA Risk Control Rules'' means the Risk Control Part of the PRA Rulebook for CRR Firms, as amended from time to time.

(38) ''PRA Rulebook'' or ''PRA Rulebook for CRR Firms'' means the PRA's Rulebook for Capital Requirement Regulation Firms, as amended from time to time.

(39) ''PRA Rulebook Glossary'' means the Glossary part of the PRA Rulebook for CRR Firms, as amended from time to time.

(40) ''PRA Senior Management Functions Rules'' means the Senior Management Functions Part of the PRA Rulebook for CRR Firms, as amended from time to time.

(41) ''Prudentially regulated'' means a Covered Entity that has a ''prudential regulator'' as that term is defined in Exchange Act section 3(a)(74).

(42) ''SMR'' means the Senior Managers Regime that forms part of the Senior Managers and Certification Regime, as amended from time to time.

(43) ''UK'' means the United Kingdom.

(44) ''UK CRR'' means the UK version of Regulation (EU) No 575/2013, as amended from time to time.

(45) ''UK CRR Reporting ITS'' means the UK version of Commission Implementing Regulation (EU) 680/2014.

(46) ''UK EMIR'' means the UK version of the ''European Market Infrastructure Regulation,'' Regulation (EU) No 648/2012, as amended from time to time.

(47) ''UK EMIR Margin RTS'' means the UK version of Commission Delegated Regulation (EU) 2016/2251, as amended from time to time.

(48) ''UK EMIR RTS'' means UK version of Commission Delegated Regulation (EU) No 149/2013, as amended from time to time.

(49) ''UK MAR'' means the UK version of Market Abuse Regulation (EU) 596/2014, as amended from time to time.

(50) ''UK MAR Investment Recommendations Regulation'' means the UK version of Commission Delegated Regulation (EU) 2016/958, as amended from time to time.

(51) ''UK MiFID Org Reg'' means the UK version of Commission Delegated Regulation (EU) 2017/565, as amended from time to time.

(52) ''UK MiFIR'' means the UK version of the ''Markets in Financial Instruments Regulation,'' Regulation (EU) 600/2014, as amended from time to time.

(53) ''UK Regulated Activities Order'' means the Financial Services and Markets Act 2000 (Regulated Activities) Order (SI 2001/544), as amended from time to time.

[FR Doc. 2021–07255 Filed 4–7–21; 8:45 am]

BILLING CODE 8011–01–P

Reader Aids

Federal Register

Vol. 86, No. 66

Thursday, April 8, 2021

CUSTOMER SERVICE AND INFORMATION

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.govinfo.gov.**

Federal Register information and research tools, including Public Inspection List and electronic text are located at: **www.federalregister.gov.**

E-mail

FEDREGTOC (Daily Federal Register Table of Contents Electronic Mailing List) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new**, enter your email address, then follow the instructions to join, leave, or manage your subscription.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html and select** *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

FEDERAL REGISTER PAGES AND DATE, APRIL

CFR PARTS AFFECTED DURING APRIL

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.

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 March 31, 2021

Public Laws Electronic Notification Service (PENS)

PENS is a free email notification service of newly enacted public laws. To subscribe, go to *https://listserv.gsa.gov/cgi-bin/wa.exe?SUBED1=PUBLAWS-L&A=1*

Note: This service is strictly for email notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.